ANNOTATIONS INCLUDE 180 N. C.

NORTH CAROLINA REPORTS

VOL. 109

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1891

REPORTED BY

THEODORE F. DAVIDSON

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2 ANNO. ED.

BY

WALTER CLARK

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MEMORANDA

SHEPHERD, J., was unavoidably absent for a considerable part of this term, and hence was prevented from participating in the hearing of many of the cases reported in this volume.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1891

JAMESVILLE AND WASHINGTON RAILROAD COMPANY v. A. FISHER.

Agency—Sheriff—Deputy—Officer—Minor—Process—Service.

1. A deputy sheriff, in the absence of any statutory provision in that respect, is not an "officer" in the sense in which that term is employed in the Constitution of this State; he is but the agent of the sheriff, under whose direction he is presumed to act, and who is responsible for his conduct in that relation.
2. It is not necessary that the appointment of a deputy sheriff, either general or special, should be in writing.
3. A sheriff may appoint a minor his deputy, general or special; and service of process by such deputy is not invalid for that reason.

APPEAL from a justice of the peace, tried at May Term, 1890, of BEAUFORT, before *Whitaker, J.*

The return of the officer upon the summons was as follows: (2) "Received 24 March, 1890; served 24 March, 1890, by reading the within summons to A. Fisher. R. T. Hodges, sheriff, by J. H. Hodges, D. S."

Both in the court of the justice of the peace and in the Superior Court, the defendant entered a special appearance and moved to dismiss for want of service, because James H. Hodges, who actually served the summons as deputy for R. T. Hodges, was, at the time of serving it, under the age of twenty-one years. It was admitted in both courts that he (James H.) was not twenty-one years old when the summons was served by him. From the judgment of the court, dismissing the action, the plaintiff appealed.

J. H. Small for plaintiff.
C. F. Warren for defendant.

AVERY, J. A sheriff is liable to answer in damages for any wrongful act of his deputy, done under color of his office, for which the sheriff would have incurred such liability had he done the act himself; and in all such cases he and his deputy are, in contemplation of law, one person. Murfree on Sheriffs, secs. 20, 59, 60, 62.

So far has this doctrine, as to all wrongful acts of the deputy done *colore officii,* been carried by this Court, that a demand on a defaulting deputy for money collected by him in that capacity, has been declared equivalent to a demand on the sheriff. *Lyle v. Wilson,* 26 N. C., 226.

While a deputy is professing to act, and inducing others to believe that he is acting under color of his office, his personality, like that of other agents, seems to be merged, in legal contemplation, in the person of the sheriff under whose directions, as principal, he is supposed to act. Murfree, *supra,* secs. 20, 61. The service of the summons is a mere ministerial duty, which can be performed by a deputy, where the law
(3) gives the right to appoint one, and even between him and third persons his official acts are considered those of the sheriff, done by his lawfully constituted agent. The right to appoint under-sheriffs or bailiffs and deputies is not always, if generally, regulated by statute. These subordinates are the servants and agents of the sheriff, and his responsibility for them and relations with them are controlled, generally, by the law governing the relation of principal and agent. Murfree, *supra, secs.* 16, 60. While public policy may have induced the courts to hold his responsibility in some instances to be greater, never less, than that of a principal, for the acts of his agent within the scope of the agency, our Code is still silent as to the manner of appointment or the distinct duties of both general and special deputies, while this Court has declared that there is no provision of the common law which requires the deputation of a sheriff to be in writing, and that in any action against a sheriff, for the misconduct of a person alleged to be his deputy, it is not necessary to prove a deputation, but it is sufficient simply to show that the person acted as deputy with the consent or privity of the sheriff. *Horne v. Allen,* 27 N. C., 36; *Buchanan v. McIntosh,* 24 N. C., 53.

In some of the States statutes have been enacted providing for the appointment of general deputies and bailiffs, and prescribing certain duties and liabilities arising out of the position; and the interpretations of these laws have given rise to some confusion and apparent conflict in the decisions of different States. In some of these States we find distinctions drawn by the courts as to the duties, powers and liabilities of general deputies, coming within the provisions of their statutes, and special deputies, who are left as at common law to be treated as the trusted servants or agents of the sheriff. *Proctor v. Walker,* 34 N. C., 660.

In North Carolina, both general and special deputies may be appointed by the sheriff without writing, and, when they act with his assent or privity, they are either his general or special agents as to the discharge of his ministerial duties, and are accountable (4) to him as such. An individual can, unquestionably, constitute an infant his agent, and subject himself to responsibility for all acts of the latter within the scope of the agency. Wharton on Agency, secs. 15, 16; I Lawson, Rights and Remedies, sec. 6; Story on Agency, sec. 7. In the absence of statutory restrictions, we see no reason why a minor, appointed by the sheriff as his general or special deputy, should not have the power to perform a mere ministerial duty of his office—such as serving a summons issued in a civil action. Murfree, *supra,* sec. 71; *McGee v. Eustis,* 3 *Stewart* (Ala.), 307; *Bartlett v. Seward,* 22 Vt., 176; *Miller v. McMillan,* 4 Ala., 530; Ewell's Evan on Agency, star pp. 40, 41. Indeed, Story's Agency says, sec. 149 note: "There is a distinction between doing an act by an agent and doing an act by a deputy, whom the law deems such. An agent can only bind his principal when he does the act in the name of his principal. But a deputy may do the act and sign his own name and it binds the principal; for the deputy, in law, has the whole power of the principal." This citation is made, not to give approval to the distinction drawn by him, but to show that the learned jurist considered a deputy as sustaining the relation of an agent to the officer who appoints him. If a deputy sheriff were, by law, constituted an officer, and the mode of appointing him and inducting him into office were prescribed, as in some of the States, our view of this case might be materially different. *Gaymore v. Burlingame,* 36 Ill., 203; Murfree, *supra,* sec. 72. The qualifications of an officer are clearly set forth in sections 4 and 5 of Article VI of the Constitution, and it is declared essential that he should be "twenty-one years old"; but we find no provision in our Constitution or laws which restricts the right to appoint agents on the one hand, or the liability for their acts on the other. In *Yeargin v. Siler,* 83 N. C., 348; *Justice Dillard,* for the Court, says: "The rule in matters judicial is *delegatus non potest* (5) *delegare,* but in duties ministerial the officer may act in person or by deputy of his own choice and appointment." We think that, in the absence of any statutory restriction, the sheriff has the power to appoint a minor his general as well as his special deputy, and clothe him with the power of a bailiff, as to his ministerial duties, as effectually as he could constitute him his agent to attend to private business for him as an individual. Broom, Legal Maxims, 619. The current of authority in this country sustains this view. It is true that in the English case cited by counsel, *Cuckson v. Winter,* 17 Eng. Com. Law, 306, the court held that it was highly improper for a sheriff to intrust the service of

a warrant in replevin to an infant, because the deputy was authorized to take possession of the goods and was responsible for the custody of them, and that service of the warrant by the infant was illegal. The learned judge who tried the case below was, doubtless, influenced by this authority in holding the service void in our case. But the conclusion of the court in *Cuckson v. Winter, supra,* seems to be based upon the idea that a defendant, whose goods were taken for rent, had no remedy for an unlawful seizure except against the deputy. That difficulty is met by holding that the sheriff is civilly responsible for the unlawful acts of his deputy, to the extent to which he would be liable if he had acted in his own proper person; and that he selects and appoints his agents at his own hazard, third parties having no interest in the security he may exact from them. Murfree, *supra,* secs. 20, 59, 60, 64. Thus, in every way, the courts of this country have, in the absence of specific statutory provisions, adjusted the powers of sheriffs and their deputies, and their liabilities to the public and to each other, according to the rules which determine the duties and responsibility of principal and agent, and have recognized the right of the sheriff to select such agents for the discharge of mere ministerial duties, as an individual
(6) could appoint and constitute for the transaction of private business even though he might intrust the duty to a person not *sui juris.* Murfree, *supra,* secs. 71, 75, and references; *Yeargin v. Siler, supra. Mr. Wharton* says, in substance, that the only qualification of the rule that infants may act as agents and bind their principals, is that the infant agent must not be very deficient in mental capacity. Wharton on Agency, sec. 15.

We think that the judge below erred in sustaining the demurrer, and the judgment is, therefore, reversed. The cause will be remanded, to the end that the defendant may be allowed to answer, if he be so advised.

Reversed.

Cited: Somers v. Comrs., 123 N. C., 584; *Bank v. Redwine,* 171 N. C., 574.

RICHARD HURDLE v. REUBEN STALLINGS.

Arbitration—Award.

While arbitrators have power to decide all questions as to the admission and rejection of evidence, as well as to its weight, which may be offered in respect to the matter submitted to them, yet it is their duty to hear all evidence material to the case that may be offered; and where it is made to appear that they arbitrarily refused to hear any evidence whatever, their award should be set aside.

MOTION by plaintiff to set aside an award, heard at Spring Term, 1891, of PERQUIMANS, *Bryan, J.*, presiding. The motion was denied, and plaintiff appealed.

S. B. Pickard (by brief) for plaintiff.
No counsel contra.

SHEPHERD, J. By consent of the parties it was ordered by the presiding judge that the award of the arbitrators should be a (7) rule of the court. The terms of the submission were that the arbitrators should "go upon the land in controversy and settle the lines between the lands of the plaintiff and the defendant, and settle all matters of difference in relation thereto."

It appears, from the uncontroverted testimony of the plaintiff and the witness Harrell, that when the arbitrators met, the plaintiff offered his deeds, plats, etc., relating to the lands in controversy, and that the arbitrators refused to receive or examine them. Harrell also states that the evidence was offered for the purpose of fixing the lines, and none of this testimony being disputed we must assume that the papers offered were relevant to the questions which were about to be passed upon. The settlement of controversies by arbitration is looked upon with great favor by the courts, and ordinarily, if the award be within the power of arbitrators, "and unaffected by fraud, mistake or irregularity, the judge has no power over it, except to make it a rule of court and enforce it according to the course of the court." *Lusk v. Clayton,* 70 N. C., 184. Even where they decide erroneously, the error will not vitiate the award "unless it appears that the arbitrators intended to decide according to law" (*Jones v. Frazier,* 8 N. C., 379); and it is said by *Shaw, C. J.*, in *Power Co. v. Gray* (6 Metc., 131), that, "as incident to the decision of the questions of fact (the arbitrators) have power to decide all questions as to the admission and rejection of evidence, as well as credit due to evidence, and the inference of fact to be drawn from it."

So, also, arbitrators have some power within their discretion to determine how much evidence they will hear (*Nicholls v. Warren,* 6 Q. B., 615, per *Lord Denman, C. J.*), but it is their general duty to hear all evidence material to the case which is offered, Morse on Arbitration and Award, 142; and Russell, Arbitration (3 Ed.) 178, says that "declining to receive evidence on any matter is, under ordinary circum-
(8) stances, a delicate step to take; for the refusal to receive proof, where proof is necessary, is fatal to the award." In this case the arbitrators were to settle the lines between the parties and all matters of difference in relation thereto. The evidence, according to the affidavits of the plaintiff, was offered for that purpose, and there is no attempt to show that it was immaterial.

Without undertaking to lay down any rule beyond the general principles indicated as to how far arbitrators may go in the rejection of testimony, we are clearly of the opinion that they have no power to arbitrarily decline to receive or examine any testimony whatever.

For this reason we think that the award should have been set aside.

Error.

Cited: Wyatt v. R. R., 110 N. C., 247; *Herndon v. Insurance Co., ib.,* 283; *Nelson v. R. R.,* 157 N. C., 199.

J. W. ALBERTSON ET AL. v. HARVEY TERRY ET AL.

Removal of Causes—Prosecution Bond—Statute of Limitations.

1. The finding of facts by the trial court upon a motion to remove is conclusive, and the ruling of the court thereupon is not reviewable.
2. An objection to a prosecution bond, made after the jury has been impaneled, comes too late.
3. The statute of limitations is not available unless pleaded.

ACTION tried at Spring Term, 1891, of PASQUOTANK, *Bryan, J.,* presiding.

The plaintiffs sued to recover the sum of five hundred dollars, alleged to be due them as attorneys at law for professional services. There was judgment by default for want of an answer, and upon the in-
(9) quiry as to the amount due them the questions presented for review arose. There was judgment for plaintiff, from which the defendants appealed.

E. F. Aydlett for plaintiffs.
Harvey Terry for defendants.

CLARK, J. The case on appeal presents four exceptions for review:

1. The denial of the motion to remove.

The statute (Code, secs. 196, 197) forbids the judge to remove a cause on an allegation that a fair trial cannot be had in the county where pending, unless satisfied, after thorough examination of the evidence, that the ends of justice demand a removal. Here the judge finds as a fact that the defendants could secure a fair trial in said county. Such finding is conclusive, and, besides the granting or refusal of such motion is not reviewable. *S. v. Duncan,* 28 N. C., 98; *S. v. Hildreth,* 31 N. C., 429; *S. v. Hill,* 72 N. C., 345; *S. v. Hall,* 73 N. C., 134; *S. v. Johnson,* 104 N. C, 780.

2. After the jury was impaneled, the defendants moved to nonsuit the plaintiffs, because the prosecution bond was improperly executed. The plaintiffs asked leave to perfect the bond, which was granted, and defendants' motion denied. The objection came too late. *Brittain v. Howell,* 19 N. C., 107; *Russell v. Sanders,* 48 N. C., 432; *Hughes v. Hodges,* 94 N. C., 56.

3. After argument by counsel to the jury, the defendants asked the court to charge the jury that "no charge in the bill of particulars against Terry is shown that is not paid in full to plaintiffs, as shown by copies of receipts filed; therefore Terry is not liable for the debts of Ely." The court declined to give the instruction, and charged the jury that it was a question of fact for them, in passing upon which they were to be guided by the evidence submitted to them. (10)

Had the judge granted the prayer, it would have been a palpable violation of the act of 1796 (Code, sec. 413). The question of payment was an issue of fact for the jury.

4. Because the court declined to charge, as requested, that all items of charges made by plaintiffs more than three years before suit was brought were barred by the statute of limitations. The trial was an inquiry instituted upon a judgment by default for want of an answer, taken at the previous term. It is familiar learning that the statute of limitations is not available unless pleaded. *Guthrie v. Bacon,* 107 N. C., 337; *Randolph v. Randolph, ib.,* 506; and this is required by the statute. The Code, sec. 138.

Affirmed.

Cited: Cooper v. Warlick, post, 673; *Bank v. Loughran,* 122 N. C., 671; *Ins. Co. v. Edwards,* 124 N. C., 117.

L. H. HORNTHAL ET AL. v. D. S. BURWELL ET AL.

Attachment—Mortgage—Domicile—County—Records and Judgments in other States—Contract.

M., being indebted to plaintiffs, conveyed to them certain personal property, then in North Carolina, by deed of mortgage, which was duly proven and registered in the proper county; M. retained possession of the property and carried it, in the prosecution of his business, into the State of Virginia, where (he being a nonresident of that State) it was seized under attachment at the suit of his creditors, and under judgments rendered in the courts of defendants (Virginia) was sold and the proceeds applied to their satisfaction. The mortgage was not registered in Virginia, and it appeared that by the laws of that State mortgages of personal property are void against creditors except from the date of their registration: *Held*, (1) that the plaintiffs were entitled to recover from the defendants the value of the property included in the mortgage, which they had caused to be seized and sold under their attachments; (2) attachment is not, strictly speaking, a proceeding *in rem*, and a judgment therein is only conclusive upon the parties to it and those in privity with them.

(11) THE CAUSE was heard upon complaint and demurrer, at Spring Term, 1891, of WASHINGTON, *Bryan, J.*, presiding.

The plaintiffs alleged:

1. That at the time of the execution of the deed of trust hereinafter named, one I. T. H. Moore was the owner, and had in his possession in Washington County, N. C., a large number of horses, mules, oxen, log-wagons, and other property.

2. That on the __ day of _____, 1888, the said Moore, being indebted to the plaintiffs in the sum of three thousand dollars, for the purpose of securing the same conveyed to the plaintiffs the said property by deed of mortgage with power of sale, which was duly registered in the county of Washington, where the property then was, and in the county of Hertford, the residence of said Moore, before the seizure of the property hereinafter complained of.

3. That Moore was engaged in getting lumber for market, and used the said property in his business, and moved the same from place to place where he could procure standing timber.

4. That during August, 1889, the said Moore became engaged in the timber business in the county of Southampton in Virginia, about two or three miles from the State line, and was using the said property in said county in his business, and while said property was in said county being so used, the defendants, who were creditors of said Moore, sued out attachments in the proper courts of said county in suits therein pending in their favor against said Moore, and caused said property to be seized

under said attachments and sold by the sheriff of said county under orders duly issued in said suits, and the money applied in part payment of the judgments in said causes, the said Moore being at the time a nonresident of Virginia. (12)

4½. That under the laws of Virginia, all mortgages of personal property are void as to creditors, except from the recording of such mortgages in the county wherein the property is, and the mortgage under which the plaintiffs claim was not recorded in the county of Southampton.

5. That the property so seized was part of that conveyed in the mortgage deed aforesaid, and consisted of three horses, seven mules, six oxen, four log-wagons and chains, two pairs of log wheels and chains, two pairs of bunk wheels, and five sets of wagon harness, which sold at said sale for six hundred and fifty-seven dollars and fifty cents, and were reasonably worth twelve hundred dollars.

6. That no part of the debt secured in the said deed of trust has been paid; the said Moore is insolvent, and the property described in the mortgage aforesaid not seized, as alleged, is of little value and entirely insufficient to pay the debt secured.

7. That the plaintiffs have been greatly damaged by the defendants.

Wherefore, they demand judgment for the sum of fifteen hundred dollars, with interest and cost."

The defendants demurred, and assigned the following grounds therefor:

"Because the complaint does not state any cause of action against these defendants, it appearing from the complaint that the mortgage under which plaintiffs claim was not recorded in the county of Southampton, in the State of Virginia, where the property in controversy was situated, as was required by the laws of that State, to make it valid against the creditors of said Moore. And that said property was attached and sold under regular attachment proceedings sued out in a suit pending in the proper courts of said county of Southampton, wherein these defendants, who were creditors of said Moore, were plaintiffs and said mortgagor was defendant, and the proceeds were insufficient to pay the judgments in said suit." (13)

It was adjudged by the court that the demurrer be overruled, and they having declined to answer over, as allowed by the court, it was further adjudged that the plaintiffs recover the sum of six hundred and fifty-seven dollars and fifty cents, with interest and costs.

From this judgment defendant appealed.

C. L. Pettigrew for plaintiffs.

B. B. Winborne for defendants.

SHEPHERD, J. The principle embodied in the maxim *mobilia sequuntur personam* is generally recognized in all civilized countries, and it follows as a natural consequence, says Story (Conflict Laws, 383), that "the laws of the owner's domicile (or the *lex loci contractus*) should in all cases determine the validity of every transfer, alienation or disposition made by the owner, whether it be *inter vivos* or be *post mortem.*" The authority of such laws, however, is admitted in other States, not *ex proprio vigore,* but *ex comitate,* and hence, it is now very generally held that when they "clash with and interfere with the rights of the citizens of the countries where the parties to the contract seek to enforce it, as one or the other of them must give way, those prevailing where the relief is sought must have the preference." *Oliver v. Townes,* 14 Martin (La.), 93; 2 Kent Com., 458; *Moye v. May,* 43 N. C., 131. This is illustrated by the leading case first cited, where a ship was sold in Virginia and was, before delivery, attached by creditors at New Orleans. The court held the sale void, as the attaching creditors because the law of the *situs* required an actual delivery to pass the title.

So, in the case of *Green v. Van Buskirk,* 7 Wallace, 139, an attachment in Illinois was sustained as against a mortgage executed by the owner in New York, but not registered in Illinois where the
(14) property was situated. The laws of that State provided that the mortgage should be "void as against third persons unless acknowledged and registered, and unless the property be delivered to and remain with the mortgagee." This principle, however, has no application to a case like ours, where the mortgage was executed and duly registered according to *both the law of the domicile and the law of the situs.* The property was situated in this State, and the title of the mortgagees perfected here. This being so, we think it quite clear that the removal of the property to another State could not deprive the mortgagees of their rights.

In support of this position there seems to be a consensus of judicial opinion. Even in Louisiana (whose courts were perhaps among the most prominent in giving effect to the law of the *situs* as above explained) there has never been any doubt upon this question. On the contrary, in *Thuret v. Jenkins,* 1 Martin (La.), 318, it was held that where the title had passed, "the circumstance of the chattel being afterwards brought into a country, according to the law of which the sale would be invalid, would not affect it." The doctrine of this case has since been affirmed in *Bank v. Wood,* 14 La., Am., 561.

To the same effect is *Langworthy v. Little,* 12 Cush., 109, where *Shaw, C. J.,* says that "a party who obtains a good title to property, absolute or qualified, by the laws of a sister State is entitled to maintain and enforce those rights in this State." The property was attached in

Massachusetts as the property of the mortgagor, and the sheriff was held liable for its conversion.

So, in Jones Chattel Mort., 301, it is said that "although the mortgage be not executed in conformity with the laws of the State to which the property is afterwards removed, if executed and recorded according to the laws of the State or country of its execution, it is effectual to hold the property in the State to which it is removed." (15)

So, in *Ballard v. Winter,* the Supreme Court of Connecticut sustained an action of trover against one of its own citizens for suing out attachment proceedings against property which had been mortgaged according to the law of Massachusetts, but which had been subsequently removed to the former State. The Court said: "By the general rules of law, title thus perfected in one State is respected in all other States and countries into which the property may come. . . . It would certainly be very inconvenient if such mortgages, fairly made in Massachusetts, should be held invalid in Connecticut in respect to movable property which may be daily passing to and fro along the dividing lines between States." This case is reported in 12 American Law Register, 759, and is highly approved by the annotator, who cites several authorities in its support.

The same point was decided by the Supreme Court of the United States in *Bank v. Lee,* 13 Peters, 107. There certain property, being in Virginia, was conveyed in trust to Richard Bland Lee for the benefit of Mrs. Lee. The title passed according to the Virginia law, but the property being subsequently removed to the District of Columbia, where, under a prevailing Maryland statute, such a transfer would not be good except upon certain conditions, which had not been complied with, the Court (*Catron, J.*) said that "the statute had no reference to a case where the title has been vested by the laws of another State, but operates only on sales, mortgages and gifts in Maryland." The following authorities are also directly in point: Hilliard Mortgages, 412; *Keenan v. Stimson,* 32 Minn., 377; *Ferguson v. Clifford,* 37 N. H., 86; *Jones v. Taylor,* 30 Vt., 42; *Bank v. Danforth,* 14 Gray, 123; *Martin v. Hill,* 12 Barb., 631; *Kanage v. Taylor,* 7 Ohio St., 134; *Wilson v. Carson,* 12 Md., 54; *Smith v. McLean,* 24 Iowa, 322; *Hicks v. Skinner,* 71 N. C., 539; *Barker v. Stacy,* 25 Miss., 477; *Foust v. Runnell,* (16) 62 Mo., 524.

The defendants, however, contend that they are protected by the sale under the attachment proceedings in the Virginia Court. They rely upon the case of *Green v. Buskirk, supra,* and insist that, under the act of Congress, full faith and credit must be given to the judgments of the courts of a sister State. It is true that the decision referred to was chiefly based upon that statute; but it must be observed that the record

of such an adjudication has only (we quote from the opinion) "the same faith and credit as it has in the State Court from which it is taken," and that "in order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence outside of the record the predicament of the property on which it operated." Such was the course pursued by the court in that case, and as we have seen that the title to the property had not passed according to the law of the *situs*, the attachment proceedings were sustained. If, however, it had appeared that at the time of the execution of the mortgage in New York the property was also there, but had been afterwards removed to Illinois, it cannot be doubted that the decision would have been otherwise. Happily, we have a case directly in point from the Supreme Court of Illinois, *Mumford v. Canty,* 50 Ill., 366. It is there distinctly held that "where personal property was mortgaged in the State of Missouri and permitted to remain with the mortgagor (contrary to the law of Illinois) after the maturity of the debt to secure which the mortgage was given, and upon being subsequently brought into Illinois was seized under an attachment in favor of a *bona fide* creditor of the mortgagor, the rights of the mortgagee (would) be determined by the law of Missouri," and the mortgagee was permitted to recover the property of the purchaser. Here, then, we have an express decision as to the *effect* which is to be given to such a judgment in the State in which it is rendered, and it is only to this extent, and no further, that the judgment is conclusive in
(17) a sister State. To hold otherwise would go beyond what the statute requires, and give the same effect to an attachment proceeding which generally follows a proceeding which is strictly and technically *in rem.* Such is not the law. An attachment proceeding, though often spoken of as a proceeding *in rem,* "cannot be admitted to come within the strict meaning of that term. . . . The judgment is conclusive only upon the actual parties to the litigation and those in privity with them, . . . and they use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin." 2 Black, Judgments, 801; Drake on Attachments, sec. 245; *Duchess of Kingston's case,* 3 Smith L. C., 2011. In his notes to the latter case, *Judge Hare* cites, with entire approval, the opinion of *Hale, J.,* in *Woodruff v. Taylor,* 20 Vt., 65, in which it is said that the operation of such a proceeding "must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person, having an independent and adverse claim to the goods," etc.

Having shown, we think, that the title perfected here was not lost by the removal of the property to Virginia, and that the record of the judg-

ment in the attachment proceedings is only to be respected in so far as effect is given to it in that State, we cannot but assume, in the absence of any decision to the contrary, that the same principle of comity, so universally recognized and acted upon, likewise prevails in Virginia, and that even if these plaintiffs were suing in that jurisdiction they would be permitted to recover. This would seem all the more reasonable, as we have extended this very comity to a citizen of our sister State in a case precisely similar to the one under consideration. *Anderson v. Doak*, 32 N. C., 295. There a slave, being in Virginia, was mortgaged by its owner and the mortgage duly registered in Carroll County. It was never registered in this State, nor was it executed accord- (18) ing to its laws. The slave came to this State and was attached by a creditor of the mortgagor. In an action of trover, brought by the mortgagee against the sheriff, the plaintiff was permitted to recover.

It will be noted that we have discussed this question as if the plaintiffs were seeking redress in the courts of Virginia. If we have shown that, according to what appears to be the entire course of judicial opinion, they would be entitled to recover there, *a fortiori* can they recover in the courts of this State when they have acquired jurisdiction over the parties?

To the foregoing authorities we will add a recent decision of the Court of Appeals of New York. In that case (*Egerly v. Bush*, 81 N. Y., 199), B. executed to plaintiff a chattel mortgage upon a span of horses, both parties then residents of New York. B. subsequently took them to Canada, where they were sold by a regular trader dealing in horses, the purchaser buying in good faith. Under the laws of Canada property cannot be reclaimed from one so purchasing without refunding the price paid. Defendant, a resident of this State, bought the horses in Canada from such purchaser and they were left in Canada. Upon refusal of defendant to deliver them, the plaintiff sued for their conversion. The Court held (*Folger, C. J.*, delivering an elaborate opinion) that the plaintiff was entitled to recover.

We are of the opinion that his Honor very properly overruled the demurrer; but he should have given the defendants an opportunity to answer. The Code, sec. 272; *Moore v. Hobbs*, 77 N. C., 65; *Bronson v. Insurance Co.*, 85 N. C., 411.

Modified and affirmed.

Cited: Williams v. Whitaker, 110 N. C., 395; *Armstrong v. Best*, 112 N. C., 61; *Woody v. Jones*, 113 N. C., 255; *Long v. Ins. Co.*, 114 N. C., 468; *Holshouser v. Copper Co.*, 138 N. C., 257; *Sloan v. Sawyer*, 175 N. C., 660.

(19)

W. W. LEWIS v. JOHN L. ROPER LUMBER COMPANY.

Color of Title—Deed—Evidence.

A deed conveying a tract of land situate in two counties, having been duly admitted to probate in one, its execution is thereby sufficiently established to make it competent evidence, as color of title, to the lands located in the other county.

ACTION to recover damages for an alleged trespass on land, and cutting and taking timber therefrom, tried at Spring Term, 1891, of WASHINGTON, *Bryan, J.*, presiding.

The defendant denied the allegations of the complaint, and claimed that it was the owner in *fee* of the land upon which the trespass is alleged to have been committed.

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

S. B. Spruill (by brief) for plaintiff.
Charles L. Pettigrew for defendant.

DAVIS, J. Among other questions presented by the case on appeal is the following: The defendant offered, as a link in his chain of title, a deed for land lying in Washington and Tyrrell Counties, including the *locus in quo*. This deed had been properly proved and registered in the county of Tyrrell, but had not been registered in Washington County. This deed defendant also offered as color of title.

Plaintiff objected to the introduction of this deed because it had not been registered in Washington County, unless the execution of the same should be proved. The court excluded the deed, and the defendant excepted.

There was evidence tending to show that the defendant, and those under whom he claims, had been in the continuous possession of
(20) the land in controversy for more than seven years.

We think the deed offered in evidence constituted color of title, and that there was error in excluding it.

The deed had been properly proven and registered in Tyrrell County, the land lying in both Tyrrell and Washington counties, and the Code, sec. 1248, provides that "Where real estate is situate in two or more counties, probate of the deed or other instrument conveying or concerning the same, made before the clerk of the Superior Court of either of said counties, is sufficient."

It is the continuous possession of land, under *color* of title, for the

statutory period that confers title, and not the *validity* of the instrument constituting *color* of title.

The possession puts everybody upon notice as to the possessor's title or claim of title, whether legal or equitable, registered or unregistered, and it is well settled that a deed, whether registered or not, is good as color of title. *Campbell v. McArthur,* 9 N. C., 33; *Hardin v. Barrett,* 51 N. C., 159; *Brown v. Brown,* 106 N. C., 451.

The deed has been proved in a court of original competent jurisdiction, and the defendant was entitled to the benefit of it as evidence in making out his chain of title to the land in controversy. *Edwards v. Cobb,* 95 N. C., 4; *Evans v. Etheridge,* 99 N. C., 43, and cases there cited.

There were other exceptions presented in the case on appeal, but we deem it unnecessary to consider them. There was error in excluding the deed offered as color of title, and the defendant is entitled to a new trial.

Error.

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(21)

WARDENS ST. PETER'S EPISCOPAL CHURCH v. THE TOWN OF WASHINGTON.

Injunction—Municipal Ordinance.

An injunction will not be granted to prevent the enforcement of an alleged unlawful municipal ordinance; nor can an action be maintained which only seeks to have such ordinance adjudged void.

ACTION, tried on complaint and demurrer at Spring Term, 1891, of BEAUFORT, *Bryan, J.,* presiding.

The ordinance in question was as follows:

"Ordinance XXXIII.—No interment of the dead shall be made within the corporate limits of the town of Washington, N. C., nor shall the clerk issue the permit for any such burial; nor shall the body of any person dying within the corporate limits of the town be removed therefrom without a permit from the town clerk, and no permit shall be given by the clerk where there has been an attending physician without a certificate from said physician stating cause of death; and no dead body shall be exhumed within the corporate limits of the town and removed therefrom without a permit from the clerk. Every violation of this ordinance and every person participating in its violation shall be fined fifty dollars."

The prayer of the complaint was that "said ordinance be declared

void, and that defendants be enjoined from enforcing the same," etc. There was judgment sustaining the demurrer, from which plaintiffs appealed.

W. B. Rodman for plaintiffs.
C. F. Warren and J. H. Small for defendant.

(22) CLARK, J. The plaintiffs in this action seek to have a town ordinance declared void, and an injunction against enforcing the same. The ordinance in question had been authorized in terms by an act of the Legislature (1876-77, Pr. Laws, ch. 34), and has since been recited and declared "valid and legal" by two acts, Pr. Laws 1891, chs. 110 and 223.

It is unnecessary, however, that we pass upon the question debated before us as to the power of the Legislature to authorize or to validate the ordinance in the exercise of the police power inherent in the State, for we have an express authority, if one were needed, that an injunction does not lie to prevent the enforcement of an alleged unlawful town ordinance. Should the plaintiff be injured by its enforcement, he has a redress at law by an action for damages, *Cohen v. Commissioners,* 77 N. C., 2, in which *Reade, J.,* says: "We are aware of no principle or precedent for the interposition of a court of Equity in such cases." Nor can there be any for the proposition that the court should declare void an unenforced municipal ordinance. To do so would be to pass upon a mere abstraction. If the plaintiffs, or any one else, should violate the ordinance, upon a criminal prosecution for such violation the validity of the ordinance, and of the acts of the Legislature authorizing and validating it, would come directly and properly before the courts. Or if the town, by arrest or otherwise, should prevent the attempted violation, an action for damages, as in the case cited, or an indictment, would equally present the question. Indeed, the allegations of the plaintiff that if they should violate the ordinance they fear an arrest and a breach of the peace, and their application for an injunction to prevent such consequences, though made in good faith, will not warrant the court in departing from settled authority.

As was said in *Busbee v. Lewis,* 85 N. C., 332, "A court of Equity will never interpose its jurisdiction in the way of a mere protective relief (there by a decree to remove a cloud upon a title), when the
(23) party has an adequate and effectual remedy at law." To same purport, *Busbee v. Macy,* 85 N. C., 329; *Pearson v. Boyden,* 86 N. C., 585. But the learning is familiar, and the principle well settled by authority and reason. The complaint does not set out facts sufficient to constitute a cause of action, therefore let it be entered.

Action dismissed.

Cited: Scott v. Smith, 121 N. C., 95; *Vickers v. Durham,* 132 N. C., 890; *Paul v. Washington,* 134 N. C., 368, 385; *Hargett v. Bell, ib.,* 395; *S. v. R. R.,* 145 N. C., 521; *Crawford v. Marion,* 154 N. C., 74.

S. C. BROWNE ET AL. v. JOHN T. DAVIS.

Trusts and Trustees—Release—Subrogation—Betterments—Improvements.

Plaintiffs conveyed to T. a tract of land, and to secure payment of the purchase-money T. conveyed the same land to a third person, and both deeds were duly registered; subsequently the defendant purchased a portion of the land from T. with notice of the trust, paid the purchase-money therefor to the trustee, who paid it to plaintiffs, who did not know that it arose from a sale of the land; and thereupon, without the knowledge of plaintiffs, the trustee, on the margin of the registry of the deed in trust, wrote an instrument, not under seal, purporting to release that portion of the land purchased by defendant: *Held,* (1) that even if the attempted release had been under seal it would have been ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remained unsatisfied; (2) the defendant was entitled to have the money paid by him repaid, and a lien established upon the land for that purpose; (3) while the defendant was not entitled to recover betterments, upon an inquiry of the amount of damages for the use and detention of the lands to which plaintiffs were entitled, it was competent for him to show the value of the improvements of a permanent character, of which plaintiffs would have actual benefit.

ACTION for the recovery of land, and damages for the wrong- (24) ful detention thereof, tried at Spring Term, 1891, of HERTFORD, *Bryan, J.,* presiding.

The plaintiffs, on 18 January, 1887, by deed duly recorded in Pasquotank County, N. C., sold and conveyed to one W. O. Temple six hundred and ninety-three acres of land in said county. On the same day Temple and wife, by deed of trust, recorded in said county, conveyed said land to one E. F. Lamb in trust to secure the payment of a portion of the purchase-money therefor.

On 7 February, 1888, Temple and wife, without the knowledge or consent of the plaintiffs, sold and conveyed, by deed duly recorded in said county, forty-five acres of said land to the defendant; at which time said trust was duly recorded, and the defendant had actual knowledge of its existence and registration and that the debt therein secured had

not been paid. Lamb was also the agent of the plaintiffs for the purpose of collecting said debt, and had the notes of Temple therefor in his hands, and received the purchase money for the forty-five acres of land and paid it over to the plaintiffs, but did not at the time advise them that it was from the sale of any portion of the lands conveyed in the trust, nor did the plaintiffs know it for some time thereafter. The following entry appears upon the margin of the registry of said trust: "For value received, I hereby release from the operation of this deed of trust that portion of the within described tract of land which was sold by W. O. Temple and wife to John T. Davis by deed dated 7 February, 1888. Witness my hand and seal, 8 February, 1888. E. F. Lamb, trustee." But this was placed there without authority from the plaintiffs, nor did they agree with the defendant that the forty-five acres of land should be released from the trust.

Temple being insolvent, and having made default in the payment, Lamb, as trustee, according to the terms of said trust, sold said land at public auction—first, all except the forty-five acres, and the
(25) proceeds therefrom not being sufficient to pay said debt, the said forty-five acres were then sold, and the plaintiffs became the purchasers of the whole of said lands at said sale and received a deed therefor. Upon the demand of the plaintiffs, the defendant refused to deliver possession of the forty-five acres of land to them; whereupon they instituted this action to recover possession thereof, and damages for its wrongful detention. The defendant contends that if he is compelled to give up the land he ought to have his money back, and also, after verdict, petitioned the court for betterments.

The plaintiffs, upon the admission in the pleadings, the evidence in the case and the issues as found by the jury, moved the court for judgment against the defendant, declaring them owners and entitled to the immediate possession of the forty-five acres of land, for damages as awarded by the jury for the wrongful detention thereof, declaring the defendant not entitled to the equities set up by him, for cost, and directing that a writ of possession be issued. This judgment was refused; whereupon the defendant moved for and obtained judgment as set out below. The plaintiffs excepted to the refusal of the court to give judgment as prayed for by them, and also to the judgment as rendered, because it declared the purchase money paid by the defendant for the forty-five acres of land a lien thereon, and directed that it be sold to pay the same and interest, and because it entertained the petition of the defendant for betterments, and directed the impaneling of a jury to assess the value of the same.

It was adjudged by the court that the plaintiffs recover the lands described in the pleadings, subject to a lien of $450, and interest thereon

from the day of sale from Temple and wife to deed, and $175, assessed by the jury for rents and detention, subject to a credit for valuable and permanent improvements placed upon said lands by defendant, the same to be ascertained by a jury upon the petition of defend- (26) ant for betterments and permanent improvements.

It was further adjudged that a jury be impaneled at the next term of the court to assess the value of the permanent improvement made by the defendant upon the lands mentioned in the pleadings, to wit, the forty-five acres of land, and that the execution upon this judgment, and the sale of the land herein provided for, be suspended until this assessment shall be made.

J. H. Sawyer (by brief) for plaintiff.
E. F. Aydlett for defendant.

SHEPHERD, J. The trustor conveyed a part of the land included in the deed of trust to the defendant for the sum of four hundred and fifty dollars, and at the same time the trustee made the following entry on the margin of the record of the said trust: "For value received I hereby release from the operation of this deed of trust that portion of the within described tract of land which was sold by W. O. Temple and wife to John T. Davis by deed dated 7 February, 1888. Witness my hand and seal. E. F. Lamb, trustee. Witness, T. P. Wilcox, R. of D." There was, in fact, no seal attached, and, therefore, the entry could not, under the most liberal construction, be considered as a deed of release divesting the title of the trustee. *Linker v. Long,* 64 N. C., 296; *Wharton v. Moore,* 84 N. C., 479. We are also of the opinion that the said entry, under the circumstances, was not warranted by section 1271 of The Code. That statute only authorizes the trustee to "acknowledge the *satisfaction of the provisions* of such trust," etc., in which case the entry operates as a reconveyance. It was never contemplated that the trustee could, by this means, release from an unsatisfied trust specific parts of the land, and it is entirely clear that this cannot be done where, as in the present case, the purchaser had actual knowledge that the large indebtedness, secured by trust, had not been satisfied. (27) It is true that the jury found that the trustee was "the agent of the plaintiffs (the *cestuis que trustent*) and acting as such at the time he made the entry," but it is also expressly found that this agency did not authorize him to make such entry; that the land was sold to the defendant without the knowledge or consent of the plaintiffs, and that there was no agreement on their part that any portion of it should be discharged from the indebtedness. What effect is ordinarily to be given, by way of estoppel, to the reception of the purchase money, in

cases like the present, need not be considered at this time, as there is nothing to show (and proof of this is incumbent on the defendant) that the plaintiffs received the money from the trustee with knowledge of the sale and entry of record. On the contrary, it appears that very soon thereafter they caused the trustee to sell the entire tract, which proved insufficient in value to satisfy their demands. The plaintiffs, becoming the purchasers at the said sale, we think that his Honor was correct in holding that they acquired the legal title and were entitled to recover.

We also concur in the ruling of the court in charging the land with the amount paid by the defendant to the plaintiffs through the trustee. There is nothing in the cases cited by the appellants' counsel which conflicts with the principle so often laid down by this Court, that one cannot repudiate a transaction made in his behalf and at the same time retain the fruits thereof. *Walker v. Brooks,* 99 N. C., 207; *Burns v. McGregor,* 90 N. C., 225; *Boyd v. Turpin,* 94 N. C., 137.

The action of his Honor, however, is clearly sustained upon the principle of subrogation, and the cases cited in Sheldon on Subrogation, sec. 30, *et seq.,* seem directly in point.

In respect to the question of improvements, we think there was error.

(28) We have seen that the entry made on the record by the trustee did not divest his title; but granting that it had this effect, or that the trustee, without the consent of the *cestuis que trustent,* had executed a formal deed of release to the defendant, the latter, affected as he was with actual, as well as constructive, notice that the indebtedness was still existing, would have taken subject to the trust; and so far from "holding the premises under a color of title believed by him . . . to be good" (section 473, Code), the law would have implied that he had knowledge of the infirmity of his claim. *Scott v. Battle,* 85 N. C., 192, and the authorities there cited. Moreover, our case is excepted from the provision above mentioned by section 481, and in *Wharton v. Moore,* 84 N. C., 479, it is held that improvements put upon the land by a purchaser from the mortgagor become additional security for the debt. Our case, we think, very plainly falls within the spirit of both the excepting statute and the decision just referred to.

While we are of the opinion that the defendant is not entitled to betterments, still when the jury come to inquire into the plaintiffs' damages on account of the use and detention of the lands, "they will be at liberty, and, indeed, in duty bound, to make a fair allowance out of the same for improvements of a permanent character, and such as (plaintiffs) will have the actual enjoyment of. That such an allowance could properly be made by the jury was said in *Dowd v. Faucett,* 15 N. C., 92; notwithstanding it was at the same time adjudged that the de-

fendant's claim for improvements, *as such,* would not be recognized by the court." *Scott v. Battle, supra.*

Modified and affirmed.

Cited: S. c., 112 N. C., 227, 228; *Woodcock v. Merrimon,* 122 N. C., 736; *Christian v. Yarborough,* 124 N. C., 77; *Herring v. Warwick,* 155 N. C., 350; *Herndon v. R. R.,* 161 N. C., 655.

(29)

J. E. CARTER, ADMR. OF J. A. WORRELL, v. A. J. ROUNTREE, ADMR. OF C. W. WORRELL, ET AL.

Judgments, Void, Irregular and Erroneous—When and How Relieved Against—Infants—Service—Fraud.

1. A void judgment is one that has merely the form of a judgment, but is destitute of some essential elements; it has no force, and may be quashed on motion or *ex mero motu,* and will be treated everywhere as a nullity.
2. An irregular judgment is one entered contrary to the method of procedure and practice of the court; and, ordinarily, the mode of relief against it is by motion in the cause, whether the action has been ended or is still pending. Such motion may be made at any time within a reasonable period.
3. An erroneous judgment is one rendered contrary to law; it cannot be attacked collaterally, and remains in force until reversed or modified.
4. When a judgment is attacked *for fraud,* the proper remedy is by motion in the cause, if the action is then pending, but if it has been ended by final judgment, an independent action must be instituted.
5. Upon a motion to vacate a judgment it is not required of the court to set forth its finding of the controverted facts upon the record, unless a request to that effect is made by some of the parties to the proceeding, when it would be error to refuse the request.
6. The fact that an infant was not personally served with a summons, in a proceeding to sell lands to make assets, but service thereof was made upon his mother, is not such an irregularity as will authorize the vacation of order for sale and its confirmation, where it appeared that the infant was represented by a guardian *ad litem.* The irregularity was cured by the statute. (The Code, sec. 387.)

MOTION to set aside a judgment, heard at Spring Term, 1891, of HERTFORD, *Bryan, J.,* presiding.

This is a motion in a special proceeding to set aside, for alleged irregularity and fraud, the orders directing a sale of the land there specified to make assets to pay debts of a testator, the proceeding having been determined before the motion was made. (30)

The court heard the motion and gave judgment setting the orders complained of aside. The plaintiffs and defendants filed affidavits in support and against the motion, but it does not appear affirmatively that the court found the facts, or based its judgment upon any finding of fact. The appellants assigned as error, first, that a motion in the cause was not a proper remedy; secondly, that the court failed to find the facts on which its judgment was based.

B. B. Winborne for plaintiff.
R. B. Peebles (by brief) and C. E. Smith for defendant.

MERRIMON, C. J. A motion in the cause is the proper remedy, whether the action be ended or not, for mere irregularities in the course of the action, and it may be made at any time within a reasonable period. This is settled by many decisions of this Court. *Williamson v. Hartman,* 92 N. C., 239; *Fowler v. Poor,* 93 N. C., 466; *Morris v. White,* 96 N. C., 93; *Syme v. Trice, id.,* 243; *Smith v. Fort,* 105 N. C., 452; *McLaurin v. McLaurin,* 106 N. C., 331; and there are other cases.

It is well settled that pending an action before the final judgment an interlocutory order or judgment may be attacked for fraud by a motion or proceeding in the action, but after the final judgment the remedy for fraud is by an independent action brought for the purpose. See the cases cited *supra,* and other cases cited in Seymour's Digest (7th), 281, *et seq.*

The motion in this case is made in the form of a petition, setting forth specifically the grounds thereof. The form does not change or at all affect its nature and purpose. Indeed, in some cases of complication it would be well to specify and set forth the grounds thereof. The motion is summary, and to specify the grounds would give it
(31) greater certainty and render it more intelligible.

As to the alleged irregularities complained of here, the motion in the proceeding is the appropriate and proper remedy. Inasmuch as the proceeding is ended, as to the alleged fraud, the remedy is not by such motion but by an independent action, as clearly pointed out in the cases cited, *supra.* The motion need not fail, however, because of the allegations of fraud. These may be treated as surplusage, and it may be upheld as sufficient as to the alleged irregularities.

It does not appear from the record that the court below found the facts from the evidence submitted to it in support of and against the motion. It may have done so, and probably did, without setting forth its findings in the record. It was competent for it to omit entering them unless it had been requested by a party to so set them forth, so as to enable the party to take exception, with a view to an appeal to this

Court. In such case it would be the duty of the court to comply with the request, and to refuse to do so would be error. *Millhiser v. Balsley,* 106 N. C., 433; *Holden v. Purifoy,* 108 N. C., 163. It does not appear affirmatively that the court failed to find the facts, nor did the appellants request it to enter its findings on the record. The second exception cannot, therefore, be sustained.

It is our duty, however, to look through the record proper, and to see whether it warrants the judgment appealed from, although no exception appears. *Thornton v. Brady,* 100 N. C., 38; *Bush v. Hall,* 95 N. C., 82, and other like cases. We have examined the record, and are of opinion that it does not.

The evidence produced tended to prove that the order of sale and the sale of the land complained of were fraudulent, and the court may have founded its judgment upon the ground that they were so. That it did does not, however, appear. If it did, the judgment was not warranted, because the orders complained of could not be attacked for fraud by a motion in the cause. The court ought not to have received (32) evidence of such fraud, nor ought it to have based its judgment upon such ground. As we have seen, the orders could be attacked for fraud only by an independent action.

Judgments may be void, irregular or erroneous. A void judgment is one that has merely semblance, without some essential element or elements, as when the court purporting to render it has not jurisdiction. An irregular judgment is one entered contrary to the course of the court—contrary to the method of procedure and practice under it allowed by law in some material respect; as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same. *Vass v. Building Association,* 91 N. C., 55; *McKee v. Angel,* 90 N. C., 60. An erroneous judgment is one rendered contrary to law. The latter cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a court of errors it shall be reversed or modified. An irregular judgment may ordinarily and generally be set aside by a motion for the purpose in the action. This is so because in such case the judgment was entered contrary to the course of the court by inadvertence, mistake or the like. A void judgment is without life or force, and the court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity.

In this case the court had jurisdiction of the parties and the subject matter of the proceedings. The defendant was a minor, and there was no service of the summons upon him personally, but service thereof was made upon his mother, as allowed by the statute (Code, sec. 217), and

a guardian *ad litem* was appointed for him, who filed an answer for the infant defendant. The record shows that the order of sale was entered, the land was sold and the sale confirmed. Regularly, the infant
(33) ought to have been served personally with process. The land specified in the petition was not very definitely described, but it was designated so as to be ascertained, and the report of the commissioner who sold it described it with more definiteness. Granting that there was irregularity, in that the summons was not served upon the infant defendant personally, the same was cured by the statute. Code, sec. 387. *Stancil v. Gay,* 92 N. C., 464; *Cates v. Pickett,* 97 N. C., 21. We are clearly of opinion that there was not such irregularity as warranted the judgment setting the order complained of aside.

It may be that these orders were tainted with fraud, but, as we have seen the remedy for that is by an independent action.

The judgment must be reversed, and the motion in the cause denied.

Error.

Cited: Grant v. Harvell, post, 79; *Smallwood v. Trenwith,* 110 N. C., 92; *King v. R. R.,* 112 N. C., 321; *Everett v. Reynolds,* 114 N. C., 368; *Smith v. Gray,* 116 N. C., 314; *Smith v. Whitten,* 117 N. C., 391; *Rawles v. Carter,* 119 N. C., 597; *Huntsman v. Lumber Co.,* 122 N. C., 586; *S. v. Truesdale,* 125 N. C., 702; *Mfg. Co. v. Hobbs,* 128 N. C., 47; *Clements v. Ireland,* 129 N. C., 221; *McLeod v. Graham,* 132 N. C., 474; *Fisher v. Ins. Co.,* 136 N. C., 224; *Clement v. Ireland,* 138 N. C., 138; *Earp v. Minton, ib.,* 204, 207; *Anderson v. Wilkins,* 142 N. C., 159; *Parker v. Ins. Co.,* 143 N. C., 342; *Flowers v. King,* 145 N. C., 235; *Rackley v. Roberts,* 147 N. C., 204; *Hargrove v. Wilson,* 148 N. C., 441; *Houser v. Bonsal,* 149 N. C., 56; *Glisson v. Glisson,* 153 N. C., 187; *Phillips v. Denton,* 158 N. C., 303; *Harris v. Bennett,* 160 N. C., 344, 345; *Stocks v. Stocks,* 179 N. C., 288; *Caviness v. Hunt,* 180 N. C., 385.

W. H. CUNNINGGIM AND WIFE v. W. H. PETERSON ET AL.

Registration of Deeds—Register Fees—Evidence.

1. The indorsement required to be made by register of deeds on mortgages and deeds in trust (The Code, sec. 3654) on the day on which such deeds are presented to him for registration, is not essential to registration; and when made is not conclusive evidence, but only *prima facie* evidence of the facts therein recited.
2. Where a deed was handed to the register for registration but he refused to register it because his fees were not paid, but the paper was left in his

office for several months, when, the fees being paid, he made an indorsement that it was filed on the day first presented, followed by an explanatory indorsement reciting the facts: *Held*, (1) that the whole indorsement should be considered; (2) that the register was not compelled to register before his fees were paid, and (3) the facts did not constitute a filing for registration on the day when the deed was first presented to the register.

ACTION, tried at February Term, 1891, of BEAUFORT, *Bryan,* (34) *J.*, presiding.

The following is so much of the case as settled on appeal as need be reported:

Plaintiffs offered a deed from W. H. Cunninggim and wife to W. H. Peterson, dated 12 July, 1891, and recorded in register's office of Beaufort. This deed was received by the register at 10 a.m., on 27 July, 1889, and recorded 29 July, 1889, and conveys *locus in quo*. They then offered a mortgage from W. H. Peterson and wife to L. H. Cunninggim, dated 27 July, 1889, and recorded in the register's office of Beaufort. This mortgage was proved before B. F. Mayo, a justice of the peace for Beaufort, on 17 July, 1889, and the privy examination of Julia Peterson taken on 27 July, 1889. The clerk of the Superior Court of Beaufort placed his certificate upon the mortgage and ordered its registration. Upon this mortgage, and upon the record, is the following indorsement: "Filed for registration at 12 o'clock m., 27 July, 1889, subject to the annexed facts. Indorsed and registered in the office of the register of deeds for Beaufort County, in Book 73, page 227, 11 January, 1890." Upon the said mortgage and record is the further indorsement: "This mortgage was brought into this office by G. Wilkens, clerk of the Superior Court, 27 July, 1889. No fees having been paid, the same was left in the office open to the inspection of the public until 30 December, 1889, at 10 a.m., when H. H. Broome paid fees, and the same was duly filed and recorded in Book 73, page 227, register's office of Beaufort. M. F. Williamson, register." Mr. Williamson testified: "On 26 July, 1889, Mr. Bonner sent me two mortgages, of which this is one, and with them was a letter; I have searched for the letter and cannot find it." The plaintiffs objected to any testimony as to the contents of the letter, as it was a declaration of Bonner's and not competent. Witness testified that Bonner stated in the letter that he "wished me to distinctly understand that he was not responsible for the (35) fees, and that I would have to look to Mr. Cunninggim for them. I then took the mortgages and carried them to the clerk, and on 27 July, 1889, the clerk carried them back into my office and handed me this mortgage; the clerk said he would not be responsible for the fees; he threw it down on my desk; I told him I would not receive it; I took the paper and put it in a box where there were a number of others sent for

registration without fees. On 30 December, 1889, H. H. Broome paid the fees and I immediately filed the paper. I made the indorsement on the mortgage 30 December, 1889. I kept this mortgage in a separate box from the one in which I keep deeds filed for registration."

Upon cross-examination, witness testified: "The clerk collects my fees sometimes, and sometimes he does not. I receive instruments sometimes without fees; sometimes the clerk collects and pays me, and at times I collect and pay the clerk; the box in which I put this mortgage is open to the public. Mr. Jacobson came and I told him the mortgage was there; I do not recollect any other indorsement made by me upon any other instrument."

Mr. Wilkens, clerk of the Superior Court of Beaufort, testified: "The register brought me several papers for probate, among them two mortgages of Mr. Cunninggim, of which this was one, and also a letter from Mr. Bonner, in which he stated that he, Bonner, would not pay the fees; the register told me he would not receive the paper without the fees, and that I might keep them in my office. When I probated the other papers I also probated these mortgages, and carried all to the register for registration; the register objected to receiving the Cunninggim papers; I pointed out to him that his predecessor used to have a box in which he filed any papers upon which the fees had not been paid, and that he could put them in the box, and that Mr. Cunninggim would probably write soon and send the fees, when he could file and register the papers.
(36) I then left him. I saw the paper afterward, and before it was recorded, on the day when Broome paid the fees; there was no indorsement on it by the register. I do not know what day this was.

W. K. Jacobson testified: "Mrs. Chapin is my sister; the deed from Peterson to her was sent to me with a letter instructing me to have it registered; the next morning I took the deed over to the register's office, and while there the subject of the mortgage was brought up; the register stated that there was such a mortgage; I asked the register what he was going to do, and whether he considered it filed; he said he did not consider it filed as he had no fees, and he would not register it without the fees. I did not see the mortgage; I never saw it until after the entry was made on it."

The first issue submitted to the jury was this: "Was the mortgage from W. H. Peterson to L. H. Cunninggim filed for registration on 27 July, 1889, or any day prior to 28 December, 1889?" The jury responded, "Yes."

The appellants requested the court to instruct the jury: "If you believe the evidence (that above recited), or any part thereof, you will answer the first issue, No." The court declined to give this instruction, or the substance thereof, and the defendants excepted.

C. F. Warren for plaintiff.
W. B. Rodman (by brief) and J. H. Small, contra.

MERRIMON, C. J., after stating the case: We are of opinion that, in any just view of all the evidence produced on the trial, bearing upon and pertinent to the first issue submitted to the jury as to the time when the mortgage deed mentioned in the pleadings was delivered to the register for registration, it went to prove, and only to prove, that this deed was not so delivered to him as required by the statute (The Code, sec. 3654), prior to 30 December, 1889, and that the (37) court should so have instructed the jury, as it was requested by the appellants to do, but which it declined to do. The register and other witnesses examined, who testified as to the pertinent facts, stated in substance that the register expressly refused to receive the deed for registration until his fees were paid. It was insisted, on argument here, that the entry on the deed, "Filed for registration at 12 o'clock, 27 July, 1889," made by the register, was evidence to the contrary, and that it had technical meaning and effect, because the statute requires the register to "indorse on each deed in trust and mortgage the day on which it is presented to him for registration."

But the statute does not make such indorsement essential to the validity of the registration. *Metts v. Bright,* 20 N. C., 311. When made it is *prima facie* true, but it is not conclusive. In a proper case it would be competent to show that it was not true in fact—that by inadvertence, mistake or for some fraudulent purpose, it was not made truly and in accordance with the facts. Otherwise, such indorsement might, in some instances, work wrong and injury without remedy. The statute does not so intend, nor is there reason why it should.

Such indorsement must also be taken and treated as a whole, especially when it appears from its terms to be explanatory and to have, intentionally, a qualified meaning and purpose. In this case, the indorsement upon the mortgage was not simply "Filed for registration at 12 o'clock m., 27 July, 1889"; it went materially further, reciting and explaining that such statement was made "subject to the annexed facts, indorsed and registered in the office of register of deeds for Beaufort County, in Book 73, page 277, 1 January, 1890. This mortgage was brought in this office for registration by C. Wilkens, clerk Superior Court, 27 July, 1889. No fees having been paid, the same was left in the office open to the inspection of the public, until 30 December, 1889, at 10 a.m., H. H. Broome paid fees, and the same was duly (38) filed and recorded in Book 73, page 227. Register's office, Beaufort County, 1 January, 1890. M. F. Williamson, register." This indorsement plainly implies that the mortgage was "filed," in the sense

of "presented for registration," on 27 July, 1889, but the register refused to accept it as delivered to him because his fees had not been paid. Hence, it is stated that it "was duly filed and recorded" on 30 December, 1889.

The register intentionally refused, as he had the right to do (The Code, sec. 3758), to treat the mortgage as delivered to him for registration until his fees in that respect had been paid. His fees were paid on the last mentioned day, and he then recognized and treated the mortgage as "delivered to him for registration." It was then "delivered" in the sense of the statute. There is no evidence in the indorsement, nor of any witness examined, that tends to prove that it was so "delivered" on 27 July, 1889, or at any time prior to 30 December, 1889. The indorsement is not materially inconsistent with the evidence of the register and others—the latter only recites the facts more fully and in detail. The mere fact that the mortgage was left in the office of the register, and with his knowledge, did not imply, necessarily, that it was delivered to him. It must have been delivered to him in such way, and with such accompaniments, as made it his duty to receive it for registration.

The appellants are entitled to a new trial, the judgment must be reversed, and the case disposed of according to law.

Error.

Cited: Smith v. Lumber Co., 144 N. C., 49.

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(39)

J. M. SPENCER v. JONATHAN BELL ET AL.

Claim and Delivery—Affidavits by Agent—Objections to Undertaking—Waiver—Weight Attached to Evidence—Justice's Jurisdiction—Judgment on Facts not Passed Upon.

1. In claim and delivery of personal property, an affidavit made by plaintiff, "per" another, is sufficient. (The Code, sec. 322.)
2. The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. (The Code, sec. 325.)
3. Where, on the trial of an action for the recovery of personal property commenced before a justice of the peace, the only witness testifying to the value of the property said it was worth fifty-five dollars, the defendant is entitled to an instruction that, if his evidence is believed, the jury will find the value of the property to be fifty-five dollars, and that the plaintiff cannot recover, the action having been instituted before a justice of the peace.

4. It is error to give a judgment predicated upon disputed facts not found by the jury.

CLAIM AND DELIVERY to recover "one certain lot of corn, in the barn on the Bell farm," of the alleged value of forty-five dollars, appealed from a justice of the peace, and tried before *Bryan, J.*, at the February Term, 1891, of BEAUFORT.

The affidavit required in the application for the delivery of the possession of the corn is signed as follows: "J. M. Spencer, per D. M. Spencer. Sworn before me, this 1 February, 1889. W. D. Saddler, J. P."

In the transcript of the justice of the peace it is stated "the plaintiff appeared by his agent, D. M. Spencer."

There is what purports to be an undertaking of the plaintiff for delivery of property as required by section 324 of the Code, with two sureties, but it is not signed by either the plaintiff or the sureties, but there is a justification, signed by each surety, in which he makes oath that he "is worth over and above his liabilities and his property exempted by law the sum of $_____." (40)

In the Superior Court, before the trial, defendants moved to dismiss the claim and delivery proceeding upon the following grounds: Because the affidavit purported to have been made by plaintiff J. M. Spencer, "per D. M. Spencer." Second: Because the plaintiff gave no bond before the issuing of the order to seize the property as required by law.

Motion denied, and defendant excepted.

No counsel for plaintiff. (42)
J. H. Small and C. F. Warren for defendant.

DAVIS, J. The first exception is to the refusal of his Honor to dismiss the claim and delivery proceedings, because the affidavit purported to have been made by the plaintiff J. M. Spencer, per D. M. Spencer.

The Code, sec. 322, provides that the requisite affidavit shall be made "by the plaintiff or some one in his behalf." The essential requisite is, that an affidavit shall be made by the plaintiff or some one in his behalf, that the facts on which the application is based are true, and while the affidavit should have been signed by D. M. Spencer, agent for or on behalf of J. M. Spencer, it sufficiently appears that the affidavit was made for the plaintiff, and the exception cannot be sustained.

The second exception is to the refusal to dismiss because the plaintiff gave no bond.

There was what purported to be an undertaking, with two sureties, and if the defendants excepted to its sufficiency, they should, within

three days after the service of a copy of the affidavit and undertaking, having proceeded as required by the Code, sec. 325, or they shall be deemed to have waived all objection to the sufficiency of the sureties. We think the objection, on account of the insufficiency of the bond and surety, came too late, and this exception cannot be sustained.

The next exception is to the refusal of the court to instruct the jury, as requested, that if they believed the testimony of the witness Bell, they will find the value of the property to be $55, and answer the second issue accordingly. Bell was the only witness who testified as to the value of the property, and he said it was worth $55. It is true, the witness Bishop testified that he "got $50 out of the corn," but he said he did not know how much corn there was, and did not testify as to its value, nor does it appear that he got all of the corn. The only evidence
(43) as to the value of the property was that of the witness Bell, who said it was worth $55, and the defendants were entitled to the instruction asked, and there was error in refusing it.

The last exception is to the judgment. The court adjudged "that the plaintiff recover of the defendants the sum of $50, the value of the said corn, to be discharged upon the payment by the defendants to the plaintiff the sum of $20.86, with interest thereon," etc. There were no findings of fact upon which such a judgment could be rendered. It is true, the plaintiff claimed a balance of $17.74 on advances to cultivate the crop of 1888, and he also claimed the value of some sacks, and the use of a cart, amounting to $3.22, which, added to the $17.74, would make $20.96; but this was denied by the defendants, and it was not within the province of his Honor to say how the fact was; only a jury could decide and say how the fact was. Besides, the action was to recover the possession of a certain lot of corn alleged to have been worth $45, and upon no state of facts, even if it had been found by the jury that the defendants were indebted to the plaintiff in the sum of $20.86, as assumed by his Honor, would the plaintiff have been entitled to the judgment as rendered. Section 431 of the Code prescribes, clearly and distinctly, the manner in which judgment in an action for the recovery of personal property shall be rendered. *Horton v. Horne,* 99 N. C., 219; *Taylor v. Hodges,* 105 N. C., 344, and cases cited.

Error.

(44)

W. H. BRAY v. W. D. BARNARD.

Penalty—County Commissioners—Officer—Official Bonds—Sheriff's—County Treasurer.

1. The statutes (The Code, secs. 1875 and 2070) requiring the officers therein designated to renew annually their official bonds, and that sheriffs shall, in addition, produce receipts for the public moneys collected by them, and in default thereof it shall be the duty of the board of county commissioners to declare the office vacant, are intended to effectuate the same purpose, and therefore a member of the board of county commissioners is liable for only one penalty for failure to perform his duty in that connection.
2. It is not the imperative duty of the board of county commissioners to institute suits against a delinquent officer for failure to account and pay over public moneys. Under section 775, The Code, they may do so, but the county treasurer is regularly the proper officer to bring such action; and in an action against a commissioner for failure to perform his duty in that respect, it is necessary to allege and prove that the commissioners negligently failed or wilfully refused to exercise their authority.

ACTION, tried at Fall Term, 1891, of CURRITUCK, *Bryan, J.*, presiding.

The action is brought by plaintiff to recover from the defendant divers penalties, which the complaint alleges he incurred as a member of the board of commissioners of the county of Currituck by neglecting to perform his duty in numerous respects as such commissioner. Among other things, it is alleged as follows:

"5. That said Barnard, sheriff as aforesaid, was required to renew his bonds annually, and on 1 December, 1889, and produce his receipts as set out in section 2070 of The Code of North Carolina, which he failed to do, thereby creating a vacancy in said office of sheriff of said county by act and operation of law, and the said board of commissioners, and the defendant, as a member thereof, was required to fill said vacancy by appointment, as required by section 720 of The Code of North Carolina, which said board, and this defendant, as a member (45) thereof, failed and neglected to do in violation of said section 720 of said Code, and this defendant thereby became liable for the penalty of two hundred dollars, and indebted to this plaintiff for same, he having brought suit for same according to section 711 of The Code aforesaid.

"8. That said John E. Barnard failed and neglected to make and renew his official bonds as sheriff as aforesaid on the first Monday in December, 1889, as required by section 2070 of The Code of North Carolina, and the said board, and the defendant, as a member thereof, failed and neglected to declare his office vacant and appoint his successor, as required by section 1875 of The Code of North Carolina, and by reason of

said failure and negligence the defendant has become liable to a penalty of two hundred dollars and indebted to plaintiff in said amount, as provided in section 711 of said Code.

"9. That said John E. Barnard, sheriff as aforesaid, failed and refused to settle the taxes for the year 1888, and the finance committee of said county so reported to the treasurer of said county and to said board of commissioners; that said sheriff was in arrears the sum of $1,759.94, and that said board, and this defendant, as a member thereof, failed and neglected to institute suit against said Barnard, sheriff as aforesaid, and his bondsmen, as they were required to do, in violation of section 775 of The Code aforesaid, and thereby became liable to a penalty of two hundred dollars, and same is due this plaintiff, according to the previous section 711 of The Code of North Carolina."

The defendant "admitted the facts alleged in the complaint, but denied the inference therein stated."

The plaintiff moved for judgment upon the pleadings. The court denied this motion for judgment, for the penalties alleged and specified in paragraphs eight and nine of the complaint above set forth,
(46) upon the ground that the penalty alleged in paragraph eight is substantially that alleged in paragraph five thereof, and upon the further ground that paragraph nine, above set forth, does not state facts sufficient to constitute a cause of action. The plaintiff excepted. As to these penalties, the court gave judgment for the defendant and the plaintiff appealed.

E. F. Aydlett for plaintiff.
W. B. Shaw for defendant.

MERRIMON, C. J., after stating the case: The statute (The Code, sec. 711) prescribes that "Any (county) commissioner, who shall neglect to perform any duty required of him by law, as a member of the board, shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same."

The plaintiff contends, first, that the defendant incurred a penalty, under this statutory provision, because the sheriff mentioned failed, for the year specified in the fifth paragraph of the complaint, to file the annual bonds required of him, and to produce receipts for moneys that he had collected, or ought to have collected, whereby his office became vacant, as prescribed by the statute (The Code, sec. 2070), and the defendant neglected to perform his duty as commissioner, in that he and his associates did not proceed to fill the vacancy so occasioned by appointment, as prescribed and required by the statute (The Code, sec.

720), which provides that "Whenever a vacancy shall occur in the office of sheriff, constable, register of deeds, county treasurer or county surveyor, the board of commissioners of the county shall fill the same by appointment." He contends, secondly, that the defendant incurred another penalty, as alleged in the eighth paragraph of the complaint, because the board of commissioners, the defendant joining them, failed to declare the office of the sheriff vacant for the causes alleged as required by the statute (The Code, sec. 1875), which pre- (47) scribes that "Upon the failure of any such officer (including sheriff) to make such regular annual renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record, to declare his office vacant, and to proceed forthwith to appoint a successor," etc.

The court below was of opinion, and held, that the duties of the board of commissioners of the county, prescribed by the statutory provision just cited, were substantially the same as those prescribed in the other statutory provision (The Code, sec. 2070) cited *supra*. In this we think the court was correct, in so far as these sections affect this case. They, as to the sheriff, are intended to secure the same purpose, except that section 2070 enlarges the purpose so as to require the sheriff, in addition to the renewal of his bond annually, to "produce the receipts in full from the State treasurer, county treasurer, and other persons, all moneys by him collected, or which ought to have been by him collected, for the use of the State and county, and for which he shall become accountable," etc. As to the sheriff, in respect to the annual renewal of his bonds, the sections are in *pari materia* and must be taken together—they are intended to effectuate the same purpose. It is not presumed that the Legislature intended to impose double penalties for the same failure of duty in a public officer. If it had so intended, it would have said so in explicit terms. The duty of the board of commissioners was to declare the office of sheriff vacant and to fill the vacancy, when, and if he failed to renew his bond annually—the *same duty* is prescribed by the two sections of The Code just cited. In one of these sections the same duty arises if the sheriff shall fail to produce the receipts mentioned as required. Under this section, if the sheriff should fail to renew his bonds it would be the duty of the board of commissioners to declare his office vacant; if he renewed his bonds and failed to produce the receipts mentioned, it would be their like duty; it would be their like duty if he failed to renew his bonds *and* to produce the receipts required. But, in the latter case, they would not be liable to two penalties. The purpose of the sections cited of the statute is to compel the board of commissioners to perform their duty in declaring the office of sheriff vacant and filling the vacancy in any one, or more, or all, of

the contingencies specified therein. Only one penalty is given against each commissioner composing the board, if he fails to perform his duty in such respect. That penalty, in this case, the plaintiff recovered under and in pursuance of the allegations contained in the fifth paragraph of his complaint.

We are also of opinion that the court properly decided that the ninth paragraph of the complaint set forth above fails to state facts sufficient to constitute a cause of action. The statute (The Code, sec. 775), certainly does not make it the imperative duty of the board of commissioners of the county to "bring suit on the official bond of the sheriff or other officer"; it provides that they "may forthwith" do so. It is thus left to their sound discretion whether they will or not. There might be substantial reasons why they would not, and, however, they might be content to leave it to the county treasurer to bring such suit, especially as, regularly, he is the proper officer to do so. *Hewlett v. Nutt,* 79 N. C., 263. The plaintiff claiming under this statutory provision should, at least, allege facts showing that the board of commissioners had negligently failed, or wilfully refused, to exercise their authority, and, hence, they had neglected to perform their duty as requird by law. In such case it may be that each of them participating in such neglect would incur the penalty prescribed.

Affirmed.

Cited: Bray v. Creekmore, post, 49; *Hudson v. McArthur,* 152 N. C., 449; *Templeton v. Baird,* 159 N. C., 66.

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(49)

W. H. BRAY v. W. B. CREEKMORE.

Amendment—Parties—Penalty—Sheriff—County Commissioners—Statute of Limitations.

1. Judgments of the trial court permitting lost pleadings to be substituted, or pleadings to be amended by striking out the name of a party plaintiff, are not reviewable.
2. The amendment of a pleading, by the mere change of the name of a party, unlike the insertion of a new cause of action, is not affected by the statute of limitations.
3. Where the amendment is merely formal, there is no necessity for service of the amended summons or complaint, but the court may order such service to be made.
4. Where the amendment brings in a new defendant, he should be served with proper process.

5. A member of a board of county commissioners is liable for the penalty prescribed in section 711 of The Code for failure of the board to declare the office of sheriff vacant, and fill the same, when such sheriff has not complied with the requirements of the statutes (The Code, secs. 2070, 3685) in respect to the renewal of his official bonds and accounting for public moneys received by him.

ACTION, which was tried upon the pleadings—substantially the same as those in *Bray v. Barnard, ante,* 44—at Fall Term, 1891, of CURRITUCK, *Brown, J.,* presiding.

The portions of the complaint referred to in the opinion are as follows:

"5. That said Barnard, sheriff as aforesaid, was required to renew his bonds annually, and on 1 December, 1889, and produce his receipts, as set out in section 2070 of The Code of North Carolina, which he failed to do, thereby creating a vacancy in said office of sheriff of said county by act and operation of law, and the said board of commissioners and the defendant, as a member thereof, was required to fill said vacancy by appointment, as required by section 720 of The Code of North Carolina, which said board and this defendant, as a member thereof, (50) failed and neglected to do, in violation of said section 720 of said Code, and this defendant thereby became liable for the penalty of two hundred dollars and indebted to this plaintiff for same, he having brought suit for same, according to section 711 of The Code aforesaid.

"7. That said J. E. Barnard, sheriff as aforesaid, failed to collect and settle the taxes of said county upon the tax list placed in his hands to collect for the year 1888, or produce his receipts for same, or give the bonds required by law before he received the tax list from said board to collect the taxes for the year 1889, and the said board permitted said Barnard to receive and collect the taxes for the year 1889 for said county before said Barnard, sheriff as aforesaid, had settled taxes for the previous year, or had produced his receipts for same, or had given the bonds required, as provided by section 3685 of said Code of North Carolina, and said board of commissioners and the defendant, as member thereof, failed and neglected to appoint a tax collector, as provided by said section 3685 of said Code, and permitted said Barnard to receive the tax list for said Currituck County for the year 1889, and collect the taxes of said county for said year, without requiring him to perform his duties as aforesaid, as required by law, and failed and neglected to appoint a tax collector, as provided by said section 3685 of said Code, and by reason of said failure and neglect this defendant became liable to a penalty of two hundred dollars, and same is due this plaintiff, as provided in section 711 of The Code of North Carolina."

The other facts, material, are stated in the opinion.

There was judgment for plaintiff, from which defendant appealed.

E. F. Aydlett for plaintiff.
W. B. Shaw for defendant.

(51) CLARK, J. 1. The action was brought "State on relation of W. H. Bray" against the defendant. On motion, words "State on relation of" were stricken out of summons and complaint, and defendant excepted. Such amendment rested in the discretion of the trial judge, and is not appealable. *Brown v. Mitchell,* 102 N. C., 347; *Maggett v. Roberts,* 108 N. C., 174. In both these cases the amendment was identical with that here objected to.

2. The complaint having been lost, the defendant asked that the action be dismissed. The plaintiff asked to file another complaint *in lieu* of that which had been lost. The court refused defendant's motion and granted the motion of the plaintiff. The defendant excepted. The action of the judge in allowing new pleadings to be filed in place of those lost is not reviewable.

3. The facts alleged in sections 5 and 7 of the complaint were not denied, and subjected the defendant to the penalties sued for. The Code, sec. 711. By consent the order was made in vacation as of Fall Term, 1890, which was within less than a year after those causes of action accrued (The Code, sec. 156 [2]); but, were it otherwise, the amendment was merely of the name of the party, not the insertion of a new cause of action, as was the case in *Hester v. Mullen,* 107 N. C., 724, and therefore, unlike the latter case, the statute of limitations is not affected by the amendment. We may also note that when the amendment is merely formal, as here, no necessity arises for the service of the amended summons or complaint. If the amended summons adds a new defendant, it must be served on such defendant (*Plemmons v. Improvement Co.,* 108 N. C., 614), and where the amended complaint touches a matter of substance, the judge may order it to be served on the defendant. Here the motion disclosed the nature and extent of the amendment asked, and when granted, the defendant could derive no benefit from service
(52) anew of the summons and complaint with merely the words "State on relation of" stricken out of them.

Affirmed.

Cited: Proctor v. Ins. Co., 124 N. C., 268; *Templeton v. Baird,* 159 N. C., 66.

MARTHA A. LIVERMAN v. THE ROANOKE AND TAR RIVER RAILROAD COMPANY.

Eminent Domain—Statute of Limitations—Damages—Corporation—Railways—Mortgagor and Mortgagee.

1. Notwithstanding the charter of a railway company, incorporated subsequent to the enactment of the general railroad statute, The Code, Vol. I, ch. 49, conferred upon it "the powers and incidents of the North Carolina Railroad Company," it can only acquire title to right of way by purchase or condemnation, and the owner of land upon which its road was constructed is not barred of right to compensation by any statute of limitations, general or special, unless the defendant's possession has been adverse for such length of time as, in ordinary cases, will mature title.
2. The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent conveyance of the premises; and in those instances where the entry confers a *right* upon the company, leaving the damages to be afterwards assessed, it may be the same rule applies; but under the general statute of this State (The Code, Vol. I, ch. 49) no such right is conferred, and hence, until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages.
3. Where a railway company entered upon land under a conveyance from a mortgagor in possession, but without acquiring the interest of the mortgagee, and afterwards the land was sold under the mortgage: *Held*, that the purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company.

PROCEEDINGS to recover compensation for lands appropriated (53) by a railroad company, tried at Spring Term, 1891, of BERTIE, *Connor, J.*, presiding.

The Roanoke and Tar River Railroad Company was incorporated by chapter 218, Laws 1885.

The petition of the plaintiff alleged that the defendant corporation entered upon the land claimed by her, without her permission, and proceeded to construct its roadbed thereon, whereby she was greatly damaged, etc., and prayed the appointment of commissioners to assess her damages. The defendant, among other things, set up by way of defense a conveyance to it by one Harrell and wife of the right of way, etc., through and over the land; and alleged that at the date of the deed Harrell was in possession, but prior theretofore he conveyed the land in mortgage to one Perry and one Jernigan; that the land was subsequently sold under the mortgage, when Perry purchased, and having received a conveyance, sold and conveyed to the plaintiff.

The defendant also pleaded the statute of limitations contained in the act incorporating the North Carolina Railroad Company, and the statute of limitations of three years prescribed in The Code.

The following facts were admitted:

1. The railroad was completed on the *locus in quo* more than two, but less than three years, before this action was commenced.

2. That at the time said railroad was constructed and completed, the plaintiff was not the owner of the *locus in quo.*

3. That at the time the road was built, Joseph John Harrell and wife were the mortgagors in possession of said land, and J. W. Perry and T. R. Jernigan the mortgagees, and under a foreclosure of said mortgage J. W. Perry became the purchaser, and on 15 May, 1890, conveyed the *locus in quo* to plaintiff.

4. On 19 May, 1887, said J. John Harrell and wife conveyed
(54) to defendant the right of way over said land. The said mortgage was registered prior to the commencement of the construction of said road, and no consent to said right of way was obtained from said mortgagees.

The court being of opinion, upon this state of facts, that the plaintiff could not maintain this proceeding, adjudged that it be dismissed with costs, and the plaintiff appealed.

F. D. Winston (by brief) for plaintiff.
J. B. Martin (by brief) for defendant.

SHEPHERD, J. 1. The plea of the statute of limitations cannot be sustained. It is true that the charter of the defendant provides that it shall have "the powers and incidents of the North Carolina Railroad Company and other corporations of like nature created by the laws of the State," but this language is exceedingly indefinite upon the question under consideration, as the charters of some of these corporations contain provisions barring the owner's claim for damages or compensation after a certain period, while others provide for no such limitation whatever. *Land v. R. R.*, 107 N. C., 72. Even had the charter of the North Carolina Railroad Company been particularly referred to, the two years' bar therein prescribed would not have prevented the application of the general railroad act (chapter 49 of The Code), which was enacted prior to the granting of the defendant's charter. Under the general act, as construed by this Court in *Land v. R. R., supra,* the defendant can only acquire title to the right of way by purchase or by proceedings to condemn, and so long as it occupies the land without title, the owner is not barred unless the defendant's possession has been adverse and for such length of time as to mature title as in ordinary cases. Thus, it

appears that there is a very great difference between the charter of the North Carolina Railroad Company and the general act, and it was clearly the policy of the Legislature that the provisions of the (55) latter should not, in any material particular, be repealed by implication. Hence, it was enacted (The Code, sec. 701) that the general act "should govern and control, anything in the special act of Assembly to the contrary notwithstanding, unless in the act of Assembly creating the corporation the section or sections (of the general act which are intended to be excluded) shall be specially referred to by number, and, as such, specially repealed." See *R. R. v. R. R.*, 106 N. C., 16, which is conclusive upon this point.

2. It is insisted, however, that, as the plaintiff was not the owner of the land at the time of the entry and the completion of the road, she is not entitled to maintain this proceeding. The cases from other States, cited by the defendant's counsel, sustain this view so far as the recovery of mere damages, incident to the unlawful entry, is concerned. They may, also, be applicable where the railroad company acquires a *right* by a simple entry, leaving the damages and compensation to be subsequently assessed. In such cases the claim of the owner is said to be personal, and does not pass to a purchaser by an ordinary conveyance of the land. The principle does not apply where, as in our case (under the general act), the railroad company acquires no right whatever until, either at its instance, or that of the owner proceedings have been instituted to condemn the property. Until this is done, the company occupies the land without title (*Land v. R. R., supra*), and it would seem quite plain that the occupation of a trespasser ought not to take away the owner's power of alienation.

In our case the only authority to enter was given by the mortgagor, and it is admitted that the consent of the mortgagee has never been obtained. It is well settled that "a deed from a mortgagor conveys only his interest, and is subject to the mortgage." Lewis Eminent Domain, sec. 289. To the same effect is Mills on Eminent (56) Domain, sec. 74, from which work we extract the following: "In the case of *Wade v. Hennessy*, 55 Vt., 207, in which the company, instead of condemning the land by due process, took a deed from the mortgagor, a mortgage having been previously given by the grantor and recorded, it was held that the fact that the railroad company, under the exercise of the right of eminent domain, might have taken the mortgagee's interest in the mortgaged premises, and thereby have obtained an unimpeachable title, did not vary the relations of the railroad company to the holder of the mortgage, as it did not exercise that right, but contented itself with the right it acquired by said deed. To the proper exercise of the right of eminent domain, it is indispensable that com-

pensation be made to the owner of the property taken by the payment of an equivalent in money. The railroad company must make all parties claiming the title parties to the proceedings. . . . If this is not done, the railroad must either redeem, or seek protection by the exercise of the right of eminent domain under the statute against the mortgagee." See also, *Wilson v. R. R.*, 67 Me., 358; *Beck v. R. R.*, 65 Miss., 172; 2 Wood Ry. Law, sec. 244. The mortgagee's interest, then, not having been affected by the deed of the mortgagor, and the mortgage having been foreclosed, it would seem very clear that the title passed to the plaintiff, who purchased the entire tract under the foreclosure sale. It seems equally clear that while she cannot recover damages incident to the entry made before she acquired the title, she may recover compensation for the land, the title to which can only vest in the defendant by virtue of this proceeding.

The defendant has been content to occupy the land without title, and it was charged with notice of the mortgage. Mills, Eminent Domain, sec. 103. It did not offer to redeem, as it might have done, but suf-
(57) fered the title to pass to the plaintiff.

We are of the opinion that the plaintiff is entitled to compensation for the land, the title to which is to be vested in the defendant by virtue of this proceeding.

Error.

Cited: S. c., 114 N. C., 695; *Phillips v. Tel. Co.*, 130 N. C., 526; *Beal v. R. R.*, 136 N. C., 299; *Abernathy v. R. R.*, 159 N. C., 344; *R. R. v. Ferguson*, 169 N. C., 71; *Caveness v. R. R.*, 172 N. C., 309.

JAMES A. BRYAN AND MARY S. BRYAN v. WASHINGTON SPIVEY ET AL.

Possession—Color of Title—Evidence.

1. In an action to recover land, a trial by jury having been waived, a witness was permitted to state that certain persons "took possession," "remained in possession," and "had possession" of the disputed premises, without giving the specific acts of the parties in respect to their occupation: *Held*, that although possession is a mixed question of law and fact, the testimony was properly admitted, and, in the absence of conflicting evidence, the court was warranted in accepting the expressions as a statement of the fact of actual occupation.
2. Every possession is taken to be on possessor's own title until the contrary is shown.

3. The burden is upon the defendant to establish the defense of adverse possession under color of title.
4. Where defendants entered originally without color and occupied the lands in severalty, and subsequently a deed was made conveying the lands to trustees for the defendants collectively, but there was evidence that defendants continued to hold in the same manner as before the execution of the deed, it was not error to hold that the defendants had failed to establish title by adverse possession under color.
5. In order to raise the presumption of a grant by thirty years possession, it is not necessary to show privity between the successive tenants of the land.

CLARK, J., did not sit on the hearing of this appeal.

ACTION, tried at February Term, 1891, of CRAVEN, *Connor, J.*, presiding.

The plaintiffs claim title, and seek to recover possession of the land in the county of Craven, known as James City. (58)

The original summons was issued 4 October, 1880. On 21 September, 1881, and on 9 September, 1889, other summons issued, bringing into the court other defendants. The parties waived trial by jury, and submitted the cause to the court to find the facts and declare the law arising thereupon.

The plaintiffs introduced W. H. Marshall, who testified as follows:

"I am acquainted with the land described in the complaint. I have known it since 1829. The description in the complaint includes what is known as James City. This land has been used and occupied by private individuals since 1829. Richard D. Speight, and those claiming under him, had it in possession from 1829 to 1858. Richard Speight left as his only son and heir at law, Richard Dobbs Speight, Sr., Richard Dobbs Speight left as his children and heirs at law, Richard D. Speight, Charles Speight, William Speight, and Margaret, who married Judge Richard Donnell. William Speight died in infancy. Charles Speight died in 1831, unmarried and without issue. Richard D. Speight died unmarried and without issue. Margaret Donnell died, leaving surviving her her husband, Judge Donnell, who died in 1864, and as his children and heirs at law:

"(1). Mary S., who married Charles Sheppard.

"(2). Richard S., who died unmarried and without issue.

"(3). Frances, who married James Sheppard, and died, leaving J. R. D. Sheppard her son and heir at law.

"(4). Ann, who has never married.

"(5). Speight, who married Thos. M. Curl during the year 1856, and was under coverture at the commencement of this action.

"Peter G. Evans took possession of the land in controversy in 1858, and remained in possession until 1862, when the colored (59)

people settled there. They were placed there by the United States Government 14 March, 1862. They were settled as contrabands. The Government had possession.

"From 1858 until 1862, Peter G. Evans and Richard S. Donnell had joint possession. Evans had it when the colored people went there. Donnel had it surveyed in 1858 or 1859."

The plaintiffs then introduced the will of Richard Dobbs Speight, Sr., dated 1 December, 1802.

The testator gave his entire estate to be divided equally between his wife and four children.

Deed from Mary S. Sheppard, Mr. and Mrs. Curl, and Ann Donnell to Mary S. Bryan, dated 1880.

Deed from J. R. D. Sheppard to Mary S. Bryan, 1880.

The description in the deeds covers the *locus in quo.*

Samuel Aydlett, a witness for the plaintiff, testified: "The defendants were living in James City in 1881 and 1887. I live there now, lived there since 1882, a good many of the defendants have lived there since 1862. They have lots inclosed with fence, and have houses in the inclosures which they occupy."

The defendants then introduced deed from Southy B. Hunter, Harmon Parmler, John Latham, and Charles H. Russell, to James Salter, dated 25 September, 1867, and recorded 20 June, 1882. (See exhibit "C.")

Southy B. Hunter, for the defendant, testified: "I live in James City. Have lived there since 1865. The deed from myself and others covers the land known as James City. It was made because Horace James was oppressing the people collecting taxes. He was the agent of the Freedman's Bureau. The government sent out two officers. The people met and appointed a committee. Some of the defendants held possession by virtue of their original possession, and others by purchase from those moving away. After the deed was made the defend-
(60) ants claimed under James Salter. The deed did not interfere with any lots except those that were vacant. Those already having lots remained in possession. Vacant lots were sold by Salter. Those who were there when the deed was made claimed to own these lots separately, and no one else had any interest in them. Those who came in afterwards bought from those who moved away. The people of James City were paying rents to Horace James before the deed was made. They paid no more rents after the deed was made. Had not paid any for a long time. Salter was to sell or give it away, as he pleased. We sold only the vacant lots to Salter."

William Benbury: "I live in James City. I have a lot there. I claim it under the deed to James Salter. Have been living there since

the place was first located. I have a house there. I claim to own it myself. No one else has any interest in it. I claim it in the same way I did when I first went there. We appointed a committee and gave it up to them. The deed was made for the people of James City. The other defendants claim under the Salter deed. I expect that they all claim as I do."

The plaintiffs admitted that all of the defendants have been in adverse possession of the several parts of James City, claimed by them since 1863, having no connection with Peter G. Evans' title. That of the defendants made the same claim as the last witness, William Benbury.

From the foregoing testimony and admissions, the court found the following facts:

Richard Dobbs Speight (the elder) died, leaving a last will and testament devising his entire estate to his wife and four children. His said children were Richard Dobbs (the younger), William, Charles and Mary. The first three died unmarried and without issue. Margaret married Richard Donnell, and died leaving surviving her her said husband, who died during the year 1864, and her children: (61)

(1). Richard S., who died unmarried and without issue (prior to 1 January, 1880).

(2). Mary S., who married Charles Sheppard.

(3). Frances, who married James Sheppard, and died leaving as her heir at law John R. D. Sheppard.

(4). Ann, who has never married.

(5). Speight, who married Thos. M. Curl during the year 1856, and was under coverture at the commencement of this action.

The children and devisees of Richard D. Speight, and those claiming through them, were in the possession of the land in controversy from 1829 to 1858, when one Peter G. Evans went into the possession jointly with Richard S. Donnell, and they remained in such joint possession until 1862.

Mrs. Mary S. Sheppard, Miss Ann Donnell, Mrs. Speight Curl and John R. D. Sheppard conveyed their right, title and interest in said land prior to the commencement of this action to the *feme* plaintiff, Mary S. Bryan.

During the year 1862 the military authorities of the United States, then occupying the city of New Bern, placed the defendants upon the land in controversy. That since 14 March, 1863, the defendants have been in the actual and adverse possession of the several parts of the land in controversy claimed by those in severalty. That when the said defendants were put upon said land they severally inclosed and built upon lots or portions thereof, and used and occupied them as homes.

That they laid out streets between said lots, and used the same adversely to the plaintiffs, and those under whom they claim, for the purpose of passing to and from their said lots.

During the year 1867 one Horace James, an agent of the Freedman's Bureau, demanded taxes or rents from the defendants, whereupon, acting upon the advice of some officers of the United States Government,
(62) the defendants resident upon said land then known as James City, called a public meeting and appointed a committee to act for them in respect to said land on 25 September, 1867. Certain members of said committee, Southy B. Hunter, Harmon Parmler, John Latham and Charles H. Russell, signed the deed to John Salter, hereto attached and marked Exhibit "C." Said deed was admitted to probate and registration on 20 June, 1882. The land known as James City is bounded by Neuse River on the north, Scott's Creek on the east, a line of breastworks on the south, and by Scott's Creek on the west. Southy B. Hunter, one of the makers of said deed, testifies that its purpose was to convey the vacant lots to James Salter. After the signing of the said deed there is no evidence as to its custody prior to the probate. The defendants, after the said deed was signed, continued to occupy the several lots or portions of said land formerly inclosed by them in the same manner as they had before done. That each of the said defendants claimed the lots occupied by them in severalty, claiming no interest in any other lots. The defendants continued to use the same streets in the same manner as they had theretofore done.

From the foregoing facts, the court declared the following conclusions of law:

(1). That from the possession of the said land in controversy from 1829 until the issuing of the summons in this action by private individuals, a presumption arises that the State has parted with its title thereto.

(2). That from the possession of the said land from 1829 until 1858, by the children of Richard D. Speight, and those claiming through them, the law presumes the execution of a deed to them by the true owners.

(3). That by the death of Richard D., William and Charles Speight, unmarried and without issue, their interest in the *locus in quo*
(63) descended to Mrs. Margaret Donnell, and upon her death her title descended to her children, Richard S., Mary S., Ann, Frances and Speight, subject to the life-estate as tenants by courtesy of her husband, Richard Donnell, who died in 1864.

(4). That said Richard Donnell was ousted, and Peter G. Evans and Richard S. Donnell went into possession of said land in 1858.

(5). The said Evans and Richard S. Donnell remained in possession until 1862, when they were ousted by defendants.

(6). That a cause of action accrued to the children of Mrs. Donnell upon the death of their father during the year 1864, but that, by the operation of the several acts of the General Assembly, the time within which they were required to bring their action is to be counted from 1 January, 1870. (Save as to Mrs. Curl, who was under coverture.)

(7). That upon the death of Richard S. Donnell (before the date of the deeds to the *feme* plaintiff) unmarried and without issue, his interest in the said land descended to his sisters, Frances, Ann, Mary S., and Mrs. Curl.

(8). That upon the death of Mrs. Frances Sheppard her interest descended to her son, John R. D. Sheppard.

(9). That by the operations of the several deeds set forth in the testimony, the title of Mrs. Curl, Miss Mary S. Sheppard, Miss Ann Donnell and John R. D. Sheppard, passed to the *feme* plaintiff, Mrs. Mary S. Bryan.

(10). That the entry by the defendants upon the land, and the occupation of the several lots or parcels thereof by them, on 14 March, 1862, was without color of title, and that such entry constituted an ouster of the true owners.

(11). That after the signing of the deed of 25 September, 1867, by Southy B. Hunter and others to James Salter, the defendants continued to occupy their several lots inclosed by them in the same manner as before, and the character of their possession was not thereby changed. This finding is based upon the fact that the testimony in respect thereto is conflicting, and, taken in connection with the answer of 11 November, 1890, the court is unable to find that they were holding (64) under the provisions of said deed for seven years prior to the commencement of this action.

(12). That in respect to the interest of Mrs. Curl, she being since 1856, under coverture, it is not affected by the statute in any aspect of the case.

When the plaintiffs then rested their case, the defendants moved for judgment for that the testimony of W. H. Marshall in regard to possession was insufficient, too uncertain, and indefinite; that possession was a question of fact and law; that plaintiffs must show that the land was used and occupied by showing what was done on it and by whom; that the testimony of said Marshall, "those claiming under him," was insufficient, uncertain and improper, unless the names of the persons referred to were given, and evidence of the manner of their claims under him was shown; and also because the testimony of said Marshall that "from 1858 to 1862, Peter G. Evans and Richard S. Donnell had joint possession," was insufficient, too indefinite and uncertain; and because no act of possession was shown, the evidence in regard to pos-

session of the land on the part of the plaintiffs being conclusions of law only; and because, upon the whole of the testimony of the plaintiff, they were not entitled to recover. Motion overruled; defendants excepted.

The defendants then moved for judgment on the whole of the evidence:

1. Because the plaintiffs had failed to show that they were entitled to the land.

2. Because the defendants had proved, and it was admitted, that they had been in the adverse possession of the land claimed by them since 1863.

3. Because the defendants had proved, and it was admitted, they had been in possession of the land claimed by them since 25 Sep-
(65) tember, 1867, under the deed from Southy B. Hunter and others.

The motion was refused, and the defendants excepted. Defendants moved for judgment on the facts found by the court. Motion denied, and defendants excepted.

The defendants moved for a new trial on the ground that the evidence of W. H. Marshall that "the land described in the complaint has been used and occupied by private individuals since 1829," and that Richard D. Speight, and those claiming under him, had it in possession from 1829 to 1858, should not have been admitted, and also on the grounds that the evidence of said Marshall, that from 1858 until 1862 Peter G. Evans and Richard S. Donnell had joint possession, and because said will and deeds were improperly admitted in evidence.

The motion was denied, and defendants excepted.

There was judgment for the plaintiffs from which the defendants appealed.

EXHIBIT C.

STATE OF NORTH CAROLINA—*Craven County.*

This do certify that we, the undersigned, do agree to bargain and sell to James Salter and his heirs for the people of the below named place to pay the expenses of the said lands, a certain piece of land known as the Kimball Hill and the James City settlement, situated in the said county, opposite the city of New Bern, that the United States give us, who told us not to pay rent to anyone, and whereas the said tract of land was given to twelve of us as a committee by the authority of the others, we do bargain and sell all the said land, except lots have been bought by same from parties that have moved and sold their lots and given deed for the same, all of which we submit,
(66) and do sell for the sum of $150—one hundred and fifty dollars.

Given under hands and caused our seals to be affixed, this 25 September, 1867.

SOUTHY B. HUNTER. (Seal)
HARMON PARMLER. (Seal)
JOHN LATHAM. (Seal)
C. H. RUSSELL. (Seal)

W. W. Clark for plaintiffs.
M. DeW. Stevenson, O. H. Guion and J. W. Hinsdale for defendants.

SHEPHERD, J. The exceptions addressed to the admission of the documentary evidence of the plaintiff having been abandoned, the only questions which remain for our consideration are whether the testimony adduced upon the trial was legally sufficient to sustain the findings of fact, and whether these findings warrant the conclusions of law as declared by the court below.

(1). It is first insisted by the defendants that upon the whole testimony the plaintiff has failed to show that the title has passed out of the State, and that, granting that the title is out of the State, there is nothing to support the presumption of a conveyance to the plaintiff or those under whom she claims.

It is well settled that an adverse possession of land for thirty years raises the presumption of a grant from the State, "and that it is not necessary even that there should be a privity or connection among the successive tenants." *Davis v. McArthur,* 78 N. C., 357; *Reed v. Earnhart,* 32 N. C., 516; *Wallace v. Maxwell, ib.,* 110; *Fitzrandolph v. Norman,* 4 N. C., 564. "This presumption," says *Smith, C. J.,* (in the case first cited), "arises at common law and without the aid of the act of 1791, and it is the duty of the court to instruct the jury to act upon it as a rule of the law of evidence. *Simpson v. Hyatt,* 46 N. C., 517." Now, if, as found by his Honor, the land in controversy (67) was "in the possession of the children and devisees of Richard D. Speight, and those claiming through them," from 1829 to 1858 (a period of twenty-nine years), and that from that date until 1862 it was occupied by Peter G. Evans, the law would raise a presumption that the title had passed out of the State, and this without reference to whether the said Evans was claiming jointly with Richard S. Donnell, and regardless of any privity between him and the preceding occupants.

If the title was out of the State, the law would also presume that a deed had been executed by the true owner to the parties under whom the plaintiff claims, they having had continuous adverse possession of the same, succeeding each other as privies, for twenty years. *Hill v. Overton,* 81 N. C., 395; *Seawell v. Bunch,* 51 N. C., 195; *Taylor v.*

Gooch, 48 N. C., 467; *Davis v. McArthur, supra; Melvin v. Waddell,* 75 N. C., 361. These propositions do not seem to be seriously controverted by the counsel for the defendants, but they insist that the testimony is not sufficient to show any possession whatever from which his Honor could find, as a legal inference, or otherwise, that there was an adverse occupation as claimed by the plaintiff. In support of this position they say "that the testimony of W. H. Marshall (the only witness introduced by the plaintiff) in regard to possession, was insufficient, too uncertain and indefinite; that possession is a question of fact and law, and that plaintiff must show that the land was used and occupied by showing what was done on it and by whom."

It cannot be doubted that what constitutes adverse possession is a mixed question of law and fact, and the same may be said of a possession that is not adverse where the evidence shows that the possession claimed is constructive only, or in other instances where it depends upon the application of legal principles.

(68) Where, however, a witness testifies that a certain person is in possession of land, and where, as in the present case, there is nothing in his or any other testimony to indicate that the possession was a conflicting one, or that the witness intended that his language should be understood in any other than its ordinary sense among laymen, to wit, actual possession or occupation, we cannot but treat it as the statement of a simple fact, and as such a proper subject for the consideration of a jury, or the court when a jury trial has been waived. That such is the ordinary meaning of the language is manifest from the following authorities:

"Possession expresses the closest relation of fact that can exist between a corporal thing and the person who possesses it, implying either (according to its strictest etymology) an actual physical contact as by *sitting,* or (as some would have it) *standing* upon a thing." Burrill Law Dict., 313.

"A witness may testify directly in the first instance to the fact of possession if he can do so positively, subject, of course, to cross-examination." Abbott Trial Ev., 622, 590.

In *Rand v. Freeman* (1 Allen, 517), a witness was asked "Did you take possession of the property?" The question was objected to as incompetent to prove possession. The Court said, "It is objected, that the question was illegal because possession consists partly of law and partly of fact. But it is a sufficient answer to this to say that the word is often used merely in reference to the fact, and the defendant could have protected himself from all prejudice by cross-examination." In *Hardenburgh v. Crary,* 1 Barb., 32, the Court, in reference to a similar question, said, "It might involve the necessity of further questions, and

perhaps of a rigid cross-examination, but this last, we think, was the true remedy and not an objection to the question itself. It belongs to that class of facts, of which there are many in the law, seemingly involving, to some extent, the expression of an opinion, or a conclusion from other particular facts as to which, from the necessity of the case, the law tolerates a direct comprehensive question." (69)

Our conclusion, therefore, is that the testimony of the witness Marshall was evidence of actual possession and occupation, and, as such, was proper to be considered by the court.

It is further objected that the testimony of the said witness—that "Richard D. Speight and those claiming under him, had it (the land) in possession from 1829 to 1858"—was "insufficient, uncertain and improper, unless the names of the persons referred to were given, and evidence of the manner of their claims under him was shown." The witness, after testifying as above, immediately proceeded to state, with much particularity, the names of the heirs and devisees of the said Speight, and the successive descents and devises, down to the date of the conveyance of the property in question to the plaintiff. His Honor finds, in substance, that these were the persons who were claiming under the said Speight, and were in possession, as stated by the said witness. We think that a fair construction of the testimony warranted the finding. This being so, we have but to apply the presumption of the adverse character of the holding arising from the unexplained fact of actual occupation, and the conclusion of the court, that those under whom the plaintiff claims were the owners of the property, is fully vindicated. *Ruffin v. Overby,* 88 N. C., 369. The case just cited is fully sustained by *Jackson v. Commissioners,* 18 N. C., 177, in which it is said (*Ruffin, C. J.,* delivering the opinion), that "every possession is taken to be on the possessor's own title until the contrary appears, as the possession is in itself the strongest evidence of the claim of title, and when long continued, of the title also. . . . Leaving the possession to the jury as a ground of presumption, left it as evidence both of the right and the claim of right; and it cannot be doubted that the jury must have understood that to authorize the presumption they must believe that Brooks occupied and used the ground *as his own.* To establish (70) such claim did not require express evidence of it independent of the possession itself."

(2). It is further contended that admitting that the title was in the persons above named, the defendants are protected by their adverse possession under color of title for seven years. This defense is an affirmative one, and the *onus probandi* is, of course, upon the defendants to establish it. *Ruffin v. Overby,* 105 N. C., 78. It is admitted by the plaintiff that the defendants have been in the adverse possession of the

several parts of the property (James City) since 1863, "claiming the same, as the . . . witness Wm. Benbury." It is denied, however, that they claim under color of title, and his Honor finds that they entered, without such color, in 1863, and that after the execution of the deed by Hunter and others to James Salter in 1867, the defendants "continued to occupy their several lots inclosed by them in the same manner as before, and that the character of their possession was not thereby changed." "This finding," says his Honor, "is based upon the fact that the testimony in respect thereto is conflicting, and taken in connection with the answer of 11 November, 1890, the court is unable to find that they were holding under the provisions of said deed for seven years prior to the commencement of this action." It is insisted that this finding was unauthorized by the testimony, and especially by reason of the admission of plaintiff. It will be observed that the admission was not that the defendants were holding under color of title, but that they were claiming in the same manner as the witness Benbury. The testimony of this witness, as his Honor says, is conflicting. The witness says, first, that he claims under the deed to Salter. This deed, it will be noticed, is in trust for "the people of James City"; by which we must understand (nothing further appearing), they are to take as tenants in common. He then states, in effect, that he claims his lot in severalty, and further remarks, "I claim it in the same way I did when I first went there." Eliminating, even, the answer above mentioned,
(71) which claims in severalty and makes no mention of the deed, we are not surprised at the inability of his Honor to find that Benbury was claiming under color of the deed to Salter; and surely his statement referred to in the admission of plaintiff cannot, even in the absence of the finding, be construed into the concession insisted upon. Appreciating the force of this reasoning, the counsel for defendants very earnestly contend that the possession, being admittedly adverse, and the deed to Salter having been proven and introduced in evidence, the law raises a presumption that the defendants claim under it, and that therefore the burden of proof is shifted, and it is incumbent on the plaintiff to rebut such presumption. *Register v. Rowell*, 3 Jones, 312. To this it may be answered that the supposed presumption is already rebutted by the finding of the court, and that we cannot review its conclusion of fact when there is any evidence tending to sustain it. Treating the finding, however, as negative in its character (which is not the case), and conceding, that in order to raise the presumption it is unnecessary that the color of title should have been executed contemporaneously with the entry, an insuperable objection to the defendant's contention is encountered in the fact *that none of these defendants are grantees in the deed; nor are*

they named therein as cestuis que trustent. Graybeal v. Davis, 95 N. C., 508, and the cases cited. This is an indispensable requisite to the presumption insisted upon. Such being the case the burden continued upon the defendants to connect themselves with the said deed and to show that they claimed under the same. Having failed to show this to the satisfaction of the Court, and, indeed, it having been affirmatively found to the contrary, we are unable to see any ground for reversing the judgment, and it must therefore be

Affirmed.

Cited: Bryan v. Alexander, 111 N. C., 142, 145; *Hamilton v. Icard,* 114 N. C., 536; *Alexander v. Gibbons,* 118 N. C., 802; *Walden v. Ray,* 121 N. C., 238; *Hawkins v. Cedar Works,* 122 N. C., 89; *Wilson v. Wilson,* 125 N. C., 528; *Bullock v. Canal Co.,* 132 N. C., 180; *Wilson v. Brown,* 134 N. C., 404; *Monk v. Wilmington,* 137 N. C., 327; *Jennings v. White,* 139 N. C., 27; *Campbell v. Everhart, ib.,* 513; *Dobbins v. Dobbins,* 141 N. C., 220; *Vanderbilt v. Johnson, ib.,* 373; *Chatham v. Lansford,* 149 N. C., 365; *Thornton v. R. R.,* 150 N. C., 692; *Berry v. McPherson,* 153 N. C., 5; *Christman v. Hilliard,* 167 N. C., 7; *Land Co. v. Floyd, ib.,* 687; *S. c.,* 171 N. C., 545; *Cross v. R. R.,* 172 N. C., 124; *Waldo v. Wilson,* 174 N. C., 628; *Patrick v. Ins. Co.,* 176 N. C., 665; *S. v. Johnson, ib.,* 724; *Alexander v. Cedar Works,* 177 N. C., 147.

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(72)

T. B. BOTTOMS v. SEABOARD AND ROANOKE RAILROAD COMPANY.

Issues—Jury—Judge's Charge—Trial.

1. Under the practice now prevailing, the jury, in civil actions, does not find a general verdict, but responds to specific issues eliminated from the pleadings, and hence it is not erroneous to deny a prayer for an instruction that, upon the evidence, a party is not entitled to recover.
2. Where the issues submitted to the jury are confused and calculated to mislead the jury, a new trial will be directed.

ACTION tried at Spring Term, 1891, of NORTHAMPTON, *Connor, J.,* presiding.

The defendant appealed.

W. W. Pebbles & Son (by brief) for plaintiff.
W. H. Day and J. W. Hinsdale for defendant.

CLARK, J. The defendant's counsel requested the court to charge:

1. That, upon the evidence offered by the plaintiff, he could not recover.

2. That, upon the whole evidence, the plaintiff could not recover, and excepted to the refusal of the same.

As the verdict under the present procedure is never that the plaintiffs do or do not recover, but the jury respond to issues submitted to them, and on their findings the court adjudges the recovery, such prayers are not proper, and it is not error to refuse them. *McDonald v. Carson,* 94 N. C., 497; *Farrell v. R. R.,* 102 N. C., 390.

The exception "to the charge as given" furnishes no information to the appellee or to the court, and has been repeatedly held too vague to be considered. *McKinnon v. Morrison,* 104 N. C., 354.

The following issues were submitted to the jury, to which they (73) responded, as appears by the record:

1. Was the plaintiff's child injured by the defendant? Answer: Yes.

2. Was the defendant guilty of negligence in respect to the injury of plaintiff's child? A. Yes.

3. Was the plaintiff guilty of contributory negligence in respect to the injury of his child? A. Yes.

4. Was the plaintiff's child injured by defendant's negligence? A. Yes.

5. What damage has plaintiff sustained? A. $750.

The defendant moves here for judgment upon these findings, on the ground that the fourth issue is the same as the second, and that the substance of all the findings is that the defendant was guilty of negligence, and the plaintiff was guilty of contributory negligence. But the form of the fourth issue differs somewhat from the second, and, taken in connection with the charge, it is extremely probable that the court meant by the fourth issue to submit to the jury an issue as suggested by the court in *Denmark v. R. R.,* 107 N. C., 185, whether, notwithstanding the contributory negligence of the plaintiff, the defendant could have avoided the accident by proper care on his part. But it is not clear that the jury so understood it, and on their face the second and fourth issues are so nearly alike that the jury may well have been misled; indeed, the issues are framed in such a manner that the material facts, as found by the jury, are confused and unsatisfactory. Under such circumstances, the settled practice is to order a new trial. *Allen v. Sallinger,* 105 N. C., 333. A case almost exactly "on all fours" with that before us is *Turrentine v. R. R.,* 92 N. C., 638.

Error.

Cited: Blackwell v. R. R., 111 N. C., 153; *Whitford v. New Bern, ib.,* 276; *Smith v. R. R.,* 114 N. C., 766; *Tucker v. Satterthwaite,* 120 N. C., 122; *Witsell v. R. R., ib.,* 558; *Willis v. R. R.,* 122 N. C., 909; *Vanderbilt v. Brown,* 128 N. C., 501; *Lea v. R. R.,* 129 N. C., 463; *Earnhardt v. Clement,* 137 N. C., 93; *Kearney v. R. R.,* 158 N. C., 543.

(74)

WALTER BOONE v. JAMES P. DARDEN.

Crops—Claim and Delivery—Description of Property—Landlord and Tenant.

Crop produced by a tenant being vested in the lessor until rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part.

ACTION, tried before *Connor, J.,* at Spring Term, 1891, of NORTHAMPTON.

The plaintiff alleged, in substance, that he rented a plantation, described in the complaint, to John Drake for the year 1889, for which Drake was to pay $600 rent; that said Drake raised upon the said plantation peanuts and other crops; that the rent was due and unpaid, and that the defendant Drake had removed the peanuts produced on the said plantation and placed them in the hands of the defendant Darden for shipment, and he demands possession of said peanuts, or their value, if possession cannot be recovered.

At the time of the issuing the summons the plaintiff, as provided by chapter 2, section 321, *et seq.,* of The Code, made claim to the immediate possession of one hundred and fifty bags of peanuts, alleging that he was the owner and entitled to the immediate possession of the same, and that they were wrongfully detained by the defendant Darden.

In obedience to the clerk's fiat the sheriff seized one hundred and fifty bags of peanuts, being a portion of the peanuts in the hands of the defendant Darden.

The defendant Darden denied the plaintiff's claim, alleged that he was the owner of the peanuts, gave the undertaking requisite to retain the possession of the property thus seized, and retained the possession of the peanuts.

By consent, the case was tried by his Honor (a jury trial being waived) on the following admitted facts: The defendant Darden (75)

was agent for the R. & T. Railroad at Severn; that the peanuts in controversy were raised by the defendant Drake on the plaintiff's farm in Northampton County in 1889; that Drake was a tenant of plaintiff at the annual rental of $600, no part of which has been paid; that Drake had carried the peanuts to Severn for shipment, and plaintiff had enough thereof seized to pay his rent; that the sheriff took one hundred and fifty bags of peanuts from the pile and seized them under the order of court.

The defendant relied on the point of law that there was no lien on any specific number of bags, and the action could not be maintained. His Honor ruled otherwise, and refused to dismiss the action, and defendant excepted.

Upon the admitted facts his Honor gave judgment for the plaintiff. Defendant appealed.

R. O. Burton, Jr., for plaintiff.
B. B. Winborne (by brief) for defendant.

DAVIS, J. It is insisted for the defendant that there were more than one hundred and fifty bags of peanuts in the possession of the defendant, and "the interest of the plaintiff is not properly described so that the officer can measure it out to him."

By the provisions of The Code, sec. 1754, the entire crop of peanuts raised on the land of the plaintiff (landlord) was vested in possession of the lessor until the rent for the land was paid. This is conceded, but the defendant insists that the plaintiff has no lien on any specific number of bags.

We are unable to see how, if the plaintiff had a lien upon, and was entitled to the possession of the whole number of bags, he was not entitled to the possession of a portion of them; nor can we see that any division was to be made by the officer.

(76) The Code, sec. 1754, gives the landlord a lien upon the whole of the tenant's crop to secure the payment of the rent, and, to make the lien more effectual, the crop is "held to be vested in possession of the lessor" until the rents are paid, and if the crop or any *part* thereof shall be removed from the land without the consent of the lessor, the statute gives him the remedies provided in an action upon claim for the delivery of personal property. The lessor's vested right to the possession of the crop is coupled with a *lien* upon the crop to secure the payment of rent or the compliance with stipulations contained in the lease. It is not an unqualified right to dispose of the crop as he pleases, but when the rents are paid and the stipulations of the lease complied with, the right to the surplus passes to the lessee or his

assigns, and the lessor has no further right to it. The law is founded upon *reason,* and to say that because the plaintiff is entitled to the possession of the entire bulk of four hundred bags to secure his rent, therefore he is not entitled to the possession of one hundred and fifty bags, a part of the four hundred sufficient to secure his rent, is as shocking to *reason* as it would be to say that the whole of a thing does not include all its parts, or that a part is greater than the whole. The plaintiff is entitled to the possession of the whole four hundred bags of peanuts to secure the payment of his rent, and the defendant's mistake is in confounding his right to have one hundred and fifty bags of it seized in an action for the claim and delivery, with his right to seize one hundred and fifty bags to which he might be entitled, out of a mass of four hundred bags, two hundred and fifty of which belonged to some one else, to which he had no right or claim. Counsel for the defendants admit that an action of replevin (in the case before us, claim and delivery) "can be maintained for a part of property in mass, such as oats, corn, etc., but the interest sued for should be described as so many pounds or bushels, so as to enable the officer to make proper division," and (77) he cites *Blakely v. Patrick,* 67 N. C., 40; *McDaniel v. Allen,* 99 N. C., 135; Cobby Replevin, secs. 78, 400, 401, 402; *Law v. Martin,* 18 Ill., 286; *Pinall v. White,* 23 Ks., 621. Upon an examination of these authorities, it will be seen that they bear no analogy to the case before us. In the case of *Blakely v. Patrick,* known as the "Buggy case," the action was "for damages for the conversion of ten new buggies by the defendant." The Court said that the mortgage under which the plaintiff claimed did not pass the title to ten new buggies as an executed contract, but only had the effect of an agreement to sell ten new buggies, for a breach of which damages may be recovered. In the case before us, both the legal title and the right of possession to all the peanuts were, by statute, *vested* in the plaintiff; so, in the case of *McDaniel v. Allen,* the plaintiff was not the owner, entitled to the possession of the three bags of cotton sued for, but his remedy was for a breach of contract for refusal to comply. The other cases cited relate to property in mass belonging to different parties, and in which the property is so commingled that each owner cannot identify and show what part of the property so mixed belongs to him, but even then "if a division can be made of equal value," says Cobby, "as in the case of corn, oats, and wheat, the law will give to each owner his just proportion, and each owner may recover his share by replevin." If the plaintiff had been the owner and entitled to the possession of only one hundred and fifty bags of the peanuts, and they had, without any fault of his, been mixed with two hundred and fifty bags belonging to the defendant, we are unable to see why, upon the authority cited by the defendant, this action could not

be maintained. The plaintiff was entitled to enough of the crop to pay the rent due, and after his claim was satisfied, the defendant was entitled to the balance, discharged of the lien. If the plaintiff had seized
(78) more than enough to satisfy his lien, and refused "to make a fair division of the crop," the defendant could have compelled him to do so in the manner prescribed in section 1755 of The Code, and we are unable to see upon what ground he can complain that the plaintiff, who was entitled to the possession of the *whole* crop to secure his rent, took only enough for that purpose and left him in possession of the balance, to which he was entitled *after*, and not until *after*, the rent was paid.

Affirmed.

Cited: Kiser v. Blanton, 123 N. C., 405.

J. W. GRANT, ADMR. D. B. N., ETC., OF MATTHEW BRYANT, v. PAUL HARRELL, ADMR. OF A. J. HARRELL.

Motion in the Cause—Final Judgment—Failure to Serve Process.

Motion in the cause, and not a new action, is the remedy for relief against a final judgment in a special proceeding for an alleged failure to serve summons.

ACTION, tried before *Connor, J.*, at Spring Term, 1891, of NORTHAMPTON.

In a special proceeding, specified in the complaint in this action, it appears, by the return of the summons in that proceeding, that the same was duly served upon the defendants therein named; whereas, in fact, as the plaintiffs allege, that summons never was served. In that special proceeding a final judgment was entered, of which the plaintiffs complain, and the purpose of this action is to have the same set aside and declared void, upon the ground that the summons mentioned was never served, and hence the court had no jurisdiction of the parties named therein as defendants. The court below, "being of opinion that a motion in the cause is the proper remedy for the plaintiffs' alleged
(79) grievance," gave judgment dismissing the action, and the plaintiffs, having excepted, appealed to this Court.

T. W. Mason and R. B. Peebles (by brief) for plaintiffs.

R. O. Burton, Jr., for defendant.

MERRIMON, C. J. In view of a multitude of decisions of this Court, it is too clear to admit of serious question that the court properly dismissed the action upon the ground that the plaintiffs' remedy is by motion in the cause. *Carter v. Rountree, ante,* 29.

DEFENDANT'S APPEAL.

The defendant's appeal is disposed of by what we have said in plaintiffs' appeal.

Affirmed.

Cited: Rackley v. Roberts, 147 N. C., 204; *Harris v. Bennett,* 160 N. C., 345; *Massie v. Hainey,* 165 N. C., 179; *Starnes v. Thompson,* 173 N. C., 468.

WALTER BOONE v. JOHN C. DRAKE.

Vendor and Vendee—Abandonment of Equity—Summary Ejectment—Justice's Jurisdiction—Landlord and Tenant.

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutilated under the directions of the vendor, is not sufficient evidence of an abandonment of his rights under the contract, nor is it sufficient evidence of a change of the relations from vendor and vendee to landlord and tenant to give a justice of the peace jurisdiction of an action to summarily eject the defendant vendee.

SUMMARY PROCEEDING to eject defendant, brought before a justice of the peace, and tried on appeal at the Spring Term, 1891, of NORTHAMPTON, before *Connor, J.*

The defendant failed to appear before the justice of the peace, (80) but appealed and filed, by leave of the court, his answer in the Superior Court.

There was evidence on the part of the plaintiff tending to show that in January, 1889, there was an oral agreement between the plaintiff and defendant for the sale of the land in controversy to the defendant for $4,500, cash; that defendant moved some of his goods on the place; that early in February, 1889, he came to plaintiff and told him he was unable to raise the money, and the contract was rescinded, and defendant agreed to rent for 1889, and that one Everett should fix the amount of rent, which he afterwards did at $600; that defendant then moved his family upon the land and raised a crop on it in 1889. That in October, 1889,

a written contract was entered into between the plaintiff and one Jenkins, under the firm name of Boone & Jenkins, and defendant, as follows:

"We have sold to Mr. J. C. Drake the J. W. Hill farm for five thousand dollars, with interest at the rate of eight per cent, from 1 January, 1889. He is to pay us fourteen hundred dollars, if possible, by January, 1890, and if he fails to raise this amount by the shipment of three hundred bags of peanuts, then he is to pay us twelve hundred dollars and execute a note for two hundred dollars. After making this payment of twelve or fourteen hundred dollars, then Mr. J. C. Drake is to execute his four notes at one, two, three and four years for one thousand dollars each, with interest at the rate of eight (8) per cent.

"17 October, 1889.

"BOONE & JENKINS.

"Witness: J. E. EVERETT."

Nothing was ever paid under said contract, nor any condition thereof performed by Drake. About 1 December, 1889, Drake expressed his inability to carry out said written contract and his dissatisfaction
(81) therewith, and the same was canceled and a new parol contract was then entered into by which Drake agreed to pay $5,000 for the land, of which he should pay $1,400 cash by 20 December, 1889, and to execute his notes at one and two years for the residue, with interest from date; that in case he failed to make the cash payment by said 20 December, 1889, then the contract should be at an end; that 20 December was fixed upon in order to enable the plaintiff to get a tenant if Drake failed to comply; that nothing was ever paid by Drake, nor notes executed.

The defendant Drake, on the other hand, denied that the written contract was canceled, but admitted that its terms were changed as above set out. It appeared to the court by the record that at the time of the trial there was pending in this Court an action brought by the said Drake against the said Boone and Jenkins to compel specific performance of the said contract of 17 October, 1889, the summons in which was issued on 16 January, 1890, and served on 18 January, 1890.

Plaintiff testified to the mutilation of the original contract which had been deposited with Everett for safe keeping, and the paper was produced with the names torn or cut through, Everett stating that Boone so directed him and Drake saying nothing.

There was evidence tending to show that Drake, about 30 December, 1889, offered to comply with the said written contract.

At the close of the evidence the defendant's counsel moved to dismiss for want of jurisdiction.

His Honor, being of opinion that the justice was not competent to try the question of surrender and cancellation of the contract, allowed the motion and dismissed the action.

Appeal by plaintiff.

R. O. Burton, Jr., for plaintiff.
B. B. Winborne (by brief) for defendant.

AVERY, J., after stating the facts: The testimony was conflict- (82) ing upon the question whether the defendant agreed to abandon his rights acquired under the contract of 17 October, 1889. The witness, who seems to have had the custody of the writing, testifies that he mutilated it by direction of Boone, the defendant saying nothing—neither objecting nor consenting. That paper constituted Drake a vendee, and if, according to his contention, he did not surrender it and all rights secured to him under it, so as to constitute an abandonment, there is no admitted phase of the facts in which the relation of vendor and vendee can be held to have ceased, and that of landlord and tenant have begun. Acts relied upon as constituting an abandonment must be "positive, unequivocal, and inconsistent with the contract." *Faw v. Whittington,* 72 N. C., 324; *Miller v. Pierce,* 104 N. C., 389. The fact, if established, that the defendant remained silent when the witness Everett, under the direction of the plaintiff, mutiliated the contract, is not necessarily inconsistent with the claim of an equity under it, much less a positive and affirmative surrender of his interest acquired under it. *White v. Butcher,* 59 N. C., 231. It is familiar learning that, in equity, time is not of the essence of the contract, and notwithstanding the default in paying the purchase money, the vendee, if he had not formally or unequivocally abandoned his rights, was the owner in equity, the vendor holding the legal title merely as security for the purchase money. *Scarlett v. Hunter,* 56 N. C., 84; *Faw v. Whittington, supra; Falls v. Carpenter,* 21 N. C., 237.

The defendant Drake denies the allegation that he expressed dissatisfaction with the contract or asked that it be amended, but insists that the parties entered into a parol agreement merely for the modification of its terms. To maintain his claim he had brought his suit for specific performance, and it was then pending in the Superior (83) Court.

If, in any view of the testimony, the relation subsisting between the plaintiff and defendant was, when the action began, that of vendor and vendee, and not that of lessor and lessee, there was such a controversy as to the title as would oust the jurisdiction of the justice of the peace. The Superior Court, in the exercise of its powers as a court of Equity, has the exclusive right to adjust the equities growing out of a contract

of purchase if it is still subsisting. *Parker v. Allen,* 84 N. C., 466; *Hughes v. Mason,* 84 N. C., 472. The issue raised by the evidence is, whether the defendant abandoned the contract of purchase. Of that question a court of Equity formerly had exclusive jurisdiction, and now, the material facts being in dispute, must be passed upon by a jury in the Superior Court. There is a controversy about the title, bringing the case clearly within the provisions of sub-section (2), section 834 of The Code. The action was properly dismissed.

Affirmed.

Cited: Smith v. Lane, 127 N. C., 578; *McLaurin v. McIntyre,* 167 N. C., 353; *R. R. v. McGuire,* 171 N. C., 281.

L. L. EDWARDS v. THE TOWN OF HENDERSON.

Appeal—Printing Record—Negligence—Attorney and Client.

1. It is not the professional duty of an attorney at law to have the record printed on appeal to the Supreme Court, and when he assumes to do so, he acts simply as the agent of the appellant, who is bound by his negligence in that respect.
2. The fact that an attorney, who had been intrusted by his client with the duty of having a record on appeal printed, forgot, in the press of other business, to have the transcript printed within the time prescribed by the rules of this Court, is not sufficient cause to strike out an order dismissing the appeal.

(84) MOTION to reinstate an appeal from VANCE, which had been dismissed for failure to print the record as required by Rules 28-30.

J. B. Batchelor and John Devereux, Jr., for plaintiff.
A. C. Zollicoffer and T. T. Hicks (by brief) for defendant.

CLARK, J. The appellant says that he intrusted the duty of causing the record to be printed to his counsel. Counsel offer no excuse except that they were busy and forgot to have it done. The duty of having the record printed is not a professional one, since the client can attend to it himself, and might easily have it printed below and sent up with the transcript. Hence, if counsel assume to discharge such duty, they are *pro hac vice* agents, not counsel, and their neglect is the neglect of

the party himself, as was held in *Griffin v. Nelson,* 106 N. C., 235, which has been cited with approval, *Finlayson v. Am. Accident Co., post,* 196.

The duty of printing the record is not a mere formality. It is a necessity, that the increasing volume of business in the Court of last resort may be more easily understood on the argument, and that each of the judges may not only then, but afterwards, have each case before him. When there is but one record, and that is manuscript, the disadvantage is seriously felt. The Court, like the Supreme Courts (it is believed) of every other State, several years since adopted this rule. This was not lightly done, but after full consideration. This Court has, ever since, felt the necessity for a strict adherence to the rule. *Rencher v. Anderson,* 93 N. C., 105; *Witt v. Long,* 93 N. C., 388; *Horton v. Green,* 104 N. C., 400; *Whitehurst v. Pettipher,* 105 N. C., 39; *Griffin v. Nelson,* 106 N. C., 235; *Stephens v. Koonce,* 106 N. C., 255; *Hunt v. R. R.,* 107 N. C., 447; *Roberts v. Lewald,* 108 N. C., 405.

To permit an appellant to obtain a delay of six months by his negligence in not complying with this requirement would con- (85) vert a rule which was adopted as a means for the speedier and better consideration of causes into a fruitful source of delay. Rather than that, appellees would prefer to argue their causes without the printed record, which the Court, in justice to itself and to litigants, cannot permit. Appellants might as well fail to send up the transcript, as not to have it in a condition to be heard by failing to have the "case and exceptions" printed.

No sufficient cause has been shown, and the motion to reinstate must be denied.

Motion denied.

Cited: Turner v. Tate, 112 N. C., 458; *Neal v. Land Co., ib.,* 841; *Carter v. Long,* 116 N. C., 47; *Dunn v. Underwood, ib.,* 525; *Wiley v. Mining Co.,* 117 N. C., 491; *Calvert v. Carstarphen,* 133 N. C., 26; *Vivian v. Mitchell,* 144 N. C., 477; *Lee v. Baird,* 146 N. C., 363; *Truelove v. Norris,* 152 N. C., 757; *S. v. Goodlake,* 166 N. C., 436; *Seawell v. Lumber Co.,* 172 N. C., 325; *Phillips v. Junior Order,* 175 N. C., 134.

F. M. MOORE v. MARY E. QUINCE ET AL.

Marriage Settlement—Trust and Trustee—Evidence—Deed, Construction and Reformation of.

1. Equity will not permit a trust to fail for the want of a trustee; and where it can be seen from the face of the instrument creating the trust, either by its express terms or from the nature of the transaction or the context, that it was the purpose of the grantor to convey an estate in fee, a court of Equity will correct and reform the deed by supplying the technical words necessary to carry out the intention of the grantor.
2. A woman, in contemplation of marriage, conveyed property to a trustee, "his executors and administrators," in trust for her sole and separate use for her life, and then in trust for such child or children as she might leave surviving; but if she should "die without making any last will and testament, then, and in that case, the said property shall become the property of J. M. (the husband), and the said trustee shall reconvey to the grantor or to the said J. M., or the survivor of them." The wife died intestate and without issue, but leaving the husband surviving: *Held*, that the instrument upon its face contained sufficient evidence of a manifest purpose of the grantor to convey an estate in fee to the trustee in trust for the grantor for her life, and in the event of her death intestate and without issue, that he should reconvey the property to the husband in fee, and that a decree directing the reformation of the deed in those respects should be made.

(86) ACTION, tried at April Term, 1891, of NEW HANOVER, before *McIver, J.*

The plaintiff introduced evidence tending to show the execution and loss of the deed of marriage settlement set up in the pleadings.

It was admitted that the contemplated marriage took place between the said Sally J. Freeman and James Moore; that she thereafter died intestate and without issue, leaving her said husband, James Moore, surviving; that after the death of his said wife the said James Moore died intestate, and that the plaintiff is his only heir at law.

Plaintiff then contended that, upon an inspection of the deed of marriage settlement, it sufficiently appeared upon the face thereof that it was manifestly the intention of all parties thereto to give an estate in fee simple to the said James Moore in the event of his surviving his wife Sally J. Freeman, and she dying intestate and without issue; but by the mistake, inadvertence or oversight of the draughtsman of the said deed, the words "and his heirs" were left out next after the words "shall become the property of the said James Moore," in the said deed, and prayed the courts to reform and correct the said deed accordingly by supplying the necessary word.

Upon the close of the plaintiff's evidence, the defendants demurred to the evidence, and the plaintiff joined in the demurrer, and after argument by counsel, the court gave judgment for defendants, from which plaintiff appealed.

Plaintiff excepted to the refusal of the court to hold with the plaintiff and to reform the said deed as prayed, and appealed from so much of said judgment as holds "that there is no sufficient evidence before the court to show that the word 'heirs' was left out of the (87) same (meaning deed of marriage settlement) by mistake or inadvertence, as is alleged in the second cause of action in the complaint."

The marriage settlement was as follows:

"Whereas a marriage is shortly to be had and solemnized between James Moore, of the county of Chatham, State of North Carolina, and Sally J. Freeman, of the same county and State; and whereas it has been agreed between the parties, with the consent of the said James Moore, which is evidenced by his signing this deed of conveyance, that the said Sally should settle for her sole use and benefit all her real and personal estate so that the same shall in no wise be subject to the debts, liabilities or contracts of her said intended husband, but that the said Sally may have and enjoy the same as if she was sole owner, notwithstanding the said marriage. Now, therefore, this deed witnesseth that the said Sally J. Freeman, for and in consideration of the premises of one dollar to her in hand paid by Henry A. London, of said county and State, before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain, and sell unto the said Henry A. London, his executors and administrators all and singular the following property, to wit:

All the lots and houses in the city of Columbia, South and Lower Carolina, all of the houses and lots in the town of Wilmington, N. C., owned by the said Sally J. Freeman, together with all appurtenances thereunto belonging or in any wise appertaining, also all money, bonds or evidence of debts due to her, the said Sally J. Freeman, also all furniture or other property of a personal nature. In special trust and confidence, nevertheless, that the said Henry A. London shall hold the said lots and houses, and money and bonds and furniture to the sole and separate use of the said Sally J. Freeman until the celebration of the said contemplated marriage and after the said (88) contemplated marriage shall have been celebrated between the said parties the said Henry A. London, trustee aforesaid, shall hold the said lots and houses, money or bonds and furniture and other property in special trust for the sole and separate use of the said Sally J. Freeman so that the same shall in no wise be responsible for the debts

or contract of the said James Moore; and it is further understood and agreed that the said trustee shall and will permit the said Sally J. Freeman to use any or all of the said property above described in any way that she, in her own judgment, may deem proper, and if the said trustee shall rent out any or all of said lots and houses, or dispose of any of said property at any time during the coverture of the said Sally J. Freeman, he shall pay over the said rents or other money derived from said property to the said Sally J. Freeman, and her receipt for the same shall be a sufficient discharge and acquittance for the same, notwithstanding her said coverture; and it is further understood and agreed that if the said Sally should die during the said coverture, that the said trustee shall hold the said property to the use and benefit of such child or children as the said Sally may leave surviving her, for them and their legal representatives, unless the said Sally, by her last will and testament, duly executed, shall otherwise direct, which last will and testament it is agreed the said Sally may make, publish and declare, notwithstanding her said coverture. But and if the said Sally shall die without making any last will and testament, then and in that case the said described property shall become the property of the said James Moore, and the said trustee shall reconvey to the said Sally, or to the said James, or the survivor of them, the said property above described, and the said trustee is in no wise responsible for any of the rents or profits of said property except such as may come actually into his hands.

In testimony whereof the said James Moore, Sally J. Freeman
(89) and Henry A. London, the trustee, have hereunto set their hands and seals, this 19 April, 1867."

E. S. Martin and George Rountree for plaintiff.
Junius Davis for defendant.

AVERY, J. It is settled law, not only that equity will not allow a trust to fail for want of a trustee, but that when a trustee is named in a deed and the nature of his fiduciary duties and the times at which they are to be performed, according to its terms, indicate clearly that the grantor contemplated either the certainty or possibility that the legal and equitable estates must be separated and the trust administered beyond the lifetime of the trustee named, a court of Equity will supply the words "and his heirs," after the name of the trustee upon the ground that it was omitted by mistake of the draughtsman when the deed was drawn. *Ryan v. McGhee,* 83 N. C., 500; Perry on Trusts, sec. 320.

Where the court is fully satisfied from the expressed purpose of the grantor, the nature of the deed and the context of that portion of it

where the word "heirs" would naturally belong, that it was his intention to convey an estate in fee, and the omission of the prescribed technical words was an oversight, there is a plain equity to have the mistake corrected. *Vickers v. Leigh,* 104 N. C., 248; *Rutledge v. Smith,* 45 N. C., 283.

When, on the examination of an ordinary deed of conveyance to trustees or marriage settlement, it appears manifest that a life-estate in the trustee is inadequate to the execution of the trust, and also that the obvious purpose of the grantor to dispose of the whole of the equitable estate will be defeated, unless the instrument can be construed to vest that estate in fee simple in the beneficiaries, the concurrence of two reasons for supplying words of inheritance makes it more clearly the duty of the court to effectuate the intention of the grantor (90) by correcting both mistakes or omissions.

The general purpose pervading the deed of settlement seems to have been to make a final disposition in any contingency of the real as well as the personal property of the wife, but the particular provisions of the deed, construed literally and according to technical rules, are strangely at war with what appears to have been the leading intent of the parties in entering into it.

The deed provides for the disposition of the fund derived from the sale by the trustee of any of the property without distinguishing between real and personal; but that clause is less indicative of the intent than some subsequent ones. The trustee, who, without enlargement beyond the words of the deed, takes but a life estate, is, in case the wife dies during coverture, to hold *"the said property to the use and benefit of such child or children, as the said Sally may leave surviving her for them and their legal representatives,"* unless the wife (Sally) should dispose of it by will, which she is empowered to make. The words *"legal representatives"* are often used (as we must gather from the context is their meaning here), in the sense of heirs at law. *Briggs v. Upton,* 7 ch. Ap. 376; *Kreber v. Bryan,* 6 Serg., & R. (Pa.), 81; *Delany v. Bumet,* 4 Gil. (Ill.), 454; *Morehouse v. Phelps,* 18 Ill., 472.

It could not have been intended that the land in this case should go to any one who, by the proper authority, might be appointed a personal representative of a surviving child of the wife and, therefore, the inevitable inference is that the words were used to mean the children and heirs at law of such children of Mrs. Moore as might die during her life leaving issue who, also, should survive their grandmother. *Bowman v. Long,* 89 Ill., 19.

If we construe the deed literally, supplying no ellipsis, the consequence would be that the trustee, who holds the legal estate in the land for life only, would be expected to discharge the trust for the

(91) wife, for the husband if she should die intestate during his life and without issue, and if she should die during coverture, leaving issue and also intestate, then for the benefit of the first and second generation of the issue, and on failure of lineal descendants for the heirs at law of such issue. The lands would not, without supplying words of inheritance, be finally disposed of by the deed, except in the event that Mrs. Moore should devise them in fee during coverture. We think it was the manifest purpose, by the marriage settlement, to give Mrs. Moore the power to make a final disposition of the land and other property by will, but if she should fail to exercise that power during coverture, and there should also be a failure of issue of the marriage, then the intention was to clothe the trustee with power to convey the land in fee simple to the survivor, whether James Moore or his wife. But in the absence of words of inheritance appended to the names of both, any possible construction of the deed would lead to very absurd conclusions. If Mrs. Moore had outlived her husband, the trustee, London, would have been required to reconvey to her, as survivor; yet if he took the legal estate under the settlement only for his own life, he could convey to her an estate for the residue of his own life and no longer. Now that James Moore became the survivor, and there was no issue of the marriage, it became the duty of the trustee to *"reconvey" to him* as survivor, and, as he has died since the death of his wife, he must convey to his only heir at law. Shall we hold that the trustee could have conveyed to him on the death of his wife only an estate *per outer vie,* and in case of London's death during his life, that the remainder in fee would have passed to her heirs at law, leaving her husband, then still living, without any interest, and, for aught we know, without home or income?

(92) We are constrained to conclude that the word "reconvey" was used upon the assumption that the legal estate had previously passed in *fee,* and that the conveyance was as necessary to revest the entire estate in the wife, if she should survive, as in the surviving husband, it being the purpose to give him, at her death, without issue and intestate, just the same estate as would have been reconveyed to the wife. This view is strengthened by the consideration that the deed of settlement was executed in the year 1867, when, in the absence of any agreement, the husband would have become the owner of the whole of the personal property immediately upon the consummation of the marriage rite and entitled to the contingent right to courtesy in the whole of her land, an estate for his own life being more advantageous than that for the life of London. It does not entirely destroy the force of this fact to admit, as we do, that the contemplated marriage was a consideration for some concession on his part. But the fact that he sur-

rendered such rights incident to the marriage adds some weight to the view that it was intended, by the provision for reconveyance, that if she should die without issue, and without availing herself of the power to provide by will for any favored one among her heirs at law, the reconveyance to her husband should pass the *fee* just as if made to herself.

We conclude, therefore, that the judge erred in refusing to allow the deed to be reformed by inserting the words "and his heirs" after the name of James Moore, as proposed, on the ground that there was no sufficient evidence, and we think, likewise, that the manifest intention of the parties was to pass the legal estate in *fee* to the trustee London, and, to use the words "and his heirs" in the *habendum* instead of "his executors and administrators." The deed must be reformed accordingly, and the trustee should be required then to reconvey in *fee* to the plaintiff, who is the only heir at law of the husband James Moore. There is error, and the judgment must be

Reversed.

Cited: Ray v. Comrs., 110 N. C., 172; *Rackley v. Chestnut, ib.*, 264; *Allen v. Baskerville*, 123 N. C., 127; *Smith v. Proctor*, 139 N. C., 320; *Board of Education v. Remick*, 160 N. C., 569; *Nobles v. Nobles*, 177 N. C., 247.

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(93)

THE NATIONAL BANK OF CHAMBERSBURG (PA.) v. L. GRIMM.

Attorney—Agent—Payment.

1. An attorney to collect a debt has no authority to receive anything except money in discharge of the demand intrusted to him.
2. The defendant, being indebted to T., executed his note for the amount, payable six months after date, which note T., before maturity, assigned to the plaintiff, who subsequently brought suit thereon. Pending the action, the attorney of plaintiff and the defendant made an agreement that certain commissions due the latter from T. should be applied to the payment of the note, but T. failed to make the application: *Held*, that plaintiff was not bound by the agreement, and was entitled to recover the full amount of the note.

ACTION, tried before *Boykin, J.*, at August Term, 1891, of MOORE.

The defendant made his promissory note to the Taylor Manufacturing Company for $401.95, dated 2 April, 1886, and due six months from date. Before the note matured the payee indorsed it for value to the plaintiff, who held it as collateral security for an indebtedness due it from

the said Manufacturing Company. The note being paid at maturity, the said company "took it up along with several other past due discounts, by giving to the bank (the plaintiff) a new note for an amount equal to the sum then due on the discounts so taken up, and on the same day again deposited with the bank" the note now sued upon as collateral security for the new note mentioned. There is due upon the latter note to the plaintiff from the company a sum of money largely in excess of the amount due upon the note sued upon.

J. M. McDowell held the note sued upon, as attorney for the plaintiff, for collection, and he brought this action in April, 1888, and the defendant was then informed that the plaintiff owned it, and he
(94) knew that it had at first been indorsed to the plaintiff before maturity for value, but there was no evidence that he knew of subsequent dealings between the plaintiff and the company. There was no evidence that the said company owed the defendant any amount before the bringing of this action.

The defendant testified, among other things, that the Taylor Manufacturing Company became indebted to him in the years 1889 and 1890, in an amount exceeding the note sued on, and that in June, 1890, the defendant called upon John M. McDowell, as attorney for plaintiff; that it was then and there agreed between them, that if the defendant would make sale of certain machinery for the Taylor Manufacturing Company, and send the notes for the same to the Taylor Manufacturing Company, which note should include the defendant's commissions, the said commissions when collected should be applied to the defendant's note; that thereafter the defendant made such sales, and his commissions amounted to more than enough to pay the note, attorney's fee and costs of suit, and that he sent the notes, which included his commissions, to the Taylor Manufacturing Company. A demand was made by plaintiff upon defendant, before this action was commenced, for the costs and attorney's fee, and defendant refused to pay the same.

There was no evidence that the Taylor Manufacturing Company ever delivered such notes to the plaintiff; that it was agreed between the defendant and McDowell that upon receipt by the plaintiff of said notes plaintiff would, upon payment of attorney's fee and cost of the action, dismiss the same; that the defendant admitted that he had never paid the costs or attorney's fee, but testified that the notes which he forwarded to the Taylor Manufacturing Company included his commissions coming to him in excess of the amount sued upon and such costs and attorney's fees.

There was evidence that the notes forwarded by him had been
(95) paid to the Taylor Manufacturing Company, but the date when paid was not stated.

There was evidence that the Taylor Manufacturing Company failed and made an assignment for the benefit of creditors some time after said notes were forwarded, and before trial of this action.

There was no evidence that McDowell, as attorney of the bank, had any other authority than to collect the note sued upon.

The following issues were submitted to the jury:

Did the Taylor Manufacturing Company transfer and assign to the plaintiff the note referred to in the complaint before maturity and for value? Answer, Yes.

Has the defendant paid and satisfied the said note? Answer, No.

The court then instructed the jury, if they believed the evidence, the plaintiff was entitled to recover the amount of its demands, and the jury should find the issues accordingly. The defendant excepted. Judgment for the plaintiff, defendant appealed.

W. J. Adams and J. W. Hinsdale for plaintiff.
W. C. Douglass and W. E. Murchison for defendant.

MERRIMON, C. J., after stating the case: It appears that the defendant executed the note sued upon to the Taylor Manufacturing Company, and the latter company sold and indorsed it to the plaintiff. Whether it was negotiable or not (and there was some question as to this), it belonged to the plaintiff at and before the time this action began, and the defendant, the maker thereof, had knowledge of this fact then and ever thereafter. Moreover, so far as appears, he then had no debt, claim or demand, legal or equitable, against the company to which he gave the note, that he could set against it, or avail himself of, as a counterclaim or other defense, whereby to prevent the plaintiff from recovering from him the sum of money therein specified. (96) He had no claim against that company until in the years 1889 and 1890. So that, at the time this action began, the plaintiff was plainly entitled to recover—the defendant then owed it—the amount of the note mentioned, which he was bound, and refused or failed, to pay.

In June of the last mentioned year, the attorney of the plaintiff, who was also treasurer of the Manufacturing Company named, and the defendant, agreed between themselves that if the defendant would make sale of certain machinery of the company, take notes therefor and deliver the same to the company, then, when the notes should be collected, the defendant's commissions for making such sales should be applied in payment of the note of the plaintiff sued upon. Thereafter, the defendant made such sale, delivered the notes taken on account of the same to the company and the latter collected the same. The defend-

ant's commissions amounted to a sum of money more than sufficient to pay the note, the subject of this action. There was no evidence to show that the company ever delivered the notes taken for the machinery to the plaintiff, or that the defendant's commissions were ever applied to the payment of the note in question. Indeed, the jury found, as a fact, that it had never been paid.

It appears that McDowell, as attorney for the plaintiff only had authority to collect the note. He, hence, had no authority to go beyond that and agree to take anything in discharge of the note but money. He had no authority to take defendant's right to commissions for selling the machinery referred to in discharge of the note. It does not appear that he undertook to do so. *Moye v. Cogdell,* 69 N. C., 93; *Herring v. Hottendorf,* 74 N. C., 588; *Williams v. Johnston,* 92 N. C., 532; *Ward v. Smith,* 7 Wall., 447; 7 Wait Actions and Defenses, 435.

(97) The fair and just interpretation of what he and the defendant agreed upon, was, that the commissions, when collected, should be applied to the payment of the plaintiff's note; that is, the treasurer of the company, as for it, agreed that when the notes should be collected, then the money received in payment of the defendant's commissions should be paid through its treasurer to the plaintiff. The plaintiff was not a party to this agreement, nor was it intended that it should be. The attorney intended no more than to say that he would take the commissions, when collected in cash, as payment. It was not intended, so far as appears from the evidence, that the *arrangement* should be accepted by the plaintiff in discharge of its note. The attorney had no authority to so agree, nor does it appear that he intended to do so. When, therefore, the Manufacturing Company collected the defendant's commissions for selling the machinery, and failed to pay the same to the plaintiff, and became insolvent, made an assignment of its property, the loss of the commissions was not that of the plaintiff, but that of the defendant. It was his misfortune that he failed to follow up his right and compel the appropriation of his commissions as contemplated by himself and McDowell.

We are, therefore, of opinion that the court's instructions to the jury, complained of, were correct.

Affirmed.

Cited: Lewis v. Blue, 110 N. C., 422.

E. B. DRAKE v. JAMES WILHELM ET AL.

Landlord and Tenant—Contract—Waiver.

If a tenant remain in possession of the premises after the expiration of his term, the landlord may recognize the tenancy as continuing upon the same conditions; but where, as in this case, the landlord makes a proposition to the tenant for a new lease, but, the proposition not being accepted, the tenant vacated: *Held* to be a waiver of the option.

ACTION, tried before *Armfield, J.*, at August Term, 1891, of (98) IREDELL.

It appears that the plaintiff and T. M. Mills agreed with each other as follows: "This agreement between E. B. Drake and T. M. Mills, witnesseth, that said Drake has rented to said Mills the storeroom and building now occupied by him, west of the store of W. E. Anderson, Broad Street, for the term of one year from 1 January, 1888, at the price of $250 per year, payable monthly, with the understanding that said Mills has the privilege to make such changes and alterations of interior part of the rooms necessary to accommodate his business, as he shall deem proper, and at his own cost and expense, not to be thereafter removed. And it is further agreed, that said Mills shall have an option to continue in and occupy said store and building for an additional year from 1 January, 1889, for the sum of $300, payable monthly."

Mills occupied the store house and premises from January, 1888, to April of the same year, when he sold and assigned the remainder of his term to the defendant, who at once took possession of and continued to occupy and pay rents for same until February, 1890, the plaintiff suing for and recovering $25 as rent for January, 1890.

Defendants showed upon the trial that some time in January, 1890, about the 4th or 5th, the plaintiff went into the store to collect the rent for December, 1889, when a conversation took place between him and defendants as to renting the store house for 1890, when he asked them $300, but during the conversation he offered to take $275, and then $250; but defendants did not accept either of these offers, and asked a few days to consider, which he agreed to give, but returned the same day and said he wanted an answer sooner. And on 24 January, 1890, he served on defendants the following written notice, having seen defendants' advertisement that defendants had rented another (99) store, to wit:

"STATESVILLE, 24 January, 1890.

"Messrs. Wilhelm & Allison: Please take notice that the rent of the building and store you occupy for 1890 is $300 a year, payable monthly, and I withdraw all proposals for change in terms.

"Respectfully, E. B. DRAKE."

Plaintiff admitted that defendants did not actually occupy the store after January, 1890, and plaintiff closed his case; when his Honor held that the conversation and transaction that took place between plaintiff and defendants in January, 1890, as to renting the house for that year, was a waiver of plaintiff's right to hold defendants as his tenants for the year 1890, and he should so instruct the jury.

Whereupon, plaintiff submitted to a nonsuit and appealed to the Supreme Court.

D. M. Furches (by brief) for plaintiff.
Robbins & Long and R. Z. Linney (by briefs) for defendants.

MERRIMON, C. J. It seems that the plaintiff accepted and treated the defendants as his tenants, and they intended to become such under the written lease above set forth. That lease terminated on 1 January, 1890. If it be granted, as contended, that as the defendants continued quietly to occupy the premises next after the written lease expired, the plaintiff might have treated them as his tenants for the year 1890 upon the same terms as to rent as those specified in the written lease referred to; the continued relation as landlord and tenant would arise only by implication. He was not bound to treat them as his tenants; he might have treated them as trespassers and ejected them; it was optional with him whether he would treat them as tenants or not, and he
(100) might waive his right of option by any act showing his purpose to do so. Taylor on L. & T., sec. 22.

Then, did the plaintiff waive such right or option in this case?

We concur in the opinion of the court below that he did. The defendants were merchants doing business in the store-house of the plaintiff. Their lease was just ended. Shortly after the first of January, and before the defendants had settled upon their place of business for the year, the plaintiff called upon them to collect the rent then due for December of 1889. He and they then had a conversation looking to the lease of the premises for the year 1890. He did not then suggest that they were his tenants for that year—that he so recognized them, or intended to do so, as possibly he had the right to do. On the contrary, distinctly showing his purpose to make a new contract or lease on his part, he proposed that the rent should be three hundred dollars. The defendants refused

to agree to pay that sum. He then offered to take two hundred and seventy-five dollars, and at last two hundred and fifty dollars. The defendants did not accept his offers, but requested him to allow them a few days within which to consider his proposition to lease, and he allowed the request. The parties separated, but the plaintiff returned the same day and said he wanted an earlier answer. Now, it seems to us obvious that the plaintiff did not treat or regard the defendants as his tenants, and that they did not so regard themselves. Why did the plaintiff offer to lease the premises, and at the reduced rent of two hundred and fifty dollars? Did he not thereby give the defendants to understand and act upon the fact that he did not recognize or insist upon any implied lease for the year? Nor did he say aught to the contrary until he learned that the defendants had leased other premises. It was too late then for him to insist upon an advantage, if he ever had it, arising by implication, that he might waive. From his conduct, and what he said, the defendants might reasonably infer and believe that they (101) were not his tenants, or so recognized or treated by him, and that they might look elsewhere, as their interests might suggest, for a suitable store-house, as they did do, without peril as to any liability to him. He must justly be held to have waived any such right or option he may possibly have had.

Affirmed.

Cited: Murrill v. Palmer, 164 N. C., 55.

ROSCOE N. KEERANS v. R. B. KEERANS.

Certiorari—Notice—Rules.

An application for *certiorari* will not be heard in the Supreme Court unless ten days notice, in writing, shall have been given to the adverse party.

MOTION, in Supreme Court for writ of *certiorari.*

J. B. Batchelor, L. M. Scott, W. C. Douglass and T. J. Shaw for plaintiff.

No counsel contra.

CLARK, J. This is an application for a writ of *certiorari,* filed 25 April, 1890, and continued for the petitioner, from time to time, till

the present term. Rule 43 prescribes that no petition for *certiorari* shall be heard "unless the petitioner shall have given the adverse party ten days notice in writing." No counsel has, at any time, represented the adverse party in this Court, and there is nothing to indicate that notice has been given, as required by the rule. The application must, therefore, be refused.

Motion denied.

(102)

JOHN HOWELL ET AL. v. H. C. JONES ET AL.

Appeal—"Case"—Practice in Supreme Court.

1. It must appear in the record that an appeal was duly taken, otherwise it will be dismissed.
2. If the record shows an appeal, but there is no case on appeal settled (in those cases where such "case" is required), the appeal will not be dismissed, but the judgment below may be affirmed on motion of appellee, if there are no errors in the record proper.

APPEAL from STANLY.

J. A. Lockhart for plaintiff.
Montgomery & Crowell (by brief) for defendant.

CLARK, J. There is no case on appeal settled by the judge, nor signed by the parties, and nothing to show that any appeal was taken in open court, nor any service of notice if appeal was taken out of court. There is a "case on appeal" signed only by appellant's counsel, but as it does not appear that it was served on appellee within the required time, nor indeed at all, it must be treated as a nullity. *Peebles v. Braswell,* 107 N. C., 68. The appeal would not be dismissed on this ground, as it may be there are errors on the fact of the record proper, as want of jurisdiction, or complaint not stating a cause of action, and the proper motion and order would be to affirm the judgment. It further fails to appear, however, that an appeal was taken or notice of appeal given. In such case the appeal must be dismissed. *Mfg. Co. v. Simmons,* 97 N. C., 89. In this last case, it is said: "It does not appear (in the record) that an appeal was taken. It does not so appear in terms, nor is there any entry of record from which it may be inferred. It is not sufficient that the appellant intended to appeal, as perhaps he did, but it must appear of record that he did in fact appeal. This is essential,
(103) to make the appeal effective, and put this Court in relation with

the Superior Court. The Code, secs. 549, 550; *Moore v. Vanderburg,* 90 N. C., 10; *Spence v. Tapscott,* 93 N. C., 250; *McCoy v. Lassiter,* 94 N. C., 131; *Brooks v. Austin, ib.,* 222."

Appeal dismissed.

Cited: McNeill v. R. R., 117 N. C., 643; *Westbrook v. Hicks,* 121 N. C., 132; *Investment Co. v. Kelly,* 123 N. C., 390; *Delozier v. Bird, ib.,* 692.

M. A. SMITH, ADMRX. OF JAMES P. DOTY ET AL. v. A. AND K. KRON.

Arbitration—Reference—Exceptions.

While arbitrators are not required to find facts and state conclusions of law, and are not bound to decide the matters submitted correctly, yet where they voluntarily extend to the parties to the controversy an opportunity to have their conclusions of law reviewed by the court, the practice is analogous to that in reference under The Code; and the party desiring to except must point out the errors complained of in proper form and apt time.

THESE CASES (*Smith, administratrix v. Kron* and *Smith v. Kron*), were heard at Spring Term, 1891, of MONTGOMERY, before *Graves, J.*, on a motion to make the award of arbitrators a rule of court.

On 2 April, 1890, the parties to each of these actions entered into an agreement to refer the matters in controversy, involved in them, to arbitrators. A portion of said agreement was in the following words:

"Now, therefore, this agreement witnesseth, that the said parties, hereinbefore named, have mutually agreed, and by these presents do mutually agree, to submit for arbitration, and do hereby submit for arbitration, to F. C. Robbins, M. S. Robbins, S. J. Pemberton and H. B. Adams, all of the matters in litigation aforesaid, or about which there is any controversy, whether specially named herein or not, who shall hear and determine the said matters and make their award in writ- (104) ing, and in the event of the failure of any three of them to agree upon an award, they shall select a fifth man, who shall act as umpire, and the award of a majority of said arbitrators and umpire, when signed and delivered, shall be binding upon the said parties and conclusive as to all matters herein submitted to said arbitrators, and the said award so made shall be a rule of court in the cases now pending, and judgment according to said award shall be rendered in said actions in so far as they shall be affected thereby."

The arbitrators, having disagreed, chose Kerr Craige as umpire, and a majority made an award as to the issues involved in both actions. No exception having been filed to their report, judgment was rendered in each of the actions confirming the report and making it a rule of court, and that defendants go without day and recover costs.

No exceptions were filed to the award. After judgment, according to the record, "counsel for plaintiff then stated that he did not think the findings of fact by the arbitrators justified the judgment or conclusions of law, and excepted and appealed to the Supreme Court."

R. H. Battle for plaintiffs.
No counsel for defendant.

AVERY, J., after stating the case, proceeded: Arbitrators are not bound, like referees, under the statute (Code, sec. 2422), to find the facts or state separately their conclusions of law and fact; but if they do attempt to state the law arising on the facts found by them, and *"miss it,"* the error may be reviewed on exceptions, and the award set aside. *Allison v. Bryson,* 65 N. C., 44; *Farmer v. Pickens,* 83 N. C., 549.

They are a law to themselves, and not bound to decide correctly, and, unless they gratuitously incorporate in their award erroneous (105) views of the law as reasons for the conclusions reached, their action in the absence of fraud is not subject to review. *Robbins v. Killebrew,* 95 N. C., 19; *Miller v. Bryan,* 86 N. C., 167.

But, where they voluntarily extend to the parties litigant, as in our case, the opportunity to have their conclusions of law passed upon by the court, the practice is analogous to that adopted in references by consent. If objection is not taken by exception, pointing out the error complained of, before the rendition of judgment, an appellant has no more right to assign their mistakes of law as error in the court below, or in this Court, by virtue of the simple announcement, when the judgment is filed, that he appeals from it, than he would have had to except to a report of a referee after its confirmation. *Keener v. Goodson,* 89 N. C., 276; *Reizenstein v. Hahn,* 107 N. C., 156.

There is no error, and the judgment is
Affirmed.

Cited: Herndon v. Ins. Co., 110 N. C., 283, 287.

THE FARMERS AND MECHANICS NATIONAL BANK OF WESTMINSTER v. J. F. BURNS ET AL.

Execution—Supplementary Proceedings—Affidavit.

An affidavit by a judgment creditor, his agent or attorney, that an execution has been issued upon his judgment, though it has not been returned, and that defendant has not sufficient property "subject to execution" to satisfy the judgment, but has property, "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient to support an order for the examination of the debtor and persons alleged to be indebted to him; and also an order forbidding the disposition, by the latter, of any effects belonging to the judgment debtor. (*Hinsdale v. Sinclair*, 83 N. C., 338, distinguished.)

SUPPLEMENTARY PROCEEDINGS, heard before *Boykin, J.*, at (106) August Term, 1891, of MOORE, on appeal from the clerk.

The plaintiff obtained its judgment against the defendants for $1,089.83, with interest, in the Superior Court of Moore, on 17 August, 1885, and the same was duly docketed in that county. No part of the same has been paid. It appears, by the affidavit of the agent of the plaintiff, that an execution upon the said judgment was, on 26 June, 1890, issued to the sheriff of Moore, in which both of the said defendants reside, said execution being against the property of both said defendants, and that the said execution still remains in the hands of the said sheriff, not having been returned by him. That affiant is informed and believes that the defendants have not sufficient property subject to execution in the State of North Carolina to satisfy the said judgment, but that the said defendants have property, money and choses in action not exempt from execution, which they unjustly refuse to apply toward the satisfaction of the said judgment. That affiant is informed and believes T. B. Burns and Robert L. Burns and Ann R. Burns have property of J. F. Burns, one of the judgment debtors aforesaid, and are indebted to him in an amount exceeding ten dollars.

Thereupon, and on motion of the plaintiff, the court (the clerk) made its order, on 26 June, 1890, requiring the defendants to appear on 8 July, 1890, "to be examined and make discovery, on oaths, concerning their property, joint and separate," and likewise requiring the said T. B. Burns, Robert L. Burns and Ann R. Burns to appear also, "to be examined and answer on oath concerning the property of J. F. Burns," defendant, in their possession and concerning their indebtedness to him, and an order was entered forbidding them "to transfer, or make any other disposition of any property belonging to said defendants, not ex-

(107) empt by law from execution of said indebtedness, or in any manner to interfere therewith until further order in the premises."

The defendants moved before the court (the clerk) to dismiss this proceeding, supplementary to the execution, for insufficiency of the affidavit made by plaintiff, for the reason that said affidavit showed that execution had been issued, but not returned by the sheriff at the time of the commencement of the said proceedings, and that the defendants had property, money and choses in action not exempt from execution; and in that said affidavit showed the existence of property, choses in action and things of value unaffected by any lien and incapable of levy.

The defendants also moved, before said clerk, to modify the order issued by him, so as to dissolve the restraining order forbidding T. B. Burns and Robert L. Burns to dispose of any property in their hands, on the ground that no notice or any other process had been served on said T. B. Burns and Robert L. Burns, nor were they parties to said proceedings.

The clerk refused to dismiss the proceedings for the alleged insufficiency of the affidavit, and also refused to modify said order; and from this ruling the defendant appealed to the judge. Upon the hearing the judge affirmed the ruling of the clerk, and refused to dismiss the proceedings and to modify said order, and to this ruling the defendants excepted and appealed to the Supreme Court.

W. J. Adams and J. W. Hinsdale for plaintiff.
W. C. Douglass for defendant.

MERRIMON, C. J., after stating the case: The statute (Code, sec. 488, par. 2) prescribes that, "After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or officer resides,

(108) *has property which he unjustly refuses to apply toward the satisfaction of the judgment,* such court or judge may, by an order, require the judgment debtor to appear at a specified time and place to answer concerning the same," etc. The affidavit objected to, substantially in all respects, is a compliance with this statutory provision. It appears from it that an execution was in the hands of the sheriff; that the defendants therein had not property sufficient, subject to execution, to satisfy the judgment; that they "have property, money and choses in action not exempt from execution, *which they unjustly refuse to apply toward the satisfaction of the said judgment.*" Thus the foundation for the order complained of was laid almost in the very words of the statute, and the case was presented in which the judgment creditor became en-

titled to examine his judgment debtor. Although the execution was in the hands of the sheriff, it may be that the property so subject to execution could not be found; it may have been hidden; the debtors also may have had money, choses in action, etc. The statute intends that when the debtor refuses to apply such property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end the court, in a proper way, may so apply the property to which the debtor may direct attention.

It was said on the argument that if the property is "not exempt from execution," as stated in the affidavit, why not levy upon and sell it? why require the examination of the defendants? The explanations and reason are given above. Here, however, the words "not exempt from execution," must be taken with the other parts of the affidavit, and it sufficiently appears that they were intended to imply that the defendants had such property not exempt from execution as part of the homestead or personal property exemption of the debtor. The affidavit states in another part of the same paragraph of it, that the defendants "have not sufficient property subject to execution" to satisfy the judgment. Clearly, the affidavit was sufficient to warrant the order under the clause of the statute cited above. *Vegelahn v. Smith,* 95 N. C., 254. (109)

Hinsdale v. Sinclair, 83 N. C., 338, is not in point here, because the statute interpreted by it is not the same, in material respects, as the present pertinent statute. (See Bat. Rev., ch. 17, sec. 264, par. 2). The present statute provides, as the former one did not, that the "creditor shall be entitled to the order of examination under this subdivision, and under subdivision one of this section (that cited above), although the judgment debtor may have an equitable estate in land subject to the lien of judgment, or may have choses in action, or other things of value, unaffected by the lien of the judgment and incapable of levy."

The order forbidding T. B. Burns, Robert Burns and Ann R. Burns "to transfer or make any other disposition of any property belonging to said defendants not exempt by law from execution," was not inappropriate or unwarranted. The purpose was not to restrain or affect these persons as to their own property, but expressly to prevent them from disposing of property of defendants in their hands, custody and control. The statute (Code, sec. 490) expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the court and make them subject to its jurisdiction for the purpose of securing the debtor's property—not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may so properly suggest; in which

case their rights may be litigated as intended and provided by the statute. (Code, sec. 497). In such case the court has power to forbid the disposition of the property until a receiver can be appointed and bring action to litigate the matter in dispute. But the court would not have (110) authority in such proceedings to make a party subject to an injunction as to his own property, he not being a party to the action. The case of *Coates v. Wilkes,* 94 N. C., 174, cited by the defendants, has no application here. In that case, Wilkes, the wife, was not a party, nor did the order in question extend simply to the property of the judgment debtor.

Affirmed.

RICHARD LOVETT v. A. H. SLOCUMB.

Receiver—Pleading—Deed—Evidence—Presumption.

1. Where a party, in this case a defendant, in an action involving the title and possession of land, demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted or not unequivocally denied by his adversary.
2. The execution of a deed having been established, there is a presumption that it is valid.

ACTION, pending in CUMBERLAND, heard, on motion of defendants for the appointment of a receiver, supported by the answer, used as an affidavit and on counter affidavits offered by the plaintiff, at chambers before *Boykin, J.*

The plaintiff, who is in possession of the land in controversy, brought his action for the surrender and cancellation of a mortgage deed executed by the plaintiff to his son, Charles Lovett, on 14 December, 1887, to secure the payment of a note of two hundred dollars due said Charles Lovett, and payable three years after 14 December, 1887, or on 14 December, 1890, and alleged that he had paid said note in full and (111) had it in his possession now; but that he was informed that the defendant Slocumb claimed an interest in the land by virtue of an alleged assignment of the mortgage deed by said Charles Lovett to him.

The defendant Slocumb set up in his answer for a first defense, substantially:

1st. That he, Slocumb, was in possession as lessee of the land on 14 December, 1887, when plaintiff executed the mortgage deed and note to Charles Lovett, and that on 24 January, 1889, the said Charles Lovett assigned the note secured by the mortgage, before maturity, to him (Slo-

cumb), which still remained unpaid, and if the plaintiff then held the note, he had gained possession of it by fraud.

2d. That he (defendant Slocumb) was the owner in fee of an undivided third of the said land.

3d. That he was the assignee also of a note for one hundred and eighty dollars, executed by the plaintiff to Emily Lovett (now Emily McPherson), on said 14 December, which note is secured by a prior mortgage to that executed to secure the note due Charles Lovett.

4th. That plaintiff was in the wrongful possession of the land and withholding it from the defendant, and, as defendant was informed, had dispossessed defendant's tenant by threats of violence.

For a second defense, substantially:

1st. That on 5 December, 1887, the plaintiff leased to him (Slocumb) all of the plaintiff's interest in and to said land for a term of three years (which lease was referred to as registered in a certain book), and that on 24 December, 1888 (during said term) the *plaintiff, for value, released to said defendant all of plaintiff's right or interest in the said land, as will appear to the release, which is registered in book No. 4, at page --, of the register's office of said county.*

For a third defense, substantially:

1st. That by virtue of the mortgages executed by plaintiff to secure the notes executed by him respectively to Emily Lovett and Charles Lovett, the defendant Slocumb (after due advertisement) sold the land in controversy on 19 March (after the action was (112) brought) to satisfy said notes, at which sale the defendant Taylor became the purchaser, and the defendant Slocumb has executed a deed to him for the land.

The defendant Slocumb further avers that the plaintiff is in possession and in reception of the rents and profits, and is totally insolvent and demands judgment, first, that a receiver be appointed to take possession of the rents; second, for possession of the land and damages for detention.

The plaintiff, on return of an order to show cause, filed his own affidavit and that of his daughter Emily McPherson (formerly Emily Lovett). The plaintiff swears that the note executed to Charles Lovett is paid in full, and both he and Emily McPherson make oath that the note executed to her, and secured by the prior mortgage, was deposited by her as collateral to secure a debt of thirty-five dollars due the defendant Slocumb from her. The plaintiff averred his willingness and readiness to pay that sum and interest.

The plaintiff does not deny the allegation that Slocumb is the owner of one undivided third interest in the land. To the allegation of Slocumb, that the plaintiff released to him all of his title and interest in

said land, the latter, in his affidavit, responds as follows: *"The defendant denies that on 24 December, 1888, or any other time, he released or intended to release his interest in the land to said A. H. Slocumb."*

Plaintiff appealed from the judgment rendered.

G. M. Rose for plaintiff.

H. T. Sutton for defendant.

AVERY, J., after stating the case: Where a party to an action asks as affirmative relief, the possession of land, and alleges that his adversary, who wrongfully withholds it, is insolvent, and the latter directly admits or fails to deny the allegation, it only remains for the action in (113) order to establish his right to demand the appointment of a receiver to take charge of the rents and profits, to show that he has set up in an affidavit, filed under the sanction of the court, or in a verified pleading in the cause, used as an affidavit, an apparently good title either not controverted at all or not unequivocally and sufficiently denied by the affidavits of the claimant in possession. Code, sec. 379 (1); *McNair v. Pope,* 96 N. C., 502; *Levenson v. Elson,* 88 N. C., 182; *Twitty v. Logan,* 80 N. C., 69; *Bryan v. Moring,* 94 N. C., 694; *Oldham v. Bank,* 84 N. C., 304.

If we concede that no title passed to the defendant Taylor by the sale on the 19th of March, since this action was brought, it still appears that the defendant Slocumb claims title in himself to an undivided interest in the land in one paragraph of his answer, to wit, one-third, and in another paragraph, to the whole, by virtue of a deed of release executed by the plaintiff to him on 24 December, 1888, whereby he surrendered to Slocumb all of his right, title and interest. He refers, also, in his answer, to the book and page of the register's records, where the deed of release is recorded, in order to corroborate his statement and to show that the deed is competent as evidence of title in him.

The plaintiff fails to deny that Slocumb was, prior to the execution of any of the mortgage deeds mentioned, his tenant in common as to one-third. But if he had controverted this claim, his denial of the allegation that he had released all of his right and title to Slocumb by a deed, which has been proved and recorded, is so equivocal that it must be regarded as an admission of the fact of executing it with the qualification that he did not intend at the time to do so. The execution of the deed having been proved, there is a presumption that it is valid and operates to pass the interest of the plaintiff in the land to Slocumb. If the plaintiff had sought to accomplish two objects, first, to cancel (114) that conveyance on the ground of fraud, and then the mortgage, because the lien had been discharged by payment, the burden

would have rested on him to successfully impeach a deed which apparently passed a good title to the grantee.

When he contents himself with the demand, "that on 24 December, 1888, or any other time, he released, or intended to release, his interest in the land to said A. H. Slocumb," his statement is not a sufficiently explicit one to raise an issue as to its execution. The deed of release, having been proved and recorded, is of itself *prima facie* evidence that the interest of the plaintiff has been conveyed to Slocumb, and of his right as against the plaintiff to demand the appointment of a receiver.

Affirmed.

JOHN W. LONG, EXECUTOR, v. J. M. FOUST ET AL.

Will, Nuncupative—Evidence.

To establish a nuncupative will, it is not necessary that the persons called by the testator to witness his testamentary declaration should have been designated by him by name; and hence, where several witnesses testified that the testator, shortly before his death, declared his will, and called upon all the persons present to take notice and witness the fact, and there were among the number several persons competent as witnesses, who approached the bedside and heard the declaration, it was not error in the court to instruct the jury there was evidence from which they might find the fact of the making of the will.

PROCEEDING begun before the clerk of the Superior Court of RANDOLPH, by John W. Long, the propounder, who offered for probate the verbal, or nuncupative, will of Henry C. Glosson, who died in said county on 23 December, 1888, which will was put in writ- (115) ing, and is in the following form, to wit:

"I give to Mrs. N. M. Patterson one hundred dollars out of my estate, and I appoint J. W. Long executor of my estate."

A jury being duly sworn and impaneled to try the case, the court submitted the following issues, to wit:

First issue—Did H. C. Glosson declare as his will in substance as follows: "I give to Mrs. N. M. Patterson one hundred dollars out of my estate, and I appoint J. W. Long executor of my estate?"

Second issue—"At the time he made the declaration of what was his will, did H. C. Glosson have mind and intelligence sufficient to enable him to have a reasonable judgment of the kind and value of the property he proposed to will and to whom he proposed to will it?"

These issues were both found in the affirmative.

The evidence produced on the trial, material here, was as follows:

B. S. Williams testified: "I was there when Henry C. Glosson died; he died about nine o'clock at night; I had been there an hour probably, was in the room twice during that time; he was very low and weak; I heard him talk; heard him say that he wanted Mrs. N. M. Patterson to have one hundred dollars for attending on him during his sickness, and wanted Dr. Long to settle or close out the estate. He called upon all in the room to witness his request. I may not have given his exact language, but have given the substance of what he said. He did not call upon any special person, but called all of us to come to his bed. I went to his bed, so did Owen, Mr. Wrenn and Mr. Johnson. I think there were other men there. Before he made the request he called to us to come to him; when we came around his bed he made the request; then he asked Mrs. Patterson to read a psalm and have prayers, which she did; this was about fifteen minutes before he died; he talked (116) after this, but I don't remember what he said. I think he had capacity and mind at the time he made the request to know what disposition he was making of his property. I heard no one called specially by name to hear the request, but all who were in the room were called, and all approached his bedside."

W. B. Owen testified that he was present at the time and heard decedent say "that he wanted Dr. Long to be his guardian or administrator"—witness is not certain which he said—"and to settle his business." "He repeated this twice, and then asked Mrs. Patterson to read a chapter and have prayers, which she did; immediately after prayers he said he wanted Mrs. Patterson to have one hundred dollars for her trouble, and Dr. Long to settle his business, and called on all standing by to be witnesses, and repeated this the second time. When he called for witnesses all approached a little nearer—Johnson, Wrenn, Olive, Williams, Allred, Stroud and myself; Mrs. Patterson and her three children were there. He called Mr. Johnson's name; ain't positive of any other. I think he said, 'In presence of all these witnesses and Mr. Johnson I make the bequest above;' and said, 'I want you all to take notice of it.' He was lying on his right side, turned his head and looked to the crowd; from all appearance of his talk his mind seemed clear. In my opinion, he knew what he was saying and had capacity to dispose of his property."

Millard Wrenn, a witness called for the propounder, testified that he was present about half an hour before his death; decedent said he wanted Mrs. Patterson to reserve or have one hundred dollars out of his estate for her trouble, and he wanted his business settled up as quiet as possible, and he wanted Dr. Long to settle his estate. He called witnesses about the one hundred dollars to Mrs. Patterson, and

also about Dr. Long settling the estate. Witness stated that, in his opinion, decedent had mind enough to know what he was (117) doing. Witness had been there about half an hour when this conversation occurred.

Defendant asked for special instructions as follows:

"1. That the jury must be satisfied by the oath of at least two witnesses present at the making of the will, who state that they were especially required to bear witness thereof by the testator himself.

"2. That the jury must be satisfied by the weight of testimony that the alleged testator was in such a condition of mind as to understand what he was doing.

"3. That the statute must be construed strictly and all its provisions must be complied with. That in calling upon persons to bear witness, the decedent must call specially upon each individual, or at least designate by either calling person by name or in some other way selecting those whom he wished to be witnesses to the will; it is not sufficient to call up an indefinite group of persons standing by."

His Honor charged the jury that they must be satisfied by the oath of at least two credible witnesses present at the making of the will, who state that they were specially called on to bear witness thereto by the testator himself of the making of said nuncupative will; that they must also be satisfied from the evidence that said 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, and that the testator was at the time of sound and disposing mind, and knew the extent and effect of what he was doing, that he was disposing of his property, and how and to whom.

His Honor called the attention of the jury to the language of the statute, and stated to them that all its provisions must be complied with, and its provisions strictly construed, and that they must be satisfied from the evidence that the witnesses were specially called upon by the testator to bear witness to what he was saying; that if they believed the evidence given in this case to be true, then he charged (118) them that there was evidence before them from which they might find that the witnesses were specially called upon by the testator himself to bear witness to his will; that it was not necessary that the testator should call the names of the witnesses; that if he called upon them, or signified to them in any certain and distinct manner that he desired them to bear witness to what he was saying as his will, it was sufficient in law.

That if they were satisfied from the evidence that Williams and Owen and others were in the room with the alleged testator at the time of his death, and he called all in the room to come to his bed and witness his

request, although he did not call any by name, and Williams and Owen and others went to his bed in consequence of this request, and he declared his request in their presence, it would be a substantial compliance with the law.

The court refused the second instruction of caveator and did not give the first and third, except in so far as stated in instructions as given.

The caveator excepted to the charge as given, and to the refusal or omission to give the special instructions asked, and appealed.

S. M. Scott for plaintiff.
No counsel contra.

MERRIMON, C. J., after stating the case, proceeded: The statute (Code, sec. 2148, par. 3) in respect to nuncupative wills, is strict in its terms and provisions. It must be strictly interpreted and as strictly observed in all material respects—the purpose being to prevent and exclude mistake, misapprehension, imposition and fraud that might easily happen or be perpetrated when the alleged testator is in his last illness, and sometimes almost in *extremis*. *Bundrick v. Haygood,* 106 N. C., (119) 468, and the cases there cited.

While the evidence in this case was not very satisfactory, we think it was sufficient to go to the jury to prove the execution of the will as required by the statute, which provides that such a will must be proven "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 is true, the testator did not specify by name the particular persons he required to witness his will as expressed by him, but the evidence of these witnesses went to prove that he was sensible, knew what he was doing, knew that several persons were present, saw them, and without naming any of them but one, he expressly required all present to be witnesses—he called to them, they were present, near to him, heard and understood his request and took notice of what he said. There were more than two persons eligible as witnesses for the purpose. The evidence tended to show the purpose and capacity of the testator to make a will, and that he did so in the presence of more than two credible witnesses who were present, and were specially required by the testator himself to bear witness thereto. It was sufficient that he saw the witnesses and charged them to bear witness to his will, and they did so, and it is not a good objection that he failed to designate them particularly by name. That he required them, each, all of them, to bear witness, was what the statute required. The purpose is that the testator shall require two witnesses at least to take notice and bear witness that he makes his will. He must require and direct a

competent person, and that person must be able to testify that he was one of the persons—the witnesses—so required, and that he did take notice and bear witness. The witnesses here testified that they were called upon by the testator; that they did take notice and witnessed his will as expressed by him. This was sufficient. *Haden* (120) *v. Bradshaw,* 60 N. C., 259; *Smith v. Smith,* 63 N. C., 637.

We think the court gave the jury so much of the special instructions asked for as the caveator was entitled to have. The other exceptions are without merit.

Affirmed.

Cited: In re Garland, 160 N. C., 558.

THE SOUTHERN FLOUR COMPANY v. MCIVER ET AL.

Assignment—Fraud—Injunction—Receiver.

In an action by creditors to set aside an alleged fraudulent assignment the complaint charged, among other things, that the assignees were insolvent, and that one of them was a fraudulently preferred creditor, and prayed for an injunction and receiver; pending the motion, the plaintiff obtained a rule on the preferred creditor and assignee to show cause why he should not repay the amount of assets he had applied to his own debts. The defendants positively denied the alleged fraud and the insolvency of the assignees, and set out with particularity the facts in relation to their property; and the preferred assignee produced evidence tending to show that the money applied to his debt had been in good faith so appropriated before the commencement of this action. The court refused to appoint a receiver, or to direct the repayment of the money, but granted an injunction *pendente lite,* and directed the other assignee to take charge of the assets: *Held,* that the judgment should be affirmed.

ACTION, from CUMBERLAND, heard upon motion before *Boykin, J.,* at chambers, on 20 August, 1891.

This is a creditor's action. The complaint alleges that the defendants, A. McIver & Son, merchants, became insolvent, and on 20 May, 1891, fraudulently conveyed their stock of goods and other property to the other defendants, H. L. Cook and John S. McIver, as assignees, ostensibly for the purpose of paying the debts of their numerous creditors; that they classified the latter, preferring some of them over others, and especially the said John S. as to a large debt, which, (121) it is alleged, was without consideration and fraudulent. It al-

leges further, that the conveyance so made is intended to hinder, delay and defraud the creditors of said firm; that the said Cook and John S. McIver, assignees, are insolvent, etc. It demands judgment that a receiver be appointed; that the said assignees be restrained by injunction from disbursing any of the assets that have or shall come into their hands pending the action; that the deed of assignment be declared void for fraud, and that the proceeds of the property be distributed to the creditors according to their respective rights, etc.

The defendants admit in their several answers the insolvency of the said firm, and the execution of the deed, but positively deny, much in detail, all fraud, fraudulent purposes and practices. They deny that the said assignees are insolvent; and the said John S., and the said firm especially, deny that his preferred debt is fraudulent, and that he is insolvent, and he specifies much of his property, etc., and the consideration of this debt, etc.

The court granted an injunction pending the action, but refused to appoint a receiver. It, however, directed that one of the said assignees, the said Cook, be charged with all the assets of all kinds conveyed to the said assignees; that he collect the assets and hold the same subject to the order of the court, and that he make report of assets that come into the hands of the said assignees and into his hands, and of disbursements made by them, etc. He made such report, from which, among other things, it appears that he and the said John S. McIver, on 27 May, 1891, paid to the latter his said preferred debt.

Thereupon a judge, in vacation, granted a rule upon the said John S. McIver to show cause why he should not refund to the said Cook the said sum of money so received by him. The court heard the motion in that respect at chambers. It found the facts and denied the (122) motion, making record thereof as follows:

The deed of assignment was made on 20 May, 1891. The summons was issued 28 May, 1891, and on that day a restraining order was issued by *Whitaker, J.*, and served on defendant H. L. Cook on 29 May, 1891, and served on defendant John S. McIver on 30 May, 1891.

On 27 and 28 May, 1891, the defendant John S. McIver received of H. L. Cook and John S. McIver, assignees, the sum of $1,003.31, and, upon a motion to show cause why he, the said John S. McIver, should not refund the said sum to H. L. Cook, who has charge of the fund under order of the court, the defendant comes in and filed the following answer to wit:

"John S. McIver, in answer to the order to show cause, says that the amount of $103.31 was actually applied by said John S. McIver and H. L. Cook, assignees of A. McIver & Son, under the deed of assignment under which they were acting, to the preferred debt of $1,000, be-

fore the service of the summons or restraining order herein, and before they had any notice of the same, or of an intention to bring suit; that said money was honestly and *bona fidely* applied to said preferred debt in good faith, according to the direction and terms of said deed of assignment, and at the time before said suit or service of summons or restraining order, the said money had been paid to said John S. McIver on his said debt; that he had no funds in his hands, as assignee, at the time of service of summons and restraining order, except what is accounted for in the report of H. L. Cook, assignee, and he has none now in his hands as assignee, nor since his removal. Affiant prays the court to grant an order dismissing the motion, and for such other and further relief as he may be entitled to."

Upon the hearing, the court denied the motion to require John S. McIver to refund the money to H. L. Cook, and the plaintiff (123) appealed from the judgment rendered.

A. Jones and J. W. Hinsdale for plaintiff.
T. H. Sutton and W. E. Murchison for defendant.

MERRIMON, C. J., after stating the case: If it be granted that the court had authority, upon motion in the course of the action, to grant relief in cases sufficiently proven, such as that invoked by the motion now under review, we think the court properly denied the motion here.

Apart from the payment of the preferred debt of John S. McIver, one of the assignees, shortly before this action began, the only evidence to support the motion was the sworn complaint used as an affidavit. The allegation of fraud as to that debt was very general; the principal facts stated as evidence of it were, that he was insolvent and son of one and the brother of the other member of the firm which made the deed of assignment. But he and his codefendants of the firm positively deny the alleged fraud and aver the perfect honesty of the debt, stating the consideration thereof, and that a substantial part of it was money advanced to the firm to aid it in the prosecution of its business. He also denies that he was or is insolvent; he avers his solvency, and states facts much in detail as to his property, going to show that he is solvent. He further swears that the payment of the debt was made before this action began, in good faith, and that he had no notice of the action or a purpose to bring it; that such payment was made fairly and with no fraudulent or dishonest intent. All the defendants positively deny all fraud and fraudulent intent, and give in evidence facts and circumstances tending more or less to sustain their denial as true. There is some evidence of bad faith and fraudulent purpose but all this is strenuously denied by the defendants, and they give evidence of facts and

(124) circumstances that tend strongly to show good faith and a purpose on the part of John S. McIver to avail himself of an advantage that he might not dishonestly take. The evidence preponderates, as we see it, in favor of the appellee.

The plaintiffs are not entitled to the relief demanded by the motion, unless it appears with reasonable certainty that the transaction and acts complained of are fraudulent and that they will suffer injustice and loss if relief shall not be granted pending the action until the hearing upon the merits. The evidence of the plaintiffs, for the present purpose, in view of that of the defendants, is not satisfactory or sufficient to entitle them to have their motion allowed. It appears strongly that John S. McIver is not insolvent, and they will have their remedy against him when the case shall be disposed of on the whole merits. If it turns out that he and others have perpetrated the alleged fraud, as he may have done, he will be amenable in this action.

Affirmed.

AVERY, J., dissents.

D. D. BROWN AND WIFE v. JONAS H. BROWN.

Landlord and Tenant—Crop—Liens—Advancements.

1. The "advancements" for which a lien is created in favor of a landlord by section 1754 of The Code, embraces anything of value supplied by the landlord to the tenant or cropper, in good faith, directly or indirectly, for the purpose of making and saving the crop.
2. When such advancements of such things as in their nature are appropriate and necessary to the cultivation of the crop—e.g., farming implements and work animals—they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary—e.g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop.
3. Where the landlord furnished board to the tenant and his family while the crop was being cultivated, it was the duty of the judge to charge the jury that if the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of the statute.

(125) ACTION, in which there was a claim and delivery, tried before *Boykin, J.*, at the August Term, 1891, of DUPLIN.

It was admitted that defendant cultivated for agricultural purposes, lands of plaintiffs in the year 1890, under and by virtue of the following

contract, viz.: "The plaintiffs would furnish land and team, and defendant perform the labor and divide the crops raised equally between them." It was further admitted that the property in controversy was defendant's part of crop raised during 1890. The plaintiffs alleged that defendant was indebted to them for advancements, and for breach of contract in that the defendant neglected and failed to cultivate the lands in a proper, husbandman-like manner. Plaintiffs' evidence tended to show that the contract of renting was entered into on 23 December, 1889, for the year 1890.

The plaintiffs' right to recover depended on whether the defendant was indebted to them for advancements made during 1890. Plaintiff testified that defendant was indebted to him in the sum of $61.22; $40.40 of this amount being the value of defendant's board from 4 January, 1890, till 16 June, 1890, and for defendant's wife from the time of his marriage, 4 May, 1890, till 16 June, 1890; that the board of each was worth $6 per month, and that no part of the board had been paid.

Defendant's evidence tended to show an indebtedness against the plaintiff for the year 1890 for $78.85. Defendant testified that he went to plaintiff's the same day, or a day or two after, contract was made, and asked plaintiff if he, plaintiff, would allow him to furnish twenty pounds of meat and one bushel of corn per month for his board and live from plaintiff's table, to which plaintiff said "Yes"; defendant (126) further testified that this board bill had been paid, and that there was no bargain with plaintiff as to board of wife of defendant.

His Honor charged the jury that the board of defendant and of his wife would not be an advancement, unless there should be an express contract proven to that effect, or unless it could be ascertained that the plaintiff and defendant intended that it should constitute an advancement and be a lien on the crop; that if there was no such intention of the parties at the time, then it would be a simple contract debt, and the plaintiffs would have no lien on the crop raised for this item of account, but it was for them to say, from all the evidence, whether or not it was an advancement, or whether plaintiffs and defendant intended it to be an advancement; if so, plaintiffs were entitled to recover.

Verdict and judgment for defendant, and the plaintiffs excepted and appealed.

W. R. Allen for plaintiffs.
H. S. Stevens and H. R. Kornegay for defendant.

MERRIMON, C. J. The statute (Code, 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, 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 rent 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 saving said crops."

(127) The agreement for the purposes thus prescribed having been made, this statutory provision at once gives and secures the lien upon the crops in favor of the landlord without any stipulation for that purpose between the parties. The lien is a legal incident to the agreement, and it attaches not only to secure the rents but as well as secure "all advancements made and expenses incurred in making and saving said crops." The intention of the parties to create the lien is implied by the agreement, unless otherwise agreed between them. A leading purpose of the statute is to secure the landlord as to the rents and advancements made by him in making and saving the crops. To that end the lien is given, and it is expressly provided that it "shall be preferred to all other liens."

An advancement, in the sense of the statute, is anything of value pertinent for the purpose to be used directly or indirectly in making and saving the crops, supplied in good faith to the lessee by the landlord. Many things are, in their nature and adaptation, *per se* pertinent for such purpose, and presumptively constitute advancements whenever so supplied. Thus, subsistence for the tenant and his employees and work animals, appropriate farming implements and the like, are advancements when so supplied. These and other like things are directly appropriate for such purpose, and when supplied to that end make advancements. They are presumed to be such. There are other things not directly so appropriate— such as shoes, tobacco, dry-goods, groceries and the like, which the landlord may supply to the lessee to pay his laborers. When such supplies are made, whether they make advancements or not, depends on whether they were supplied for the purpose specified. It must appear affirmatively that they were. That the lessee diverts such things from the purpose contemplated cannot change their nature and the purpose of them. *Womble v. Leach,* 83 N. C., 84; *Ledbetter v. Quick,* 90 N. C., 276.

(128) If here the plaintiff had supplied the defendant, as his tenant, with meal, meat, sugar and coffee in reasonable quantities, or appropriate farming tools to make and save his crop, such things, in the nature of the matter, would have been directly appropriate for the purpose, and the presumption would have been that they were ad-

vancements. That the plaintiff supplied subsistence from his own table to the defendant for such purpose, could make no substantial or legal difference, because he supplied that which was in its nature, and that of the whole matter, essential to make and save the crops, and the relations of the parties raised the presumption that such supplies were advancements.

The plaintiff, as he alleges, supplied the defendant in his own house with subsistence to the end that he might make his crops. That the defendant's wife shared in the subsistence so supplied cannot alter the case. It was his duty to feed and care for her. To feed his family properly was a burden incident to making and saving the crops. The court should, therefore, have instructed the jury, substantially, in submitting the view of the case insisted upon by the plaintiff, that if the latter supplied the defendant with board to the end he might make and save his crops, then he was entitled to recover the reasonable value of the board, and the same would (nothing to the contrary appearing) constitute an advancement, and, therefore, a lien upon the crops. The plaintiff was not required, as the court said he was, to prove an express contract that the board of defendant and his wife should be an advancement, because if the plaintiff leased the lands to the defendant (and that he did was not controverted), and supplied him with board to the end he might make and save his crops, at once such supplies, per force of the statute, became the advancements, in the absence of agreement to the contrary, and a lien upon the crops. There is, therefore, error, and the plaintiff is entitled to a new trial.

Error.

Cited: Ballard v. Johnston, 114 N. C., 144; *Bargain House v. Watson,* 148 N. C., 298.

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(129)

AMANDA EVERITT v. C. C. WALKER ET AL.

Cause of Action—Parent and Child—Contract—Pleading.

The complaint alleged that plaintiff had, at the dying request of her sister, taken charge of and supported, by her own unaided labors, an infant child of the sister; that the father of the child at that time was, and since has remained, insane, and has been continuously an inmate of the State Asylum; that he was possessed of an estate about the value of $6,000, now under the control of his guardian, and prayed judgment for compensation for the support of the infant: *Held,* upon demurrer, that the complaint did not state facts sufficient to constitute a cause of action,

for that it did not allege any contract, express or implied, with the father, and that it appeared the support of the infant was voluntarily assumed by plaintiff.

ACTION, tried at Fall Term, 1891, of NEW HANOVER, before *Boykin, J.*

The following is a copy of the pleadings:

1. That Mary C. Walker is the child of C. C. Walker and Mary C. Walker, his wife, and that said child was born 29 July, 1879.

2. That C. C. Walker, the father, became insane in the summer of 1880, since which time he has been continuously insane, and an inmate of the Insane Asylum at Raleigh, and that Mary C. Walker, the mother, died in October, 1880.

3. That the plaintiff is the sister of the child's mother, and that the mother, on her death bed, requested the plaintiff to care for and support said child; that the plaintiff told her she would, and that she has supported her of her own labor since the mother's death in 1880, the child being of too tender years to assist in her own support.

4. That the plaintiff tried to obtain aid from others of the child's relatives, but failed in her efforts, and that the child must have died or become a charge upon the county had not the plaintiff supported her.

5. That the plaintiff is dependent upon her own labor for her support.

(130) 6. That $100 per year for the first six years, and $200 per year for the remainder of the time is a fair compensation for the expense of said child's maintenance, which, up to the institution of this action, will thus amount to $1,266, and for this amount the plaintiff claims that the defendant is justly indebted to her.

7. That the Wilmington Savings and Trust Company has been appointed by the clerk of the Superior Court of New Hanover County guardian of C. C. Walker, that said company has qualified, and is now acting as such guardian.

8. That the said company has in its hands the sum of $1,900, more or less, personal property of C. C. Walker, and that there is a large undivided portion of the estate of John Walker, deceased, of which estate C. C. Walker is an heir and devisee, and that his portion of said undivided estate will be $4,000, more or less.

Wherefore, the plaintiff prays the judgment of the court for the sum of $1,266, the costs of this action, and for such other and further relief as the court shall think her entitled to.

The defendants demur to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action in this:

1. That it appears on the face of the complaint that there was no contract, either express or implied, upon the part of the defendants, or either of them, that the plaintiff should take upon herself the support of said

child, or that they, or either of them, would pay for the support of said child.

2. That it appears upon the face of the complaint that the plaintiff took upon herself the care and support of the said child out of pure benevolence, and solely at the request of its mother, and in fulfillment of a promise made to her by the plaintiff.

The court overruled the demurrer, with leave to the defendants to answer, and they, having excepted, appealed to this Court.

P. B. Manning for plaintiff. (131)
E. S. Martin and Junius Davis for defendants.

MERRIMON, C. J. We think the court should have sustained the demurrer, upon the general ground that the complaint fails to state facts sufficient to constitute a cause of action. It is not alleged that the defendant Walker employed the plaintiff to do the service for his child for which she claims compensation, or that he promised expressly, or by implication, to pay her for the same; nor are facts alleged upon which the law implies his liability and obligation to pay therefor. It is not alleged that the father abandoned or neglected his child; that he would not, or could not, protect and provide for and support her; or that he knew of, recognized, approved of and accepted the services of the plaintiff; that he was so in default, or promised to pay for the plaintiff's services, is left to mere inference and remote implication. If it be granted that a father is legally bound to provide for, protect and support his child, it must be alleged, in a case like this, that he failed to do so, or that he promised expressly, or by clear implication, to pay for the services for which compensation is demanded. The facts stated in the fourth paragraph of the complaint are too indefinite, indirect and inconclusive to constitute or be treated as a substitute for a material part of the allegation of a cause of action. Moreover, it appears from the complaint, that at the time the services were rendered the father was insane and an inmate of the insane asylum, and, at least, *prima facie* incapable of promising to pay the plaintiff for her services.

Besides, it appears from the complaint that the plaintiff cared for and supported the child of her sister at the latter's request, made shortly before she died, as a work of benevolence and charity, for which she made no charge and expected no pecuniary compensation. She promised her sister not simply to *care for,* but to *care for and support* her child; she said nothing of compensation at the time she made the promise or at any time afterwards, until she brought this action, (132) so far as appears. She does not allege or intimate that she charged the father for her services, or that she expected compensation from him.

It seems that at first the father was poor and insane; that afterwards in some way he came to have property, and the plaintiff then, and not until then, determined to ask for the compensation she seeks to recover by this action. This she cannot do. She could not support the child from motives of charity and love for her departed sister without any intention of charging the father for the same, and afterwards, when he came to be the owner of property, compel him to pay her for her good work of love and charity. She had, in such case, no valid claim at law or in equity. *University v. McNair,* 37 N. C., 605; *Hedrick v. Wagoner,* 53 N. C., 360; *Miller v. Lash,* 85 N. C., 54; *Young v. Herman,* 97 N. C., 280.

The order overruling the demurrer must be reversed, and the case disposed of according to law.

Error.

AVERY, J., dissented.

H. W. HUMPHREY ET AL. v. BOARD OF TRUSTEES OF FRONT STREET METHODIST EPISCOPAL CHURCH, SOUTH.

Cemeteries—Police Regulation—Municipal Corporations and Ordinances.

1. The right acquired by any person, under a deed or contract, to bury dead bodies in any particular spot, or to erect and maintain vaults for that purpose, whether construed as an easement or license, is subject to the police power of the government, in the exercise of which, not only future interments may be prohibited, but the remains of persons theretofore buried may be removed.
2. This power of police regulation may be delegated by the Legislature to municipal corporations, and enforced by appropriate ordinances.

(133) ACTION, tried at Spring Term, 1890, of NEW HANOVER, before *Graves, J.,* for damages for removal of remains from a burial vault.

The plaintiff proposed these issues:

1. Did ancestors of plaintiffs purchase from the defendant corporation the vault described in the pleadings?

2. Did the defendant corporation convey by deed to the ancestors of plaintiffs the property described in the pleadings?

3. How long have the plaintiffs, and those under whom the plaintiffs claim, been in the possession of said vault and the land on which it was built, and used the same as a place of interment?

4. Has such use given to the plaintiffs easement in the lands of defendant corporation over which said vault was constructed?

5. Did the defendant corporation, by its agents, enter upon and tear down said vault, against the will of the plaintiffs, and without license from the plaintiffs?

The defendant, before the issues were settled, admitted that the plaintiffs were the heirs at law of Bryan L. Koonce; that defendant was a corporation, and that by its proper officers it had executed a paper-writing which had been duly registered in 1854, whereby it acknowledged the receipt of one hundred dollars from Bryan L. Koonce and his heirs, in full payment for one vault constructed in the burying ground back of the brick church on the corner of Front and Walnut Streets in the town of Wilmington, and numbered 21, "the said Bryan L. Koonce, his heirs, administrators and assigns to have full and exclusive right to inter in said vault as long as it should be used for the purpose of interment, and have free and perpetual privilege of entering upon the church land for that purpose." (134)

The court, being of opinion that an easement was granted to Bryan L. Koonce, which descended to plaintiffs, his admitted heirs, and that there was no necessity for the first, second, third and fourth issues proposed by the plaintiffs, settled these issues:

1. Did the defendant corporation by it agents or servants wrongfully tear down and destroy said vault?

2. What amount of damages have plaintiffs sustained thereby?

And plaintiffs excepted.

The plaintiffs offered in evidence the will of Bryan L. Koonce and deed of the corporation, which defendant admitted.

There was evidence offered by plaintiffs tending to show that the corporation desired to erect a church building at some other point in the city of Wilmington, and to change the burying ground, and with that purpose agents of defendant were requested to treat with plaintiffs for the cession of their rights of property in said vault; that Bryan L. Koonce was buried in that vault; that the other vaults had been removed and the remains interred in them removed by the defendant or friends of the deceased; that the remains of Bryan L. Koonce were removed without the consent of plaintiffs, and against their will, and that the vault had been torn down without their consent. The defendant admitted that the vault had been opened and the remains of the deceased Bryan L. Koonce, had been removed, but offered evidence tending to show that the vault had been opened and the remains removed with the consent of plaintiffs.

The defendants offered in evidence the act of General Assembly in relation to the town of Wilmington, 1854-55 (charter), and the ordi-

nances of the city of Wilmington (14), 11 June, 1858, and April, 1861, prohibiting interments within certain bounds, and there was testi-
(135) mony to show that the vault was inside the boundary named in the ordinances in which interments were prohibited.

The plaintiffs asked the court to instruct the jury "that if the plaintiffs removed said remains from the said vault involuntarily, the plaintiffs are entitled to recover."

This was refused, and plaintiffs excepted.

The plaintiffs asked the court to further instruct the jury that if the plaintiffs removed said remains from said vault, influenced by the promises or threats of the defendants in making such said removal, the plaintiffs are entitled to recover, and this was refused, and the plaintiffs excepted.

The court instructed the jury:

"The deed or paper-writing made by the defendants to Bryan L. Koonce and his heirs is sufficient in form, and passed by grant *an easement* to use the land described, a vault for burial, which descended to his heirs, the plaintiffs. That easement became an *inherent* right which the defendant was bound to recognize. But, although the grant was an executed contract, the right of the public is superior to the right of any private person, and where there arises a public necessity for it on account of public convenience, or to protect public health, the law allows private rights to be subjected to such restrictions as are for the common good so that if the acts read, purporting to be acts of the General Assembly, were really passed and became law, they conferred power on the proper authorities of the city of Wilmington to pass ordinances to regulate the burial of the dead in the city, and if you find that the ordinances offered in evidence have been adopted by the proper authority, and if you find that the vault described in this action was in the boundaries in which burials were prohibited, then the plaintiffs had no right to use the vault as a place of further burial, but they did have the right to continue to enjoy the easement so far as to have the bodies which had been
(136) deposited there to remain unmolested.

"The plaintiffs, then, are entitled to recover if the defendant broke down the vault or removed the remains of Bryan L. Koonce by its agents or officers wrongfully, and if the defendants removed the remains or broke down the vault and removed it without the consent of the plaintiffs, such removal of the remains or breaking down or removing the vault was wrongful, and the plaintiffs would be entitled to recover. If the remains of Bryan L. Koonce were removed with consent of plaintiffs, then such removing the remains was not wrongful, and plaintiffs could not recover for that, or if the vault was opened by plaintiffs' consent, such act was not wrongful as to defendant, and plaintiffs could not

recover for that. If defendant wrongfully removed remains in vault, your answer to first issue should be 'Yes,' but if the vault or remains were removed with plaintiff's consent, your answer should be 'No.' If you answer first issue 'No,' it is not necessary to pass on the question of owner."

The jury responded to the first issue, "No"; and to the second, "None." There was a motion for a new trial, which was overruled, and the plaintiffs appealed to the Supreme Court from the rulings and judgment, and assigned as error:

1. The verdict is against the weight of the evidence, and is contrary to the justice and equity of the cause.

2. The legal effect and consequence of the verdict of the jury would be to deprive the plaintiffs of a vested right created by deed, which can only be done by a deed from them, or by a release in writing, and this being a grant by a corporation of a freehold interest in the nature of an easement, and being made by deed, cannot be revoked, nor extinguished, nor conveyed in any other way than by a deed, or by a voluntary abandonment for such a length of time as would raise the presumption of a grant.

3. The grant of an easement for an indefinite period amounts in law to the grant of a freehold interest, and a deed is necessary (137) for creating or conferring an easement if the interest is freehold, and such interest cannot be conveyed in any way but by a deed, nor extinguished in any way but by nonuser for such a length of time as would raise the presumption of a grant.

No counsel for plaintiffs.

S. C. Weill and E. S. Martin for defendant.

CLARK, J., after stating the case, proceeded: There is no just ground for the exception to the issues. It is settled by repeated decisions of this Court that, while the issues must arise upon the pleadings, the trial judge may, in his discretion, submit either one or many, subject only to the restriction that sufficient facts shall be found to enable the court to proceed to judgment, and that neither party shall be denied the opportunity to present any view of the law arising upon the evidence through the medium of pertinent instructions. *McAdoo v. R. R.*, 105 N. C., 140; *Denmark v. R. R.*, 107 N. C., 187; *Leach v. Linde*, 108 N. C., 547.

The issues submitted were in compliance with these requirements, especially after the admissions made by the defendant. The fewer the issues, if sufficient to develop the case, the better, as a jury may be confused by a multiplicity of issues.

The two prayers for instructions were, properly, not given, as they were not applicable to any evidence sent up, nor to any issue, either those asked by plaintiffs or those submitted, and the court was not called upon to charge as to abstract propositions of law. While there was conflicting evidence whether the remains of Bryan L. Koonce were removed with the consent of the plaintiffs, there appears no evidence that the plaintiffs removed them involuntarily or induced by threats or promises. It seems from the evidence that the remains were
(138) removed by the defendant, and the finding of the jury, construed in connection with the charge, was that such removal and the incidental damage to the vault were with the consent of the plaintiffs, for the court told the jury, "if the vault or remains were removed with plaintiff's consent, to answer the first issue, 'No'; but if defendant wrongfully removed the remains to respond 'Yes' to such issue." The jury responded to the issue "No."

Whether plaintiff had an easement, or a mere license (as was held in Kincaid's Appeal, 66 Pa., 411), it is subject to the police power of the State, which by act of Assembly has authorized the ordinance of the city forbidding interments at that spot. This is an inherent power in the State, and is very generally exercised with the growth of towns, by forbidding further interments within city limits after a given date; otherwise a burial ground, which in the infancy of a town may be outside the limits, might continue a place of interment, to the nuisance of the city, after the cemetery has become the central point of population, and surrounded on all sides by dwellings and places of business. *Pres. Church v. New York,* 5 Cowen, 538; *Woodlawn v. Everett,* 118 Mass., 354; *City Council v. Church,* 5 Strob. (S. C.), 306; *Coates v. New York,* 7 Cowen, 585, Cooley Const. Lim., 595; and the legislative discretion even extends to the power to authorize the removal of bodies already interred. 5 Am. Rep., 377; *Richard v. Church,* 32 Barb., 42; *Page v. Symonds,* 63 N. H., 17; 3 Lawson Rights and Rem., sec. 1343; 3 A. & E., 53, and numerous cases there cited; though usually, as in this case, the Legislature restricts the authority conferred to the prohibition of future interments. Besides, the conveyance under which the easement is claimed only grants "the right to inter in said vault so long as it shall be used for the purpose of interment." By virtue of the burning of the church and its subsequent removal to another lot, as well as by the city ordinance forbidding interments within city limits,
(139) the lot in question has ceased to be used for interments, and if an easement was granted it has ceased, certainly as to future interments, by its own terms. There is no question arising, therefore, whether an easement could be surrendered or extinguished otherwise than by deed. The gravamen, however, of plaintiffs' action is as to the removal

of the remains of the plaintiffs' ancestor, heretofore interred. As to that, the jury has found that such removal was with the plaintiff's consent. They have, therefore, no ground of complaint in that respect.

As to the first error assigned as ground for a new trial, "that the verdict was against the weight of the evidence," that was a matter with the judge below, and not reviewable. *Whitehurst v. Pettipher,* 105 N. C., 40; *High v. Bailey,* 107 N. C., 70; *Redmond v. Stepp,* 100 N. C., 212; *McKinnon v. Morrison,* 104 N. C., 354.

No error.

Cited: Cornelius v. Brawley, post, 548; *Hopkins v. Bowers,* 111 N. C., 177; *Luttrell v. Martin,* 112 N. C., 605; *Miller v. Asheville, ib.,* 772; *Forte v. Boone,* 114 N. C., 178; *Hansley v. R. R.,* 115 N. C., 623; *Cotton Mills v. Abernethy, ib.,* 409; *Wool v. Bond,* 118 N. C., 2; *Rittenhouse v. R. R.,* 120 N. C., 546; *Patterson v. Mills,* 121 N. C., 266; *In re Herring,* 152 N. C., 259; *Houston v. Traction Co.,* 155 N. C., 9; *Gaskins v. Hancock,* 156 N. C., 58; *Highsmith v. Page,* 161 N. C., 357; *Daniels v. Distributing Co.,* 178 N. C., 16.

MARY O'CONNOR v. THOMAS O'CONNOR.

Divorce—Alimony—Husband and Wife—Pleading—Issues.

1. In an action for divorce *a mensa et thoro,* on the ground of personal violence, by the husband, rendering the life and condition of the wife intolerable and burdensome, it is essential that the plaintiff shall specifically set forth in her complaint the circumstances under which the violence was committed, what *her* conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is insufficient.
2. If the pleadings raise an issue on the conduct of the wife, at the time of the alleged violence, the defendant has a right to have that matter passed on by the jury.
3. A divorce will not be granted for cruel and barbarous treatment under The Code, sec. 1286 (3), where it appears the acts complained of were committed more than ten years before the commencement of the action, and in the meanwhile the parties had continued to reside together.
4. Nor will a divorce be granted for causes arising within six months before the commencement of the action.

ACTION for divorce *a mensa et thoro,* tried at August Term, (140) 1891, of GUILFORD, before *Winston, J.*

Twelve issues were submitted to the jury, being those tendered by defendant and adopted by the court. The issues and responses were as follows:

1. Were the plaintiff and defendant lawfully married? Answer: Yes.

2. Have plaintiff and defendant resided in this State for two years next preceding this action? Answer: Yes.

3. Did the defendant in 1878 violently choke, beat and bruise the plaintiff at the time she was pregnant? Answer: Yes.

4. Did the defendant in September, 1884, strike the plaintiff with a gun? Answer: Yes.

5. Did the defendant, about 15 October, 1889, violently throw the plaintiff against the door, hurting her head? Answer: Yes.

6. Did the defendant, on Thanksgiving day, 1890, drag plaintiff out of her chair and attempt to throw her out of the house? Answer: Yes.

7. Did the defendant call plaintiff vile and opprobrious names, accusing her of a want of chastity, in the presence of her children and strangers? Answer: Yes.

8. If defendant did call plaintiff vile and opprobrious names, accusing her of a want of chastity, did he do so under provocation by plaintiff, and in a sudden fit of anger? Answer: Yes.

9. Was the notice in the newspaper made with intent to insult plaintiff and bring her into humiliation and contempt? Answer: Yes.

10. Did defendant bring a strange woman into his house and
(141) give her the management and control of his household affairs, to the exclusion of the plaintiff? Answer: No.

11. What amount of money, if any, has plaintiff let defendant have of her separate estate, and which is not repaid? Answer: $100.

12. Does the plaintiff now reside in her husband's dwelling because she has no means to support herself elsewhere, and no home to go to, or friend to aid her? Answer: Yes.

The plaintiff, in her own behalf, testified substantially to the several acts of cruelty, violence and mistreatment on the part of the defendant, as set out in the complaint, and she further testified that each and every one of the said acts and doings of the defendant were without cause or provocation on her part.

Plaintiff also placed in evidence a copy of the *Daily Workman* containing the publication referred to in the complaint, which was identified and admitted as a newspaper published and circulated at the time as alleged.

The defendant testified in his own behalf, and denied specifically each one of the several allegations of cruelty, violence and mistreatment alleged in the complaint, and testified to by plaintiff, except he admitted that he did charge plaintiff with a want of chastity, but that he did this

in the heat of passion, and at a time when plaintiff had crossed and provoked him. He also admitted publishing plaintiff in the *Daily Workman,* but said that he apprehended that plaintiff would make bills, or get money, as she had declared her purpose (as witness stated) to do this, and leave and go back North to her former home.

Five of the children of plaintiff and defendant, three males and two females, all grown, and all residing with the defendant, were introduced by defendant as witnesses in his behalf, and each gave testimony tending to corroborate defendant.

After verdict, the plaintiff, by leave of the court, amended the complaint by inserting in Article 4, before each of the several al- (142) legations of cruelty, violence and mistreatment, the words "without cause or provocation on her part."

Defendant excepted to these amendments.

Both parties then moved for judgment; the plaintiff for a decree of separation and alimony; the defendant for judgment in his favor on the complaint, and findings of the jury.

Judgment was entered for plaintiff. From the refusal of the court to grant his motion, the defendant appealed.

Dillard & King and J. T. Morehead (by brief) for plaintiff.
J. E. Boyd and R. M. Douglas (by brief) for defendant.

AVERY, J., after stating the case, proceeded: It is true, as insisted by counsel in the brief, that a husband who brings his action for divorce from the bonds of matrimony is not required to "purge his conscience" by negativing, in his complaint, the possibility of unfaithfulness on his part. *Edwards v. Edwards,* 61 N. C., 544; *Steel v. Steel,* 104 N. C., 631. But when the wife demands only a divorce *a mensa et thoro,* on the ground that the husband, by personal violence, has made her life intolerable and her condition burdensome, she must state specifically in her complaint, what, if anything, was said or done by her just before or at the time her husband struck her, or threatened her, or charged her with inconsistency; or she must, in some way, negative, by explicitly setting forth what her conduct was, the idea that any act or word on her part was calculated to arouse sudden passion on the part of the husband, or put him on the defensive. *White v. White,* 84 N. C., 340; *Joyner v. Joyner,* 59 N. C., 322; *Jackson v. Jackson,* 105 N. C., 433; *McQueen v. McQueen,* 82 N. C., 471. In the case of *White-* (143) *v. White, supra,* the complainant alleged that an assault upon her by her husband with a piece of iron about a foot and a half long, and another with a stick about two and a half long, were committed on her person without any provocation; "but," said the court, "she was

entirely silent as to the antecedent and attending circumstances and the causes which prompted the defendant thus to act. She makes no statement of her own conduct, nor of any facts in explanation of the *three violent assaults described in the complaint, separated at long intervals from each other,* so that the court can see whether there was any, and what, excuse or extenuation for such outbursts of temper in an old man, crippled and verging upon seventy years of age." In that case the jury found in response to an issue, that the defendant did "*beat,* abuse and ill-treat the plaintiff, *as alleged* in the complaint." The fact that the jury find, in responding to four separate issues, that four assaults were committed at long intervals, instead of three, does not distinguish the case at bar in principle from *White v. White, supra.* The language of the amendment (*"without cause or provocation on her part"*) made by the court, after verdict, is substantially the same as that declared in *White v. White,* insufficient to give the complainant a status in court.

In *Joyner v. Joyner, supra,* the Court held that, though the wife had been stricken by the husband with a horse-whip and corrected with a switch, it was essential that she must set forth in her petition for divorce from bed and board the circumstances under which the blows were given, what her conduct was, and especially "what she had done or said to induce such violence on the part of the husband."

The judge had the right to allow an amendment of the pleadings so as to make an allegation conform to the proof, where both parties had offered testimony bearing upon the issue raised by such allega-
(144) tion and the defense to it. But as the amendment itself was not sufficiently specific to show that the plaintiff's action was well grounded, it is not necessary to discuss the form of the issues. Where the pleadings raise an issue as to the conduct of the wife at the time of the assault, or when she was otherwise mistreated, the husband has the right to demand that the question so raised shall be passed upon by the jury through the medium of some issue submitted. *White v. White, supra.* It is intimated, rather than suggested, that the assault made in 1878, on account of the wife's condition amounted to such cruel and barbarous treatment as to endanger her life, and that therefore the plaintiff may rightfully insist that she has brought the case within the meaning of sub-sec. 3, sec. 1286. To this we answer, first, that it is not found by the jury that her life was endangered, and the judgment cannot be predicated upon that view in the absence of such a finding; second, that she had lived with her husband for ten years after that assault and before this action was brought. The court will not allow a separation for an offense so long ago condoned.

The publication in the newspaper and the assault on Thanksgiving day were both causes of complaint that arose within six months before

the issuing of the summons, which was the commencement of the action. Neither can be considered as grounds for granting the relief prayed for in this action. *Jackson v. Jackson, supra.* "The courts have held parties seeking divorce to strict proof, not only in conformity to a fair construction of the statutes relating to the subject, but in accordance with the dictates of public policy."

We think there was error in the refusal to grant the defendant's motion; but, as the amendment allowed by the court is not sufficient to give the plaintiff a status in court, a new trial will be awarded, and an opportunity extended to plaintiff to make the allegations more specific. *Porter v. R. R.*, 97 N. C., 66.

New trial.

Cited: Ladd v. Ladd, 121 N. C., 121; *Martin v. Martin,* 130 N. C., 28; *Green v. Green,* 131 N. C., 535; *Dowdy v. Dowdy,* 154 N. C., 558, 559; *Sanders v. Sanders,* 157 N. C., 233; *Alexander v. Alexander,* 165 N. C., 46; *Garsed v. Garsed,* 170 N. C., 673.

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(145)

G. T. GLASSCOCK v. G. M. HAZELL.

Contract, Express or Implied—Money Had and Received—Pleading.

Plaintiff shipped to the owner of a mill machinery under an agreement that if, after sixty days trial, it proved satisfactory, the miller would purchase it at a price stipulated, and if not satisfactory, to be at shipper's order. The machinery was not tested within the time, but was put into the mill, which was subsequently purchased by defendant without notice of the agreement, who sold it to other parties. Prior to the conversion the plaintiff demanded it, or its value, and testified that defendant promised to pay such value, which was denied by defendant: *Held,* (1) In the absence of proof of the amount received by defendant from sale of the machinery, the plaintiff could not recover upon an implied contract for money had and received; (2) but as there was some evidence of an express promise to pay the value of the machinery, that issue should have been submitted to the jury, and it was error to charge that plaintiff could not recover.

APPEAL from a justice's court, tried at the December Term, 1889, of GUILFORD, *Graves, J.*, presiding.

The plaintiff testified in his own behalf: "I shipped to Holden & Hill, in Orange County, a twenty-five inch turbine water-wheel on trial. They said they did not have an opportunity to test it, and did not buy

it. The agreement was, if they desired to purchase the wheel after testing it, they were to pay fifty dollars cash and secure the balance. The price of the wheel was two hundred dollars, and it was worth two hundred dollars. Mr. Hazell, the defendant, told me he had the wheel; that he had bought the mill and claimed the wheel. I told him I owned the wheel. He said all he wanted was his money, and he wanted me to help him sell. He said he had thirteen hundred dollars in it; I told him I thought the property was worth fifteen hundred dollars,
(146) and that would pay us both. I made efforts to sell, he having asked me to help him sell it. After I heard he had sold, I went to see him, and told him I wanted my money; he said if it was my wheel he would have to pay for it.

"The time first given was sixty days; then they asked thirty days longer, as they had not tested it. I did not make any personal demand, but wrote them I wish they would remit the cash payment and give mortgage for the balance, as I supposed the wheel proved satisfactory. They were to try the wheel sixty days, and then they could buy it. I could remove it at the end of ninety days. They were not to return it, but it was to remain subject to my order. I told Hazell the wheel was mine after the sale. Said he had bought once; said he had bought the mill, and considered he bought the wheel with the mill."

In answer to the question, "Why did you let the wheel remain?" they said they had not tested it.

Gerringer, a witness for the plaintiff, testified: "I bought the property from Hazell; I had made one payment, when I told Hazell I did not wish to buy any lawsuit. He said a man in Greensboro—Glasscock—claimed the wheel, but he would sell it. It had been used very little when I got it. Hazell said he bought it at a mortgage sale. He sold to me for $1,800. He said he would sell me the mill and wheel, and if there was any paying to be done, he would pay Glasscock."

The defendant, on his own behalf, testified: "I bought under mortgage. I did not have any notice that Glasscock had any claim on the wheel. The wheel was in. I never promised to pay Glasscock for the wheel. I always told him I bought the wheel with the mill. I told him I would like it if he would help me sell; that I wanted my money. I had no notice at sale. Did not know of Glasscock's claim until six months after."

(147) The sawmill and all was sold under the decree of foreclosure.

At the conclusion of the argument of counsel, his Honor instructed the jury: "The plaintiff, having failed to show the price obtained for the wheel by the defendant, cannot recover and your verdict should be for the defendant." To which plaintiff excepted. There was a verdict and judgment for defendant, and plaintiff appealed.

J. T. Morehead (by brief) for plaintiff.
Dillard & King and J. E. Boyd (by briefs) for defendant.

SHEPHERD, J. As the plaintiff does not sue for the specific property, and as the amount claimed by him is over fifty dollars, he can only recover before a justice of the peace upon a contract either express or implied.

We concur with his Honor that the plaintiff could not recover upon the implied contract—that is, for money had and received—as there was no testimony to show the amount obtained for the wheel by the defendant. *Rand v. Nesmith,* 61 Mo., 111; *Pearsall v. Chafin,* 44 Pa. St., 9.

We think, however, that there was some testimony of an express agreement to pay for the wheel if it was the property of the plaintiff, and neither this testimony nor that bearing upon the title of the plaintiff was submitted to the jury. The court seems to have treated the action as if brought for money had and received—the tort being waived—but we are of the opinion that the informal complaint filed before the justice was broad enough to have warranted a recovery upon an express promise.

The authorities cited by the defendant do not satisfy us that the plaintiff was precluded from asserting title to the property. The plaintiff testified that Hill & Holden did not buy the wheel, but that it was delivered to them upon the understanding that they might purchase after testing it, upon paying fifty dollars cash and securing the balance. These terms do not seem to have been complied with, (148) and we do not see under these circumstances, how the title passed out of the plaintiff. If the jury, however, should believe that it was a conditional sale (and of this there was some evidence), then the plaintiff must fail in this action, as there was no registration, and the condition would be void as to purchasers. *Brem v. Lockhart,* 93 N. C., 191; Code, sec. 1275.

Error.

Cited: Blalock v. Strain, 122 N. C., 287.

J. G. MILLER ET AL. v. Z. GROOME.

Reference—Exceptions.

In a reference under The Code, it is the duty of the trial court to review and pass upon all the exceptions to the report of the referee, whether to the conclusions of law or findings of fact, and set aside, modify, or confirm them according to his judgment; his conclusions upon the exceptions to matters of law are reviewable, but those upon the facts are not.

ACTION, heard upon exceptions to the report of a referee at February Term, 1891, of GUILFORD, before *Boykin, J.*

The referee gave judgment for defendant, and plaintiff filed exceptions to his report. Upon the call of the case, the pleadings, report, order of reference and exceptions were read, when his Honor asked if the law laid down by the referee was conceded to be correct on the facts found, and the plaintiff answered "Yes." His Honor further asked if the testimony upon which the findings of fact were made was conflicting and contradictory, and being answered by the plaintiff
(149) that it was, he declined to hear testimony, overruled the exceptions, and the plaintiff appealed from the judgment rendered, assigning as error that his Honor did not hear the testimony and pass upon the same, and that he overruled the exceptions.

J. T. Morehead for plaintiffs.
Dillard & King (by brief) and J. E. Boyd for defendant.

DAVIS, J. This was a reference under The Code, and the referee, as was his duty, reported the facts found and his conclusions of law separately, and he also reported the evidence upon which he found the facts, and, as a matter of right, either party could file exceptions, appeal and have the report reviewed by the judge of the Superior Court, whose duty it is to consider the exceptions and set aside, modify or confirm the report, according to his judgment, and his ruling upon the findings of fact is conclusive upon this Court, but his ruling upon questions of law are subject to review here. *Commissioners v. Magnin,* 85 N. C., 114, and cases cited; *McNeill v. Hodges,* 105 N. C., 52. The plaintiff filed exceptions to the referee's report, both as to findings of fact and conclusions of law. One of the exceptions was to the competency of testimony, which, if overruled, would be the subject of review in this Court. It was clearly the right of the appellant to have the report of the referee reviewed by the judge. Code, sec. 423. It was perfectly competent, upon review, if he so thought, to adopt the findings of fact and conclusions of law of the referee, and then they would become the findings and conclusions of the court; but it was error in his Honor to summarily dispose of the exceptions by overruling them and confirming the report, without reviewing and passing upon them judicially.

Error.

Cited: In re Fowler, 156 N. C., 347; *Overman v. Lanier,* 156 N. C., 538, 539; *Dumas v. Morrison,* 175 N. C., 434; *Caldwell v. Robinson,* 179 N. C., 522.

(150)

STATE EX. REL. LAURA M. RICE v. B. H. HEARN ET AL.

Principal and Surety—Assignee—Judgment—Payment—Trustee.

1. The assignee of a judgment takes it subject to all the equities between the parties thereto, whether he had notice of them or not.
2. A surety who pays the amount recovered against him and his principal or cosureties may have the judgment assigned to another in trust for his use, and it will continue in force for his benefit; and he may, upon motion in the cause, have satisfaction of the judgment entered, even against the consent of the assignee.

MOTION, heard before *Whitaker, J.*, at March Term, 1891, of PITT.

The motion was made in behalf of William Whitehead, a defendant in a judgment rendered at June Term, 1886, of Pitt Superior Court, for the sum of $232.62, with interest from 1 November, 1881, and for costs in the action above entitled.

The court found the following facts:

1. That at June Term, 1886, the plaintiffs recovered judgment against the defendants on the official bond of Henry Sheppard, former clerk of the Superior Court of Pitt County, for $232.62, with interest from 1 November, 1881, which judgment was duly docketed in said county.

2. That upon 2 January, 1889, the defendants, William Whitehead and W. M. King, paid the said judgment in full, including the costs, King paying $50 and Whitehead the balance.

3. That in order to more easily obtain contributions from their cosureties, the principal being insolvent, and for no other purpose, the said Whitehead caused the said judgment to be transferred, on 2 January, 1889, on the docket to S. A. Reddin, who was the nephew of the said Whitehead and was then insolvent; that he paid no (151) money for the transfer of said judgment, or any other valuable consideration, and that he held said judgment as the trustee of and for the benefit of said Whitehead and King, though it does not so appear from the transfer itself.

4. That on 11 March, 1891, the said Reddin transferred and assigned, on the docket, the judgment to Oscar Hooker, and that the transfer purported to be for value.

. . . . . .

Upon the facts so found, it is considered and adjudged by the court that the said judgment has been fully paid and satisfied, and it is ordered that satisfaction thereof be entered of record, and the clerk of this Court is directed to write upon the judgment docket, after the record of said judgment, the words, "Satisfied and paid in full." From which Hooker appealed to this Court.

T. F. Davidson (Jarvis & Blow filed a brief) for appellee.
C. M. Bernard for appellant.

MERRIMON, C. J. The assignment of the judgment to Reddin for the use and benefit of the appellees was a legitimate transaction, and the latter could compel him to a due observance of their equitable rights. It is very clear, as the authorities cited by the appellees' counsel abundantly show, that the appellant purchased the judgment subject to their rights and equities. *Jordan v. Black,* 6 N. C., 30; *Moody v. Sitton,* 37 N. C., 382; *Bank v. Bynum,* 84 N. C., 24; *Havens v. Potts,* 86 N. C., 31; Freeman on Judgments, sec. 427; Black on Judgments, secs. 953, 956. See *Sherwood v. Collier,* 14 N. C., 380; *Ferebee v. Doxey,* 28 N. C., 446; *Barringer v. Boyden,* 52 N. C., 187.

The appellees did not discharge the judgment by the deposit (152) of money they made; it continued in force for their benefit.

There was, however, no valid reason why they might not ask the court to declare and treat it as satisfied and discharged, and this might be done by motion, certainly in the absence of objection as to the course of procedure.

Judgment affirmed.

Cited: Peeples v. Gray, 115 N. C., 42; *Robinson v. McDowell,* 125 N. C., 342; *Patton v. Cooper,* 132 N. C., 794; *Fowle v. McLain,* 168 N. C., 542.

GILBERT THORP v. R. V. MINOR ET AL.

Agency—Bailment—Damages—Minor—Negligence.

A horse belonging to M., a defendant, but in possession of another defendant, was lent by the latter to his clerk to drive to a picnic, with instructions to return it; the horse was brought back by a boy of eighteen or nineteen years old, who was also made a defendant (but had no guardian), who left it standing unhitched in the street, where it became frightened and ran away and damaged plaintiff's horse: *Held,* (1) that plaintiff was not entitled to recover against the minor, no guardian *ad litem* having been appointed to represent him; (2) nor against the clerk, for there was no allegation against him in the complaint; (3) nor against the owner, or the defendant who lent the horse, for that the person guilty of the negligence was not in their employment.

ACTION, tried at January Term, 1891, of GRANVILLE, *Boykin, J.,* presiding.

The defendant R. V. Minor was the owner of a horse, which he permitted to remain with the defendants Meadows & Wilkerson, when he rented his warehouse to them, and all three occasionally used the horse. On the day in question W. A. Wilkerson, who was a clerk in the employ of the firm, obtained the use of the horse by permission of Meadows (without the knowledge or authority of Minor, the owner of the horse), to drive to a picnic, and Meadows told him (153) to send the horse back if he had an opportunity to do so, which he did by the defendant Hester, a boy of eighteen or nineteen years of age, and who was not in the employ of Meadows & Wilkerson or of Minor. It was further in evidence that the defendant Hester left the horse standing in the street unhitched, under charge of no one, that the horse ran away and ran violently against plaintiff's horse in spite of his efforts to prevent it and damaged plaintiff's horse by running the buggy shaft into his shoulder, so that he died. The court intimated an opinion that plaintiff could not recover of Hester because he was a minor and no guardian *ad litem* had been appointed, nor against Meadows & Wilkerson, because there was no evidence that Hester was in their employ. The plaintiff, in deference to the intimation of the court, took a nonsuit and appealed.

R. H. Battle, S. F. Mordecai and A. W. Graham for plaintiff.
T. T. Hicks for defendant.

CLARK, J., having stated the case as above, proceeded: We concur with his Honor:

1. The plaintiff could not recover against the defendant Hester, because he was an infant and no guardian *ad litem* had been appointed.

2. Nor against the clerk, W. A. Wilkerson, for there is no allegation of any kind against him in the complaint, his name not being so much as mentioned therein. There must be *allegata* as well as *probata*.

3. Nor against Meadows & Wilkerson, as the evidence did not disclose that Hester was in their employ. The clerk (W. A. Wilkerson), as to the use of the horse, was not acting in the scope of his employment, and it was as if the horse had been loaned or hired to any one else. The mere request to the clerk to send the horse back (154) would not have made the firm responsible for the pay of the person who brought the horse back, if he charged for such services, and, of course, would not, therefore, have made them responsible for his negligence. Whether the clerk borrowed or hired the horse, it was an implied part of the hiring or borrowing that he should return the horse, and if he chose to send him back by another, such other was his servant and not the servant of the firm. If the clerk had driven the horse back himself, the firm would not have been responsible for his negligence,

nor can they be made liable because he chose to send him back by a substitute.

Nor is there any evidence to charge the owner, Minor, with negligence or liability in any respect.

Affirmed.

Cited: Reich v. Cone, 180 N. C., 268.

L. M. SCOTT, TRUSTEE, v. GEORGE D. LANE.

Husband and Wife—Homestead.

The owner of real estate, to whom no homestead has been allotted, and against whom there are existing no liens under which a homestead might be set apart preliminary to a sale, may alien his land, no matter when he acquired title, and pass the entire interest and estate therein, including the homestead right (except the inchoate right of dower of the wife, in the event she survives him), without the wife joining in the conveyance.

ACTION, to recover the possession of land, tried before *MacRae, J.,* at December Term, 1890, of GUILFORD.

The following issues were agreed on and submitted to the jury:

1. Is the plaintiff the owner and entitled to the possession of (155) the land described in the complaint?

2. Does the defendant wrongfully withhold possession of the same from the plaintiff?

3. What damage, if any, has the plaintiff sustained?

The plaintiff offered in evidence two mortgages executed by the defendant to the Mechanics Building and Loan Association of Greensboro —on the land in controversy—the first, bearing date 27 May, 1872, to secure the loan of $210; the second, bearing date 5 May, 1874, to secure a loan of $132.

The plaintiff then introduced in evidence the record of an action in the Superior Court of Guilford, begun on 17 February, 1880, by the Mechanics Building and Loan Association of Greensboro, against defendant, praying for judgment against the defendant for the amount due, and secured by said mortgages, and for the foreclosure thereof by sale; a decree made at Spring Term, 1883, of judgment in favor of the plaintiff against the defendant therein for $290.98, and interest and cost, and an order of foreclosure and sale for the satisfaction of said judgment, and the appointment of a commissioner to make such sale; a report of sale made by said commissioner on 2 July, 1883, to L. M. Scott, at the price of $300; a decree confirming said sale at a special term in July, 1884, and an order to make title to the purchaser.

The plaintiff then offered a deed from the commissioner to L. M. Scott, trustee, bearing date 4 January, 1888, which was duly registered in said county.

The defendant was then examined as a witness in his own behalf and testified that he was married in February, 1852; that he acquired the land in controversy by will of his father, Isaac Lane, at his death in October, 1869; that his wife is still living; that they live upon the land in question; that it is all the land they have, and is not worth over $1,000; and that they have no children; that he owed no other debts at the time of making the mortgages. (156)

The mortgage was executed by the defendant, George D. Lane, alone, and not by his wife.

The presiding judge instructed the jury, upon the evidence, to respond to the first issue, that "The plaintiff is the owner of an estate in fee simple in the reversion after the expiration of the homestead rights of the defendant and his wife in the land described in the complaint."

To the second issue "No."

And to the third issue, "None."

The jury returned a verdict in accordance with the instruction. Judgment was rendered for the defendant.

The plaintiff appealed to the Supreme Court from the judgment, and assigned as ground of error the refusal of the court to instruct the jury to answer first and second issues "Yes," as requested by the plaintiff, and the charge given in lieu thereof by the court, and the judgment rendered.

L. M. Scott for plaintiff.
No counsel contra.

CLARK, J. According to the defendant's testimony, he was indebted to no one else when he executed the mortgages, and there is nothing in the pleadings and evidence to indicate that the mortgaged property had theretofore been allotted as a homestead. There was no restriction, therefore, upon the owner's *jus disponendi,* and the purchaser, at the sale under the mortgage, acquired a good title as against the defendant mortgagor, subject to the contingent right of dower of the wife if she should survive him. A case exactly in point is *Hughes v. Hodges,* 102 N. C., 236; *ib.,* 262.

Upon the evidence, the court should have instructed the jury to return a verdict for the plaintiff.

Error.

Cited: Van Story v. Thornton, 112 N. C., 222; *Thomas v. Fulford,* 117 N. C., 685; *Brinkley v. Brinkley,* 128 N. C., 514; *Joyner v. Sugg,*

131 N. C., 349; *S. c.*, 132 N. C., 591; *Rodman v. Robinson*, 134 N. C., 505; *Shackleford v. Morrill*, 142 N. C., 222; *Simmons v. McCullin*, 163 N. C., 412; *Dalrymple v. Cole*, 170 N. C., 105.

(157)

J. I. MOORE v. W. H. GARNER, ADMR. OF ROBERT GARNER.

Amendment—Appeal from Justice of the Peace—Estoppel.

1. Upon an appeal in a civil action from the court of a justice of the peace to the Superior Court, the latter has power to amend the pleadings and allow new pleas or matters of defense to be set up, and its action in this respect is not, ordinarily, reviewable.
2. In an action to recover a sum alleged to be due, the defendant may set up by way of estoppel the judgment of the court, involving the same matter, rendered on a former motion for leave to issue execution on a dormant judgment.

DAVIS, J., did not sit on the hearing of this appeal.

APPEAL from a justice of the peace, tried before *Boykin, J.*, at January Term, 1891, of GRANVILLE.

The facts are stated in the opinion.

N. Y. Gulley (by brief) for plaintiff.
J. W. Graham for defendant.

MERRIMON, C. J. This action began in the court of a justice of the peace, and the pleadings there were oral. The plaintiff appealed to the Superior Court from a judgment adverse to him. In the latter court, "it did not appear what pleas were put in before the justice of the peace, and counsel could not agree as to the matter," and the court, hence, allowed "all pleas to which either party might have been entitled." The plaintiff assigned this as error.

The plaintiff had the right to appeal, and the Superior Court upon the appeal had complete jurisdiction of the action for all the purposes of "a new trial of the whole matter at the ensuing term of said court," the appeal to "be heard on the original papers." Code, secs. 875, (158) 880, 881. The action thus in the Superior Court was to be tried *de novo*, and the court had ample power to amend the pleadings, and to allow new pleas of matters of defense to be alleged, including matters of estoppel, whether such defense had been allowed in the court below or not; and the exercise of its discretion by the court, in allowing new

and additional defenses, is not, ordinarily reviewable here. *Poston v. Rose,* 87 N. C., 279; *Johnson v. Rowland,* 80 N. C., 1; *Hinton v. Deans,* 75 N. C., 18; *Thomas v. Simpson,* 80 N. C., 4; *Faison v. Johnson,* 78 N. C., 78; *Dobson v. Chambers,* 78 N. C., 334.

The plaintiff brings this action to recover from the defendant $134.14, with interest, which he alleges the intestate of the defendant realized from the sale of certain property of the plaintiff, and agreed to apply to the payment of certain judgments against the plaintiff that belonged to the intestate, which the latter failed to do. The defendant, by permission of the court, alleged as a defense, that the plaintiff's alleged claim and cause of action had been litigated and determined adversely to him in another proceeding, wherein the present defendant was the interested plaintiff, and the present plaintiff was defendant. That proceeding was a rule upon the defendant (the present plaintiff) to show why an execution should not issue to enforce the judgments above mentioned. The defendant insisted that, therefore, the plaintiff was estopped as to his alleged cause of action, and the court so decided. This decision is assigned as error.

The record is confused and not very intelligible. It was the duty of the appellant to show the alleged error if he could. If he failed because of his laches, it is his fault—not that of the court. We cannot see that there is error. It appears from the evidence, accepted as true (and the court so treated it), that the plaintiff's alleged cause of action was litigated and determined against him in the proceeding above mentioned and referred to. That it was contested and determined in an application for leave to issue an execution to enforce a judg- (159) ment, is no reason why the plaintiff should not be estopped. The whole matter embraced properly by such application became, and remains, *res adjudicata.* In disposing of the application, it was pertinent and proper for the present plaintiff to show that he had paid the judgment, and he did allege and contend that it was paid by the proceeds of the sale of his property realized by the intestate, the very money he seeks by this action to recover. In another proper proceeding between the plaintiff and the defendant, the present alleged cause of action was litigated and its merits adjudicated. The defendant clearly has the right to avail himself of the defense the court allowed him to allege and establish. *Sanderson v. Daily,* 83 N. C., 67; *Tuttle v. Harrill,* 85 N. C., 456; *Warden v. McKinnon,* 99 N. C., 251; *Temple v. Williams,* 91 N. C., 82; *McElwee v. Blackwell,* 101 N. C., 193.

Affirmed.

THE LYNCHBURG AND DURHAM RAILROAD COMPANY v. THE BOARD OF COMMISSIONERS OF PERSON COUNTY.

Constitution—Subscription in Aid of Public Works—Qualified Voters —Estoppel—Mandamus—Election—Ultra Vires.

1. It is essential to the validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships, and other municipal organizations, that the proposition shall have first had the assent of a majority of the *qualified voters* in the territory affected, to be duly ascertained by an election regularly held for that purpose.
2. Where the returns of such an election ascertained only that "a majority of the *votes cast* was in favor of subscription," and a declaration to that effect was made by the county commissioners: *Held*, that the constitutional requirement had not been observed, and a *mandamus* to compel the issue of the bonds so alleged to be authorized was properly refused.
3. The fact that after such an election the county, township, or other municipal organization in which the election was held appointed an agent, who made a subscription of stock on behalf of his principal, that the organization acted and was recognized as a stockholder in the corporation in aid of which the bonds were to be issued, and that the latter made contracts with third parties, relying upon the validity of the transaction, will not operate as an estoppel, such acts being *ultra vires*.

(160) ACTION, tried 13 April, 1891, in Roxboro, before *Boykin, J.*, at chambers.

The plaintiffs ask for a writ of *mandamus* to compel the defendants to issue six thousand dollars of bonds and deliver same to plaintiffs, on account of Mt. Tirzah Township in said county, and to accept for same sixty shares of stock in plaintiff's corporation. To entitle them to the relief asked, they allege the following facts:

That plaintiff is a corporation, having succeeded to all the rights and franchises of the once existing Roxboro Railroad Company, to which said company, under Laws 1885, ch. 342, the townships of Person County (including Mt. Tirzah), under certain conditions, were authorized to subscribe stock. The said acts provided for the holding of an election in the various townships of said county upon the question of subscription, and provided that the subscription should be authorized and made whenever a *"majority of all the votes cast"* at any such election should be for subscription. On 17 September, 1886, all the precedent conditions of said chapter having been complied with, an election was held thereunder in Mt. Tirzah Township upon the question of subscribing six thousand dollars to said company, and that the "returns thereof showed that a majority of the votes cast were in favor of sub-

scription; that the defendants canvassed said returns and declared the result in accordance therewith." Afterwards an agent, appointed by the defendants, made the said subscription; that said township has ever since then been duly represented in all the meetings of (161) the plaintiff and its predecessor the said Roxboro Railroad Company; that the plaintiff, relying in good faith upon said subscription together with other subscriptions, began the construction of its road from Lynchburg to Durham, contracting with a certain construction company to do the work, and in part payment agreeing to deliver to said construction company, when received, six thousand dollars of bonds of said township of Mt. Tirzah; that defendants in 1889 adopted a form of coupon bond for said township; that plaintiff has done all that is required to be done by it under said chapter to entitle it to the issue of said bonds, and have tendered to the defendants stock to the amount of said bonds.

The defendants refuse to issue and deliver said bonds, on account of the following facts:

That the said Laws 1885, ch. 342, authorizing a subscription upon a majority of the votes cast, is unconstitutional; that at said election there were, on the registration books, two hundred and seventeen duly qualified voters, of which number only fifty-nine voted for subscription, leaving one hundred and fifty-eight votes to be considered against subscription, wherefore the subscription is void; that the defendants have never declared that the subscription was authorized; that plaintiff has all the while known that the subscription had not been approved by a majority of the qualified voters.

That it is true a representative of the township was appointed and a form of coupon bond adopted by the defendants, but that when these things were done a director and an attorney of plaintiff and its predecessor were before the defendants in session assembled representing the plaintiff, and it was then especially understood and agreed that the said acts of the defendants should be without weight against the people of said township, who never thought their township was liable for any subscription, and that it was then understood that the validity of said subscription might be tested at any future time.

That no subscription was authorized by said election, that the (162) tax-payers of said township have never considered the subscription valid, and that the plaintiff never in good faith relied upon it, but all the while knew of its illegality, through two of its representatives, both of whom are citizens of said county, and that the defendants have done all their acts, in relation to said subscription, with the especial agreement with said director and attorney, representing both the plain-

tiff and its predecessor, the Roxboro Railroad, that said acts should be without effect against said township.

His Honor was of the opinion that the validity of the said election could not now be contested, and that the defendants could not avail themselves of the matters of defense set up in the answer, and gave judgment that the writ of *mandamus* issue as prayed.

From this judgment defendants appealed.

W. A. Guthrie for plaintiff.
W. W. Kitchin for defendants.

CLARK, J. It has been settled in this State, by numerous decisions, that a majority of the qualified or registered voters, and not merely of those voting, is necessary to enable a municipal corporation to loan its credit or contract a debt, under the provisions of Article VII, section 7 of Constitution; *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown,* 96 N. C., 127; *Markham v. Manning,* 96 N. C., 132; *McDowell v. Construction Co.,* 96 N. C., 81; *Riggsbee v. Durham,* 99 N. C., 341.

The plaintiff, who applies for a *mandamus* to compel the county commissioners to issue bonds for Mount Tirzah Township, does not allege an adjudication of declaration by the county commissioners, on a canvass of the returns, that the subscription had been carried by a (163) majority of the qualified voters of said township. Nor does it aver that, in fact, it was so carried. The complaint alleges that "the returns showed that a *majority of the votes cast* were in favor of subscription," and a declaration of the result to that effect by the commissioners on a canvass of the vote, and a copy of such, is set out. The basis of authority to issue the bonds, the vote of a majority of the qualified voters, is wanting and the *mandamus* must be denied.

Had the plaintiff averred that, though not so declared by the canvassing board, a majority of the qualified voters of said township, in fact, voted in favor of subscription, the proceedings, if brought to impeach the decision of the canvassing board, would be too late, the election having been held 7 August, 1886, and this action not instituted till 31 December, 1890. *Jones v. Commissioners,* 107 N. C., 248. In fact, however, the proceeding is not to impeach the declaration of the result as declared, and it is alleged in the answer, and it was not controverted in the argument, that a majority of the qualified voters of said township did not vote in favor of the subscription. The plaintiff, however, claims that the defendants are estopped by the fact that they appointed an agent to subscribe the amount of the subscription on behalf of said township, who did so subscribe for it on behalf of the township on the books of the plaintiff company, and that said township has been repre-

sented in the meetings of the stockholders of the company by an agent appointed by the justices of the peace of the township, who has voted in such meetings, and that the plaintiff has made contracts relying upon the validity of such subscription. These allegations are denied in the answer, and it is alleged that the plaintiff well knew that such election did not authorize the issuance of the bonds, and this before making the contracts referred to. The judge found the facts on this contention as claimed by the plaintiff. The only authority that can fasten upon the township the obligation to pay a subscription, is the duly ascertained vote of a majority of its qualified voters. Without (164) it any action of the county commissioners or township justices, appointing agents to subscribe for and to represent or vote for said township in the stockholders' meetings of the plaintiff company, was a nullity and *ultra vires*. The life-giving power required by the Constitution, the due expression of the popular will at the ballot-box, being lacking, if the commissioners had gone still further and actually issued the bonds, they would have been invalid even in the hands of innocent purchasers. *Duke v. Brown,* 96 N. C., 127.

Jones v. Commissioners, 107 N. C., 248, differs from this case. There the townships named voted the same day as those in this case, but as to them the county commissioners, on a canvass of the vote, declared that a majority of the qualified voters, duly registered, had voted in favor of the subscription. Afterwards the bonds were issued and taxes levied to pay the interest. After the lapse of more than three years, the plaintiff, there a taxpayer, sought to impeach the result, alleging, among other things, that a majority of the qualified voters had not, in fact, voted in favor of such subscription. The court, while adhering to the precedents that such proceedings were admissible, if made in reasonable time, held that the delay was unreasonable and that the proceeding was barred.

It is unnecessary to consider the exception that the summons was returnable at chambers and not to term. The complaint fails to state a cause of action.

Action dismissed.

Cited: Claybrook v. Comrs., 114 N. C., 461; *Glenn v. Wray,* 126 N. C., 734; *Hood v. Sutton,* 175 N. C., 101.

(165)

ELLEN DICKENS ET AL. v. J. A. LONG ET AL.

Homestead—Sale, Judicial and Execution—Evidence, Burden of Proof —Pleading—Estoppel.

1. One who seeks to avoid a *prima facie* title to land under execution or judicial sale, upon the ground that such land was exempt from sale under the laws providing homesteads, must allege in his pleadings specifically the facts upon which the right to the homestead depends; and the burden is also upon him to establish such facts.

2. In an action to recover land, the plaintiffs claimed by descent from their father, and the defendants set up title under a judicial sale in a special proceeding to make assets to pay the father's debts, and it appeared on the trial that one of the heirs at law had not been made party to the proceedings: *Held*, that while the other heirs, who had been made parties, could not, in the action to recover land, collaterally attack the validity of the decree and sale under the special proceedings, and were estopped thereby, the heir who had not been made party should be permitted to prosecute the suit for his undivided share.

ACTION, tried at April Term, 1891, of PERSON, before *Boykin, J.*

The plaintiffs brought this action in the Superior Court in term to set aside a sale of the land in controversy, made by virtue of a decree rendered in March, 1883, in a special proceeding instituted before the clerk by the administrator of their deceased father for the purpose of selling land to pay debts, and also to recover the possession of the land from those holding by *mesne* conveyances under the purchaser at the said administrator's sale.

After setting forth that the sale was made, that one Sallie Barnett became the purchaser for the sum of $203, and that it was confirmed by the court, the cause of action is stated in the complaint, as follows:

7. That the said order of sale was and is irregular, illegal, un-
(166) just, a fraud upon the plaintiff's rights and void, and the acts done thereunder are illegal and void, because:

(1) Isabella Edwards, a child and heir of said Mangum, and a plaintiff herein, and her husband, were not parties in and to said special proceeding.

(2) The defendants in said special proceeding, who were then under the age of fourteen years, to wit, said Lucy and Susan, were not summoned as required by law (Code, sec. 217), which fact appears from the indorsement on the summons therein, it being as follows: "Received 22 February, 1883. Served on all the defendants, including J. S. Merritt, guardian *ad litem*, by reading the summons to each of them. This 3 March, 1883. Fee $7.20. C. G. Mitchell, sheriff Person County."

(3) The guardian *ad litem* for the infants in said special proceeding, said Vinie, Lucy and Susan, whose answer was filed on 12 March, 1883, as appears from same, was, at the time of said filing, and at the time of said order and sale, representing interests adverse to his said wards, infants, which fact appears from the papers and accounts, now filed in the clerk's office, in the administration of said Mangum's estate, one of which accounts, for the sum of $19.48, has upon its back the following indorsement. "For value received, I transfer this account to J. S. Merritt. This 1 March, 1883. John C. Pass." The said Pass being then, and ever since then, the clerk of the Superior Court of Person County, and constituting the court herein mentioned, which said facts rendered, as plaintiffs are advised and believe, J. S. Merritt, who was appointed by the court, the said J. C. Pass, on 22 February, 1883, guardian *ad litem,* as aforesaid, incompetent to act as such guardian; all of which facts were in the knowledge of the court.

9. That the said sale of land was illegal, unjust and void, because:

(1) The aforesaid order was void, and contained no authority to sell, on account of the facts set forth in article 8 of this com- (167) plaint.

(2) The homestead was not laid off and set apart before sale under said order.

(3) The homestead in said land was sold to pay debts, when it was exempt from the payment of such debts.

10. That the said minors, Lucy and Susan, are entitled to a homestead in said land.

11. That the plaintiffs are the owners, and entitled to the possession of said land as heirs of Mangum Barnett, deceased, since, as they are informed and believe, the said sale was void as aforesaid, as being contrary to the Constitution and laws of North Carolina, and a great injustice upon their rights. . . .

13. That the defendants deny the title of the plaintiffs, who are the real owners of said land, and refuse to give possession of same to plaintiffs, who are justly entitled to it.

. . . Wherefore, the plaintiffs demand judgment against the defendants:

(1) For the recovery of the possession of said tract of land above described.

(2) For the recovery of the sum of eight hundred dollars damages for the unlawful occupation of same.

(3) For six hundred dollars for the rents and profits of same for the last three years.

(4) That the said commissioner's deed to Sally Barnett be declared void.

(5) For their costs in this action sustained, and for any other just relief.

The defendants insisted that the complaint did not state facts sufficient to constitute a cause of action, for reasons set out in their answer, to wit, that the deed referred to in the complaint from chambers (commissioner to Sallie Barnett) could not be in this cause attacked, it being the deed under which defendants claimed the land in controversy.

(168) During the argument the court intimated an opinion that the deed could not be attacked in this suit, and also an opinion that the plaintiffs did not, in their complaint, affirmatively state that the defendants in the suit of *Chambers v. Dickens* (referred to in the complaint, said defendants being part of the plaintiffs herein), were entitled to a homestead in said land, and that it was not sold for debts good against the homestead. In deference thereto, the plaintiffs submitted to a judgment of nonsuit and appealed.

W. W. Kitchin for plaintiff.

V. C. Bryant and J. W. Graham for defendant.

AVERY, J., after stating the case: Reversing the order in which the points were presented by counsel, and assuming for the present that the judgment in the special proceeding—by virtue of which Sallie Barnett bought the land in controversy, which she has since sold to several other defendants—cannot be attacked, on account of irregularities in this action brought in the Superior Court, it would only remain to determine whether, without impeaching that judgment, the plaintiffs, admitting the truth of every allegation contained in the complaint, have shown *prima facie* that they have title to the land in controversy. If the judgment be treated as valid and the sale and confirmation unimpeachable for present purposes, then the deed executed to Sallie Barnett by the commissioner would, as against the parties to that record, claiming likewise through their father (Mangum Barnett), show title in her, and unless it appeared from the complaint (if admitted to be true) that the sale was void, because it was made in violation of Article X of the Constitution, and the statutes enacted in pursuance of it in reference to homestead exemptions, the plaintiffs cannot recover. *Mobley v. Griffin,* 104 N. C., 112. The burden was upon the plaintiffs, in view of

(169) such proof, to establish their right to have had a homestead allotted in the land sold; and here the question to be determined as on demurrer to the complaint, is whether, according to their own allegations, the sale may have been, in any phase of their statement, or under any state of facts that may be fairly inferred from it to have existed at that time, made without any infringement upon the right of the

plaintiffs under the Constitution and laws to claim and have assigned to them a homestead in a portion or all of the land sold. *Mobley v. Griffin, supra; McCracken v. Adler,* 98 N. C., 400; *Wilson v. Taylor, ib.,* 275. If the debts of the intestate, to meet which the license was granted to the administrator to sell, were contracted before the homestead provision of the Constitution became operative, were taxes due the State, or were contracted for the purchase money of the land, the plaintiffs were not entitled to the homestead in the land sold under the decree against creditors holding such claims. *Long v. Walker,* 105 N. C., 90; Constitution, Art. X, sec. 2.

It has been expressly decided by this Court that where a plaintiff offers in evidence, in an action involving the title and right to the possession of land, the record of the judgment, execution, levy and sale of the land in controversy, as the property of the defendant, or of one from whom the defendant is shown to derive title, the latter cannot rebut this *prima facie* proof of title by a simple denial or by an allegation, without testimony tending to establish it, that he is entitled to the homestead in the land in dispute. *Mobley v. Griffin, supra.* Upon the same principle, if a plaintiff allege in his complaint facts which, if true, establish *prima facie* the title of the defendants as against him by a deed made in pursuance of a judgment of the court, the general allegation that such sale was void for failure to allot a homestead without averring specifically the facts upon which the right to the homestead depends, so as to exclude the possibility of the validity of the sale, consistent (170) with such statement, must be held insufficient to meet and rebut the apparent right of the plaintiff to recover. Upon a careful review of the complaint, it appears that the plaintiffs have failed, if they could truthfully have done so, to negative the possibility that the land was sold to make assets to satisfy debts created before the right to such exemptions accrued. We concur with the judge below in the view that the facts alleged by the plaintiffs are not sufficient to relieve them of the burden of showing their right to have a homestead assigned in said land, if we grant that the irregularities (if any appeared upon the face of the record of the special proceeding) would not be sufficient to destroy its efficacy as evidence of the validity of the sale under which Sallie Barnett and the other defendants, through her, claimed title.

But, recurring to the other question, which so frequently confronts us with slight variations in the facts, but no difference in the general principles applicable, we think it manifest that the judgment in the special proceeding can only be attacked directly by those who were parties to the proceeding, and that it would be collateral impeachment of it to declare that, together with the subsequent orders of confirmation, etc., it did not constitute evidence that so much of the right and

the title of Mangum Barnett as descended to those whose names appear as parties of record, has passed to Sallie Barnett. *England v. Garner,* 90 N. C., 197; *Fowler v. Poor,* 93 N. C., 466; *Ward v. Lowndes,* 96 N. C., 367; *Sumner v. Sessoms,* 94 N. C., 371; *Beard v. Hall,* 63 N. C., 39; *Simmons v. Hassell,* 68 N. C., 213; *Morris v. Gentry,* 89 N. C., 248.

But the plaintiffs allege that Isabella Edwards was a child and heir at law of Mangum Barnett, and that neither she nor her husband, Hal Edwards, were either real or nominal parties to the special proceeding, and that she is not concluded as to her rights in the land by the decree of sale. The defendants deny the allegations of fact that she is an heir at law of Mangum Barnett, and insist, by way of argument, that
(171) if she is, she cannot now claim a homestead in the land because she is more than twenty-one years of age. If Isabella Edwards is one of the heirs at law, and is not estopped by the judgment in the special proceeding from claiming title to the interest that descended to her in common with the other heirs of Mangum Barnett at his death, then she is entitled to recover possession of the land, and to be let in, to the extent of her interest as tenant in common, with the defendants who have acquired, so far as we can see in this action, the undivided interest of his other heirs at law. *Gilchrist v. Middleton,* 107 N. C., 663; *Allen v. Sallinger,* 103 N. C., 14. If the sale, under a judicial decree, purporting to authorize the administration of Mangum Barnett to sell this particular piece of land for assets, gives to the purchaser who holds the deed of the personal representative for the land sold, and those claiming under her, a title good against an heir at law, who was not a party to the proceeding, then the plaintiff Isabella cannot demand that the question whether she is or is not an heir at law be passed upon by the jury. But if she is not concluded, and the jury find that she is an heir at law, it is obvious that she is entitled, at least, to be let into possession and to have damages awarded in proportion to her interest. *Gilchrist v. Middleton, supra.*

Section 1438 of The Code provides that no order to sell the real estate of a decedent shall be granted to the personal representative until the heirs or devisees of the decedent shall have been made parties, and the statute is now substantially the same that has been in force since 1846. Revised Code, ch. 44, sec. 47; *Thompson v. Cox,* 53 N. C., 313. The law, therefore, obviously contemplates that those to whom any interest in the land has passed by descent or devise shall be made parties to any special proceeding instituted to subject such lands to pay the debts of the decedent. The general rule as to estoppel is that a decree of a court of competent jurisdiction is binding on the parties to
(172) the suit or proceeding in which it is entered, and on those who are in privity with them in all collateral actions or proceedings,

but, ordinarily, it is not conclusive as to strangers. Bigelow on Estoppel (4 Ed.), 24, 34; *Edwards v. Baker,* 99 N. C., 258; *Coble v. Clapp,* 54 N. C., 173; *Falls v. Gamble,* 66 N. C., 455; *Blackwell v. McElwee,* 94 N. C., 425; *Warden v. McKinnon,* 99 N. C., 251. A judgment is not even binding on one who is not a party at the time of its rendition to the action or proceeding in which it is entered, though he had been a party previous to that time. *Owens v. Alexander,* 78 N. C., 1. The purchaser, Mrs. Barnett, might have successfully resisted the payment of the purchase-money on the ground that Isabella Edwards, if indeed she was an heir at law of Mangum Barnett, had not been made a party and concluded by the judgment. *Edney v. Edney,* 80 N. C., 81. But now that she has paid it in full, though she and those claiming under her may possibly resort to more than one remedy to make good their loss on account of the defective title, the doctrine of maintaining the integrity of judicial decrees cannot be pushed, as against strangers to the record, to the extremity of depriving them of their property without notice or a day in court. Isabella Edwards was not even a nominal party to the special proceeding, and the judgment did not purport to authorize the sale of any interest she might have. We think that there was error in the refusal to submit to the jury issues involving the title and right of possession of Isabella Edwards. The preliminary question, whether she was an heir at law of Mangum Barnett, could have been passed upon in considering the issue as to title. It was not alleged or contended that Isabella was an infant when the decree was made in the special proceeding.

While we concur with the judge below in the general view which he seems to have taken of the law, we think that there was error in withdrawing from the jury the question whether Isabella Edwards was an heir at law of Mangum Barnett, and, as such, entitled to (173) be let in as tenant in common with the defendants.

Whether the action will be further prosecuted in her interest alone, or whether all will submit to nonsuit and await the result of a direct proceeding before moving for possession of the land, is a question addressed to the plaintiffs and their counsel.

There is error, and a new trial is awarded.

Error.

Cited: S. c., 112 N. C., 313; *Buie v. Scott, ib.,* 377; *Woody v. Johnson, ib.,* 813; *Allison v. Snider,* 118 N. C., 956; *Morrisett v. Ferebee,* 120 N. C., 9; *Marshburn v. Lashlie,* 122 N. C., 240; *Spence v. Goodwin,* 128 N. C., 276; *LeRoy v. Steamboat Co.,* 165 N. C., 114.

THOMAS D. CLEMENT, ADMR. OF AMOS GOOCH, v. WILLIAM COZART, ADMR. OF JAMES C. COZART, ET AL.

Administration—Creditor and Debtor—Fraudulent Conveyance.

1. A voluntary conveyance of property by a debtor is *ipso facto* fraudulent and void, as against preëxisting debts, unless sufficient property available for payment of such debts is retained; whether it be likewise fraudulent and void against subsequent creditors depends upon the *intent* with which it was made, and that is a question to be passed upon by the jury.
2. It is the duty of an administrator, without undue delay, to apply for license to convert the real estate of the decedent's lands into assets to pay debts, and if he fails to do so, the courts, at the instance of any creditor, will compel him to discharge this duty.

ACTION, tried on complaint and demurrer, before *Boykin, J.*, at the April Term, 1891, of GRANVILLE.

The plaintiff alleged: 1. That Amos Gooch, late of said county of Granville, died intestate in said county in March, 1885.

2. That on 16 March, 1885, plaintiff was duly appointed and qualified as administrator upon said intestate's estate.

3. That on 1 September, 1877, the defendants, Thomas I. (174) Smith and James C. Cozart and John G. Harris, for a valuable consideration, executed and delivered to plaintiff's said intestate, Amos Gooch, their bond for the payment to him of the sum of one thousand dollars.

4. That at the September Term, 1886, of the Superior Court of said county, plaintiff, as administrator as aforesaid, recovered judgment on said bond against the said Thomas I. Smith and the said James C. Cozart for $1,245, with interest on $1,000, the principal sum in said bond, at the rate of six per cent per annum from 6 February, 1886, until paid, and for his costs of action.

5. That on 15 February, 1888, said Smith, who was a son-in-law of the said James C., paid in part satisfaction of said judgment debt $468.32, that no other or further payments have been made towards the satisfaction of said debt, leaving the balance, with interest, still due and owing.

6. That by deed, absolute on its face, dated 21 November, 1871, the said James C. Cozart and his wife Jane, for the recited consideration of $2,000, conveyed to their son-in-law, the defendant David C. Lunsford, and to their son, the defendant Thomas C. Cozart, three tracts of land, all lying near the waters of Tar River in said county of Granville, to wit: (The three tracts of land are set out by metes and bounds, aggregating three hundred and seventy acres.)

7. That at the time of the execution of said deed the said James C. Cozart was greatly indebted, much beyond his ability to pay, and said

deed was executed by him and his said wife with the intent to hinder, delay and defraud the then and all subsequent creditors of said James C., and this covinous purpose of the said James C. and his said wife was well known to the said grantees and to the *cestuis que trustent* in said deed at the time of the execution thereof as aforesaid.

8. That said deed was executed by said James C. and his said wife, as plaintiffs are informed and believe, upon some secret trust for the use and benefit of the said grantors in some way unknown (175) to plaintiffs.

9. That no part of said recited consideration of $2,000 was ever paid by said grantees to said grantors, nor was it ever intended by either or any of the parties to said deed that said sum of $2,000, or any part thereof, ever should be paid, but said deed was in truth, and was intended by the parties to it to be, a voluntary conveyance.

10. That said James C. Cozart died intestate in said county of Granville in 1887.

11. That on 23 April, 1888, the defendant William W. Cozart, who was a son of the said James C. Cozart and his said wife Jane, applied to the Superior Court of said county for letters of administration upon the estate of the said James C., and in his said application he swore that the personal estate of said James C. was worth about $5, and that he, the said James C., owned no real property at the time of his death.

12. That on 24 April, 1888, the said William W. Cozart was duly and legally appointed administrator of the said James C. Cozart, and executed his bond as such administrator, with E. B. Cozart and A. S. Carrington as his sureties thereto, in the penal sum of $10, conditioned according to law for the faithful performance of his duties as administrator of the estate of the said James C.

13. That on 18 September, 1889, the said William W., as administrator aforesaid, filed in the office of the clerk of the Superior Court of said county an inventory of the personal estate of the said James C., of the value of about $350.

14. That on 16 April, 1890, the said William W., as administrator as aforesaid, filed on oath in the office of said clerk an account of the sales of the personal property belonging to the estate of the said James C., and of all receipts and disbursements on account of said estate, and that the receipts as returned by him into the office of the said clerk aggregated $351.98, and the disbursements as returned by (176) him as aforesaid aggregated $288.65, leaving a balance in his hands, as returned by him, of $63.33 only.

15. That said account of sales, as just above stated, and said disbursements, was intended by said William W. to be, and is, his final account with his said intestate's estate.

16. That the said James C., at the time of his death as aforesaid, left no money or effects or personal property of any kind whatsoever, beyond what is stated in said inventory and said account of sales of his said administrator, and that the same was insufficient to pay said James C. Cozart's debts and the costs and charges of administering his estate, and it will be necessary to sell the real property or some part thereof to pay his debts and the costs and charges of administering his estate.

17. That the said James C. Cozart died seized of the three tracts of land, aggregating three hundred and seventy-two acres, set forth and described in article six of this complaint.

18. That on 4 December, 1884, the defendants David C. Lunsford and his wife Nancy J., and the defendants Thomas G. Cozart and his wife Bettie F., for the recited consideration of $1, conveyed by deed said three tracts of land to the defendant William W. Cozart and his heirs, in trust for the use and benefit of the said James C. and his said wife Jane, for their lives, and for the life of the survivor of them, and, at the death of such survivor to be sold by the said William W., and the proceeds of such sale to be by him, the said William W., divided amongst the children or heirs at law of the said James C. Cozart.

19. That the said Thomas I. Smith is insolvent.

20. That the said James C. Cozart left him surviving the defendants to this action, who are his only heirs at law.

Wherefore, the plaintiff demands judgment against the defendants:

1. That the defendant William W. Cozart, as administrator (177) of James C. Cozart, render an account of the personal estate of his said intestate, which did come, or ought to have come to his hands to be administered by him as such administrator, and also of the debts and funeral expenses of the said James C., and also of the costs and charges of his said administration.

2. That out of said personal property said administrator pay his intestate's debts, if there be a sufficiency thereof for that purpose.

3. That if, upon the taking and stating of such account, it shall appear that there is not in the hands of said administrator a sufficiency of personal assets to pay his intestate's debts and the costs and charges of administering his estate, then and in that event said William W., as administrator as aforesaid, or as trustee as aforesaid, be ordered, adjudged and decreed to sell said lands, or as much thereof as may be necessary to pay his intestate's debts, and out of the proceeds of said sale to pay said debts.

For their costs of action.

4. For such other and further relief, etc.

In this action the defendants demur to the amended complaint, in that it does not state facts sufficient to constitute a cause of action:

1. In that it appears that the conveyance of the tracts of land, described in the complaint by James C. Cozart, was made 21 November, 1871, and the debt on which judgment was taken by the plaintiff was not contracted until 1 September, 1877; and, under section 1545 of The Code, plaintiff's intestate was not disturbed, hindered, delayed or defrauded thereby.

2. That there is no allegation that any clause of defeasance was omitted by mistake from the said deed, which, being absolute on its face, even though voluntary, conveyed all interest which James C. Cozart had in the said tracts of land to his son and son-in law upon good consideration; and no parol agreement in regard to any present (178) or future interest therein, even if the same existed, as alleged in the complaint (it not being stated that it was in writing, signed by David C. Lunsford and Thomas G. Cozart, as required by section 1554 of The Code), could be enforced after the execution of said deed by James C. Cozart, nor by his subsequent creditors, who now ask to be subrogated to his rights.

3. In that it appears, from the allegations of said complaint, that after the debt on which this action is founded was contracted, James C. Cozart had no interest in said tracts of land except that acquired by the conveyance of David C. Lunsford and Thomas G. Cozart to W. W. Cozart as trustee, and such interest expired with the life of said James C. Cozart, and there was nothing left of which he was seized at his death which his administrators could sell.

4. That the allegations of said complaint, in regard to creditors of James C. Cozart in 1871, are vague and indefinite, and should be disregarded, as their claims are long since barred, and, besides, the plaintiff shows no connection of any creditors then existing, if there were such, as alleged, with this proceeding, nor is there any allegation that any right of such creditors were assigned to the plaintiff's intestate.

5. That there is no allegation that the defendant W. W. Cozart, as administrator of James C. Cozart, has refused to bring suit to sell any land upon the request of the plaintiff, or in any way neglected to perform any duty in regard thereto. Wherefore, the defendants demand judgment that the said plaintiff has no cause of action against them upon the facts alleged, and that the said James C. Cozart had no interest at his death in the said tracts of land, which could be sold by defendant W. W. Cozart, either as administrator or trustee, and that the plaintiff had made no request for such sale prior to this action, and for these reasons that this demurrer be sustained and said action be dismissed as to all the defendants. That as there appears from

(179) said complaint to be no necessity for an account of the administration of said estate, and it is alleged that there has been a final settlement thereof, this action be also dismissed as to the administrator.

There was judgment sustaining the demurrer, and plaintiff appealed.

L. C. Edwards, J. B. Batchelor and John Devereux, Jr., for plaintiff.
John W. Graham for defendant.

DAVIS, J., after stating the case as above, proceeded: 1. The first ground of demurrer is based upon the fact, as appears in the complaint, that the debt of the plaintiff was not contracted until some time after the deed from James C. Cozart to his son-in-law was executed, and the deed could not, therefore, be embraced by the statute of frauds (Code, sec. 1545), which makes void fraudulent gifts, grants, etc., "only as against that person, his heirs, executors and assigns, whose debts, accounts, damages, penalties and forfeitures, by such fraudulent or covinous devices and practices aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded," etc., and it is insisted that a debt which had no existence when the deed was made could not be so disturbed, hindered, etc. We apprehend that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, such a deed would be void as to all persons whose claims "are, shall or might be" defrauded thereby. As to preëxisting debts such a deed would
(180) be *ipso facto* fraudulent and void. *Morgan v. McLelland,* 14 N. C., 82.

"A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor"; as against subsequent creditors, whether fraudulent or not, depends upon the *bona fides* of the transaction, and the question is one of intent, to be passed upon by the jury. *O'Daniel v. Crawford,* 15 N. C., 197, in which the subject of fraudulent conveyances is elaborately discussed in concurring opinions by *Ruffin, C. J.,* and *Gaston* and *Daniel, JJ.*

The first ground of demurrer cannot be sustained.

2. The second ground of demurrer is that there is no allegation of any clause of defeasance, and the deed being upon good consideration, the grantor had no interest in the land which could be enforced by him or his subsequent creditors. If the conveyance was made upon a fraudulent trust, of course, the court would not aid the grantor in its enforcement, but the deed was void as to creditors, and no clause of defeasance

was necessary as to them, and the second ground of demurrer cannot be sustained.

3. The third ground of demurrer cannot be sustained. The plaintiff's action rests upon the allegation that the deed of James C. Cozart to his son-in-law, Lunsford, was fraudulent and void as against creditors, and neither Lunsford nor W. W. Cozart, the trustee, acquired any title as against creditors.

4. The fourth ground of demurrer is based upon the assumption that the deed could only be fraudulent and void as against creditors existing at the time of the deed; as we have seen, this is a misapprehension, and the fourth ground of demurrer cannot be sustained.

5. It is alleged in the complaint, and the demurrer admits, that the personal property of the decedent was insufficient to pay his debts, and that a sale of his real estate was necessary for that purpose. The statute (Code, sec. 1436), makes it the duty of the administrator, without undue delay, to apply to the court for license to sell the (181) real estate, etc., and the court, at the instance of the creditor, may compel him to perform this duty. *Pelletier v. Saunders,* 67 N. C., 261. For the purposes of demurrer, it is admitted that the deed of the decedent was made with the intent to hinder, delay and defraud the then existing and subsequent creditors of the grantor, and that the defendant administrator was a party to this fraudulent transaction; that he had filed his final account, leaving debts of the decedent unpaid, without selling, or applying to the court for license to sell, the real estate of his intestate; and from the facts fully appearing in the complaint, and admitted by the demurrer, the administrator had designedly failed and neglected to perform his duty and apply to the court for license to sell the land fraudulently conveyed by the deed of the intestate, under and through which he and the other defendants are beneficiaries, and from the facts appearing in the complaint, no demand was necessary. Before the real estate of a decedent can be sold to pay debts, either upon the application of an administrator or at the instance of a creditor, under sections 1448 and 1474 of The Code, it must be made to appear that the personal estate has been exhausted, or is insufficient to pay the debts of the decedent, and this may be, and usually is, ascertained by an account. This is well settled, as will appear by reference to the present case when before this Court on a former appeal, 107 N. C., 695, and cases there cited. And the fifth ground of demurrer cannot be sustained.

There is error, and the demurrer must be overruled. Let this be certified, to the end that the defendants may answer, or not, as they may be advised.

Error.

Cited: Messick v. Fries, 128 N. C., 453.

(182)

JOSIAH TURNER v. W. W. HOLDEN.

Judgment—Proceedings Supplementary to Execution—Notice and Service Thereof—Appeal.

1. An action is not ended by the rendition of a judgment; it remains open for all motions and proceedings for its enforcement, including proceedings supplementary to execution.
2. A judgment debtor is entitled to notice, for such time as the court shall deem just, of an order requiring him to appear and answer concerning his property which is sought to be subjected to the satisfaction of any judgment against him in a proceeding supplementary to the execution.
3. Such notice may be duly served by leaving a copy thereof at the residence of the debtor with his wife, she being of suitable age and discretion.
4. An appeal, before a final determination of the matter, from an order refusing to dismiss a supplementary proceeding, upon the ground of defective service of notice, is premature.

It appears that the plaintiff had obtained his judgment against the defendant in the Superior Court of WAKE, and that the same was duly docketed; that, afterwards, on 20 April, 1891, the plaintiff began this proceeding, supplementary to the execution, and obtained from the court (the clerk) an order requiring the defendant to appear and answer concerning his property, at a time and place specified, as allowed by the statute in such cases. A copy of this order was placed in the hands of the sheriff of said county to be served upon the defendant. The sheriff made return thereof as follows:

"Received 25 April, 1891.

"Executed by delivering a copy and exhibiting the original of the within order and affidavit to Mrs. L. V. Holden, and also left a copy of order and affidavit with Mrs. L. V. Holden for W. W. Holden, 29 April, 1891, at 4 o'clock p.m.

(183) "W. M. PAGE, *Sheriff Wake County.*
"By C. M. WALTERS, *Deputy.*"

Sheriff, by leave of court, made the following amended return:

"Received 25 April, 1891.

"Executed by delivering a copy and exhibiting the original of the within order and affidavit to Mrs. L. V. Holden, and also by leaving a copy of order and affidavit with Mrs. L. V. Holden, wife of W. W. Holden, for said W. W. Holden, at his residence in the city of Raleigh, at the hour of 4 o'clock p.m., on 29 April, 1891, the said L. V. Holden

being a person of suitable age and discretion with whom to leave such papers.

"W. M. PAGE, *Sheriff*,
"Per C. M. WALTERS, *D. S.*"

The defendant contended that the copy of the order and notice was not properly and duly served upon him, and his counsel contended further that they had the right to appear for the purpose simply of a motion to dismiss the proceeding on the ground that notice had not been served. They moved that the record be so amended as to show that they appeared and only for such purpose. The court (the clerk) denied this motion, and the defendant appealed to the judge. The clerk refused to certify the record, etc., to the judge. Thereupon the defendant applied to the judge for a writ of *certiorari*, requiring the clerk to certify the record, etc., to him. The judge granted the writ, and due return thereof was made.

The court (the judge), upon consideration, made its order, whereof the following is a copy:

"This cause coming on to be heard this day before *Robert W. Winston, Judge*, the plaintiff, represented by John Devereux, Jr., and Chester Turner, and the defendant by Thos. C. Fuller and W. R. Henry, who enter a special appearance in writing, and move to dismiss upon the return of John W. Thompson, C. S. C. of Wake County, to the order to him to certify the record of his proceedings to the court, and having been heard upon the argument of counsel for both sides, the defendant's counsel state that they do not appear generally in this (184) action, but specially, in order to move to dismiss the proceedings, and insist that the same ought to be dismissed for the reason that W. W. Holden has not been properly served with process, in that this proceeding to be begun by process, the same should have been read to him in person.

"That the clerk ought to have permitted an amendment of the record, so as to show that the appearance of Messrs. Fuller and Hinsdale, on 11 May, 1891, was a special appearance, and not general."

The court, being of opinion that the notice of this supplemental proceeding had been properly served, and also that the clerk's finding and ruling that the said attorneys appeared generally on said 11 May, 1891, was final and conclusive, and that such general appearance cured any defect in serving said process or notice, if such defect ever existed, overruled the motion to dismiss. From which order and ruling the defendant took an appeal to Supreme Court.

John Devereux, Jr., and C. D. Turner for plaintiff.
J. W. Hinsdale for defendant.

MERRIMON, C. J. The court had jurisdiction of the defendant by virtue of the service of the summons, the original process and his appearance in the action. The action was not ended for all purposes when the plaintiff obtained his judgment; it remained, and remains, current for all proper purposes in the enforcement of the judgment by the ordinary execution and other appropriate means, including proceedings supplementary to the execution. The latter are not separate from and independent of the action; they are incident to and part of it; they constitute and are no more than a means allowed by the statute in the action whereby to reach the property of the defendant and enforce satisfaction of the judgment. Hence, they are not begun by (185) original process, a summons. The statute does not so provide.

It (Code, sec. 488) prescribes that the judgment creditor, "at any time after such return made (return of the ordinary execution), and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned, or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued."

Although the statute does not in terms prescribe that notice of such order shall be given, still its nature, purpose, practice and justice require that notice shall be given for such time as the court shall deem just. *Weiller v. Lawrence,* 81 N. C., 65. Such notice must be so given and served upon the party to be notified, in the way prescribed for giving and serving notices in actions. The statute (Code, sec. 597) provides that "notices shall be in writing; notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter." One of the methods provided (the same sec., par. 2) prescribes that "if (service) upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion." Service thus made is sufficient. The court has jurisdiction in cases like this of the party to the action, and it is deemed sufficient to give him notice in the way prescribed of any motion or proceeding in the action. It is the duty of parties to actions to be on the alert at all times, until the same shall be completely ended. If it should turn out that a party was prejudiced in that he did not actually get the notice, the court would, in a proper case, afford relief.

In the present case the order, so far as appears, was regularly granted and the service of notice thereof on the defendant was sufficient. The court clearly had power to allow the sheriff to amend his return, and the return, as amended, shows that the notice to the (186) defendant was served by leaving a copy of the order for him at his residence at the hour specified—that it was left with his wife. She surely was a person of "suitable age and discretion" to deliver the notice to him, her husband, and the inference is that she did so. If he did not, in fact, get the notice, then his remedy is not to move to dismiss the proceeding, but to ask for reasonable time to answer, as the law requires.

As the court had jurisdiction of the defendant, and the notice had been duly served, the motion of his counsel to be allowed to appear for the purpose of a motion to dismiss the proceeding was not pertinent, and was properly denied. No question is presented here as to the sufficiency of service of notice upon an attorney.

The court held properly that the notice had been duly served. This was sufficient; it did not need to further state, as a ground of its order, that "the clerk's finding and ruling that the said attorneys appeared generally on said 11 May, 1891, was final and conclusive," etc. The action of the clerk was not final and conclusive. In a proper case, on appeal to him, it would be the duty of the court to review the findings of fact by the clerk and correct his errors of law. He was no more than the servant of the court, and subject to its supervision in the way prescribed by the statute (Code, sec. 251, *et seq.*); *Bank v. Burns,* 107 N. C., 465. The court (the judge) did not need to grant the writ of *certiorari* to compel the clerk to state the case on appeal, as allowed by the statute (Code, sec. 254); he might have directed the clerk to do so by mere order.

The plaintiff moved to dismiss the appeal to this Court, and we are of opinion that the motion must be allowed. The order appealed from was incidental, and no more, at most, than interlocutory. To deny the defendant's motion could not seriously prejudice him or impair any substantial right he might have. The court simply decided that he had been duly served with notice, and was before it for pertinent and proper purposes. If the notice had not been prop- (187) erly served, the court would simply have directed a reasonable delay of proceedings, or that a new notice issue forthwith to be served within a day specified. *Weiller v. Lawrence, supra.* Appeals to this Court do not lie from every order in the course of an action. This has been decided in many cases, and the court has repeatedly pointed out when an appeal does and does not lie.

Appeal dismissed.

Cited: S. v. Price, 110 N. C., 601; *Hinsdale v. Underwood,* 116 N. C. 594; *Martin v. Buffaloe,* 128 N. C., 308; *Ledford v. Emerson,* 143 N. C., 538.

HERMAN R. BALTZER v. THE STATE OF NORTH CAROLINA.

Action Against the State—Jurisdiction.

The decision of this Court in the case of *Baltzer and Taaks v. The State of North Carolina,* 104 N. C., 265, in respect to the jurisdiction of the Supreme Court over actions of this character, is reaffirmed.

ORIGINAL ACTION, instituted in the Supreme Court, under Article IV, section 9 of the Constitution, to recover the amount due upon the coupons of a certain alleged bond of the State of North Carolina, purporting to have been issued in aid of the Chatham Railroad Company, under an ordinance of the Convention of North Carolina, ratified 11 March, 1868.

E. C. Smith for plaintiff.
Theo. F. Davidson, Attorney-General, for defendant.

MERRIMON, C. J. We cannot hesitate to decide that this Court has no jurisdiction of the cause of action alleged in the complaint. It plainly comes within what was said in *Horne v. State,* 84 N. C., 362,
(188) and *Baltzer v. State,* 104 N. C., 265, cases very thoroughly argued, and decided by the Court, after much earnest consideration. We are called upon to overrule those cases and proceed to consider the case upon its merits, and determine the important questions presented by the pleadings. Nothing appears from the brief of the learned counsel for the plaintiff, nor can we conceive of any adequate reason that ought to prompt us to do so. For the reasons sufficiently stated in the cases cited *supra,* the motion of the Attorney-General to dismiss the action must be allowed.

Action dismissed.

AFFIRMED on Writ of Error, 161 U. S., 246.

ROBERT KORNEGAY v. J. F. KORNEGAY.

Conditional Sale—Trial—Issues—Judgment.

1. A conditional sale of personal property is valid *inter partes*, notwithstanding it is not registered as prescribed by The Code, sec. 1275.

2. In an action to recover the possession of a horse, the defendant alleged that he had purchased it from plaintiff, who had warranted its soundness, of which warranty there had been a breach, for which he set up a counterclaim; upon issues submitted, the jury found that the plaintiff was not the owner; that the defendant owed him $45 balance of purchase money; that plaintiff warranted the soundness of the horse; that it was not sound, and the defendant was entitled to recover $22.50 damages on account thereof: *Held*, (1) that it was error in the court to disregard the finding upon the issue in respect to the ownership, and render judgment for the plaintiff thereon, such finding not being necessarily inconsistent with the others; (2) that it being uncertain, from the other issues, whether the amount awarded defendant was in excess or diminution of the amount found due on the purchase money, the verdict should be set aside and a new trial granted.

APPEAL from *Whitaker, J.*, September Term, 1891, of WAYNE.

The complaint alleges, in substance, that the plaintiff is the owner of the horse described therein and entitled to have possession thereof; that the defendant has possession of the horse and refuses to surrender the same, etc. The defendant denies the material allegations of the complaint, and alleges, that the plaintiff sold him the horse for (189) ninety-five dollars; that he paid fifty dollars of this price and gave the plaintiff his note for the balance, forty-five dollars, to be due on 1 November, 1888; that the plaintiff warranted the horse to be sound, whereas he was unsound, and he was greatly endamaged by such unsoundness; therefore he alleges his *counterclaim* for damages, etc., etc.

The reply puts in issue the allegation of the answer.

The court submitted to the jury the following issues, to which they responded as indicated at the end of each:

1. Is the plaintiff the owner of the property in controversy? No.

2. What, if anything, does the defendant owe the plaintiff? Forty-five dollars, and interest.

3. Did plaintiff represent that the mare in controversy was sound? Yes.

4. Was said representation false, and was it relied upon as a material inducement to the trade? Yes.

5. What damage, if any, is defendant entitled to recover? Twenty-two dollars and fifty cents.

On the trial the plaintiff put in evidence a note, whereof the following is a copy:

"MT. OLIVE, N. C., 18 February, 1888.

"On 1 November, 1888, I promise to pay Robert Kornegay, or order, the sum of forty-five dollars, for value received, balance due on horse, said horse to remain R. Kornegay's property until this note is paid.

"Witness my hand and seal. J. F. KORNEGAY." (Seal.)

Said note had not been registered, and the defendant objected to the introduction of the same on the ground that it had not been
(190) registered. Objection overruled and note admitted, and defendant excepted.

Upon the return of the verdict by the jury as above set out, defendant moved to set the same aside as inconsistent in the findings. Motion refused and defendant excepted. The defendant then moved for judgment, adjudging him to be the owner of the mare in controversy. The court refused to give such judgment, and defendant excepted. The defendant then asked the court to allow him costs, insisting that the question of costs was in the discretion of the court. The court stated that it was disposed to allow defendant costs if it had the power, but that it had not such power, and, thereupon, gave the judgment set out in the record, and defendant excepted. Defendant excepted to the said judgment, for that it adjudged that said mare be sold, and that she was the property of the plaintiff, and for that it awarded costs against the defendant, and appealed.

W. R. Allen for plaintiff.
W. C. Munroe for defendant.

MERRIMON, C. J., having stated the case as above, proceeded: The purpose of the statute (Code, sec. 1275), requiring all conditional sales of personal property to be reduced to writing and registered, is to protect creditors and purchasers for value. It is no part of its purpose to render such sales, whether in writing or not, invalid as between the parties to it. As between them, such sale has the same qualities and is just as effectual as it would have been, and may be proven by the like evidence as before the statute was enacted, and the parties may have the like remedies against each other. *Brem v. Lockhart,* 93 N. C., 191; *Empire Drill Co. v. Allison,* 94 N. C., 548; *Butts v. Screws,* 95 N. C., 215. This controversy is between the first parties to the conditional sale in question, and, hence, the court properly allowed the note for part of the
(191) price of the horse to be put in evidence, although it had not been registered.

The plaintiff alleged in his complaint that he had title to the horse in question. This the defendant broadly denied, and thus the first issue submitted to the jury, a very material one, was raised by the pleadings. The jury found, by their verdict, that the plaintiff was not the owner. Nevertheless, "the court being of opinion that the first of said issues is a general finding, controlled by the findings upon the other issues, and may be treated as surplusage, . . . adjudged that the plaintiff is the owner of said horse and entitled to retain the possession thereof," etc. We are unable to see upon what ground the court treated the finding of the jury upon the first issue as immaterial, or how this finding was rendered so by the other findings of the jury. The latter may have been proper, but they were not necessarily inconsistent with the first one. The plaintiff may not have been the owner of the horse, and the defendant may have owed him for the same, forty-five dollars. The plaintiff may have falsely represented to the defendant that the horse was "sound," the defendant may have relied upon such representation and been endamaged as a consequence; and yet, the plaintiff might not be the owner of the horse. There are no special findings of fact inconsistent with the general verdict. The findings may all be true, certainly they are not necessarily inconsistent. The finding in response to the first issue was very material, and if it was unwarranted by the evidence, the court should have set the verdict aside and directed a new trial. In view of the verdict, the court erred in adjudging that the plaintiff was the owner of the horse, and that the same be sold by a commissioner.

The findings of the jury, in response to the second and fifth issues, are not sufficiently intelligible; they leave the matter to which they refer too vague and uncertain to warrant a judgment based upon them. It cannot be determined with reasonable certainty whether the jury simply meant to find that the defendant owes the plaintiff (192) $45 with interest, and that the damages allowed the defendant shall be subtracted from that sum, or whether the damages so allowed shall be recovered by the defendant, and the plaintiff shall recover nothing. It may be, the jury meant to find that the defendant was endamaged $45 with interest, and, in addition $22.50. It is so contended. It is contended as earnestly otherwise. In such a state of uncertainty, the verdict must be treated as void, and a new trial directed to be had. We do not intend to be understood as condemning the practice of submitting issues for the purpose of ascertaining damages in favor of the defendant in cases where he pleads a counterclaim.

Error.

Cited: Blalock v. Strain, 122 N. C., 287; *Hardy v. Mitchell,* 156 N. C., 78; *Dry-kiln v. Ellington,* 172 N. C., 484.

W. T. SPRUILL AND WIFE v. M. T. ARRINGTON ET AL.

Landlord and Tenant—Vendor and Vendee—Lien—Costs.

A. contracted to purchase land from C., but did not pay the entire purchase-money; C. instituted an action and recovered judgment, under which the land was sold for the satisfaction of the balance due, when the plaintiff became the purchaser and entered; and thereupon A. rented from her for the remainder of the current year. Prior to the sale, A. had executed an agricultural lien to the defendant, who had notice of the action to foreclose for advances made and to be made for the year: *Held*, (1) that by virtue of the agreement to lease, the relation of A. was changed from that of vendee to that of tenant of the plaintiff, and the lien of the landlord took precedence of that of defendant for advances, notwithstanding the priority of the latter in time; (2) where a party is allowed to come in and defend an action, and the plaintiff recovers judgment, he is entitled to costs against all the defendants.

ACTION, tried before *Whitaker, J.*, at the Spring Term, 1891, of NASH.

(193) *F. A. Woodard for plaintiff.*

Batchelor & Devereux (by brief) and R. H. Battle for defendants.

DAVIS, J. In September, 1880, the defendant, M. T. Arrington, contracted to purchase of C. M. Cooke the land on which the cotton, which is the subject of this controversy, was produced. All the purchase-money was not paid, and on 28 April, 1889, the said land was sold under a judgment and decree of foreclosure in an action properly instituted for that purpose to pay the purchase-money therefor, and the *feme* plaintiff became the purchaser, and the next day rented the same to the defendant M. T. Arrington, who had previously been in possession under the contract of purchase from C. M. Cooke. It was in evidence, and not controverted, that the day after the plaintiff purchased the land, her husband went on it; it was unoccupied and no cotton had been planted.

It is admitted that the defendant Arrington rented the land from the *feme* plaintiff for the balance of the year, after 30 April, 1889 and was to pay $120 rent. On 28 January, 1889, the defendant Arrington executed an agricultural lien upon the crop to be raised on said land in the year 1889 to the defendants Boddie, Ward & Co., to secure advances, etc., and that they furnished the said Arrington supplies, etc., for agricultural purposes, amounting to $292.13 up to 18 April, 1889, and after that to 16 October, 1889, to the amount of $202.13.

There is much irrelevant matter sent up with the transcript, but the material question presented for our determination is whether the plain-

tiff landlord, who purchased the land on 28 April, 1889, and rented it to the defendant Arrington for the balance of the year, was entitled to a preferred lien on the crop produced this year to secure the rent; or are the defendants Boddie, Ward & Co., entitled to the crop under the lien executed to them by M. T. Arrington on 28 January, prior to the purchase by the plaintiff? (194)

The Code, sec. 1754, not only gives to the landlord or lessor a lien on all crops raised on the land rented, which shall "be preferred to all other liens, but the crop is vested in *possession* of the lessor" until the rents are paid and all stipulations contained in the lease or agreement are complied with, whether the land be rented by written or oral agreement, and it is provided in section 1800 that the lien in favor of those making advances on crops "shall not affect the rights of the landlords to their proper share of rents."

The lien in aid of advances is in preference to all other liens, except that of the landlord for rents. *Wooten v. Hill,* 98 N. C., 48, and cases cited and relied on by counsel for defendant.

The relation between the plaintiff and defendant M. T. Arrington was that of landlord and tenant, and not that of vendor and vendee. But it is insisted by counsel for defendants that when the lien was executed in January, 1889, Arrington was the vendee of C. M. Cooke and entitled to all the crops made upon the lands as vendee in possession and not a lessee, and if the lien upon the crop to be made was a preferred lien to them, it could not be defeated by any arrangement between the plaintiff who succeeded to the rights of the vendor and the said Arrington, in respect to his paying rent to which Boddie, Ward & Co. were in no way parties. How it might be between a mortgagor and mortgagee, or between a vendor and vendee, when there was no change in the possession, we need not consider, but the purchaser of the land, whether under a foreclosure or from the vendor or mortgagee, who takes possession and rents the land whether to the vendee or mortgagor, or to any other person, occupies the position and is entitled to the rights of a landlord, and that is the case before us. The counsel for the defendants say: "Unless possession has been taken of the premises, or a receiver has been appointed, the mortgagor is the owner as to all the world, and (195) is entitled to all the profits made." And for this he cites *Killebrew v. Hines,* 104 N. C., 182. This is true, but there is a marked difference between the case before us and that of *Killebrew v. Hines.* In that case the cotton was made by the vendees in possession, and it was not until after it was severed and baled that the vendor asserted his claim to it, and it was properly held "that if there be no entry or equitable proceeding by which the crops are sequestered, the mortgagee (vendor) has no lien upon and cannot recover them in an action

in the nature of replevin." In the case before us the purchaser, at the sale for the foreclosure, took possession of the land as she had the undoubted right to do, before the cotton was planted, and rented it to Arrington. Suppose, instead of renting it to him, she had cultivated it herself or rented it to some one else, as she had the right to do, what would have become of the claim of Boddie, Ward & Co., under their lien? Noting the distinction between the cases, we refer to the able discussion of the questions in *Killebrew v. Hines,* and the cases there cited, as settling the claim of priority in favor of the plaintiff.

But it is said that the plaintiff had no interest in the land prior to her purchase in April, and Boddie, Ward & Co. had then made considerable advances under their agricultural lien. They had notice of the decree of foreclosure, and the crop was not planted when the plaintiff purchased, nor does it appear that the advances were used in preparing the land for the crop, and even if it did they could not claim an apportionment of the crop under sections 1748 and 1749 of The Code, for Arrington would have been entitled to no such apportionment.

The lien executed by Arrington gave them no title to what did not belong to him.

There was some discussion upon the question of the sufficiency (196) of the description of the property in the lien of 28 January, 1889, to which the plaintiff objected, but he did not appeal, and that question is not before us, and is immaterial, if it were.

We can see no force in the defendant's objection to the form in which the issues were submitted. They presented clearly and fairly the questions raised by the pleadings.

The only remaining objection is to the judgment, because it taxes the costs against the defendant, whereas Boddie, Ward & Co. ought to have been charged with the costs that accrued after they intervened.

The defendants Boddie, Ward & Co. intervened and filed a joint answer with their codefendant M. T. Arrington, and they made a joint defense, and the judgment is for the plaintiff against all the defendants for the recovery and for costs. The plaintiff is entitled to the costs. Code, sec. 525 (2). Having joined in the controversy, and made common cause in the defense, the intervenors must abide the result.

No error.

Cited: Carr v. Dail, 114 N. C., 288.

H. L. FINLAYSON v. THE AMERICAN ACCIDENT COMPANY OF LOUISVILLE, KENTUCKY.

Excusable Neglect—Vacating Judgment—Appeal.

1. The findings of fact by a justice of the peace, upon a motion to vacate a judgment for excusable neglect, are reviewable on appeal by the Superior Court, but the findings of fact by the Superior Court upon such motion and appeal are not reviewable by the Supreme Court.
2. Where the local agent of an incorporated company appeared on the return day of a summons, before a justice of the peace, and procured a continuance for ten days, within which time it had an opportunity to employ counsel to represent it, but it neglected to do so until the day of the trial, when, because of delay in the mail, the counsel was not able to appear until after the trial: *Held*, to be inexcusable neglect.
3. Upon a motion to vacate a judgment rendered by a justice of the peace there was judgment denying the motion, and an appeal was taken to the Superior Court: *Held*, in the absence of any evidence of notice of appeal, within ten days from the original judgment, it would be presumed the appeal was from the judgment refusing the motion to vacate, and not from the judgment upon the merits of the action.

ACTION, heard on motion before *Whitaker, J.*, at the Septem- (197) ber Term, 1891, of WAYNE.

The action was commenced before a justice of the peace, and on 29 December, 1890, a judgment was rendered in favor of the plaintiff, after hearing the plaintiff's evidence, the defendant being absent and not represented by counsel. Within ten days after the rendition of said judgment the defendant filed its petition to rehear said action under section 845 of The Code. The justice heard all the affidavits offered on that point, and found that the failure of the defendant to appear and answer was not due to the "sickness, excusable mistake or neglect of the defendant," and thereupon declined to reopen the case. From the refusal to reopen said case the defendant appealed to the Superior Court.

In the Superior Court the defendant asked the court to review the ruling of the justice of the peace upon the petition to rehear and remand the case to the justice that the defendant may be allowed to plead.

The court reviewed the ruling of the justice of the peace, and, upon hearing the affidavits, found, as a fact, that the summons in this action was made returnable on the 19th of December, 1890, and was served upon the defendant on said day; that on that day, at the request of the defendant, the trial was continued to 29 December, 1890, at 3 o'clock p.m.; that Drewry & Kenny, general agents for defendant (198) company, employed an attorney at law residing and having his office in the city of Raleigh, to represent the defendant in this action, and

that immediately upon said employment he wrote a letter to attorneys at law in Goldsboro, N. C., to represent the defendant at said trial, which letter was received by them on 29 December, 1890, at 3:30 p.m.; that within about an hour after receiving said letter the said attorneys called at the office of the plaintiff's attorneys for the purpose of inquiring as to the status of said action and putting in the pleas of defendant company, but they were absent, and at 9 o'clock that night they were informed that the action had been tried at 3 o'clock p.m. of that day; that on 26 December, 1890, Mr. J. B. Kenny, of the firm of Drewry & Kenny, remarked to the plaintiff, H. L. Finlayson, that this action was to be tried on the Monday following, and Finlayson replied in the affirmative; Kenny then asked the plaintiff as to who were good lawyers in Goldsboro; the plaintiff gave him the names of two law firms in said town and offered to take a letter to such counsel as said Kenny might see proper to employ to represent said company, and that said Kenny said he would write by mail; that about a week prior to the employment of the attorney in Raleigh said Drewry talked to him about this case, but did not employ him; that the mail train from Raleigh on 29 December, 1890, was a little late.

The court being of the opinion that the absence of the defendant at the trial on 29 December, 1890, was not caused by the sickness, excusable mistake, or neglect of said defendant, declined the motion of the defendant, to which defendant excepts.

The defendant then asked the court to permit it to plead in this action, which motion was refused, and the defendant excepted.

The defendant specially excepted because the court declined to
(199) find, as a fact, that said Drewry understood that he had retained and employed Colonel Hinsdale to represent the defendant in this action in the latter part of December, 1890, when he first talked to him about the matter.

W. C. Munroe for plaintiff.
W. R. Allen for defendant.

CLARK, J. The defendant, who was not present at the trial before the justice of the peace "in person or by attorney," moved, within ten days, to set aside the judgment for excusable neglect under section 845 of The Code. The justice found, as a fact, there was no excusable neglect or mistake on the part of the defendant, who thereupon excepted and appealed. In the Superior Court the judge found the facts as sent up in the case on appeal, and affirmed the ruling of the justice.

The findings of fact by the justice are reviewable by the judge of the Superior Court on appeal, while findings of fact by the judge (ex-

cept in injunctions and in similar cases) are not subject to review by this Court. The reason for the distinction is pointed out in *Deaton's case,* 105 N. C., 59. We are, therefore, bound by his Honor's findings of fact, and can only consider whether in law they constitute excusable neglect. *Clegg v. Soapstone Co.,* 66 N. C., 391; *Powell v. Weith,* 66 N. C., 423; *Jones v. Swepson,* 79 N. C., 510.

In this case it was found, as a fact, that on the return day of the summons the defendant's local agent appeared and procured a continuance for ten days, but, notwithstanding, it did not employ counsel till so late that though he "immediately wrote to local counsel in Goldsboro" (where the cause was tried), the letter was received a half hour after the time set for the trial. This was inexcusable neglect. Nor is there any force in the objection that the judge declined to find that the general agents of the defendant company *understood* that they had retained said counsel a week previously, for, even if it be admissible (200) for such an excuse to be set up, they certainly knew of the misunderstanding when they had the second interview with their counsel, and it was negligence not then to telegraph, which would have secured local counsel in ample time, instead of trusting to the slower movements of the mail. Then, too, the local agent in Goldsboro, who appeared on the return day and procured the continuance, when he found his company unrepresented at the trial, should have employed counsel, or, at least, have asked a short delay to telegraph the general agents. Besides, take it most strongly for the defendant that the agents in Raleigh not only understood they had, but actually had, employed counsel in Raleigh a week before, as he was not to appear in the case himself, but merely to employ local counsel in Goldsboro, the scope of his employment *pro hac vice* was not professional, but that of a mere agent, being a duty which they could have performed themselves, and his negligence was the negligence of the company (*Churchill v. Ins. Co.,* 92 N. C., 485; *Griffin v. Nelson,* 106 N. C., 235; *Boing v. R. R.,* 88 N. C., 62), and would not excuse. In fact, however, the judge does find that, subsequent to the alleged first interview with counsel in Raleigh, and three days before the trial, one of defendant's general agents saw the plaintiff, mentioned the date set for the trial, and stated that they themselves would write to counsel in Goldsboro to represent the defendant. Litigation is a serious matter. When a party has a case in court the best thing he can do is to attend to it. The very perfunctory attention which was given by the defendant, or its agents, in the present case is not of such a nature as to call for the interposition of a court.

The point is also suggested that the defendant appealed from the judgment on the merits, as well as from the judgment refusing the motion to set aside the judgment. But, if so, it should be made

(201) to appear that the appeal was taken within the ten days after such judgment was rendered. *Spaugh v. Boner,* 85 N. C., 208; Code, sec. 876. The record does not disclose such fact, but merely that the motion to set aside the judgment was refused and an appeal taken, presumably from the judgment refusing the motion. If, in fact, the appeal was from the judgment on the merits, the appellant should have applied to the justice of the peace to have it so stated, or have served his notice of appeal stating it, and within the time prescribed by law, and the burden was on him to show this. On the contrary, it appears from "the case on appeal" that the appeal was treated in the Superior Court solely as an appeal from the refusal of the motion to set aside, and it recites the judgment before the justice, the motion to set it aside and reopen the case, its refusal, and that "from the refusal to reopen said case the defendant appealed to the Superior Court." Had there been an appeal within ten days on the merits, the trial in the Superior Court would have been *de novo,* and there would have been no point in the contest whether the justice should have set aside the judgment.

While in case of a disagreement between the record proper and the "case on appeal," the former governs (*S. v. Keeter,* 80 N. C., 472; *Adrian v. Shaw,* 84 N. C., 832), there is, as we have said, nothing in the record to show clearly that there was an appeal from the judgment on the merits, and nothing at all to indicate that if it was, that such appeal was taken within the prescribed time. Code, sec. 876. However the fact may be, we are restricted to what appears in the transcript. The presumption is always in favor of the correctness of the judgment below, and the burden is on the appellant to show error. This we do not think he has done.

Affirmed.

Cited: Edwards v. Henderson, ante, 84; *S. v. Johnson, post,* 853; *Clark v. Mfg. Co.,* 110 N. C., 112; *Williams v. R. R., ib.,* 468, 474, 476; *King v. R. R.,* 112 N. C., 322; *Baker v. Belvin,* 122 N. C., 192; *Manning v. R. R., ib.,* 828; *Ricaud v. Alderman,* 132 N. C., 64; *Turner v. Machine Co.,* 133 N. C., 385; *In re Scarborough's Will,* 139 N. C., 426; *Allen Co. v. R. R.,* 145 N. C., 41; *Thompson v. Notion Co.,* 160 N. C., 523.

(202)

A. T. BRUCE ET AL. v. J. J. NICHOLSON ET AL.

Husband and Wife—Estate by Entirety—Judgment—Lien—Parties.

1. Under a conveyance of land in *fee* to husband and wife, they take, not as tenants in common or joint tenants, but by entireties with the right of survivorship, each being seized *per tout, et non per my;* neither can convey or encumber the estate without the assent of the other, nor can the interest of either become subject to the lien, or any proceeding to sell for the satisfaction of any judgment during their joint lives.
2. The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches.
3. It is not error to refuse to allow a junior judgment creditor to be made party to an action to foreclose a prior mortgage in order that he may attack the *bona fides* of the mortgage; his remedy is by an independent action.

MOTION, heard before *Whitaker, J.,* at June Term, 1891, of PITT.

The following is so much of the case stated on appeal as need be reported:

The plaintiff, in his complaint, recited two mortgages of land executed by defendants (Sugg and wife) to plaintiff (the one on 7 December, 1883, and the other on 1 December, 1886), and a certain judgment rendered in favor of one W. S. Rawls against said defendant at March Term, 1889, which had been purchased by plaintiff for a valuable consideration, and duly assigned to him. Among the tracts conveyed by the mortgages was one which Sugg and wife held under a deed executed to them jointly by Charles D. Rountree and wife. The action is to foreclose the mortgage, etc.

No answer was filed. Service of summons was accepted by the (203) defendants.

J. J. Nicholson & Sons, judgment creditors of the defendant Isaac Sugg, by virtue of a certain judgment rendered at June Term, 1886, of said court, caused a notice of motion in this cause to be served on the parties, and at the present term, upon affidavits filed, they moved for leave to come in and be made party defendant for the reasons set forth in the affidavit, to the end that they may have their rights as judgment creditors duly protected. A counter affidavit, made by defendant Isaac Sugg, was filed by plaintiff.

The court refused the application of Nicholson to be made party defendant, for the reason that he had no interest in the land sought to be

sold, and the court, finding that the land covered by the mortgage is the sole property of the *feme* defendant, except one tract, and that this tract is the property of Sugg and his wife holding by entireties.

Nicholson, the appellant, excepted. Thereupon a judgment, by consent of plaintiff and defendant Sugg and wife, was rendered, and Nicholson appealed.

T. F. Davidson (and Jarvis & Blow, by brief) for plaintiff.
C. M. Bernard for appellant.

MERRIMON, C. J. The appellant's judgment is not against the *feme* defendant, who is the wife of her codefendant I. A. Sugg, nor do they seek to have her property—land—devoted to its satisfaction; it is against the defendant husband.

The land, except a small tract of four acres, embraced by the mortgages of the plaintiffs, which they seek by this action to foreclose, is that of the *feme* defendant wife. The court so expressly finds and declares, The husband has no such interest in her land as is subject to levy and sale to satisfy the appellant's judgment. It does not appear that he is tenant by the courtesy *initiate,* and if it did so appear, such in-
(204) terest could not be sold to satisfy the judgment. The statute (Code, sec. 1840) so expressly provides. Code, sec. 1838. As to this land, the appellant has no judgment lien to be enforced in or by this action.

The defendants, husband and wife, held the small tract of land conveyed to them, not as joint tenants or tenants in common, but by entireties. In contemplation of law, they were for such purpose but one person, and each had the whole estate as one person, and when one of them should die, the whole estate would continue in the survivor. They, by reason of their relations to each other, could not take the *fee simple* estate conveyed to them by moities, but both were seized of the entirety *per tout, et non per my.* This is so by the common law and is the settled law of this State. *Motley v. Whitmore,* 19 N. C., 537; *Long v. Barnes,* 87 N. C., 329; *Todd v. Zachary,* 45 N. C., 286; *Simonton v. Cornelius,* 98 N. C., 433; *Harrison v. Ray,* 108 N. C., 215; 2 Bl., 182.

The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice, such estate to any greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person, and the ownership of the estate by that person, prevents the disposition of it otherwise than jointly.

As a consequence, neither the interest of the husband, nor that of the wife, can be sold under execution so as to pass away title during their joint lives or as against the survivor after the death of one of them. It is said in Rorer on Judicial Sales, that "no proceeding against one of them, during their joint lives will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives. Neither party to such tenancy can sell or convey their (his) interest, for it is incapable of being (205) separated." He cites many authorities to support what he thus says. Indeed it seems that the estate is not that of the husband or the wife; it belongs to that third person recognized by the law, the husband *and* the wife. It requires the coöperation of both to dispose of it effectually. Rorer Judicial Sales, sec. 549; Freeman Cotenancy, secs. 73, 74; 4 Kent, 362; *Simonton v. Cornelius, supra.*

The statute (Code, sec. 435) prescribes that a docketed judgment, directing the payment of money, "shall be a *lien* on the real property in the county where the same is docketed of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter for ten years from the date of the rendition of the judgment."

The lien thus intended and created does not vest in the judgment creditor any estate or interest in the real property subject to it; it only creates and secures the right of the creditor to have the judgment debt paid out of the proceeds of the sale of the property, made under the ordinary process of execution or other proper process or order of the court. The lien extends to and embraces only such estate, legal and equitable, in the real property of the judgment debtor as may be sold or disposed of at the time it attached. In *Bristol v. Hallyburton,* 93 N. C., 384, *Justice Ashe,* for the Court, said: "A sale under an execution, upon a judgment which is a general lien on all the property of the debtor, vests only the interest of the debtor at the time the judgment lien attaches, or such as the debtor might have conveyed by suitable instrument for a valuable consideration. It is limited to, and can rise no higher than that (the interest) or (the) debtor; a stream cannot rise higher than its fountain. A purchaser, under an execution, takes all that belongs to the debtor, and nothing more." It was, hence, said in that case, that a *vested* remainder in land might be sold (206) under execution, but a *contingent* remainder could not. *McKethan v. Walker,* 66 N. C., 95; *Hoppock v. Shober,* 69 N. C., 153; *Dixon v. Dixon,* 81 N. C., 323; *Dail v. Freeman,* 92 N. C., 351. The statute contemplates and intends a lien upon some present subsisting estate, legal or equitable, in the real property of the judgment debtor

that may be enforced in some proper way. It would be idle and absurd to intend a lien that could not be made effectual. Freeman on Judgments, sec. 357; Rorer on Judicial Sales, sec. 557 and note.

As we have seen, the husband, who is the judgment debtor in this case, had no interest in the land that he could dispose of, nor that was subject to sale under execution or any legal process. A sale would be ineffectual. The possibility that the husband might survive his wife and thus become the sole owner of the property, was not the subject of sale or lien. This did not constitute or create any present estate, legal or equitable, any more than a contingent remainder or any other mere prospective possibility. *Bristol v. Hallyburton, supra.*

It seems that at the common law, the husband, by virtue of his marital rights, could dispose of the possession of real estate held by entireties. But, however this may be, the statute (Code, sec. 1840) expressly provides that he shall not have power to dispose of his wife's land for his own life or any less term of years without her assent, nor can the same be subject to sale to satisfy any execution obtained against him.

The appellants, therefore, had no lien upon the land or any part of or interest in it, so far as appears, and the court properly denied their motion to be made a party defendant.

It appears, from the affidavit upon which the appellants based their motion, and from the brief of their counsel, that they did not ask to be made a party defendant in the action for the purpose of enforc-
(207) ing their supposed lien and sharing in the funds, the proceeds of the sale of the land according to their alleged right, but for the purpose of alleging collusion between the plaintiffs and defendants to the prejudice of themselves and other creditors, and to contest the validity of the plaintiff's mortgages and debts secured by them.

The court might properly have denied the motion upon the ground that a party would not be allowed to come into the action for such purpose. The effect of such suggested procedure and practice would be, not to completely determine the action and administer the rights of divers persons who had mortgages of and liens upon the property to be sold, etc., but to allow a party to come into the action and allege a distinct and different cause of action against the plaintiffs and defendants and litigate the same. Such practice is unwarranted, and cannot be tolerated. In such case the remedy of the complaining party is by an independent action, brought for the purpose, against the plaintiffs and defendants.

Judgment affirmed.

Cited: Johnson v. Edwards, post, 467; *Gray v. Bailey,* 117 N. C., 442; *Spruill v. Mfg. Co.,* 130 N. C., 44; *Ray v. Long,* 132 N. C., 895;

Stalcup v. Stalcup, 137 N. C., 307; *Darden v. Timberlake,* 139 N. C., 183; *West v. R. R.,* 140 N. C., 621; *Bynum v. Wicker,* 141 N. C., 96; *Jones v. Smith,* 149 N. C., 319; *Hood v. Mercer,* 150 N. C., 700; *Isley v. Sellars,* 153 N. C., 378; *Luther v. Luther,* 157 N. C., 502; *Bank v. McEwen,* 160 N. C., 418; *Greenville v. Gornto,* 161 N. C., 343; *Holloway v. Green,* 167 N. C., 94; *McKinnon v. Caulk, ib.,* 412; *Finch v. Cecil,* 170 N. C., 73; *Brown v. Harding,* 170 N. C., 266; *Harris v. Distributing Co.,* 172 N. C., 16; *Ginn v. Edmundson,* 173 N. C., 86; *Freeman v. Belfer, ib.,* 582; *Kirkwood v. Peden, ib.,* 464; *Moore v. Trust Co.,* 178 N. C., 123.

GEORGE W. JOHNSTON v. S. V. WHITEHEAD ET AL.

Appeal—Notice—Rule 17.

1. An appellant is not entitled to notice of a motion to dismiss an appeal for failure to comply with the rules in respect to the transmission, docketing, and printing the record.
2. Where an action was tried in June, 1890, and an agreement was made whereby appellant was allowed until January, 1891, to perfect his case, but he failed to have the case docketed or apply for a *certiorari* at Spring Term, 1891, of this Court, when the appeal was dismissed: *Held,* he was not entitled to have his appeal reinstated.

MOTION to reinstate on appeal. (208)

C. M. Bernard for plaintiff.
No counsel contra.

CLARK, J. This action was tried at June Term, 1890, of PITT. At Spring Term, 1891, of this Court, the transcript on appeal not having been brought up, the appellee filed the requisite certificate, and had the appeal dismissed under Rule 17. At this term (Fall, 1891), the appellant moved to reinstate, and as cause therefor files an agreement of counsel made in September, 1890; that time till 31 January, 1891, should be allowed the appellant "to perfect case on appeal," and also urges that the motion to dismiss was made without notice.

The agreement to give time, till 31 January, 1891, to perfect appeal would have been ground to resist a motion to dismiss, if made at Fall Term, 1890, when the appeal should in due course have been docketed, but was no excuse for the transcript not being on file when the district to which it belongs was called at Spring Term, 1891, or for a *certiorari*

not being applied for if the appellant was in no default. *Pittman v. Kimberly,* 92 N. C., 562. Besides, if the appeal was improperly dismissed, the motion to reinstate by the rule (17) should have been made "during the term" at which it was dismissed, and, if granted, the cause would have stood for argument at this term. To permit the cause to be reinstated now is not only not authorized by the rules, but contrary to the rights of the appellee, as it would put off the argument and decision of the appeal till Spring Term, 1892, which regularly should have stood for argument at Fall Term, 1890, and that, too, when, by appellant's own showing, the agreement for delay only postponed the hearing till Spring Term, 1891. If the case on appeal was lost or mislaid, the remedy of appellant was by a *certiorari* at the first term of this Court.

(209) *Pittman v. Kimberly, supra; Bailey v. Brown,* 105 N. C., 127; *Porter v. R. R.,* 106 N. C., 478; *Mitchell v. Tedder,* 108 N. C., 266.

The objection that the motion to dismiss was granted without notice is without force. Notice of such motion is not required.

Appellants are too often prone to forget that appellees have rights. The "law's delay" is assigned by Hamlet as one of the great evils of life, and the barons at Runnymede thought it so great a one that they exacted the insertion of a guarantee against it in Magna Charta—a guarantee which has been copied into the Constitution probably of every American State, and which is to be found in section 35 of our own Declaration of Rights. This guarantee, so notably won, so carefully retained for so many centuries, and still incorporated in our organic law, that "justice shall be administered without delay," is not a mere rhetorical flourish. It is a constitutional right. The party who seeks delay must show good cause why the other party should be subjected to it, and the burden is on him to show that he himself is without laches. The appellant has shown no cause why the appeal was not docketed here, or a *certiorari* applied for, at the Spring Term, 1891, and none why this motion to reinstate, if there had been ground for it, was not made "during the term" at which the appeal was dismissed.

Motion denied.

Cited: Pipkin v. Green, 110 N. C., 462; *Calvert v. Carstarphen,* 133 N. C., 26; *Howard v. Speight,* 180 N. C., 654.

LINDSAY COLTRANE v. T. C. LAMB.

Grant—Registration—Deed—Deputy—Exceptions on Appeal.

1. It is not necessary to the validity of the registration of a grant of land by the State that its execution should be proven, as in conveyances by individuals, and an order made for its registration. The great seal of the State is sufficient evidence of its authenticity to justify the register in putting it upon the record.
2. Under Rev. Code, ch. 37, sec. 2, which was in force in the year 1867, deputy clerks of the courts of pleas and quarter sessions had authority to take proofs of the execution of instruments requiring registration.
3. An exception for failure to give an instruction requested should point out the error complained of, and if it involves any question as to evidence offered, that evidence should be set out.

ACTION, tried at August Term, 1890, of GUILFORD, *MacRae, J.*, (210) presiding.

There was judgment for plaintiff and defendant appealed.

The facts are stated in the opinion.

L. M. Scott for plaintiff.
No counsel contra.

MERRIMON, C. J. The plaintiff and defendant are the owners of adjoining tracts of land, and the purpose of this action is to settle the line that divides their property. On the trial, for the purpose of locating the line in question, the plaintiff was allowed to put in evidence, the defendant objecting, a grant from the State dated 16 May, 1787, which was registered in the county of Guilford. The ground of objection was, that there did not appear any acknowledgment or order or registration thereon. The court, upon inspection of the registration, found that the grant had been so registered more than one hundred years. The objection is without force. For the reasons well stated in *Ray v. Stewart,* 105 N. C., 472, the ruling of the court must be sustained. See also, *Freeman v. Hatley,* 48 N. C., 115.

For the like purpose, the plaintiff was allowed, the defendant objecting, to put in evidence a deed dated 1 December, 1848, which was proved and ordered to be registered, and registered in 1867; and also another deed, dated 27 May, 1856, which was proven and ordered to be registered, and registered in 1867. The defendant's objection to these deeds was, that they were proven before and ordered to be registered (211) by a deputy clerk. The objection cannot be sustained. Nothing to the contrary appearing, it must be taken that the deputy clerk who

took the proof of the deeds and ordered the same to be registered was the deputy of a clerk of the late court of pleas and quarter sessions, and that he was duly qualified as such. The objection is that such officer could not take proof and make such order of a deed. The statute pertinent (Rev. Stat., ch. 37, sec. 25; Rev. Code, ch. 37, sec. 2) expressly provides otherwise, and that the deputy may take probate of deeds, etc., of instruments and papers required to be registered. That statute was in force during and long before the year 1867, when the deeds referred to were proven and registered. *Suddereth v. Smyth,* 35 N. C., 452.

The defendant also excepted upon the ground that the court failed to give the jury a particular instruction specified. It does not appear that it was error not to give the same. So far as appears, there was no evidence that warranted such instruction, nor does it appear that the nature of the contention of the parties rendered it pertinent. So much of the evidence should always be stated in the case settled or stated for this Court, as to show the pertinency and purpose of the exception. Otherwise, it must be disregarded. This Court cannot see that the instruction should have been given. Moreover, it does not appear that the defendant requested the court to give the same in addition to others that it gave in varying aspects of the case.

Affirmed.

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(212)

HENRY WEIL ET AL. v. ROBERT B. FLOWERS.

Agricultural Lien—Chattel Mortgage—Application of Payments—Description.

1. A description in an agricultural lien of "all my crop now growing, or to be grown the present year on my land," sufficiently designates the property intended to be subjected to the lien; but a subsequent clause in the same instrument, describing other crops as growing or to be grown "on any other land," is insufficient.
2. An agricultural lien contained a provision that any surplus remaining after the satisfaction of the debt therein secured should be applied to the payment of an antecedent debt: *Held,* (1) that the instrument in respect to the latter operated as a chattel mortgage; (2) that in the absence of the consent of the creditor, the debtor had no right to direct the application of the said surplus to any other claim of the creditor, though such other claim was secured by a subsequent mortgage on the same property.

ACTION, tried at January Term, 1891, of WAYNE, *Winston, J.,* presiding.

This action is brought to recover the personal property specified in the complaint, the plaintiffs availing themselves of the provisional remedy of claim and delivery. The plaintiffs allege their title to and right to have possession of the property particularly specified. The defendant, in his answer, denies the material allegations of the complaint. The court submitted, among others, this issue: "1. Are the plaintiffs owners of the property in dispute, or any part thereof?" to which the jury responded, "No."

On the trial the plaintiffs put in evidence a paper-writing, whereof the following is a copy:

"Know all men by these presents, that I, R. B. Flowers (farmer), of Wayne County, and State of North Carolina, for and in consideration of $5, to me advanced by H. Weil & Bros. (merchants of said county), and in consideration of further advances promised to be made by said H. Weil & Bros. during the year, from time to time, not (213) to exceed $200, the better to enable me to make a crop the present year, have bargained, sold and assigned, and by these presents do bargain, sell and assign unto said H. Weil & Bros. all my entire crop now growing or to be growing the present year, on my land, or on any other land I may cultivate the present year, of cotton, corn, fodder, peas, rice and other agricultural products, and hereby promise, covenant and agree to transfer, set over, and deliver the same, or as much thereof as may be necessary to pay said advances, on or by 15 October, 1888, to said H. Weil & Bros., to be by them sold for cash, and the proceeds of such sale to be applied to the payment of such advances, and any balance remaining they are to apply to a note of $876, given H. Weil & Bros., 1 January, 1885.

"And the said R. B. Flowers, in consideration of the premises above set forth, hereby sells and conveys to said H. Weil & Bros. the following articles of personal property, to wit, one black mare mule, twelve years old; one cow and two heifers, three sows and three pigs and their increase, one wagon, two carts, one buggy and harness, and my entire interest in the crops of my tenants, renters and croppers for 1888, either for rent, or guano, or supplies I may furnish them, and one cotton gin and press. All of which the party of the first part represents to be his own right and property, and that no other person has any claim on the same.

"With the agreement, nevertheless, that if the said R. B. Flowers shall pay said H. Weil & Bros. for all such advances as they may make said R. B. Flowers in pursuance of this agreement, on or by 15 October, 1888, as aforesaid, then this agreement and every part thereof to be void; and, on failure of said R. B. Flowers to pay said H. Weil & Bros. by the said 15 October, they are hereby authorized and (214)

empowered to take possession of said crops and personal property and sell the same, or so much thereof as will satisfy said debt and all necessary expenses, and the balance, if any, apply to said note of $876.

"It is further agreed and understood, that if the party of the first part should from any cause fail to cultivate said crops, or do any act, the effect of which would defeat the objects of this conveyance, then the party of the second part shall not be obliged to make any further advances, and the indebtedness already incurred shall become due and collectible at once, in the manner hereinbefore provided.

"In witness whereof, the said R. B. Flowers hath hereunto set his hand and seal, this 13 February, 1888.

"R. B. FLOWERS. (Seal.)"

The defendant objected "to so much of the crop lien or chattel mortgage (that just recited) as refers to the crops, on the ground that sufficient description of the crop is given. Objection sustained, and the plaintiffs except."

The plaintiff then put in evidence a note of defendant to them for $876, dated 1 January, 1885, and due 1 November, 1885. They also put in evidence the defendant's other note to them for $135 to be due on 15 November, 1888, which was secured by a chattel mortgage executed on 17 February, 1888. This mortgage purported to convey to the plaintiffs certain property therein described, as follows:

"One mouse-colored horse, mule and one black mare mule, and all my crop of cotton, corn, fodder, peas, etc., to be raised or grown by me the present year, 1888, also all the interest I have or may have in the crops of my tenants for the year 1888."

The defendant contended that he had paid for all advancements made to him in pursuance of the above set forth agricultural lien, and likewise the debt secured by the last mentioned chattel mortgage. The
(215) plaintiffs contended, on the other hand, that the last mentioned note had not been paid, that the payments made by the defendant with proceeds of cotton, embraced by the agricultural lien, had been applied, and properly, to the payment of advancements made under the lien and to payment in part of the note therein mentioned for $876. The defendant testified that he had instructed the plaintiffs to apply the payments made by him to the discharge of the debt for advancements and the note for $135, secured by the chattel mortgage.

The court, among other things, instructed the jury as follows:

"That the inquiry was whether the $135 note had been paid:

"1. A debtor owing several debts has a right to apply the payments to any one of them, but this right must be exercised when the money is paid, otherwise the creditor has the right to make the application.

"2. If the jury believe that at the time R. B. Flowers made these different payments, which the plaintiffs admit he made, he directed the plaintiffs to apply the same to the mule note, they ought to have been so applied."

The plaintiffs requested the court to charge:

1. That in the absence of a special agreement at the time of the payments spoken of, or thereafter, to apply them differently, the law would apply them to the $876 note.

2. That there could be no agreement to apply said payments differently unless assented to by the plaintiffs, and there is no evidence of such assent.

The first of the foregoing instructions was given by his Honor and the second refused, and the plaintiffs excepted.

Plaintiffs excepted:

1. To the first instruction given by his Honor, upon the ground that it was inconsistent with the special instruction prayed for by plaintiffs and given by his Honor, and further, upon the ground (216) that said instruction, while true as an abstract proposition of law, was not applicable to the facts in the case.

2. Plaintiffs also excepted to the second instruction given, upon the ground that it was inconsistent with the special instruction prayed for by the plaintiff and given, and also upon the ground that by the terms of said crop lien said payments were to be applied to the payment of the $876 note, and the defendant had no right to direct a different application except by the consent of the plaintiffs.

3. Plaintiffs further excepted to said charge for that his Honor failed to instruct the jury as the rights of the plaintiffs in case they should find that said two hundred dollars secured in said crop lien and the $135 note secured in said chattel mortgage were paid.

Verdict and judgment for the defendant, and plaintiffs appealed.

W. R. Allen for plaintiffs.
W. C. Munroe for defendant.

MERRIMON, C. J. The first exception must be sustained. The description of the crops in the agricultural lien as "All my entire crop now growing, or to be grown the present year on my land," designated with sufficient certainty the land and also the crops intended to be conveyed. They could, by such description, be ascertained. The other words "or on any other land" were too indefinite, because they pointed to no particular lands. The lands of the maker of the lien, at the time he executed it, could be seen and known—those that he *might* cultivate, could not. *Woodlief v. Harris,* 95 N. C., 211; *Gwathmey v.*

(217) *Etheridge,* 99 N. C., 571; *S. v. Logan,* 100 N. C., 454; *Brown v. Miller,* 108 N. C., 395; *Rountree v. Britt,* 94 N. C., 104.

We are also of opinion that the court should have instructed the jury that the plaintiffs had the right, by virtue of provisions of the agricultural lien, to apply the money, the proceeds of the cotton or other property embraced by it, after paying the debt for advancements, to the payment of the note therein specified. The agricultural lien was not simply such; it took on and possessed the qualities of a chattel mortgage as to the note, and expressly provided that any surplus above the payment for advancements should be applied to the payment of the note, so far as the same might be adequate. Such provision might be made in such lien. An agricultural lien may contain a mortgage provision. *Rawlings v. Hunt,* 90 N. C., 270.

The subsequent chattel mortgage to secure the note for $135 mentioned, did not have the effect to change or modify the provision for paying the note above referred to. Though this mortgage embraced the same property that the lien embraced, it was made subsequent and subject to the lien and all the provisions therein contained, in the absence of any modifying provision. It did not in terms, or by implication, modify the lien. As to the large note specified in the latter, it was a second mortgage subject to the first. The mere fact that the plaintiffs took the second mortgage did not, in legal effect, modify the provision for the large note in the first one. There is nothing in the second mortgage that shows such purpose; nor was there any evidence of agreement, by parol or otherwise, to modify the first mortgage provision in the lien. The court ought not, therefore, to have told the jury that the defendant had the right to direct the application of the money to the note embraced by the second mortgage, and they might find that he gave such instruction to the plaintiff. The evidence went to prove that the plaintiffs had the right to apply the payment made as above
(218) stated, and there was no evidence to the contrary.

There is, therefore, error. The plaintiffs are entitled to a new trial.

Error.

Cited: Perry v. Bragg, post, 304; *Hurley v. Ray,* 160 N. C., 379.

JAMES MOORE v. W. H. J. GOODWIN ET AL.

Evidence—Statute of Limitations—Principal and Surety.

1. The declaration of one obligor in a bond that he had paid the debt, unsupported by substantive proof of such payment, is not competent evidence in support of a plea of payment by other co-obligors.
2. Payment made by a principal upon a bond before the cause of action thereon is barred against the sureties arrests the operation of the statute of limitations.

ACTION, tried before Winston, J., at the February Term, 1891, of WAKE.

The plaintiff alleged that on 6 February, 1886, one Colin Campbell, as principal, and the defendants W. H. J. Goodwin and C. E. J. Goodwin, as sureties, covenanted under their hands and seals to pay the plaintiff, twelve months after date, $300, with interest at 8 per cent from date, for money borrowed, and that no part of said debt has been paid, except $24 interest to January, 1887, and $24 interest to 9 January, 1888, both of which payments were indorsed as credits on the bond.

The defendants admitted the execution of the bond, but alleged that it was executed by them, as was well known to the plaintiff, as sureties, and that the same was payable more than three years prior to the bringing of this action. They further alleged that they were informed, and believed, that said note has been paid by the principal, Campbell, in a settlement with the plaintiff. (219)

The only evidence offered to prove a payment was that of the defendants, who said that Campbell told them that he was square with Moore; that Moore was present, and that one of them told the plaintiff in 1887 that he must collect the note, to which plaintiff replied, "All right."

His Honor excluded this evidence, but stated that he would admit it if the defendants would offer substantive proof of a settlement of the note in controversy between the plaintiff and Campbell. The defendants' counsel stated that they had no substantive evidence of such a settlement. Defendants appealed.

S. F. Mordecai for plaintiff.
S. G. Ryan for defendants.

DAVIS, J. The evidence was properly excluded by the court; in fact, counsel for defendants in this Court did not urge the exclusion as error, but earnestly insisted that the statute of limitations was a bar to the

collection of the debt, as against the sureties. (Code, secs. 155, 171.) Section 155 bars a recovery as to sureties, unless the action is brought within three years, and section 171 provides that "no act, admission or acknowledgement . . . by any of the makers of a promissory note or bond after the statute of limitations shall have barred the same, shall be received in evidence to repel the statute," etc., except against the party making the admission or acknowledgment. Section 172 requires the acknowledgment or promise to be in writing to remove the bar, but this shall not "alter the effect of any payment of principal or interest."

In the case before us the payments were made before the statute had barred, and his Honor held that this repelled the bar. That this (220) was correct is too well settled by the decisions of this Court to admit of doubt. *Bank v. Harris,* 96 N. C., 118, and the cases there cited.

We are earnestly asked by counsel to review and reverse this ruling, and we are referred to many adjudications in other States, but, upon examination, we have no doubt of the correctness of the construction placed upon our statute, and reaffirm it.

Counsel says that if several co-obligors owe a debt of $1,000 under this ruling, if the note or bond shall be credited with the pitiful sum of ten cents within every three years, the debt may be kept in force against the sureties for a century. The hardship and injustice, so eloquently portrayed by counsel are without force, in view of the facts that the payment must be honestly made, and the credit not falsely or fraudulently given, and the surety or indorser, if he shall consider himself in danger of being held liable for a century, or for a longer time than he may wish, he can easily and safely protect himself against such hardship by giving the notice prescribed in section 2097 of The Code.

Error.

Cited: Moore v. Beaman, 111 N. C., 332; *LeDuc v. Butler,* 112 N. C., 462; *Copeland v. Collins,* 122 N. C., 621, 625.

W. J. WEIR v. SALLIE E. PAGE ET AL.

Contract—Evidence—Married Women—Mechanic's Lien.

Plaintiff, under a contract with the husband of defendant, did work and furnished material in the construction of a building on defendant's separate real property; defendant knew that the work was being done and materials furnished, and made no objection: *Held,* there was no evidence of any valid contract with defendant, nor could her property be subjected to the satisfaction of plaintiff's claim for compensation.

WEIR *v.* PAGE.

ACTION, tried before *Winston, J.*, at the April Term, 1891, of WAKE.

The action was originally brought against Rufus H. Page and Sallie E. Page, his wife, but Rufus H. Page died before the com- (221) plaint was filed, and his personal representative has never been made a party, and the action is prosecuted against Sallie E. Page alone.

The plaintiff seeks to enforce a claim and lien for work and labor done and material furnished on the property of Rufus H. Page and the separate property of the *feme* defendant, as set out in the complaint.

The defendant, in her answer, says that she was informed by her husband, now deceased, that he had contracted with the plaintiff, or the firm of Hammill & Weir, to do some work on the property mentioned in the complaint, some of which was her separate property, and that the same was to be paid for in the manner set out in the answer; but she denies that said contract was for or on her behalf, and she denies that her said husband had any power or authority to bind her by said contract, but that her said husband was to be solely responsible for the same and to pay in the manner particularly stated in the answer, she denies that any one had any authority from her to make the contract alleged in the complaint.

W. J. Weir testified in his own behalf that he had a contract with Rufus H. Page to do the brick-work and plastering on two houses on Saunders Street; that he made the contract with Rufus H. Page, and never had a word of conversation with Sallie E. Page about the houses; that Ellington lives in one and Mrs. Page in the other; that the value of the work done on the property of Rufus H. Page was $5.87 and the residue, amounting to $1,571.11, was done on the property of Mrs. Page; that $771.11 has been paid on the claim, and no other sum; that he owed Page only a small sum when the work was begun; that Rufus H. Page gave his individual note for the amount due in settlement of the whole claim upon which the suit is brought.

The defendant, Mrs. Sallie E. Page, introduced as a witness for (222) the plaintiff, testified that she knew that work was being done on both the Saunders street lots and on the wood-yard lot at the time, and went around several times and saw the work going on; that she did not authorize her husband to contract for any work on these houses; that she knew who did the work; that Stanley and Thomas were the carpenters and Hammill & Weir were the contractors for the brick and plaster-work; that she raised no objection to the work that the plaintiffs did on the place.

The plaintiff proposed to ask this witness what was her husband's pecuniary condition in 1877, to show that the plaintiff did not rely on the husband for payment, but relied on his lien, and also to corroborate

Weir's statement to this effect. This was objected to by the defendant, and excluded by the court, and the plaintiff excepted.

This witness further testified that she did not direct or authorize any change in the building; that she expected to rent the places out; that in 1877 Mr. Page was operating with money borrowed on the wood-yard property; that the wood-yard property was under mortgage when she took it.

The defendant offered in evidence an account, rendered by the plaintiff, at the foot of which was the following: "Settled by due bill. Raleigh, N. C., 17 January, 1878," and signed by W. J. Weir.

The plaintiff was recalled and testified, after objection from the defendant, that he did not give the paper referred to in lieu of his lien, but told Rufus H. Page that he would rely on the statutory lien.

The court charged the jury that there was no evidence of any contract to bind the separate property of the *feme* defendant, and that her property cannot be subjected to the lien of the plaintiff's claim. To this charge the plaintiff excepted, and assigned the same as error. The plaintiff insisted that the husband was agent for his wife, and besides that, the separate estate was bound under the whole evidence. The
(223) court being of contrary opinion so held, and plaintiff excepted and appealed.

S. G. Ryan for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendants.

DAVIS, J. The plaintiff bases his claim and lien for work and labor done and material furnished upon a contract made with Rufus H. Page, the deceased husband of the defendant. It is well settled that unless a married woman be a free trader, as prescribed by statute, Code, secs. 1827, 1828 *et seq.,* she is incapable of making any executory contract, affecting her real or personal estate, except as allowed in section 1826 of The Code. We deem it sufficient to refer to these sections of The Code and to *Farthing v. Shields,* 106 N. C., 289, and the authorities there cited, in which the subject is considered as conclusive of the correctness of the ruling of his Honor below.

But counsel for the plaintiff says the defendant's property has been greatly enhanced in value by the work and labor done and material furnished, and that she enjoys the benefit of this increased value at the expense of the plaintiff, and upon broad principles of equity *ex equo et bono,* he is entitled to compensation and ought to be paid by the defendant, who enjoys the benefit of the increased value. The only answer to this—and so far as this Court is concerned or has power, it is conclusive—is that the law to which reference has been made, clearly and explicitly

declares otherwise, unless the work and labor had been done and the material furnished under a contract allowed by law. It is the duty of this Court to construe and declare the law, and it is not within its province to make or alter it.

The Constitution of North Carolina secures to every married woman the sole and separate estate in her real and personal property, independent of her husband, as if she were a *feme sole*. Having, in relation to her separate estate, all the *rights* of a *feme sole*, (224) whether and to what extent her protecting disabilities ought to be removed, and her liabilities, in dealing with her separate estate, as to all persons other than her husband, made commensurate with her rights, and whether such alterations in the law would not prevent much injustice and many frauds, are questions to be addressed to the wise consideration and sound discretion of the law-making power, and not to the court.

No error.

Cited: Thompson v. Taylor, 110 N. C., 72; *Fort v. Allen, ib.,* 192; *Bridge Co. v. Comrs.,* 111 N. C., 318; *Nicholson v. Nichols,* 115 N. C., 202; *Finger v. Hunter,* 130 N. C., 530; *Payne v. Flack,* 152 N. C., 600; *Kearney v. Vann,* 154 N. C., 316, 319, 320; *Stephens v. Hicks,* 156 N. C., 244; *Butler v. Butler,* 169 N. C., 59; *Finch v. Cecil,* 170 N. C., 73.

M. R. SMITH v. YOUNG BROS.

Creditor and Debtor—Counterclaim—Conversion—Pleading.

1. One cannot wrongfully gain possession of property and apply it, or its proceeds, to the satisfaction of a debt due from the owner.
2. If one acquires possession of property upon a promise to pay cash for it, but refuses to make such payment, and to return the property upon demand, he is guilty of wrongful conversion.
3. A party cannot set up, as a counterclaim to an action for tort, matters which arise out of a contract unconnected with the transaction sued on.

APPEAL from a justice of the peace, tried before *Winston, J.,* at the February Term, 1891, of HARNETT.

During 1888 the plaintiff gave the defendants two promissory notes, secured by liens on his crop of 1888, for provisions, etc., for that year, and failed to fully pay off said notes, but at the commencement of this action there was a balance still due on said notes of $96. In the fall of 1890 the plaintiff carried a bale of cotton to the town of Dunn, in which place defendant was doing business as general merchant

(225) and cotton buyer, and offered said cotton for sale, it being a part of his crop of 1890, and the defendants' agent being on the market bought the cotton as agent of defendants, weighed the same and gave the plaintiff a ticket to the defendants for the money for said cotton, amounting to $47.32. When the plaintiff presented his ticket to the defendants for his money, the pay for said cotton, the defendants refused to pay the plaintiff any money for said cotton, but against the consent of the plaintiff the defendants applied the cotton as a payment to the balance due of $96 on the notes of the preceding year. The plaintiff then, in a few days, began this action before a justice of the peace for the value of said cotton, alleging that the defendants had unlawfully converted the same to their use. The justice decided that the defendants hold only a part of the cotton, and both sides appealed to the Superior Court. On the hearing, the defendants, having set up their counterclaim of $96, denied that there was any unlawful conversion. The defendants contended that there was no unlawful conversion, and that they were entitled, as a matter of right, to their counterclaim, $96, with interest on the same, and that the price of said cotton should go as payment on said counterclaim, and that they have judgment against the plaintiff for the remainder of said counterclaim. His Honor held that there was an unlawful conversion, and that that was a tort, and that the defendants could not set up their counterclaim and were not entitled to the same in this action, and overruled the defendants' contentions, and gave judgment overruling the defendants' counterclaim, and judgment for the full amount of the cotton, together with the costs of this action, to which the defendants excepted and appealed.

No counsel for plaintiff.
F. P. Jones, contra.

AVERY, J. In furtherance of the general purpose pervading (226) The Code system of pleading to prevent a multiplicity of actions, when the controversies between the parties can be settled without the expense and delay incident to the old practice, the language of our statute (section 244 of The Code, with sub-sections 1 and 2) was made very comprehensive, and interpreting it in the spirit that animated those who enacted it, we should certainly be slow to restrict its operation so as to prevent the pleading as a counterclaim of any demand within the statutory definition liberally construed.

Sub-section 1 embraces, first, cause of action arising either out of the *contract* or *transaction* set forth in the complaint as the foundation of the action, and in giving effect to this clause it has been held not only that the defendant could plead a counterclaim growing out of the contract sued on, but that where action is brought for what would have

been formerly denominated a tort, the defendant may set up a claim arising out of contract, if it also arises out of the *same transaction* or *vice versa*. *Bitting v. Thaxton,* 72 N. C., 541; *Walsh v. Hall,* 66 N. C., 233.

But the last clause of the sub-section is even broader—permitting the party brought into court to meet a demand, whether purporting to arise out of contract or tort, by setting up, as a counterclaim, any state of facts "connected with the subject of the action" which would constitute sufficient ground for an independent action by the plaintiff against the defendant. But it cannot be maintained that dealings between the same parties, culminating in a settlement in which notes and mortgages on the crops of previous years were executed by the plaintiff, have any remote connection with the sale of the particular cotton out of which the controversy arose.

When the agent of the defendant weighed the cotton and gave the plaintiff a statement of the number of pounds to be taken to the defendants as evidence of the amount of cash due, which he agreed to pay, and by such promise induced the plaintiff to give up his (227) cotton, the refusal of the defendants to pay, and their retention of the cotton after demand, was a wrongful conversion of the property to their use, and the plaintiff had the right to recover its value ($47.32) in the action before the justice of the peace. *Carraway v. Burbank,* 12 N. C., 306; *Ragsdale v. Williams,* 30 N. C., 498. The defendants bought for cash and were bound to pay the money or return the cotton. A man cannot take property wrongfully and apply the value of it rightfully even in discharge of a just debt due him from the owner. If tolerated, it would prove a dangerous and demoralizing method of collecting debts. The sale was properly treated as a nullity by the court, upon the general principle that a purchase made with the intent to get the property without paying for it is fraudulent, and voidable at the instance of the seller. 1 Benjamin on Sales, sec. 656 and note 18; *Donalson v. Farwell,* 93 U. S., 631. If a suit, in the nature of an action for conversion, is brought and can be maintained, then a defendant will not be allowed to set up a debt as a counterclaim under sub-section 2, because that, by its express terms, applies only where the action is brought to enforce a contract, and here the defendant did not elect to waive the tort.

For the reasons given, we think that the judgment of the court below should be

Affirmed.

Cited: Blake v. Blackley, post, 262, 263; *Perry v. Bank,* 131 N. C., 118; *Myers v. R. R.,* 171 N. C., 192; *Auto Co. v. Rudd,* 176 N. C., 499; *Little v. Fleishman,* 177 N. C., 26; *Hutton v. Horton,* 178 N. C., 553; *Hamilton v. Benton,* 180 N. C., 82.

THE TRUSTEES OF THE GOLDSBORO GRADED SCHOOL v. D. J. BROADHURST.

Constitution—Taxation—Municipal Corporation—Schools—Statute.

1. Expenses incurred in establishing graded schools are not such "necessary expenses" as, under Art. VII, sec. 7, of the Constitution, may be provided for by taxation without the assent of the qualified voters of the community subject to the burden.
2. The act of 1891, ch. 206, authorizing and directing the commissioners of Wayne County to levy a tax upon the citizens of Goldsboro Township to pay the interest and provide a sinking fund to meet the principal of certain bonds issued in aid of graded schools, without the sanction of the qualified voters therein, is in conflict with the Constitution in that respect, and void.

ACTION, tried before *Whitaker, J.*, at Spring Term, 1891, of WAYNE.

In pursuance of the statute (Laws 1881, ch. 189), an election was held in Goldsboro township, in the county of Wayne, on the fourth Monday in May, 1881, to take the sense of the voters therein as to establishing therein graded schools as contemplated by that statute, and at that election a majority of the qualified voters of the township voted in favor of establishing such schools and to levy the tax to support the same.

Afterward, the statute (Laws 1887, ch. 382) amended and modified as therein provided the above cited statute, and under and in pursuance of its provisions as alleged, an election was held in said township on the first Monday in May, 1887, at which a majority of the qualified voters thereof approved of the levy and collection of the annual tax in the statute allowed and provided for. The money raised by levy of taxes and constituting the school fund as intended by the last mentioned statute, was applied by the board of trustees of such graded schools to supplying such schools, and the payment of the debt incurred for the purchase of grounds and the construction of the buildings for
(229) the colored school.

The trustees mentioned, at the time they purchased the grounds and buildings for white children, executed bonds to the amount of $10,000, and to secure the payment of the same executed a mortgage of the said grounds and buildings, which bonds are yet unpaid. The said grounds and buildings are necessary to the said schools.

The statute (Laws 1891, ch. 206) prescribes that for the purpose of paying for and repairing the school buildings and grounds of the said graded schools for white children, the said trustees shall have power, and they are authorized, to issue bonds of the denomination of $100 to an amount not exceeding $15,000, bearing interest at a rate not exceed-

ing six per cent per annum, and running to maturity at a period not exceeding thirty years. The trustees are allowed to sell said bonds at not less than par of their face value, or exchange them for the bonds above mentioned. To raise a fund to pay the interest and provide a sinking fund to pay the principal on said bonds, the trustees are allowed to appropriate annually a sufficient amount from the school fund going into their hands; and if they fail to do so, the county commissioners of said county are required to levy a tax on the taxable property and polls of said township for the purpose as prescribed. To secure the payment of said bonds, the said trustees are empowered to execute a mortgage of the said school property.

Accordingly the said trustees have executed bonds and a mortgage of the property referred to, to secure the same, as allowed by the statute last cited, and sold and delivered to the defendant three of them, representing to him that they were *valid and a charge upon the property of said township.* It is alleged that he agreed and promised to pay for the bonds so delivered to him $300, and he refuses now to pay the same. This action is brought to recover that sum.

The defendant alleges that the bonds are not a charge upon the taxable property and polls of the township, because the proposi- (230) tion to make such charge has not been submitted to and voted for by a majority of the qualified voters of said township. The court held otherwise, and gave judgment for the plaintiff, and the defendant, having excepted, appealed.

W. C. Munroe for plaintiff.
No counsel contra.

MERRIMON, C. J. The single distinct question raised by the assignment of error for our decision is: "Is the board of commissioners of the county of Wayne charged and required by the statutes (Laws 1881, ch. 189; Laws 1887, ch. 382; Laws 1891, ch. 206), all or any one of them, to annually levy a tax, as prescribed, upon the taxable property and polls of Goldsboro township in said county to pay the interest as the same shall come due, and to provide a sinking fund to pay the principal when the same shall mature, of the bonds in question?" It is insisted that this question must be decided in the negative, because a majority of the qualified voters of the township named have not voted to create the mortgage-debt of which such bonds are a part, nor have they voted in favor of the levy of such tax.

The first and second of the statutes cited above authorize the levy of taxes on the taxable property and polls of Goldsboro township for the purpose of establishing and the annual support of graded schools in that

township; but they do not, certainly they do not in terms, authorize the trustees of these schools to create a debt secured by the mortgage of the school property; nor do they in terms, or by implication, authorize the board of commissioners of the county to levy taxes to pay the interest or principal of any debt for any purpose. The statute of 1891 expressly authorized the trustees of the schools to issue their bonds to the
(231) amount of $15,000 and exchange them for those bonds first mentioned unpaid and outstanding, and to sell the same; and to annually apply so much of the taxes levied for the support of the schools as may be necessary to pay the interest on such bonds, and to provide a sinking fund for the payment of the principal of the debt at its maturity. It further provided that "If the said board of trustees shall fail to provide for the payment of the interest or for the establishment of the sinking fund hereinbefore provided for, it shall be the duty of the board of county commissioners of Wayne County to levy a tax upon property and polls in Goldsboro township in said county, annually, for the payment of said interest and the establishment of said sinking fund," etc. Thus, plainly the debt last mentioned is sought to be made that of the township, and taxes are to be levied to pay it by the board of commissioners of the county in the way and to the extent prescribed. The obvious purpose is to have the township assume and pay the debt secured by the bonds and mortgage, if the trustees fail to provide for its payment.

The township with corporate entity conferred upon it is, in an important sense, a municipal corporation, exercising such corporate powers and functions as may be conferred upon it by statute. Code, sec. 707, par. 14; *Brown v. Commissioners,* 100 N. C., 92; *Wallace v. Trustees,* 84 N. C., 164. Here the clear purpose was to confer upon the township, as a corporate entity, capacity, power and authority to assume a debt of the trustees of the graded schools. Whether this is sufficiently done or not is a question we need not now decide, it is not necessary to do so, because, granting, for the present purpose, that it is, we are clearly of opinion that the tax cannot be levied as prescribed, for the conclusive reason that a majority of the qualified voters of the township have not voted in favor of assuming the debt of the trustees, nor in favor of the levy of a tax for the purpose. The Constitution (Art. VII, sec. 7) expressly provides that "no county, city, town or other munici-
(232) pal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." No vote was taken to ascertain the will of a majority of such voters.

It cannot be said, properly, that the debt authorized by the last mentioned statute, or the other debt at first created by the trustees of the graded schools for the purchase of lands and the erection of appropriate school buildings, are debts created to pay "necessary expenses" of the township. Expenses incurred in establishing and supporting graded schools are not part of such "necessary expenses," because such schools do not pertain to or constitute part of the organization, or come within the ordinary purposes of townships any more than colleges or other like institutions, or particular enterprises or undertakings that are intended specially to promote the convenience or advantage of the people of a particular locality. Such things are exceptional in townships and not necessary for their ordinary purposes. The very purpose of the constitutional inhibition is to prevent the creation of debts for such exceptional purposes, without the sanction of the majority of the qualified voters of the township, city or town. Important as are public schools, and graded schools as well, it is not the purpose of townships as such to establish and support them. Under the Constitution, and appropriate legislation in pursuance thereof, schools are otherwise provided for. Hence, when it is deemed expedient and desirable that a graded school shall be established in a particular township, a debt for the purpose can be created only with the sanction of a majority of the qualified voters thereof. *Lane v. Stanly,* 65 N. C., 153.

This case is in no sense like that of *Blanton v. Commissioners,* 101 N. C., 532. There, no new debt was in question, or to be paid. The statute simply allowed the board of commissioners to issue (233) new bonds in lieu of or to pay the old ones maturing. Here, there was no old or prior debt of the township to be paid—the purpose is to pay a new debt. The judgment must be reversed, and the case disposed of according to law.

Error.

Cited: Sprague v. Comrs., 165 N. C., 604; *Moran v. Comrs.,* 168 N. C., 290; *Stephens v. Charlotte,* 172 N. C., 566.

ZACH. TAYLOR v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Contributory Negligence.

Plaintiff was a laborer in defendant's employment and, at the time he received the injuries for which he sued, was riding in a "shanty-car," having doors on each side, attached to a material train, which was moving at a high rate of speed over a new and crooked roadbed. He was well ac-

quainted with the character and location of the road. Becoming uneasy, the plaintiff left his position at the end of the car and went to the center, where there was a stove. One of the doors was open, and as the plaintiff attempted to pass between it and the stove the train passed a curve and he was thrown out and injured. His purpose in approaching the door was to be in a situation to jump in case of emergency. There was evidence that he could have reached the spot safely by passing on the other side of the stove by the closed door: *Held*, the plaintiff was guilty of contributory negligence, and was not entitled to recover.

ACTION, tried at April Term, 1891, of WAYNE, before *Winston, J.*

This action was brought to recover damages occasioned by the alleged negligence of the defendant. The latter, in its answer, denies the material allegations of the complaint, and alleges contributory negligence on the part of the plaintiff, which directly brought about the injuries complained of.

The court submitted the following issues to the jury:

(234) "1. Was the plaintiff injured by the negligence of the defendant? 2. Was the plaintiff guilty of contributory negligence? 3. What damage, if any, is the plaintiff entitled to recover?" To the first of these issues, the jury responded "No"; there was no response to the second and third.

On the trial the plaintiff was examined as a witness in his own behalf, and testified as follows: "I was injured on the railroad from Winston to Wilkesboro in October, 1890. I had been working for defendant since 7 July, 1890, and had been a railroad hand for seven years. I do not know the rate of speed of the train on which I was at the time, but it was very fast, faster than the mail train runs—looked like the world was turning round. It was an awful crooked road, not one-half mile of it straight; it ran with the Yadkin river; it was a mountainous, hilly country, and it was a new road. The track was pretty rough. I was thrown off the train. The train went to Elkin and laid over; there was a sidetrack there long enough to hold the train, but the conductor came out and we went on. The train ran fast; it was a material train, made up of flat-cars and a shanty-car; I was employed on the train as a laborer; I was at the rear end of shanty-car, near my bunk, on the inside of the car; I got scared and uneasy, and came to stove in middle of car; there were two other men in the car sitting on seats, blocks of wood, on either side of the door, which was open. The door was on the side of the car; the right-hand man got up and I went to take his seat, and as I raised my foot, the train made a swift curve and switched me out of the door. I moved from the end of the car because I was afraid; and if she jumped the track, I could jump out. I thought it would turn over, because the road was rough, crooked and the train running fast. I was flung down a fill in the weeds and stunned for a few minutes, broke my

arm and hurt me inside—hurt me for lifetime, I think. Two doors to shanty, one on each side, window in each end of car; one door was open and the other closed; flat-cars were in front of the (235) shanty-car."

On cross-examination the witness said "I had been over that road often; knew it was pretty rough and had short curves; had been over that curve often and knew it well; was sitting between the bunks on block of wood, near rear of car; Nelson Smith and Martin Holt were in the car with me; the left-hand door was partly open, and they were sitting on blocks of wood near the door; blocks were not fastened; I went to the open door to get out, if she slacked up; Martin Holt got up from his seat; Nelson Smith did not get up; there was a stove in the middle of the car between the doors; I went to take Martin Holt's seat; went on side of stove next to open door—right-hand door was shut; I tried to get hold of the stovepipe as I was falling; I could have gone by the closed door and reached the block if I had thought of it; that was the safest way, and if I had thought it was going to jerk, I would have done it; the train came back and took me up. I did not tell Dr. Dalton at the depot in Winston, on 29 October, 1890, that the train was running twenty-five miles an hour." There was other evidence that need not be reported.

There were divers exceptions to the instructions the court gave and others it refused to give at the instance of the plaintiff. These need not be reported for reasons stated in the opinion of the court. There was judgment for the defendant, and the plaintiff appealed to this Court.

W. C. Munroe and W. R. Allen for plaintiff.
F. H. Busbee for defendant.

MERRIMON, C. J. When the plaintiff brings his action to recover damages for injuries sustained by him, occasioned by the alleged negligence of the defendant, he cannot recover if the defendant alleges and proves contributory negligence on the part of the plaintiff, which (236) was the direct proximate cause of such injuries. To make such defense effective it must appear that the negligence of the plaintiff was concurrent with that of the defendant and directly contributed to the injuries complained of. The contributory negligence is direct, proximate, when the concurrent negligence of the parties respectively at once produce such injuries. *Doggett v. R. R.*, 78 N. C., 305; *Gunter v. Wicker*, 85 N. C., 310; *Farmer v. R. R.*, 88 N. C., 564; *Troy v. R. R.*, 99 N. C., 298.

Now, accepting the evidence of the plaintiff and all the evidence produced on the trial favorable to him as true, and granting, for the present

purpose, that the defendant was negligent, as alleged in the complaint, we are of opinion that he is not entitled to recover. He was himself negligent, and his negligence contributed directly and proximately to the injuries of which he complains. He was an experienced railroad laborer, was familiar with defendant's road, had been a laborer on it for several months, had frequently passed over it, knew it was new and rough and had many short curves. At the time of the accident in question, he was on a material train which was running very rapidly; he was in the rear of the "shanty-car." It was a closed car, having an opening (a large one) on each side of it, one of them was closed and the other was open. A person standing unsupported in front of that opening would be very subject to be thrown out by a sudden jerk or rocking motion of the car, while the train of which it was part was running rapidly over the rough and crooked road. This was obvious to any person of ordinary intelligence, and especially to one familiar with railroads and moving trains, as was the plaintiff. Nevertheless, the plaintiff left the rear of the car, where he was seated and protected, and walked towards the stove located in the center of the car and between it and the open door on the side of the car, the space between being about
(237) two or three feet; he did not support himself by holding fast with his hands to anything, or otherwise he might safely have passed between the stove and the closed door; he did not do so; he was unnecessarily passing the plainly perilous place without any support or protection when he might have avoided it, and as he raised his foot, moving towards a seat he intended to reach and occupy, "the train made a swift curve and 'switched' him out of the door." As a consequence he was stunned and his arm broken. It was gross negligence on his part thus to expose himself to imminent peril. He, thereby, clearly contributed directly to the injuries he sustained, and must suffer the misfortune he so helped to bring upon himself. This is a much stronger case against the plaintiff than that of *Smith v. R. R.*, 99 N. C., 241, in which the plaintiff was held to have contributed to his injury.

The appellant's counsel insisted on the argument that the plaintiff was not chargeable with contributory negligence, because he was frightened and moved by fear of impending danger to go to the open door so that in case of emergency he might jump off the car. It is not necessary to determine or inquire here to what extent sudden fright or well grounded fear, occasioned by the negligence of the defendant, might, in possible cases, relieve or excuse a party as to contributory negligence. In this case the plaintiff did not, through fear, jump or attempt to jump off the car; he did not intend to do so unless in case of emergency. He was only apprehensive of danger and intended to be where he could promptly get off the car, if need be. In so doing he was careless and

grossly negligent. Instead of going the safer way, as he admitted he might, and would have done if he had been more circumspect, he attempted to pass, without support or protection, almost immediately in front of the open door, a place, under the circumstances, of much danger. The mere fact that a person is alarmed and seeks to place himself where he may more readily relieve himself from danger, does not excuse him from reasonable care and prudence in his (238) efforts to do so.

It is unnecessary to consider and pass upon the several assignments of error, because, as we have said before, granting that the defendant was negligent, as alleged in the complaint, and accepting all the evidence favorable to the plaintiff as true, the latter could not recover, inasmuch as he contributed directly by his own negligence to the injuries he sustained. This Court sees that, according to the plaintiff's own showing, he is not entitled to judgment; that the court properly entered judgment for the defendant. The plaintiff cannot, therefore, be heard to complain that the court possibly erred in some respect in the course of reaching a proper conclusion, and entering judgment accordingly.

Judgment affirmed.

Cited: Allen v. R. R., 145 N. C., 217; *Mincey v. R. R.*, 161 N. C., 469.

J. H. BENTON, ADMR. OF W. A. BENTON, v. EDWARD TOLER.

Evidence—Burden of Proof—Payment—Judge's Charge.

In an action to recover the amount of certain bonds found by an administrator among the papers of his intestate, and upon which there were no payments indorsed, the defendant pleaded payment, and offered evidence tending to show that he had made divers payments, some of which were not contested on the trial: *Held*, that while the burden was on the defendant to establish his plea by a preponderance of evidence, it was error in the court to assume, and so instruct the jury, that the testimony offered to establish the fact of payment was not sufficient in law for that purpose.

ACTION, tried before *Whitaker, J.*, at the August Term, 1891, of JOHNSTON.

The plaintiff alleged, in substance, that the defendant executed to his intestate four several bonds, set out in the complaint, (239) amounting in the aggregate to $254.45, with interest from the date mentioned, and that at the death of his intestate said bonds were found among his valuable papers with no payments or credits indorsed on either of them, and he demanded judgment for payment of said debt and interest.

The defendant admitted the execution of the notes, but alleged that all, except the note for $25, had been paid. The following was the only issue submitted to the jury:

"What amount, if any, has the defendant paid on the notes set out in the complaint?"

The defendant offered several witnesses in support of his plea; the substance of their testimony is stated in the opinion of the Court.

In reply, the widow of the intestate testified, so far as material to the question before this Court, that the defendant paid one bale of cotton in 1879; that he sometimes sold her husband chickens, for which he was paid cash, as he said the chickens belonged to his wife; that he brought pork three times, but none since the beginning of 1883; that the defendant brought cotton one time only, and that was in 1879; that in January in 1887 the first note had not been paid, or she never knew of any payment; that the pork went on the note, also the lard, some hams in 1882 and 1883, and two cows at $18 each, or $36 for the two, in 1882-83.

His Honor instructed the jury that the burden was on the defendant, and having pleaded payment, it was necessary for him to prove it; that in answering the issue submitted to them they might say as much as $96, that is, the $9 as testified to by the witness Lanham, the one bale of cotton at $57 as testified to by the witness Stafford, and the two cows at $18 each, if they were so satisfied by the evidence, but they could not find any greater payment than $96, to which the defendant (240) excepted. The jury responded to the issue, $96. The defendant moved for a new trial on the ground of error in his Honor's instruction as above stated. The motion was refused, and the defendant appealed.

No counsel for plaintiff.
E. W. Pou, Jr., contra.

DAVIS, J. The burden of proof of payment was on the defendant, and his Honor instructed the jury that "they could not find any greater payment than $96." If there was any evidence, in the most favorable view of it for the defendant, that more than $96 had been paid, it was a question for the jury, and not for the court, to say how much had been paid.

It was in evidence that the intestate, the August before he died, sent word to the defendant to come to see him; that he, the defendant, had about paid for his land and he wanted to cancel and give up to Toler his papers.

Fuller testified that some time before the intestate's death, he told him that the defendant had nearly paid for his land. Thornton testified

that the intestate, shortly before his death, said that Toler had nearly paid for his land. The witness Stafford testified to the delivery of one bale of cotton, and the widow of the intestate testified to the delivery of one bale in 1879. Whether there was only one bale delivered was a question for the jury.

The widow of the intestate testified that the defendant brought pork three times and that it went on the note, also the lard and some hams.

It was in evidence, without objection, that Toler said Benton (the plaintiff) would not settle until he swore to his account; that he said that his account against the intestate was upwards of $200, and that he swore to his account. There was evidence, taken in the most favorable aspect for the defendant, tending to show that more than $96 had been paid by him, and though it may be difficult to say (241) just how much was paid, that difficulty is for the jury, and not for the court. The court cannot weigh the evidence and declare the result as a matter of law to the jury. *State v. Locke,* 77 N. C., 481.

It is too well settled to need citation of authority, that if there was any evidence of a greater payment than $96 it should be left to the jury. Besides competent evidence, the declaration of the defendant was before the jury without objection, and for the purpose of deciding the question before us, it must be taken as competent and true. *Gibbs v. Lyon,* 95 N. C., 147.

The defendant was illiterate, as it appears upon the face of the record that he used a mark in signing his name. He had executed to the plaintiff's intestate four notes, aggregating $254.48, two of them for $100 each, on 9 February, 1878, for land, payable respectively 1 January, 1880 and 1881. It is in evidence, and not controverted, that the defendant made payments from time to time in cotton, pork, lard, hams and cows, for none of which was credit indorsed on the note, and, if the witnesses are to be believed, the plaintiff's intestate himself said, more than once, shortly before his death, that the defendant had nearly paid for his land, for which the bulk of the debt was created. If it be said that the defendant ought to have taken receipts, may it not be as truly said that the creditor, in whom, it is to be presumed from the facts, he confided, ought to have given credit? If it appear that the debt was nearly all paid, can the debtor get credit for no payment unless he can show just how many dollars and cents were paid, and when? His Honor should have left the question of payment to the jury upon the whole evidence, with proper instructions, and there was error in telling them that they could find a payment of $96, and no more.

Error.

Cited: S. v. Windley, 178 N. C., 675.

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CHARLES McNAMEE v. B. J. ALEXANDER AND OCTAVIUS COKE, SECRETARY OF STATE.

Grant—Entry—Injunction—Cloud upon Title—Statute—Constitution —Costs.

The plaintiff alleged that he was the owner, by virtue of *mesne* conveyances connecting him with the grants from the State, to the bed of a non-navigable river; that defendant had entered the same land and was proceeding to have a grant issued therefor; that the entry was void for irregularities, but that the evidence thereof might be lost by lapse of time; that a grant based upon such entry would constitute a cloud upon his title, and prayed that the Secretary of State should be enjoined from issuing, and the defendant Alexander from receiving and recording, such grant: *Held*, (1) that according to his own showing the plaintiff had an adequate remedy at law and was not entitled to an injunction; (2) an action to remove a cloud upon title cannot be maintained unless it affirmatively appears that the plaintiff is rightfully in possession; (3) a remedial statute, enacted to cure the defects in the title to lands of one person cannot operate to divest the estate of another in the same property; (4) that while it was error in the judge below to dismiss the action upon a motion for an injunction, yet as the material question presented by the appeal was the validity of the judgment refusing an injunction, in respect to which the judgment below is affirmed, the defendant is entitled to costs in this Court.

APPEAL from a judgment dissolving a restraining order, granted at chambers at Oxford on 27 June, 1891, by *Winston, J.*

The plaintiff set forth in his complaint that the defendant B. J. Alexander had entered and caused to be surveyed a portion of the bed of the French Broad River, in Buncombe County, for all of which land the plaintiff had title through *mense* conveyances connecting him with grants from the State, some of which crossed the river so as to include the whole bed, and others of which extended to the middle of the stream from each side. The plaintiff alleged that the said entries, on (243) account of the form and manner of recording them upon the books of the entry-taker, and the mistakes made by the surveyor in locating them, were void—but that the evidence showing them to be void for irregularity might be lost by lapse of time.

The plaintiff prayed judgment that the entries be declared void, that the Secretary of State be enjoined from issuing, and the defendant Alexander from receiving, or putting on record, grants issued upon said entries. It was contended that the grants, if issued, would prove a cloud upon the title of the plaintiff, among others, for the reason that the Legislature might cure the defects in the entries by statute.

The judge below, after granting a temporary restraining order, dissolved it, and gave judgment that the defendant go without day, and for costs. The plaintiff appealed from the judgment.

F. H. Busbee for plaintiff.
G. V. Strong and A. Stronach for defendant.

AVERY, J., after stating the facts, proceeded: If the plaintiff, by means of some grants from the State covering the whole bed of the French Broad River by crossing the stream, and others extending *ad filum aquae* from each side, together with *mesne* conveyances connecting him with all of such grants, could, as he alleges, show title to the whole of the bed of said river from Smith's bridge to the mouth of Avery's Creek, being the portion of the river bed covered by the entries and surveys of the defendant Alexander, and for which the latter is asking that grants be issued, it would follow, according to his own statement of the facts, that for any conceivable injury that the plaintiff may hereafter sustain on account of the issuing of the grants applied for, he would have a full and complete remedy by an action of law. If this proposition can be sustained, it is familiar learning that he is not entitled to extraordinary relief by injunction. (244)

Should the defendant obtain his grant, enter upon the bed of the river and erect a fish-trap, as suggested by counsel, then the plaintiff, having the older and better title, as he alleges, could bring the proper action and recover possession, and such damages as he may have sustained on account of the trespass.

Meantime, if the plaintiff is in the actual possession of any part of the land covered by one of the grants through which he claims title, his constructive possession extends over the whole boundary of such grant, either across the bed of the stream or *ad filum aquae,* according to the nature of the particular patent, and until the defendant Alexander shall enter, the plaintiff cannot maintain an action at law, even on account of location of the entry on, or issuance of the grant for, his land. *Pearson v. Boyden,* 86 N. C., 585; *Kitchen v. Wilson,* 80 N. C., 191; *Staton v. Mullis,* 92 N. C., 623; *Davis v. Higgins,* 91 N. C., 382; *Ruffin v. Overby,* 105 N. C., 78.

By recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any point on either of the separate tracts will become equivalent in law to a possession of "the whole and every part." Code, sec. 1277. It is, therefore, in the power of the plaintiff to make an actual possession of one of his tracts a constructive possession of all of his contiguous tracts. If the plain-

tiff, therefore, has shown himself to be in the rightful possession of the land in controversy, he cannot maintain the action in this case to remove a cloud upon his title, because he has an adequate remedy by action at law in case of any wrongful invasion of the premises. On the other hand, an action brought for the purpose of removing a cloud upon the title cannot be maintained at all, unless it appears
(245) affirmatively that the plaintiff is in the rightful possession. *Peacock v. Stott,* 104 N. C., 154. If it be admitted that the plaintiff is holding rightfully under each and every grant through which he claims, his remedy at law is adequate, unless it can be made to appear that proofs upon which the plaintiff would not recover in a controversy at law, despite grants issued to defendant on his entries, may be lost by the lapse of time, and that by such loss the defendant may be enabled to prevail in such action hereafter, whereas the plaintiff can show the better title now. *Browning v. Lavender,* 104 N. C., 69; *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis, ib.,* 332; *Murray v. Hazell,* 99 N. C., 168. If the plaintiff had, when this action was brought, a perfect title, as he alleges and contends, to the whole of that portion of the bed of the river in dispute, then he would have the right to recover in an action for possession as against the defendant Alexander, claiming under a junior grant, whether valid or void.

If the plaintiff cannot connect himself with older grants or good title covering the land in dispute, then he is not aggrieved and has no status in the court, for even an entry located by him so as to cover the *locus in quo* would be but an *inchoate* equity, which would not be enforced by an action. *Featherston v. Mills,* 15 N. C., 596; *Plemmons v. Fore,* 37 N. C., 312.

If the plaintiff can show title through older grants, though it be admitted that, as between the defendant Alexander and the State, a grant which when issued was void for failure to comply with the entry laws, could be made valid by a curative act of the Legislature, still no remedial statute could be construed to divest an interest in land acquired by the plaintiff, before its passage, out of him and vest it in Alexander.

No law which transfers the property of one person to another for his own private purposes, without the consent of the owner, has ever been held a constitutional exercise of legislative power in any State in the Union. Cooley's Cons. Lim., star p. 165; *Wilkerson v. Leland,* 2
(264) Peters, 380; *Hoke v. Henderson,* 15 N. C., 4; *King v. Commissioners,* 65 N. C., 603; *Stanmire v. Powell,* 35 N. C., 312; Sedgwick Stat. & Const. Lim., pp. 368, 195, and Southerland Stat. Const., sec. 480; *Westerville v. Gregg,* 12 N. Y., 202; *Eakin v. Roub,* 12 Serg. & R., 340; *Harbranch v. Milwaukee,* 13 Wis., 37; *R. R. v. R. R.,* 50 N. H., 50.

We have discussed *seriatim* the questions raised by the plaintiff's assignment of errors, because they may hereafter arise again. But the plaintiff cannot maintain this action brought in the Superior Court of Wake County to enjoin the Secretary of State, the defendant Octavius Coke, from issuing grants to the defendant Alexander, for the reason that our statute (Code, sec. 2786) provides a remedy at law to be prosecuted in the Superior Court of Buncombe County, where the land lies, against the defendant Alexander, if he shall hereafter obtain, or has, since this action was brought, obtained a grant from the State "by false suggestion, surprise or fraud," or "against law," to the injury of the plaintiff. *Carter v. White,* 101 N. C., 31; *Crow v. Holland,* 15 N. C., 417; *Miller v. Twitty,* 20 N. C., 7. If the plaintiff can hereafter make it appear, before the proper tribunal, that a junior grant has been issued contrary to law for the land which he holds, as he alleges, under older patents, then he can find redress for any grievance shown under the plain provisions of the statute. It is necessary, therefore, to discuss the other question, so elaborately presented by the able counsel for the plaintiff. The Secretary of State has not refused to issue the grant to Alexander, as in case of *Wool v. Saunders,* 108 N. C., 729, and he has not raised the question whether the entry is void upon its face, and if not, whether he shall be compelled to issue the grant applied for.

If the plaintiff can connect himself with older grants covering all of the lands embraced by defendant's entries as surveyed, or (247) could have shown a perfect title to the land in controversy in any way when the entries were made by the defendant Alexander, then, in case the latter should enter upon it claiming under a junior grant, the plaintiff could bring his action for possession in the Superior Court of Buncombe County and put him out, or if the junior grant has been or should hereafter be issued contrary to law, a party aggrieved thereby could proceed under the statute (Code, sec. 2786), though no trespass may have been committed. Meantime, if the entries appeared from a bare inspection to be manifestly void, the courts would neither interpose to restrain the Secretary of State from issuing grants upon them nor compel him by *mandamus* to issue them. *Wool v. Saunders, supra.*

We concur with the judge who tried the case below, in the opinion that the law has provided a full and adequate remedy for the plaintiff, and that he has failed to show that the grant, if issued to the defendant, would prove a cloud upon his title.

There is error. Judgment must be affirmed, except as to the order of dismissal. It was error to order that the case be dismissed, but as that does not affect the merits, and the only material question was

whether the Secretary of State should be restrained from issuing a grant, the plaintiff must pay the costs incurred in this Court.

Modified and affirmed.

Cited: Gwaltney v. Timber Co., 111 N. C., 570; *S. v. Eason,* 114 N. C., 791; *Wilson v. Featherston,* 120 N. C., 450; *Wilson v. Jordan,* 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215; *McLean v. Shaw, ib.,* 492; *Bowser v. Wescott,* 145 N. C., 61, 69; *Crockett v. Bray,* 151 N. C., 618; *Bank v. Whilden,* 159 N. C., 282.

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W. P. PHILLIPS v. H. A. HODGES.

Estoppel—Married Women—Registration—Deeds.

1. A wife is not estopped by the declarations and conduct of her husband, in her presence, in respect to her interest in property to which she is entitled jointly with her husband.
2. Under the act of 1885, ch. 147, a conveyance of land, made prior to the passage of that act, is not valid against creditors or *bona fide* purchasers unless registered before 1 January, 1886.
3. An unregistered deed passes only an equitable title, which may be converted into a legal title by registration.

ACTION for land, tried before *Boykin, J.,* at November Term, 1890, of HARNETT.

The action was commenced 8 June, 1888, by W. P. Phillips, who afterwards died, and the present plaintiffs were made parties.

It was admitted that prior to 2 April, 1852, one W. B. Surles owned the land, and on that day he conveyed it by deed to N. L. Phillips and Patience W. Phillips, his wife, which deed was registered 11 January, 1886.

On 28 April, 1852, Nathan L. Phillips alone executed a deed back to W. B. Surles, which was registered 10 April, 1854. W. B. Surles continued in possession until 7 February, 1859, when he sold and conveyed the land for a valuable consideration to James C. Surles, who immediately entered and remained in possession until his death, in 1880. His family continued in possession until, under special proceedings to make real estate assets, the land was sold by Daniel Stewart, his administrator and commissioner, at public sale to H. A. Hodges, the defendant, to whom, after confirmation of sale and payment of the purchase money, the said Stewart, by order of the court, executed a deed for the land dated 7 April, 1884, and registered 23 April, 1884. At

the public sale W. B. Surles was present, and at the request of the administrator Daniel Stewart, got up and publicly stated (249) that the title was perfectly good. This statement was made in the presence of N. L. Phillips and wife, Patience W. Phillips, neither of whom interposed any objection, and N. L. Phillips assisted at the sale by acting as auctioneer.

H. A. Hodges immediately took possession, and has remained in possession ever since.

A year or two after H. A. Hodges had paid for the land, obtained his deed and taken possession, N. L. Phillips showed him the old deed to himself and wife from W. B. Surles, dated 2 April, 1852, then unregistered, and told him that, although he had been paid for the land, he could hold it under that deed, but would surrender the deed to him for $25, to which Hodges remarked that he wouldn't give him twenty-five cents for it. This was the first notice Hodges had of the deed.

On 12 November, 1887, N. L. Phillips and wife made a deed of gift for the land to their son W. P. Phillips, the original plaintiff, who instituted this suit 8 June, 1888. N. L. Phillips died in 1889, leaving his wife, Patience W. Phillips, surviving him, who is still living and was present at the trial of this cause, but not examined.

The defendant asked the following special instructions in writing:

"That the deed from W. B. Surles to N. L. Phillips and wife, dated 2 April, 1852, not having been registered until 11 January, 1886, passed no title as against J. C. Surles or the defendant H. A. Hodges, under Laws 1885, ch. 147, sec. 1."

His Honor having intimated that such was his opinion, and that he would so charge the jury, the plaintiffs excepted to the ruling of the court, and in deference thereto submitted to a nonsuit and appealed.

N. W. Ray (by brief) and F. P. Jones for plaintiff.

R. P. Buxton for defendant.

DAVIS, J., after stating the case as above, proceeded: The (250) foregoing is the full statement of the case on appeal, from which it will be seen at a glance that there is not a shadow of merit or equity in the plaintiff's claim to the land in controversy, and we shall see upon an examination of the law upon which he relies that it is equally without foundation.

It will be conceded, as insisted for the plaintiff, that by the deed of 2 April, 1852, from W. B. Surles to N. L. Phillips and Patience W. Phillips, his wife, the husband and wife took the land *per my et per tout,* and the act of 1784 (Code, sec. 1326) abolishing survivorship in joint tenancies does not apply to conveyances to husband and wife, for the reason assigned by *Gaston, J.,* in *Motley v. Whitemore,* 19 N. C., 537,

that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." *Long v. Barnes,* 87 N. C., 329, and cases cited.

It will be conceded, too, that the subsequent reconveyance by N. L. Phillips alone to W. B. Surles could not deprive the wife, Patience W. Phillips, of the right of survivorship. *Simonton v. Cornelius,* 98 N. C., 433, and cases cited.

It is insisted for the defendant that the conduct of N. L. Phillips and his wife at the sale was a fraud upon the purchaser for value and without notice, and that they are thereby estopped from asserting title to the land. That is true as to N. L. Phillips, but the wife, by reason of her presence at the sale with her husband, and her silence when he stated publicly in her hearing that the "title was perfectly good," was not by that alone estopped. While the reason for this may not be entirely satisfactory, it is well settled by authority, though, speaking for myself and yielding to settled judicial precedent, I am unable to see why it was not as much a fraud in the wife, who, it appears, had sufficient interest to attend the sale, to stand by and hear the husband make the statement that estopped him as a fraud upon an innocent purchaser, as it was in him (251) to make the statement. It is not easy to conceive of any honest purpose in withholding from registration and publicity for more than thirty years the deed to N. L. Phillips and wife through whom the plaintiff claims. The statute of presumptions had commenced to run more than a quarter of a century before this action was instituted; and though unlike the statute of limitations, which is a complete bar as to all persons not under disabilities, it is so emphatically a statute of repose that no saving is made in it of the rights of infants *femes covert* or persons *non compos mentis. Headen v. Womack,* 88 N. C., 468, and cases cited. But the learned counsel for the defendant was content, as he might well be, to rely upon the act of 1885, ch. 147, which made the deed of no avail against creditors or innocent purchasers for value unless registered prior to 1 January, 1886, whereas it was registered after that time. The unregistered deed did not pass the legal title, but only an equitable title, to be perfected by registration. *Davis v. Inscoe,* 84 N. C., 396, and cases cited. Counsel, in his brief, says: "Would it not have been prudent for a purchaser to have inquired as to how N. L. Phillips acquired his title? Such inquiry would have disclosed the fact that he held only a joint estate with his wife," etc., which would bring the case within the proviso of the act of 1885. This contention might, perhaps, be made with some force, but for the fact that the purchaser had no source of information to which he could more reasonably resort than to N. L. Phillips, who, in the presence of his wife, with the

deed under which they claimed in his possession, gave the fraudulent assurance that the title was perfect.

The counsel for the plaintiff says the deed, when registered, related back to its execution, and "the act of 1885 would be unconstitutional if the effect of it would be to divest from P. W. Phillips, in 1885, an estate which vested in her by deed in 1852." The error of counsel is in overlooking the fact that but for the act of 1885, and the various successive acts after two years from April, 1852, extending the (252) time for registration, the deed to Phillips and wife would have conveyed no legal title unless registered within two years from 2 April, 1852.

Registration is required for the protection of innocent purchasers for value and creditors, and to prevent frauds, and the Legislature did not think it was wise to extend the time for registration after 1 January, 1886, so as to give legal validity to deeds, as against innocent purchasers and creditors, and the case before us illustrates the wisdom of the lawmakers.

There is no error and the judgment is

Affirmed.

Cited: Johnson v. Edwards, post, 467; *West v. R. R.,* 140 N. C., 621; *Brown v. Hutchinson,* 155 N. C., 208.

D. G. McMILLAN ET AL. v. C. T. WILLIAMS ET AL.

Lien—Sale under Execution—Exemption—Burden of Proof—Evidence —Judgment.

1. When it appears that a sale under execution, and by virtue of which a purchaser claims, was made upon a judgment rendered on a debt contracted since the Constitution of 1868 became operative, the burden is on the purchaser to show that the property so sold and purchased was liable to sale under execution.
2. A judgment to enforce a mechanic's lien upon specific property for its satisfaction must contain a general description of such property, and an execution thereon must direct that such property shall first be sold to satisfy the judgment.
3. The judgment should also be identified as that brought within the period prescribed by the statute, Code, sec. 1790.
4. In all cases of sales under such judgments and executions the burden is on him who claims thereunder to show the proper and necessary connection between the execution under which the sale is made and the judgment upon which it is based.

(253) ACTION for the possession of land, tried at September Term, 1891, of HARNETT, before *Boykin, J.*

The plaintiffs relied upon a sheriff's deed for the land in dispute, and offered the record of a civil action before a justice of the peace in which the judgment was obtained, which was afterwards docketed in the Superior Court, and with it the execution issued thereon, levy and sale by virtue of which the sheriff executed the deed. The claim declared upon before the justice of the peace was as follows:

"For labor done in November, December and January, in 1887 and 1888, to the amount of $128.82. The defendant appears in court and confesses judgment, and the court adjudges that the defendant pay to the plaintiff the sum of $128.82, and the further sum of all costs," etc.

The plaintiffs relied upon a laborer's lien to authorize the sale of land, without allotting the homestead. The lien filed was in the following form:

EXHIBIT H.

"The said McMillan Bros. file this lien against the said C. T. Williams and S. W. Parker in the office of the clerk of the Superior Court of Harnett County, N. C., in and for said county. Said lien is for work and labor on the two houses of C. T. Williams and S. W. Parker, as per bill of particulars herewith filed; said houses—two in number—being situate in the county of Harnett, in the town of Dunn, in said county of Harnett. And upon the said two houses, where the said C. T. Williams and S. W. Parker now reside, in said town of Dunn, Harnett County, N. C., the said McMillan Bros. claim their lien.

"This 6 June, 1888.

"McMILLAN BROS., *Claimants.*"

This was accompanied by a bill of particulars.

Judgment was rendered for defendants and plaintiffs appealed.

(254) *A. Jones for plaintiffs.*

F. P. Jones for defendants.

AVERY, J. The record of a judgment, execution, levy and sale of a tract of land, as the property of a defendant in an action for possession, the sheriff's deed to the plaintiff, or to one with whom the plaintiff connects himself by *mesne* conveyances, together with evidence or admission of the identity of the land conveyed by the sheriff with that declared for in the complaint, and of the actual possession of some portion of said land by the defendant, when the action was brought, will, nothing more appearing, constitute a *prima facie* proof of title in the plaintiff. *Mobley v. Griffin,* 104 N. C., 112. But where it is admitted,

as in this case, that the sale under the execution was made to satisfy a debt contracted since the homestead provision of the Constitution became operative, and without assigning a homestead to the defendant in execution, when he did not hold one under a previous allotment, the burden of proof is shifted and the *onus* is on the plaintiff to show the liability of the land to be sold to satisfy the debt. *Mobley v. Griffin, supra; Long v. Walker,* 105 N. C., 90; *McCracken v. Adler,* 98 N. C., 400. The plaintiff in this case has taken up this burden and attempted to bring himself within the exception (contained in Article X, section 4 of the Constitution, and provided for in chapter 41 of the Code), by showing that the sale was made to satisfy a subsisting mechanic's lien upon the land. He offered the record of the action before the justice of the peace, from which it appeared that the plaintiffs complained for "an account for labor done in November, December and January in 1887 and 1888, to the amount of $128.88." The judgment was entered on the judgment docket in the following form, after entitling the case: "Judgment by confession in J. P. court of Harnett County on 13 July, 1888, in favor of plaintiff and against defendant for $128.82, and the further sum of costs in this action.

"Docketed 23 August, 1888, 10 a.m. J. P.'s costs, 80 cents; (255) C. S. C.'s costs, $1.05."

On 6 June, 1888, the plaintiffs had filed a lien, the form of which we need not discuss, with an account for furnishing and putting tin on a roof, amounting to the sum of $137.82.

In *Boyle v. Robbins,* 71 N. C., 133, Laws 1868-69, ch. 144, sec. 9 (which has been brought forward and re-enacted in the Code, sec. 1791), was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be found by the lien the justice must insert in his execution a requirement that the specific property, subject to the lien, shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the Superior Court, and the clerk must incorporate in the execution similar direction as to the order of selling. So the judgment cannot be enforced in strict compliance with the law unless the officer, whose duty it is to issue execution, has gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien and consequently to a primary liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it, is to embody it in the judgment, which will constitute a part of the record

in either court, no matter which officer may find it necessary to insert the date and description in the execution. The case at bar illustrates the importance of adhering to this rule, for another reason. It is essential that the judgment should be identified as that brought within the period prescribed in statute (Code, sec. 1790) to enforce the (256) lien. The defendants, in the answers, deny that this judgment was rendered upon the account, filed as a lien, and, while some circumstances tend to show that the same claim was or may have been the subject, both of the lien and the action, we have no evidence sufficient to establish absolutely the identity of the two accounts. The burden being on the plaintiffs, to bring the judgment within the exception, under section 4, Article X of the Constitution, before they can establish the validity of the sale of the defendant's homestead, we think that in failing to connect the judgment and execution with the lien filed, they have failed to adduce testimony that is essential to show their title.

The words inserted in the execution after the words "you are commanded to satisfy said judgment," and before the words "out of the personal property of the defendant within your county, to wit, by first selling the right, title and interest which the said owners had in the property at the time of filing their lien and *next*," do not answer the purpose of connecting the lien with the judgment. If it were true that the plaintiffs recovered two judgments against the defendants for sums nearly the same as that claimed in the lien, neither being for an identical amount, he might issue on either, selecting that one not secured by some other means than the lien.

The land sold has been allotted to the defendant S. W. Parker as his homestead, and, though the deed for it may have been executed to the firm of Parker & Williams (composed of the defendant C. T. Williams and himself), he might lawfully have it assigned out of partnership property with the assent of Williams. *Scott v. Kenan,* 94 N. C., 296; *Burns v. Harris,* 67 N. C., 140; *Stout v. McNeill,* 98 N. C., 1.

The right to lay off the exemption of either out of the fund or joint property by consent of the other partner, cannot be questioned by a creditor. *Scott v. Kenan, supra.* While a partner cannot, as a right, (257) demand that his homestead shall be allotted out of the partnership lands, yet, if all of the other partners give their assent up to the time of allotment, a creditor cannot attack the validity of the proceeding and subject the land assigned to the satisfaction of a judgment in his favor. Though the defendants filed separate answers, there is nothing inconsistent in the answer of Williams with the claim set up on the part of the defendant Parker to the land as an allotted homestead, and we must assume, if his allegation be true, that the former assented to the assignments made and now acquiesces in its consequences.

In a controversy between partners, or their assignees, the assent must appear to have been positive and voluntary, but even a partner cannot withdraw such assent after the allotment. *Stout v. McNeill, supra.*

Affirmed.

JOSEPH BLAKE AND WIFE ET AL. v. J. C. BLACKLEY.

Contract—Evidence—Fraud.

1. If one induces another to part with the possession of his property by a promise to pay cash for it upon delivery, and by the exhibition of apparent resources to pay the purchase price, when in fact he did not intend to pay the money, but did intend, after getting possession, to credit the amount upon a debt held by him against the owner, the contract is voidable, at the election of the vendor, and he may maintain an action for the recovery of the specific property agreed to be sold.
2. A creditor will not be permitted, by the practice of a fraud, to acquire title to the property of his debtor for the purpose of the satisfaction of his debt.
3. In such case, testimony that the defendant represented that he intended to pay cash for the property; that he had a check on a neighboring bank which would be paid next day, and that after getting possession of the property he endeavored to put it out of the reach and conceal it from the vendor, is evidence of the fraudulent intent.

DAVIS, J., did not sit on the hearing of this appeal.

ACTION, tried at April Term, 1891, of WAKE, before *Winston, J.* (258)

The plaintiffs brought their action to recover two horses and one set of harness, valued at three hundred dollars, and by claim and delivery proceedings took possession of the property sued for soon after the action was brought in June, 1890.

There was evidence tending to show that the *feme* plaintiff and George W. Wynne, a coplaintiff, early in the year 1890 entered into an agreement to engage in the business of buying and selling horses in the city of Raleigh, the *feme* plaintiff furnishing the money and Wynne contributing his time and personal attention to the business for which he was to receive one-half of the clear profit; that shortly thereafter the defendant entered into negotiations with Wynne for the purchase of two horses and harness, the property of the plaintiffs, the defendant representing that he intended to pay cash, and exhibiting a check on a bank in Raleigh, which he alleged would be cashed on the opening of the bank next day; that during the negotiations Wynne told the defendant the horses were his, but theretofore told him that his coplaintiff had an interest in them, and that defendant had knowledge of this fact.

The trade was concluded late in the day, when defendant desired to take the property from plaintiff's stables, but this was declined by Wynne, who said he would keep them until next morning. When Wynne returned to the stables next morning, defendant had taken the property and sent it away; thereupon, being called upon to make payment, he presented a note to himself, executed by Wynne for $250, and some cash, representing the difference between the amount of the note
(259) and the purchase price. Wynne refused to accept the payment thus offered.

There was also evidence tending to show that defendant declared he was going to "work a little scheme on Wynne"; and, afterwards, when he was asked by the husband of the *feme* plaintiff what he had done with the horses, said he "had run them out of her reach."

There was further evidence that, after getting possession of the horses in the early morning he had started them in the direction of his home, in an adjoining county, by the usual route, but after going a short distance had changed them to another road. It was admitted that defendant had no money in the bank in Raleigh at that time.

At the close of the evidence, and before his Honor charged the jury, the defendant prayed for the following instruction: "Upon the whole evidence the plaintiffs are not entitled to recover," which his Honor refused to give and defendant excepted, but charged the jury as follows: "If George W. Wynne was drawn in to part with the property described by fraudulent misrepresentation or concealment of facts on the part of Blackley, material to the contract and operating as inducements thereto, and they were such as a man of ordinary sagacity might reasonably rely on and be influenced by, and such owner or owners did rely on and were influenced by them in making said contract, then such trade was voidable and the owner, or owners, of the property have the right to annul the contract and sue for the recovery of the same; and if the jury believe that the defendant went to Wynne and falsely and fraudulently represented to him that he had the money with which to pay for the horses and harness and would pay cash for the same, when in truth and in fact he did not have such money, and did not intend to pay cash for the same, and if the jury believe further that the defendant went to the bank to collect money intending thereby to deceive the said Wynne, and to lead him to believe that he would pay for said horses with money
(260) drawn from said bank, when in truth he did not intend at said time to use such money to pay cash for said horses; and if the jury believe from all the other facts and circumstances of this case that the intent of Blackley was to deceive said Wynne and to fraudulently induce him to part with the possession of said property by making false statements, or by concealing facts, and because of such false and fraudu-

lent representations and concealments, said Wynne did part with said horses, then, in law, such a fraud would have been perpetrated on said Wynne that no title passed to Blackley, and you will answer the second issue, Yes.

"The jury will consider, in this connection, all the evidence as you remember it; the early departure next morning and the argument of defendant's counsel that this was because of hot weather; changing the direction that the horses had started; the declarations made to Holder that he intended to work a trick on Wynne, and Holder's reply that Mrs. Blake owned the horses, and all the other evidence in the case.

"On the other hand, if the evidence has not led your minds to the conclusion that Blackley did falsely and fraudulently represent that he had the cash with which to pay for said horses and with which he would pay for same, and that his intention was to defraud and deceive said Wynne, then you will answer the second issue, No."

On the first issue the court charged: "That if Mrs. Blake furnished the money with which to buy the horses, and with which the horses were bought, Mrs. Blake to pay the expense of feeding and also the rent, Wynne to buy any horses in his own judgment, and also to sell the same and Wynne to have one-half the profits, then you will answer issue, Yes; but if Mrs. Blake did not furnish such money, and if the said horses really belonged to Wynne, then you will answer the first issue, G. W. Wynne alone.

"On the third issue, if evidence is believed, you will answer $300." (261)

The issues and responses were as follows:

1. Were the plaintiffs, Lucy A. Blake and George W. Wynne, entitled to the possession of the horses and harness mentioned in the complaint on 7 July, 1890? Answer: Yes.

2. Did the defendant J. W. Blackley obtain possession of the horses and harness by false and fraudulent representations? Answer: Yes.

3. What damage did Lucy A. Blake and G. W. Wynne sustain by the taking of the horses and harness? Answer: Three hundred dollars.

The defendant moved for a new trial, and assigned as grounds therefor:

1. The refusal of his Honor to give the instruction prayed.

2. For a variance in the allegations in the amended complaint and the evidence, the complaint setting up a co-ownership in the property in the plaintiffs Lucy A. Blake and George W. Wynne, and the evidence showing that said parties were copartners.

3. That from the evidence it appeared that Mrs. Lucy A. Blake was a married woman at commencement and trial of this action, and that the business connection between herself and George W. Wynne was

formed and conducted for the sole purpose of trading in horses, such business connection, defendant contended, was contrary to the policy of the law.

4. That there was no evidence to show that defendant Blackley did not have money with which to pay for the property mentioned in the complaint, the evidence being (by admission) that he had no money deposited in any bank in Raleigh to his credit, but it being proved
(262) that he had in his possession a check for money he showed to Wynne when he said he was going to the bank to get money.

Motion for new trial refused, and judgment being rendered for plaintiffs, the defendant excepted and appealed.

John Devereux, Jr., and S. G. Ryan for plaintiffs.
N. Y. Gulley for defendant.

AVERY, J. The main question raised by the appeal is whether, upon the whole of the evidence, in any phase of it, and in the particular aspect presented by the judge below to the jury, the plaintiffs were entitled to recover.

The mere fact, if admitted, that the defendant told a falsehood, or made a promise to pay at a time when he knew he would not, in all reasonable probability, be able to pay, would not invalidate the sale. But, if one induces another to part with his goods by a promise to pay cash for them on the same day, showing a check to inspire confidence in his engagement, when, in fact, he does not intend, at the moment of making the representation, to pay for the property in money at any time, but purposes, after getting possession of it by holding out the hope of the immediate receipt of ready cash, to credit its value on a claim held by him against the owner or one of the owners of it, the contract is fraudulent and voidable, at the instance of the original owner, and where the owner has been induced to surrender the possession, he may maintain an action in the nature of *detinue,* and recover the specific property, if to be found, or in the nature of *trover* for the wrongful conversion, consummated by the refusal to surrender it on demand. Bishop on Contracts, sec. 667; Benjamin on Sales, sec. 656 and note 18; *Smith v. Young, ante,* 224, 8 A. & E., 650; *Donaldson v. Farwell,* 93 U. S., 631.

The representation of the defendant, if the testimony was believed, that he wished to start the horses in the early morning while it
(263) was cool, and transferring them from the road ordinarily traveled to his home from the place of purchase to another way not so well known, in connection with the declaration made to a witness before he had acquired possession of them, that he intended to play a trick on

Wynne, were sufficient to warrant the verdict. It was the duty of the judge to submit this testimony with all of the circumstances, and let the jury pass upon the intent of the defendant, and the defendant has no just ground to complain that the language in which his Honor couched the proposition was such as might have misled the jury to his prejudice.

Whether the declaration of the defendant was drawn out by a direct question or whether made gratuitously, the object in telling Wynne that he had money in the bank and exhibiting a check, was to induce Wynne to surrender the property before it was paid for, and ultimately to avoid paying for it, and, therefore, the false representation, which the jury find misled Wynne and caused him to part with the horses before receiving the purchase money, vitiated the contract *ab initio* at the option of the injured party to be exercised within a reasonable time. *Wilson v. White,* 80 N. C., 280; *Donaldson v. Farwell, supra.* In this view of the case it is immaterial whether the property belonged to the *feme* plaintiff or to her and Wynne as partners, or to Wynne individually. A creditor is not allowed, by practicing a fraud, to acquire title to the property of his debtor, even with the purpose of crediting its value on a just debt. *Smith v. Young, supra.* If the law should give its sanction to the wrongful conversion of property, whether by force or fraud, for the purpose of collecting even undisputed debts, the end would not justify the means, either legally or morally.

There was evidence tending to show that the defendant exhibited a check for which he declared that he could not get the cash in the afternoon or evening before, because the banks of the city of Raleigh were closed, and that he would get the cash for it on the morning following so soon as the banks should be opened. It was not ma- (264) terial whether his language was such as to convey the idea that his money was on deposit in a Raleigh bank or elsewhere. The gravamen of the fraud was in falsely and wilfully creating the impression on the mind of Wynne that he had money which could be procured by means of a check, and which he would apply in payment for the horses, when, in fact, the defendant's purpose was to acquire possession of the horses and to credit the value, with or without the assent of Wynne, on a debt which Wynne owed him.

Another exception made by the defendant seems to be founded upon the theory that because a married woman is not a free trader and has no power to bind her separate property by a contract, she has no right to acquire property by purchase or to maintain (even when her husband is joined) an action for the wrongful withholding of it after she has acquired it. "It is settled law in North Carolina that our statutes (Code, ch. 47) impose no limit upon the wife's power to acquire property by contracting with her husband or any other person, but only operate to

restrain her from or protect her in disposing of property already acquired by her." *Osborne v. Wilkes,* 108 N. C., 667; *Battle v. Mayo,* 102 N. C., 439; *George v. High,* 85 N. C., 99; *Kirkman v. Bank,* 77 N. C., 394; *Dula v. Young,* 70 N. C., 450; *Stephenson v. Felton,* 106 N. C., 121.

For the reasons given, we think there was no error in the rulings of the court below, which constitute the grounds of exception, and the judgment must be affirmed.

No error.

Cited: Joyner v. Early, 139 N. C., 50.

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(265)

MARY E. BEVILLE v. H. S. COX, ADMR. OF JOANNA COX.

New Trial—Appeal from Justice of the Peace—Jurisdiction—Married Women—Coverture—Contract—Pleading.

1. When a *venire de novo* is awarded by the Supreme Court the cause goes back for trial upon the whole case (unless restricted to specific issues) as if no former trial had taken place.
2. The Superior Court is not bound to recognize supplemental additions voluntarily made by a justice of the peace to the transcript of the record of an appeal from him.
3. The fact that a plaintiff who sues to enforce a contract is a married woman, when such fact does not appear on the face of the complaint, can only be taken advantage of by special plea or answer in abatement. It will be waived by a general denial.
4. Where, in an action before a justice of the peace, the plaintiff included in her complaint demands, of only some of which that court had jurisdiction, and on appeal to the Superior Court recovered judgment upon that portion which was cognizable before the justice of the peace: *Held,* the judgment would be sustained.

ACTION, tried at May Term, 1890, of GUILFORD, *Boykin, J.,* presiding.

This action was brought to recover compensation for services by plaintiff to the testatrix of defendant, first tried on appeal from a justice's court, before *MacRae, J.,* at August Term, 1890, upon the issue, "Is the defendant indebted to the plaintiff as alleged, and if so, how much?" and from the judgment at that term there was an appeal to the Supreme Court and new trial granted. (107 N. C., 175.)

Upon the last trial the plaintiff tendered the same issue on which the case had been tried before; and thereupon the defendant tendered the following additional issues, to wit:

"Is the plaintiff a married woman? Did plaintiff's cause of action, if any she has, accrue within three years before the beginning of this action? Is the action barred by the statute of limitations?"

To the submission of these issues the plaintiff objected, on the ground that defendant had offered to plead the same matters be- (266) fore *MacRae, J.*, who declined them, to which refusal no exception was taken by defendant; and on the further ground that the paper-writing filed in the papers and marked by the clerk as filed 19 November, 1890, and called a supplemental return of the justice of the peace, had been procured from the justice without an order of the Superior Court therefor, and put into the papers without notice to plaintiff, and therefore did not constitute a part of the record. On this objection, on inquiry of the judge as to whether these matters embraced by said issues had been discussed before *MacRae, J.*, and ruled upon by him, the defendant admitted they had been, and thereupon they were rejected, and the trial proceeded upon the issue tendered by the plaintiff. To this refusal of defendant's issues the defendant excepted.

In opening, plaintiff announced to the court that she claimed to recover in this action, in conformity with the decision of the Supreme Court in the case, only for her services to testatrix of defendant, under contract with her, from February, 1885, to August, 1886, at which last date she—testatrix—had intermarried with the defendant, H. S. Cox, and she introduced testimony tending to show that she lived with defendant's testatrix, her aunt, from February, 1885, to August, 1886, under a contract with said testatrix to pay her for her services, such as cooking, washing, etc., and also tending to show that her services were reasonably worth one dollar per week, and that during all the time the testatrix of defendant was a *feme sole.*

To support the contention of defendant under the issue submitted, there was testimony tending to show that plaintiff was living with the testatrix of the defendant as a member of her family, without any contract for or expectation of pay, and defendant proposed to ask of the plaintiff whether she was or was not at the date of her alleged contract, and during her services to defendant's testatrix, the (267) wife of a man by name of Smith, which was objected to as not pertinent to and embraced in the issue submitted to the jury, which was excluded by the court. Defendant excepted.

The defendant moved to dismiss the action for want of jurisdiction in justice's court, which his Honor refused to do.

His Honor instructed the jury, that if the testimony satisfied them that plaintiff rendered the services as alleged under a contract to be paid for the same, she was entitled to recover such amount as from the testimony they should find such services reasonably worth from February,

1885, to August, 1886, the date of testatrix's marriage with the defendant Cox, and that she could not recover for services rendered since said marriage.

There was a verdict for plaintiff for services up to August, 1886.

Plaintiff moved for judgment, and defendant moved for a new trial, for errors, to wit, the refusal of his Honor to submit the issues tendered by defendant and exclusion of testimony as excepted to, and so much of his Honor's charge to the jury as instructed them that plaintiff could recover.

The judge declined to give a new trial, and signed judgment for plaintiff, from which defendant appealed.

J. H. Dillard (by brief) for plaintiff.
J. T. Morehead (by brief) for defendant.

CLARK, J. When this case went back for a new trial it was competent to admit additional evidence, or further pleadings and issues. *Ashby v. Page,* 108 N. C., 6. A new trial is on the whole merits (unless it is restricted to certain issues), and the court below can proceed as if no former trial had taken place. *McMillan v. Baker,* 92 N. C., 110; *Jones v. Swepson,* 94 N. C., 700. Whether, however, the court would (268) permit the additional pleas asked by defendant, was in its discretion and not reviewable (*Hinton v. Deans,* 75 N. C., 18; *Johnson v. Rowland,* 80 N. C., 1), unless the court put the refusal upon a want of power, which was not done. The inquiry by the court as to the action of the preceding judge seems to have been to aid himself in the exercise of his discretion. At least we are not to presume error when it is not affirmatively stated that the refusal was on the ground of a want of power. Besides, the additional issues asked and refused did not arise upon the pleadings or the magistrate's return. We know of no practice which would require the judge to recognize the additional returns, voluntarily sent up since the former trial by the justice of the peace. Why the justice did not amend his return earlier, or why a *recordari* was not issued to have the additional matter sent up, does not appear. Doubtless the judge, if the parties consented, or without their consent, might permit the supplementary returns to be filed, but he did not do so. If a *recordari* had been applied for, the adverse party would have had notice and been put on inquiry, of which benefit he was deprived by the volunteered action of the justice.

It is clear that, both under the old practice and the new, advantage cannot be taken of the coverture of the plaintiff under the plea of the general issue. That plea controverts the allegations of the plaintiff, It does not admit of proof of matter in avoidance, such as the coverture

of plaintiff. Gould on Pleadings, 531. A married woman may sue alone on a contract to pay her for her services rendered, subject to the non-joinder of the husband being pleaded in abatement. *Moran v. Cubitt,* 3 Exch., 611; *Bendix v. Wakeman,* 12 M. & W., 97; *Dalton v. Midland R. R.,* 22 L. R. (N. S.), 177. If a married woman sues alone, and the disability does not appear upon the face of the complaint, the defendant can only avail himself of the coverture by specially pleading it. The objection is waived by a general denial. *Dillaye* (269) *v. Parks,* 31 Barb., 132. The plea of the general issue is a waiver of all objection to the person of the plaintiff and admits his capacity to sue. *Brown v. Illius,* 27 Conn., 84; *Bank v. Curtis,* 14 Conn., 437. In our own State it is held that if the subject-matter is within the jurisdiction, "any peculiar circumstance excluding the plaintiff or exempting the defendant must be brought forward by a plea to the jurisdiction. Otherwise, there is an implied *waiver of the objection,* and the court goes on in the exercise of its ordinary jurisdiction." *Blackwell v. Dibbrell,* 103 N. C., 270, citing *Pearson, J.,* in *Houston v. Branch,* 44 N. C., 85. The court, therefore, properly excluded evidence which would only have been competent to support a plea in abatement, not pleaded.

If the contract had been a continuing one, the plaintiff could have recovered before the justice of the peace for the entire services (not exceeding $200), as was pointed out in this case, 107 N. C., 175, as well for those rendered after marriage of defendant's intestate as before. But if, in her complaint before the justice, the plaintiff joined in the account charges for services rendered after the marriage of such intestate, as well as those before, and on appeal only recovered for those rendered before the marriage, we do not see how the defendant can complain. *Deloatch v. Coman,* 90 N. C., 186; *Ashe v. Gray,* 88 N. C., 190. In any aspect of the case the coverture of the defendant's intestate could not defeat the recovery before a justice for at least the services rendered before her marriage. Code, sec. 1823; *Hodges v. Hill,* 105 N. C., 130; *Neville v. Pope,* 95 N. C., 346.

No error.

Cited: Hunter v. R. R., 163 N. C., 282.

(270)

W. A. RAMSEY v. J. A. CHEEK.

Slander—Libel—Malice—Evidence—Burden of Proof—Privileged Communication.

1. In libel and slander, when the words are actionable *per se* the law presumes malice, and the burden is on the defendant to show that the charge is true, unless the alleged libelous matter is privileged, then the rule is otherwise.

2. Privileged communications are of two kinds: (1) Absolute privilege, where the alleged defamatory words are uttered in the course of the performance of public service, in which case, notwithstanding proof of the falsehood of the charge and actual malice, an action cannot be maintained thereon; (2) Qualified privilege, where the alleged libelous language is spoken by one under no legal obligation to act, about a matter affecting the public good; in such case there is a presumption of law that the words were spoken *bona fide*, and the burden is on the plaintiff to show the falsity of the charge, and that it was made with express malice.

3. In cases of qualified privileged communications, evidence that the charge was false will not of itself be sufficient to establish the malice, unless there is proof that the defendant knew that it was false. (*Wakefield v. Smithwick*, 49 N. C. (4 Jones), 327, is disapproved in this respect); or that there were opportunities available to him whereby he might have ascertained the truth, but which he neglected.

4. Express malice is malice in fact, as distinguished from implied malice, which is raised by law from the use of words actionable *per se*.

5. The malice may be proved by extrinsic evidence, e.g., ill-feeling, threats, etc., or by the words of the defamatory charge itself, and the circumstances accompanying its publication.

6. Where the defendant, in a letter to the superintendent of the census, charged the plaintiff, who had been appointed an enumerator, with the murder of two Union soldiers, and also that he had, with others, defrauded defendant out of his election to a State office (and there was evidence tending to show that these charges were not true), and complaining that plaintiff had been appointed to an office against defendant's recommendation, it was error in the court to withdraw the case from the jury and nonsuit the plaintiff, upon the ground there was no evidence of the requisite malice.

7. Whether the communication is privileged is a question of law (subject to review on appeal) unless the facts are disputed, in which case it is a mixed question of law and fact.

(271) ACTION, tried before *Boykin, J.*, at March Term, 1891, of DURHAM.

The alleged libel was contained in a letter written by defendant to the Superintendent of the Census, as follows:

HILLSBORO, N. C., 10 June, 1890.

HON. ROBERT PORTER, WASHINGTON, D. C.:

DEAR SIR:—In this district Mr. Hawkins appointed a large majority of enumerators, extreme Democrats, ballot-box stuffers, among them MURDERERS and drunkards. I having represented the county of Durham in the State Legislature, having been the Republican candidate for the State Senate last election, thought that I was entitled to recommend and get a part of my Republican friends appointed enumerators, but instead of this, Hawkins pays no attention to me and friends, but appoints in Durham a man named Ramsey who murdered, since the war, over two *Union scldiers* while they were *asleep*. This same man was the leader in defrauding me and Mr. Nichols out of our election last election. Another of his appointees in Durham, Mr. Bratcher, helped to carry Mr. Jordan to the woods to hang him one day after election, but was prevented by E. J. Parish and others. You remember seeing Mr. Jordan's published account in all leading Republican journals? Mr. Jordan stood high as a church man and citizen; at this place, he ap'ted one Tinnen, who is extreme partizan and was discharged during *Cleveland's* administration for *drunkenness*. The above characters is a sample of the kind of men Hawkins appointed. We do not know, or can we understand, such work coming from a Republican. Some good men say he has boodled out the places to Democrats to in- (272) jure the Republican cause in the future, whoever has control or recommends the appointments in North Carolina, does not care for the interest of the Republican party in this section.

For reference will refer you to Hon. John Nichols, or Brower, or Collector E. A. White, Col. A. W. Shaffer, of Raleigh, N. C. My sole object in notifying you about the above is to do my duty to the party in which I belong, *Republican*.

Respectfully,

JAMES A. CHEEK.

The plaintiff introduced testimony tending to show that the charges against him in the letter were untrue; that he was a man of good character, and that the defendant had no official connection with the public service, and, thereon, rested his case.

The defendant offered no testimony, but contended that upon the evidence the plaintiff could not recover; that the alleged libelous letter was a privileged communication, and the burden was on the plaintiff to show (express) malice, and he had failed to do so. The plaintiff contended the letter was not privileged to the extent claimed by the defendant; that he had offered no evidence to show that he wrote the letter for an honest *bona fide* purpose, and that the letter itself contained

evidence to go to the jury of express malice, and particularly, in expressing malice towards the plaintiff in that the writer in it made the assertion that the plaintiff was the same man who "was the leader in defrauding" the defendant out of his election as the Republican candidate for the Senate at the election in 1888; that the letter on its face bears evidence of express malice towards the plaintiff to go to the jury, and was written with the intent to punish the plaintiff for what the defendant Cheek conceived to be a personal wrong done to him by the plaintiff.

The court held that the alleged libelous letter was a privileged
(273) communication as matter of law, that there was no evidence to go to the jury to show express malice, and the plaintiff could not recover.

Upon this announcement of decision and intimation of opinion by the court, the plaintiff excepted to the rulings of the court, and submitted to a nonsuit, and appealed.

W. A. Guthrie and J. S. Manning for plaintiff.
J. Parker and J. W. Graham for defendants.

CLARK, J. The words used charged the plaintiff with an indictable offense, and also were calculated to disparage him in his office. They were actionable *per se*. The defendant introduced no evidence, neither to prove the truth of the allegations nor to show that he had written the letter for an honest *bona fide* purpose, but contended that the letter was a privileged communication, and that the burden was on the plaintiff to show express malice, which he had failed to do. The court being of opinion with the defendant, the plaintiff took a *nonsuit* and appealed. In libel and slander, if the words are actionable *per se*, the law presumes malice, and the burden is on the defendant to show that the charge is true, unless the communication is privileged. Then the rule is otherwise.

Privileged communications are of two kinds:

1. *Absolutely Privileged*—Which are restricted to cases in which it is so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only where the public service or the due administration of justice requires it, e.g., words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench,

by a witness in the box, and the like. In these cases the action (274) is absolutely barred. 13 A. & E., 406.

2. *Qualified Privilege*—In less important matters where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege, if he can prove that the words were not used *bona fide,* but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. Odgers Libel and Slander, 184. In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. 13 A. & E., *supra.* Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se,* when the occasion is not privileged. Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact.

The present case is one of qualified privilege. The plaintiff was not in government employ under Porter. He was not called upon by any moral or legal obligation to make the report, and it was not made in the line of official duty. It was not absolutely privileged. But he was an American citizen interested in the proper and efficient administration of the public service. He had, therefore, the right to criticise public officers, and if he honestly and *bona fide* believed, and had probable cause to believe, that the character and conduct of plaintiff were such that the public interest demanded his removal, he had a right to make the communication in question, giving his reasons therefor, to the head of the department. The presumption of law is that he acted *bona fide,* and the burden was on the plaintiff to show that he wrote the letter with malice or without probable cause. *Briggs v. Garrett,* 111 Penn., 404; *Rodwell v. Osgood,* 3 Pick., 379; S. C. 15, A. M. Dec., (275) 228. Malice in this connection is defined as "any indirect and wicked motive which induces the defendant to defame the plaintiff. If malice be proved, the privilege attaching to the occasion is lost at once." Odgers, *supra,* 267; *Clark v. Molyneux,* 3 Q. B. D., 246; *Bromage v. Prosser,* 4 B. & C., 2; *Hooper v. Truscott,* 2 Bingham, N. C., 457; *Dickson v. Earl of Wilton,* 1 F. & F., 419. The rules applicable to an ordinary action for libel apply in such cases whenever malice is proved. Proof that the words are false is not sufficient evidence of malice unless there is evidence that the defendant knew, at the time of using them, that they were false. *Fountain v. Boodle,* 43 E. C. L., 605; Odgers, *supra,* 275. That the defendant was mistaken in the charges made by him on such confidential or privileged occasion, is, taken alone, no evidence of malice. *Kent v. Bongartz,* 2 Am. St. Reports, 870, and cases cited.

We do not assent to the opposite doctrine which would seem to be laid down by *Pearson, J.*, in *Wakefield v. Smithwick,* 49 N. C., 327, which is not supported by the authority he cites, and, doubtless, intended to follow, for if the words are true a defendant does not need the protection of privilege. It is when they are false that he claims it. To strip him of such protection there must be falsehood and malice. To hold that falsehood is itself proof of malice in such cases reduces the protection to depend on a presumption of the truth of the charges. If, however, there are means at hand for ascertaining the truth of the matter, of which the defendant neglects to avail himself, and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretense for any claim of privilege. Odgers, *supra,* 199. "To entitle matter otherwise libelous to the protection (of qualified privilege) which attaches to communications made in the fulfillment of duty, *bona fides,* or to our own equivalent, honesty of purpose is essential; and to this again, two things are necessary: (1) that it be made (276) not merely on an occasion which would justify making it, but also from a sense of duty; (2) that it be made with a belief of its truth." *Cockburn, C. J.,* in *Dawkins v. Lord Paulet,* L. R., 5 Q. B., at page 102. The malice may be proved by some *extrinsic* evidence, such as ill-feeling or personal hostility or threats and the like on the part of the defendant towards the plaintiff. But the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication as affording evidence of malice. Odger's *supra,* 277-288; 13 A. & E., 431.

In the present case the letter charged the defendant with murder and with having cheated the plaintiff out of his election. There was evidence tending to prove that these charges were untrue, and that the character of plaintiff was good. There was no evidence in reply, and the answer admits that the object of the communication was to secure the removal of plaintiff from the office he held. There was evidence on the face of the letter tending to show that the motive of the defendant was ill-will to the plaintiff, by reason of his alleged action in defrauding defendant of his election, and spleen on account of his (the defendant) not having had his recommendation more considered, and his friends appointed to the offices to which Ramsey and others named in the letter had been appointed. There being evidence tending to prove malice, as above defined (which need not be personal ill-will to the plaintiff), his Honor erred in not submitting the case to the jury.

If the defendant made the communication not recklessly or maliciously, but *bona fide* and out of a desire to benefit the public service, the plaintiff cannot recover, though the charges made by the defendant may be untrue. That the plaintiff was of a different political party from

himself, gave him, however, no license to make to the appointing power false and defamatory charges against him, maliciously (277) or without probable cause, simply to secure his removal from office. If the defendant thought the plaintiff should be removed from office because belonging to a different political party, and therefore, in his judgment, unsuitable or unfit to hold the office, he should have put his letter on that ground and there could have been no complaint. He had no right to make defamatory charges, if false, to secure defendant's removal, the motive not being a *bona fide* one to purge the public service of a felon and ballot-box stuffer, but merely to remove one who was objectionable to him either as being of an opposite party or by having injured him personally, or from having been appointed instead of his own recommendee for the place. If the defendant's motive was to injure Hawkins, and to do that he recklessly made false and defamatory allegations against the plaintiff, that is malice which would entitle the plaintiff to damages.

It is to the public interest that the unfitness or derelictions of public officials should be reported to the authority having the power of removal, and any citizen *bona fide* making such report does no more than his duty, and is protected by public policy against the recovery of damages, even though the charge should prove to be false. But public justice will not permit the government archives to be made with impunity the receptacle of false and defamatory charges, put forward to secure the removal of an officer, where by the malice of the party making such charge may be gratified, or that some benefit or advantage, direct or indirect, may come to him. *Proctor v. Webster,* 162 B., 112 (1885). If the party knows the charge to be false, or makes it without probable cause, this is evidence of malice. *Wakefield v. Smithwick,* 49 N. C., 327.

If the charge in such case is false, the law looks to the motive. If the defendant, not moved by the public welfare, but by some wicked and indirect motive, such as to gratify his malice or his love of (278) patronage, to assert his own influence or the like by false charges, has wilfully or recklessly defamed the plaintiff, the latter is entitled to recover damages at the hands of the jury.

Error.

Cited: Bradsher v. Cheek, post, 278; *S. c.,* 112 N. C., 838; *Byrd v. Hudson,* 113 N. C., 212; *Crawford v. Barnes,* 118 N. C., 915; *Gattis v. Kilgo,* 128 N. C., 407, 410; *Osborn v. Leach,* 135 N. C., 630; *Perry v. Perry,* 153 N. C., 267; *Hamilton v. Nance;* 159 N. C., 59; *Beck v. Bank,* 161 N. C., 206; *Hadley v. Tinnin,* 170 N. C., 86; *Brown v. Lumber Co.,* 167 N. C., 13; *Riley v. Stone,* 174 N. C., 598; *Lewis v. Carr,* 178 N. C., 580; *S. v. Publishing Co.,* 179 N. C., 723.

W. C. BRADSHER v. JAMES A. CHEEK.

ACTION, tried before *Boykin, J.*, at March Term, 1891, of DURHAM.

W. W. Fuller for plaintiff.
J. Parker and J. W. Graham for defendant.

CLARK, J. This action is brought against the same defendant, and upon the same letter, as in the case of *Ramsey v. Cheek, ante,* 270. The only difference is that the charge made against this plaintiff in the letter is of an attempt to murder instead of murder, and there is no allegation of personal injury to the defendant by this plaintiff having defrauded him out of his election. But from the letter itself there was evidence to go to the jury tending to show express malice as stated in the opinion in that case. The defendant may have made the communication, as the law presumes, with a *bona fide* and patriotic motive to secure the removal from office of a man whom he deemed unfit to fill it by reason of his having attempted to commit a felony, or it may be that his motive was wounded self-love in not having those recommended by himself appointed, or to obtain the removal of the plaintiff and Ramsey on false allegations and the securing the nomination of their successors for his own friends. This was a matter for the jury to pass upon, and they had a right to consider the paper itself, there being on its face, taken altogether, and with the circumstances surrounding, some
(279) evidence of express malice, as is more fully pointed out in the foregoing case.

Error.

Cited: S. c., 112 N. C., 839; *Byrd v. Hudson,* 113 N. C., 213.

H. A. BAGG v. WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

Constitutional Law—Interstate Commerce—Statute—Penalty.

The statute of North Carolina (Code, sec. 1967) imposing a penalty upon railroad companies for failure to ship freight within five days, is operative upon freights to be shipped to points outside the State as well as those to be delivered within its territory, and is not in conflict with the power conferred by the Federal Constitution upon Congress to regulate commerce among the States of the Union.

BAGG *v.* R. R.

ACTION, brought to recover a penalty imposed by section 1967 of The Code, for detention of freight more than five days after delivery for shipment without the consent of the consignor, tried before *Armfield, J.*, at September Term, 1890, of NEW HANOVER.

The termini of the defendant's road are the one in North Carolina and the other in South Carolina. The goods were consigned by a shipper in Wilmington, North Carolina, to a person at a station on defendant's line in South Carolina.

The court intimated an opinion that the statute was unconstitutional as to freight shipped beyond the limits of the State of North Carolina, and that the plaintiff could not recover. Plaintiff thereupon submitted to a judgment of nonsuit and appealed.

No counsel for plaintiff.
J. Davis for defendant.

AVERY, J. The power to regulate commerce among the several (280) States, as well as with foreign nations, was delegated to the Federal Government in pursuance of a preconceived purpose on the part of the leading representatives of public opinion, to provide for and promote the free and unrestricted sale and interchange of commodities between the States. It appears from contemporaneous history of the condition of the country, especially from the Journals of the General Assemblies of the States and of the Federal Convention, that there was a deep-seated desire in all parts of the Union to establish a uniform system of commercial regulation, such as would prohibit one State from imposing burdens upon the business of citizens of other States, whether by a tax upon their persons or property *in transitu*, on their goods when offered for sale, or by an impost tax. 1 Elliott's Debates, 140; 5 *ib.*, 540.

The earlier cases that gave rise to the construction of this clause of the Constitution were chiefly controversies as to the right of a State to levy a tax upon passengers or products passing through and along its highways to a market beyond its borders. The test of constitutionality, to which every doubtful State statute was subjected, was involved in the inquiry whether its enforcement would tend to trammel the trade between citizens of different States or embarrass them in passing from one to another.

The idea was crystallized by *Justice Strong* in the definition of regulating commerce, given by him in *R. R. v. Husen*, 95 U. S., 470, to wit: "Transportation is essential to commerce, or rather it is commerce itself; and *every obstacle to it, or burden laid upon it by legislative authority, is regulation.*" *Ward v. Maryland*, 12 Wall., 418; State Freight Tax, 15 *id.*, 232; *Wilton v. Missouri*, 91 U. S., 275; *Henderson v. New York*, 92 *id.*, 259; *Chy Lung v. Freeman, id.*, 275.

(281) "Commerce (said *Chief Justice Marshall*) undoubtedly is traffic, but it is something more, it is intercourse."

The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the Legislatures of the several States of the Union, the only limit to its exercise being that the statute shall not conflict with any provision of the State Constitution, or with the Federal Constitution, or laws made under its delegated powers. *Martin v. Hunter,* 1 Wheaton, 326; *S. v. Moore,* 104 N. C., 714; *State Tax on Railroad Gross Receipts,* 82 U. S., 284. So long as the State legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. *Morgan S. S. Co. v. Louisiana,* 118 U. S., 455; *Train v. Disinfecting Co.,* 144 Mass., 523; *Smith v. Alabama,* 124 U. S., 465; *R. R. v. Alabama,* 128 U. S., 96; *Wilton v. Missouri,* 91 U. S., 275; *R. R. v. Fuller,* 17 Wall., 560.

The power of Congress over commerce between the States is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from restraint which it has the right to impose, except by such statutes as are passed by the States for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid Federal legislation. Cooley's Const. Lim., 595; *Mobile v. Kimball,* 102 U. S., 697; *Wilson v. McNamee,* 102 U. S., 572; *Wilson v. B. B., etc., Co.,* 2 Peters, 245;
(282) *Pound v. Turck,* 95 U. S., 459; *Turner v. Maryland,* 107 U. S., 38; *Morgan S. S. Co. v. Louisiana, supra.*

Familiar instances of statutes falling within the foregoing exception are found in those relating to harbor pilotage, beacons, buoys, the improvement of navigable waters, the examination as to fitness of engineers and other railroad employees, and which are discussed by the courts in the cases cited above.

The validity of these and other State laws, which relate directly to or indirectly affect commerce between the States, has been sustained upon the ground either that the particular statute upon its face appeared to have been passed for the purpose of expediting the safe transportation of persons and property, or in the exercise of police powers which it is more convenient to leave subject to local legislation, such as the building of bridges over inland navigable streams.

Where the manifest tendency of enforcing such laws has been, as far as could be foreseen from their terms, to impede the free and expeditious conduct of commerce over interstate lines by land or water, they have been declared repugnant to the organic laws and void, even where Congress had failed to legislate on the branch of the subject to which they relate. The futile attempts by State legislatures, either to give exclusive privileges to a particular telegraph company, or to subject telegraph companies generally to such license tax or taxes on messages as would imply the right to destroy their business by burdening them with such imposts, illustrate the view which we have submitted, that where Congress has not exercised a police power, comprehended under the general authority to regulate commerce, the States may exercise the power to aid, but not to impede or obstruct it. *Pensacola Co. v. Tel. Co.,* 96 U. S., 1; *Tel. Co. v. Texas,* 105 U. S., 460; *Leloup v. Mobile,* 127 U. S., 640.

The Supreme Court of the United States has also, in a long line of cases, passed upon the power assumed by some of the States to impose a tax on persons or goods *in transitu* to another State, a license tax upon traveling salesmen, who might offer to sell within their (283) borders merchandise manufactured in or commodities shipped from another State, before such articles of commerce should become intermingled with its own products. These adjudications, within the last decade, have marked much more clearly the line to which Congress may rightfully claim exclusive authority to legislate, and have, also, indicated more definitely the limit to which the States may still cross that boundary in the exercise of permissive police power. The controlling principle which pervades all of them is, that such legislation by the States is inhibited as impedes, obstructs or controls commerce, or comes in conflict with some statute passed by Congress to regulate it. *Robbins v. Shelly Taxing District,* 120 U. S., 489; *McCall v. California,* 136 U. S., 104; *Asher v. Texas,* 128 U. S., 129; *Lyng v. Michigan,* 135 U. S., 166; *Walling v. Michigan,* 116 U. S., 446; *Inman S. Co. v. Tinker,* 94 U. S., 238; *In re Rahm,* 140 U. S., 545; *Bowman v. R. R.,* 125 U. S., 465; *Philadelphia S. Co. v. Pennsylvania,* 122 U. S., 326.

In *R. R. v. Husen, supra, Justice Strong,* delivering the opinion said: "Many acts of a State may, indeed, affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to distinguish between that *which merely affects or influences,* and that which *regulates* or furnishes a rule of conduct. . . . While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders; while it may prevent animals suffering from contagious or infectious diseases, or convicts from entering the State; while,

for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police power,
(284) *substantially prohibit or burden either foreign or interstate commerce.*"

In *Wilson v. Missouri,* 91 U. S., 282, it is said "the fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered in reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be *free* and *untrammeled.*"

In *Tel. Co. v. Pendleton,* 122 U. S., 358, *Justice Field* says: "In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States, is affirmed, *whenever that body chooses to exert its power,* and it is also held, *that the State can impose no impediments to the freedom of that commerce.*"

In *Walling v. Michigan,* 116 U. S., 446, *Justice Bradley,* speaking for the court, says: "We have repeatedly held, that *so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates that such commerce shall be free and untrammeled.*" *Phom v. Houston,* 114 U. S., 631.

When we come, therefore, to the application of the authorities to the case at bar, the question arises at the threshold of the inquiry, whether the statute, which is drawn in question, would, in its enforcement, tend to trammel or obstruct the trade carried on between the States, and not whether it might remotely influence it.

The statute (Code, sec. 1967), which was declared to be repugnant to the Constitution of the United States in the court below, is as follows:

"It shall be unlawful for any railroad company operating in this State to allow any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating
(285) this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for same."

Neither the Act of Congress, passed in 1887, to regulate commerce, nor the amendatory Act of 1889, prescribes the time or the manner in which freight received for shipment to another State shall be forwarded; nor do these statutes clothe the commission with power to regulate the time of shipment. Therefore, if the defendant company, whose line extends into the section of our State where many farmers are engaged in raising vegetables for sale in Northern cities, should, for the purpose of stimu-

lating production in a State further South and more remote from the markets, fail to furnish transportation to this class of persons, known as "truckers," for more than five days, and thereby give to the planters of South Carolina the exclusive benefits of the markets till vegetables of the same kind, then mature here, should ripen in Virginia, the producers would suffer loss without adequate remedy, because no provision is made in any national law for preventing such secret preference. It would be almost impossible, in the very nature of things, to prove the existence of such a purpose, though in fact entertained and acted upon by some agent in control of the through line, or in any way to show that, in a system so extensive and complicated, the injury was due to any cause other than undesigned and unavoidable accident. In the same way, in the absence of a State statute imposing a penalty or any other local legislation on the subject facilities for shipment may be furnished more promptly to one town or station than to another neighboring one, and thereby its business may be injured and its improvements retarded. No other compulsory law could be conceived of that is calculated to operate so uniformly in insuring the shipment of both local and interstate products without preference to one class of shippers over another, or to one station over a neighboring one. If the evil to be remedied were the habit of giving the preference to through freight consigned to another State over local shipments to points (286) within the State, where is the power to compel fairness lodged? The power delegated to Congress to control through shipments would not warrant the enactment of a law going further than to prohibit unfairness and insure promptness in transporting goods shipped to another State. If, then, the authority of the State is confined to such legislation as will apply to and insure uniformity and dispatch in forwarding freight to points within its own territory, how could the evil of giving advantage either to the through or local shipper be corrected? Surely, as between the Federal Legislature acting under well defined and delegated powers and the States that have retained and may exercise all the residuary authority to provide by statute for the protection of its citizens, subject only to the restraints of their own organic law, the right should be conceded to the latter without question.

It is settled that the statute under consideration is valid, as to the transportation of freight to points within the State, and so far may be enforced in the State courts, just as the license taxes could be collected from persons selling the products of the State that imposed them, and within its limits.

If we concede then that each power, State and National, is sovereign and exclusive within its own domain in dealing with the problem of expediting shipments, we have located the authority to regulate the

conduct of each class of consignments *inter sese,* and it might be exercised, if the statutes so provided, by two railroad commissions supplementing each other. But when the interests of State and interstate traders conflict, and such regulation is needed as will prevent corporations from giving undue preference to either over the other, under this theory it would seem that the States have neither delegated nor reserved the right to afford such relief by appropriate legislation, but that
(287) in the transfer of delegated authority to the Federal Union, this power, so conducive, if not essential, to the public weal, has been lodged *in nubibus* beyond the reach of either. There is nothing upon the face of the statute, as in that discussed in *Robbins v. Shelly Tax District, supra,* to show that it was intended to operate or does operate as a restriction upon the interstate commerce. On the contrary, the enforcement of the penalty is at once a stimulus and a compensation, placed within the reach of every one who consigns his freight to another State, and he may avail himself of its aid as an incentive to promptness to the same extent as the local shipper may do. In fact, the controversy before us has its origin in a failure to ship goods to another State, and we are asked to declare the law invalid when its aid has been invoked to expedite interstate commerce, and to thereby leave the defendant at liberty to embarrass such traffic, not by legislation, but by inaction or unfair conduct.

It was contended, on the argument, that a State could not compel railroad companies, doing business between States, to provide cars for removing freight within a given period without risk of impairing the facilities for shipment from the adjacent State by withdrawal of the company's cars from it. That is an evil that may be met and provided against by the enactment of a similar statute in the adjacent State, and thus forcing the company to provide an adequate supply of cars to remove its freight without delay. Besides, the same result would as naturally follow, if the statute were limited in its operations to compelling the removal of freights consigned to points within the State, and if the argument were allowed to influence us at all, we would be driven to the conclusion that the penalty cannot be recovered, even where the agreement is to ship the freight to a station in North Carolina. Cars cannot be provided for the shipment of local freight if they are moved to particular points not to fulfill a duty due to persons who have been induced by the invitation of the carriers to intrust goods to their care, but to avoid the consequences of disregarding a penal statute,
(288) without influencing to some extent the business of the whole line.

Where these arteries of trade have termini in different States, or where they lie entirely within a single State, but constitute a part of a long

through-line formed for the purpose of competing for business with other similar lines, it would be as certainly impossible to interfere in any way with any branch of the system, whether located entirely within one or situate in two States, without to some extent affecting the whole line, as it would be to check the flow of blood in a vein of one's arm, or to temporarily open the vein, without influencing the action of the main artery of that arm.

This case illustrates the distinction drawn by *Justice Strong* in *R. R. v. Husen, supra,* between a State statute that affects or influences incidentally even to the slightest extent, the transportation of commodities from one State to another, and one that is palpably intended to embarrass such commerce, and trammel it by restrictions, especially where, in addition, there is a plain discrimination in favor of the local trade or production.

Neither the clause of the Constitution which we have considered, nor any other, has been construed to interfere with "the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." *Barber v. Connolly,* 113 U. S., 27; *Maylor v. Kansas,* 123 U. S., 623. The palpable purpose of the Legislature, in enacting our statute, was to stimulate trade and develop the resources of its people. It throws the ægis of State protection alike over freight consigned under the care of the State and that of which the general government has the right of supervision. The requirements of a State law that locomotive engineers be examined as to the condition of their eyes to determine whether they were (289) color-blind and as to fitness generally, and required to have a license, have been declared valid under the general authority to protect life, health and property; yet such statutes interfere with and affect, but do not obstruct, commerce between the States. *Smith v. Alabama, supra; R. R. v. Alabama,* 128 U. S., 96. In *Smith v. Alabama,* the Court said: "If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles or employees of sufficient skill and knowledge, or in not properly conducting or managing the act of transportation, why may not the State also impose, on behalf of the public, as an additional means of prevention, *penalties for the non-observance of these precautions?*"

Justice Field, in delivering the opinion of the Court in *R. R. v. Alabama, supra,* said: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress

may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that commerce; that such legislation will supersede any State action on the subject. *But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.*"

If it is not only the right but the duty of State Legislatures to provide for the safety of the persons alike of its own citizens and those of other States passing across its territory on trains, by such legislation as Congress had plenary power to pass, if it had chosen to exercise that power, it would seem doubly due to all persons interested in the traffic conducted along the railway lines which cross it, that their property intrusted to the corporations owning them should be protected by
(290) proper legislation, especially if the power of Congress in the premises is not plenary, and there is no authority lodged anywhere except in the States to pass a statute that will operate uniformly and on all classes of freight.

It is true that section 1967 has been modified so as to give persons injured by failure to ship within five days, the right to recover double the amount of damages actually sustained. Laws 1891, ch. 520. But by its terms the statute does not apply to actions pending in the courts so as to affect the right to recover the prescribed penalty.

We might add that though Congress has plenary authority over whiskey stored in a Government distillery and in the custody of a gauger, it is, nevertheless, larceny to steal such whiskey. *S. v. Harmon,* 104 N. C., 792; *S. v. Cross,* 101 N. C., 770; *S. v. Bishop,* 98 N. C., 773.

In like manner, national banks are the creatures of the general government and subject to such supervision and regulation as Congress may provide for, yet the State may protect the property of such banks by punishing the forger of a note to defraud it. *Cross v. North Carolina,* 132 U. S., 132.

Where, therefore, the State Legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not acted, or has not the authority to afford so complete a remedy for the evil as the State Legislature, there can be no question about the validity of such legislation or the duty of the State courts to enforce it.

Freight Discrimination case, 95 N. C., 432, presented a question widely different from that raised by this appeal. That case involved a construction of section 1966 of The Code, which was an act, by its terms, prohibiting the exaction of a greater charge for hauling freight a shorter distance over a given line than is charged by the same carrier for transporting freight of the same class to a greater distance in the same direction. If the statute had been enforced as to shipments beyond

the limits of the State it would have been clearly an invasion (291) of the exclusive domain of Congress, and would have provided for one of the most flagrant abuses on the part of carrier of goods shipped from one State to another that has been remedied by the more recent Act of Congress. The court there conceded that the regulation of charges was operative within, though not beyond, the boundaries of the State. The passage of that statute was, as to its operation beyond our lines, an undisguised attempt to interfere with commerce by regulating charges, and not an effort to aid such traffic by speeding shipments to their appointed destination.

We think that there was error in the ruling of the court below, that the plaintiff could not recover because the goods were consigned to a point beyond the limits of the State, and a new trial must, therefore, be granted.

New trial.

Cited: S. v. Womble, 112 N. C., 867; *S. v. R. R.,* 119 N. C., 820; *Hutton v. Webb,* 124 N. C., 753; *Currie v. R. R.,* 135 N. C., 537; *Walker v. R. R.,* 137 N. C., 168; *Harrell v. R. R.,* 144 N. C., 538; *Morris v. Express Co.,* 146 N. C, 172; *Reid v. R. R.,* 149 N. C., 425; *Hardware Co. v. R. R.,* 150 N. C., 706; *Reid v. R. R. ib.,* 758; *Lumber Co. v. R. R.,* 152 N. C., 72; *Reid v. R. R.,* 153 N. C., 492.

G. C. FARTHING v. JOHN H. DARK.

Negotiable Paper—Purchaser—Contract—Indorsement.

The plaintiff purchased a negotiable note executed by defendant for value, and before maturity, from the payee, who was a stranger to him; the price paid was considerably less than the face value of the note, which was payable six months from date, and at a place which plaintiff knew had no existence; he had notice also that the payee had sold to others a number of similar notes at a large discount, and that they were given for some kind of a patent right under some contract, the terms of which were unknown to him: *Held,* that these facts were sufficient to impose upon the plaintiff the burden of further inquiry into the nature of the transaction between the original parties to the contract, and affected him with knowledge of all that inquiry would disclose.

MERRIMON, C. J., and SHEPHERD, J., dissenting.

APPEAL from a justice of the peace, tried before *Winston, J.,* (292) at the Fall Term, 1891, of CHATHAM.

The plaintiff sued on a promissory note, of which the following is a copy:

"$125.00. DURHAM, N. C., 13 Feb'y, 1891.

"Six months after date I promise to pay to the order of W. B. Pallett & Co. one hundred and twenty-five dollars, negotiable and payable at Durham Fence Factory, or office of Wortham, Warren & Co. Planing Mills. Value received.

"Indorsed: W. B. Pallett & Co. J. H. DRAKE."

The defendant admitted the execution, pleaded fraud in the *factum*, failure of consideration, and equities arising out of a contemporaneous contract, as set out in the answer.

The plaintiff introduced the note and rested his case.

The execution of the note having been admitted, the defendant offered in evidence an agreement between W. B. Pallett & Co. and himself, marked "A," which was in substance that, "whereas, W. B. Pallett & Co., of the town of Durham, had established a permanent industry in Durham for the purpose of manufacturing and selling the Champion Combination Slat and Wire fence, upon the consideration named they appointed the defendant agent to sell the manufactured fence in the township of Baldwin, Chatham County, and receive the compensation named. The said W. B. Pallett & Co. were at all times to furnish the defendant with the fence at the price of 45, 50 and 52 cents per rod, according to the character of the fence, and the defendant was to pay Pallett & Co. five cents per rod of the commission after he had sold 1,000 rods of fence and received all the commission, $250; as he has this day secured to be paid $125 by execution of his note, being
(293) one-half of the commission on the first 1,000 rods of fence sold. And if 500 rods of fence are not sold at the end of six months by the said second party, then said company, or their authorized representative, are fully empowered to cancel said agency, and appoint another agent in his stead; but if they decide to cancel said agency, which shall be at their option, they shall surrender said note after first being paid one-half of the commission on the fence sold during the said six months."

The defendant testified: "One W. B. Pallett came to me and proposed to make me his agent for six months for my township in Chatham County, telling me he had established a permanent factory in the town of Durham for the manufacture of a wire fence described in circulars, which he read to me, and of which he gave me several copies. I executed my note, and we executed the contract in duplicate. He told me the note was simply to butt against the fence, and that at the end of six

months it would be given up to me and canceled, and if I sold no fence I would have to pay nothing on it. In about two weeks after this I went to Durham, and went to see Wortham, Warren & Co. I found no fence, no factory, and that W. B. Pallett had left the country. I went there to get the fence. I wanted some for my own farm, and some for my neighbors. This is the only time I went or sent about buying the fence. I never wrote about it." The defendant rested his case.

G. C. Farthing, the plaintiff, testified: "I bought the note sued on 19 February, 1891, and paid $100 for it. I did not know of the contract. I bought of W. B. Pallett & Co. I live in Durham, and have lived there for twenty-six years. I am a merchant and not a dealer in paper like this note. I had known Pallett but a few days. He was a stranger in Durham. Shortly after I purchased the note he left Durham. I heard of him in Danville. At the time I bought this note I purchased four others. He had previously sold nine others to J. F. Slaughter. Slaughter had spoken to me about them before I pur- (294) chased. He had the pick and paid $100 each for the ones he bought. I paid $100 each for three of those I bought, but for two, upon men I thought not good, I paid $62.50, making $425 in all for the five notes of $125 each.

"The notes Slaughter bought were for the same sums, and upon the same banks as the one sued on. I knew that the notes were given for some sort of a township right. Pallett told me. I didn't know what sort of a contract. I knew at that time that there was no factory in Durham called the Durham Fence Factory, at which the notes were made payable. There is no such factory there now. I made inquiries of Make Jeans of the financial standing of the defendant, and of C. N. Justice, the obligor in another of the notes I bought, both of whom reside in Chatham County. He told me they were good for their debts. I did not tell him that I knew that there was any contract between Pallett and Dark by which Wortham, Warren & Co. were to furnish a fence. I saw Justice shortly after I purchased the notes, and offered to sell him his note for $110. I did not tell him that I gave that sum for it. I gave $100 for his note."

W. H. Wortham, for the plaintiff, testified: "I am the Wortham of Wortham, Warren & Co. Planing Mills. Pallett came to see me, and made a contract with me for the manufacture of wire fence. It is in writing. I am prepared to furnish the fence according to the contract, and have been since about 20 February. We were the manufacturing agents of W. B. Pallett & Co. Pallett sent me machinery. I did not have room for it in my factory and put it up outside. I did not tell Dark and Justice in the latter part of February, and after the purchase

of the notes by plaintiff, that I had made no contract with Pallett, and that they could get no fence from there unless Pallett came back and made it. I did tell them that Pallett attempted to make me an
(295) agent for the sale of the fence, and that I refused to agree to become such agent for Durham township. I did not tell Justice, about 10 March last, near Farthing's store, at an auction sale of horses, that I had never given Pallett consent for the use of my name, and that I would not furnish any of the fence."

The plaintiff closed his case and the defendant introduced Make Jeans as a witness, who testified: "I live in the town of Durham. The plaintiff came to my store and said he was about to purchase the notes of the defendant, and on C. N. Justice, and asked their financial standing. I told him they were good; that Dark was my step-father. He said the notes had been given for the right to sell wire fence which would be put up by Wortham, Warren & Co. Pallett had given me $25 for giving him the names of good farmers in Chatham County. I gave him the names of Dark and Justice.

C. N. Justice, a witness for the defendant, testified: "I am the obligor upon one of the notes mentioned. Shortly after the purchase of my note by the plaintiff, I went to see him in Durham. He proposed to sell me my note for $110, and said to me that was what he gave for it. About two weeks after the execution of my note, I went with Mr. Dark to see Wortham, Warren & Co. Mr. Wortham told us that there was no fence there, and would not be unless Pallett came back and made it. That he would have nothing to do with it. That he would not let Pallett's machinery come into his house. About 10 March I saw him again near Farthing's store, where there was an auction sale of horses, and he then told me that he had never authorized Pallett to use his name, and that he would furnish no fence. I never went to see about fence again."

J. H. Dark, recalled, testified: "I was with Mr. Justice when he went to see Mr. Wortham. He told us he was going to make no fence; that he would make none; that he would not even let Pallett's machinery come into his house. There was some machinery outside of the
(296) house setting on two scantlings about 4 x 4."

The defendant asked his Honor to instruct the jury, that the defendant having pleaded fraud in the inception of the note, and having introduced evidence tending to show fraud, the burden of proof was upon the plaintiff to show that he became the owner of the note before maturity, for value, and without notice of the fraud, and without notice of such facts and circumstances as would stimulate inquiry. His Honor declined to give this instruction, and the defendant excepted.

The defendant asked his Honor to instruct the jury, that if they

should believe that the plaintiff purchased the note sued on, together with four others of the same character, for the sum of $100 each for three notes, and $62.50 for each of two notes; that at the same time one J. F. Slaughter had purchased nine similar notes upon solvent men at the same discount, from the same person, paying $100 each for the notes due in six months for $125 each, that plaintiff knew that the payee was then a stranger in the town in which plaintiff resided; that some of these notes were payable at the Durham Fence Factory; that plaintiff knew that there was no such factory in existence at Durham; that plaintiff made inquiries and ascertained that defendant and others who gave said fourteen notes were all solvent men, except two, for which the plaintiff paid $62.50 each; that the plaintiff knew that all of these notes were given for some sort of a township right, and knew that they were given for the right to sell wire fence; that he knew that by such right the payees were to have wire fence made by Wortham, Warren & Co.; that plaintiff was not a dealer or trader in negotiable paper, then the plaintiff had notice of the fraud and defenses of the defendant. This charge his Honor declined to give, and the defendant excepted.

The defendant asked the court to charge the jury, that if they believed the facts set forth in the preceding prayer, that then the (297) plaintiff had notice of such facts and circumstances as would stimulate an inquiry, and that he is presumed to have notice of all facts which such inquiry would have disclosed. This the court declined to give, and the defendant excepted.

The defendant asked the court to instruct the jury, that if they found the facts as set forth in the preceding instruction but one, that they could be considered by the jury in passing upon the question of notice. This the court declined to give, and the defendant excepted.

His Honor then charged the jury as follows: "The plaintiff having produced the note at the trial, and its execution being admitted, and being negotiable, the law presumes that the plaintiff is the owner; the only question for your consideration, the defendant having pleaded fraud, is, do you believe the statement made by the plaintiff that he paid value for the note before maturity, and had notice of such fraud or equities; if so, you will answer the issue, 'Yes, $125, and interest from 13 August, 1891.'" To which charge the defendant excepted.

There was verdict and judgment for the plaintiff, and appeal by the defendant.

J. S. Manning for plaintiff.
T. B. Womack for defendant.

DAVIS, J. It is insisted for the plaintiff that he purchased the note

for value and without notice; that the note was negotiable, and there is a *prima facie* presumption of law in favor of every holder of a negotiable note to the extent that he is the owner of it, and that he took it for value, and before dishonor, in the regular course of business, and if there be fraud or illegality in the inception of it, the burden is upon the
(298) maker to show it. This proposition is supported by abundant authority, and will not be controverted. But the defendant says that there was evidence tending to rebut this presumption and fix the plaintiff with notice, and that he was not a *bona fide* purchaser for value and without notice, and that the court erred in refusing to submit this evidence to the jury, and in instructing them that if they believed the statement made by the plaintiff that he paid value for the note before maturity, without notice of any fraud or equities, they should answer the issue "Yes."

Was there any evidence of facts and circumstances within the knowledge of the plaintiff calculated to attract attention and put him upon his guard, and stimulate inquiry as to the character of the note which he purchased? "If so, it is well settled," says *Ruffin, C. J.*, in *Bunting v. Ricks*, 22 N. C., 130, "that the person is affected with knowledge of all that the inquiry would disclose," and this is reaffirmed in *Hulbert v. Douglas*, 94 N. C., 122.

We think that the testimony of the plaintiff himself shows facts that should have put him on inquiry. He was careful to make inquiry as to the solvency of the maker of the note. This was prudent; but when he was offered a note by a perfect stranger for $100 made by the defendant, whom he had, upon inquiry, ascertained to be perfectly solvent, for $125, payable six months after date, at a place named in his own town, which he knew to have no existence, and when he knew, as he did, that the note was given "for some sort of a township right," upon some sort of contract, he did not know what, would not ordinary prudence and a proper regard for the rights and interest of the debtor, whom he knew to be solvent, have suggested that he press his inquiry further, and ascertain something about the character of the payee in the note, and why it was made payable at a place which he knew had no existence, as well as to have inquired as to the solvency of the maker of the note?

Conceding in favor of the purchaser of negotiable paper before
(299) maturity, that the simple fact that he purchased from a stranger who sold for much less than its value, would not be sufficient. There was conflicting testimony, and we think his Honor erred in refusing to submit the question to the jury upon all the evidence. It was error to single out the testimony of the plaintiff and tell the jury that

if they believed his statement they must answer the issue "Yes." *Long v. Hall,* 97 N. C., 286; *S. v. Rogers,* 93 N. C., 523, and cases cited.

Error.

Overruled: S. c., 111 N. C., 243; *Carrington v. Waff,* 112 N. C., 121; *Smathers v. Hotel Co.,* 162 N. C., 351.

W. R. BARBEE ET AL. v. B. W. BARBEE ET AL.

Advancements—Evidence.

The fact that a father conveyed to his son a tract of land worth $1,200 for a recited valuable consideration of $400 will not prevent the grantee from being charged with the difference as an advancement, if it was the purpose of the grantor to do so; and the purpose to treat it as an advancement may be proved by parol evidence.

SPECIAL PROCEEDINGS for partition, heard at Spring Term, 1891, of DURHAM, *Boykin, J.,* presiding.

The following is so much of the case stated on appeal as need be reported:

In 1872 Gray Barbee, the ancestor of the parties, and who subsequently died intestate, conveyed to his son B. W. Barbee, a tract of land by a deed of bargain and sale in fee, regular in form and with usual covenants of warranty. The consideration expressed in said deed was four hundred dollars, and this was actually paid by said grantee, $100 to the grantor, and $100, according to his direction, to each of three other children of said grantor. The land was worth $1,200, and this (300) amount, deducting the $400 which the land actually cost him, made the said B. W. Barbee share in the advantage of the partition of some of his lands made by the said Gray Barbee equally with his brothers and sisters, who were advanced. The referee, who found as facts that the price paid by said B. W. Barbee was $400, and the actual value of the land conveyed was $1,200, found also, as a fact, that the said Gray Barbee intended the $800 excess of value over the price paid as an advancement to said B. W. Barbee.

Upon a consideration of the report of the referee, finding the facts as just stated, and the opinion the Supreme Court filed in this case, his Honor held that the grantee was chargeable with $800, the difference between the price paid for said land and the value of said land as an advancement, and rendered the judgment set out in the record. Appel-

lant insisted, that as it was found as a fact, and undisputed, that he had paid $400 for the land, the same (the land) could not be charged to him as an advancement, nor could any part of it, though its actual value was $1,200. This objection was overruled, and the defendant excepted, and appealed to the Supreme Court from so much of the judgment only as charged him with said $800, he being charged in said judgment with $1,137.50 for land, while, as he insisted, he should only have been charged with $337.50.

The defendant appellant B. W. Barbee contended that there was no evidence to sustain the referee's finding as to the intent of Gray Barbee that the land conveyed should be an advancement. Plaintiff contended that there was.

J. Parker and W. A. Guthrie for plaintiff.
W. W. Fuller and John W. Graham for defendant.

MERRIMON, C. J., after stating the case: This case has been before this Court by a former appeal disposed of at the last term. In (301) that appeal (see *Barbee v. Barbee,* 108 N. C., 581) it was decided that the recital in the deed of the payment of the consideration therein specified for the land referred to conveyed by the appellant's father to him, did not preclude and estop the plaintiffs from showing by parol evidence that the real value of the land was not the consideration recited in the deed, but was in fact $1,200, and that the father intended that the appellant should account for $800 of that sum as an advancement in the division of his estate among his children after his death. It appears from exceptions to evidence that one purpose of this appeal is to ask the Court to overrule or modify that decision. If the appellant was dissatisfied with it he should have made his application to rehear. That would have been the orderly and regular course to pursue. Perhaps we have the power to overrule the decision, but we are entirely satisfied with its correctness, and are not in the least inclined to disturb it.

The mere fact that the appellant's father in his lifetime conveyed to him a tract of land worth $1,200, and recited in the deed of conveyance the consideration for it of $400, could not prevent the father from charging the appellant with the value of the land above and beyond the consideration recited in the deed as an advancement, if he saw fit and really intended to do so. The father might find it convenient to do so, and there is no rule of justice, nor principle, nor statute, nor reason of policy that forbids it to be done. It might be better and safer to explain in the deed such purpose, but it is not at all necessary that this shall be done. The purpose to treat a part of the value of the land

as an advancement may be proven by parol evidence, whether the same be in writing or not. The case of *Harper v. Harper,* 92 N. C., 300, and *Barbee v. Barbee, supra,* in effect sustain the view just expressed. It is difficult to conceive of a just reason why a father shall not have the right to require his son to pay part of the value of a tract of land he conveys to the latter and charge him with the remaining part as an advancement. *Meeker v. Meeker,* 16 Conn., 383; *Speer v.* (302) *Speer,* 14 N. J. (Chan.), 240.

The evidence is voluminous, and it would serve no useful purpose to recite and advert to it here in detail. It is sufficient to say that we have examined it, and cannot hesitate to decide that there was competent evidence before the referee from which he might find that the father of the appellant intended to charge the latter with $800 of the value of the land referred to, not as a gift, but as an advancement.

The objections and exceptions to the admission of evidence before the referee do not appear to have been passed upon by the court below, and hence they are not before us for review. It seems that it was not intended that we should consider them.

Judgment affirmed.

Cited: Boutten v. R. R., 128 N. C., 341.

HUGH J. LOVIC v. THE PROVIDENCE LIFE INSURANCE COMPANY.

Appeal—Record.

Where there is no statement of case on appeal or assignment of error in the record the judgment will be affirmed.

ACTION, tried at February Term, 1891, of CRAVEN, before *Connor, J.*

O. H. Guion for plaintiff.
M. DeW. Stevenson for defendant.

DAVIS, J. There is no statement of the case on appeal, and no exceptions or assignment of error appear in the record, nor is there anything in the voluminous transcript sent to this Court to show (303) that either party was dissatisfied with anything that occurred in the progress of the trial, or that any appeal was taken, except the following entry at the close of the judgment: "From the foregoing judgment the plaintiff and defendant appeal; notice waived; bond fixed at $25"; and, "it is agreed that either party have until 1 May, 1891, to file

case on appeal and perfect appeal. 4 April, 1891." This agreement is signed by counsel for both sides. Only one transcript is sent up, and there is nothing to indicate whether it is the appeal of the plaintiff or defendant, except the clerk's certificate of deposit of $25 in cash made by the defendant in lieu of an appeal bond. No appeal has been perfected as required by The Code, or in accordance with the agreement of the parties, and the judgment must be affirmed. *Mitchell v. Tedder,* 108 N. C., 266; *S. v. Henry,* 104 N. C., 914.

Affirmed.

Cited: Hurley v. Ray, 160 N. C., 379.

J. B. PERRY v. DUNCAN BRAGG.

Agricultural Lien—Description.

A description in an agricultural lien of the land upon which the crops were to be grown as "a tract of land in Granville County, known as the C. H. Dement, deceased, or any other lands he (defendant) may cultivate during the year 1889," is not void for uncertainty as to the "Dement" tract (which may be aided by parol proof), but is void in respect to the other lands mentioned.

ACTION, tried at January Term, 1891, of GRANVILLE, *Boykin, J.,* presiding. Judgment for defendant, and plaintiff appealed.

(304) *N. Y. Gulley (by brief) for plaintiff.*
J. W. Hays (by brief) for defendant.

CLARK, J. This action is to recover certain crops by virtue of an agricultural lien thereon given by the defendant to the plaintiff. The said lien describes the lands on which such crops are to be raised, as follows: "Upon a tract of land in Granville County, known as the C. H. Dement, deceased, or any other lands he (the defendant) may cultivate during the year 1888." The court ruled that the description of the land on which the crops were raised was too vague and uncertain to pass title to said crops, and rendered judgment on that ground against the plaintiff, to which he excepted. The record discloses no other ruling of the judge, nor any other exception by appellant.

It has been held in *Weil v. Flowers, ante,* 212, that a description, similar to that above recited, was valid and sufficient as to crops raised

by the defendant during the year on the land in the county named "known as C. H. Dement, deceased," and that such description is not rendered invalid and insufficient by the superadded words, "or any other lands he may cultivate." The latter words are mere surplusage, not vitiating the definite words preceding them, "the land in Granville County known as C. H. Dement, deceased," which admit of parol proof to identify it.

There is no suggestion by exception, nor in the printed briefs filed by counsel, that the land of "C. H. Dement, deceased," was not sufficiently identified by proof, but if there is any doubt on that point, the facts will be developed in a new trial.

Error.

(305)

OLIVER LAMBE ET AL. v. H. M. LOVE ET AL.

Appeal—Roads.

1. An appeal lies from the action of the board of county commissioners confirming the report of a jury laying out a road, notwithstanding there was no appeal from the original order allowing the road and appointing a jury to locate it.
2. An appeal from a refusal to dismiss, before final judgment, is premature.

PETITION to have a public road and ferry established, heard before *McIver, J.*, at Spring Term, 1891, of CHATHAM.

The prayer of the petitioner was allowed. The jury laid out the road, assessed damages and made their report to the county commissioners, who confirmed the same. Thereupon the respondents appealed to the Superior Court. In the latter court the appellants (petitioners) moved to dismiss the appeal, "upon the ground that the defendants (respondents) should have appealed from the order of the commissioners establishing the public road, fixing the termini and directing the sheriff to summon a jury of freeholders to lay off said road, and that the defendant could not appeal from the order confirming the report of the jurors." The court denied the motion, and the petitioners, having excepted, appealed.

John Manning and J. S. Manning for plaintiffs.
T. B. Womack for defendants.

MERRIMON, C. J. It may be that the respondent was satisfied with the order of the county commissioners directing the laying out of the public

road, and he did not desire to appeal from such order, but he may have been dissatisfied for good cause with the action of the jury in (306) some material respect, and that of the county commissioners in confirming their report. The jury may not have been a lawful one; they may have proceeded improperly in the execution of the order, or in assessing damages to the prejudice of the respondent. If so, and their report was improperly confirmed, he had the right to appeal, and it was the duty of the Superior Court to hear and determine the matter according to law. What we have said is in no sense in conflict with what is said and decided in *McDowell v. Insane Asylum,* 101 N. C., 656. It may, and frequently does, happen that the principal, and in a legal sense, final, judgment or order in an action or proceeding is erroneously executed. In such case the complaining party has the right to appeal, certainly when and as soon as the execution of the order or judgment is completed and acted upon by the court. The court, therefore, properly denied the motion.

Moreover, an appeal did not lie from the denial of a motion to dismiss the appeal. The appellants should have assigned error in the record to be considered on appeal from the final judgment. *Wilson v. Lineberger,* 82 N. C., 412; *R. R. v. Richardson, id.,* 343; *West v. Reynolds,* 94 N. C., 333; *Davis v. Ely,* 100 N. C., 283; *S. v. Warren, id.,* 489.

Judgment affirmed.

Cited: Keaton v. Godfrey, 152 N. C., 17; *Walls v. Strickland,* 174 N. C., 301; *Williams v. Bailey,* 177 N. C., 40.

W. J. WYATT v. LYNCHBURG AND DURHAM RAILROAD COMPANY.

Appeal—Transcript.

When the record on appeal does not set forth the pleadings, nor an agreed state of facts in lieu thereof, the cause will be remanded.

APPEAL from *Winston, J.,* Fall Term, 1891, of DURHAM.

(307) *J. W. Graham, J. Parker, R. B. Boone and J. S. Manning for plaintiff.*

W. A. Guthrie for defendant.

CLARK, J. The transcript shows process, a reference to arbitration, an award, exception thereto, the action of the court below thereon and an

appeal, but there are no pleadings nor an agreed state of facts in lieu thereof, that we might see the contention of the parties, and that the court below had jurisdiction of the cause of action.

The court would permit the pleadings to be filed in this Court *nunc pro tunc* (Rule 26), so as not to delay the hearing, but as both parties are not able to do this, the cause must be remanded. The case is substantially the same as *Daniel v. Rogers,* 95 N. C., 134; *Rowland v. Mitchell,* 90 N. C., 649.

Remanded.

Cited: Ferrabow v. Green, 110 N. C., 415.

H. H. MARKHAM, RECEIVER, *v.* R. F. WHITEHURST ET AL.

Fraud—Assignment—Property Subject to Execution—Inventions—Creditor and Debtor.

1. While a purely mental conception of a judgment debtor cannot be subjected to the payment of his indebtedness, nevertheless if, by his knowledge and skill in such conception, he acquires an interest, which is the subject of assignment, such interest may be reached by his creditors.
2. A person being in embarrassed financial condition conceived a formula for the manufacture of cigarettes, which he devoted to a company organized for the purpose of utilizing it, and, as a consideration therefor, the company issued to the wife of the inventor shares of stock for which she paid no other consideration: *Held,* (1) that the issue of the stock to the wife was fraudulent as to the husband's creditors; (2) that the husband was not entitled to have them protected from the demands of his creditors, upon the ground that the stock was the product of his skill and labor, and he had a right to appropriate it to the support of his family.

ACTION, brought by plaintiff as receiver, appointed in pro- (308) ceedings supplemental to execution, to recover of the defendants ninety-five shares of stock of the Durham Medicated Cigarette Company, tried before *Boykin, J.,* at the March Term, 1891, of DURHAM.

The plaintiff introduced, without objection, the testimony of the defendant R. F. Whitehurst, before D. C. Mangum, clerk Superior Court, in the supplemental proceeding before referred to. The defendants introduced no testimony, but demurred in terms to the evidence of plaintiff, and waived trial by jury and agreed that his Honor should render judgment without finding of facts. His Honor overruled the demurrer

and gave judgment for plaintiff, from which judgment defendants appealed.

The other facts necessary to an understanding of the questions decided are stated in the opinion.

W. W. Fuller and J. S. Manning for plaintiff.
R. B. Boone and J. Parker for defendants.

SHEPHERD, J. It is unquestionably true that the purely mental conception of a judgment-debtor cannot be reached by his creditors and subjected to the payment of his indebtedness. But, says *Lord Alvanly* (referring to the proposition that an invention was an idea or scheme in a man's head which could not be reached by process of law): "If an inventor avail himself of his knowledge and skill and thereby acquire a beneficial interest which may be subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry." *Hess v. Stevenson,* 3 B. & P., 565; Wait Fraudulent Conveyances and Creditors' Bills, sec. 38. Mr. Wait, in section 24, says, "that the manifest tendency of the authorities is to reclaim every species of the debtor's
(309) property, prospective or contingent, for the creditor. As has been shown (he further remarks), transfers of tangible interest and rights in action, stocks, annuities, life insurance policies, book-royalties, patent rights, property of imprisoned felons, legacies and choses in action generally, may be reached." See, also, *Burton v. Farinholt,* 86 N. C., 260, and *Worthy v. Brady,* 91 N. C., 265. If, therefore, as it appears in the present case, the judgment-debtor acquired a right to the stock in controversy in consideration of the formula furnished by him for the manufacture of medicated cigarettes, such a right was a beneficial interest, which was subject to the demand of his creditors; and if he, being insolvent, and without reserving sufficient property to pay his existing indebtedness, caused the said stock to be issued in the name of his wife (she not being a purchaser for value), it would seem very clear that the plaintiff would be entitled to the relief prayed for.

It is insisted, however, that the creditor has no lien upon the labor, skill or attainments of the debtor, and that he may gratuitously devote them to the support of his wife and family. Granting the principle as laid down and qualified in *Osborne v. Wilkes,* 108 N. C., 673 (and further than this we are not prepared to go), we do not see how it applies to the case before us. The judgment-debtor possesses a certain valuable formula which he sells for so much stock, which stock he procures to be issued in the name of his wife. This surely is not merely devoting his personal services and skill for the wife's benefit, but it is the acquisition

by him of a thing of value which is subject to the claims of his creditors. Besides, it does not appear that he was to devote his services to the company, except to the extent that he was to carry out the formula and make it valuable. Even if he had agreed to perform future personal services in consideration of the stock then issued, our case would not fall within the principle stated, for a debtor "is not permitted to treasure up a fund accruing from his labor or vocation, whatever it may be, and claim that it shall be protected for the benefit of himself or (310) his family against the demands of creditors. Every agreement or contrivance entered into with such a view to deprive his creditors of his future earnings and enable him to retain and use them for his benefit and advantage, or to make a permanent provision for his family, is fraudulent and void." Bump. Fraud Con., 270, citing *Hamlin v. Zimmerman,* 5 Sneed, 39; *Tuppon v. Childs,* 14 Barb., 85; *Patterson v. Campbell,* 95 Ala., 933, and other decisions.

As it is not contended, upon the testimony, that the wife is a purchaser for value, we are of the opinion, for the foregoing reasons, that the plaintiff was entitled to recover, and that the judgment should be

Affirmed.

THE STATE AND COUNTY OF GUILFORD v. THE GEORGIA COMPANY.

Appeal, when Premature—Process—Service—Publication—Statute.

1. An appeal from the refusal of a motion to dismiss an action for want of proper service of process, taken before final judgment, is premature and will not be considered. The better practice is to note an exception and proceed with the trial.
2. Service of summons made by publication from 3 August to 31 August, the term of the court to which the process was returnable beginning on the latter day, is a sufficient publication of "once a week for four weeks," and a compliance with the statutes in that respect. (Code, secs. 200, 596, 602; chapter 108, Laws 1889.)
3. It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void.

THIS CAUSE was heard, upon motion, before *Winston, J.,* at (311) Fall Term, 1891, of GUILFORD.

The petition alleges that notice of summons was published in *The Daily Record* from 3 August, 1891, to 31 August, 1891, both days inclusive, the last day being the day on which court began.

That on Saturday, 5 September, the case was called by his Honor in its order on the summons docket, when the attorney for defendant entered a special appearance, and moved:

1. That this case go over to next term as return term of summons, because the notice of publication embraces only four weeks, and not four weeks and ten days.

2. The case is not properly constituted in this court, in that a copy of the summons and the proper title of action was not made in the publication.

Both motions were overruled and defendant prayed an appeal, which was refused.

The following is a copy of the publication made:

NOTICE.

GUILFORD COUNTY—*Superior Court.*

STATE OF NORTH CAROLINA AND THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY *v.* THE GEORGIA COMPANY. } *Service by Publication.*

This is a civil action, brought in this court in behalf of the creditors of the defendant corporation to obtain the appointment of a receiver, and to follow and collect the assets of the defendant corporation for the payment of State and county taxes; and it appearing to my satisfaction

(312) that the defendant is a corporation duly organized under the laws of this State; that a summons has been duly issued against the defendant, and that no officer or agent thereof, upon whom the service of the same can be lawfully made, can, after due diligence, be found within the State, the defendant, the said The Georgia Company, is hereby notified to appear at the next term of this court to be held on 31 August, 1891, and demur or answer to the complaint which will be filed in said cause within the first three days of said term, or judgment by default will be entered against it.

It is ordered that this notice be published once a week for four successive weeks in *The Daily Record,* a newspaper published in the said county of Guilford.

This 3 August, 1891. JNO. J. NELSON, *C. S. C.*

L. M. Scott and R. M. Douglas for plaintiffs.
P. B. Means and F. H. Busbee for defendant.

CLARK, J. This application is for a *certiorari,* as a substitute for an appeal claimed to have been denied by the judge. *Skinner v. Maxwell,* 67 N. C., 257. It is clear that an appeal did not lie from the interlocutory ruling of the court, and it was the duty of the judge not to suspend proceedings. *Carleton v. Byers,* 71 N. C., 331. If the defendant was not duly served with process properly returnable to such term, he could either have disregarded the further proceedings of the court, which would have been a nullity as to him, or he could have had his exception noted and have proceeded with the trial; the latter being the preferable and more commendable course. *Plemmons v. Improvement Co.,* 108 N. C., 614. The manifest delays and inconveniences from entertaining premature and fragmentary appeals have, indeed, been often pointed out. *Hines v. Hines,* 84 N. C., 122; *Commissioners v. Satchwell,* 88 N. C., 1; *White v. Utley,* 94 N. C., 511, and in many other cases. As no appeal lay, a *certiorari* as a substitute therefor cannot be granted. *Badger v. Daniel,* 82 N. C., 468. (313)

Notwithstanding the petition must be denied, it may serve the end in view, to pass upon the points presented, as has been sometimes, though rarely, done by the Court, upon sufficient cause to justify it. *McBryde v. Patterson,* 78 N. C., 412; *S. v. Tyler,* 85 N. C., 569; *S. v. Lockyear,* 95 N. C., 633; *S. v. Nash,* 97 N. C., 514; *S. v. Divine,* 98 N. C., 778.

The publication required by chapter 108, Acts 1889, is "once a week for four weeks." This, it appears from the petitioner's application, was made, for it avers the daily publication in a newspaper from 3 August to 31 August, 1891, and a publication on the four Mondays, August 3, 10, 17 and 24, was a publication "once a week for four weeks" prior to the term of court beginning Monday, 31 August. But if the requirement is construed to mean publication "for four weeks," still there was a compliance under our statute (Code, secs. 596 and 602), for, "excluding the first day (3 August) and including the last day," 31 August, there was publication made for twenty-eight days, or "four weeks." The same construction has always been given to the statute (Code, sec. 200) requiring personal service "ten days before the beginning of the term," for service before midnight of Friday, the tenth day before court, has always been held sufficient. *Taylor v. Harris,* 82 N. C., 25. We do not think that the defendant, when served by publication, is entitled to ten days in addition to the four weeks. The publication "once a week for four weeks" is a substitute for and stands in lieu of the "ten days" which is allowed to a party on whom summons is personally served. This is not only consonant to the reason of the thing, but is in accordance with the express words of the statute, Code, sec. 227: "In the cases in which service by publication is allowed, the summons

shall be deemed served at the expiration of the time prescribed by the order of publication, and the party *shall then be in court"*; that (314) is exactly as a party who has had ten days' personal notice of the summons would be in court. We are cited to the New York decisions, but the statute in that State (Code N. Y., 441) differs essentially from ours in the omission of the words "and the party shall then be in court."

Nor is there any force in the further objection, that "a copy of the summons and the proper title of the action was not made in the publication." The publication as set out in the petition is a substantial publication of the summons and a full compliance with the statute. It contains everything that is in the summons, and the additional matter in the publication, at the most, was mere surplusage. We cannot conceive how the defendant could have been prejudiced thereby.

Motion denied.

Cited: Sheldon v. Kivett, 110 N. C., 411; *Milling Co. v. Finlay, ib.,* 413; *Clark v. Mfg. Co., ib.,* 112; *Luttrell v. Martin,* 111 N. C., 528; *Vann v. Lawrence,* 111 N. C., 34; *Luttrell v. Martin,* 112 N. C., 604; *Fertilizer Co. v. Taylor, ib.,* 148; *Wilmington v. Sprunt,* 114 N. C., 312; *Farris v. R. R.,* 115 N. C., 602; *Farthing v. Carrington,* 116 N. C., 336; *Cooper v. Wyman,* 122 N. C., 788; *Houston v. Lumber Co.,* 136 N. C., 329; *S. v. Dewey,* 139 N. C., 559, 560; *Allen Co. v. R. R.,* 145 N. C., 41; *Currie v. Mining Co.,* 157 N. C., 218; *School v. Pierce,* 163 N. C., 42; *Gouge v. Bennett,* 166 N. C., 238; *Taylor v. Johnson,* 171 N. C., 86; *Williams v. Bailey,* 177 N. C., 40.

R. L. DIBBRELL ET AL. V. THE GEORGIA HOME INSURANCE COMPANY.

Printing Record—Rules—Practice in Supreme Court.

When a printed brief is filed under Rule 12, the party filing is to be taken as asking a decision at such term and as opposing a continuance, and a motion by the opposite party to continue the case till next term will not be granted unless expressly assented to or for good cause shown.

MOTION of plaintiff in Supreme Court to strike out order of continuance.

A. C. Zollicoffer (by brief) for plaintiffs.
J. W. Hinsdale for defendant.

CLARK, J. Rule 12 of this Court provides: "When a case is (315) reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel." When this cause was reached in the regular call of the docket there was a printed brief on file for plaintiff's counsel, who was not present. The defendant's counsel, who was in Court, moved for a continuance, which was granted not for any good cause, but because unopposed.

The plaintiff's counsel moves to strike out the continuance, and that the cause stand for decision at this term. His contention is, that by going to the expense of printing and filing a brief, he gave notice that he desired and expected the cause to be disposed of at this term, and that the rule would be of practically little benefit to counsel not residing in Raleigh if, notwithstanding, they must attend in person to prevent the continuance of their cases at the mere motion of the opposite party.

It seems to us that this contention is just, and is based on the proper construction of the rule. When the counsel files his printed brief that is his argument submitted to the Court, and the case stands for decision without further argument, unless he shall see fit to also aid us with an oral argument, or the other side shall present an oral or printed argument, when the case is called. When good cause is shown in support of a motion for continuance, the Court will grant it, whether the opposite party is represented by counsel in person or by brief, but such was not the case here.

The motion for a continuance was improvidently granted and must be stricken out. The counsel for defendant did not submit an oral argument when he had the opportunity, and he cannot do so now, as the district has been passed. The plaintiff is, however, not to be deprived of his right to have the case disposed of at this term, and the defendant will be allowed ten days from the filing of this opinion (316) to submit a printed brief.

This is the first occasion on which the construction of this rule has been before the Court, and the embarrassment arising as to the conflicting rights of the parties, consequent upon the improper granting of the continuance, cannot again occur.

Motion allowed.

ROBERT A. TUNSTALL v. RICHARD COBB ET AL.

Evidence—Expert—Comparison of Writings—Estoppel—Deed—Release —Contract—Specific Performance.

1. A witness who has qualified himself as an expert may, in the presence of the jury, be allowed to compare a paper whose genuineness is questioned, with another paper executed by the party who alleges the falsity of the first, and express an opinion thereon, provided the instrument so proposed to be made the basis of comparison is not denied, or the person by whom it is alleged to have been made is estopped to deny it; but where the paper offered as such basis requires proof to establish its authenticity, it is erroneous to admit it in evidence.
2. In an action to recover land, the plaintiff offered a deed to himself from the devisor of the defendant, upon which there was an indorsement, not under seal and not registered, alleged to have been made by plaintiff in the following words, "I relinquish all my right and title to the within deed"; there was also evidence tending to show that the devisor lived on the land, paying taxes thereon, and occupying it as his own for a number of years, and that his devisee continued to do the same for some time after his death; that the plaintiff lived near by and never asserted any claim to the land until after the death of the devisor, and had declared that he had no interest in it: *Held*, (1) the indorsement on the deed did not operate as a reconveyance of the estate conveyed by the deed; (2) neither the indorsement nor the facts of possession and declarations of the plaintiff estopped him from asserting his title under the deed; (3) but if the indorsement was made upon a valuable consideration (which may be proved by parol evidence), it may be treated as a valid contract to reconvey, and in a proper action a specific performance thereof decreed.

CLARK, J., dissents.

(317) ACTION, for the possession of land, tried before *MacRae, J.*, at November Term, 1890, of GRANVILLE.

Defendant Cobb was admitted to be the tenant of the defendant S. B. Hays, who was allowed to come in and defend as landlord.

Both parties claimed title to the land in dispute under one Peter Hays.

The plaintiff offered in evidence a deed from Peter Hays to himself, dated 6 March, 1886, for the land described in the complaint, duly proven and registered. Upon this deed was an indorsement in these words:

"I relinquish all my right and title to the within deed.

"ROBERT A. TUNSTALL."

The plaintiff then offered as a witness Jos. A. Fuller, who testified that he once owned this land and thinks it is worth $75 or $100 per

year; that there are forty acres in it, more or less. There are seventy-six acres in the whole Hays tract. Peter Hays was in possession of it but a short time before he sold it to Tunstall. He went back after he was married the last time.

Defendant offered as a witness W. H. Parrott, who testified that Mrs. Hays (defendant) and Peter were married in 1877. They lived on the land in dispute from then until Peter Hays' death in August, 1889. She and her tenants have been in possession ever since. Witness has seen the deed from Peter Hays to plaintiff before. It was some time in the winter after his death. The indorsement was on it then.

Defendant's counsel then offered to read the indorsement, to show an estoppel upon plaintiff, and also as color of title in (318) defendant, but upon objection by plaintiff it was ruled out because it had not been proven.

Mrs. Hays then testified that she is the widow of Peter Hays, was married thirteen years before he died in August, 1889. He left a will, and witness is his executrix. Witness and her husband lived on the land from their marriage until his death, and it has been occupied by the tenants of witness ever since his death. Before the marriage, Peter Hays lived on the land twelve years and stopped living there a while. Mr. Parrott found this deed in Mr. Hays' papers. All the time witness' husband was in possession, the plaintiff made no claim to the land. Her husband paid the taxes. Tuesday after Mr. Hays was buried, was the first time witness heard of plaintiff's claim to the land. He said he had a deed to the land and would have it. But witness heard him tell Mr. Hays five or six years before his death that he, plaintiff, had never paid a dollar for the land and did not have any claim on a foot of it; that he never intended to have it while Hays was living or after he was dead.

W. H. Hunt testified that he is cashier of the Bank of Oxford, and has been so about four years, and has been connected with the bank about six years, and thinks he has had experience enough to enable him to judge handwritings.

Witness was shown the indorsement upon the deed signed R. A. Tunstall, and at the bond on the back of the summons in this action, and compared the signature of R. A. Tunstall on these papers and said that they were the same. Witness was then asked to look at another paper, a *capais* and bond, where the signature of R. A. Tunstall had already been proven by a witness on this trial, but which paper has no connection with this case, and to compare the handwriting. Objection by plaintiff; overruled, and plaintiff excepts.

Witness answered that the name of R. A. Tunstall on these (319) two papers was in the same handwriting.

Witness was asked to compare the name of J. M. Hays on the indorsement, and on other papers not connected with this cause, the signatures to which had been acknowledged by him to be genuine. Objection by plaintiff; overruled, and plaintiff excepted.

Witness said that the signatures were the same.

The court then permitted the indorsement upon the deed to be read in evidence. Plaintiff excepted.

There was evidence tending to show that plaintiff and Peter Hays occupied the land in controversy for some time and that plaintiff resided near by.

The judge, among other things, charged the jury that, "the plaintiff having a deed for the land, and both parties claiming under Peter Hays, the plaintiff is the owner and entitled to the possession of the land in dispute, nothing else appearing; but the defendant, Mrs. Hays, invoked the doctrine of estoppel. The question then is, Did the plaintiff make the indorsement upon the deed? Was this indorsement, if made by plaintiff, intended as an agreement upon consideration between Tunstall and Peter Hays that Tunstall was to reconvey the land to Hays, or was it intended by both parties to it to be a reconveyance, and did the plaintiff, after the making of the indorsement, permit Peter Hays to occupy the land as his own until his death? If you find all these things to be true, the plaintiff would be estopped from now claiming the land."

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

J. B. Batchelor, L. C. Edwards and John Devereux, Jr., for plaintiff.
A. W. Graham for defendants.

(320) AVERY, J. In the progress of the trial it became material to show that the subscription of the plaintiff's name to a writing indorsed on a deed, was his genuine signature. A witness had testified that what purported to be the plaintiff's signature to a bond indorsed upon a *capias* not connected with this action, was in his own proper handwriting, and genuine. On the examination of the cashier of a bank, who had qualified as an expert, defendant's counsel proposed to ask him to look at the signature on the *capias* and that to the writing indorsed on the deed, which was in evidence, and compare the handwriting. This the witness was allowed to do, despite the objection of the plaintiff.

Three reasons are given for excluding as incompetent a comparison by an expert witness, of a signature or writing not admitted to be genuine or connected with the case on trial, with a signature or writing, which has been offered in evidence, where the genuineness of the latter is drawn in question:

1. There is danger of fraud in the selecting of writings, offered as specimens for the occasion.

2. The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue.

3. The opposing party may be surprised by the introduction of specimens, not admitted to be genuine, and for want of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. 1 Greenleaf, secs. 578 to 580; *Fuller v. Fox,* 101 N. C., 119; *Outlaw v. Hurdle,* 46 N. C., 150; *Tuttle v. Rainey,* 98 N. C., 513; *Pope v. Askew,* 23 N. C., 16.

A comparison of handwriting is in some States permitted to be made by the jury or experts, and in others only by experts in the presence of the jury. Where a witness has acquired a knowledge of the person's writing, he compares a disputed signature or writing with an exemplar in his own mind. But when he testifies as an expert he (321) must first be furnished, as the basis of his testimony, with some specimen the genuineness of which may be insisted on before the jury. The law was finally settled in England (in 1854) by 17 and 18 Victoria, which provided that a disputed writing may be compared by witnesses in the presence of the jury with *"a writing proved to the satisfaction of the judge to be genuine,"* and both may be submitted to the jury. It seems that there is no statute in any of the States which, like the English law, empowers the judge to determine the *quantum* of proof necessary to establish the genuineness of another specimen placed in juxtaposition with the disputed writing. But there is a great diversity in the ruling of the courts of the various States as to what is sufficient proof of the genuineness of a writing to constitute it a standard for comparison. In some of the States only specimens, admitted to be genuine, or filed as genuine by the party whose writing gives rise to the controversy in the records of the action involving it, are admissible as a criterion for testing the disputed writing, while in others it is competent to create a standard of comparison by offering proof of its genuineness. See 9 A. & E., pp. 279 to 290.

In North Carolina it seems to be settled law that an expert in the presence of the jury may be allowed to compare the disputed paper with other papers in the case, whose genuineness is not denied, and also with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of, or concedes to be genuine, but no comparison by the jury is permitted. *Pope v. Askew,* 23 N. C., 16; *Outlaw v. Hurdle,* 46 N. C., 150; *Otey v. Hoyt,* 48 N. C., 407; *Yates v. Yates,* 76 N. C., 142; *Fuller v. Fox,* 101 N. C., 119. It will appear from an examination of the authorities that, while this rule

differs to some extent from that adopted or formulated by the courts of other States, it seems nevertheless to be definitely settled. 9 A. (322) & E., p. 285, and note 4. The tendency now seems to be to authorize by statute a comparison by witnesses and juries of disputed writings with others, whose genuineness is to be established in some manner pointed out by the law.

The paper offered as an exemplar or standard of comparison purported to be a *"bond and capias, where the signature of Robert Tunstall had already been proven on the trial."* It does not appear, from the statement of the case, whether what purported to be the bond and *capias* purported also to be records of the Superior Court of Granville or of some other court, but only that the *"paper (capias,* with bond indorsed) *has no connection with this case."* Robert Tunstall had not admitted the genuineness of the bond or *capias,* and it constituted no part of the record of the case on trial, nor are we informed where it purported to belong. It does not appear whether Robert Tunstall's name purported to have been written as an obligor or a witness to the bond, or as an officer who served and returned the *capias,* and it is obvious that we cannot declare that he was estopped to deny a signature, when we do not know to what it was appended. So that the genuineness of what purported to be the signature of Robert Tunstall, offered as an exemplar for the expert witness, was proven, if at all, only *"by a witness"* examined in the case. In *Yates v. Yates, supra,* the signature of one Eller to a deposition offered in evidence as genuine by one party was compared by an expert witness, at the instance of the other party to the action, with the disputed signature; and in *Fuller v. Fox, supra,* it was declared, in effect, that even that comparison could not have been made by the jury. "A jury is to hear the evidence, not to see it." *Outlaw v. Hurdle, supra.* It appeared, therefore, that the testimony offered, not being admitted to be genuine or connected with the case, was amenable to all of the objections mentioned by Mr. Greenleaf, *supra.*

Where courts have established the general rule that a com- (323) parison of handwritings is to be excluded, the usual exception, as laid down by the highest authority (1 Wharton Ev., sec. 713), is that "when a writing, proved to be that of the party whose signature is in litigation, is already in evidence, *having been put in for other purposes,* then it is *admissible* to resort to this writing in order to determine the genuineness of the litigated instrument." In support of this proposition Dr. Wharton cites cases decided in those courts that have opened the door much wider than this for the allowance of such comparisons, even by experts. But applying even this rule to our case, it is not pretended that the bond and capias were offered or admitted for any other purpose than to compare the signatures of Robert Tunstall, or one of

them, with that on the back of the deed. It is manifest that the rules adopted in most of the States prior to the passage of any act regulating the comparison of handwriting, were, as mentioned by *Rodman J.*, in *Yates v. Yates, supra,* more liberal than that laid down by this Court. But we do not feel at liberty to disturb the settled practice. It is the province of the Legislature to determine whether it is best to alter or establish rules of evidence.

Both parties claim title under one Peter Hays, who, on 6 March, 1866, conveyed the land in dispute to the plaintiff Robert Tunstall. After the deed had been registered, the following indorsement purported to have been made: "I relinquish all my right and title to the within deed. 10 March, 1874." (Signed by Robert A. Tunstall and witnessed by James McHays.)

It was the genuineness of the signature of Tunstall so indorsed on the deed that was disputed on the trial. But if we suppose that the signature was admitted, or was proved to the satisfaction of the jury, to be in the proper handwriting of Robert Tunstall, it would remain to determine whether, in any view of the case, the *feme* defendant would take as the devisee for life of Peter Hays. We think that the court below erred in leaving the jury to pass upon the question whether (324) Robert Tunstall was estopped by his own conduct from setting up a claim to the land in dispute. Nothing more appearing than that Peter Hays moved upon the land a second time in 1877, and was permitted to occupy it until his death in 1889 without paying rent, and that he paid the taxes during that period, these circumstances, taken in connection with Tunstall's declaration made to Peter Hays in presence of his wife, would not estop Tunstall from claiming under a deed registered before the indorsement was placed upon it. Mrs. Hays testified that the plaintiff told her husband, five or six years before his death, that he had never paid a dollar for the land and had no claim on a foot of it, and that he did not intend to claim it while Peter should live, or after his death. After this conversation, Peter continued to live upon the land just as before, and enjoyed the rents, paying nothing but the accruing taxes. His position was in no respect analogous to that of one who buys land at a public sale and pays his money for it, because he is assured by another that he has no claim upon it. As Peter Hays had been the beneficiary by the arrangment, there would be no difficulty about placing him in *statu quo*. *Holmes v. Crowell,* 73 N. C., 613; Bigelow on Estoppel, 484. The writing indorsed upon the deed cannot operate as a reconveyance of the legal and equitable estate in the land by Tunstall to Peter Hays, and his Honor was in error in submitting that view to the jury, whether a valuable consideration had been shown for executing the writing on the back of the deed, or not. Even a paper-writing in the

form of a deed, but without a seal, would not have operated to reconvey the land, no matter what was the real intention of the parties. *Avent v. Arrington,* 105 N. C., 377. Unless the writing can be enforced as a contract to reconvey, we would be at liberty to say that the plaintiff, if a new trial should be awarded, must, in any event, recover, and (325) we are confronted with the question whether it will be possible for the defendant on a new trial to set up the said indorsement as a contract to reconvey. The *feme* defendant, in her amended answer, relies upon the grounds, first, that the plaintiff by reason of the indorsement released and abandoned all interest in the land; secondly, that by his conduct *dehors* the conveyance or indorsement, he was estopped to set up a claim under the deed. The judge held that there was evidence of an estoppel *in pais* which he submitted to the jury, and they found that the plaintiff by his conduct was estopped. Conceding that his Honor erred in this view of the case, and admitting that the writing and signing of the indorsement, together with the undisturbed occupation of the land by Peter Hays after his marriage to the *feme* defendant in 1877, and until his death in 1889, without payment of rent, would not necessarily show an abandonment by him of his rights under the deed, could the *feme* defendant, if she should *hereafter demand in an answer a specific performance of the agreement* to reconvey (treating the indorsement as a contract) in any conceivable state of facts, establish her right in equity to such relief?

It is not essential, according to the construction given to our statute of frauds, that the consideration upon which one has contracted to convey land should be set forth in the written memorandum of the agreement to sell. *Thornburg v. Masten,* 88 N. C., 293; *Ashford v. Robinson,* 30 N. C., 114; *Miller v. Irvine,* 18 N. C., 103. Therefore, if the language can be fairly construed as an executory agreement to convey the land described in the body of the deed, the consideration might be shown *aliunde,* and the defendant might ask a specific performance of the contract. When one person, moved by a sufficient consideration, declares a purpose to relinquish all of the right and interest that passed to him by virtue of the deed, on which the declaration is indorsed, and it appears that the attempted release is made upon consideration (326) to the grantor by the grantee on the back of the conveyance in fee simple, a court of Equity is not bound to stick in the bark and refuse its aid to compel a formal reconveyance to the original grantor. There can be no doubt that the land referred to in the writing was that admitted to have been fully described in the deed, and its identity is as clearly ascertained as if the description in the deed had been copied in the indorsement. The quantity of interest that he intended to relinquish was all of his right and title in a piece of land that Peter

Hays had conveyed to him in fee simple. The physical connection between the deed and memorandum is sufficient to make it valid, as the description of the subject-matter and of the quantity of interest, by the reference to the deed. 8 A. & E., 712; *Mayer v. Adrian,* 77 N. C., 83.

In *Beattie v. R. R.,* 108 N. C., 429, it was held that an instrument of writing signed, but not sealed, in which one agreed to relinquish to a railroad company the right of way over such route as might be fixed and ascertained by a survey through his land, was such a contract as a court of Equity would have enforced by decreeing a specific performance, had the company completed its line within reasonable time and before the presumption of abandonment had arisen from non-user. There, the identity of the right of way was to be established by the survey and location of the line, as in our case, by reference to the description in the deed. In that case "the right of way" would have been construed to mean the easement provided for in the charter. It is evident from the language that the parties intended that whatever title Robert Tunstall had in the land should be "relinquished" to Peter Hays, and if any consideration passed for that agreement, the courts should compel him, upon a proper demand for such relief, to convey all of his right and title to those who take under the will of Peter Hays, according to their several interests. In *Linker v. Long,* 64 N. C., 296, *Pearson, C. J.,* after stating that it was properly conceded on the argument (327) that the indorsement on a deed, "I transfer the within deed to W. E. T. again," did not amount to a reconveyance, said, for the Court: "The only effect that can be allowed in this writing is that it furnishes evidence of an agreement to reconvey, which a court of Equity will enforce by a decree for specific performance, provided it be supported by a valuable consideration." It is obvious, then, that if a valuable consideration is shown to have passed, the writing, though insufficient as a release, may be enforced as a contract to reconvey. What particular circumstances were relied upon by counsel to show the payment of the notes assigned by Fuller, or that any other consideration passed from Peter Hays to Robert Tunstall, it is not necessary that we should inquire. We take it for granted that all available testimony tending to show a consideration will be adduced on another trial. It is sufficient now to declare there was error in the charge in holding that there was evidence to go to the jury of an estoppel *in pais,* or of an actual release or reconveyance, as well as in the admission of testimony as to the comparison of handwriting, for which a new trial is awarded.

CLARK, J., dissenting: It seems to me that the rule is correctly stated (1 Wharton Ev., sec. 713) that "when a writing, proved to be that of a party whose signature is in litigation, is *already in evidence,* having

been put in for other purposes, then it is admissible to resort to this writing in order to determine the genuineness of the litigated instrument." This is consonant to sound reason, and is supported by many adjudications. It has been denied by no decision of any court, and is expressly followed in this State by *Yates v. Yates,* 76 N. C., 142. It would seem that it should still be followed as a just and proper
(328) principle. In the present case, the record states that the paper offered as an exemplar or standard of comparison, was a bond and *capias,* where the signature of Robert Tunstall "had been already proved" on the trial. The plain meaning of these words cannot be controverted. It is not merely stated that there was evidence "tending to prove" such paper, nor does it appear in any way that there was any controverted evidence as to the genuineness of the signature to the *capias* and bond. We are not to presume that the court below erred. The presumption is the other way. The statment that the proposed exemplar "had been already proved," taken in connection with the fact that it is not alleged or stated that there was any evidence to contradict the genuineness of the paper, is conclusive, on appeal, of the fact that it had, indeed, been already "proved," i.e., its genuineness not denied, when it had been offered in proof. Otherwise, the record would state an untruth, since, if the genuineness of the writing offered as an exemplar had been controverted, it could not have been "proved" till the evidence had been passed on by a jury. If the record is true, and we must take it so, the writing which in a previous stage of the trial had been "proved" to be genuine, was properly allowed by the court to be used by the expert as a standard of comparison for the signature in controversy.

PER CURIAM. Error.

Cited: Croom v. Sugg, 110 N. C., 261; *Hodges v. Wilkinson,* 111 N. C., 63; *Hargrove v. Adcock, ib.,* 169; *S. v. DeGraff,* 113 N. C., 693; *Jarvis v. Vanderford,* 116 N. C., 152. *Kornegay v. Kornegay,* 117 N. C., 244; *S. v. Noe,* 119 N. C., 851; *Ratliff v. Ratliff,* 131 N. C., 429; *Bivings v. Gosnell,* 141 N. C., 342; *Martin v. Knight,* 147 N. C., 580; *Herring v. Warwick,* 155 N. C., 350; *Nicholson v. Lumber Co.,* 156 N. C., 66; *Boyd v. Leatherwood,* 165 N. C., 616; *Bank v. McArthur,* 168 N. C., 55; *Vaught v. Williams,* 177 N. C., 85.

CHARLES DEWEY ET AL. v. B. F. SUGG ET AL.

Judgment—Lien—Docketing—Index and Cross-Index.

1. To constitute a lien, a judgment must be "docketed" in the manner prescribed by The Code, secs. 83, 433, 434, and one of the indispensable requirements is that the record shall contain an index and cross-index of the names of the parties to the judgment.
2. Where a judgment against several persons was entered on the judgment docket, but the caption and index and cross-index contained the name of only one of the defendants: *Held*, that no lien was created against the property of the defendants whose names were so omitted.

PETITION, heard before *Whitaker, J.*, at March Term, 1891, of (329) PITT.

The sheriff of said county, having in his hands moneys made by levy on and sale of lands of one William Whitehead under divers executions, one of which had issued on a certain judgment, hereinafter referred to, rendered against said Whitehead as well as against one B. F. Sugg, and being advised that the said judgment had not been duly docketed in Pitt County as to the said Whitehead, before 13 December, prayed the court in said petition for its order and instructions as to the same, and its direction as to the proper application and payment of said moneys, etc.

On the filing of said petition there was, during the term, a rule against plaintiffs in that judgment to show cause, etc.

It appears:

1. That previous to June Term, 1887, of Pitt Superior Court, the plaintiffs brought their action in said court against B. F. Sugg for the recovery of certain personal property.

2. That B. F. Sugg gave bond for the return of the property seized by the sheriff, and I. A. Sugg and William Whitehead became his sureties upon said bond.

3. That at June Term, 1887, the plaintiffs recovered a judgment against B. F. Sugg for the delivery of the property seized, and in case a return thereof could not be had, then for five hundred and ten dollars the value thereof, both as against the said B. F. Sugg and his sureties I. A. Sugg and William Whitehead.

4. That this judgment was entitled, "Charles Dewey, George W. Dewey and E. B. Dewey, trading as Dewey Brothers, against B. F. Sugg," and there was no reference in the caption to the said I. A. Sugg or the said William Whitehead, and nothing in said cap- (330) tion to indicate that either of them were parties to the said judgment.

5. That this judgment was shortly thereafter, and within ten days after the said June Term, copied upon the judgment docket, in Book No. 9, exactly as it was originally written, and with no reference to the said I. A. Sugg or William Whitehead in the caption thereof, and with no minute or either of their names on the margin of the docket.

6. That the following is a copy of the judgment as it appears on the judgment docket No. 9, and as it was rendered, namely:

Charles Dewey, George W. Dewey and E. B. Dewey, trading as Dewey Brothers
against
B. F. Sugg.

Pitt County Superior Court—June Term, 1887.
Before J. H. Merrimon, Judge.

Judgment was rendered in favor of the plaintiff, and against the defendant, for the possession of the property described in the complaint, and if a return of the property cannot be had, that he recover of the defendants B. F. Sugg and William Whitehead and I. A. Sugg, the sureties on defendant's replevin bond, the sum of five hundred and ten dollars, with interest on same from 1 December, 1886, and the costs of this action.

7. That the docket upon which it is recorded, as set forth above, contains an index, but no cross-index, and upon said index there appears this entry, made at about the time when said judgment was copied upon said docket, as follows:

"Dewey Bros.—B. F. Sugg."

But there nowhere appears in said index the entry of said judgment as against the said I. A. Sugg and the said William Whitehead, nor was it ever indexed as to them.

8. That an index and a cross-index of judgments is kept in
(331) a separate book by the clerk of the Superior Court of Pitt County, and have been kept by him for more than five years, the names of the plaintiffs, followed by the names of the defendants, being written on the left-hand page, and the names of the defendants, followed by the names of the plaintiffs, being written on the opposite or right-hand page, under the appropriate letter of the alphabet.

9. That this judgment was at or about the time of its being written on the docket, indexed on the said index under the letter D, and on the left-hand page, and it is as follows:

"Dewey Bros.—Sugg, B. F. & I. A."

And the name of Whitehead did not appear as one of the defendants in said index.

10. That at the same time it was indexed on the cross-index under the letter S, and on the right-hand page as follows:

"Sugg, B. F.—Dewey Bros."

And the name of Whitehead did not appear in said index as one of the defendants in said judgment.

11. That the said judgment was not at that time cross-indexed, either under the letter W, or elsewhere, as to Whitehead.

12. That on 15 December, 1890, the clerk of the Superior Court, under the letter D, after the word "B. F. Sugg" added the words "I. A. Sugg and William Whitehead," and on the cross-index, on the right-hand page, under the letter W, the said clerk, on 15 December, 1890, made this entry:

"Whitehead, William *et al.*—Dewey Bros."

13. That up to, and until the said 15 December, 1890, it did not appear either from the index to Docket No. 9, upon which (332) the original judgment was recorded, or from the index or cross-index kept by the clerk of the Superior Court of Pitt County of all judgments filed in his office, that Charles Dewey, George W. Dewey and E. B. Dewey, trading as Dewey Brothers, had recovered any judgment against the said Whitehead for any amount, or that Dewey Brothers had recovered a judgment for any amount against said Whitehead.

Upon this state of facts, the court held that the plaintiffs' judgment mentioned was not sufficiently docketed until 15 December, 1890; that it created and constituted no lien upon the lands of the said Whitehead, in the county of Pitt, prior to that time, and that the plaintiffs were not entitled to share in a fund, the proceeds of his land sold by the sheriff, under proper process, to satisfy divers judgments against him, duly docketed before that time, and gave judgment accordingly. The plaintiffs excepted and appealed.

C. M. Bernard for plaintiff.

Theo. F. Davidson (Jarvis & Blow filed a brief) for defendant.

MERRIMON, C. J., after stating the case, proceeded: The records of the courts are very important and essential in the administration of public justice. Appropriate statutes and general principles of law, to some extent, require the courts to make them, prescribe their purpose, where and by whom they shall be kept, and when and where they may be seen by every person interested to see them. While they are of great

general utility, they import verity and constitute the highest evidence of the rights and liabilities of all persons whom they directly concern and affect, and serve to give notice and information for the use and benefit of the public in many ways, and for a variety of valuable (333) purposes. It is, hence, essential that they should be made and kept substantially in all material respects as the law prescribes and requires. Otherwise they might fail of their purpose, and some person in some way interested must suffer detriment more or less serious.

The statute (Code, sec. 83) requires the clerks of the several Superior Courts of this State to keep certain books specified, in which entries of the records of that court shall be made and preserved, and among them is "a judgment docket, in which the substance of the judgment shall be recorded, and every proceeding subsequent thereto noted."

This distinct judgment docket—its nature and purpose—is prescribed, and it is required to be kept for the purpose of the court. The law prescribes what shall be recorded on it, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice.

The statute (Code, sec. 433) further prescribes and requires that "every judgment of the Superior Court, affecting the right of real property, and any judgment requiring in whole or in part the payment of money, shall be entered by the clerk of said Superior Court on the judgment docket of said court. The entry shall contain the name of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the Superior Court thereof, during a term of the court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have rendered and docketed on the first day of said term." The section requires the classes of judgments specified to be docketed on the judgment docket, and directs how they shall be entered. It is not (334) simply required that they shall be docketed, but it is further, and of purpose required, that they shall be docketed substantially in the way and manner prescribed. They are to be so entered and in this way, "the entry shall contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof." The particularity thus required as to details is not merely directory and meaningless—it is intended to serve a substantial purpose—that of giving information and notice as to the particulars specified, to the public—everybody interested to have such information. It would be orderly

and much better that such particulars should be set forth in the order directed by the statute, still, if they appear in their substance but disorderly, from the entry, this will be sufficient. The requirement that a cross-index shall be kept is not merely directory—it is important and necessary. It is intended to enable any person to learn that there is a docketed judgment in favor of a certain party or parties, and against certain other parties, and where to find it on the docket. The inquirer is not required to look through the whole docket to learn if there be a judgment against a particular person—he must be able to learn from such index that there is a judgment against him, and where he can find it on the docket, its nature, purpose, etc. When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any one of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law.

The statute (Code, sec. 434) further prescribes and requires a judgment-roll to be made up and filed as prescribed. It further (335) prescribes (sec. 435) that "upon filing a judgment-roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the Superior Court of the county where the judgment-roll was filed, and may be docketed on the judgment docket of the Superior Court of any other county upon filing with the clerk thereof a transcript of the original docket, *and shall be a lien on the real property in the county where the same is docketed,* of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment."

A docketed judgment, hence, creates and secures a lien upon the judgment-debtor's land. But a judgment, in order to create such lien, must be docketed in the way and manner above pointed out; otherwise, as we have seen, the judgment is not docketed, and no such or any lien arises. *Holman v. Miller,* 103 N. C., 118; 1 Black Judgments, secs. 404, 406; *Cumming v. Long,* 16 Iowa, 41; *Thomas v. Desney,* 57 Ind., 58; *Nye v. Moody,* 70 Texas, 434; *Ridgeway's Appeal,* 15 Pa. St., 117; *Hamilton's Appeal,* 103 Pa. St., 368; *Metz v. Bank,* 7 Neb., 165.

The important statutory provisions above recited and referred to prescribe and establish a *method* of creating judgment liens upon real property, and they must receive such reasonable interpretation as will give

strength, certainty and uniformity to that method to effectuate its purposes. This can only be done by a strict observance of at least the substance of the requirements prescribed. Otherwise uncertainty, confusion and injustice must prevail to a greater or less extent in its administration.

In the present case we think the plaintiff's judgment was not
(336) sufficiently docketed to create a lien upon the real property of defendant judgment-debtor, William Whitehead. The judgment entered on the judgment docket is informal and disorderly, but granting that it is a judgment and the entry contains sufficiently the name of the parties to it, the relief granted, the date of it, and the time of its docketing, still the index makes no mention whatever of this or any judgment against Whitehead. Any person looking on the index with a view to learn if there were a docketed judgment against him, would have found nothing whatever leading him to examine or believe there was any such judgment. Thus such person would have been misled, such a person may have been misled, numerous persons may have been misled. The law intends to prevent this, and that no such lien shall be created or exist to prejudice any person who cannot have the benefit of the means so provided to prevent prejudice thus arising. The judgment must be properly indexed as to each and all of the parties in order to create the lien. The statute expressly makes it the duty of the clerk to make such entries, and he fails to do so at his peril.

As the plaintiffs' judgment was not effectually docketed as to the defendant Whitehead, they could not share in the fund, the proceeds of the sale of his lands, under valid process issuing upon duly docketed judgments to the prejudice of the latter.

Affirmed.

Cited: Davis v. Whitaker, 114 N. C., 281; *Redmond v. Staton,* 116 N. C., 141; *Hahn v. Moseley,* 119 N. C., 75; *Darden v. Blount,* 126 N. C., 249; *Valentine v. Britton,* 127 N. C., 59; *Wilson v. Lumber Co.,* 131 N. C., 166; *Wilkes v. Miller,* 156 N. C., 431; *Brown v. Harding,* 171 N. C., 688; *Ely v. Norman,* 175 N. C., 298.

(337)

THOMAS M. STATON v. THE NORFOLK AND CAROLINA RAILROAD COMPANY.

Railroad—Construction of—Eminent Domain—Surface Water—Damages.

A railroad company has the right to cut and maintain, on its right of way, such ditches as may be necessary to carry the surface water collected thereon to any natural outlet capable of receiving it, but it has not the right to divert such surface water into a channel where it would not naturally flow, and which is not adequate to receive it, if thereby the lands of others are injured.

ACTION, tried at Fall Term, 1890, of HALIFAX, *Whitaker, J.*, presiding.

The following is a copy of the material parts of the complaint:

2. That the plaintiff is the owner of a farm in said county, containing about one hundred and sixty acres, and the defendant, some time during the year 1889, located and constructed its road near said farm.

3. That he planted a large portion of said farm in corn and other crops the said year.

4. That the defendant, some time during said year, negligently, wrongfully and unlawfully cut a ditch through which great quantities of water from a large pocoson were diverted from their natural course, and from the way in which it had been accustomed to flow, and emptied upon his said farm.

5. That on account of the negligent, wrongful and unlawful cutting of said ditch, and the negligent and unlawful diversion of the course of said water, the plaintiff's farm was constantly kept overflowed during said year, and the crops therein planted were entirely drowned and destroyed.

6. That on account of the negligent, unlawful and wrongful cutting of said ditch, and the unlawful and negligent diversion of the course of said water, the plaintiff's farm has been sobbed, soured and its fertility destroyed and rendered unfit for agricultural pur- (338) poses.

7. That on account of said negligent, unlawful and wrongful acts of the defendant, the plaintiff has been damaged to the amount of one thousand dollars.

The defendant denied these allegations. The parties agreed upon and the court submitted the following issues to the jury, and they responded as follows:

1. Is the plaintiff the owner of the farm described in the complaint? Yes.

2. Did the defendant locate its road near the farm? Yes.

3. Was the ditch cut by defendant negligently, wrongfully and unlawfully cut? Yes.

4. Did the cutting of said ditch cause the water from the pocoson to overflow the land of the plaintiff in 1889? Yes.

5. Was the overflow, if any, caused by surface water? Yes.

6. Did the defendant negligently damage the plaintiff's land for agricultural purposes? Yes.

7. What damage, if any, has the plaintiff sustained? Two hundred and twenty dollars.

The plaintiff produced evidence on the trial tending to prove the allegations of the complaint. It was admitted that the defendant owned the right of way for the proper purposes of its railroad. It likewise produced evidence going to prove that its roadway was not situate upon any part of the plaintiff's land; that the ditch mentioned and complained of was cut alongside of the railroad track; that it was necessary to the construction and uses of the road; that its purpose was to convey surface water from a pocoson and along the road to Indian Branch. One witness testified for the defendant that, "in March, 1889, I had charge of railroad grading and ditching in this pocoson; ditch cut along railroad down to Indian Branch to relieve the road-bed of the surface water. We began down at Indian Branch and worked up toward pocoson; cut the ditch from a branch up through a field to pocoson. We (339) stopped from 26 March to 1 April, 1889. About one-half foot of water in pocoson. If ditch had not been cut we could not have made a solid road-bed; we could not have gotten dirt to make the road-bed; unless water in pocoson gets very high ditch through Mark Bell's field does not carry off any water; this ditch in poor condition, logs in it; the water drained off by railroad; surface water; ditch cut in pretty fair shape."

Another witness testified: "Civil engineer eleven years; have examined the locality, measured ditch and taken measurements of that country. The ditch cut by railroad necessary to build road; ditch through pocoson 2 x 2; through field 5 x 6; difference in capacity between Indian Branch and railroad ditch, 1 to 50; for rains ordinarily expected, ditch sufficient to carry off the water without overflow on plaintiff's land; ditch skilfully constructed."

Another testified: "I had contract for building this part of road; I cut the ditch under direction of civil engineer of defendant company; the work skilfully done. The railroad embankment acts as dam against upper part of pocoson; work began on pocoson in March, 1889; in 1888 little or no water in pocoson; in 1889, except after rain, little or no water; 1889 very wet year; capacity of ditch sufficient to relieve

road of surface water in 1889; ditch could not carry water enough to flood Indian Branch; ditch sufficient to carry the water which came down ditch along railroad, unless in case of extra heavy rain; ditch we dug would carry all water which came from the pocoson and Indian Branch; Mark Bell's ditch was filled up."

The defendant requested the court to give the jury sundry special instructions which it gave, and to give the following, which it refused to give, and thereupon the defendant excepted:

"3. If the ditch was necessary in the construction of the road, the right of way being condemned and paid for, and the water additional surface water, then the defendant had a right to cut a (340) ditch and drain the road as it did.

"8. The defendant had a right to drain its road-bed, and if the ditch was cut through to a natural drain, and it could not have been drained in any other direction without overflowing the lands of other persons, then they had a right to drain the surface water into a natural drain, and the plaintiff cannot recover."

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

W. A. Dunn for plaintiff.
T. N. Hill and W. H. Day for defendant.

MERRIMON, C. J., after stating the case: Unquestionably the defendant had the right to cut through and along its right of way and keep in repair such appropriate ditches and culverts as were necessary to carry off the surface water coming upon the right of way to a natural drain or outlet adequate to receive it. There was evidence of the defendant tending to prove that the ditch complained of was wholly situate upon its right of way; that the ditch was necessary, skilfully constructed, and that it was adequate in its capacity to carry the surface water into a natural drain without flooding the latter, unless in case of an extraordinary rainfall. In view of the contention of the parties, the evidence and conflict of same, we think the court should have given the jury the third instruction asked for by the defendant which was denied. It may be that the jury believed that the defendant had no right to divert the surface water on its right of way to a natural outlet, even though this were done altogether upon its own land. The instruction might have prevented such possible misapprehension. And for the like reason, the court should have given the eighth instruction denied, except so much thereof as implied that the plaintiff could not recover. (341)

The defendant had no right to collect surface water on its right of way and divert it, by cutting a ditch for the purpose, into a

channel where it would not naturally flow, and which was not adequate to receive it, and thus flood and injure the land of another. A party must submit to the natural disadvantages and inconveniences incident to his land, unless he can in some lawful way avoid or remove and rid himself of them. But he has no right as a general rule to rid himself of them by shifting them by artificial means to the land of another, when naturally and in the order of things they would not go upon such land or affect it adversely. *Porter v. Durham,* 74 N. C., 767; Wash. on Eas., 353, *et seq.* Nor is a railroad company or other corporation ordinarily on any footing in such respect other than a natural person.

The judgment must be reversed and a new trial granted.

SHEPHERD, J., dissenting: Conceding that the defendant has a right to cut the ditch and conduct the surface water into a natural stream passing through its right of way, the privilege must necessarily be attended with the qualification that the ditch should not be constructed so as to divert the surface water from the direction in which, by the general inclination of the land, it naturally flows and discharge it, to the injury of others, into a stream which is inadequate to receive it. I think that from the testimony of the plaintiff (who was examined in his own behalf), there was some evidence of this latter view, and, although it may have been slight, it warranted his Honor in refusing instructions which entirely ignored the very important qualification I have mentioned.

PER CURIAM. Error.

Cited: Jenkins v. R. R., 110 N. C., 446; *Fleming v. R. R.,* 115 N. C., 696; *Parker v. R. R.,* 119 N. C., 687; *Mizell v. McGowan,* 120 N. C., 138; *Clark v. Guano Co.,* 144 N. C., 76; *Briscoe v. Parker,* 145 N. C., 17; *Davenport v. R. R.,* 148 N. C., 293; *Roberts v. Baldwin,* 151 N. C., 408; *Barcliff v. R. R.,* 168 N. C., 269.

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S. W. WHITEHURST ET AL. v. MERCHANTS AND FARMERS TRANSPORTATION COMPANY ET AL.

Judgment—Vacating—Process—Jurisdiction—Justice of the Peace.

1. A judgment based upon process which purports to have been duly served but which in fact was never served, is not void, but is voidable for irregularity, the remedy against it being by a motion in the cause.
2. While the court of a justice of the peace is not a court of record, nevertheless its judgments are conclusive until reversed, modified, or vacated in some proceeding instituted for that purpose; and such court has the same

jurisdiction to hear applications to vacate judgments rendered by it as Superior Courts possess over judgments rendered by them.

3. A motion to vacate a judgment rendered in the court of a justice of the peace for irregularity should be made before the justice who gave the judgment or his successor, notwithstanding it may have been docketed; the Superior Court has no jurisdiction except upon appeal.

4. If the judgment has been docketed in the Superior Court and subsequently vacated by the justice of the peace, the defendant may, upon motion, have the judgment therein set aside; such docketing, however, only operates as a judgment of the Superior Court for the purposes of lien.

ACTION, tried at Spring Term, 1891, of BEAUFORT, *Bryan, J.*, presiding.

The present defendant brought its action in the court of a justice of the peace, against the present plaintiffs, to recover the sum of $75, and obtained judgment on 13 November, 1886, and afterwards filed and docketed a transcript of its judgment in the office of the Superior Court clerk of the county where the judgment was rendered, as allowed by the statute (Code, section 839). The present plaintiffs allege that the summons in the action just mentioned was served on J. B. Whitehurst, one of the defendants therein named (who is one of the present plaintiffs), that it was never served on S. Whitehurst or C. W. (343) Whitehurst therein named, who are two of the present plaintiffs; that, nevertheless, the said summons purports to have been served upon all the persons named as defendants therein.

This action is brought by the plaintiffs for the purpose of having the judgment above mentioned set aside and declared to be void, and to obtain relief by injunction, etc., upon the ground that no summons was ever served upon them.

Counsel for the defendant moved that the action be dismissed, "because a motion in the original cause was the proper remedy," etc.

The court gave judgment dismissing the action, and the plaintiffs appealed.

J. H. Small for plaintiffs.
C. F. Warren for defendant.

MERRIMON, C. J. A judgment against a party who has not submitted himself to the jurisdiction of the court granting it for that purpose, and who has not, in fact, been served with original leading process, though the same purports to have been served, is irregular and may be avoided, the remedy being a motion in the cause to set the judgment aside for irregularity. Such judgment is not void—it is only voidable, because it appears by the record (return) that the original summons was served upon the party against whom it is entered. It, however, so appears in

such case by inadvertence, mistake or false return of the summons by the sheriff.

The court is careful to see that it has jurisdiction, and that its course of action in the progress of the action is orderly and duly observed. When there is irregularity in any material respect appearing upon the face of the record to the prejudice of a party, it will, *ex mero motu,* correct the same, or, within a reasonable period, on motion of the (344) party prejudiced, it will correct, set aside, or modify, if need be, the order, judgment or other matter or thing complained of. And as to the jurisdiction of the party, and perhaps in some other possible cases, it will, there being no laches, on motion in the cause, supported by affidavits, inquire whether it has such jurisdiction, although upon the face of the record it appears to have the same. Thus, if the original summons in the action be returned by the sheriff *"served"* upon the defendant therein named, it will so inquire whether, in fact, such service was made, or whether the return is made untruly by inadvertence, mistake, or falsely on purpose. This is important and necessary, because the service of the summons is essential to the jurisdiction, unless the party submits himself to the court, and, besides, to give the party his day in court, as the law contemplates he shall have the same. *Keaton v. Banks,* 32 N. C., 381; *Mason v. Miles,* 63 N. C., 564; *Cowles v. Hayes,* 69 N. C., 406; *Doyle v. Brown,* 72 N. C., 393; *Koonce v. Butler,* 84 N. C., 221; *Brickhouse v. Sutton,* 99 N. C., 103, and there are numerous other cases.

Although the court of a justice of the peace is not a court of record, its proceedings are authoritative and judicial in their nature, and its judgments are conclusive and binding until they shall, in an orderly way, be set aside, reversed or modified. Such judgments cannot be attacked, when it appears from the proceedings that the court had jurisdiction, for irregularity or other cause. The remedy for irregularity is by a motion in the action before the justice of the peace who granted the judgment, or before his successor in office. The office of justice of the peace is continuous in its nature, and filled by the incumbent, and to be filled after him by his successors. He is required to keep dockets, enter minutes of proceedings before him, keep and preserve his official papers and transfer the same to his successors. (Code, secs. 828, 831.) So that it is orderly, convenient, necessary and appropriate to make pertinent motions of all kinds in an action in (345) such court just as like motions may be made in actions in the Superior Courts. If a motion should be made to set aside a judgment in the court of a justice of the peace, and it should be allowed or denied improperly, the complaining party might appeal to the Su-

perior Court. *Hooks v. Moses,* 30 N. C., 88; *McKee v. Angel,* 90 N. C., 60; *Moore v. Edwards,* 92 N. C., 43.

That a judgment of a justice of the peace has been docketed in the office of the Superior Court clerk, as allowed by the statute (Code, sec. 839), does not give the Superior Court jurisdiction of the *action* in which such judgment was rendered. The docketing makes the judgment that of the Superior Court in all respects only for the purpose of creating a lien upon the real estate of the judgment debtor, and enforcing the same by execution and otherwise. Hence, the latter court has no authority to set the judgment aside for irregularity, or upon the ground that the summons in the action in which it was rendered had not, in fact, been served upon the defendant therein named, while the return of the same showed that it had been. *Ledbetter v. Osborne,* 66 N. C., 379; *Birdsey v. Harris,* 68 N. C., 92; *Morton v. Rippy,* 84 N. C., 611.

If a judgment of a justice of the peace shall have been docketed and afterwards set aside in the way above indicated, the defendant in the action should apply by motion to the Superior Court to set the judgment there aside, and the court should grant the motion, basing its action upon that of the court of the justice of the peace. Thus complete and effectual relief would be granted.

So that the plaintiffs in the present action should have sought the relief they demanded by a motion in the action mentioned in the court of the justice of the peace. This action was improvidently brought, and the court properly dismissed it.

Affirmed.

Cited: King v. R. R., 112 N. C., 319; *Gallop v. Allen,* 113 N. C., 26; *Patterson v. Walton,* 119 N. C., 501; *Dunham v. Anders,* 128 N. C., 212; *Bullard v. Edwards,* 140 N. C., 648; *Rutherford v. Ray,* 147 N. C., 258, 262; *Thompson v. Notion Co.,* 160 N. C., 525; *Ballard v. Lowry,* 163 N. C., 489; *Lowman v. Ballard,* 168 N. C., 18; *Stocks v. Stocks,* 179 N. C., 288; *Caviness v. Hunt,* 180 N. C., 385.

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JUDITH W. HARRISON ET AL. v. T. L. HARGROVE ET AL.

Judgments and Decrees, When They May be Vacated—Purchaser.

1. While courts have the power to correct their records and set aside irregular judgments at any time, they will not exercise this power where there has been long delay or unexplained laches on the part of those seeking relief

against the judgment complained of, especially where the rights of third persons may be affected.

2. The defendant purchased land under a decree in a proceeding by an administrator to sell land for assets, in which decree it was recited that the heirs at law and devisees of the decedent had been personally served with process, took possession, and remained therein for seventeen years, when the heirs and devisees who, in the meantime, resided near him and had knowledge of his purchase and occupation, made a motion to vacate the decree for sale upon the ground that they had not, in fact, been parties to the proceeding to sell: *Held*, that the decree, so far as it affected the rights of the defendant purchaser, ought not to be set aside.

ACTION for the recovery of land, tried before *Womack, J.*, at October Term, 1890, of VANCE.

The material facts are stated in the opinion.

J. B. Batchelor and John Devereux, Jr., for plaintiffs.
E. C. Smith, A. W. Graham and M. V. Lanier for defendants.

SHEPHERD, J. This was an action of ejectment prosecuted by Judith and Rebecca Harrison as the devisees of their father, Robert Harrison. The defendant purchased the land in controversy at a sale made by the administrator *c. t. a.* of said Robert, pursuant to a decree of the Superior Court of Granville County. The decree recited that personal service of the summons had been made on the plaintiffs and other devisees; and being unable to attack it collaterally, the plaintiffs, in 1889, moved in the original cause (that is, in the special proceeding (347) just mentioned) to set aside the said sale and decree on the ground that no service was, in fact, ever made upon them, and that there had been no appearance by any one in their behalf. The motion was allowed, the Court declaring the proceeding irregular and void, but at the same time requiring that all of the papers in the cause should remain on file for the use of the purchaser when his rights should be questioned. This order of the judge was affirmed by this Court (*Harrison v. Harrison*, 106 N. C., 282), but owing to its peculiar terms, the rights of the defendant, a *bona fide* purchaser, were left undetermined and, so far as he is concerned, the question here presented is whether, as against him, the decree in a direct proceeding should have been set aside. We must, of course, treat in this way, for if the decree be considered now as absolutely set aside for want of jurisdiction of the parties, it is very clear that it can afford the defendant no protection, and it must also follow that the provisions of the order, apparently saving the rights of the purchasers and looking to the future litigation, would be ignored.

After very great consideration, we have concluded that the important question, so ably argued by counsel (involving, as they do, the conclusive-

ness of judicial records and especially their recitals of jurisdictional facts), need not be passed upon in this appeal. It is generally stated that courts will correct their records and set aside irregular judgments at any time, but where there has been long delay, and especially when the rights of third persons can be affected, they will require satisfactory explanation of such *laches* as well as meritorious grounds for such relief.

Whatever may be the effect of setting aside a decree like this for want of service of process, it is well settled by our decisions and other authorities that the vice being a secret one, and the record reciting the necessary jurisdictional facts, such a decree is voidable only and comes within the principle we have just stated. *Doyle v.* (348) *Brown,* 72 N. C., 393; 1 Womack's Digest, 2336; Freeman's Judgment, 116.

This principle requires the party making the application to act in good faith and with ordinary diligence, "and relief will not be granted if he has knowingly acquiesced in the judgment complained of, or has been guilty of *laches* or unreasonable delay in seeking his remedy." 1 Black, Judgments, 313.

Under the circumstances of this case, it seems very plain that we should not—as against this defendant—give any relief until the want of notice is negatived and the long delay explained. The decree and sale were made in 1870, and this action was brought in 1887. The motion to set aside the decree was made in 1889, and thus we have seventeen years or more of inaction on the part of the plaintiffs, who during all this time were under no disabilities whatever. In addition to this, the purchaser was in possession of the property, and there is evidence showing that these plaintiffs with their mother lived about three hundred yards distance on an adjoining tract. It is true that the mother, under the will, had a life-estate in the land, and that she did not die until 1887, but the land was, says the will, "to be used by her for the support of herself and all my children who may choose to live with her," etc. These plaintiffs having a right to be supported from said land during the life of their mother, and also entitled in remainder, could have moved to set aside the decree at any time after it was rendered, for some cause, they failed to do so until 1889.

Taking these circumstances, together with the fact that they must have known of the long and adverse possession by the defendant of the adjoining land, and we are entirely clear that we should not exercise this *"quasi* equitable" (Black on Judgments, *supra*) power of the court and grant the plaintiffs relief as upon setting aside the decree.

Indeed, if there is anything in the rule which requires long delay to be explained and knowledge of a decree to be negatived, (349)

we can conceive of no stronger case for its application than the present one. With the exception of the finding, on the motion to set aside, that the plaintiffs were not served with process and had no notice (and this must, of course, refer to the time of the decree), there is nothing in the record to negative any subsequent knowledge of the proceedings, nor is there any explanation of their acquiescence in the long possession of the defendant.

These circumstances, while insufficient to estop the plaintiffs, if there were no decree in their way, do, in our opinion (in view of the peculiar terms of the order mentioned), warrant the Court in refusing to treat the decree as having been set aside as to this defendant.

New trial.

Cited: S. c., 111 N. C., 205; *Williams v. Johnson,* 112 N. C., 437; *Harrison v. Harrison,* 114 N. C., 219, 223; *Harrison v. Hargrove,* 120 N. C., 99; *Settle v. Settle,* 141 N. C., 573; *Card v. Finch,* 142 N. C., 150; *Hatcher v. Faison, ib.,* 367; *Webb v. Borden,* 145 N. C., 199; *Sprinkle v. Holton,* 146 N. C., 266; *Yarborough v. Moore,* 151 N. C., 122; *Credle v. Baugham,* 152 N. C., 20; *Glisson v. Glisson,* 153 N. C., 187; *McKellar v. McKay,* 156 N. C., 286; *Wright v. Harris,* 160 N. C., 546; *Mann v. Mann,* 176 N. C., 377.

W. H. SNEEDEN v. GEORGE HARRIS ET AL.

Cause of Action—Process, Abuse of—Malicious Prosecution—Pleading.

1. In a suit to recover damages for the malicious abuse of process in a civil action, it is not necessary that the complaint shall aver a judicial determination of the action in which such process issued. It is otherwise in actions for malicious prosecutions for crime.
2. An allegation in the complaint for falsely and maliciously suing out process in a civil action, that one of the defendants, at the request of the others, executed as surety an undertaking upon an order for the arrest of plaintiff, but which fails to show any other ground of action against him, does not state a sufficient cause of action against such defendant.

ACTION, heard upon complaint and demurrer, before *McIver,* (350) *J.,* at the April Term, 1891, of NEW HANOVER.

The complaint is as follows:

1. That during the summer and fall of 1887 plaintiff was in possession of a certain tract of land, or island, in New Hanover County in

Wrightsville Sound, near the ocean, and known as Sneeden's Hammocks, occupying same under a claim of title which he believed to be good and valid.

2. That during that period there was a considerable discussion in the community about the probability of two railroads being constructed to the sound, and it was understood that both were desirous of securing possession of said property, known as Sneeden's Hammocks, the one The Wilmington Sea Coast Railroad Co., intending it as their terminus, the other, The Wilmington, Onslow and East Carolina Railroad Co., intending to make it the terminus of a branch road to the ocean, as plaintiff is informed and believes, and states, for this reason, the market value of his property became greatly enhanced.

3. The defendants George and Julia Harris also claim title to said island, and were negotiating with the railroad companies to make sale of it to one of them, and some time in October or November in that year entered into a contract with the W., O. and E. C. Railroad Company through defendant D. L. Russell, who was largely interested in said road, and its financial agent, projector and manager, to sell one-half of said island to said railroad company, or to him and certain other divers persons interested with him, for $25,000, and as the plaintiff has been informed by defendants, Harris and Russell, the said contract would have been executed at that time but for the possession of the property by the plaintiff.

4. But finding their bargain blocked by plaintiff's possession, the defendants, George and Julia Harris (through her agent and husband George Harris), and D. L. Russell, consulted together as to the best means to carry out their common object and obtain immedi- (351) ate possession of the property so they might make a sale thereof, and well knowing there was no lawful means of accomplishing this, they determined upon and proceeded to execute the base, malicious and illegal plan of suing out a writ of arrest and bail under the false and malicious pretense that plaintiff was slandering their title to the property by claiming it to be his own, and of having him arrested and removed from the property and imprisoned, so that they might take possession as soon as the plaintiff was removed; by which wrongful and malicious act the process of the court was abused, and used for a purpose not set forth in the affidavit upon which the order of arrest was obtained.

5. In pursuance of this unlawful, base and malicious design and purpose, they applied to Henry P. West, the other defendant, and induced him to sign a bond required by law, and then sued out before the clerk a writ of arrest and bail, and had the same placed in the sheriff's hands, who late in the afternoon about the first day of November, in said year, assaulted, arrested and removed the plaintiff from the possession of the

property which he was quietly enjoying and believed to be his own; and as soon as plaintiff was removed, the defendant took possession of and held the property until they sold it to the Wilmington Sea Coast Railroad Company.

6. That defendants well knew, at the time they made said affidavit, that plaintiff was a very poor man, and that no damages could be obtained from him, and that the statements made in said affidavit that he was slandering their title were false, and that the purpose and object in bringing this suit was not to hold him to answer a claim for damages, but that it was in truth and fact, as above alleged, and has been acknowledged by defendant George Harris, for the express and deliberate purpose of suing out a writ of arrest to obtain immediate possession
(352) of the property which they could not otherwise secure, and in so doing they purposely and deliberately abused the process of the court.

7. That plaintiff was removed from possession as aforesaid, carried a distance of eight miles to the common jail of the county, and then and there was incarcerated and restrained of his liberty for a period of ten days.

8. That plaintiff was an old man about sixty-five years of age, and at the time of his said imprisonment his wife was extremely ill of a sickness from which she shortly afterwards died, and at the time of his imprisonment he was daily expecting her death; and in order to avoid being separated from her, and to enable him to be present at her bedside to administer to her wants, and also to avoid the pain, suffering, and disgrace of going to jail, fearing the ill-effects of close confinement upon one so old and infirm as himself, and well knowing his innocence of any unlawful act, and being too poor to give bond, he applied to several persons through his friends to give bail for him, but each of the persons applied to refused his petition.

9. That by reason of his imprisonment he was separated from his wife and unable to be with her in her last days, and was prevented from attending to his ordinary affairs, and greatly suffered in mind and body. By all of which he was damaged five thousand dollars.

10. That, as aforesaid, in pursuance of their illegal and evil purpose, immediately upon the removal of the plaintiff from the property, the defendant took possession, broke open his house, removed and scattered his effects, leveled his house with the ground, shot and destroyed his hogs and poultry, and committed other acts of violence, abuse and spoilation, thereby showing their ill feelings and the malice influencing the defendants towards the plaintiff, by all of which acts of violence the plaintiff was damaged five thousand dollars.

Wherefore, plaintiff demands judgment against defendants (1) for $5,500 damages actually sustained by him from defendant's (353) unlawful acts; (2) $5,000 punatory damages for suing out a writ contrary to law and having plaintiff arrested and imprisoned upon a charge so false and with a purpose so wrongful, illegal and malicious, and for costs.

The defendants demurred to the complaint and assigned several grounds of demurrer, but the only one relied upon in this Court was "that the complaint does not allege or show upon its face that the civil action in which the warrant or writ of arrest was issued, whereunder the plaintiff was arrested and imprisoned, has been finally and legally determined and ended before the commencement of this action;" and as to defendant West, upon the additional ground that the complaint did not allege facts sufficient to constitute a cause of action as against him. The demurrer was sustained, and plaintiff appealed.

T. W. Strange for plaintiff.
Junius Davis for defendant.

DAVIS, J. The substance of the allegation as to defendant West is that, at the request of defendant Harris, he signed the usual undertaking required in arrest and bail, and it is not alleged that he participated in the torts alleged, nor does it appear that he was in any way liable for them except as surety on said undertaking, which would be *ex contractu,* and the demurrer as to him must be sustained.

As to the other defendants, the complaint clearly and distinctly alleges, in substance, that the plaintiff was in the quiet and peaceable possession of certain real property which he believed to be his own, but to which the defendants also claimed title, and that the defendants, desiring to get speedy possession of the said property, without risk and delay attending an action for the recovery of real property, conceived and executed a plan to have the plaintiff removed from the possession by falsely and maliciously suing out a writ of arrest and bail (354) for alleged slander of their title, and causing him to be arrested and imprisoned, and while so removed from the possession and imprisoned they entered upon the property, "broke open his house, removed and scattered his effects, leveled his house with the ground, shot and destroyed his hogs and poultry, and committed other acts of violence, abuse and spoilation."

The action of *Harris v. Sneeden,* in which the plaintiff in this action was taken under arrest and bail for "slander of title," was before this Court at its September Term, 1888 (101 N. C., 273), and the Court said it was *questionable* whether an action for slander of title was em-

braced by the statute on arrest and bail (Code, sec. 290, *et seq.*), but the Court did not decide the question, and, for the reason presently to be stated, its decision is not necessary in this action.

It is proper to state that this Court sustained the judgment of the court below in vacating the order of arrest, but the plaintiff in that action (defendants in this) had accomplished their purpose to get possession, while the defendant in that action (plaintiff in this) was in custody. The demurrer admits, for the purpose of this action, that Sneeden was in the quiet possession of the land and that he believed it to be his, and whether an action for slander of title could be maintained, or whether the true title was in the plaintiff or defendants, is immaterial to the question now before the Court, which is, whether the plaintiff can maintain this action without alleging the final legal determination of the action of the defendants against the plaintiff in which the warrant of writ of arrest was issued and the plaintiff was imprisoned. This is not an action for malicious prosecution for an alleged crime in which it would be necessary to allege and show a judicial determination of the prosecution in favor of the accused. Every good citizen is interested in
(355) the suppression of crime, and, if there be probable cause, may prosecute in the name of the State, and if the accused be adjudged guilty he will not be heard to complain of the prosecution, nor can he maintain an action against the prosecutor, whatever may have been his motive. This is an action for alleged malicious use and abuse of civil process.

But the counsel for the defendant says, "there is not the slightest proof (allegation) that the defendants gave the sheriff any instructions not enjoined by the exigency of the writ which he had in his hands." This action is not against the sheriff for abuse of the process in his hands, but against the defendants for having maliciously and fraudulently sued out a writ of arrest and bail for a purpose falsely alleged therein, when their real purpose, admitted by the demurrer, was not that named in the affidavit or process, but the ulterior object to get speedy possession of the land, and no instructions from them to the sheriff were necessary. They expected that he, in the discharge of his duty, would arrest Sneeden under the writ which they had sued out, and thereby enable them to get possession of the land, and level Sneeden's house with the ground and destroy his property so that he could not regain or reoccupy it.

Counsel for defendants say: "Let us take it that Harris recovered judgment against the plaintiff in the original action of slander of title in which the writ was issued. Such a judgment would establish, as against the plaintiff, that the land in dispute belonged to Harris; that this plaintiff had no interest in it, and had taken possession of it and

set up title in himself, with the false and malicious intent to injure Harris. Then, if this action is sustained, we would have the singular spectacle of the plaintiff recovering damages from Harris because he basely and maliciously took possession of his own land after it had been left vacant in consequence of the lawful arrest and imprisonment of the plaintiff." It is true the sheriff did no wrong in discharging his duty in arresting Sneeden in obedience to the command of the writ; but does it follow that because it was the duty of the sheriff to (356) arrest under the writ, the defendants could lawfully sue out the writ to enable them to procure the arrest of Sneeden, not for the purpose named in the writ, but for the admitted ulterior, collateral purpose to get possession of the land in dispute as soon as it was made vacant by the arrest and imprisonment of the claimant in adverse possession, under the writ they had falsely and fraudulently sued out for that purpose, instead of instituting an action to try the title to the land in dispute and recover possession upon their title, if they had any? If in their affidavit for arrest and bail they had stated that their real, and it appears only, purpose was, as is admitted by the demurrer, to procure the arrest of Sneeden to enable them to get possession of the land in dispute, instead of the recovery of damages for slander of title, no writ could have issued and Sneeden could not have been lawfully arrested by the sheriff. Counsel for the defendants fail to note the marked distinction between a prosecution for the malicious use and abuse of process for ulterior purposes not named in the process, and a prosecution for alleged crime. In the latter, there must be a final determination of the prosecution before an action for malicious prosecution can be maintained, and no citation of authority was needed for this; but in the former, this is not necessary. In the one, the public have an interest; in the other, the individual only. And while it is true, as a general rule of law, that imprisonment under legal process is not duress, yet if one falsely, maliciously, and without probable cause, procures the arrest and imprisonment of another on process legal and regular in form, and obtains thereby a deed from the party so arrested, such deed is void by reason of duress. *Watkins v. Baird,* 6 Mass., 506, and cases cited.

When an action is for the malicious abuse of legal process in order to compel a party to do a collateral thing or to accomplish (357) an ulterior purpose, it is not necessary to allege that the process improperly employed is at an end. *Prough v. Entriken,* 11 Penn. St., 81, and the numerous cases there cited; *Grainger v. Hill,* 33 E. C. L., 328. Conceding that the defendants were the true owners of the property in dispute, the plaintiff was in possession claiming it as his own, and if, without any process, they had gone and taken forcible possession and demolished the house claimed by him and destroyed his property,

as alleged, it will not be denied that they would have subjected themselves to both civil and criminal actions. Did the fact that they got possession by the fraudulent use of legal process justify their acts, or were they not aggravated by making the strong arm of the law the instrument by which they were enabled to perpetrate them? "The law is just and good," and entitled to the obedience of all, the strong as well as the weak, and cannot sustain the perversion of its process to shield lawlessness and wrong, or permit it to be made the tool of trickery and cunning. The defendants admit that their purpose was not that named in their affidavit, but to get speedy possession of the land by having the plaintiff arrested and removed from it by the sheriff to enable them to enter upon it.

This case is distinguishable from that of *Hewitt v. Wooten,* 7 Jones, 182. In that case it did not appear that the writ was sued out for the purpose of extorting money or any ulterior purpose. In this case the ulterior and wrongful purpose is alleged and admitted, which brings it clearly within the principle laid down in *Grainger v. Hill, supra,* and sanctioned in *Hewitt v. Wooten.* Whether under the old practice the remedy of the plaintiff would have been *trespass* or *case* is now immaterial, as the old technical distinctions in the form of actions (as between trespass and case), which so often perplex the profession, (358) have been abolished (Code, sec. 133), and the civil action, with its complaint stating clearly and concisely the facts constituting the cause of action, substituted (Code, sec. 231, *et seq.*); and while the plaintiff's cause of action might have been more concisely stated, *utile per inutile non vitiatur,* and the demurrer must be overruled.

Let this be certified, to the end that the defendants may answer if they shall be so advised, and the action proceeded with according to law.

Error.

Cited: Lockhart v. Bear, 117 N. C., 304; *R. R. v. Hardware Co.,* 138 N. C., 177; *Tyler v. Mahoney,* 166 N. C., 513; *S. c.,* 168 N. C., 239.

E. W. WARD v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Negligence—Railroad—Right of Way.

A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes, but is required to keep the right of way

clear of such growth to the outside of the side ditches on either side of the track.

MERRIMON, C. J., and DAVIS, J., dissenting.

ACTION, tried at Fall Term, 1890, of PENDER, before *Armfield, J.*

The issues submitted, with the responses by the jury, were as follows:

"1. Did defendant, by its negligence in moving its cars and engines, kill the horse of the plaintiff? Yes.

"2. If yes, what damage has plaintiff sustained thereby? Eighty-eight dollars."

There was testimony offered on the part of the plaintiff tending to show that, within six months before the beginning of this action, the defendant had killed the horse of the plaintiff by running against him in the day-time with a freight train running on defendant's (359) road, and also testimony as to the value of the horse. Defendant introduced the engineer, fireman and others who were on the train at the time of the killing of the horse. They testified that the train was a long and heavy freight train running rapidly and with great momentum; that the engineer in charge of the train was on the vigilant lookout for stock in front of the train, but that the weeds and bushes had grown up close to the track of defendant's road at that point within two feet of the track as high as plaintiff's horse; that the horse was concealed from the engineer by these weeds and bushes until the train was close upon him, when he suddenly emerged from the weeds and bushes on to the track; that the engineer, immediately on seeing the horse, he being on the lookout to the front, blew down-brakes, blew the cattle alarm and reversed his engine, that the brakes were applied, but that the horse was so close to the train that all these efforts were unavailing, and the train ran over the horse and killed him.

Defendant asked his Honor to instruct the jury: "If the jury believed that the engineer, as soon as he could, by looking out and being on the watch, discovered the horse and then used all the efforts at his command to stop the train, and could not do so in time to keep from striking the horse, then the defendant was not guilty of negligence, and plaintiff could not recover."

His Honor told the jury this would be true unless the defendant had negligently allowed bushes and weeds to grow on its right of way so close to its track that the horse was concealed thereby until it was too late to stop the train and prevent his destruction.

Defendant further asked his Honor to instruct that, "If the jury should believe that the engineer was prevented from seeing the horse, or would have been prevented from seeing the horse had he been on the careful lookout, by the weeds and bushes growing within two feet of

the ends of the cross-ties on the side of the road on which the
(360) horse was killed, and the said bushes were three or four feet high, then the *prima facie* case in favor of the plaintiff would be rebutted, and jury should find first issue in favor of defendant."

The substance of the instruction given is embodied in the opinion of the Court.

There was a verdict for plaintiff. Defendant moved for a new trial on account of the refusal of the court to give the instructions asked for, and for alleged error in the instructions given.

No counsel for plaintiff.
A. W. Haywood for defendant.

AVERY, J. It is settled law in this State that if an engineer in charge of an engine sees, or can, by keeping a careful outlook, see a cow or horse upon the track in his front, it is his duty to stop the train, if he can do so without peril to the passengers and property under his charge, by the use of all the appliances for checking the speed at his command. *Carlton v. R. R.*, 104 N. C., 365; *Wilson v. R. R.*, 90 N. C., 69; *Snowden v. R. R.*, 95 N. C., 93; *Bullock v. R. R.*, 105 N. C., 180; *Deans v. R. R.*, 107 N. C., 686.

If, by the exercise of ordinary care, the engineer can discover that an animal is greatly frightened and is running apparently excitedly and wildly beside or near the track, or continues on and sometimes off it, it is the duty of the engineer to "slacken the speed, keep the engine under his control," and, if necessary, "stop it," until the animal is out of danger. *Wilson v. R. R., supra.*

"When the cattle are quietly grazing, resting or moving near the track—not on it—manifesting no disposition to go on it, the speed of the train need not be checked." *Wilson v. R. R., supra.*

We have thus stated the general rules laid down by this Court
(361) in reference to the negligence in injuring livestock, in order the more intelligently to discuss the instruction given by the Court in case at bar, that even though the engineer could not, by keeping the most vigilant outlook, discover that the plaintiff's horse was in the vicinity of the track in time to stop the engine, yet *"it was the duty of the defendant to keep its right of way near its track reasonably clear of weeds and bushes which might conceal stock approaching its road until it was too late to stop a train and prevent their destruction,"* and that "if they (the jury) *believed* that the horse was killed because he was so concealed by weeds and bushes, which the defendant had negligently permitted to *grow up in close proximity to the track,"* that the engineer could not see in time to avert the injury, the defendant's negligence was the proximate cause of it.

We take notice of the fact that, whatever may be the privilege of railroad companies to exercise dominion over their whole right of way, the universal custom has been to allow the abutting owner, whose land has been taken for the use of the public, to cultivate up to the side ditches that are kept open for the purpose of proper drainage by the company. While we concede that it is the duty of the corporation in constructing its road to cut down the large trees that might fall on or blow upon the track, we would be loath to give our sanction to any ruling that would make it incumbent upon them, in order to protect themselves from liability, to take actual possession of any portion of the right of way not needed for corporate purposes proper, namely, to remove from it corn, grain, high grass, weeds or bushes, that may spring up immediately outside of the ditches and grow upon cultivated land high enough to conceal a horse or cow from the view of an engineer who is approaching with a moving train.

It is important that every principle of law to which the conduct of the citizen is to be made to conform, should mark out the line (362) of his duty with reasonable certainty. It is essential, in order to insure the transportation of passengers and freight with the dispatch and promptness that will meet the wants of a commercial people, that the managers of railroads should have a definite idea of the duties and liabilities of the companies, and should be able, by using proper precaution, to provide against it without subjecting the public to serious inconvenience or delay. If, therefore, the judge had told the jury that it was negligence to suffer weeds and bushes to grow up in or upon the banks of the ditches of which the companies assume actual control and dominion, to a sufficient height to obstruct the view of persons or animals from an approaching engine, he would have fixed a known and well-defined boundary line up to which the corporate authorities would be required to remove such obstructions, and would, at the same time, have held them bound to discharge a duty which is but the exercise of ordinary diligence on their part. To burden these corporations with the further duty of removing such obstructions beyond the territory of which they assume actual control for corporate purposes, is not only to license but compel them, for their own security, to cut down corn or grain, as well as weeds, when it springs up so high as to hide cattle from view, and thus enable the engineer to see whether they are grazing quietly or moving about frantically as a train draws near to them. The court below laid down the indefinite rule, that it was negligence to allow weeds or bushes to grow "near to," or "in close proximity" to the track; he left the precise distance to which the duty extended so vague and uncertain that railroad companies cannot provide against liability, however watchful their servants may be, except by assuming actual control and keep-

ing clear of corn, grain, grass, weeds and bushes the whole right of way, especially where there are curves so sharp that the line of vision (363) of the engineer in looking to his front would cross the right of way at or near its outer boundary line. "Near," in common parlance, is understood, and by lexicographers is defined, to mean either "close" or "at no great distance"; while "in close proximity," or "in the immediate vicinity," are equivalent terms, and either of the expressions might have been understood by the jury as a declaration that it was negligence to leave weeds or bushes that would hide cattle from view anywhere on the right of way. One hundred feet from the center of the railroad (the ordinary limit of the right of way) would be considered by men of intelligence as at no great distance from, or in the immediate vicinity of, a track, and the instruction was, therefore, misleading; unless we intend to enjoin upon railroad companies the duty of ousting the owners of the abutting land and seeing that it is kept clear of cornstalks or weeds, which under good culture would, after the crops are gathered, hide from view cattle on the right of way in the immediate vicinity of the track. In order to provide against liability under the rule laid down by his Honor, railroad companies must either assume such control of the right of way, or the fast trains by which the companies have contracted for the expeditious transportation of the mails, persons and property must stop and "beat the bushes" at every curve in the line where the soil is rich, in order to ascertain whether a cow or horse can be made to emerge from them before proceeding on their important mission.

Where bushes are allowed to grow in or inside of the ditches along the portion of the right of way of which the corporation assumes actual control, so as to obstruct the view of an engineer on an approaching train, a greater degree of care does devolve upon the company, just as we have said in *Hinkle v. R. R.*, (decided at this term), that where a company suffers cars or other obstructions to be placed on a sidetrack so as to shut off the view of a moving train from a traveler driv- (364) ing towards a crossing on the line, it is negligence in an engineer to fail to give notice of his approach. 19 Am. & Eng. R. Cases, 312, notes and authorities cited; *R. R. v. Moody*, 45 Am. & Eng. R. C., 254, and notes; 527, *et seq.*

We think that the court below erred in fixing upon corporations the duty of removing obstructions, such as weeds or cornstalks, that are incident to the ordinary course of husbandry outside of the portions of the right of way, including sidetracks under the actual control of the companies. It is, of course, the duty of the company to construct the road properly and in such a manner as will not expose travelers to needless dangers. It is incumbent on them, as we have said, to remove all

trees from the right of way, and also any structure that is liable to fall upon passing trains or upon the track so as to obstruct it. But in our case, the question is as to their duty in reference to the right of way outside of the track and ditches, and after the completion of the road in reference to weeds and bushes that may spring up while the land is being cultivated with ordinary care.

There was error, for which the defendant is entitled to a new trial.

CLARK, J., concurring: It is the duty of a railroad company, as to its patrons, to keep the road-bed in good condition, and for that purpose to keep enough of its right of way clear to prevent accident from trees or limbs falling upon its track. It owes no duties as to the condition of its right of way or of its track as to others, except the statutory duty as to crossings. If a trestle is so defective that a foot passenger who chooses to walk thereon, instead of in the highway, falls through and is hurt, would the company be liable? Or if a dead tree left standing on the right of way falls and kills stock pasturing (365) there, must the company respond in damages? Or suppose stock frightened by the whistle or the noise of the train fall into a ditch on the right of way, must the corporation pay? I wot not. If accident from these causes occurs to those to whom the company owes duties, it would be liable; but it is no part of its duty to furnish a safe foot-path for people or safe pasturage for cattle. If the man or the cattle are on the track, it is the duty of the company to avoid injury to them if by the exercise of a proper lookout and care it can do so. But the principle goes no further. There are in this State about 3,500 miles of railroad, and every year extends the mileage. If these companies are guilty of negligence when they do not keep their right of way, thirty-five hundred miles in length and two hundred feet wide, shrubbed, so that a piney woods cow or a razor-back hog may always be visible thereon, or in default of that are guilty of negligence if they do not slacken speed and "beat the bushes" wherever high enough and dense enough to conceal the recumbent forms of those interesting animals, who otherwise might be startled from their slumbers and rush upon the track, then the duty required of engineers and the expense imposed upon the companies will *not* be "trivial." The railroads own the right of way. It belongs to them for the purposes of their traffic. All that can be required of them, as to others than its passengers and freight, is the good old rule that it *use* its own in such manner as not to injure others. It is not required to put its track or right of way in good condition for the safe use of others who pay nothing to them to enable them to do so. In those cases where railroads have been held liable for fire originating on their right of way, the negligence was not in allowing the grass to grow there—they are

not expected to keep the right of way plowed up—but in using defective spark arresters, or negligently using them, so that fire is communicated to the inflammable grass or matter and thence passes to the (366) property of others which is thereby destroyed. In the present case the prayer for instruction, that if "the engineer did not, and by the exercise of a diligent lookout could not, have seen the stock on the track in time to avoid the injury, the issue should be answered in favor of the defendant," was warranted by *Carlton v. R. R.*, 104 N. C., 365, and other precedents, and should have been given in the form asked, without the modification made by the court below.

MERRIMON, C. J., dissenting: In this State a railroad company is not required to inclose its railroad by fence or otherwise, and hence it is not regarded or treated in law as a trespass if the livestock of farmers and others, at large in the forests or fields, wander upon its road or graze upon its right of way. If such livestock so wandering shall be negligently killed by its moving locomotives or trains, it will be answerable to the person whose property shall be so injured in damages. Indeed, the statute (Code, sec. 2326) prescribes that such killing of stock shall *prima facie* be negligently done, and the burden of proving the absence of negligence in such case is put upon the railroad company. Such company is bound to reasonable care and diligence in preventing such injuries. It is, therefore, its duty to keep its roadway in such reasonable condition as will prevent the killing of stock, and, as well, to prevent possible injury arising therefrom to passengers and freight passing over its road, and injury to its own property. It is negligence on its part when it fails to do so. To prevent such injuries it is bound to keep its roadway, as far as practicable, free from such things as will obstruct the view of the engineman looking ahead of the moving train. He should be able to see stock of all kinds on the road or the roadway, in order that he may be able to sound the danger alarm as early (367) as practicable and frighten the stock away, and to put his engine in condition to stop the train promptly.

If bushes, weeds, grass and the like are permitted to grow upon the roadway unrestrained, they not infrequently, particularly where the soil is rich, grow so high and thickly as to hide the animal grazing there, and prevent the engineman from seeing it until the engine is almost upon it. He then sounds the alarm: this and the rushing train alarm the animal and it at once springs upon the track, is killed, the train may be thrown off the track, passengers killed or wounded, or freight injured or ruined. All this may easily happen—has happened. It may be easily prevented by keeping the roadway clear from bushes and high weeds that grow thickly. But for such growth, the stock would gener-

ally be seen in ample time to frighten them off or stop the train, and thus sometimes prevent damage very serious in its extent and nature.

The cost of keeping the roadway clear is trifling compared with the loss occasioned by failing to do so. Indeed, one of the very purposes of the broad roadway allowed to railroad companies is to prevent injuries like those mentioned. It is expected and intended that it shall be kept reasonably clean and free from all such things as will give rise to injury and danger. Hence, it has oftentimes been held that it is negligence to allow dry grass to remain on the roadway, or dry decaying cross-ties and the like to remain there, because they easily take fire, and thus frequently spread devastation.

In possible cases, no doubt, it may be that the roadway cannot be kept clear, but such cases are not general nor common. Nor is this any reason why it shall not be done when practicable. It is said that such a requirement will drive the railroad company to assert its right against farmers and others who are generally allowed, as a matter of favor, to cultivate the land freely and closely to the road track. This is an unfounded apprehension. Stock are not allowed to go at large in the fields where corn, wheat, rye, tobacco and the like grow, and there is, hence, no danger arising from cattle straying in the (368) cultivated fields.

In the present case, if the bushes and grass had not been permitted to grow so high and stand on the roadway, the possibility, the strong probability, is that the animal would not have been killed. But for the bushes and grass the engineman might—would—have seen the animal long before he did and frightened it away, or he might readily have slackened the speed of the train, or, if need be, stopped it. It was fortunate that the train was not thrown from the track and greater damage done. I cannot hesitate to say that, in my judgment, the defendant was justly chargeable with negligence, and that the charge of the court to the jury was reasonable and just.

DAVIS, J., concurred in the dissenting opinion of the *Chief Justice*.

PER CURIAM. Error.

Cited: S. c., 113 N. C., 570; *Tate v. Greensboro,* 114 N. C., 411; *Black v. R. R.,* 115 N. C., 673; *Blue v. R. R.,* 117 N. C., 649; *R. R. v. Sturgeon,* 120 N. C., 228; *Norton v. R. R.,* 122 N. C., 934; *Shields v. R. R.,* 129 N. C., 4; *Simpson v. Lumber Co.,* 131 N. C., 521; *Moore v. Electric Co.,* 136 N. C., 556.

JULIA M. HART v. GODFREY HART.

Fraud—Evidence—Married Woman.

In an action brought by a wife to recover from her husband certain moneys alleged to belong to her arising from the sale of lands which the husband had conveyed to her, the answer charged that the conveyance to the wife was made whilst the husband was in embarrassed circumstances, and was made to defeat and hinder his creditors, and that the wife had full knowledge of the purpose and participated therein: *Held*, (1) that it was error to reject evidence of these facts; (2) that the husband was a competent witness to prove them; (3) that if they were established, the wife was not entitled to recover; (4) that a married woman has capacity to perpetrate a fraud, and even as against her husband the courts will not interfere to protect or enforce any interest or claim arising out of the fraudulent transaction.

SHEPHERD, J., dissents.

(369) ACTION, tried at January Term, 1891, of NEW HANOVER, *Graves, J.*, presiding.

The plaintiff alleges in her complaint that the defendant, her husband, on 23 October, 1873, conveyed to her in consideration of love and affection and five dollars, the real and personal property specified in the deed; that thereafter, on 2 January, 1875, her said husband induced her to unite with him in conveying said land to one Lomax for the sum of $1,000, all of which was paid to the defendant and she received no part thereof; that the defendant received for the land $1,375, which was and is the property of plaintiff; that before bringing this action she demanded of the defendant that he pay the said sum and interest, etc. She demands judgment for the same etc.

The defendant denies that any title to the said land ever passed to the plaintiff by virtue of said deed; on the contrary, the defendant alleges that any deed which he may have made to plaintiff was with the understanding that it should not be registered unless defendant should so direct, and that it never has been registered, as defendant is informed and believes, and that the same had not been registered as late as April, 1888; and the defendant further alleges that any deed which he may have made to plaintiff was a deed of gift, without any valuable consideration whatever, and that it was his purpose, well known to the plaintiff, to register said deed only in the event that judgments by creditors should be recovered or threatened.

That the conveyance of the defendant to the plaintiff was for the purpose of hindering and delaying creditors, as was well known to the plaintiff, and was with the distinct understanding that plaintiff would convey to the defendant, or any other person, as the defendant might

direct, and, so the defendant alleges that the plaintiff was in equal wrong with the defendant.

That at the time of the conveyance by the defendant to the (370) plaintiff, in October, 1873, the defendant was largely indebted to various persons, besides the debt above mentioned, and was insolvent, and all this was explained to the plaintiff and well understood by her, and the deed to her was made for the purpose of securing compromises and settlement of his debts, as the plaintiff was fully advised, and with the understanding between the plaintiff and the defendant that she would at any and all times convey the land according as the defendant should direct.

The defendant was introduced as a witness in his own behalf, and testified: "Was married to plaintiff in 1873. I made deed to her when in financial difficulty."

The defendant proposed to show that no money was paid by plaintiff to defendant as a consideration for the deed, and that he was in financial trouble when he made it, and that it was made to defraud creditors. Plaintiff objected; objection sustained; defendant excepted.

The defendant proposed to show a parol agreement, made at the time of the deed between himself and plaintiff, that he was to have the proceeds of the land. Plaintiff objected; objection sustained; defendant excepted.

The defendant proposed to show by this witness that, subsequently to the making of the deed to plaintiff, plaintiff agreed that the proceeds of the land should be his. The plaintiff objected; objection sustained; defendant excepted.

The defendant proposed to show that at the time of the sale to Lomax the plaintiff agreed for him to take the proceeds for his own use and benefit. The plaintiff objected; objection sustained, and defendant excepted.

Witness testified that plaintiff never said one word about the money after the sale to Lomax. "I paid out $50 to lawyer French to foreclose mortgage given me by Lomax, and paid taxes and insurance and other expenses for keeping up property amounting to $100." Witness further testified that at the time of making the deed to plaintiff there was a mortgage on said property to one G. W. Curtis, and that after date of deed to wife, he paid off balance due on said mortgage, (371) amounting to about $600.

On cross-examination, plaintiff asked defendant what he was worth today. Defendant objected; objection overruled, and defendant excepted. Answer, I am worth $5,000.

His Honor charged the jury that the effect of the deed from defendant to plaintiff was to convey to her the property, real and personal, therein

described. On the sale of the property the proceeds were due to the plaintiff, and she will be entitled to recover it, unless she gave the same to the defendant.

There was judgment for plaintiff, and defendant appealed.

Defendant assigns error:

1. The admission of the evidence to which objection was made by defendant.

2. The refusal to admit the evidence offered by defendant.

3. The ruling of court that the deed from defendant to plaintiff passed the title to the property therein described.

T. W. Strange for plaintiff.
S. C. Weill for defendant.

MERRIMON, C. J. Passing by any question as to the sufficiency of the deed from the defendant husband to the plaintiff, his wife, as an unregistered deed, we think the defendant is entitled to a new trial upon another and different ground.

The defendant alleges in his answer that at the time he executed the deed in question, he was largely indebted to divers persons; that he was then insolvent and financially embarrassed, and that this deed was executed in fraud of and to defraud his creditors; that it was executed for that express purpose, and the plaintiff so well understood; that she was so "fully advised and with the understanding (between the plaintiff and defendant) that she would, at any and all times, con-
(372) vey the land according as the defendant should direct," and that it was understood by the parties that the deed was to be registered "only in the event that judgments by creditors should be recovered or threatened."

It appeared on the trial that the deed was not offered for registration until August, 1889, long after the execution of a deed to Lomax, in which the plaintiff joined in order to conclude her as to her right of dower. The defendant was a witness in his own behalf, and offered to testify that he was pecuniarily embarrassed, and that the deed was made for the fraudulent purpose as alleged by him; but the plaintiff objecting, the proposed evidence was rejected. In this there was error. The evidence should have been received.

The plaintiff's right is founded upon this deed. If it is fraudulent, as alleged, and therefore void, she is not entitled to the money she seeks to recover. Her claim springs out of and is founded in a fraudulent transaction, and the defendant, a party to it, having the money, the fruit of it, the court will not help her recover it from him. That the plaintiff is a married woman and the wife of the defendant cannot help her

or alter the case. A married woman can acquire, hold and dispose of property in a large sense as a *feme sole.* She has capacity to perpetrate and participate in a fraud—the fraudulent purposes and transactions of her husband. She has no right, or privilege, or disability that excuses her as to such fraudulent transactions in which she participates, nor that protects her against their consequences, not even as against her husband, when she must invoke the aid of the courts to assert her claim. She has privileges and immunities in some respects, but not such as will help her to share in a fraud with impunity when she must go into a court of justice to enforce her claims growing out of it. The law abhors fraud and will not help any person to take advantage of and have benefit of it. It would be singular and monstrous—a great reproach to the courts of justice—if a husband and his wife could perpetrate (373) a fraud upon his creditors and the courts would afterwards help her to assert a claim against her husband growing out of that fraud! In such case the wife must be on the same footing as a *feme sole,* and treated as such. *Burns v. McGregor,* 90 N. C., 222; *Walker v. Brooks,* 99 N. C., 207; *Loftin v. Crossland,* 94 N. C., 76; *Boyd v. Turpin, id.,* 137.

The evidence rejected was relevant and pertinent—it tended directly to prove the fraud as alleged. If it be said that it did not go to prove that the plaintiff had knowledge of and participated in the same, the answer is, it was relevant and competent and ought to have been received. It may be that the defendant would have testified that the plaintiff had such knowledge, or it might be that he would have proven such knowledge by some other witness, or in some other way. But why should he do so after the court had excluded the proposed evidence of fraud? Besides, there was some evidence of the plaintiff's knowledge of it. The deed was executed in 1873. She did not offer it for registration until 1889, more than fifteen years having elapsed, and in the meantime, in 1875, she joined her husband in executing a deed conveying the land, in which it was recited that she did so in order to relinquish her right of dower. This recital, perhaps, did not conclude her as to any other right she might have, but it was some evidence that she did not, at that time, regard the deed in question as having been made as a *bona fide* conveyance of the land to her.

There is error. The defendant is entitled to a new trial, and we so adjudge.

Error.

Cited: Williams v. Walker, 111 N. C., 609.

(374)

J. W. PERRY v. J. K. SCOTT.

Deed—Description.

1. A description of land in a deed as "lying and being in the county of Jones, and bounded as follows, to wit: on the south side of Trent River, adjoining the lands of Colgrove, McDaniel, and others, containing three hundred and sixty acres, more or less," is not so vague and indefinite as to render the conveyance void, but may be aided by parol evidence.
2. The decisions of this Court in *Blow v. Vaughan*, 105 N. C., 198, and *Wilson v. Johnson, ib.*, 211, so far as they are in conflict with this opinion, are overruled.

AVERY, J., dissenting.

SPECIAL PROCEEDINGS for partition, tried at Fall Term, 1890, of JONES (upon issues joined before the clerk), *Armfield, J.*, presiding.

The defendant claimed under deed made by a sheriff on sale under execution, in which the land was described as "lying and being in the county of Jones, bounded as follows, to wit: On the south side of the Trent River, adjoining the lands of Colgrove, McDaniel and others, containing three hundred and sixty acres, more or less."

The plaintiff insisted that the description in this deed was so vague and uncertain that parol evidence could not be received in aid of it, but his Honor being of a contrary opinion, admitted the evidence, and plaintiff excepted.

There was judgment for defendant, and plaintiff appealed.

G. V. Strong for plaintiff.
No counsel contra.

SHEPHERD, J. The single question presented for our consideration is whether the description in the deed offered by the defendant is
(375) so vague and uncertain as to preclude any testimony whatever tending to fit it to the land in controversy. In other words, is it a *patent* ambiguity, which, according to *Lord Bacon,* "is never holpen by averment," and in the language of *Pearson, J.,* entirely "a question of construction" for the Court? *Institute v. Norwood,* 45 N. C., 65.

As the sufficiency of the testimony offered by the defendant is not made the subject of exception, and as such testimony is not set forth in the case upon appeal, it must follow that if we can conceive of any testimony which would with reasonable certainty fit the description to the land in question, the ruling of his Honor should be affirmed.

The deed of the sheriff reciting a judgment against Daniel Perry, an execution, levy and a sale under *venditioni exponas,* it must, upon every

principle of construction, be inferred that it is the land of the said Perry that is sought to be conveyed, and this being so, we are of the opinion that testimony to the effect that at the time of the sale the said Perry owned but one distinct tract of land in the county of Jones "on the south side of Trent River adjoining the lands of Colgrove, McDaniel and others containing three hundred and sixty acres, more or less," would have warranted the jury in finding that the land had been sufficiently identified. This result, it seems, would have been conceded had the words "bounded" or "bounded by" been substituted for the word "adjoining," and it is earnestly insisted that, by reason of this distinction, the deed is void upon its face.

Without adverting to the presence of the word "bounded" in the first and more general part of the description, and pretermitting the question whether that word may not well be transposed so as to be construed in connection with the last and more particular language there used, we will proceed to consider the correctness of the contention of the plaintiff. In doing this, it is our purpose to avoid a discussion of the general doctrine of description in deeds, believing, as we do, that it is unprofitable, if not dangerous, to anticipate cases that may (376) hereafter arise upon this very difficult and vexatious subject.

The principle asserted finds support in what is said in *Blow v. Vaughan,* 105 N. C., 198, and the subsequent decision in the case of *Wilson v. Johnson, ib.,* 211; but upon a very careful examination of the previous decisions of this Court, induced by the reflection that its adoption may materially affect many titles in this State, about which there has been and can really be no doubt as to the actual identity of the lands conveyed, we are satisfied that the distinction mentioned is not sustained either by reason or authority, and that the overwhelming weight of judicial decision is against it.

In view of the very serious consequences that may follow its further recognition, we think that what we conceive to be a mistake should be corrected, and, as *Pearson, C. J.,* says, "the sooner the better, for if the error is allowed to spread, it may insinuate itself into so many parts and become so much ramified as to make it impossible to eradicate it without doing more harm than good. But if the seed has not spread too much, pull it up and throw it away." *Gaskill v. King,* 34 N. C., 223.

An examination of the case of *Blow v. Vaughan, supra,* will show that the decision was clearly correct, but that what was said by the learned *Justice* who delivered the opinion, as bearing upon the particular point now under consideration, was unnecessary to the disposition of the appeal. The description in the deed was "fifty acres of land lying in the county of Hertford and bounded as follows: By the lands of John H.

Liverman, John P. Liverman and Isaac Snipes." The Court held that parol testimony was permissible to fit the description to the land, but as it appeared that the description embraced a tract of one hundred and twenty-five acres, and there was no sufficient testimony to locate any particular fifty acres, it was determined that the land sued
(377) for had not been identified. The complaint substituted the word "adjoining" for "bounded," "but it was not insisted (says the opinion) that there was a fatal variance between the land declared for in the complaint and that embraced in the descriptive clause of the deed offered to show title." The discussion, however, extended to the sufficiency of the complaint, and while it was said that the description, as there stated, was too indefinite to be susceptible of explanation by parol testimony, it was also explicitly declared that as the complaint might "have been amended or incorrectly copied," the action would not be dismissed because of the use of the word "adjoining" in the place of the word "bounded," nor because of variance between the allegation and proof, "for," continues the opinion, "the point was not made as it might have been." From this it is plainly seen that the statement that the description contained in the complaint was too vague and indefinite, was unnecessary to the determination of the appeal, and was in that sense a *dictum* and not necessarily binding on the court. It is true, however, that the principle was approved in *Wilson v. Johnson, supra* (decided at the same term), but by a reference to the very brief opinion in that case, it will appear that the decision was founded solely upon what was said in *Blow v. Vaughan, supra.*

Under these circumstances we feel at liberty to examine into the previous decisions of the Court with a view of determining whether the principle mentioned should remain unquestioned and become settled judicial authority in this State.

The great practical importance of the question must be our excuse for a somewhat extended and perhaps tedious examination of the cases upon the subject.

First, let us look into "the reason of the thing," without reference to the authorities.

When one has paid out his money and taken a deed for land,
(378) it would offend every principle of natural justice to deprive him of his property unless it is required by some positive rule of law, the strict enforcement of which is imperatively demanded on the ground of public policy. Therefore it is that the courts will not lightly pronounce deeds to be void because of imperfect description if the land can with reasonable certainty be identified; and in the numerous decisions of this Court upon the infinite variety of descriptions presented for construction, there can be seen but one clear and unwavering purpose in

the minds of the judges, and that is, without contravening the statute of frauds, to give effect to the true intention of the parties. *Ut res magis valeat quam pereat.* In doing this, they have found it impossible, as *Ruffin, C. J.,* once said, to formulate any artificial rules by which, in many cases, this intention is to be ascertained, and they have necessarily been compelled to resort, in such instances, to those principles of reasoning which commend themselves to men of plain and ordinary understanding.

Now if I own a distinct tract of land and describe it in a conveyance as a tract of so many acres, more or less, "adjoining the lands of A, B, C and others," would it occur to any layman of common intelligence that the description was so vague and indefinite on its face that it would be useless to attempt to identify it? And if it were shown that I owned but one tract adjoining A, B, C and others, and that I had no other lands whatever, or none adjoining those parties, would he not be astonished when told that the deed furnished no means by which the land could be identified, and that on account of the use of the word "adjoining" instead of "bounded," or "bounded by," it conveyed nothing whatever? We think it would be a troublesome task to make him understand why, in such a case, these latter words are necessary, while he could very readily appreciate their significance if the land described was not a distinct tract, or was (as in *Allen v. Chambers,* (379) 39 N. C., 125) a part of a larger tract.

In such cases the words mentioned, or others of similar import, might become very material; but we repeat that it is not easy to understand how they are so important in the case put by way of illustration.

Neither would the argument in *Harrell v. Butler,* 92 N. C., 20, be appreciated, for it cannot be seen how such a description would apply (as is said in that case) "to one tract as well as another that adjoins" them, when there is only one tract belonging to the grantor that does so adjoin them; nor can it be understood what difference it makes whether this one distinct tract might "lie as well on the one side as the other of the lands belonging to those persons."

That the description we have mentioned is not so vague and indefinite as to exclude the introduction of parol testimony to fit it to the land, is, we think, well sustained by the very great preponderance of the decisions in this State. But before referring to these, we will examine the cases cited in support of the contrary view:

In *Horton v. Cook,* 54 N. C., 270, the description is dissimilar to ours and the grant was held good. The case, therefore, is not in point.

In *Fuller v. Williams,* 45 N. C., 162, the description is, "Henry Fuller enters one hundred acres of land on the waters of Uharee, adjoining the lands of his own and runs for complement." It was held that the entry

was too vague to amount to notice to a junior enterer who had surveyed his land and taken out a grant. A perusal of this case will very clearly suggest that the one hundred acres was but a part of a larger tract.

In *Allen v. Chambers,* 39 N. C., 126, the description is, "a certain tract of land lying on Flat River, including Taylor Hicks's spring house and lot, adjoining the lands of Louis, Davies, Womack and (380) others." It was declared too indefinite, "because it mentions no quantity, nor how any land is to be *laid off* around the improvements of Hicks." It is manifest that the Court did not decide that the word "adjoining" would have been insufficient had the whole tract been conveyed; and that the Court considered that it was a part of a larger tract, is clearly evident from the words "to be laid off," etc., as well as from the facts appearing in the evidence.

In *Grier v. Rhyne,* 69 N. C., 346, the description is, "a certain piece of land in the county aforesaid, adjoining the lands of A and B, being a part of the Alexander tract, supposed to contain thirty or thirty-five acres." It appearing that the tract out of which this quantity was to be taken contained seventy acres, and there being nothing to locate the same, it was held that the land was not identified.

We feel sure that these decisions are not applicable to the case put by us, in which the whole of a distinct tract is the subject of the conveyance.

In *Dickens v. Barnes,* 79 N. C., 490, the description is, "one tract of land lying and being in the county aforesaid, adjoining the lands of John A. Phelps and Norfleet Pender, containing twenty acres, more or less." The description omits the words "and others," which seem to have been regarded in some cases of doubt, as important (see *Harrell v. Butler, supra*), and the decision is therefore not precisely in point. In *Harrell v. Butler* it is very nearly intimated that *Dickens v. Barnes* is overruled by *Farmer v. Batts,* 83 N. C., 387. In *Harrell's case* (which seems to be more in point than any of the others cited), the description was "all my interest in a piece of land adjoining the lands of J. K. and others." The Court held it to be insufficient, and distinguished it from *Farmer v. Batts,* because no *quantity* was stated; whereas, in our case, both the quantity and the words "and others" are set forth. It will be seen that none of the foregoing cases are directly in point, and without pausing to discuss the very nice shades of distinction upon (381) which some of them appear to have been decided, we will now proceed to mention several of the many decisions which, it seems to us, undoubtedly sustain our view. In doing this, we will (as was done in *Blow v. Vaughan, supra*) include the cases in which the words "and others" are omitted; for if, as suggested in some of the decisions (see *Harrell's case, supra*), their presence is considered as making the de-

scription more definite, the cases sustaining descriptions without those words are all the more forcible as authority. Besides, they are important upon the question more immediately under consideration, to wit, the sufficiency of the word "adjoining," when used as a part of the descriptive clause of a deed in certain instances.

In *Hinton v. Roach,* 95 N. C., 106, the descriptive words, "a certain tract in N. Township, adjoining the lands of H. S. and others, said to contain 37½ acres," were sustained, and thus we have, at the beginning a case later than any of the foregoing, which is admittedly in point. It will be noted that the Court did not overlook *Harrell's case,* as *Justice Ashe,* who delivered the opinion in both cases, cited it among other authorities referred to by him.

In *Wharton v. Eborn,* 88 N. C., 344, we have another direct authority. The descriptive words were, "a certain parcel of land situate in B. County on R. Branch, adjoining the lands of W. L. Tyre, Henry Ormand and the lands formerly belonging to B. W. Hodges, and containing 140 acres, it being the same land conveyed by John W. Earle to said Rowland by deed dated 28 May, 1868." The deed from Earle to Rowland does not appear to have been put in evidence, nor was there any testimony as to its boundaries. This eliminates the latter part of the description and leaves it similar to that in *Hinton v. Roach, supra.* The surveyor testified that he had surveyed the lines of the adjoining lands and knew the description from the deed, and that no other tract in the county would fit the description. The Court sustained the description upon this testimony, remarking that, "according to the testimony of the surveyor, the terms used indicate to one ac- (382) quainted with the watercourses and the *adjoining tracts* called for, the very land in question, and could not have been applicable to any other."

In *Edwards v. Bowden,* 99 N. C., 80, the description was "a tract lying in G. County, N. C., adjoining the lands of P. L. and R. N., situate on the east side of the road leading from Jerusalem church to P. L.'s, it being a portion of their part of the original Pridgen tract, and containing fifty acres." The Court said (*Merrimon, J.,* delivering the opinion) that if the words "it being a portion of their part of the original Gray R. Bridgers' tract containing fifty acres," be omitted from the description, it would be substantially like that held to be sufficient in *Kitchen v. Herring,* 41 N. C., 190. The words in that case were "a certain tract of land lying on the southwest side of Black River, adjoining the lands of William Haffland and Martial," and in *McGlawhorn v. Worthington,* 98 N. C., 199, the description held to be sufficient was "all that tract or parcel of land situate in said county and bounded as follows: Adjoining the lands of Augustus Brackston, James Hines, T. N.

Manning, Cobb, Tripp and others, containing three hundred and sixty acres, more or less." So that if the words of the description were only these: "A tract of land lying in Greene County, North Carolina, adjoining the lands of Patrick Lynch and R. M. Bowden, situate on the east side of the road leading from Jerusalem church to Patrick Lynch's," there could be no reasonable question as to the sufficiency of the description. In the course of the opinion it was further remarked: "Hence, the land is described as a tract, a body of land having descriptive identity, adjoining the lands of," etc. How could it adjoin the lands of the persons named if it were not designated by some boundary? Here
(383) we have an explicit approval of the efficacy of the word "adjoining," which is fully supported by authorities cited.

Pausing here for a moment, we will remark that the necessity for the presence of the word "my" or "my lands" in such descriptions in conveyances by the owner, as indicated in several of the older cases, seems, from a perusal of the foregoing decisions, to be no longer recognized, and their immateriality is distinctly declared by the late distinguished *Chief Justice* in *Farmer v. Batts, supra,* where he says "that the assertion of title in the vendor is not less unequivocally involved in the very act of disposing of it as his property." It would indeed seem but charitable to assume that he who undertakes to convey property intends to dispose of what he claims to be his own.

But to resume: In addition to other cases that may be cited, we have a series of decisions as to the sufficiency of levies on executions issued by justices of the peace under a statute which required the officer to designate "the lands and tenements he has levied on where situate, on what watercourse and whose land it *adjoins.*" Revised Code, ch. 62, section 16.

It is urged that these decisions ought to be confined to cases arising under the statute, and should not be considered in the construction of ordinary conveyances. But if we examine into the purpose of the statute, it will plainly appear that such a contention is without foundation. Under the former law, the land of the judgment debtor was bound by the *feiri facias,* and it was not essential to the acquisition of a lien that a levy should have been made. It was otherwise when an execution was issued by a justice of the peace, in which case the lien was created only by the levy, which must, says *Pearson, J.*, have had "a certain degree of particularity so as to identify the land and enable the sheriff to sell under the *venditioni exponas,* and of which notice must have been given." *Judge v. Houston,* 34 N. C., 113. It was for the very purpose of insuring this particularity that the statute was enacted, and it is quite diffi-
cult to understand, why (in the solicitude of the Court to up-
(384) hold deeds and effectuate the intention of the parties) this plain

and unequivocal legislative construction should not be followed in all cases. That it has been so recognized and acted upon in the construction of ordinary contracts and deeds, is manifest from several of our decisions. Notably is this so in *Kitchen v. Herring, supra,* where it is said that "the description in this contract is similar to that constantly made by constables in levies upon land, from which sheriffs have no difficulty as to what land to sell and how to make deeds." See also *Farmer v. Batts, supra,* in which *Ward v. Saunders,* 28 N. C., 382 (a case relating to a justice's levy), was cited as authority, and where the application of such decisions to descriptions generally is expressly admitted and acted upon.

We will now refer to a few of these descriptions which have been held sufficient:

"Levied on the lands and tenements of Isham Doby, adjoining the lands of Allan Newsome, Claiborne Newsome and others." *Ward v. Saunders, supra.*

"Levied on the legal and equitable interest of Abraham Paul to 450 acres of land, more or less, in R. County, adjoining the lands of Giles McLain, Dugald McCullom, John McLain and others." *McLean v. Paul,* 27 N. C., 22.

"The lands of defendant in the county of Chatham, on waters of Tyson Creek, adjoining the lands of Bryant Burroughs and others, containing 200 acres, more or less." *Hilliard v. Phillips,* 81 N. C., 99.

"Levied this execution on the land of S. M. Hunter, on the east side of the North East River, adjoining the land of Stephen M. Grady, and others." *Judge v. Houston, supra.*

We could cite other cases in support of the sufficiency of the word "adjoining" when used as indicated in the example we have put, but it would seem unnecessary in the presence of this consensus of judicial opinion, and we are now somewhat surprised that there should ever have been any doubt upon the subject. (385)

In consideration of this great weight of authority, and in view of the serious results which may follow a further approval of the principle in question, we think that we should go back to where we stood before the *dictum* in the case of *Blow v. Vaughan, supra;* and although we may often be perplexed in deciding particular cases of this character by reason of the inherent difficulties of the subject, it is far better, in our opinion, to meet these as they arise, with an anxious effort to give effect to the intention of the parties, than by the adoption of a procrustean rule, to shut out, in many instances, all inquiry whatever. The other exceptions are without merit.

AVERY, J., dissenting: I do not concur in the opinion of the Court. In the early part of the term I prepared a dissenting opinion, which it was my purpose to condense and modify in many respects. But the pressure of more important duties prevented me from doing so, and, as I stand alone in my views, I do not feel willing to occupy so much space for the mere gratification of placing before the profession or the public my reasons for disagreeing with my brethren.

PER CURIAM. Affirmed.

Cited: Emry v. R. R., post, 613; *Leatherwood v. Fulbright, ib.,* 685; *Vickers v. Henry,* 110 N. C., 373; *Lowe v. Harris,* 112 N. C., 479, 498; *Wilkins v. Jones,* 119 N. C., 96; *Hemphill v. Annis, ib.,* 516; *Sherman v. Simpson,* 121 N. C., 130; *Puryear v. Sanford,* 124 N. C., 284; *Edwards v. Deans,* 125 N. C., 63; *Hinton v. Moore,* 139 N. C., 46; *Smith v. Proctor, ib.,* 318; *Janney v. Robbins,* 141 N. C., 403; *Gudger v. White, ib.,* 520; *Grimes v. Bryan,* 149 N. C., 250; *Babb v. Mfg. Co.,* 150 N. C., 140; *Phillips v. Denton,* 158 N. C., 304; *Byrd v. Sexton,* 161 N. C., 572; *Hudson v. Morton,* 162 N. C., 7; *Johnson v. Mfg. Co.,* 165 N. C., 107; *Hawes v. Lumber Co.,* 166 N. C., 103; *Batchelor v. Norris,* 166 N. C., 509; *Timber Co. v. Yarbrough,* 179 N. C., 337, 338.

JAMES E. CLAYTON ET AL. V. THE ORE KNOB COMPANY.

Corporation—Capital Stock—Reference—Report.

1. A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock" does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation.
2. The report of a referee found that there were no assets of an insolvent corporation applicable to the payment of certain debts; that the capital stock ($1,500,000) had not been paid for in cash, but had simply been issued to the corporators in proportion to their several interests in certain mining property, but that there was no evidence of the value of such property: *Held,* that there was error in confirming the report; it should have been remanded with directions to inquire and report the value of the land taken in payment of the stock, and if there was any discrepancy between that value and the par value of the stock, to the end that the unpaid balance on the stock might be collected and applied for the benefit of creditors.

(386) ACTION, heard at Fall Term, 1891, of ASHE, upon exceptions to referee's report, *Bynum, J.,* presiding.

The plaintiffs, Clayton and Williams, brought this action to recover large sums of money due them from the defendant. In their complaint

they alleged that the defendant was insolvent, and, for causes stated, demanded that a receiver be appointed to take charge of the property and wind up its business, etc. They were large stockholders as well as creditors of the defendant and were appointed receivers. They and other creditors obtained judgments against the defendants, and its leviable property was sold for a sum of money greatly inadequate to pay its debts. The sum so realized was distributed to creditors.

In the course of the action it became and was treated as a creditor's action, and the appellant Daniel Black, a judgment creditor, was made a party plaintiff. Thereupon it was referred to a referee "to take and state an account of the effects that are, or ought to be, if any, in the hands of the said receivers belonging to said company, and the amount of capital stock of said company, paid and unpaid. That he will report specially whether there are, or ought to be, any effects in the hands of said receivers applicable to the Black judgment, and if so, how much. That he will report his findings of fact and conclusions of law separate, and make his report to August Term of this Court."

Afterwards the referee made his report, and among other (387) findings of fact, found:

"2. I find that the capital stock of the defendant company at its organization was $1,500,000, and that the same was divided into 150,000 shares of the par value of $10 each. And the said capital stock was issued to the corporators as full paid-up stock, as allowed by its charter.

"3. I find that the said capital stock of said corporation was, in fact, never paid up in cash at the organization of the company or afterwards, but was issued to the corporators in proportion to their several interests in certain real estate then owned by them in Ashe County, and known as the Ore Knob property, consisting of a tract of land upon which was a mine of copper. But no evidence was offered to show the value of said real property at the time such stock was issued."

He further finds, as a conclusion of law:

"1. From the foregoing facts, I find that the receivers neither have, nor ought to have, any assets in their hands applicable to the Black judgment, and recommend that judgment be rendered accordingly.

"2. I also find that all the assets that came into the hands of the receivers were paid out under order of the court, and that plaintiff Daniel Black is concluded as to that matter by the judgments heretofore rendered."

The appellant filed exceptions to the report as follows:

"1. That plaintiffs except to the referee's finding in his first conclusion of law, and for cause of exception say that he had no evidence to

sustain his finding that the receivers neither had nor ought to have had, any assets in their hands, when the evidence showed that the paid-up capital stock of the defendant was $1,500,000, and the defendant's judgment only amounted to a little over $30,000; and the receivers neither had, nor ought to have had, the balance of the paid-up capital stock in excess of the debts, the said receivers themselves being the principal creditors and subscribers to the said paid-up capi-
(388) tal stock to the amount of, to wit, Herman Williams in the sum of $27,750, and J. E. Clayton in the sum of $28,660.

2. That plaintiffs except to the second conclusion of law by the referee, and for cause of exception say: "That he erred in finding that the plaintiffs were concluded by the judgments rendered in the cause by the receiver, when his finding of fact eight shows that the plaintiffs were not a party to the action at the time the judgment was rendered by *Clark, J.*, but were made a party at the succeeding term of the Court, and the order of *Armfield, J.*, at said term, could not have the effect of an original cause of the said receivers against said defendant company, and that it is contrary to his finding of fact No. 9. That the said Herman Williams and J. E. Clayton were then due the company as subscribers to the capital stock more than fifty thousand dollars. While said amount constituted a trust fund for the benefit of creditors, and no part of which could be taken by them (the said Williams and Clayton) until all the other creditors were satisfied or the subscribed stock was exhausted."

The court thereupon gave judgment, whereof the following is a copy:

"This cause coming on to be heard upon the report of Commissioner Doughton and exceptions thereto, and being heard, it is adjudged that the exceptions be overruled, and the report confirmed. That Commissioner Doughton be allowed the sum of seventy-five dollars for taking and stating the account and making his report, to be paid by the said receivers, Jas. E. Clayton and Herman Williams, and upon the payment thereof that they be discharged from further duties and liabilities as such receivers."

Daniel Black excepted and appealed.

G. W. Bower for appellant.
No counsel for appellee.

(389) MERRIMON, C. J., after stating the case: Although this action was not at first formally a creditor's action, it afterwards was made and treated as such, and the appellant, a judgment creditor, was properly made a party plaintiff to the end he might share in the assets of the defendant accordingly as he might be entitled. That he may have

shared in assets in the hands of the receivers did not prevent him or other creditors from insisting that there were, or ought to be, other and additional assets out of which his and other unpaid debts might and should be paid. There was no final decree or judgment at the time the order of reference was made, and there is, hence, no reason why the appellant should be concluded by former orders and judgments entered in the course of the action. The action is equitable in its nature, and it was the duty of the court to see that the receivers had collected all the assets of the defendant and distributed the same to parties entitled to have the same according to their respective rights.

Very certainly, the capital stock, paid or unpaid, of the defendant, constitutes a trust fund for the benefit of its creditors, and whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts. If the capital stock has not been paid for, it is the plain duty of the court to require it to be collected, or so much thereof as may be necessary to pay its unpaid debts. *Foundry Co. v. Killian,* 99 N. C., 501, and cases there cited; *Heggie v. B. & L. Association,* 107 N. C., 581; *Sawyer v. Hay,* 17 Wall., 620; *Wood v. Drummer,* 3 Mason, 308; Ang. and Ames Corp., sec. 600, *et seq.*

The defendant was incorporated for mining and smelting purposes, and it may be that its capital stock might in good faith have been paid for by its stockholders with property other than money, appropriate for its purposes, as a tract of land containing a copper mine, and when the stock has been paid in good faith such payment would be legitimate, unless in some proper way and connection it should (390) be alleged and proven that such payment was simulated, grossly inadequate and fraudulent, and intended to serve fraudulent purposes. In such case, such fraud appearing, the court would compel payment of the stock, certainly less a fair price for the property so applied and used. And in an action like this, the creditor might allege the fraud and have the questions arising in that respect determined according to the course and practice of the court. There is no valid reason why he might not. The court has ample jurisdiction for the purpose as to parties and the subject-matter embraced by the litigation.

In the present state of the pleadings in this case, no question of fraud is raised as to the payment of the capital stock of the defendant; the referee, however, finds that, in fact, it never was paid in cash, but proper certificates of stock were "issued to the corporators in proportion to their several interests in certain real estate then owned by them in Ashe County, and known as the Ore Knob property, consisting of a tract of land upon which was a mine of copper." He does not find, as he should have done, if such was the fact, that the property was received and con-

veyed to the company with the understanding and intent that it should be and stand as payment for the stock, or for some part of it, if so intended. It is stated by the referee that no evidence was offered to show the value of the property—whether it was treated as a payment of the stock, or some part of it, seems to have been wholly ignored. Such finding was important, and the case could not be properly disposed of without it. It is scarcely probable that the property was so intended. The capital stock was $1,500,000, divided into shares of $10 each. That is a great sum, and it is scarcely probable that the land was accepted and treated as of that value. It is more probable that the property was taken at a fair value, and the stock, except to that extent, was
(391) never paid for. The referee should have found how the facts were. Hence, the referee's first finding of law, that the receivers "neither have, nor ought to have, any assets in their hands applicable to the" appellant's judgment, was unwarranted.

The inquiry does not involve any question of fraud. As we have said, such question does not arise in the present state of the pleadings.

The charter of the defendant provides that "said (the capital) stock shall be issued as full paid stock, shall be personal property and transferable." This does not imply that the stock shall be issued to the stockholders without paying anything for it. Though the charter does not, in terms, imply that it may be paid for otherwise than with money, it would seem that it might be paid for with property, but surely not at a nominal, simulated price! But we advert to this provision of the charter—rather a peculiar one—only to say that it does not imply that the corporators are to receive the certificates of stock without paying for the same.

There is error. The judgment must be set aside, and the referee must be directed to find the facts as indicated in this opinion, and if it shall turn out that the capital stock of the defendant has not been so paid in property, then the receivers must be required to collect so much thereof as may be adequate to pay the appellant's debt.

AVERY, J., dissenting: The questions presented by the appeal are:

1. Whether the referee has found that the capital stock of the company was paid up in property, if *not* in *cash*.

2. Whether, if his report can be construed to mean that it was paid in land, a judgment creditor, who has not alleged fraud in the organization of the corporation, has the right to demand that the report be remanded for the purpose of ascertaining the value of the land conveyed in payment of stock, and of calling on the stockholders to pay
(392) his judgment, if the difference between the value of the property taken in lieu of cash for stock and the par value of the stock

should be as much or more than the judgment, or if the difference should be less, then that the amount of the over-valuation should at all events be applied to plaintiff's judgment.

The referee reports on this subject, that the capital stock of the company was $1,500,000, divided into 150,000 shares of the par value of $10 each, and "that the said capital stock of the said corporation was, in fact, *never paid up in cash* at the organization of the company or afterwards, *but was issued to the corporators in proportion to their several interests in certain real estate, then owned by them in Ashe County and known as the Ore Knob property, consisting of a tract of land upon which was a mine of copper.*" The referee further finds, that *"no evidence was offered to show the value of said real property at the time such stock was issued."*

The stock was evidently paid up, according to the report, by placing a valuation of $1,500,000 on a copper mine in Ashe County, known as Ore Knob, which was conveyed to the corporation by tenants in common, who owned it in consideration of the issue of certificates of stock to each one of said owners to an aggregate amount, which bore the same proportion to the whole capital stock of $1,500,000, that his individual interest bore to the whole interest. The referee reports the names of but three of the holders of this large amount of stock, Clayton, Williams and John Small, all of whom are judgment creditors of the corporation, and states the number of shares of stock held by only two of those three.

The proposition to remand, with directions to the referee to ascertain the real value of the property, is insisted upon on the ground that the burden is upon the stockholders, where there is no allegation of fraud or over-valuation to show affirmatively that property conveyed as stock to a private corporation was worth the par value of the stock received (though such stock, when issued, could not be (393) sold in the market for ten cents on the dollar), or to account to the creditors of the corporation to the extent of the sum ascertained by subtracting the real value of the property from the par value of the stock. Cook Stock and Stockholders, secs. 44, 47, 48, states the principle to be the very reverse of that contended for here. He says, "in order to reach the person receiving paid-up stock for property, the *corporate creditors* (not the corporators) must prove three things." They must prove, first, that "the property was *over-valued* and *unreasonably over-valued*"; secondly, "that the over-valuation was *intentional and fraudulent*"; thirdly, "that the person so receiving stock has made a profit thereby." If the doctrine laid down by him is supported by the weight of authority, both in this country and in England, as it seems to be, the burden would be on the creditor of a private corporation to show

a fraudulent over-estimate, and it seems scarcely necessary to cite the numerous decisions of this Court to establish the proposition that he who rests his right of recovery on such ground must both allege and prove the fraud.

The judgment creditor Black has instituted no proceeding for the purpose of assailing the good faith of the corporators. To require the stockholders and promoters of a corporation to take up the laboring oar and negative the possibility that there may have been a fraudulent and intentional over-valuation of a copper mine, would be to make a dangerous and radical change in a well established rule of evidence to meet the emergency of a supposed hard case.

There can be no more doubt as to the liability of the stockholders in such cases, where fraud is properly alleged and proven by the injured party, than there is that the promoters of a pretended corporation are responsible for loss sustained by persons who give credit to the corporation by reason of their false and fraudulent representations.

(394) In the case of *Stracy v. R. R.,* 5 Dillon, 348 (10 Myers, Fed. Dig. Corp., sec. 167), *Judge Dillon* held not only that shares of stock issued to a contractor for the construction of a railroad in payment for work that was never done, were presumably valid, but that after passing into the hands of innocent purchasers such shares could not, even on proof of a fraudulent arrangement between the company and contractor, be assessed to pay the difference between the par value of the stock and the real value of the work done by the contractor. The same learned *Judge* declares in *Phelan v. Hozard,* 5 Dillon, secs. 45, 47 (10 Myers, Fed. Dig. Corp., secs. 156, 157), that property taken for stock must be held a full payment for such stock as against creditors until the agreement to take it is impeached and rescinded for fraud in a direct proceeding for that purpose, and that the creditor could not show "that the property accepted by a company in full payment of its stock was not fully worth the price of the stock, and thus compel the holder of the stock to pay the difference between such price and the alleged value of the property." 10 Myers, Fed. Dig., p. 47, secs. 127, 128. *Judge Dillon* cites to sustain his position a number of English cases, among them the case of *In re Boylan Hall Colliery Co.,* L. R., 5 Ch. 346, and *Pitt's case,* L. R., 5 Ch. 11. In the former case, ten persons, after working a coal mine, which they owned as tenants in common, for some time, formed a corporation with a capital stock of £20,000 and conveyed to it the colliery for "a number of shares proportioned to their respective interests." It was held that, in the absence of fraud, the shares should be taken "as paid up by handing over the colliery," just as it should be assumed that the stock in our case was fully paid by the transfer of a copper mine instead of a coal mine. In *Pitt's case, supra,*

it was held that the payment of shares of stock in a private corporation in property must be held a payment in full *till im-* (395) *peached for fraud.* See also *Coates's case,* L. R., 17 Eq., 131; *Anderson's case,* L. R., 7 Ch. Div. 75; *Schroeder's case,* L. R., 11 Eq., 131; *Bush's case,* L. R., 9 Ch. Div. 554; *Spargo's case,* L. R., 8 Ch. Div., 407; *Savage v. Ball,* 17 N. J., 142; *Smith v. North Am. Co.,* 1 Nev., 423; *Goodrich v. Reynolds,* 31 Ill., 490; *Spence v. Iowa Valley Co.,* 36 Iowa, 407.

Proceeding upon the principles established by the authorities cited and generally recognized by the legal profession, private corporations have been and are constantly being organized and reorganized all over the State of North Carolina under the general act (Code, ch. 16) for the purpose of working mines of various kinds, and with the view of promoting the growth and development of our towns. All of these companies are authorized to hold as much as three hundred acres of land, and those organized for mining and manufacturing purposes are not confined within that limit. Code, sec. 666. In all of these companies land at an agreed price constitutes a portion of the assets of the corporation, and has been taken for a part or the whole of the shares of capital stock. The prosperity of some sections of our State depends in a large measure upon the development of mines by foreign and domestic corporations. The prices of this species of property are so fluctuating, and are often fixed by the reports of their officers sent to London, Liverpool or New York, of which our citizens have no notice and in which they take no interest. It would clog and embarrass these operations and prevent the expenditure of thousands of dollars, which we have reason to expect would otherwise continue to be expended in the State, if all such corporations should be put upon notice that stockholders who hereafter advance money to develop mines or improve the real estate taken as stock, and attempt to secure such advancement by a mortgage of the property or a judgment confessed by the company so as to constitute a lien upon it, take upon themselves, as against creditors who acquire subsequent liens, the burden of showing that their property, originally accepted in full payment of shares of stock, (396) was not over-valued because such property when sold at a forced sale under execution brought a price far below the par value of the stock for which it was sold. Well established rules of evidence must not be made to depend for their existence upon the fluctuating prices of mining property.

A party relying upon fraud as a reason for holding a stockholder to such unusual liability, should be required to institute a direct proceeding to impeach the payment of stock, and to take upon himself the bur-

den of proving not only that there was an over-valuation, but that it was intentional and fraudulent. Cook on Stock, sec. 44

Judgments were rendered in favor of Herman Williams and James E. Clayton, stockholders, at the Fall Term, 1893, of the Superior Court of Ashe County, in the aggregate for about $30,000, and execution being issued, the Ore Knob land, together with the personal property, brought $7,300 only. The judgment was rendered in favor of the plaintiff Black for $100 at Spring Term, 1887, and the execution issued on his judgment being in the hands of the sheriff when the sale was made, he was allowed to share *pro rata* in the proceeds of the sale of personalty, but received no part of the fund arising from the sale of the land. Plaintiff's judgment is not fully paid, and a large sum is still due on the judgments in favor of Williams and Clayton. The referee reports that there was no evidence offered before him to show the real value of the property, and he had no means of estimating it, except the price it brought at the sale. Herman Williams owned $27,750 and James E. Clayton $28,660 of the capital stock on 9 January, 1883, which was issued to them originally for their interest in the Ore Knob property. What other persons owned interests in said property, what proportions they owned, and how much stock was issued to them, nowhere
(397) appears in the referee's report; but it does appear that $1,500,000 worth of stock was issued to these two and other corporators in proportion to their several interests in the mine. We know that Herman Williams and Clayton did not get all of the stock, but, in the aggregate, only $56.410, being a little over one-thirtieth of the stock issued to the owners of said mine. Who were the holders of the other shares of stock, except one John Small, or what were their respective interests in the mine given in exchange for each share, the referee did not deem it necessary to find. Clayton and Williams seem to have advanced and expended money or furnished supplies for the company. The validity of their judgments is not called in the question. John Small, another stockholder, has a judgment which is still unsatisfied. The referee does not report the amount of his judgment, the extent of his original interest in the mine, or the number of shares of stock issued to him. For aught that appears in the findings of fact he may own all the other shares of stock, except those held by Clayton and Williams, and his stock may have been issued for a proportionate interest in the Ore Knob property.

Under all the circumstances, after a sale has been made to satisfy a number of unimpeached judgments, constituting *prima facie* liens superior to that of plaintiff, the proposed order allowing a reference for the purpose of eliciting evidence to draw in question the validity of said judgments or, what is the same thing, the apparent right to the proceeds of sale on the ground that Clayton and Williams perpetrated

a fraud, would be without precedent in the judicial annals of this or any other State. The court cannot gratuitously, at this or any other stage of the action, raise an issue of fraud for the benefit of a party and order a referee to try that which the parties have never agreed to submit to him. The question whether these judgment creditors have fraudulently over-valued the property given for stock, when properly raised, is an issue for the jury, till they consent to try before another (398) tribunal.

It is true that in this action, which is in the nature of a creditor's bill, Black might have made himself a party plaintiff earlier, and when he did become a party, he might have filed a complaint alleging the fraud in distinct terms or disputing the claim of the other creditors, who were parties. *Wordsworth v. Davis,* 75 N. C., 159.

But, in my judgment, after the referee has explicitly stated that the whole stock was taken in property, I think it is too late to remand the case to him for a further report. The meaning of his language seems to me unmistakable. If Black has suffered it is the result of his own laches. He might allege fraud as a ground of relief, and have the issue tried by the jury, or by consent, by the referee. It seems that he had his claim passed upon, as he now avers, before he became a party with full notice of all that had happened. I think he has waited too long, and has no right at this late day, when the proceeds of the sale of the assets are brought into court, and nothing remaining to be done but to distribute them among the claimants, to institute, in effect, a new action against his coplaintiff and others.

PER CURIAM. Error.

Cited: Cotton Mills v. Cotton Mills, 115 N. C., 477; *Cooper v. Security Co.,* 122 N. C., 464; *McIver v. Hardware Co.,* 144 N. C., 484; *Whitlock v. Alexander,* 160 N. C., 468; *Gilmore v. Smathers,* 167 N. C., 444; *Bernard v. Carr, ib.,* 482.

D. C. PEARSON v. R. BARRINGER.

Arbitration and Award—Exceptions.

1. An award, under a reference, "to establish and declare the line in dispute between the parties," should not be set aside because it awarded that a portion of the land claimed by one should be added to that claimed by the other party, the effect of the award being to establish and fix the disputed line.
2. One who seeks to impeach an award because one of the arbitrators was interested in the controversy, which fact was unknown at the time of his selection, must make his objection as soon as he discovers the disqualifying facts.

(399) ACTION, tried before *Bynum, J.*, at Fall Term, 1891, of BURKE.

This cause was referred at Fall Term under the following order:

"This cause is, by consent, referred to B. F. Davis and L. A. Bristol as arbitrators (with power in them to call in an umpire who shall decide in case they disagree), to declare and establish the line in dispute between the plaintiff and the defendant, dividing the lot known as the McKesson from that known as the Chunn property; the right of the defendant (if any) to have the lane between the said lots kept open, and the amount of damages, if any, which either is entitled to recover of the other, their award when filed and confirmed to be a rule of this Court and final, and a settlement of all claims and disputes as regards said lots."

And thereupon, the said Davis, Bristol and Brittain having made report, the defendant, at Fall Term, 1890, filed exceptions thereto, which were overruled, and gave judgment according to the report, and defendant appealed.

S. J. Ervin for plaintiff.
John Devereux, Jr., for defendant.

SHEPHERD, J. Only two reasons for setting aside the award were insisted upon on the argument before us.

(1) The first is, that the arbitrators exceeded their authority, in that they undertook to take five feet from the defendant's land and "add" it to that of the plaintiff: whereas, they were only authorized "to declare and establish the line in dispute between the plaintiff and the defendant," etc.

(400) We do not think that the award is susceptible of the construction that the arbitrators assumed to try the title or to divest the estate of one part and put it in the other. Very clearly the authority to declare and establish the line in dispute necessarily implied the right to so fix the line that one of the parties would get less land than he claimed.

The award upon this point is as follows: "We find that the line between Pearson and Barringer shall be five feet from the present fence, as it now stands, clear through from King to College streets, to come off Barringer's lots, Nos. 42 and 51, and added to Nos. 41 and 52, Pearson's lots." The court is entirely satisfied that the use of the words "come off" and "added to," was simply for the purpose of describing the line as established by the arbitrators, and that in no sense can it be understood as an assumption of authority on their part to arbitrarily take land from one party and give it to the other.

(2) It is earnestly insisted that the award should be set aside because Bristol, the arbitrator chosen by the plaintiff, was a surety on the prosecution bond, and therefore an interested party.

It is well settled, that parties "knowing the facts, may submit their differences to any person, whether he is interested in the matters involved (*Navigation Co. v. Fenton,* 4 W. & S. [Pa.], 205), or is related to one of the parties, and the award will be binding upon them." (6 Wait's Act. & Def., 519; Morse on Arbitration, 105). But if the submission be made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts, and if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as a waiver and the award will not be disturbed. *Davis v. Forshee,* 34 Ala., 107. "A party," says Morse on Arbitration (*supra*), "will not be allowed to lie by after he has attained the knowledge and proceed with the hearing without objection, thereby accumulating expense and taking his chance of (401) a decision in his favor, and then, at a later stage, or after a decision has been or seems likely to be rendered against him, for the first time produce and urge his objection." From these and other authorities, it would seem clear that when one seeks to impeach an award, he must show that he made objection as soon as he discovered the disqualifying facts. The affidavit of the defendant in this case does not show this. It simply states that such facts were unknown to him "at the time said Bristol was appointed as arbitrator," but it does not negative the existence of such knowledge in time to object before the making of the award. We think this was necessary, and in its absence we must decline to interfere. The other points made by defendants are without merit.

Affirmed.

Cited: Kelly v. R. R., 110 N. C., 436; *Nelson v. R. R.,* 157 N. C., 202.

A. T. CURTIS v. THE PIEDMONT LUMBER AND MINING COMPANY.

Corporations, Contracts by—Pendency of Another Action—Pleading,

1. The requirement of the statute (Code, sec. 683) that contracts by corporations, exceeding one hundred dollars, shall be in writing and under the seal of the corporation, or signed by some authorized officer of the company, refers to executory contracts, and is mandatory in respect thereto. The bare recognition of such contract by the officers of the company will not dispense with the necessity of complying with the statute.

2. To avail itself of the statute, it is necessary that the corporation shall specifically plead and rely upon it.
3. The pendency of another action between the same parties for the same cause is a bar to a second suit, when the fact is properly presented by demurrer or answer. (Code, 239 subsec. 3.)

AVERY, J., did not sit on the hearing of this appeal.

(402) ACTION, tried before *Bynum, J.*, at Fall Term, 1891 of McDOWELL.

The plaintiff alleges in his complaint that he contracted with the defendant at a time specified to deliver to it at a place designated a certain number of poplar logs containing and aggregating 90,000 feet at the price of $12 per thousand feet, making the sum of $1,530; that he delivered the logs at the place specified and notified the defendant that he had done so; that the latter refused to receive the same without lawful excuse; that the logs became injured by exposure to the weather; that at last he sold the same for the largest price he could get for them; that in all things he complied with and performed his part of said contract, and the defendant without excuse refused and neglected to do so on its part, etc., and demands judgment for the balance due upon said contract, $455 and costs.

The defendant denies that it contracted with the plaintiff as alleged, and alleges a materially different contract it made with the plaintiff, which he failed to keep and perform, etc. It further alleges and pleads as a bar that at and before this action began, another action brought by the plaintiff against the defendant founded upon the same alleged cause of action was pending and undetermined in the Superior Court of the county of McDowell. It alleges and pleads as a further defense, that the contract alleged by the plaintiff involved and imposed on the defendant a liability in favor of the plaintiff for a sum of money greater than $100; that such contract was not reduced to writing and under the seal of the defendant corporation, nor was any such contract signed by any officer of the defendant authorized to sign the same, and that such alleged contract was void under statute (Code, sec. 683), etc.

Upon the trial of the issue of fact submitted to the jury, "it was admitted that when the summons was issued in this case, another suit was pending in McDowell County wherein Curtis (the present plain-
(403) tiff) was plaintiff, and the same defendant for the same cause of action; that the summons issued 9 April, 1890, and a nonsuit was entered at Fall Term, 1890." This action began 17 July, 1890. The defendant asked the court to instruct the jury:

"1. The contract not being in writing, and a liability in excess of one hundred dollars being imposed upon the defendant under said contract, the plaintiff was not entitled to recover."

The court refused to grant this instruction, but said to the jury, "If you find that the contract was verbal; that the plaintiff went to work under it, that Martin, as agent of the company, recognized it in letters introduced, and made the plaintiff payments under the contract, then the contract would be good in law, and plaintiff can recover for a breach of it." The defendant excepted.

There was a verdict for the plaintiff. The defendant moved for judgment against plaintiff for costs, on the ground that the action pending when this suit was brought was a bar to this action. Motion denied and defendant excepted. Judgment was entered for plaintiff and defendant appealed.

No counsel for plaintiff.
S. J. Ervin for defendant.

MERRIMON, C. J. The statute (Code, sec. 683; Laws 1871-72, ch. 199, sec. 23) prescribes that "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." This provision is important and not merely directory. Its purpose is to protect corporations against the hasty or fraudulent acts and practices of their incautious or faithless officers and agents, and as well those persons who deal with them in respect to contracts involving pecuniary liability of importance. They must neces- (404) sarily act and contract by and through their officers and agents, and it is wise and salutary to protect them and those who deal with them in the way thus provided. Such contracts must be in writing and under the common seal of the corporation, or signed by some one of its officers authorized thereto. It is not sufficient to simply recognize, by such officer or agent, a merely verbal contract to give it efficiency. It must be done in writing, and in such way as to give evidence of the nature, purpose and substance of the contract. Otherwise, the statute would be practically nugatory.

In this case, the defendant is a corporation of this State and clearly comes within the purpose of the statute above recited. The plaintiff alleges specifically a merely verbal contract with it, whereby a liability of it to the plaintiff might be incurred for a sum much greater than one hundred dollars. The defendant, in order to avail itself of the defense of the statute, must plead it specifically. It must appear from the pleadings that it intends to rely upon the same. Here the defendant does plead it specifically, and relies upon it as a particular ground of defense.

The plaintiff relies upon divers letters written by the defendant's

treasurer to him to show that he, for the defendant, recognized the alleged contract in writing. These letters are set forth in the case stated on appeal, and we have examined them carefully. They do not, in any reasonable interpretation of them, refer to, or at all purport to recognize, the contract alleged. They do not refer to this or any particular contract, they simply refer to logs that the plaintiff sent and was expected to send to the defendant, but when or to what point they were to be sent, what number, what kind and at what price, does not appear by terms or the remotest implication. There was no evidence to go to the jury to prove the contract in writing signed by the defendant's officers, and,

(405) hence, the plea should have been sustained. *Kenner v. Mfg. Co.*, 91 N. C., 421; *Rumbough v. Improvement Co.*, 105 N. C., 461.

The statute refers to executory contracts which create liabilities and obligations of the corporation—not to cases where they have received and availed themselves of property sold and actually delivered to them. No doubt the defendant might be compelled to pay the fair value of any logs it received and accepted from the plaintiff, but no question in that respect is presented here.

The defendant also pleaded specifically the pendency of another action in the same court, between the same parties, founded on the same cause of action as in this case. It could not avail itself of such defense except by demurrer in proper cases, or by pleading the same specifically in the answer, and it may be pleaded with other defenses. Code, sec. 239, par. 3; *Blackwell v. Dibbrell*, 103 N. C., 270; *Montague v. Brown*, 104 N. C., 161. Such defense is a good one when well pleaded, and should be sustained. *Woody v. Jordan*, 69 N. C., 189; *Smith v. Moore*, 79 N. C., 82; *Tuttle v. Harrill*, 85 N. C., 456; *Sloan v. McDowell*, 75 N. C., 29; *Long v. Jarratt*, 94 N. C., 443; 1 Chit. Pl., 454. Here it is admitted that there was an action pending in the same court, between the same parties, founded upon and involving the same cause of action as in the present action, when the latter began. That the plaintiff in the former action submitted to a judgment of nonsuit after the present one began, could not alter the case—he should have done so before this action began, if for any cause he could not proceed in the former one. Upon the admission of the pendency of the former action, the court should at once have sustained the defendant's plea and dismissed the action.

The defendant is entitled to a new trial.

Error.

Cited: Roberts v. Woodworking Co., 111 N. C., 433; *Luttrell v. Martin*, 112 N. C., 605; *Cozart v. Lumber Co.*, 113 N. C., 297; *Curtis v.*

Lumber Co., 113 N. C., 420; *S. c.*, 114 N. C., 531; *Clowe v. Pine Product Co., ib.*, 309; *Friedenwald v. Tobacco Co.*, 117 N. C., 557; *Williams v. Lumber Co.*, 118 N. C., 932; *Smith v. Lumber Co.*, 140 N. C., 378; *Wilmington v. Bryan*, 141 N. C., 683, 685; *Kesterson v. R. R.*, 146 N. C., 277.

(406)

E. T. HENNING ET AL. v. JACOB WARNER.

Judgment, Conditional, Void—Tenants in Common—Sole Seizin—Possession, Adverse—Estoppel.

1. Conditional or alternative judgments being void in civil as well as criminal actions, it was not error in the court to ignore an order or judgment made at a previous term, directing that if no bond was filed before a date therein fixed, the action should be dismissed and allow the bond to be filed.
2. Upon the trial on an issue of *sole seizin*, it was in evidence that two of seven tenants in common had been in actual possession, receiving the rents and profits and exercising control over the land for more than twenty years; one of these tenants joined with the other five (who had not been in possession) in a special proceeding for partition in which they alleged they were equally and jointly seized; the other tenant in possession set up *sole seizin:* Held, (1) that whatever might have been the relation between the tenants who were in possession, as between themselves, it was error to instruct the jury that the possession of one could only be considered as tending to show that the possession of the other was not adverse to the remaining tenants; (2) although that tenant who had been in possession, but had joined in the proceeding for partition, was thereby estopped to set up any estate acquired by adverse possession, that fact in nowise would prejudice the right of the tenant pleading *sole seizin* to assert his title by reason of such possession; (3) the court should have so framed the issues and instructed the jury as to ascertain the precise extent of the interest of each tenant.

SPECIAL PROCEEDINGS for partition. On a plea of *sole seizin* it was transferred to the civil issue docket and tried at the February Term of FORSYTH, 1891, before *Bynum, J.*

The land was known as lot number 8, which was assigned to Elizabeth, the widow of J. A. Henning, by consent, for her lifetime in lieu of dower. She died in 1844, when the seven heirs at law, children of her marriage with J. A. Henning, held the land as tenants in (407) common. It is not necessary to set forth the evidence in detail. William Henning continued to live on the land until he died, about 1887, but conveyed it to the defendant Warner by deed, dated 15 November, 1883.

Katie, a sister of William, lived with him on the land till she died. Her daughter Bettie continued to live with William after the death of Katie, and on the death of Bettie, Viney, her daughter and a granddaughter of Katie, continued to live on the land till a year ago, or two years after the death of William.

There was testimony tending to show that William Henning, during all of this period, received the rents and paid the taxes. There was, also, testimony tending to show that the rents were received by him and his sister Kate and divided between them, and were later divided between him and her daughter, Bettie, and still later that he shared the rents with the granddaughter Viney. It was also in evidence for the defendant that about two years before the action was brought on the ____ day of _____, 1890, Viney, who has now joined the other heirs at law as plaintiffs, asked his permission to be allowed to stay on the land, and remained, by his permission and on condition of good behavior, till the fall preceding the trial. Only one issue was submitted which, with the response to it, was as follows: "Are the plaintiffs tenants in common with the defendant in the land set out in the petition? Yes."

At October Term, 1890, the following order was entered: "It is ordered by the court that if no bond is filed before Tuesday of the next term of this court, the case stands dismissed."

When the case was called for trial the defendant moved to dismiss for non-compliance with this order. His Honor, exercising his
(408) discretion, allowed the plaintiffs to file a bond, and refused to dismiss.

For alleged error in instructions given to the jury, the defendant appealed.

R. B. Kerner for plaintiff.
C. Manly for defendant.

AVERY, J., after stating the case, proceeded: "Alternative or conditional judgments at law are void in civil as well as in criminal cases." *Strickland v. Cox,* 102 N. C., 411; *In re Deaton,* 105 N. C., 59. The order made at October Term, 1890, that the action should stand dismissed, if no bond should be filed by defendant before Tuesday of the next term, was very properly disregarded by the judge who presided subsequently and tried the issue involving the title of the defendant. It was not necessary to set aside the order or to formally declare it void. It was competent to treat it as a nullity by allowing the defendant then to file the bond to secure costs, in accordance with requirements of section 237 of The Code. Under the terms of that section the defendant

is not permitted to plead, answer or demur, before executing and filing the prescribed undertaking. The effect of the order made by the judge was to extend the time for filing answer and allow the bond to be deposited in the court before treating the action as at issue. The purpose of the Legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond.

The testimony would have possibly supported any one of three specific findings of fact, certainly either of two. (409)

1. That William Henning, by his adverse possession for twenty years, had acquired title to the whole interest in the land in fee simple, and had conveyed the whole to the defendant Warner.

2. That William Henning and his sister Katie, succeeded by her descendants, had been jointly in the perception of the profits for over twenty years, and had thereby acquired title as tenants in common, each to one undivided half, and that, consequently, only an undivided half passed by William's deed to Warner, the title to the other half being in Viney, and subject to the assertion of her right in it, until, by joining in the petition, she was estopped of record from denying that the other heirs at law were entitled to share equally with her, whatever interest she held.

3. That there was, in fact, no adverse possession on the part of William or Katie and her daughter or granddaughter, and consequently the undivided fee was still vested in the heirs at law of J. A. Henning, according to their several interests, as his descendants.

It is evident that the jury did not believe that William Henning had acquired the whole undivided fee, and consequently that the defendant Warner was sole seized. They have found that the plaintiffs and the defendant are tenants in common, and have, thereby, negatived the idea of *sole seizin* in him. If the court submitted on the question whether Warner was sole seized (and we so understand its charge) it was error, because the instruction asked by the defendant certainly raised a question as to the effect of the occupancy of Katie and Viney, supposing that they were successively in the joint perception of the profits with William Henning for twenty years. Instead of presenting this question, the court told the jury "that the possession of Viney Henning could only be taken as a circumstance tending to show that William Henning's possession was not adverse to that of plaintiffs." In giving this instruction there was error. (410)

The two, William and Katie and her issue, occupied the land from 1844 to till 1889, certainly, during which time no rents were received by others of the heirs of J. A. Henning. If they were jointly receiving the rents, the possession inured equally to the benefit of both, and at the end of twenty years, nothing more appearing than that they did so enjoy the profits, the law raised a presumption from the fact that the other heirs, not shown to be under disability, had failed to assert any dominion over the land, that they had conveyed their interest to those in possession, or abandoned all claim to it. *Avent v. Arrington,* 105 N. C., 377; Wood on Limitations, sec. 254; *Hopkins v. Calder,* 7 *Caldwell* (Tenn.), 37; *Rogers v. Mabe,* 15 N. C., 180.

If the jury believed that Katie, and afterwards Viney, were on the land, not as the pensioners of William, but as the recipients successively of an equal share of the profits derived from it, the presumption would arise that in 1883, when William conveyed to the defendant Warner, he was the owner as tenant in common with Viney of only one undivided half, and conveyed to Warner only that interest. It was a question for the jury to determine, from the conflicting testimony, what were the relations of William and his sister and her daughter and granddaughter as residents upon the land, but if the whole evidence, or the substance of it, is set forth in the statement of the case on appeal, it may be well to consider whether there was any evidence to go to the jury to rebut the presumption of absolute ownership in the recipient of the rents for over twenty years, as it was not questioned that they were paid either to William Henning or to him and his sister and her heirs.

If the title to one undivided half interest vested in Viney, she could not divest her title by leasing from Warner. If she went in as
(411) his tenant in 1889, she was estopped to deny, during her occupancy under the contract with him, that he was the owner, but she was at liberty to reassert her title as against him after abandoning possession. While she could not directly divest herself of that interest, after acquiring it by possession, except by a conveyance of it or by her laches in allowing another to occupy it for the statutory period (*Avent v. Arrington, supra*), she might, by joining the other plaintiffs in a petition setting forth, as she has done, that she claims no interest except by inheritance through her mother from her grandmother, estop herself from setting up her claim to the one undivided half, though it had vested in her by possession. The effect would be to give her coplaintiffs equal benefit of her possession as to the one undivided half with herself, but the interest of William Henning, which he conveyed to Warner, would be in nowise enlarged by this pleading, but would, in that event, still remain one undivided half.

It will be the duty of the court also, when the case shall be tried again, to require the jury to find more specifically the interests of the tenants in common. It will not be sufficient to find that they sustained that relation to each other. *Gilchrist v. Middleton,* 107 N. C., 684; *Allen v. Sallinger,* 103 N. C., 14; *Lenoir v. Mining Co.,* 106 N. C., 473. It is admitted that William Henning's interest, as an heir at law of J. A. Henning, passed by the deed to Warner, giving him one-seventh in any event, as we understand it. But if one undivided half vested in William, it passed by the deed. So that an opportunity ought to have been given by an additional issue to the jury to determine upon proper instructions whether one-seventh, one-half or the whole interest in the land passed by the deed to Warner.

There was error, for which a new trial must be awarded.

Error.

(412)

BETSY J. MILLER v. DAVID BUMGARDNER.

Action to Recover Land—Defense Under the General Issue—Adverse Possession—Color of Title—Estoppel—Limitations—Disabilities of Infancy and Coverture—Burden of Proof.

1. Where plaintiff took possession of land, under a deed from a married woman without privy examination, and remained in possession for six years, and until it was purchased by defendant under execution against plaintiff, plaintiff is not estopped from maintaining an action under a deed executed by such married woman, with privy examination, subsequently to such execution sale.
2. In such action defendant may, under his plea of a general denial, assert plaintiff's adverse possession under the first deed, which is color of title, and that of himself as the purchaser under execution, the joint possession being for a period of more than seven years.
3. In such action, where plaintiff relied upon the coverture and infancy of her grantor to avoid the adverse possession relied upon by defendant, and it appeared that, after the execution of the first deed, the husband of the *feme covert* died, if such *feme* attained her majority before her second marriage, the statute of limitations was put in motion against her and the plaintiff, her grantee, which was not arrested by her second marriage, and the onus of showing that such *feme* married the second time before attaining her majority is upon the plaintiff.

ACTION, for the possession of land, tried at the Spring Term, 1891, of ASHE, before *Hoke, J.*

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

The facts are stated in the opinion.

No counsel for plaintiff.
G. W. Bower for defendant.

AVERY, J. It was admitted that, prior to the year 1876, one
(413) Mollie Cox was the owner of the land in dispute, and that she married one Denton Williams, and during coverture, in September, 1876, a deed signed by her husband, Denton Williams, and herself, was delivered to the plaintiff Betsy Jane Miller, but the *feme covert* was not privily examined as to its execution. The defendant, relying on this deed or paper delivered to the plaintiff as color of title, offered evidence tending to show that Betsy Jane Miller, the plaintiff, took possession under it at the date of its execution in September, 1876, and remained in possession continuously till 3 January, 1883, when Williams Miller, under whom the defendant Bumgardner holds, was placed in possession by the sheriff by virtue of a writ of possession, issued in an action brought by him claiming title and possession of said land against the plaintiff. It was in evidence, also, that the said Williams Miller, prior to the institution of said suit had purchased a note, given by plaintiff to said Mollie Williams for the purchase money, recovered judgment on the same against plaintiff, bought at sale under execution issued on said judgment, and recovered in said action on the sheriff's deed.

Avoiding the estoppel growing out of that action, the plaintiff Betsy Jane Miller offered, as evidence of title, a deed executed by Mollie Robertson (who was first Mollie Cox, then married Denton Williams, and after his death married Robertson), in which her husband joined, dated 28 July, 1888, which was duly proven. As both parties to the action acknowledged in the pleadings that the title was in Mollie Robertson (*nee* Mollie Cox), this deed offered by the plaintiff was *prima facie* proof that the title had passed from Mollie Robertson and was in the plaintiff at the time when the action was brought, and, nothing more appearing, the plaintiff was entitled to recover upon it, the possession by defendants being admitted.

To meet this apparently sufficient title, the defendants offered
(414) testimony tending to show the continuous possession by Betsy Jane Miller, the plaintiff in this action, for over six years between dates already given, under the paper purporting to be a deed from Denton Williams and his wife, Mollie, to her, and to connect with that occupancy by her that of Williams Miller, under whom defendants claim, and who took possession in 1883 as the purchaser of her interest at execution sale.

Williams Miller, and those claiming under him, were clearly in privity with her, as to her claim of title by virtue of the occupancy

under the paper purporting to have been executed by Williams and wife, and while the plaintiff was not estopped from setting up the subsequent deed as evidence of title, she was a stranger and adverse to, while the defendants were in privity with her former claim of title under that paper as color. There was no error in the charge of the court that the paper was sufficient to show color of title in Betsy Miller during her occupancy under it. *Avent v. Arrington,* 105 N. C., 377.

There is as little doubt that the defendants, being in privity with her former title as claimants under the purchaser at execution sale, might avail themselves of her possession from September, 1876, to 3 January, 1883. Wood Lim., sec. 271. But it was admitted on the trial that Mollie Williams was a *feme covert,* as she purported to be on the face of the paper which was offered and is relied on by defendant as color of title. The plaintiff having shown an apparently good title from the common source, the defendants had the right to set up adverse possession under the general denial (*Freeman v. Sprague,* 82 N. C., 366), but the burden was upon them nevertheless to prove continuous possession under the paper offered as color for such period as was necessary to vest the title in Williams Miller, under whom they claimed. This they did by connecting his possession in his own proper person with that of plaintiff, and proving that it continued from 3 (415) January, 1883, when the sheriff put him in, till this action was brought, on 6 August, 1888.

The plaintiff then offered testimony tending to show that Mollie Cox was laboring under the disability of infancy when she married Denton Williams, and did not arrive at the age of twenty-one years until after he had died in 1877, and until she had, on 3 November, 1880, married her present husband. The plaintiff thus took the burden again upon herself in attempting to destroy the force of the proof of continuous possession for the statutory period. Bailey's Onus Probandi, p. 258.

On the other hand, the defendant offered testimony tending to show that Mollie Robertson became twenty-one years old in 1878, prior to her second marriage, and that the statute began to run before the second disability supervened. There was no error in the instruction given that if the statute began to run during her coverture it discontinued to run after second marriage, and that consequently the possession of defendants, and those under whom they claimed, was adverse from 1878 till the action was brought in 1888, and if she was twenty-one years old in 1878, the plaintiff could not recover.

The jury came in, after having retired for some time, to request further instruction from the court, "saying their minds were agreed on all but one point, and that was as to when Mollie Robertson became twenty-one, whether before or after her second marriage, and as to that *their*

minds were about balanced, and asked what they must do." The court charged them that the burden of establishing the affirmative of the issue of title was upon the plaintiff, and "if the evidence left their minds in doubt on this question," they would answer that issue "No."

The plaintiff had offered the evidence as to the disability of the *feme covert* to meet the testimony as to possession, and the burden was on her to show the supervening disability, which prevented the
(416) statute from running. It was not incumbent on the defendant to negative the possibility of her infancy and of its continuance until another disability supervened. Proof of possession under color for seven years, extending from the period of her widowhood in 1878, till the action began (the title being admitted to be out of the State), was presumptive evidence that it vested in Williams Miller to the boundaries described in the paper under which he claimed. *McLean v. Smith,* 106 N. C., 172; *Ruffin v. Overby,* 105 N. C., 78. The burden was upon the plaintiff, therefore, to show by a preponderance of evidence that the disability of infancy continued till the second marriage, and if she failed to satisfy the jury by the greater weight of testimony so as to leave the scales (figuratively speaking) no longer evenly balanced as to this question, it was their duty to find for the defendant, and it was not error in the court to so instruct them. *S. v. Rogers,* 79 N. C., 609.

The presumption is in favor of the title of one who is in possession, and a plaintiff cannot overcome that presumption, except by satisfying the jury by the greater weight of evidence of the truth of such facts as it is incumbent on him to prove.

For the reasons given, we think that there was no error in the instruction of the court to the jury to which the plaintiff excepted.

No error.

Cited: Smith v. Ingram, 130 N. C., 107.

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(417)

C. J. COWLES v. J. M. REAVIS.

Will, Probate and Construction of—Power to Convey—Executors—Boundary—Evidence.

1. A will, with two subscribing witnesses, admitted to probate in common form prior to 1856, upon proof by one of the said witnesses, was properly proven.
2. A will devised certain lands to widow of testator for life, with power to the executors therein named (of whom the life tenant was one) to sell and convey after the termination of the life estate: *Held*, that the deed

of the surviving executor was valid to convey the land, though the death of the widow was not proved, that fact being presumed.

3. A beginning corner of a tract of land may be established by commencing the survey at any other known corner or point of the tract.

4. A call for the beginning corner, that corner being established, requires the line to be run to that point irrespective of the distance named in the call.

ACTION, tried before *Graves, J.*, at the Fall Term, 1891, of WILKES.

The plaintiff alleged that he was the owner of certain land described by metes and bounds in the complaint.

The defendant, by his answer, denies the allegations of the complaint and says that he is the owner of two tracts of land adjoining land of the plaintiff, set out by metes and bounds in the answer, and if any portion of these tracts is covered by the boundaries alleged in the plaintiff's deed, then he is in possession of that portion of said land, and has been in possession for more than seven years under color of title, and is the owner thereof.

At the trial the plaintiff offered in evidence a grant from the State to David Mickle, which he alleged covered the land in controversy. He then offered the will of David Mickle, dated 13 August, 1840, attested by two subscribing witnesses, but only proved by one. The will is set out in the complaint, in which he gives certain property, (418) including his "home tracts of land," to his wife Lucy Mickle for and during her life, and, among other things, he directs as follows: "I want my executor, hereinafter named, after the death of my beloved wife or widow, to sell the remainder of the estate, both real and personal," and divide the proceeds as directed by said will. He appoints his wife, Lucy Mickle, and his son, Moses L. Mickle, "executors of this my last will and testament." The subscribing witnesses were Joshua Fletcher and W. Mastin, and the certificate of probate was as follows: "The execution of the within will was proved in open court by William Mastin, one of the subscribing witnesses thereto, and ordered to be recorded."

The defendant objected to the introduction of this will, and insisted that there was no sufficient probate. Objection overruled, and defendant excepted.

The plaintiff then offered in evidence a deed from Moses L. Mickle, one of the executors named in the will of David Mickle, which recited that said land was sold under the authority of said will. The defendant objected to the introduction of this deed because it was executed by only one executor, and because there was no evidence of the death of the life tenant. Objection overruled, and defendant excepted. The call of the grant from the State and the deeds under which the plaintiff claims was as follows:

"Beginning at a red oak, Addison Foster's southeast corner, running south 76 poles to a white oak; thence west with Hays' line 60 poles to a stake; thence south 60 poles to a stake; thence west 40 poles to a stake; thence south 112 poles to a stake; thence east 80 poles to a stake; thence south 112 poles, with Joseph Law's to a pine; thence east ____ poles to a white oak, Block's line; thence with his line 180 poles to a poplar; thence west with Law's line 125 poles to the beginning, containing 200 acres, more or less."

The red oak at the beginning corner could not be found, as all (419) the land, where it was, had been cleared and cut down. There was much evidence tending to locate the white oak in Hays' line, the Hays line, west of the pine in Mickle and Lane's line, the white oak in Brock's line, and the corner poplar of Mickle being his southeast corner.

The defendant asked the following instructions, among others:

"2. In this case the beginning corner of plaintiff's grant must be located at the southeast corner of the Addison Foster tract (and it cannot be at any other point on the line of said Foster's land.)

"3. That if the jury failed to find the southeast corner of the Foster tract from the evidence, then the plaintiff must fail, the surveyor Somers and the plaintiff both being sworn; that if the beginning corner is the southeast corner of any tract located on the plat or shown in evidence, that then the plaintiff's grant would not cover any land in controversy.

"4. That in any aspect of this case the last call of plaintiff's grant with John Law's line from the poplar, must stop at the end of 125 poles, the distance in the grant.

"5. That if the jury fail to locate the southeast corner of the Foster tract, but find from the evidence that the poplar in the last call of the plaintiff's grant is proven, then the beginning corner could not be nearer the defendant's land than where the distance gave out in running the calls of the line from the poplar."

His Honor modified the second instruction by striking out the words in parentheses, and refused to give the third, fourth and fifth. His Honor further charged the jury on the question of the boundary as follows: "What are the boundaries, are questions of law to be settled by the court, but where the boundaries are, are matters of fact for the jury. That the true and only beginning corner of plaintiff's deed (420) is the southeast corner of the Addison Foster tract, and here the jury must begin, but it is for the jury to locate said corner and say where it is. That having located the southeast corner of Addison Foster's tract, they must begin there and run the course and distance called for in the deed; stopping at the end of the course and distance, unless some natural object, line, etc., was called for, when they

must run to the object called for regardless of course and distance." He then charged the jury, with this rule to govern them, that they must run according to the calls of the deed; that in running the last call, thence west from the poplar with John Law's line 125 poles to the beginning (which calls are set forth in the plat), they must commence at the poplar and run with Law's line to the beginning (it having been established), whether the number of poles gave out or not before reaching the beginning. There was much more of the charge not necessary for this case. Motion for a new trial by the defendant, assigning as error:

1. The ruling of the court in admitting the will of David Mickle.
2. Admitting the deed duly executed by one of the executors.
3. For failure of court to give instructions 2, 3, 4 and 5, asked by defendant.
4. Because the court declined to tell jury in running last call from poplar that they must stop at end of 125 poles.

Judgment for plaintiff. Appeal by defendant.

C. Manly for plaintiff.
R. Z. Linney (by brief) for defendant.

DAVIS, J. It appears upon the face of the will that there were two subscribing witnesses, and it was sufficient to pass the real estate of the testator. It is certified by the clerk that it was proved in open court by one of them, and this is sufficient evidence of probate. *Harven v. Springs,* 32 N. C., 180, and cases cited. The will was proved (421) in common form, prior to 1856, and is governed by chapter 122, section 6, Rev. Stat., which authorized the probate in common form by one subscribing witness, and not by chapter 119, section 15, Rev. Code. *Jenkins v. Jenkins,* 96 N. C., 254. The case of *Gerard's Will,* 3 N. C., 144, cited by counsel for defendant, has no application. That case only decided that the will must be proved in the court of the county in which the deceased resided. It was there proposed to prove the will of Gerard, who resided in Edgecombe County, in the Superior Court of Halifax, and the court held that that could not be done. Nor is the case of *Leatherwood v. Boyd,* 60 N. C., 123, like this. *Pearson, C. J.,* says that "had the certificate stopped after the words, 'the last will and testament of John Leatherwood was duly proved in common form by the oath of R. A. Edmundson, one of the subscribing witnesses thereto,' it would have been sufficient, for the presumption is that the court knew how to take the probate of a will, and saw that it was properly done. But if there be anything on the face of the proceedings to show the contrary, that will rebut the presumption." In that case the certificate

stated further facts that rebutted the maxim, *omina presumunter rite esse acta.* In this case nothing appears in the certificate to rebut the presumption. *Marshall v. Fisher,* 46 N. C., 111. The first exception was properly overruled.

The second exception is, that the deed from Moses L. Mickle was improperly admitted, because executed by only one of the executors, and it does not appear on the face of the deed that the life-tenant was dead. It appears from the will itself that the deed could be only made by the executor Moses L. Mickle, for the executrix was the tenant for life, and the land was to be sold after her death. But chapter 46, section 40, (422) was in force at the time, and expressly authorized the surviving executor to sell, and this exception cannot be sustained. Nor is there any force in the objection that it does not appear from the deed that Lucy Mickle, the devisee for life, was dead. This will be presumed. 1 Greenleaf Ev., sec. 20; *Hughes v. Hodges,* 102 N .C., 262.

The third exception is to the refusal of the court to give instructions numbered 2, 3, 4 and 5, asked by the defendant. It is too clear to need citation of authority that if the beginning corner has been destroyed, as in this case, it is competent, in order to ascertain the true boundary, to survey the land by beginning at any known corner or point from which the boundaries may be located, and the second instruction asked for was given as far as the defendant was entitled to it. The 3, 4 and 5 instructions were properly refused, and the charge of his Honor upon the question of boundary covered all that the defendant was entitled to. The last call was 125 poles to the beginning, and the beginning point having been established, the line must extend to or stop at it, regardless of distance.

No error.

Cited: Norwood v. Crawford, 114 N. C., 522; *Tucker v. Satterthwaite,* 123 N. C., 532.

W. C. ORRENDER v. M. R. CHAFFIN ET AL.

Fraud—Evidence Inadequacy of Price—Trial by Jury, Right to.

1. Inadequacy of price is not, *per se,* a sufficient ground for setting aside a conveyance; it is a circumstance, and in some state of facts a badge of fraud, which may be considered in connection with other facts in determining the existence of fraud.
2. Where, upon an issue involving the validity of a conveyance of land made by an administrator, there was evidence that the grantee purchased at an inadequate price, but he testified there was no collusion or under-

standing between him and the administrator that he should purchase: *Held*, that it was error in the court to take the case from the jury and direct a verdict that the conveyance was void.

ACTION, tried at the Spring Term, 1891, of DAVIE, before (423) *Bynum, J.*

The plaintiff brought an action for possession of, and offered the deed of an administrator *c. t. a.* to, the land in controversy, made by virtue of a power contained in the will of David Call, executed in 1838, which power is construed in the case of *Orrender v. Call,* 101 N. C., 399, together with the will of David Call.

The defendants claim through conveyances from the heirs at law of David Call, and set up, as a ground of affirmative relief, that there was a fraudulent combination or collusive arrangement between the plaintiff and the administrator to prevent a fair competition of bidders at the administrator's sale of the land, and that by reason of such collusive combination the plaintiff was enabled to buy at a grossly inadequate price. The defendants ask that the sale be declared fraudulent, and the deed executed in pursuance of it be declared void and canceled.

There were many circumstances shown tending to prove such fraudulent combination, but as the court directed a finding on the issues for the defendant, it is not necessary to give in full any testimony but that of the plaintiff. His wife was a daughter of Berry Call and a devisee under his will. He testified as follows: "I was present on the day of sale. Chaffin, the administrator, put up the land for sale; Conatzer stepped up and forbade the sale, and said he had a deed; Taylor did the same; they stopped the sale; Bailey said they were going to sell the land under the will of David Call, Sr., and if any others had any exceptions, to come up; the lands were then put up; several there; I bid ten dollars on the land; no bid against me; bought the David Call land for five dollars; no other bids; it was knocked off to me; Chaffin did not know I was going to bid; I had no understanding with him.

"I signed Chaffin's administration bond; got him to administer; did not talk with counsel about land before sale; I had (424) counsel before sale; got him to examine will; he was also counsel for the administrator Chaffin, and announced the terms of the sale. He said we are going to sell under the will, and asked if others had obections to state it. I paid a low price; there are 61 or 62 acres in the Dave Call place; there are 28 acres in the Conatzer place; there are 225 or 230 acres in the John Taylor place; the land worth $300 or $400; I sold it for $500. I got Chaffin to administer and signed his bond; don't know what commissions Chaffin got; I made no arrangements with him to get his pay."

The issues submitted, with the responses returned by direction of the court, were as follows:

1. Is the plaintiff the owner of the land in controversy? No.
2. What damage, if any, has the plaintiff sustained?
3. Was the sale of the administrator invalid as alleged in the answer? Yes.

The plaintiff and the defendant Chaffin both asked instructions. Among the requests by plaintiff, was one that the burden was upon the defendant Conatzer to prove the fraud alleged, and also a guilty participation in the fraud on the part of the plaintiff Orrender. The court declined to give the instruction, and directed the jury to respond to the first issue, No, and to the third issue, Yes. To the refusal of the court to give the instructions asked, and to the ruling in directing the issues to be so found by the jury, the plaintiff excepted, as also did the defendant Chaffin, and appealed.

E. L. Gaither, J. B. Batchelor, John Devereux, Jr., A. E. Holton and T. B. Bailey for plaintiff.

C. B. Watson for defendant.

AVERY, J. The judge who tried the cause below erred in taking (425) the issues away from the jury and directing what their findings should be.

There is a class of cases in which the court may declare that in any aspect of the evidence the party charged was guilty of fraud, and there is often an admitted state of facts which the court may tell the jury raises a presumption of fraud, and, in the absence of testimony tending to rebut the *prima facie* proof, the finding of the jury may be directed by the court. *Berry v. Hall,* 105 N. C., 163; *Woodruff v. Bowles,* 104 N. C., 197; *Brown v. Mitchell,* 102 N. C., 368; *Hardy v. Simpson,* 35 N. C., 132; *Costen v. McDowell,* 107 N. C., 546; *McLeod v. Bullard,* 84 N. C., 515; *Lee v. Pearce,* 68 N. C., 76. The case at bar does not fall within either of the classifications mentioned, but involves an issue the affirmative of which it is necessary to sustain by testimony satisfactory to the jury. *Bobbitt v. Rodwell,* 105 N. C., 236; *Harding v. Long,* 103 N. C., 1; *Lee v. Pearce, supra.*

In *Berry v. Hall, supra,* the Court say that "the fact that an inadequate price was paid is but a circumstance tending to show fraud, and at most is to be considered a badge of fraud that throws suspicion on the transaction and calls for close scrutiny. . . . Proof of gross inadequacy of price standing alone as a circumstance, in the absence of actual fraud or undue influence, is insufficient to warrant a decree declaring the conveyance void." See also Bump on Fraud. Con., 76, 77

and 87; Bigelow on Fraud, 136; Kerr on Fraud & M., 189; *Potter v. Everett,* 42 N. C., 158; *Moore v. Reed,* 37 N. C., 580.

In *Osborne v. Wilkes,* 108 N. C., 671, this Court said: "Inadequacy of price is not of itself in any case sufficient ground for setting aside a conveyance as fraudulent, but is a suspicious circumstance to be considered in connection with other testimony tending to show fraud in procuring its execution. . . . If additional testimony were offered tending to show a fraudulent combination to prevent a fair competition of bidders on the part of her husband and others, (426) in which she participated, or of which she had notice before buying, then the jury would be justified in considering the inadequacy of the price paid for the Capps mine in connection with other badges of fraud, and with the fact that she was the wife of a debtor." In that case the sheriff sold under execution the Capps mine, a tract of land that had once been sold for $13,000, and the wife of the judgment debtor bought it for five dollars. The judge below was asked to charge that there was a presumption of fraud in the purchase of the property, but, in lieu of the instruction asked, charged the jury that if the sale was *bona fide,* and not made in pursuance of an arrangement between the husband, acting for the wife, and the sheriff, to defraud creditors by getting property for a small price, it was valid, though $13,000 worth of property was bought for five dollars.

If the testimony was not such as to show fraud in law, to be declared by the Court, and did not raise a presumption that the land was sold by the administrator and bought by the plaintiff in pursuance of a collusive plan concocted by them, at a totally inadequate price, then the small sum paid by the purchaser was but a badge of fraud to be considered by the jury in connection with other suspicious circumstances in passing upon an issue as to the alleged fraudulent combination between the administrator and the plaintiff to prevent a fair competition of bidders, and to enable the latter to buy the land at the sale at a grossly inadequate price, if such issue was fairly raised by the pleadings. In this case, the plaintiff had the right guaranteed to him by the constitution, to demand that the jury should pass upon the issue involving the question of fraud, after appropriate instructions from the court, and to pass upon the weight of the testimony, and determine whether it was sufficient to satisfy them that there was such a fraudulent combination to prevent the property from bringing a higher price and to enable the plaintiff to buy it far below its real value. *Berry v. Hall,* (427) *supra.* If the administrator acted in good faith, or if Orrender did not participate in any wrongful purpose on the part of Chaffin, but bought the land upon his own judgment and upon advice as to title, despite the claim of Cornatzer and his openly forbidding the sale, then

the right of Orrender, as a *bona fide* purchaser, is not impaired or vitiated, because the defendant by his own conduct at the sale enabled him to get the land at a nominal price.

Counsel for the plaintiff contended here (stating that the case was presented in the same way to the court below), not only that the judge was warranted in declaring that there was fraud and in taking the case out of the hands of the jury, on the ground that the price paid by the purchaser at execution sale was grossly inadequate, but that the testimony, in the aspect most favorable to the plaintiff, was sufficient to raise a presumption at least, which was not rebutted by the other evidence, that there was a collusive combination between the administrator Chaffin, and the plaintiff Orrender, to cause the land to sell and enable the latter to buy at a price out of proportion to its true market value. In answer to this view of the subject we need not look beyond the testimony of Orrender himself, to which counsel referred us. Orrender concluded his testimony with this statement: *"Chaffin did not know I was going to bid. I had no understanding with him."* If Orrender is to be believed, there was no combination between the administrator and himself, and he had a right to demand that the jury pass upon his own statement, though the evidence of every other witness had been directly in conflict with it. It is true that there were many circumstances, mentioned by counsel, that could have been collected and presented to the jury, as tending to show that Orrender's statement was not true. The facts, that he induced Chaffin to administer, signed his bond, and consulted with his counsel as to the title, and that the (428) administrator advertised to sell in thirty days, refused to postpone the sale and afterwards invited objections to selling, taken in connection with the very great inadequacy of the price and other circumstances, might have been presented by counsel in the argument, as apparently inconsistent with and having a tendency to contradict the plaintiff's statement that he acted in good faith. If the answer distinctly charged a fraudulent combination, or was aided by the answer of Chaffin so as to cure the defective pleading, an issue should have been submitted involving the question whether there was a fraudulent combination. It would seem now, that whatever defect there may be in the allegation of fraud, the answer is aided in this respect by the denial of collusion by the other party. The question whether Conatzer forbade the sale and thereby caused the land to bring a small price, would bear upon the main issue, but would not be decisive of the controversy. If Orrender acted in good faith and the land sold for a song, simply because of the imprudent and unfortunate course pursued by the purchasers, claiming under the heirs at law, the validity of the sale and of the sheriff's deed cannot be successfully assailed. His Honor should

have submitted an appropriate issue involving and decisive of the questions whether the purchase was made in good faith, or whether there was a fraudulent combination which prevented the land from bringing a fair price. In his instruction to the jury, it was his right, and might have been made by proper requests his duty, to recapitulate to the jury all of the testimony tending to establish or to disprove the allegation of fraud set up as a ground of affirmative relief.

Counsel did not insist, with apparent confidence, upon the view that the purchasers from the heirs at law took a good title despite the power of sale contained in the will. We will not, therefore, discuss that subject at any considerable length, as the will of David Call, Sr., was construed in the case of *Orrender v. Call,* 101 N. C., 399, and it was held that the administrator had power under the will to convey (429) the land after the death of his widow. It was also held in that case that no alienation of a devisee operated to defeat the power of sale, and that the possession of the alienee under such deed was not adverse. It will be possible, if any mistake has been made as to the number of devisees under the will, to correct it when another judgment shall be entered.

It was proper to make the administrator Chaffin a party defendant, as it was necessary to have him before the court before the demand for affirmative relief could be heard and granted.

For the error of the court in directing the response of the jury to the issues, a new trial must be awarded to the plaintiff.

Error.

APPEAL OF THE DEFENDANT CONATZER.

AVERY, J. The defendant appeals from the ruling of the court directing the issues to be found in his favor, and to the refusal to give instructions prayed for. Under the circumstances, it is too plain for argument that there is no error in the ruling of the court, of which the defendant Conatzer could justly complain. There was no error assigned except that mentioned, which seems to have been the common ground of exception by both parties.

Affirmed.

Cited: Bank v. Gilmer, 116 N. C., 703.

(430)

O. F. CLARK v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Common Carriers—Negligence—Proximate Cause—Evidence—Jury, Province of—Conduct of Trial.

Where a locomotive engineer could see the track from his place upon the engine for a distance of a mile in front, and plaintiff's intestate was killed on a trestle 125 feet long and from 8 to 11 feet high, with a mile-post at the north end nearest the approaching train, and there was testimony tending to show that a *very active* man might have escaped the train by jumping upon a cap, but there was conflicting evidence as to the questions: (1) whether the alarm signal was given at a distance of 450, 150, or 100 yards from the trestle; (2) whether the plaintiff's intestate stepped upon the trestle when the engine was 450, 50, or 40 yards from it; (3) whether the train was running at a speed of 35 or 50 miles an hour; (4) whether the train could have been stopped by the engineer in 450 or 100 yards; (5) whether the engineer applied brakes and attempted to stop the train at a distance of 40 or 50 yards from the trestle, or did not diminish speed till deceased was stricken; (6) whether the train was stopped in 50 or 200 to 250 yards after intestate was stricken, near the south end of the trestle, and thrown 25 yards beyond it; (7) whether deceased might have jumped to the ground without danger of injury, and would have landed on stone, sand, or mud if he had jumped off: *Held*, (1) That it was not error to submit the case to the jury to determine whether, notwithstanding the negligence of plaintiff's intestate, the defendant's train could have been stopped without peril to the passengers and property being transported on it in time to have averted the injury entirely or to have prevented its fatal consequences, after the engineer could, by proper watchfulness, have discovered that intestate was walking upon the trestle in his front. (2) While, as a general rule, the engineer would have the right to assume that a person walking upon the track was in possession of all his faculties, yet, where the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution and to stop the train, if necessary, to secure his safety. (3) When an engineer sees or can, by proper watchfulness, discover that a traveler has placed himself in peril on a trestle or bridge, he should act upon the supposition that the person may be drunk or bereft of reason from sudden terror, and use all of the means at his command, consistent with safety, to diminish the speed of his train. (4) It is the province of the jury, in the exercise of reason and common sense, either by the aid of or without expert testimony, to determine within what distance a train might have been stopped under any given circumstances. (5) Where the original wrong only became injurious in consequence of the intervention of some wrongful act or omission by another, the injury should be imputed to the last wrong as the proximate cause or *causa causans*, and not to that which is more remote. (6) It is not material how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. (7) If, after plaintiff's intestate went upon the trestle, the defendant's servant could, by proper watchfulness, have

discovered his danger in time to avert it, without jeopardy to the person or property on the train, and neglected to do so, the negligence of the two was not concurrent or contemporaneous. (8) It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence upon the issues.

CLARK and DAVIS, JJ., dissenting.

ACTION, tried at August Term, 1891, of JOHNSTON, before (431) *Whitaker, J.*

The following issues were submitted to the jury:

1. Was J. M. Clark killed by the negligent running of defendant's engine?

2. Was there contributory negligence on his part?

3. After said J. M. Clark put himself in peril, might the killing have been avoided by the exercise of proper care and prudence on the part of defendant company's engineer?

4. What damage, if any, is plaintiff entitled to recover?

The jury answered each of the first three issues (1, 2 and 3), "Yes," and fourth issue, "$1,250."

The following is the material evidence in the case:

Jackson Lassiter, for plaintiff: "I am acquainted with the place where the plaintiff's intestate was killed. The trestle is about 125 feet long. Judging from my knowledge of the situation, acquired by the examination of the locality after the accident, plaintiff's in- (432) testate was knocked by engine 25 or 30 yards. I heard the train blow—give the danger signal; might have blown several times more; when I looked the train was 450 yards from the trestle. This was a passenger train, a little behind time. A train with air brakes can be stopped in 150 yards. When the train reached the trestle I could see no diminution of speed. Train stopped pretty soon after it got over the trestle, and was, at time of blowing, traveling at rate of 30 or 35 miles an hour. This trestle had been used by the public as a foot-way for 17 or 18 years. When I got to the trestle plaintiff's intestate was dead. The accident was a little past 2 o'clock p.m. A person might have gotten on a cap of the trestle and have avoided being run over, if he was pretty active." The witness then introduced diagram of the trestle and locality of the killing which he swore was correct, showing that Clark was struck near the south end of the trestle, and that his body was knocked by the engine about 25 yards beyond the south end of the trestle and down the embankment, and showing that when the engine blew the alarm it was 450 yards from the north end of the trestle.

Cross-examined.—"A long grade there. A man on trestle could have been seen by engineer a mile, and a person on the trestle might have seen the train the same distance."

J. D. Moore, for plaintiff: "I heard the train blow; looked and saw a man on the trestle—five or six yards on it. The train blew as it does when stock is on the track. When the train blew it was 450 yards from the trestle. I could see no slack-up of the train. It was running at least thirty-five miles an hour. Train ran one hundred yards over and beyond the trestle before it stopped. The stream runs under the trestle, and is six or eight feet wide; trestle 125 feet long; rock on each
(433) side trestle on the ground south of stream. Engineer could see man on trestle mile off; cannot tell how near he would have to get to trestle before he would know the man was on the trestle."

Jackson Lassiter, recalled: "The engineer could tell man was on the trestle four or five hundred yards off. There was a mile-post at north end of trestle."

Mrs. O. E. Clark: "The intestate was forty-nine or fifty years old. He was partly deaf in one ear; he was lame in one ankle and limped."

John W. Snipes: "I am acquainted with intestate of plaintiff; he made about one hundred dollars per year, free from board."

James W. Morris, for defendant: "Am agent of the Atlantic Coast Line. The general character of Thomas McMillan, as an engineer and as a man, is good. Engineer could not tell, with train running forty-five miles an hour, whether man was on trestle or other part of track more than about 125 yards, if the man was just entering the trestle. Train running forty-five miles an hour could be stopped in 450 or 500 yards."

Thomas McMillan: "I have been an engineer sixteen or seventeen years on the Wilmington and Weldon Railroad. I was engineer on this train (No. 23), bound south, behind time thirty minutes, running forty-five to fifty miles an hour; seven coaches, two of which were sleepers. I was in my proper position, sitting on the right-hand side of the engine. Clark was killed on the trestle of the Old Town Creek at foot of hill, going down grade for a fraction over a mile; grade twenty-five feet to the mile. I was keeping a lookout ahead; saw Clark first, about three-quarters of a mile off, walking on outside right-hand side of track. When I got within about one hundred yards of him I saw that he had not noticed the approaching train. I blew a distinct road-crossing sig-
nal (two long and two short blasts of the whistle); the fireman,
(434) at the same time, rang the bell. I did this as a warning to him that a train was approaching from the rear. He acknowledged that by stopping and looking back at the train. He then turned and went towards the trestle, still on the outside of the track. If he had stayed where he was I could have passed him with safety to himself. When I got within forty or fifty yards of him he had arrived at a point at or near the north end of the trestle; he stepped upon the track di-

rectly in front of the engine; attempted to trot or run across the trestle. When he stepped upon the track I shut off steam and applied the brakes; then I blew the danger whistle. When he had run twelve or fifteen feet on the trestle, the engine struck him. Train had the latest improved and best automatic brakes. As soon as possible, after applying brakes, I reversed the engine. After I applied brakes train ran about 400 yards. He might have walked down off the embankment where he was when he looked back at the engine, and also at the end of the culvert. I had no reason to believe from any action of Clark's that he was going to attempt to cross the trestle; I thought he would keep out of the way of the train. The highest point of the trestle is eleven feet; on the north side of stream trestle is only seven or eight feet high."

Cross-examined:—"When Clark stepped on track engine was in forty or fifty yards of him. A verdict against the railroad in this case would not cause me to lose my place; the railroad does not discharge its employees because of verdicts of juries. It would not, however, retain in its employ a negligent or careless engineer."

L. B. Tillery: "Train running at thirty-five miles could be stopped in about 300 yards running; as that train was running, could be stopped in between 400 or 500 yards; I cannot be strictly accurate as to the distance."

Mack Jones: "I was fireman on this train; when I first saw Clark he was on right-hand side of track; if he had stayed there he would not have been hurt; I first saw him about half a mile off; when in a hundred yards engineer gave the alarm; when we went on trestle (435) we were in thirty or forty yards of him. Train stopped in 200 or 250 yards from where Clark was struck. He had two ticklers; been in service of defendant six or seven years. Train running between forty-five and fifty miles an hour."

John Cotton: "I was passenger on train, standing on front of second-class car looking ahead. I saw the man walking alongside of the track; heard the whistle blow, and saw the man when he turned around and then proceeded walking. Felt the brake applied; heard the short blasts of the whistle."

George Ricks: "I was a track hand, and was then at work about two hundred yards from the south end of the trestle; I heard the whistle blow—train was then coming on the north side of the trestle; I cannot give any idea of the distance the train was from the north end of the trestle when the whistle blew; when the whistle blew I looked up, and James M. Clark was on the trestle and was running in the direction of me, which was south. It was the evening mail, southward bound. He was in the middle of the track of the trestle, running, when I saw him; he had a small valise on his back; he kept running till the train struck

him. I had seen him, before the whistle blew, coming towards the trestle, and he was walking on gravel-walk by the side of the track at the end of the cross-ties; my attention was not again directed towards him until I heard the whistle. On the north side of the trestle, the road is straight for two and a half miles. The engineer could see a man on the trestle for one mile. I cannot say that the train slowed up any before it struck him; a man standing in front of train cannot tell whether it is slowing up or not. It didn't run but mighty little ways after it struck him before it stopped. He fell on the east side of the track, where I saw him. It knocked him up, and he fell over on the east side; I do not know how far he fell from the place he was
(436) struck. The train stopped in about fifty yards from the south end of the trestle after striking Mr. Clark. The trestle is a regular pass-way for people, anybody crosses that wants to."

Cross-examined:—"There is a private crossing about one-fourth of a mile north of the trestle on which Clark was killed. The engineer blew at the land-bridge crossing, one mile north of trestle. Mr. Clark was then on the gravel-walk at the end of the cross-ties. If Mr. Clark had kept on the gravel-walk he would have been safe. He kept on the gravel-walk till he got to the trestle. At that time a man could have gone down and crossed the creek dry-footed. A man could, with safety, have jumped to the ground—it was sand bottom; at the north end of trestle, could have gone down embankment with all ease. When I first saw him, he was walking alongside the road, like any other man. He appeared to be sober and in his right mind; when I first saw him on the trestle he was running, and the whistle was blowing and the bell ringing, and continued to blow and ring until the train struck him; engine ran about fifty yards after train struck the deceased. Coming towards Town Creek from the north is down-grade for a mile. There was nothing to hinder Mr. Clark from seeing the coming train; it was a still day; could hear the train roaring a mile that day."

By consent of the plaintiff, the second issue was answered "Yes."

The defendant excepted to the admission of none of the foregoing evidence, nor to the exclusion of any evidence.

The defendant offered no prayer for instructions.

After the verdict of the jury assessing the damage at $1,250, the defendant moved for a new trial, on the ground that the verdict was not sustained by the foregoing evidence. The defendant also moved for a new trial upon the ground that his Honor, in recapitulating the evidence, stated that it was contended by counsel for the plaintiff that Mc-
(437) Millan, the engineer, ought not to be believed, because if he came on the stand and should admit such statement of facts as would warrant a verdict for plaintiff, he, McMillan, would lose his place, and

that his Honor did not recite the opposite contention of counsel for defendant.

His Honor recapitulated the various contentions of the counsel on both sides fully to the jury, and, in calling attention of the jury to the various contentions of the counsel, stated: "It was contended by counsel for plaintiff that the engineer ought not to be believed, because if he were to admit such statement of facts as would warrant a verdict for plaintiff it would be a moral confession of manslaughter, and that he would probably lose his place; that it was contended by counsel for the defendant that McMillan, the engineer, was a man of good character, both as a man and as an engineer, as testified to by various witnesses; that an engineer of his character and reputation would not run his engine recklessly so as to kill a human being, and that he would not lose his position with the defendant company, no matter what the verdict of the jury was; and that railroad companies did not discharge employees on account of the verdict of juries, for they would lose their best officers if they did so." His Honor charged, among other things, that these were contentions of counsel; that it was his duty to call attention of the jury to the contentions; that it was their duty to consider the same, and in weighing the testimony of the various witnesses examined, to consider what interest, if any, the witness had in the matter.

Motion for new trial overruled; judgment; appeal.

J. H. Pou for plaintiff.
W. C. Munroe for defendant.

AVERY, J. The main question presented by the statement of (438) the case on appeal, and ably and elaborately argued by the counsel on both sides, was whether, in any phase of the testimony, the court should have permitted the jury to pass upon the issues involving the question of defendant's negligence. The plaintiff contends that there was ample evidence to warrant the findings of the jury, in response to the first issue, that his intestate was killed by the negligent running of the defendant's train, and, in response to the third issue, that notwithstanding the negligence of his intestate, the injury might have been avoided by the exercise of proper care and prudence on the part of the defendant company's engineer. The defendant assigned as error the failure of the court to instruct the jury that there was not sufficient evidence to justify an affirmative response to said issues. So that if a collocation of detached portions of the testimony would *prima facie* tend to show that the engineer was negligent, and that, by such precaution as a man of ordinary prudence would have taken, he could have prevented the collision, it was the duty of the court to submit the issues

to the jury, and they were justified, in the exercise of their exclusive right, in responding to them as they did. *Sherndon v. R. R.*, 36 N. Y., 39; *Kenyon v. R. R.*, 3 Hun, 481. The engineer, according to the testimony of all the witnesses, could see the trestle on which the intestate was killed for a mile before he reached it. George Ricks, a witness for the defendant, deposed that the train approached from the north; Jackson Lassiter, a witness for the plaintiff, testified that there was a mile-post at the north end of the trestle, and that the engineer going south could tell that a man was on the trestle when his engine was four or five hundred yards distant from it; that the plaintiff's intestate was stricken by the engine near the south end of the trestle, which was 125 feet long, and thrown about twenty-five yards south of it and down an embankment; that the train could have been stopped within 150 yards,
(439) and that the witness looked when the danger signal was given and the train was then 450 yards from the trestle, but the witness looking at it could see no diminution of its speed when it reached the trestle; just as the witness Moore stated that he could see no "slack-up" of the train till it reached the trestle. George Ricks, deposing in behalf of the defendant, could not say that the train "slowed up" any before it struck decedent, though he could see its approach distinctly and that said decedent was running in the middle of the track, when he first saw him, just after the whistle blew.

The defendant's engineer testified that when the signal was given, at a distance of one hundred yards, the plaintiff's intestate acknowledged it by stopping and looking back at the engine; that he was still north of the trestle, had not reached it but turned and went towards the trestle, still on the outside of the track, and when the engineer was fifty yards north of the trestle he stepped upon the track at or near the north end of it for the first time, that he then applied the brakes but struck deceased ten or twelve feet from the north end. The defendant's fireman thought the train was not stopped for 200 to 250 yards beyond where Clark was stricken, while he thought the alarm was given 100 yards north of the trestle. The intestate began to run, according to Ricks's statement, along the middle of the track on the trestle when the signal was blown. There was testimony to the effect that the frame of the trestle was from eight to eleven feet above the ground, and that a very active man might have escaped injury by jumping upon a cap.

The jury were not bound to find that the whole of the testimony of any witness was true, and it is immaterial whether they thought any given one was mistaken as to his recollection or observation of some matters, and accurate as to other facts, or was false in part and credible as to other statements. Any one of several theories arising out of the evidence may have been adopted by the jury. They may have

concluded that Lassiter was to be believed when he stated that (440) Clark was killed at the south end of the trestle, after the engine had traversed its whole length, and not near the north end, as the engineer stated; and that theory may have been strengthened by finding it to be true that the intestate was thrown up into the air, and at the same time received such an impetus forward as to land his body twenty-five yards further at the side of the embankment. They had a right to conclude from the evidence, which we have stated, that deceased was on the trestle in the middle of the track when the whistle blew and the bell rang, and they had testimony sufficient to warrant the belief that at that very moment the engine was 450 yards from the trestle, and could have been stopped in 150 yards. The jury were justified in concluding, as a fact, that the engineer did not, as a witness testified, perceptibly slacken his speed in the least till he struck Clark, and this theory would be sustained by defendant's own testimony (that of the fireman, Jones), that the train ran on 200 to 250 yards after striking him before it was fully stopped, while it could have been brought to a standstill within 150 yards (according to the evidence of Lassiter, which the jury had a right certainly to believe), as they had a right to fix a lower estimate as the true one.

If the foregoing is a fair summary of the facts, that the jury might have found as a part of a special verdict, then we may assume, for our present purpose, that any theory arising out of it is a true embodiment of their finding. Suppose the engineer saw the plaintiff's intestate, after looking back in acknowledgment of the danger signal, rushing along the middle of a trestle 125 feet long, with no means of escape till he should reach the south end of it, except by jumping eleven feet (the height on the south side) to the ground, or the display of unusual activity by jumping upon a cap, and that he ran his engine 300 yards while Clark was still running along the center of the track on the trestle, he could have stopped it within the remaining 150 (441) yards, if not sooner, before even reaching the north end of the trestle. But, when there was no longer any doubt that intestate was fully committed to risking his life in the effort to cross, because of his persistent movement south on the track, while the engine advanced 300 yards after the signal was given, the engineer rushed recklessly onward without the slightest diminution of speed. But if, by any calculation as to the relative progress of two bodies in motion on the same road, the jury concluded that the train was nearer to the trestle when the alarm was given, there is no possible method by which we can legitimately tell whether they fixed that distance at 450, 150, 100 or 50 yards. If it was 150 yards, and Lassiter was to be believed, then the engineer could (after the deceased made his purpose apparent by looking at the

engine and then moving forward) have stopped at the very northern extremity, or if they thought 100 yards was the distance, as the engineer testified, the engine would have been brought down to a slow pace within nine yards of a full stop when it came in contact with intestate, so that the force of the collision might not have been sufficient to do him serious injury if he was stricken at the south end of the trestle. Suppose the jury believed that the estimate of the distance by the engineer, who thought he blew 100 yards and put on brakes fifty yards from the north end, was correct, then he could have stopped in 150 yards. The force of the engine would have been greatly reduced after the use of all appliances for 100 yards, and it might have been considered by them but a fair inference that the blow would not have been fatal, if harmless at all, when the collision should come, had the engineer used every effort to stop, consistent with safety, immediately on giving the alarm. If he could have stopped the engine in less than 100 yards he might have saved intestate's life, whether he put on brakes at 50 or 100 yards.

(442) For we must bear in mind, also, that it was decided in *Deans v. R. R., supra,* that the jury were not bound to adopt the estimate of the witnesses or to hear expert testimony as to the distance within which an engine might be stopped, but could determine that question as one addressed to their common sense for themselves. By fixing that distance at more or less than 150 yards, the estimate of the conductor being that it would require 400 to 500 yards, and varying the finding as to speed from thirty to fifty miles per hour, according to the conflicting testimony an infinite number of combinations might have been made by the jury as to the different questions of distance and speed and force, giving rise to endless inferences from them.

It was in evidence that the deceased was lame, but was running in the middle of the track on the trestle. It was the province of the jury to say where he was, whether entirely north of the trestle, on the trestle, or at what point on it, when the whistle blew. We are not justified in conjecturing as to their findings of evidential facts, when the witness left a margin in distances between 150 and 450 yards, and the jury were at liberty to go even below the minimum mentioned by Lassiter. The jury were justified in concluding that the speed of the engine had not been abated in the least though a frightened human being had been chased by an engine along a trestle from which the engineer ought to have known he could not escape without peril to life or limb, until he was tossed like a ball into the air and thrown forward for twenty-five yards, where his mangled corpse tumbled off the embankment. The evidence of the fireman that the train was not stopped till it had gone 200 to 250 yards south of the trestle, may have been considered by the jury as corroborative of the other witness who said that the speed was

not perceptibly diminished. That would depend upon their estimate of the time and distance requisite for stopping the train, and in settling that question, the jury very probably first determined what the speed was, whether thirty, thirty-five, forty or fifty miles an hour, according to the varying opinions of witnesses and, possibly, (443) whether it was true that the train was running down grade, as stated by a witness. They could believe, or discredit, the whole or a part of the testimony of any witness, and we have no right to assume what their finding was. If there was no conceivable view of the testimony in which the defendant's servants might have saved the life that was lost (despite the admitted negligence of the plaintiff, and after it was apparent to the servant sitting upon his engine that the plaintiff had carelessly put his person in jeopardy), by simply using the appliances at his command and without peril to the persons and property in his charge, the court would have been justified in withdrawing the case from the jury, but not otherwise. The engineer knew, or ought to have known, that the mile-post marked the end of the trestle, and when he saw that the plaintiff's intestate, after turning and looking at the approaching train, was still persisting his perilous purpose of crossing the trestle in its front, he should have resolved all doubt in favor of human life and forthwith have reversed his engine and put on the brakes. We may assume that he did neither, as there is abundant testimony to have warranted the jury in so believing. At this supreme moment the law and the common instincts of humanity would condemn his rushing recklessly onward for no better reason than that the deceased might jump eleven feet to the ground without injury, or, by a display of unusual agility, might place himself upon a cap.

It is settled law in this State that where an engineer sees that a human being is on the track at a point where he can step off at his pleasure and without delay, he can assume that he is in full possession of his senses and faculties, without information to the contrary, and will step aside before the engine can overtake him. But where it is apparent to an engineer, who is keeping a proper outlook, that a man is lying prone upon the track, or his team is delayed in moving a wagon (444) over a crossing, it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed. *Deans v. R. R.*, 107 N. C., 686; *Bullock v. R. R.*, 105 N. C., 180. The same rule prevails where the engineer knows, or ought to know, that a human being has passed a mile-post which marks the end of a trestle nearest to him, and can see that the person, despite

his signal, persists in running along the track from which he cannot step aside, and from which he can escape instantly only by a perilous jump or unusual activity. The law expects him, when he sees a man still lying motionless, after he has given the alarm signal, to take precaution against the possibility of his being drunk, or where one does not move his team at a crossing under similar circumstances, to act upon the idea that the wagon is fastened in some way. While, as a general rule, the engineer "would have a right to assume that a person walking upon the track was in possession of ordinary sight and hearing, yet where the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution," and to stop the train if necessary to secure his safety. 2 Shearman & Redfield on Neg., secs. 483 and 484; Wharton on Neg., sec. 301; *R. R. v. Webber,* 18 Am. Reports, 402.

In *Cook v. R. R.,* 87 Ala., 533, it was held error to refuse to charge that if defendant's agents did see, or by the exercise of proper care could have seen, plaintiff's intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop, the defendant was liable. We may add to this rule as applicable (445) to our case that the defendant was also liable if its servant under such circumstances could have so diminished the speed of the engine before the collision occurred as possibly to have saved the life of intestate. The plaintiff was unquestionably negligent, but his negligence was not the proximate cause of his death, if the defendant's servant could have prevented it, after the latter had reason to know of the peril, without danger to persons or property in his charge. 2 Shear. & Red. on Neg., sec. 484 (p. 298), note 1. The principle laid down in the Alabama case which we have cited, must necessarily prevail in every State where the doctrine of *Gunter v. Wicker,* 85 N. C., 312, is established. Where the courts hold, as in Kansas, that one who walks upon a bridge constituting a part of the track of a railway is a trespasser, and the engineer is not bound to keep a lookout for such an intruder, and if he is killed while on a bridge or trestle the company is only liable for wilful negligence, it follows that they always refuse to sanction the doctrine so fully settled by this Court. Hence, it was found necessary to overrule *Herring v. R. R.,* 32 N. C., 402, in *Deans v. R. R.,* 107 N. C., 686.

The true test of the engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellowman is in peril, and that the danger to his person can only be averted by stopping or reducing the speed of the train. When an engineer sees a man persistently putting himself in peril on a trestle or bridge, so that

he can no more get off the track than one who is lying on it in an apparent stupor, except by exposing himself to danger, why is it not reasonable in him to act instantly on the natural inference that one whose conduct is so extraordinary, is either drunk or bereft of reason from sudden terror? *Cook v. R. R., supra*; Wharton on Negligence, sec. 301.

Greater caution is expected of a company in all cases, where, for any cause, it is apparent that one is not apprised of his (446) danger. 60 Alabama, 621, 640.

Though plaintiff's intestate was negligent in going upon the trestle when he knew, or might have known, before the alarm was given, that a train was approaching, his admitted fault would not excuse the subsequent carelessness of the engineer in inflicting an injury upon him that could have been avoided. One wrong no more justifies another in law than in morals. *Needham v. R. R.*, 37 Cal., 407. Because one carelessly exposes his life on account either of drunkenness or deliberate folly, he does not thereby become an outlaw so as to give railroad companies the right to run their through trains in reckless disregard of his safety. There is no presumption that a child or a man apparently drunk will get out of the way. When intestate acted like a drunken man and made no effort to leave the trestle, the engineer should have stopped the train. 2 Woods R. R., 1268 and note 1. *Kenyon v. R. R.*, 5 Hun, *supra; Sheridan v. R. R.*, 36 N. Y., 39. Persons in great peril are not expected to exercise the presence of mind and care that would ordinarily be characteristic of a prudent man. The law makes allowance for their excitement, and leaves the circumstances of their conduct to the jury. *Buell v. R. R.*, 31 N. Y., 314; *R. R. v. Yarnard*, 17 Ill., 509; Wharton on Negligence, sec. 304.

The jury doubtless thought that the conduct of the deceased, after the engineer saw him on the track, was such that the latter had reason to believe that he was drunk. In corroboration of this theory he had, according to the testimony, two bottles of spirituous liquor upon his person, just as Deans was found with a bottle and broken glass at his side. According to the views of the testimony which we have presented as the possible and legitimate theories adopted by the jury, there was almost, if not quite, as cogent reason for the conclusion on the part of the jury in our case as in *Deans' case,* that a person who acted (447) so unnaturally and carelessly must have been drunk. It was unquestionably negligence to get drunk and lie down upon the track, as it was to go upon it in full view of an approaching train. But in the one case as in the other it was the province of the jury, not of the court, to determine whether the engineer had reason to believe that a man was so situated that he could not, without peril, get off the track in time to escape the train moving as it was, or was so much intoxicated

that he could not, or would not, attempt to escape, and whether, after he could have discovered the situation, the engineer might, by exercising ordinary care, have avoided the fatal injury. *Cook v. R. R., supra.* Instinct would prompt a man, under such circumstances, to try to save his life, and, in the absence of all evidence, the presumption is that he had exercised due care. *R. R. v. Weber,* 76 Penn. St., 157.

In the case of *Deans v. R. R.,* it was declared to be the province of the jury to determine which of two natural inferences should be drawn from an admitted state of facts. In our case there are not only different inferences directly deducible from the evidence, but there is contradictory testimony, giving rise necessarily to different conclusions of law according to the possible findings of the jury. *R. R. v. Van Steinburg,* 17 Mich., 99.

We cannot follow counsel in the line of argument adopted, and say, that because the court held in the case referred to, that without expert testimony the *jury* could exercise their own common sense and determine within what space an engineer might stop his train, we can go a bow-shot further here and declare that the *court* may judicially determine what would be the relative progress of the two bodies moving upon the same track, the train, whose speed was estimated by various witnesses at thirty to fifty miles per hour, and a man, who was said to be lamed, but whose velocity was not even guessed at by any wit-
(448) ness. The difficulty would be enhanced by the fact to which we have adverted, that the jury had the exclusive right to say within what distance the train could be stopped, and an essential factor would be wanting if any one outside of the jury should undertake the problem. If, moreover, the case at bar does not present a number both of conflicts in evidence of the various witnesses and of diverse inferences deducible from different views of the evidence leading to conclusions of law, modified according to the inference drawn, it would seem difficult to conceive of one that does.

The Court cannot, for the want of ascertained data, work out the problem so as to reach a special verdict. The engineer, when his train was rushing on at such a speed, and a human being was placing himself in imminent peril of life, was not warranted in making a calculation in his head of this intricate problem. It is now manifest that if he refused to slacken his speed in the least (as we must assume on the demurrer to the evidence he did), and acted upon a hurried calculation as to the rapidity with which the intestate was moving, he made a fatal mistake. The man is dead and the engine killed him. So that the figures, contrary to maxim, were false. If the jury believed that the engineer could, by ordinary care, after seeing the situation of deceased,

have diminished the force of the collision so as to bruise, instead of killing him, their verdict ought not to be disturbed.

It is due to the counsel who discussed the doctrine of proximate and remote cause with so much subtility, to state briefly the reason why a court, where the principle announced in *Davies v. Mann,* 12 M. & W., and first adopted by this Court in *Gunter v. Wicker,* prevails, cannot concur in his line of reasoning. It has been generally conceded, that from the standpoint which is occupied by this Court, the rule of *causa causans* has been more happily and succinctly stated by *Judge Cooley* in his work on Torts, than by any other writer. He says (pp. 70, 71): "If the original wrong only becomes injurious in con- (449) sequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." 4 A. & E., 25 and note 3, with authorities cited; *Isbel v. R. R.,* 27 Conn., 404. Applying the principle to the facts of our case, it is manifest that, though plaintiff's intestate was negligent in going upon a trestle when he ought to have known that a train was approaching, he would not have been killed if the engineer had stopped the train before it came in contact with him. If, then, there was any evidence that warranted the finding of the jury in response to the third issue, which meant that the death was due to the negligence of the engineer in failing to stop or diminish the speed of the train, it would follow that the court must hold, as law, that the negligence of the defendant was the proximate cause of the injury. The authorities do not sustain the position assumed by counsel. It makes no difference how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. 4 A. & E., 27; *Needham v. R. R., supra; Trow v. R. R.,* 24 Vt., 494. The illustration of concurrent negligence given by *Judge Cooley* outlines still more clearly the distinction which we have attempted to draw. It is the case of two persons who, in concert, block up a street. "Neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act." There are two divergent lines of authority upon this subject, but the position assumed by counsel for the defendant finds no support in the decisions of those courts that have, like this, adhered closely to the doctrine of *Davies v. Mann,* 10 M. & W., 545. The negligence of the plaintiff in our case consisted in going upon the trestle when an ap- (450) proaching train was in sight, as it could have been seen a mile. But if, after he went upon the trestle, the defendant company's servant could, by proper watchfulness, have discovered his danger in time to

avert it without jeopardy to the persons or property on defendant's train, and neglected to do so, the negligence of the two was not concurrent nor contemporaneous. That of the defendant was so far subsequent to the plaintiff's wrongful act as to give time to the servant of the former to have discovered the danger, and averted the injury by the proper use of the means at his command. 2 Thomp. Neg., 1157; Whart. Neg., secs. 343, 346, 348.

It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence upon the issues. It is often helpful, if not necessary, for the court to do so, in order that they may understand how to apply the law to the testimony.

CLARK, J., dissenting: In this case it is not denied that the plaintiff's intestate was guilty of negligence. The exception taken by the defendant below is, in purport and effect, that there was no evidence sufficient to go to the jury tending to show that, notwithstanding the negligence of the deceased, the injury "might have been avoided by the exercise of reasonable care and prudence on the part of the defendant."

Taking the plaintiff's evidence in every respect to be true, this exception of defendant should be sustained. By that evidence, the plaintiff's intestate was walking on a trestle a little after the regular schedule time of the passenger train, and at a point where he could see the train for a mile. The trestle was 125 feet long, the engineer sounded the whistle 450 or 500 yards from the north end of the trestle going south and about two p.m. in the day time, the train moving at the rate of thirty or thirty-five miles an hour.

When the engineer sees a man, not known by him to be deaf,
(451) drunk or insane, walking on the track, he has ground to believe that on sounding the whistle the man will get off the track in time. He is not compelled to slacken the speed of the train on that account. This has been often decided, and lately in *McAdoo v. R. R.*, 105 N. C., 140, and *Meredith v. R. R.*, 108 N. C., 616.

It cannot, with reason, be contended that in this case this short trestle should have caused the engineer to slacken his speed; for aside from the difficulty of an engineer moving at that speed being able to locate a man on any specified 125 feet of track, there was but 125 feet, i.e., 41 2-3 yards of the trestle, and, by plaintiff's evidence, the deceased was five or six yards on the trestle when the whistle blew. If the engineer did not know the man was on the trestle, he had reasonable ground to believe he would not go on it after the signal. If he is held responsible for the knowledge that the man was on the trestle, he had reasonable ground to believe that the man would turn back the six yards he had traversed, and he must also be credited with the knowledge that

if the man persisted in attempting to cross that while the engine, moving thirty or thirty-five miles an hour, was running more than a quarter of a mile (456 yards), a man could traverse the remaining thirty-six yards of the trestle, who was walking at one-thirteenth of that speed, or under three miles an hour. It was not unreasonable in the engineer to suppose that a man who would attempt to cross a trestle in front of a passenger train would at least move as rapidly as three miles an hour, when an ordinary walk is more rapid. This is not like *Conigland's case,* where the deceased was a deaf man and the engineer knew him; nor like *Deans v. R. R.,* 107 N. C., 686, where the man was drunk and helpless on the track; nor like *Manly v. R. R.,* 74 N. C., 655, where the injured parties were children; nor like *Troy v. R. R.,* 99 N. C., 298, where the accident was in the night time in a populous town and the train moving at an unusual hour, no headlight used and no signal being given; nor like those cases where the trains were passing (452) out of the regular time and no signal was sounded; nor like live-stock cases, *Carlton v. R. R.,* 104 N. C., 365, and the like; nor those in which stress is laid on the fact that stock, unlike human beings, have not intelligence enough to get off the track. Here the train was on nearly regular schedule time, there was no evidence that the man was drunk or that the engineer had reason to think he was; it was in broad daylight (2 p.m.); the signal was sounded in ample time, and the engineer was not wanting in due care in supposing that after the signal the man would not go on the trestle, or if there, he would get off as he had time to do. We do not advert to plaintiff's evidence that the deceased might have escaped by getting on the end of one of the several large sills in the trestle, nor that he could have let himself down to the ground, only some eight feet below. Still less do we advert to the evidence offered for the defendant. But taking the plaintiff's evidence alone, the shortness of the trestle and the signal given in such ample time, it is clear there was no evidence to go to the jury that there was negligence in not stopping or slackening up a train under these circumstances. If the trestle had been a long one, or very high, a different case entirely would be presented. But here it was only a little over forty yards long and eight feet high. With the slightest regard to prudence, the man might and should have gotten off in ample time. If, as is probable from plaintiff's evidence, the plaintiff deliberately walked or recklessly rushed on the trestle after the signal sounded, or walked slower than a man ordinarily does, that was a piece of folly or foolhardiness that the engineer might well be excused for not anticipating.

Railroads are expected to guard against every avoidable injury, and even to prevent injury to a plaintiff from the consequences of his own negligence, if, by reasonable care they can avoid it, but the traveling

public and the railroads have rights also, and the latter should
(453) not be held liable for damages in presuming, under the circumstances of this case, that the plaintiff, after the signal given, either would not go on the trestle or, if there, would get off, as he had full time to do.

It is almost certain that the deceased ran upon the trestle after the whistle sounded (for if on it at that time he would have cleared it at an ordinary walk before the engine could have reached it at the speed stated by plaintiff's witness, of thirty or thirty-five miles an hour), and if this is so, it is not shown how close the engine then was to him, and that the engineer could then have stopped his train in time to avoid striking him. Yet, the burden of showing this was on the plaintiff. If deceased was on the trestle when the whistle blew, the engineer knew he had ample time to cross so short a trestle before the engine could reach it. If he went on it after the whistle blew, it is not shown when, nor that the engineer could then have stopped the train in time.

In *Dean v. R. R., supra,* it is said: "We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine, he has a right to assume, without further information, that he is a reasonable person, and will step out of the way of harm before the engine reaches him. *McAdoo v. R. R.,* 105 N. C., 153; *Daily v. R. R.,* 106 N. C., 301; *Parker v. R. R.,* 86 N. C., 221." The same rule is again laid down in *Meredith v. R. R.,* 108 N. C., 616. These cases should be decisive of the one before us. Here, from the shortness of the trestle, the distance at which the train could be seen, and the length of time the signal was given, "the engineer had the right to assume that the person would step out of harm's way before the engineer reached him." To lay down the principle that where an engineer sees a man apparently sober on a short and low trestle, the full
length of which he knows the man, at an ordinary gait, can cross
(454) after the signal is sounded, he must, nevertheless, stop or slacken speed; or that if he sees a man walking near such trestle he must do likewise for fear that he may rush upon the trestle and try to beat the train across, is a rule that is hardly consistent with the decisions above cited, nor consonant with the right of way of the railroad to the use of its own track. Should the man, nevertheless, be so foolhardy, as was probably the case here, as to run upon the trestle after the signal was given, the engineer, in the interest of human life, should stop the train if time is given him to do so, but the burden of showing that he could do so is on the plaintiff. Upon the plaintiff's evidence in this case, his intestate was guilty of gross negligence, and there was no evidence sufficient to go to the jury that the defendant, by the exercise of reasonable care and prudence, could have avoided the unfortunate conse-

quences of the intestate's recklessness. The engineer knew that the intestate, if on the trestle, had ample time to get off after the whistle sounded, and reason to suppose that he would do so, and he was not called on to anticipate that the intestate would rush upon the trestle when the engine was so close at hand that it does not appear it could have been stopped in time to avoid the accident.

PER CURIAM. Affirmed.

Cited: Emery v. Nav. Co., 111 N. C., 102; *Norwood v. R. R., ib.*, 240, 242; *Mason v. R. R., ib.*, 493; *Cawfield v. R. R.*, 111 N. C., 600; *High v. R. R.*, 112 N. C., 388; *Smith v. R. R.*, 114 N. C., 754, 767; *Pickett v. R. R.*, 117 N. C., 629, 631; *Lloyd v. R. R.*, 118 N. C., 1012; *Baker v. R. R., ib.*, 1020; *Little v. R. R., ib.*, 1075; *Styles v. R. R., ib.*, 1088; *Little v. R. R.*, 119 N. C., 776; *Lea v. R. R.*, 129 N. C., 463; *Weeks v. R. R.*, 131 N. C., 81; *Harris v. R. R.*, 132 N. C., 165; *Smith v. R. R.*, 145 N. C., 103; *Snipes v. Mfg. Co.*, 152 N. C., 46; *Penny v. R. R.*, 153 N. C., 302; *S. v. Cox, ib.*, 644; *Holman v. R. R.*, 159 N. C., 46; *Woodie v. N. Wilkesboro, ib.*, 356; *Norman v. R. R.*, 167 N. C., 541; *Lloyd v. Venable*, 168 N. C., 536; *Hill v. R. R.*, 169 N. C., 741; *Hopkins v. R. R.*, 170 N. C., 487; *Davis v. R. R., ib.*, 586; *Horne v. R. R., ib.*, 653; *McManus v. R. R.*, 174 N. C., 737.

Dissenting Opinion. Cited and approved, Strickland v. R. R., 150 N. C., 4.

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(455)

J. G. POSEY v. P. F. PATTON.

Appeal—Instructions—Trial—Conduct of.

1. Special instructions requested after the judge concluded his charge will not be considered, although the refusal to give them was not put upon the ground that they were not asked in apt time.
2. That the judge, during the progress of the trial, made a memorandum in small letters and figures on the paper containing the issues, which corresponded with the answer given by the jury to that issue, which he inadvertently omitted to erase before handing the paper to the jury, cannot be first excepted to in the appellant's case on appeal where, upon discovering the memorandum, the jury informed the court that they had given the matter no consideration, and the court was not requested to set aside the verdict for that reason.

ACTION, tried before *Hoke, J.*, at Spring Term, 1891, of HENDERSON.

There were no exceptions to the charge or to the evidence. After the court had concluded the charge, and as the jury were about to retire,

the defendant's counsel proffered a written request for instructions, and excepted because the same were not given.

The court remarked that the charge had already been given in substance, and declined to further charge the jury on the subject. Defendant excepted.

As the evidence progressed, the court made a memorandum, in pencil, in small letters and figures just below the written matter of the second issue, and above the next ruled lines as follows, "$493.88, interest from 1 May, 1890," and neglected or omitted to erase such memorandum before handing the issues to the jury. The jury, after remaining out a short while, returned a verdict "Yes" to the first issue, and to the second issue "$493.88, with interest from 1 May, 1890." The jury wrote out their answer to each issue and returned their verdict in open court.

The memorandum was unsigned, and there was nothing to (456) indicate to the jury that same had been made by the court.

On examining the verdict, the court perceived that the memorandum had been left in the paper, and remarked to the jury that it was an inadvertence. The jury made answer that they had given the memorandum no consideration. This occurred in the presence and hearing of the defendant's counsel in open court, and they made no objection or exception to the verdict. The counsel do make an exception for this reason in their case for appeal served on plaintiff, and this was the first time, and only way, their objection was made known. Judgment for plaintiff. Appeal by defendant.

No counsel for plaintiff.
Theo. F. Davidson for defendant.

CLARK, J. The prayer for instructions came too late. It should have been asked at or before the close of the evidence. Code, secs. 414, 415; *Powell v. R. R.,* 68 N. C., 395; *Davis v. Council,* 92 N. C., 725; *S. v. Rowe,* 98 N. C., 629; *Taylor v. Plummer,* 105 N. C., 56; *Marsh v. Richardson,* 106 N. C., 548; *Grubbs v. Insurance Co.,* 108 N. C., 472. This is a just and reasonable requirement. It is not fair to the opposite party to ask the judge, at such a late moment, for an instruction to be given or refused, hastily perhaps, at the peril of a new trial with the consequent expense to parties, which might be avoided if the instruction was asked at or before the close of the evidence, when the judge would have fair opportunity, during the argument of counsel to the jury, for the consideration of the legal propositions involved. A trial is not intended to be a game of surprises, but a calm, orderly, deliberate settlement of the matters in controversy. It is not to be

supposed that there was here any intention of counsel to take advantage by the sudden presentation of the prayer for instruction, but the reason of the requirement is shown in this very case where the (457) learned judge thought he had already given the instruction asked, and counsel now contend that he had not. It is true the judge did not put his refusal of the instruction on the ground that it was asked too late. The law does that. It was incumbent on the appellant to proffer the request to charge in writing and in apt time. When it appears that either of these requisites was wanting, the exception for failure to give the charge cannot be sustained.

It does not appear that the request to charge was read in the presence of the jury. We presume that it was not. If it was not, the jury could draw no inference prejudicial to the appellant from its refusal, nor can he complain of an omission to charge on a particular phase of the case as to which no instruction was properly asked. *Boon v. Murphy,* 108 N. C., 187, and cases there cited. If the prayer for instruction was read in the hearing of the jury, still less was the appellant prejudiced, as the remark of the judge, even if incorrect, that he had already given such charge, was equivalent to telling the jury that such was the law. As to the memorandum on the issue, the case states that the court discovering that it had not been erased, of its own motion and very properly, called the matter to the attention of the jury with the purpose, it must be presumed, of setting the verdict aside if any prejudice had been caused by the inadvertence. "The jury made answer that they had given the memorandum no consideration." If there had been anything tending even to put it in doubt, whether prejudice may not have been done the appellant by the inadvertence, we feel sure that the just judge who presided would unhesitatingly and promptly have set the verdict aside. It seems the appellant's counsel did not think their client had suffered any harm, for they neither made any exception then nor moved for a new trial on that account. The exception on that ground was taken in making out appellant's case on appeal. This was too late, even if there had been any merit (458) in the exception. It has been often held that an exception to the charge, or a refusal to charge, may be taken for the first time by appellant on stating his case on appeal. *Taylor v. Plummer, supra; Lowe v. Elliott,* 107 N. C., 718; but that exceptions as to all other matters must be taken *at the time* or they are waived. Code, sec. 412 (2); *S. v. Ballard,* 79 N. C., 627; *Scott v. Green,* 89 N. C., 278; *S. v. Brown,* 100 N. C., 519; *Bank v. McElwee,* 104 N. C., 305.

No error.

Cited: Merrell v. Whitmire, 110 N. C., 370; *Lee v. Williams,* 111 N. C., 203; *Ward v. R. R.,* 112 N. C., 178; *Luttrell v. Martin, ib.,* 607; *Craddock v. Barnes,* 142 N. C., 99; *Pritchett v. R. R.,* 157 N. C., 100.

R. F. JETER ET AL. v. WILSON DAVIS ET AL.

Tenancy in Common—Adverse Possession—Possession of Cestui Que Trust as against Trustee.

Where land is conveyed to one in trust for others as tenants in common, the possession of one of the *cestuis que trustent,* begun under such deed and continued under a subsequent deed from the same grantor, is not adverse to the trustee, and does not confer title as against the other beneficiaries when held for a period less than twenty years.

SPECIAL PROCEEDINGS for partition, transferred to the civil issue docket upon issues joined and heard before *Hoke, J.,* at Fall Term, 1891, of YADKIN.

The defendant J. W. Davis answered and set up *sole seizin.* The plaintiffs introduced a deed from Josiah Davis to Stephen Davis, as trustee. Also deed marked "Exhibit B," for the sole purpose of estopping J. W. Davis.

Defendant J. W. Davis introduced a deed from Josiah Davis to J. W. Davis ("Exhibit B.")

(459) It was admitted that these deeds covered the *locus in quo.*

Plaintiffs introduced A. J. McCollum, who testified that the plaintiffs and defendants are the children and grandchildren of Josiah Davis and Louisa Davis, and the children referred to in the first deed; that there were nine children, all of age and living at the death of their mother (four sons and five daughters); that three of the daughters were married before the death of their mother, and that T. J. McCollum lived on the lands about one year after the death of their mother, when they married and left. While they were there, J. W. Davis supported them; that Josiah Davis died about two years ago, and his wife Louisa Davis died about twelve or thirteen years ago; that she lived with J. W. Davis on the lands after the deed from Josiah Davis to J. W. Davis was made and up to the time of her death; that J. W. Davis supported her.

On cross-examination, witness stated that J. W. Davis had been in possession of the lands, cultivating them, since the death of Louisa

Davis "the mother." There was a dispute about it between him and the other children—they were claiming it and he was holding it under his deed; that J. W. Davis has been on lands since the death of Louisa Davis, twelve or thirteen years ago, has cleared and fenced it. He has had exclusive possession since the date of the deed marked "Exhibit B"; that J. F. Davis died about one year ago, and that his children are minors. Plaintiff rested.

Defendant J. W. Davis claims under the deed marked "B," and contends that the claim of the plaintiffs and other defendants is barred by seven years adverse possession.

The court ruled that, from the testimony, the plaintiffs and defendants were tenants in common, and so instructed the jury. Judgment accordingly. Defendant J. W. Davis excepted and appealed.

T. C. Phillips for plaintiffs.
A. E. Holton for defendants.

SHEPHERD, J. We concur with his Honor in his ruling that, (460) taking the whole testimony, the defendant J. W. Davis had not sustained his plea of *sole seizin* of the land in controversy.

In 1874 Josiah Davis conveyed the land to his brother Stephen, in trust for the use and support of his wife and children, and after the death of the wife it was to be equally divided among them. The appellant, being one of the children, was an equitable tenant in common with his brothers and sisters, and, although he was in possession and took a deed to himself from the same grantor in 1877, charged with different trusts, and conceding that he was not estopped to claim under such deed, still his possession, being less than twenty years, would not have the effect of barring his cotenants. However uncertain the decisions may have been, this point may now be considered as settled. *Page v. Branch,* 97 N. C., 97; *Gilchrist v. Middleton,* 107 N. C., 663, and cases cited.

It is urged that the trustee is barred, and therefore the estate of the plaintiffs must share the same fate.

The defendant is presumed to have entered under the deed of 1874, as an equitable tenant in common. This being so, his possession was the possession of the trustee, and "there could be no adverse claim or possession during the continuance of the relation" (2 Perry Trusts, 863); "for a *cestui que trust* in actual possession is the tenant at will of the trustee, and the statute of limitations does not apply." Wood Lim., 203; 2 Lewin, Trusts, 881; 2 Perry, Trusts, 863. Holding, as he does, under the trustee he cannot destroy that relation by setting up an adverse possession under a subsequent deed from the same grantor, and

even if he could do so, his disclaiming conduct must be of the same character as would create an adverse possession against a cotenant in common. Buswell on Adverse Possession, sec. 342.

Affirmed.

Cited: Shannon v. Lamb, 126 N. C., 46.

(461)

AMER TILLEY ET AL. v. LUCY A. KING ET AL.

Will—Condition Precedent.

1. A condition in a will, precedent to the vesting of an estate therein devised, may be valid, notwithstanding there is no ulterior limitation of such estate.
2. The testator devised a tract of land to his widow for life, and if his grandson "stays with us until after our deaths and takes care of us, then I give and bequeath this tract to him forever." The testator made other provisions for his children, among them being the father of the said grandson: *Held,* that the requirement that the grandson should remain with the testator and his wife and care for them until their deaths constituted a condition precedent to the vesting of the estate in the land devised to him.

ACTION, tried before *Graves, J.,* at the Special July Term of STOKES, 1891.

The plaintiffs alleged that they are tenants in common with the defendants of the lands described in the pleadings as the heirs at law of A. B. Tilley.

The defendants denied this, and alleged that under the will of A. B. Tilley, deceased, they, as the heirs of P. H. Tilley, are the sole owners of the described land.

It was admitted that the will of A. B. Tilley was made in 1873; that P. H. Tilley had been living with him for two or three years before the will was made, and continued there until he died, in 1881; that he remained one year after his grandfather's death with his grandmother and then left. It was further admitted that his grandmother lived for seven or eight years after P. H. Tilley left her; that A. B. Tilley made provision for his children in his will, and among the number J. A. Tilley, the father of P. H. Tilley, who was living at the time of testator's death, and that the only grandchild willed specially any property was P. H. Tilley.

The plaintiffs proposed to show that P. H. Tilley only remained with his grandmother one year after the death of his (462) grandfather, when, without any provocation, but voluntarily, he left. The defendants objected to this testimony; the objection was sustained, and plaintiffs excepted. The plaintiffs further proposed to show that after his grandfather's death P. H. Tilley refused to stay longer with his grandmother unless she would pay him wages, and to induce him to stay she did pay him as wages a part of the crop cultivated by him. The defendants objected to this testimony; objections sustained, and plaintiff excepted.

His Honor being of the opinion that, under the will of A. B. Tilley, P. H. Tilley had a vested remainder in the lands after the death of his grandmother, and that there was not such a condition precedent, the failure to perform which defeated the estate of the said P. H. Tilley, held that the defendants claiming through said P. H. Tilley were sole seized of said lands and not tenants in common with the plaintiffs. Upon this intimation and ruling of the court, the plaintiffs submitted to a nonsuit and appealed.

The portion of the will material to the case is:

"I give and bequeath to my wife Lockey Tilley the tract of land whereon I now live, and if Powell H. Tilley stays with us until after our deaths and takes care of us, then I give and bequeath this tract of land to him forever."

C. Manly for plaintiffs.

R. F. Haymore and J. T. Morehead (by brief) and C. B. Watson for defendants.

SHEPHERD, J. The only question material to be considered is whether his Honor was correct in ruling that in the will of A. B. Tilley there was no condition precedent to the vesting of an estate in his grandson P. H. Tilley, and that the latter took a vested remainder expectant upon the determination of the life-estate of his grandmother. (463)

The words to be construed are as follows: "And if Powell H. Tilley stays with us until after our deaths, and takes care of us, then I give and bequeath this tract of land to him forever." The testator provided for his wife and children, among whom was the father of P. H. Tilley, and there is no mention of the latter in any other part of the will, nor is there anything in that instrument which in any way explains or controls the ordinary meaning of the above words.

The language is, to our minds, entirely explicit, and must be construed to mean precisely what it declares unless some rule of interpretation is met which imperatively requires us to do otherwise.

Now, it is well settled "that there are no precise technical words in wills, nor even in deeds, to make a stipulation a condition precedent or subsequent . . . (and) that it is to be construed according to the intention as gathered from the whole instrument." 2 Minor's Inst., 260; 4 Kent., 125.

Even according to technical rules, the words used by the testator are words of strict condition, but regardless of such rules it is clear to us that it was not the intention of the testator that any estate should vest in his grandson until after the death of his wife, and then only in the event of his having fully performed the conditions imposed. How could this intention have been more clearly emphasized than by the use of the word "then" and what, we ask, is there in the will that authorizes us to give a different meaning to the language employed?

The cases cited by counsel for the defendant are where the devising clause is followed by or coupled with a proviso that the devisee shall pay to another a specific sum (*Woods v. Woods,* 44 N. C., 290; *Whitehead v. Thompson,* 79 N. C., 450), or to support or maintain
(464) a certain person. *Misenheimer v. Sifford,* 94 N. C., 592. In these and other similar cases to be found in the text-books, the courts have been astute in holding such provisions to be either conditions subsequent, or trusts or charges upon the land. In our case there are no direct words of devise, and the vesting of the estate is clearly postponed until the performance of the conditions. Even if we could ignore the plain meaning of the language, it would be difficult to put the case within the principle of the decisions mentioned, because, from the very nature of a part of the conditions (that is, to live with the grandparents and give them the comfort of his society), it could not be enforced by way of trust or charge.

The testator and his wife had no children living with them, and it was natural that they should desire the society of their grandchild in their declining years. The father of this child had already been provided for, and, under the circumstances, we cannot hesitate in holding that the testator intended to create a condition precedent.

It is insisted that where the condition requires something to be done which will take time, it should be construed as a condition subsequent. But, says a writer of high authority, if there be "a condition which involves anything in the nature of a consideration, it is in general a condition precedent." Theobald, Law of Wills, 400.

As we have seen that the living with these old people was a material inducement to the making of the devise, the principle referred to has no application.

Again, it is urged that there is no limitation over to a third person upon a failure to perform the conditions. This undoubtedly has great

weight where the intention is left in doubt, but it can have no influence where the meaning is clearly expressed, for it is an elementary principle that a condition precedent may be created without an ulterior limitation.

For the reasons given, we think that there should be a new trial.

Error.

Cited: Helms v. Helms, 135 N. C., 169; *S. c.,* 137 N. C., 211; *Whitaker v. Jenkins,* 138 N. C., 481; *Lynch v. Melton,* 150 N. C., 597; *Phifer v. Mullis,* 167 N. C., 411.

(465)

J. I. BLACKBURN v. A. J. FAIR.

Trial—Special Instructions, When Asked.

The failure of the judge to give instructions which he should have properly given if asked in apt time, is not ground for reversal if the motion is made for first time after verdict.

ACTION, tried at July Special Term, 1891, of STOKES, *Graves, J.,* presiding. The defendant appealed.

C. B. Watson for plaintiff.
No counsel contra.

MERRIMON, C. J. There was no exception to evidence received or to that excluded on the trial in this case. Nor were there any objections to the instructions the court gave the jury. After verdict, on the motion for a new trial, the defendant, in support of his motion, contended that it should have given the jury certain instructions his counsel for the first time then suggested. The motion was denied.

The court having given the jury appropriate instructions, as it appears it did, without objection, if the defendant desired that it should give fuller or special instructions, he should have stated the same in apt time. It was too late after verdict to complain that instructions that the court might have given were not given. *Davis v. Council,* 92 N. C., 725; *Branton v. O'Briant,* 93 N. C., 99; *S. v. Debnam,* 98 N. C., 712; *S. v. Bailey,* 100 N. C., 528.

Affirmed.

Cited: Craddock v. Barnes, 142 N. C., 99.

(466)

JAMES T. JOHNSON AND WIFE v. MILLIE A. EDWARDS.

Husband and Wife—Seizin by Entireties—Statute of Limitations.

Where the husband and wife are seized by entireties of land, an action by them, involving the title or possession thereof, will not be barred by the statute of limitations as to one unless it bars both.

ACTION, tried before *Graves, J.,* at July Special Term, 1891, of STOKES.

It appears that 8 November, 1886, Solomon T. Edwards executed a deed of conveyance purporting to convey the fee simple of the land described in the complaint to the plaintiff James T. Johnson and his wife Rejina; that afterwards, on 5 February, 1887, the deed was surreptitiously taken from the place of deposit thereof and of other like valuable things, and destroyed or put without the possession and control of the plaintiffs, and that they have not been able to find the same after earnest and diligent search; that the said deed was not registered.

It further appears that afterwards, on 17 May, 1887, the said Solomon T. Edwards executed a second like deed purporting to convey the fee simple in the same land to the defendant Millie A. Edwards, and he afterwards died on 13 January, 1890.

The pleading raised issues of fact, and the jury found, among the other facts, that the plaintiffs' cause of action accrued on 7 February, 1887, and more than three years next before this action began. "On the pleadings and findings of the jury, the plaintiffs moved for judgment in their favor, which motion was denied. Defendant then moved for judgment: for that the said action was barred by the statute of limitations as pleaded by her as to both plaintiffs, which motion the court allowed, dismissing the action, and gave judgment accord-
(467) ingly." The plaintiffs excepted and appealed to this Court.

C. Manly for plaintiffs.
C. B. Watson for defendant.

MERRIMON, C. J., after stating the case: Whatever may be the nature and merits of the plaintiffs' cause of action, it was not barred by any statute of limitation, because the deed under which they claim, and by this action seek to have benefit of, purported to convey to them the fee simple in the land in question. As they were husband and wife, they were not tenants in common and did not take by moieties, but by *entireties*—they were seized, if seized at all, of the entirety *per tout et non per my.* They owned the land, or whatever interest they acquired in it,

as one person. They could not sell or dispose of it, or any interest in it, but by their joint action. The husband could not encumber it or at all prejudice the wife's estate by his *laches* or his positive acts. *Bruce v. Nicholson, ante,* 202, and *Phillips v. Hodges, ante,* 248, and the cases there cited.

The statute of limitations could not bar or affect the rights of the *feme* plaintiff because, as a married woman, she was under disability. The husband had no interest or estate separable from hers, nor, as we have seen, could his *laches* affect her rights adversely. The nature of the estate and interest of the husband and wife are so thoroughly identified as one and the same as to each, that the right of the husband cannot be barred without the like bar of the right of the wife. Her right cannot be barred, and no more can that of the husband. Such causes of action as that the subject of this action are not subject to the statute of limitations, because the married woman's rights are not.

The court ought, therefore, to have given judgment, as the parties appeared to be entitled without regard to the statute of limitations.

Error.

Cited: Spruill v. Mfg. Co., 130 N. C., 44; *Darden v. Timberlake,* 139 N. C., 183; *Moore v. Trust Co.,* 178 N. C., 124.

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(468)

STATE EX REL. MARY E. COLLINS ET AL. v. C. C. SMITH ET AL.

Administration—Final Account—Judgment, Former, When a Bar.

The defendant was appointed administrator in 1863; in 1868 the plaintiffs (next of kin) instituted an action on the defendant's bond for an account and settlement, in which there was a reference, but no report was made, and in 1870 the action was dismissed at plaintiffs' cost, from which there was no appeal. In 1884, upon plaintiffs' application, a citation issued to defendant to file his final account, and upon such filing there was a full investigation, both parties being present, which resulted in a small balance due the defendant. The plaintiff being dissatisfied therewith, brought the present action upon the administration bond: *Held,* that it was barred by the former judgment in 1870 and the proceedings subsequently before the clerk on the filing of the final account.

MERRIMON, C. J., dissented.

ACTION, tried at July Special Term, 1891, of STOKES, before *Graves, J.*

The plaintiffs are the distributees of William Smith, deceased, and the defendant C. C. Smith is his administrator, and this action is brought

against him and the defendant Martin, surety on his administration bond, for an account and settlement of the estate of the deceased.

The defendants in their answer allege that action and proceedings had in the Superior Court before the judge thereof, and the proceedings had before the probate court (set out in the further statement of facts in the opinion), constituted a bar to any recovery in this action; and they relied upon and specially pleaded the statute of presumptions and the statute of limitations in bar of any recovery therein. The action was continued from term to term till July Special Term, 1891, when the following judgment was rendered:

"This cause coming on to be heard upon the facts found by
(469) the court, a jury trial having been waived by the parties, and upon the complaint and answer the court being of opinion that plaintiffs are not entitled to maintain their action upon the complaint filed, doth adjudge that the action be dismissed, and that defendants recover of the plaintiffs and the surety on the prosecution bond the costs," etc. From which judgment plaintiffs appealed.

The material facts found by the court are stated in the opinion.

C. Manly for plaintiffs.

C. B. Watson for defendants.

DAVIS, J. The defendant Smith qualified as administrator of William Smith in 1863, and gave bond as such with the defendant Martin as surety, and in 1868 the plaintiffs instituted an action upon said administration bond for an account and settlement of the estate, at the same time applying for a restraining order. At Spring Term, 1869, it was "referred to the clerk of the court to take an account of the defendant's administration, and make settlement of the same, and report to the next term of the court." Nothing appears in the record to show that any report was made by the clerk, as directed by the order of reference, but there was what purported to be a report and account made by the defendant to the clerk, 27 August, 1870, in obedience to a notification from him to the said administrator to make a final settlement of the estate of his intestate. The account was signed by the administrator, and there is a verification attached in the handwriting of the clerk, but not signed by him, and there is no evidence to show that it was filed at the time, except this and the statement of defendants' counsel that he placed the report in the clerk's office at the date of the *jurat,* (17 August, 1870).

The plaintiffs' counsel examined the clerk's office carefully and
(470) never found the report, and when asked about it, the defendants' attorney brought it from his office and gave it to plaintiffs' attorney, in 1884. . .

At Spring Term, 1870, there was a judgment dismissing the plaintiffs' action "at the costs of the plaintiffs," from which judgment there was no appeal.

On 2 December, 1884, upon the application of the plaintiffs, another citation was issued by the clerk to the defendant administrator, requiring him to file his final account for settlement, as provided by section 1402 of The Code. The account was fully investigated and passed upon by the clerk, in which a balance was found due the administrator, and filed as a final account, from which there was no appeal, but the plaintiffs being dissatisfied therewith brought this action upon the defendant's administration bond to the Fall Term, 1885, of the Superior Court.

His Honor states the evidence, but does not find as a fact that the account made out by the defendant, signed 17 August, 1870, was filed as a final account, but we need not consider the question of the statute of limitations, as we are of the opinion that the judgment rendered at Spring Term, 1870, from which there was no appeal, and the final account stated by the clerk on 16 July, 1885, constituted a bar to the plaintiffs' recovery in this action.

If it be said that the judgment rendered at Spring Term, 1870, in the action brought by these plaintiffs on the administration bond, on which this action is brought, was not a judgment upon the merits, because it does not definitely appear that any report was made by the clerk of an account and settlement of the estate of the intestate as directed by the order of reference in that action. The answer is, if the judgment be treated as a nonsuit, a new action for the same cause may be brought within one year. The Code, sec. 166. That action was brought by the widow of the intestate and the present plaintiffs on the administration bond of the defendant in 1868 for an account, and this action is brought by the present plaintiffs, who (except the widow, who (471) has no interest in this action) are the same as in that action against the same defendants on the same administration bond in 1885 for the same purpose, and the judgment in the former action is conclusive as to the parties and privies thereto as to everything that might have been litigated and settled in said action, within the scope of the particular issues or matters actually litigated and determined, and the matters or things necessarily implied by them. *Williams v. Clouse,* 91 N. C., 323; Black on Judgments, secs. 609, 610, 613, 615, 633, 644; Freeman on Judgments, sec. 319*a*.

The plaintiffs allege in their complaint, "that the administrator has not made his final settlement nor filed his final account for same." The record shows, and the fact is found, that at the instance of the plaintiffs the final account of the defendant was audited and filed, the plaintiffs being present and contesting various items therein. There is no alle-

gation of any fraud or mistake in the final account so audited, nor is it attacked in any way by the plaintiffs, and it is at least *prima facie* correct. *Allen v. Royster,* 107 N. C., 278, and the cases cited. We are not called upon to review *Rowland v. Thompson,* 64 N. C., 714, in which the practice that should be observed in taking the final account of administrators is laid down. According to the practice there stated, either party dissatisfied with the final account as audited may appeal. There is no error.

Affirmed.

Cited: Donnelly v. Wilcox, 113 N. C., 409; *Bean v. Bean,* 135 N. C., 94; *Rich v. Morisey,* 149 N. C., 48; *Marler v. Golden,* 172 N. C., 825.

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(472)

D. A. HINKLE v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Common Carriers—Railroads—Highways and Public Crossings—Province of Jury.

1. It is negligence if the engineer of a moving train omits to give, in reasonable time, some signal on approaching a crossing of a public highway, or a point where the public have been habitually permitted to cross a railway track, when such crossing may be hidden from the view of travelers by cars or other obstructions allowed by the company to remain on its track, or by embankments, cuts, or sharp curves on its lines.
2. Where a railway company erected a whistle-post at a proper distance from a crossing to give warning of the approach of its trains, and it appeared the public were accustomed to act on the supposition that a signal would be given at that point: *Held,* to be negligence on the part of the company if its engineer failed to give such proper signal on the arrival of the train at that place.
3. Where the injured person would not have gone on the crossing but for the negligence of the engineer in failing to give the proper signal, a railway company will be liable for the damages resulting from a collision, although the party injured may have been careless in exposing himself.
4. It is the duty of a person going upon a crossing of a railroad to look and listen for the approach of trains, though that may not be the time a regular train is due at that point, but he is only bound to *look* when to do so would aid him in ascertaining the approach of a train; under other circumstances he has a right to rely upon his sense of hearing.
5. If one, after the proper signals have been given, ventures upon the track he does so at his own risk, unless the railroad company is guilty of some negligence to which any resulting injury can be directly imputed.

6. It is the province of the jury, where there is conflicting evidence, to determine whether the injured person did look and listen for the approach of a train before attempting to cross a railroad; and whether an engineer, keeping a proper lookout, could have stopped his train or so slackened its speed as to diminish the dangers of a collision.

7. A road used as a mill road may, because of its location, be also such a "plantation road" as will impose upon a railroad company the burden of keeping it in repair under section 1975 of The Code.

ACTION, tried at Fall Term, 1891, of DAVIDSON, before *Armfield, J.* (473)

The facts are stated in the opinion.

C. B. Watson for plaintiff.

D. Schenck and G. F. Bason for defendant.

AVERY, J. In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway, or a point where the public have been habitually permitted to cross, as at the intersection of a mill road or a farm road frequently used, is evidence of negligence to be submitted to the jury. 2 Shearman and Red. on Neg., secs. 463 and 464; *Warner v. R. R.*, 44 N. Y., 465; *Troy v. R. R.*, 99 N. C., 298; 2 Wood R. R., p. 1292; *Barrey v. R. R.*, 92 N. Y., 289.

It is negligence *per se*, because of the peril both to passengers on trains and people using highways, to omit to give in reasonable time some signal from a train moving, whether at the rate of twenty or forty miles an hour, when it is hidden from the view of travelers, who may be approaching and in danger of coming in collision with it, by the cars of the company left standing on its track, or by an embankment, a cut or a sharp curve in its line, or by any other obstruction allowed to be placed or placed in any way by the company. *Randall v. R. R.*, 104 N. C., 416; 2 Woods R. R., p. 1313, and note 3; *R. R. v. Goetz*, 79 Ky., 442; *Penn. Co. v. Krick*, 47 Ind., 368; *Strong v. R. R.*, 61 Cal., 326; *Kenney v. R. R.*, 105 Miss., 270.

Where a railroad company has erected a whistle-post at a proper distance from a crossing in order to notify engineers when to give timely warning of the approach of a train to persons using the intersecting highway, and the purpose of the company is known to the public so that persons generally are led to act on the supposition that (474) a signal will be given at the post, it is negligence on the part of the company if the engineer fail to sound the whistle at the point so indicated in passing with a freight or passenger train in his charge.

2 Woods R. R., p. 1313; *Spencer v. R. R.*, 29 Iowa, 55; *Surrey v. R. R.*, 10 Allen (Mass.), 368; *Newsom v. R. R.*, 29 N. Y., 383.

Where a jury find that the injured person would not have ventured upon the track at such a crossing, and would have incurred no risk of a collision with the train, but for the negligence of the engineer in failing to give timely warning of its approach, the corporation is liable to answer in damages, though the plaintiff may have been careless in exposing himself to danger. *Deans v. R. R.*, 107 N. C., 686, and cases cited.

In *Randall v. R. R., supra,* the judge who tried the case below charged the jury, in effect, that if the engineer failed, in passing around a sharp curve, caused by a projecting cliff or mountain, to give the usual signal of approach to a crossing just beyond the curve, from which his train was not visible, the corporation was liable for injury to a team of oxen that were being driven along a parallel road beside the track and near said crossing, if, as the testimony tended to show, the owner would have driven them to a point more remote from the railroad and where they would have been free from danger, had he heard the expected warning at the usual place. There was a conflict of testimony in that as in our case. The engineer testified that he blew at the usual point for the crossing, not far from the place where the animals were killed, while other witnesses contradicted this statement. Kinney, the engineer in the case at bar, testified that he blew at a post erected below Linwood Station, which he located 342½ yards south of that depot; that he passed the station going north without stopping, and blew again at the proper point to warn persons passing over the crossing of the
(475) Lexington road, which is 231 yards north of Linwood, but that he gave no other warning after passing that signal-post till he struck the horse attached to the covered wagon in which the plaintiff and his father were riding, at the crossing of the mill road, 652 yards north of the intersection with the Lexington road. It is admitted that there was a signal-post erected on the west side of the track, or on the left of the engineer going north, at a distance of 208 yards south of the mill road crossing and 444 yards north of the crossing of the Lexington road.

Three witnesses for the plaintiff testified positively that the engineer blew the whistle at a bridge about a half-mile south of Linwood, and far south of the first whistle-post on his right, and did not blow again till the plaintiff was injured. Another witness, who lived in sixty or seventy yards of Linwood, stated that he did not hear any whistle after that given at the bridge.

Conceding, for the sake of the argument, that the signal-post on the left (208 yards from the mill road crossing) was intended for trains

moving south, and that the custom was to blow opposite to it to give notice of the approach of trains moving south to travelers on the Lexington road, we think that the judge below was not in error in telling the jury that a traveler had the right to rely on hearing the usual signal at posts known by the public to have been erected to indicate to engineers the point for blowing the whistle as a warning of the approach of a train. According to the testimony offered for the plaintiff, the engineer failed to blow at the lower post (where he admits he ought to have given a signal, and says that he did), or below the Lexington road crossing, while the engineer testifies to the contrary. In *Randall v. R. R., supra,* it was the station-blow that the jury found that the engineer had failed to give and plaintiff was near, not at, a crossing, and about 100 yards from the station, when his oxen jumped upon the track and were killed; yet if he had heard the usual station-blow at the point where he had a right to expect it, he would have moved (476) his cattle out of danger, and thereby avoided the accident.

But counsel pressed with much earnestness and ingenuity the more sweeping and general exception, growing out of the tenth paragraph of his prayer for instructions, that there was no evidence of negligence on the part of defendant company. Not only was the court justified by the testimony tending to show the failure to sound the whistle at the lower post, in refusing to give this instruction, but the jury should have been left to determine (looking at every aspect of the testimony and the inferences to be drawn from it) whether the engineer blew the whistle before reaching the Lexington road, and whether his admitted failure, at the proper distance from the mill road crossing, to repeat the warning, was the proximate cause of the injury; for if, by giving a signal at either place where defendant had a right to expect it, the accident would have been avoided, then such omission was the immediate cause of the injury, and the plaintiff was entitled to recover, though he may have shown a want of care in going upon the track. *Lay v. R. R.,* 106 N. C., 404; *Deans v. R. R., supra.* In passing upon these questions, the jury could have considered, and doubtless did, the contention on the one hand that the train was moving along a deep cut, up-grade, and could not have been seen by the plaintiff, who had been stationed by his father on the shafts of the covered wagon, until the wagon was driven upon the track, and on the other, that the train must have been distinctly visible to one looking out from the front of the wagon for forty yards before they drove upon the crossing.

The jury found, in response to the first issue, that the plaintiff was injured by the negligence of the defendant company, and in answer to the second issue, that the plaintiff did not contribute to cause the injuries by his own negligence.

It was the duty of the plaintiff to look and listen before going
(477) upon the track, although it may not have been the hour when a regular train was expected. *Randall v. R. R., supra.* "He is only bound to look, when to do so would aid him in determining whether a train is approaching. In all other respects he *has a right to rely upon his ears. But when the proper signals are given,* if a traveler ventures upon the track, and miscalculates as to the chances of crossing, the *risk is his; unless some negligence can be imputed to the company which has directly caused the injury.*" 2 Wood R. R., p. 1310, sec. 343, and note 2 (*ib.*, p. 1312, and note 1). *Kenney v. R. R., supra.*

The court instructed the jury upon this subject as follows: "It was the duty of the plaintiff to keep a proper lookout as well as the engineer, and one time looking and listening at a distance from the track is not a proper lookout. He ought to have used his senses of sight and hearing all the time, and if he failed to do so, and thereby caused his injury, the answer to the second issue should be 'Yes.'" If the court had, in compliance with the defendant's request, told the jury that it was "the duty of the plaintiff to see and hear," and his failure to do so was equivalent to not looking or listening at all, the instruction would unquestionably have been erroneous, and subject to well grounded exception on the part of the plaintiff. It is manifest that the court had no right, where there was conflicting testimony, and more than one inference deducible from the evidence, to instruct the jury that they must find, in any aspect of the case, that the plaintiff, by his own negligence, contributed to bringing about the collision, much less that the negligence of the plaintiff was the direct cause of the injury. The plaintiff testified that he and his father (who is his next friend as plaintiff) started from the house of his brother, the witness A. A. Hinkle, near the Lexington road,
in a covered wagon, and, as they traveled along the road, he looked
(478) out of the wagon two or three times to see if a train was coming; and that when they had gone down the hill, within about twenty yards of the crossing, he stopped the wagon and listened. The plaintiff then got out on the cross-pieces of the shaft and held to the wagon with one hand while he rested the other on the horse's rump, and, as his father drove on, looked and listened, but neither heard nor saw an approaching train till the horse got upon the track, when he had but time to utter an exclamation and fell back into the wagon with his father before they were stricken and carried or thrown about seventy-five feet and were left in an insensible state by the train. It will be observed that the boy, if he is to be believed, looked and listened, and neither saw nor heard anything. The judge had no right to tell the jury that because the engineer, however respectable or intelligent, testified to the height of the banks along the cut, and introduced a map to corroborate his

opinion that a train on the track, anywhere north of Linwood and south of the mill road crossing, was visible to a person passing along the road traveled by plaintiff from his brother's house to the crossing, they must disregard the plaintiff's statement, and answer the second issue "Yes." It was the province of the jury to determine whether the plaintiff did, in fact, after stopping and listening at the foot of the hill, ride sixty feet, looking and listening still, but in vain, from the shaft all the way, for a train that could not be seen till the horse was upon the track, and to say whether it was possible for him to see the approaching train or hear the noise, in the absence of signals, as it moved up-grade from the station. In such a conflict the court could not instruct the jury as to the weight of the testimony. Although the engineer may have failed to give the usual signals south of the depot or of either of the crossings, it was the duty of the plaintiff to look and listen before going upon the track, and he testified that he did. The jury were warranted by the testimony, therefore, in finding that he used ordinary care to guard against accident before attempting to cross. His father, (479) according to the evidence, was deaf, and was compelled to rely upon the hearing of the plaintiff, a boy of fourteen. It was not the duty of the plaintiff, if, after listening at twenty yards distance and riding on the shaft he neither heard nor saw an approaching train, to get down and look up and down the track, even though his view of the railroad line was obstructed. *R. R. v. Ackerman,* 74 Pa. St., 265.

It was not error in the court to give the jury the instruction as to the duty of the engineer to keep a vigilant outlook, which is the subject of exception. It was not contended that the proposition embodied in the instruction given was not a correct statement of the law, but that it was inapplicable to the facts, and calculated to mislead the jury. There was some evidence that counsel had a right to comment upon and to have submitted to the jury, as tending to show that after the engineer saw, or could, by keeping a proper lookout, have seen the plaintiff's horse stepping upon the track, he might have stopped his train altogether before reaching the crossing, or have so lowered its speed as to strike with little force and diminish the chances of serious injury to the inmates of the wagon, who were thrown seventy-five feet by the violent concussion.

The expert witness Rutherford, who was introduced for the defendant, testified that the engineer might have seen a man on his left within nine or ten feet of the track, on the mill road, when the engine was three hundred feet from the crossing, and that he could have seen a horse six feet from the track 1,000 feet from the crossing, and could have stopped his engine within 500 feet. If the engineer could have seen, or saw, the horse and was unable to tell whether he was harnessed, and he

seemed to be approaching the track, it was his duty to slacken speed. *Snowden v. R. R.*, 95 N. C., 93; *Carlton v. R. R.*, 104 N. C., 365. If he saw that the horse was attached to a covered wagon, and could see that the inmates were not on the outlook but were inside the
(480) wagon, it was his duty to stop his engine. If the jury believed that the engineer had failed to give the usual signals, then it was his duty to keep a more vigilant watch along the track. He had no right under such circumstances to keep his seat as he approached the crossing, and also to direct the fireman to put coal in the engine, so that neither could keep a proper lookout upon the crossing after he had neglected to whistle. We are assuming that the jury believed the whistle was not blown north of the bridge, in order to show that there were phases of the evidence that warranted the judge in giving, if they did not impose upon him the duty of giving, the instruction complained of. Counsel could not expect the court to find as a fact and tell the jury that the fireman could not look out on the left because his fire had gone down while the train was sidetracked at Holtsburg, and the engineer could not get out of his seat long enough to look first on one side and then on the other while his subordinate replenished the supply of coal. Whether he could stand up and keep his hand upon the throttle of the engine under such circumstances, and whether it was necessary to do so in order to provide for the safety of all who might expose themselves to danger of being injured by his train, were questions, not for the court to pass upon, but for the jury to consider in their bearings upon the issues.

The court below permitted the plaintiff to show by a witness that soon after the accident the defendant company repaired the crossing at the mill road so as to make it less difficult to get upon the track. The defendant objected then, and assigns as error now the admission of the testimony. The court assigned as a reason for the ruling, that it was competent to show in this way that the defendant knew of the existence of the crossing and treated it as a public crossing, or one that the corporation was under obligations to keep in repair. Although the
(481) road may have been used as a mill road, it may also, as a plantation road, have come within the requirement of section 1975 of The Code, which fact would have made it the duty of the company to keep it repaired. At that stage of the trial it is not difficult to see that it might become material for the jury to know whether such duty was imposed upon the defendant by law, especially if, in the further progress of the trial, it should appear that the engineer, by keeping a proper outlook, might have had reason to believe that the plaintiff's wagon was impeded by some defect in crossing. *Bullock v. R. R.*, 105 N. C., 180. It is evident, at any rate, that the defendant was not prejudiced

by the ruling, because it could not have materially influenced the jury in their findings.

The judge below had, unquestionably, the right, in the exercise of his discretion, to refuse the motion for a new trial on the ground of newly discovered evidence in any case. *Carson v. Dellinger,* 90 N. C., 226. There is no error, and the motion for a new trial must be refused.

Affirmed.

Cited: Blackwell v. R. R., 111 N. C., 154; *Cawfield v. R. R., ib.,* 600; *Alexander v. R. R.,* 112 N. C., 734; *Ward v. R. R.,* 113 N. C., 570; *Gilmore v. R. R.,* 115 N. C., 660; *Black v. R. R., ib.,* 673; *Pickett v. R. R.,* 117 N. C., 631; *Russell v. R. R.,* 118 N. C., 1108; *Mayes v. R. R.,* 119 N. C., 769; *Mesic v. R. R.,* 120 N. C., 491; *Norton v. R. R.,* 122 N. C., 934, 935; *McIlhaney v. R. R., ib.,* 998; *Powell v. R. R.,* 125 N. C., 374; *Raper v. R. R.,* 126 N. C., 565; *Edwards v. R. R.,* 132 N. C., 100; *Butts v. R. R.,* 133 N. C., 83; *Cooper v. R. R.,* 140 N. C., 219, 227; *Cooper v. R. R.,* 140 N. C., 219; *Inman v. R. R.,* 149 N. C., 147; *Norris v. R. R.,* 152 N. C., 512; *Jenkins v. R. R.,* 155 N. C., 204; *Osborne v. R. R.,* 160 N. C., 312; *Johnson v. R. R.,* 163 N. C., 447; *Bagwell v. R. R.,* 167 N. C., 615; *Goff v. R. R.,* 179 N. C., 216; *Dudley v. R. R.,* 180 N. C., 36.

J. F. WALKER v. J. M. ADAMS.

Penalty—Register of Deeds—Marriage License.

When a register of deeds, on application for marriage license by a person whom he knew, but with whose character he was unacquainted, required the applicant to make affidavit that he and the woman he proposed to marry were of lawful age, and there was no impediment to the marriage, and there were no other circumstances to put the register of deeds on further inquiry, but, in fact, the woman was under age: *Held,* that the means adopted by the register amounted to the reasonable inquiry required by the law to be made by him.

ACTION, tried on appeal from a justice of the peace, at Spring Term, 1891, of WILKES, *Bynum, J.,* presiding. (482)

This action was brought in the court of a justice of the peace to recover the penalty of $200, prescribed by The Code, sec. 1616, which it is alleged the defendant incurred in that, on 9 December, 1890, he, as register of deeds of the county of Wilkes, issued a license for the marriage of the male and female persons named in the pleadings, the female being a daughter of the plaintiff, residing with him, and at that time

under the age of fifteen years, without a written consent of the father, as required by The Code, sec. 1814. In that court there was judgment for the defendant, and the plaintiff appealed to the Superior Court. In the latter court the parties agreed upon and submitted the material facts of the case to the court for its judgment. Thereupon, there was judgment for the defendant, and the plaintiff excepted and appealed to this Court.

It appeared that when the said male person applied for the license, the defendant said to him, "Judging from your appearance I take you to be of age, but I do not know the female whom you propose to marry." The latter said, "She is about nineteen years old"; the defendant said, "Will you make affidavit of that fact?" and he replied he would. The defendant then administered an oath to the said person, and he testified by his affidavit that the persons for whom the license was intended (he being the male) were of the lawful age to marry, and that he believed there was no legal cause or impediment in the way of their marriage. The affidavit was attached to the license. The defendant knew the male person applying; he did not know his character, but had heard nothing against him.

Finley & Green (by brief) for plaintiff.
A. E. Holton for defendant.

MERRIMON, C. J. The statute (The Code, sec. 1816) makes it (483) the imperative duty of the register of deeds to make *reasonable inquiry,* before he issues a license for the marriage of any two persons, as to whether there is any legal impediment in the way of the proposed marriage, and whether either of the parties to be married is under the age of eighteen years, and has not the consent in writing of the father or other person having the lawful care and control of such person as prescribed by the statute (The Code, sec. 1814), that such marriage may be had. If he issues license without such inquiry, and such impediment exists, he thereby incurs the penalty of two hundred dollars in favor of any person who shall sue for the same. This statute has been repeatedly interpreted by this Court in varying aspects of it. *Bowles v. Cochran,* 93 N. C., 398; *Williams v. Hodges,* 101 N. C., 300; *Maggett v. Roberts,* 108 N. C., 174.

In this case the male person proposing to be married applied to the defendant, register of deeds, for the marriage license. The defendant knew him, and while he did not know his character he knew nothing against him. He asked him as to the age of the female, and was assured that she was about nineteen years of age. He was properly not content to accept the verbal statement of the person so applying, but he required

him to make affidavit of the fact, and he did so, so far as the defendant could see, in good faith; he had no reason—none appears or is suggested—to believe the contrary. The statute, Laws 1887, ch. 331, allows the register of deeds, when it shall appear to him that it is probable there is any legal impediment to the proposed marriage, to administer an oath to the person applying for the license as to the legal capacity of the parties to contract a marriage. The purpose of this statute is to facilitate and help the reasonable inquiry to be made by the register, and such inquiry is reasonable when the evidence before the register is such as renders it probable there is no legal impediment. Nothing to the contrary appearing, surely the affidavit of a party, known (484) to the register, applying for a license that there was no such impediment, and that the female to be married was above the age of eighteen years, made it *probable* in the mind of the defendant that no legal objection to the marriage existed. If there had been other evidence and facts and circumstances tending to put the register on further inquiry, it might have been otherwise. But there was no such evidence, and so far as appears the defendant was cautious and acted in good faith. The inquiry was reasonable in contemplation of the statute, and the defendant, therefore, did not incur the penalty. See cases cited, *supra.*

Affirmed.

Cited: Harcum v. Marsh, 130 N. C., 159; *Gray v. Lentz,* 173 N. C., 354; *Julian v. Daniels,* 175 N. C., 554.

E. H. PASS v. JOHN W. PASS AND WIFE.

Counterclaim—Nonsuit—Fraud.

In an action to foreclose a mortgage, the defendant, among other things, set up the defense that the transaction was fraudulent, having been entered into by the parties (brothers) for the purpose of defrauding the mortgagor's creditors. On the trial the plaintiff asked to be allowed to take a nonsuit, but that was denied and the trial ordered to proceed: *Held,* that the parties being *particeps criminis* to the fraud, there was no such counterclaim set up in the pleadings as the law would recognize; that the courts would not aid either party, and there was error in refusing to allow the plaintiff to abandon his action.

ACTION, tried at Spring Term, 1891, of SURRY, *Bynum, J.,* presiding.

The plaintiff brought this action to recover the debt and foreclose the mortgage of land to secure it specified in the complaint. The answer

denies the material allegations of the complaint, and, among
(485) other things, alleges "that said note and mortgages referred to in the complaint, was a fraudulent arrangement entered into between plaintiff and defendant for the purpose and with the intent to hinder, delay and defraud the creditors of this defendant at the request of plaintiff, and through the advice and counsel of plaintiff in this action, he being an older brother of defendant, and defendant relying upon his advice and counsel." It further alleges a counterclaim which it is conceded may be litigated in this action, but it is not material here. The answer demands judgment, that the said note be surrendered to the defendant and that the mortgage be canceled, etc. The plaintiff asked, at the proper time, to be allowed to "take a nonsuit" as to his alleged cause of action, but the court denied his motion, and made an order, of which the following is a copy:

"This cause coming on to be heard upon complaint, answer and replication and the plaintiff's motion for nonsuit, and it appearing that the defendants have set up an equitable defense to the plaintiff's cause of action, to wit, that the bond and deed declared on by plaintiff were fraudulent, and insist upon the issue being tried by a jury, it is adjudged that plaintiff's motion be denied and the cause stand for trial upon the issues raised by defendant's answer."

Plaintiff excepted and appealed.

C. B. Watson for plaintiff.

T. C. Phillips and A. E. Holton for defendant.

MERRIMON, C. J. Very certainly the plaintiff had the right to dismiss the action as to his cause of action, and, in effect, become nonsuit under the present method of civil procedure, unless the defendant pleaded, by his answer, a counterclaim arising out of and involving the plaintiff's alleged cause of action. This is so, whether the cause of action be legal or equitable, or both legal and equitable, and for the like reasons,
(486) that need not be here restated. *Whedbee v. Leggett,* 92 N. C., 469; *Bank v. Stewart,* 93 N. C., 402; *McNeill v. Lawton,* 97 N. C., 16; *Bynum v. Powe, ib.,* 374; *Gatewood v. Leak,* 99 N. C., 363; *Mfg. Co. v. Buxton,* 105 N. C., 74.

Then, did the defendant allege a counterclaim growing out of and involving the plaintiff's cause of action? We think not. He alleges, in general terms and effect, that the plaintiff's cause of action, the note and mortgage, was a fraudulent transaction suggested by the plaintiff and participated in by the plaintiff and himself for the purpose of hindering, delaying and defrauding the defendant's creditors. In such case the Court will not help either of the parties. The cause of action

is thoroughly tainted with fraud, and both parties are *particeps criminis.* The plaintiff alleges no honest cause of action, and the defendant has no counterclaim in any aspect of the matter, that the court will take notice of and enforce. The parties are in *pari delicto.* Hence, there is no reason why the plaintiff may not abandon his action and go out of court.

It seems that the defendant may have intended to allege the fraud of the plaintiff, and that he did not intentionally share therein; that the plaintiff was intelligent and he was ignorant; that he, hence, confided in his brother, who misled, entrapped, deceived and defrauded the defendant for his own gain and advantage; but clearly he did not so allege in terms or effect. If he might have alleged a possible case in which the court could and would have granted relief to him, he might have asked leave to amend his answer, but he did not do so. Hence, the plaintiff was entitled to have his motion allowed.

There is error. The order appealed from must be reversed and the motion of plaintiff allowed, unless the court shall, for cause satisfactory to it, allow the defendant to amend his answer.

Error.

Cited: Bank v. Comrs., 116 N. C., 380; *Marshall v. Dicks,* 175 N. C., 40.

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(487)

W. E. COX ET AL. v. MARTIN PRUETT ET AL.

Appeal—Certiorari.

The Supreme Court will not grant the writ of *certiorari* as a substitute for an appeal where the petition fails to show that the appellant took an appeal and caused the proper entries and notice thereof to be given within ten days after the rendition of the judgment or of notice thereof; the simple allegation in the petition that appellant within ten days caused a notice of appeal to be placed in the hands of the sheriff, and that it was served, is not sufficient.

Application for *certiorari.*

R. A. Doughton and A. D. Jones for plaintiff.
Q. F. Neal for defendant.

MERRIMON, C. J. This is an application for the writ of *certiorari* as a substitute for an appeal lost.

The petition alleges that within ten days next after the petitioners had notice of the order complained of, they placed a notice of an appeal

in the hands of the sheriff to be served on the plaintiffs in the action, and that it was served. But it is not alleged, nor does it at all appear, that the petitioners took an appeal within ten days after notice, or within ten days after the rendition of such order, nor is it alleged, nor does it appear, that within that time the appellant caused his appeal to be entered by the clerk on the judgment docket and notice thereof to be given to the adverse party, as required by the statute (The Code, sec. 550). On the contrary, it appears by the affidavit of the clerk that no notice of appeal ever went to his office. It is not alleged, nor does it appear, that the adverse party in any way prevented the petitioners from taking an appeal within the time allowed by law. It does not appear that the petitioners ever took an appeal, nor is any proper reason assigned why they did not or could not. Clearly, the petitioners are not entitled to have their prayer granted.

Petition dismissed.

(488)

SARAH A. BLACKBURN v. S. BLACKBURN.

Deeds and Grants, Exceptions and Reservations in —Trusts—Parol.

1. Exceptions and reservations in grants and deeds inure only to the benefit of the grantor and those claiming under him; they cannot operate to convey an estate to others.
2. The grantor, before the delivery of a deed which he had signed conveying a tract of land to another, made, under seal, this indorsement, "I (the said E. B.) do hereby certify that S. B., a daughter of said E. B., doth hold a lifetime possession in the said deed": *Held*, to amount to a declaration of a trust in favor of the said S. B., and that the grantee took the title subject thereto.
3. An oral declaration of a trust, made contemporaneously with the transmission of the title, may be established, even without a consideration. No particular form of words is necessary.

SPECIAL PROCEEDINGS, tried before *McCorkle, J.*, at Fall Term, 1890, of WILKES.

The only point presented for review is whether the indorsement on the deed vested an estate, either in law or equity, in Sarah Blackburn.

His Honor held that Sarah was entitled in equity to a life-estate, and from the judgment in conformity with that opinion the defendant appealed.

The following is the case agreed: Eli Blackburn, Sr., executed, on 11 May, 1872, a deed in *fee simple* to Eli Blackburn, Jr., for the following described land situate in Wilkes County (description given). On the

back of said deed the following indorsement was made before he delivered said deed to Eli Blackburn, Jr., to wit: "Accordance deed. I, the said Eli Blackburn, Sr., do hereby certify that Sarah Blackburn, a daughter of said Blackburn, doth hold a lifetime possession in the said Eli deed." (Signed and sealed in the presence of witnesses.) It is agreed that the said indorsement has reference to the said deed executed 11 May, 1872, by Eli Blackburn, Sr., to Eli Blackburn, Jr. (489)

No counsel for plaintiff.
C. Manly for defendant.

SHEPHERD, J., after stating the case, proceeded: It is very clear that the indorsement on the deed did not operate as an exception or reservation so as to vest an estate for life in Sarah Blackburn. Exceptions and reservations inure only to the benefit of the grantor and those claiming under him, and have no effect by way of passing an estate to a third party. Tiedeman, Real Prop., 843; 2 Devlin, Deeds, 979.

We think, however (without passing upon the question whether the language used can be construed into a covenant to stand seized to uses), that the judgment of his Honor may be sustained on the ground that the indorsement, made before or at the time of the delivery, amounted to a declaration of trust, to wit, that the grantee should hold the land for the use of the said Sarah for life. Even without consideration, an oral declaration of trust in favor of a third person, made contemporaneously with the transmission of the legal title, will, when established by competent testimony, be recognized and enforced in a court of Equity. *Pittman v. Pittman,* 107 N. C., 159.

If this be so, *a fortiori* will the court give effect to such a contemporaneous declaration when made in writing under seal and for a good consideration. No particular form of words is necessary to establish such a trust. "The intent is what the courts look to." 2 Fomb., 36, note; 3 Ves. Jun., 9; Bispham Eq., 98.

The language in our case is very similar to that used in *Fisher v. Fields,* 10 Johns., 494, which was held to be sufficient, and, indeed, upon looking over the many cases in the reports, there can be no doubt upon the question. (490)

The grantee, then, taking the title accompanied with this contemporaneous declaration, must be declared seized of the land in trust for Sarah Blackburn for the term of her natural life.

Affirmed.

Cited: Sykes v. Boone, 132 N. C., 202; *Laws v. Christmas,* 170 N. C., 316; *Waldroop v. Waldroop,* 179 N. C., 676.

MARY E. HANES v. THE NORTH CAROLINA RAILROAD COMPANY.

Condemnation of Land—Commissioners' Report—Exceptions.

1. While a judge cannot, upon exceptions filed to the report of commissioners appointed to assess damages caused by the location and construction of a railway, alter the report by inserting a different amount as damages, or annul the order appointing the commissioners and submit the matter to a jury, yet he has the discretionary power to confirm or set aside such report, and may recommit the question to the same, or other commissioners, and in aid of this power he may hear affidavits.
2. A report of such commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right of way.
3. The requirement of the statute that the report of the commissioners shall be under seal is directory only.

SPECIAL PROCEEDINGS to assess damages for right of way, and heard (on appeal from the clerk) at February Term, 1891, of FORSYTH, before *Bynum, J.*

The report of the commissioners was as follows:

Obedient to a summons by the sheriff of Forsyth County, we, the undersigned commissioners, appointed by the clerk of Forsyth County Superior Court to assess the damages and benefits resulting to Mary C. Hanes by reason of the construction by the defendant com-
(491) pany of a railroad through her lands, being duly sworn, and having viewed the premises, do make the following report: Having taken into consideration the value of the plaintiff's land appropriated for the use of said railroad, and the disadvantages and inconveniences resulting to the plaintiff by reason of the construction of said railroad, we find that the plaintiff Mary C. Hanes is damaged to the amount of twelve hundred dollars ($1,200).

We further find that the benefits arising to the plaintiff from the construction of said railroad are nothing.

Respectfully submitted,

J. A. NIFONG,
C. T. POPE,
THEO. KIMEL,
Commissioners.

This 24 February, 1890.

The defendant excepted to the report of the commissioners: 1st. Because the description of the condemned land was insufficient. 2d. Because the commissioners did not report under seal. 3d. Because "the

damage was excessive and out of all proportion to the value of land condemned."

The clerk made an order confirming the report, and from that order the defendant appealed.

The judge entered the following judgment: "This cause coming on, etc., all exceptions to said report are overruled, the court holding the report sufficiently definite; that the requirement that the report should be under seal is directory only." The court further held, in passing on exception four, that he had no legal power to hear affidavits on the question of damages, nor to submit said question by issue to a jury, but that the act of the commissioners was conclusive as to the amount of damages, there being no power in the court to review the amount assessed by them. "It is adjudged that the report be confirmed, and that plaintiff recover $1,200 of defendant, and costs of this (492) action."

The defendant appealed.

Eller & Starbuck (by brief) for plaintiff.
C. Manly for defendant.

AVERY, J. The statute (Code, sec. 1946) provides that "the court or judge on the hearing, may direct a new appraisement, modify or confirm the report, or make such order in the premises as to him shall seem right and proper." If under the general statute regulating special proceedings (Code, sec. 116), the plaintiff had the right before commissioners were appointed to insist that the clerk should frame an issue involving the question of damages and transmit the case to be tried in term time by a jury, he could not, after acquiescing in the order appointing commissioners and thereby assenting to that mode of trial, reassert and enforce that right after waiving it, and when he discovered that, under the mode of trial agreed to, if not selected by him, the findings were not so favorable to him as he had expected. *R. R. v. Parker,* 105 N. C., 246.

"The judge might have heard the affidavits both of defendant and the plaintiff" as a help or guide in the exercise of the broad discretion given him by the statute. *Skinner v. Carter,* 108 N. C., 106. While his refusal to hear them, nothing more appearing, is not necessarily reviewable in this Court, as it would have been presumed that he did so in the exercise of the power conferred by the statute, it was error to refuse to hear the affidavits on the ground that he had no legal power to pass upon them. He had authority unquestionably to set aside the report, and to direct a new appraisement by the same commissioners or others appointed in their stead, on the ground that he thought the damage assessed was excessive, even though we should concede that, under the

ruling of this Court in *R. R. v. Ely,* 101 N. C., 8, the judge could
(493) no more modify the findings of the commissioners in that respect by substituting a smaller sum, than he could make the same change in the verdict of the jury. *Skinner v. Carter, supra*; Code, sec. 1946. He was clothed with the discretionary power to confirm the report, if such course seemed to him in all respects fair and proper, or "to make such order as seemed just," though he could no more annul the order appointing the commissioners, and then direct an issue to be tried by a jury, than he could have vacated a consent order of reference when one of the parties objected. But while the judge could not have called a jury, in aid of his conscience, to find the facts, how could he ascertain whether it was his duty to set aside the report and direct a new assessment by the same or other commissioners, or to remand the case again for a new assessment, as he might have done (*Skinner v. Carter, supra*), unless he was at liberty to hear testimony in the form of affidavits, as on a motion to grant or dissolve an order of injunction, or in other cases where he was empowered to review the facts?

We concur with his Honor in the view that the description was not fatally defective, because the location of the right of way could be, and doubtless has been, made certain, so long as the roadbed shall be used, as a given number of feet from the known location of the track on either side. *Id certum est, quod certum reddi potest. Beattie v. R. R.,* 108 N. C., 425. The requirement of the statute, Code, sec. 1946, that the commissioners should attach a seal to their signature was unquestionably merely directory, not mandatory, as was declared by the court below. The clerk could not more readily vouch for the genuineness of a report, filed by persons selected by him, because a seal was added to the signature, and the failure to append the seal does not in any way affect a substantial right of either of the parties. Code, sec. 289; *Lineberger v. Tidewell,* 104 N. C., 506; *Matthews v. Joyce,* 85 N. C., 258.
(494) For the error in resting the refusal to hear affidavits upon the ground that he had no legal power to hear them in their bearing upon the question of setting aside the appraisement, the judgment is reversed, and the cause will stand for hearing upon the exceptions to the report of the commissioners filed before the clerk.

Error.

Cited: Worthington v. Coward, 114 N. C., 291; *Durham v. Rigsbee,* 141 N. C., 132.

THE RICHMOND AND DANVILLE RAILROAD COMPANY v. THE TOWN OF REIDSVILLE.

Taxes—Action to Refund—Demand—Statute.

1. The statute, chapter 137, section 84, Laws 1887, requiring that a taxpayer, within thirty days after the payment of an alleged invalid tax, make a demand for its repayment before bringing suit therefor, is mandatory in that respect, and such action cannot be maintained without first making the demand within the prescribed time.
2. The requirement of demand is not confined to claims for refunding any particular taxes or taxes alleged to be invalid on any particular account; it extends to all taxes.

ACTION, tried at January Term, 1891, of ROCKINGHAM, *Bynum, J.*, presiding.

The plaintiff brought this action to recover the sum of $200, which it alleges the defendant unlawfully collected from it as license tax. It alleges that it was a common carrier of freights and passengers into and out of this State into and from other States; that it was not subject to such tax; that such tax interfered with interstate commerce, and was imposed in violation of the Constitution of the United States, etc. The defendant, among other defenses, pleaded: "That (495) plaintiff failed to make a demand for the taxes so paid within thirty days after payment thereof, as provided by law in such cases, and for this reason defendant says plaintiff company cannot maintain this action, and pleads the same in bar thereof."

By consent of parties, the court found the following facts:

4. That in 1887 and 1888, the defendant levied a license tax of $50 for each of said years on the plaintiff company—the following being the town ordinance: "For defraying the current expenses of the corporation for the year 1887, the following general (on real and personal estate) poll and license taxes shall be levied and collected, to wit: On each railroad company a tax of fifty dollars"; that this tax was continued during the year 1889, but increased to $100.

5. That on 13 March, 1889, the taxes for the years 1887 and 1888 were demanded by the tax collector of the town of Reidsville of the plaintiff and payment refused; that on 19 March, 1889, the tax collector levied on some of the cars of plaintiffs for said tax, when plaintiff paid the same, under protest, to save its property from sale, the protest being as follows: "To the tax collector of Reidsville, North Carolina: Please take notice that the Richmond and Danville Railroad Company pays the $100 claimed by Reidsville against said company under protest, and that it will sue to recover the same in due time. D. Schenck,

counsel R. & D. R. R. Co. 19 March, 1889"; on the back of which is indorsed: "I accept service of this protest. R. M. Clack, Tax Collector"; that said Clack was tax collector at that time; that in June, 1889, the tax collector demanded the $100 tax levied for the year 1889, and payment was refused; that he levied and the tax was paid on 22 June, 1889, under like protest and proceedings as were had for the taxes of 1887 and 1888.

6. That on 23 July, 1889, plaintiff demanded of defendant the
(496) refunding or repayment of the taxes paid, or set out in finding of fact No. 5, which was refused.

Thereupon the court gave judgment, whereof the following is a copy:

"This cause coming on to be heard, a trial by jury having been waived, and the facts agreed to be admitted and found by the court, and being found and admitted, as set out in the case, it is ordered, adjudged and decreed that the town of Reidsville is authorized to levy the tax imposed under the ordinance of said town against the plaintiff company, and that the same is not unconstitutional. The other questions are, therefore, not passed upon, and it is further considered by the court, that the plaintiff take nothing by its writ, that the defendant go hence without day and recover its costs of action, to be taxed by the clerk."

The plaintiff excepted and appealed.

D. Schenck and G. F. Bason for plaintiff.
No counsel for defendant.

MERRIMON, C. J., after stating the case: It is not questioned that the defendant, through its officers and agents had power and authority by the terms and purposes of the statute incorporating it to impose and collect the license tax complained of by the plaintiff. The latter contends however, that that statute and tax was unlawful and void, because, as it alleges, they were in contravention of the Constitution of the United States (Art. I, sec. 8, par. 3), which declares and provides "That Congress shall have power . . . to regulate commerce with foreign nations, and among the several States and with the Indian Tribes."

We are not called upon, nor would it be proper for us to decide the grave question thus sought to be raised, because, apart from it,
(497) and upon another and different ground, the plaintiff is not entitled to recover.

Whether the statute referred to is valid or not, it is very certain that the Legislature deemed it valid, and intended further that such tax as that in question might be imposed and collected and treated as a tax. The statute so expressly declares. This being so, as soon as the defend-

ant collected the tax complained of, the plaintiff, if it intended to insist that it was unlawfully imposed and collected within thirty days next thereafter, ought to have demanded of the defendant that it refund the money so collected from it as a tax. The statute (Laws 1887, ch. 137, sec. 84) provides and gives the remedy in such case. It forbids the grant of relief by injunction against the collection of any tax, and further provides that "in every case the person or persons claiming any tax or any part thereof to be for *any reason invalid,* or that the valuation of his property is excessive or unequal, who shall pay the same to the tax collector or other proper authority in all respects as though the same was legal and valid, such person may at *any time within thirty days after such payment* demand the same in writing from the treasurer of the State, or of the county, city or town, for the benefit or under the authority or by the request of which the same was levied," etc. This statutory provision and regulation is significant and important in its purpose. It prescribes and establishes a method—the method and procedure whereby, when an illegal or improper tax has been imposed and collected, the right of the party complaining may be settled and the money improperly taken promptly refunded to him. The purpose is to require a prompt demand for the refunding of the money claimed with a view to a settlement of the matter in dispute while the facts in respect thereto are fresh in the minds of those who know them, to expedite justice, prevent litigation if possible and economize as to costs. To that end the proper authorities are required to examine and pass upon the merits of the claim, as they are required to do as to claims generally against the State, city or town, as the case may be. (498)

The demand within the time specified is made a *prerequisite* to an action to recover the money claimed. The section of the statute cited further provides that if the money so demanded "shall not be refunded within ninety days thereafter, the claimant may sue such county, city or town for the amount so demanded, including in his suit against the county both State and county tax; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason *invalid* or excessive, judgment shall be rendered therefor with interest," etc.

Such prerequisite of demand is not confined to claims for refunding any particular class of taxes, or taxes illegal or invalid on any particular account or for any particular cause. The statute is broad and comprehensive in its terms and purposes, and applies to all taxes on whatever account claimed to be illegally collected. The language employed is, "*in every such case* the person or persons claiming any tax, or any part thereof, to be for any reason invalid," etc. If it be granted that the statute under which the tax was imposed was void, this would put the

plaintiff's claim without the statute cited above. The defendant had at least colorable authority. The tax was imposed, collected, paid under protest as a tax, and so treated. We can see no reason why the plaintiff's claim is on a different footing from other taxes claimed to be unlawfully levied and collected. The statute embraces by its broad terms and purposes all such taxes.

Nor is the prerequisite to bringing an action thus required unjust or unreasonable. The claimant has thirty days next after he pays the taxes alleged by him to be illegal within which to make demand as required. The demand is simple, easily made, and the time allowed (499) is ample for such purpose. If it shall not be complied with in ninety days after it is made, the claimant is allowed to bring his action. He is not deprived of his action, nor of just opportunity to assert his right. The preliminary requisite to bringing his action is for his benefit as well as that of the State, county, city or town. It is not unwarranted. The Legislature clearly has power to prescribe and regulate by statute the method of preferring claims against the State and its agencies for taxes illegally levied and collected, as well as on other accounts, and how and when actions to establish and enforce such claims shall be brought and conducted. *R. R. v. Lewis,* 99 N. C., 62; *Mace v. Commissioners, ib.,* 65.

The statutory provision under consideration is founded on justice, convenience and sound policy. The class of claims to which it refers are against the State and its agencies. The latter are presumed to be honest and just, prepared and willing to allow and disallow all well-founded claims against them. They are not presumed to desire to litigate or withhold justice from any one, nor, in their nature, business relations and transactions can they know of the nature and merits of multitudes of claims and demands that may be made against them in the absence of notice. It is therefore right, just and expedient to require persons having such claims and demands to present them, and with reasonable promptness, before bringing actions to establish and enforce them. To so require imposes no unreasonable burden upon claimants, and the latter should not be allowed to delay making demand upon the public authorities that claims due them be recognized and paid, or denied and rejected. This is especially so as to claims for taxes improperly or unlawfully exacted. Such claims should be made and settled as soon as practicable.

It is insisted that the statute is only directory, that there are no negative words showing a purpose to prevent the recovery, if the demand shall not be made within thirty days next after the collection of (500) the illegal tax. The terms and purpose to require such demand, and within that time, are express, and, if there are no express

words of negation, this appears by the strongest implication. If the demand may be made after lapse of thirty days, within what time shall it be made? Will it be sufficient if made within sixty days, within six months, within one year, within two years, after the collection of the tax? The demand must be made within thirty days, else the statute has no reasonable or practical meaning. It must be alleged in the complaint that it was so made, otherwise no sufficient cause of action is alleged. It cannot be that the statute is meaningless, a mere form.

There are numerous statutes similar to the one under consideration, and they have been uniformly upheld and enforced. There is no reason why they should not be, where the regulations and prerequisites they prescribe are reasonable. Code, secs. 756, 757; *Love v. Commissioners,* 64 N. C., 706; *Jones v. Commissioners,* 73 N. C., 182; *Hawley v. Commissioners,* 82 N. C., 22; *Royster v. Commissioners,* 98 N. C., 148.

The defendant expressly alleges in its answer as a defense that the plaintiff did not, within thirty days next after the payment of the alleged unlawful taxes, demand that it refund to the plaintiff the sum of money so collected, and the court so found the fact to be. As the demand was essential to the plaintiff's cause of action, and no such demand was alleged in the complaint, and it appears none was made within the time prescribed, the plaintiff cannot recover.

The court, therefore, properly entered judgment, upon the facts found, for the defendant. It should not, however, have recited as the reason for its judgment, that the statute alleged to be void was valid. Such recital was unnecessary, and, moreover, the proper ground upon which the judgment rests is that no demand was made as required by the statute, and the judgment upon that ground must be

Affirmed.

Cited: Chemical Co. v. Board of Agriculture 111 N. C., 137; *Hall v. Fayetteville,* 115 N. C., 284; *Hatwood v. Fayetteville,* 121 N. C., 208; *Armstrong v. Stedman,* 130 N. C., 221; *Teeter v. Wallace,* 138 N. C., 268; *R. R. v. Brunswick,* 178 N. C., 256.

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(501)

BOYKIN, CARMER & CO. v. D. B. BUIE ET AL.

Compromise—Acceptance of Offer—Tender—Satisfaction of Judgment.

1. An agreement to accept a part of a debt in discharge of the whole is an enforceable contract under The Code, sec. 574.
2. Where plaintiffs replied to a letter from one of the defendants, proposing to pay 30 per cent, or one-fifth, of a judgment if he should be released there-

from, that "the claim now, with interest, amounts to $759.31, one-fifth of which will be $45.55, for which amount we will be pleased to give you a receipt against the claim," it was an acceptance of the defendant's offer.

3. Where a judgment creditor accepted an offer of 30 per cent of the judgment in compromise, and in compliance therewith defendant sent to plaintiffs a check for the amount, which plaintiffs declined to receive, except as a payment upon the debt *pro tanto*, such defendant is entitled to have an entry of satisfaction made upon the judgment docket as to him, in answer to a motion for leave to issue execution upon such judgment.

MOTION for leave to issue execution on a judgment, heard on appeal from the clerk at Fall Term, 1890, of ROBESON, before *Graves, J.*

Judgment was rendered by a justice of the peace against the firm of D. B. Buie & Bros., composed of D. Buie, J. C. Buie and the appellant M. C. Buie, in favor of the plaintiffs, which judgment was subsequently docketed in the Superior Court, and at subsequent term of the latter court, a judgment was rendered in favor of the plaintiffs against the defendants for the sum of _____. Both of these judgments were entered upon the judgment docket of the Superior Court. On 5 February, 1890, the defendant M. C. Buie wrote to the plaintiffs proposing to pay thirty per cent of both these judgments, provided that, upon payment of said sum, the said M. C. Buie should be released from any further obligation arising out of said judgments, and that the same should be satisfied, so far as he is concerned. The plaintiffs replied as
(502) follows: "Replying to your favor of the 5th, just received, that you are prepared to pay thirty per cent of the account against Buie and that your brothers, you believe, will do the same: The claim now with interest amounts to $759.31, one-fifth of which will be $45.55, for which amount we will be pleased to give you receipt against the claim, and trust your brothers will do the same."

In answer to the letter (of plaintiffs) the defendant M. C. Buie forwarded to the plaintiffs a check on the Bank of Guilford, in Greensboro, N. C., for the sum of $45.55, setting forth in the check that it was in full of said judgments. The plaintiffs returned said check to said M. C. Buie, refusing to receive the same except on condition that it should be entered as a credit *pro tanto* on the judgments.

M. C. Buie sent the said check back a second, and a third time, and each time it was returned in a letter giving the same reason for refusing to apply it. The defendant Buie has ever since kept funds in said bank to pay the amount of said check, and asks to be allowed to pay the amount into court and have it entered as a payment in full of his indebtedness on said judgments.

Upon the above facts, and from the affidavits, the court found that plaintiffs live in Baltimore, Md., and have their place of business there,

and that defendant M. C. Buie lives at Red Springs, Robeson County, N. C., and that there was an acceptance by plaintiffs of the defendant M. C. Buie's offer of compromise, and that the tender of the check for $45.55 was a payment of the indebtedness of the defendant M. C. Buie, and he was entitled to have entry of satisfaction on the record as to the whole of the judgments as against him, and so ordered. The plaintiffs excepted, and appealed from the judgment rendered.

A. Stronach for plaintiff.
No counsel contra.

AVERY, J. We concur with the judge who heard the motion in (503) the court below, in the opinion that the plaintiffs accepted the proposal of the defendant M. C. Buie, and were bound, when he forwarded the check for $45.55, the sum mentioned in their letter, to apply the same in full discharge of his indebtedness by reason of said judgments. The defendant has the right to demand that the substance of the said agreement shall appear upon the judgment docket, so as to show that the plaintiffs can proceed no further by virtue of the judgments against him. Under the provisions of the statute (Code, sec. 574), where a creditor voluntarily accepts from the debtor a less sum than is actually due, by way of compromise and in lieu of the whole, the debt is discharged. *Koonce v. Russell,* 103 N. C., 179. When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three joint judgment debtors, is accepted by the creditor, and the debtor within a reasonable time, tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment.

There is no error, and the judgment is
Affirmed.

Cited: Colgate v. Latta, 115 N. C., 127; *Ramsey v. Browder,* 136 N. C., 253; *Armstrong v. Lonon,* 149 N. C., 435.

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(504)

JOHN M. JOHNSTON ET AL. v. THE DANVILLE, MOCKSVILLE AND SOUTHWESTERN RAILROAD COMPANY.

Appeal—Costs—Practice on Certificate from Supreme Court—Judgment.

1. The statute in reference to appeals (chapter 192, Laws 1887) is directory only in those respects which relate to the forms to be observed and the time when the orders, judgments, etc., should be made upon receipt by the

Superior Court of the opinion and judgment of the Supreme Court in cases which have been appealed and certified down; and hence, the Superior Court has power to enter such orders, etc., at any term thereof, subsequent to the first, after the certificate from the Supreme Court is received.

2. Judgment for costs in the Supreme Court is rendered in that Court; the Superior Court has no jurisdiction in that matter.

3. The practice in entering judgment on certificate from Supreme Court pointed out by MERRIMON, C. J.

This case was before this Court by a former appeal, at the February Term of 1890, 106 N. C., 322, and the judgment appealed from was then affirmed. Thereupon the order and judgment of this Court was certified to the Superior Court, and the following is a copy thereof:

"This cause came on to be argued upon the transcript of the record from the Superior Court of Rockingham County. Upon consideration whereof this Court is of opinion that there is no error in the record and proceedings of the said Superior Court:

"It is, therefore, considered and adjudged by the Court here, that the opinion of the Court as delivered by the *Honorable A. S. Merrimon, Chief Justice,* be certified to the said Superior Court, to the intent that the judgment be affirmed.

"And it is considered and adjudged further, that the appellant, J. Turner Morehead, do pay the costs of the appeal in this Court incurred, to wit, the sum of thirteen dollars, and let execution issue therefor."

In the Superior Court of Rockingham County, at the January (505) Term, 1891, thereof, *Bynum, J.,* presiding, the court entered judgment in pursuance of the order here, as follows:

"In this action J. Turner Morehead, receiver of the Danville, Mocksville and Southwestern Railroad Company, defendant, having taken an appeal from the judgment of *James C. MacRae, Judge,* entered on 6 November, 1886, and the certificate having come down from the Supreme Court, and the same being now read and considered by the court, it is ordered and adjudged by this court now here, in obedience to said certificate from the Supreme Court, that the order of the said *James C. MacRae, Judge,* be and the same is affirmed and re-entered as the judgment and decree of this court, the costs in this court, together with the costs in the Supreme Court, to be paid as in said decree mentioned and as directed by the judgment of the Supreme Court, by the said J. Turner Morehead, receiver."

The appellant assigned error of this judgment as follows, and appealed to this Court:

1. That it does not comply with the mandatory statute of this State contained in section 3, chapter 192, Laws 1887:

(*a*) In that it was not filed "at the first term of the Superior Court after the certificate was received"; and

(*b*) In that it fails to "direct the execution thereof to proceed," when said statute expressly commands that, "if the judgment is affirmed, the court below *shall* direct the execution thereof to proceed."

2. That there can be no legal process issued on the judgment until the "order" is made therein to "proceed."

(6) That this judgment is defective in form and contrary to the course and practice of the court, in that it adjudges "that the order of the said *James C. MacRae, Judge,* be and the same is affirmed and re-entered as the judgment and decree of this Court," when the judgment should have been, that the motion to vacate and set aside the judgment confessed in this action and court be denied and dis- (506) missed, in accordance with the former judgment herein of *James C. MacRae, Judge,* and the opinion of the Supreme Court in this cause.

(7) That so much of this judgment as refers to costs is erroneous, in that it orders "the costs . . . to be paid . . . as directed by the judgment of the Superior Court by the said J. Turner Morehead, receiver," when, according to the certificate from the Supreme Court, the judgment of the Supreme Court, as to costs, is against J. Turner Morehead."

No counsel for plaintiff.
P. B. Means for defendant.

MERRIMON, C. J. The statute (Laws 1887, ch. 192, sec. 3), among other things, provides that, "In civil cases at the first term of the Superior Court after such certificate (that of the Supreme Court) 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." Obviously, this statutory provision is directory as to the mere forms to be observed. It does not mean or intend that if at the first term of the court below after it received the certificate from this Court, it should fail for any cause to act upon the same, there could be no proper or sufficient action taken afterwards. It directs the orderly course to be observed, but it will be sufficient if the substance of the purpose of the statute is pursued. In effectuating such purpose, the orderly course and forms prescribed are almost necessarily subject to well known rules of practice that prevail in the courts. Regularly and orderly the certificate from this Court should be entered in the court below at the first (507)

term after it is received there, and the judgment there made to conform to it. If the judgment is affirmed it would be sufficient to enter on the record, "and accordingly the judgment of this Court is so affirmed; let execution issue," in proper cases. If the judgment is to be modified or amended, then it ought to be said, "accordingly the judgment of this Court is accordingly modified" or "is accordingly amended, and it is considered and adjudged," etc.; or if a new trial is directed, in that case it should be entered, if the certificate so directs, "accordingly it is ordered and adjudged that the judgment of the court be reversed and a new trial awarded, and the case will stand for trial," etc. Such orders should be so framed as to meet the purpose of the directions of the court and the exigency of the case in the court below. Besides, in cases so requiring, the court below should enter appropriate judgments upon *supersedeas* undertakings, and for additional costs when there are properly such. When the appropriate judgment is entered, it is better and more orderly to direct formally that execution issue, but when judgment is entered, by implication and the rules of practice, execution must issue in pursuance thereof, and according to the course of practice. The statute recited above so implies and intends. It is practical and intends to promote and secure the ends of justice.

In this case, the judgment appealed from and complained of as to matters of form and order, though fuller than need be and not so aptly expressed as it probably might be, is a substantial compliance with the order of this Court and with the statute above cited, except as to the costs of this Court. Judgment is entered here for the costs of this Court and ought not to be entered in the court below, nor was it so intended in this case or directed. The certificate only embraced the judgment here for costs—it is so stated in the certificate and this part of it might not inappropriately have been omitted—it was no more, however,
(508) than harmless, redundant matter, as was apparent.

The judgment must be modified in so far as it refers to and embraces the costs of this Court so as to omit such costs.

Modified and affirmed.

Cited: Dobson v. R. R., 133 N. C., 625.

S. O. THOMPSON v. C. W. WIGGINS.

Curtesy, Tenant by—Husband and Wife—Constitution.

1. A tenant by the curtesy *initiate* cannot maintain an action for the rents of his wife's real estate, when the marriage has taken place since the Constitution of 1868.
2. The only right attaching to such tenancy by the curtesy *initiate* in the wife's real estate is the bare right of joint occupancy with the wife with the right of ingress and egress.
3. The tenant by the curtesy *initiate* is still a freeholder.

ACTION, tried before *McIver, J.*, upon waiver of jury trial, at September Term, 1891, of ROBESON.

There was judgment for plaintiff, from which defendant appealed.

Black & Patterson (by brief) for plaintiff.
French & Norment (by brief) for defendant.

CLARK, J. The question presented is the right of the husband to sue for the rents of the wife's real estate when the marriage has taken place since the Constitution of 1868. That Constitution provides, Art. X, sec. 6, that the real and personal property of any female, whether acquired before or after marriage, "shall be and remain the sole and separate estate and property of such female." The rents (509) arising from her real estate are, therefore, the wife's, and an action therefor must be brought by the wife, she being the real party in interest. Code, sec. 177. It is not even necessary that the husband be joined as a party plaintiff (Code, sec. 178 [1]), much less can he sue alone. The fact that the defendant here had paid the rent for the two previous years to the husband, is evidence of agency, which would usually protect the defendant if he had paid the rent again to the husband, but would not authorize the husband to sue for the rent, as the action must be brought in the name of the principal, the real party in interest. Besides, such agency, if it existed, had been terminated by the insanity of the wife. The action can only be maintained by a guardian of the lunatic wife.

The cases which recognize the husband's right to sue alone for the land, or for the rents and profits by virtue of his tenancy by the curtesy *initiate*, are all cases where the marriage took place prior to the Constitution of 1868. *Wilson v. Arentz*, 70 N. C., 670; *Jones v. Carter*, 73 N. C., 148; *Morris v. Morris*, 94 N. C., 613; *Houston v. Brown*, 52 N. C., 161; *Teague v. Downs*, 69 N. C., 280; *Jones v. Cohen*, 82 N. C., 75;

and *S. v. Mills,* 91 N. C., 581, were also decisions as to the effect of the act of 1848 upon tenancy by the curtesy *initiate* without reference to the later action of the Constitution of 1868 upon it.

Tenancy by the curtesy *consummate,* remains as at common law. Code, secs. 1838, 1839; *Houston v. Brown, supra.* The husband may sell such interest, *Long v. Graeber,* 64 N. C., 431, and it is liable to sale under execution against him after his wife's death. *McCaskill v. McCormac,* 99 N. C., 548. By virtue of the act of 1848, and the further modification made by the Constitution of 1868, the tenancy of the curtesy *initiate* is stripped of its common law attributes (*Long v. Walker, post,* 510, and *Jones v. Coffey, post,* 515), till there only remains the husband's bare "right of joint occupancy with his wife, (510) with the right of ingress and egress" (*Manning v. Manning,* 79 N. C., 293; *ib.,* 300), and the right to the curtesy *consummate* contingent upon his surviving her. This interest it is that is forbidden to be sold by The Code, sec. 1840, until it has become vested in possession by the death of the wife. *McCaskill v. McCormac, supra.* The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of power to lease her lands, and relieved of liability of his interest being sold during the wife's life. By reason of such bare seizin he is still a freeholder, and as such has always been deemed eligible as a juror in those cases in which being a freeholder is a qualification. He has, by the curtesy *initiate,* a freehold interest, but not an estate, in the property.

In holding, however, that the husband, while tenant by the curtesy *initiate,* could maintain an action for the rents of his wife's realty, there was

Error.

Cited: Walker v. Long, post, 512; *Jones v. Coffey, post,* 518; *Cobb v. Rasberry,* 116 N. C., 139; *S. v. Jones,* 132 N. C., 1048; *Hodgin v. R. R.,* 143 N. C., 94, 95; *Sipe v. Herman,* 161 N. C., 111; *Jackson v. Beard,* 162 N. C., 110, 116; *Kilpatrick v. Kilpatrick,* 176 N. C., 184.

MARY A. WALKER v. JOHN W. LONG.

Constitution—Tenant by Curtesy—Husband and Wife—Deed—Parties.

1. The common-law estate of the husband as tenant by the curtesy *initiate* in the lands of his wife was abolished by section 6, Article X, of the Constitution, and now, by virtue of that provision and the statutes passed in pursuance thereof, while the husband has an *interest*, the right to enter upon and occupy the land with the wife, he has no *estate* therein until her death.
2. The husband cannot maintain an action in his name alone to recover lands of which he is tenant by the curtesy *initiate*, but the wife can maintain such action, either by joining her husband or suing alone.
3. A conveyance of land from husband to wife will pass the legal estate of the vendor and enable the vendee to sustain an action to declare title and recover possession.

ACTION, tried at August Term, 1891, of IREDELL, *Armfield, J.*, (511) presiding.

The facts are stated in the opinion.

Robbins & Long (by brief) for plaintiff.
D. M. Furches (by brief) for defendant.

MERRIMON, C. J. The plaintiff sues alone. It appears that she is a married woman having living children of her marriage with her present husband capable of inheriting her real property. She alleges that she is the owner in *fee* and entitled to have possession of the land specified in the complaint. On the trial she put in evidence of her title to the land, a deed purporting to convey the same to her in *fee*, executed to her on 7 June, 1883, pending the marriage by her present husband.

The defendant appellee contends, first, that she cannot maintain this action, because her husband is tenant of the land by the curtesy *initiate*, and he alone can sue to recover possession of the same, and certainly she cannot, without suing as party with her husband.

It may be conceded that the tenant, by the curtesy *initiate*, could have sued alone for and recovered possession of the lands and the rents and profits, in this State, before the adoption of the present Constitution. *Houston v. Brown*, 52 N. C., 161; *Wilson v. Arentz*, 70 N. C., 670; *S. v. Mills*, 91 N. C., 593; *Morris v. Morris*, 94 N. C., 613.

But that Constitution (Art. X, sec. 6) has wrought very material and far reaching changes as to the rights respectively of husband and wife in respect to her property, both real and personal, and enlarged her personalty and her power in respect to and control over her prop-

erty. It provides that, "the real and personal property of any female in this State, acquired before marriage, and all property, real and per-
sonal, to which she may, after marriage, become in any manner
(512) entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried." This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property, as if she were unmarried, except in the single respect of conveying it. She must convey the same with the *assent* of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right, or estate, he might at one time have had as tenant by the curtesy *initiate*. The strong, exclusive language of the clause recited above is, that the property "shall *be and remain* the sole and separate estate and property of such female, the wife," and to make the provision more thoroughly exclusive, it further provides that such property "shall not be liable for any debts, obligations or engagements of her husband." Pertinent legislation, since the Constitution became operative, is in harmony with the section above recited. The statute (Code, secs. 1837, 1838) provides that "the savings from the income of the separate estate of the wife are her separate property"; and the husband shall be, not tenant by the curtesy *initiate,* but tenant by the curtesy *after the death* of the wife, in case she die intestate. The husband, as husband, has no estate in his wife's land during her lifetime. But he has an *interest* as tenant by the curtesy *initiate. Thompson v. Wiggins, ante,* 508. He has, by reason of his relation to her as husband, and his right to have the benefit of her society, the right to go upon her land and occupy the same freely with her as her husband. And hence, by going to her house and upon her premises for all lawful purposes, he is not a trespasser; he so goes and remains of right, but he has no estate in
the property. This Court has so, in substance and effect, repeat-
(513) edly decided. *Manning v. Manning,* 79 N. C., 293; *Manning v. Manning, ib.,* 300; *Cecil v. Smith,* 81 N. C., 285; *Kirkman v. Bank,* 77 N. C., 394.

The property in controversy, for the present purpose, must be treated as the plaintiff's. The statute (Code, sec. 178, par. 1) provides that the wife may sue alone when the "action concerns her separate property." As we have seen, this action does concern the separate property of the plaintiff wife. Hence, the appellant's first objection is unfounded.

The plaintiff claims title by virtue of a deed of conveyance from her husband, executed on 7 June, 1883, pending her marriage with him.

The appellant further contends that such deed was ineffectual to pass the legal estate in the land to the plaintiff wife, and, therefore, she cannot recover at law—that she can only recover her equitable estate in an action equitable in its nature, and she must allege specifically the nature of her title, which she has not done.

We need not stop to inquire whether or not the plaintiff could recover upon her equitable title, if she has one, because we are of opinion, treating the deed in question as free from fraudulent taint, and as sufficient in other respects, it had the effect to convey the legal title to the land to the plaintiff. As we have seen, the constitutional provision above recited has made the wife a person in an important sense, distinct from her husband as to her own property. She owns it free from his interference with or control over it. She has power to acquire it. She can devise and bequeath it—she can sell and convey it as if she were a *feme sole,* except that she must convey it with the written assent of her husband. As to her separate property, however acquired, she and her husband are, as to property rights and estates, not to be recognized and treated in legal contemplation as one person—as to that, they are made distinct and several persons—she is as an unmarried woman—it is so expressly provided. Hence, when the husband conveys prop- (514) erty, of whatever nature, to his wife, he does not in any legal sense convey to himself; and when the wife so conveys to her husband, she does not in such sense convey to herself. The conveyance is made in such case by one distinct person to another. The wife is to have the full legal as well as equitable benefit from such conveyance as if she were unmarried. There is, therefore, no reason why the husband may not convey to the wife.

Moreover, the statute (Code, secs. 1835, 1836) expressly provides that husband and wife may contract with each other. This cannot mean that they are one person contracting with himself! They are allowed to contract with each other as distinct persons capable of contracting with each other, and having separate and distinct benefit from such contract. Hence, in proper cases, they may maintain actions against each other. Hence, too, the wife may sue alone as to her own property. This Court has, in many cases, recognized, upheld and enforced such contracts as effectual as well at law as in equity. *George v. High,* 85 N. C., 99; *Brown v. Mitchell,* 102 N. C., 347; *Battle v. Mayo, ib.,* 413; *Woodruff v. Bowles,* 104 N. C., 197; *Stephenson v. Felton,* 106 N. C., 121; *Osborne v. Wilkes,* 108 N. C., 651.

There is error. The judgment of nonsuit must be set aside, and the case disposed of according to law.

Error.

Cited: Thompson v. Williams, ante, 509; *Jones v. Coffey, post,* 518; *Fort v. Allen,* 110 N. C., 189; *Taylor v. Taylor,* 112 N. C., 137; *Sydnor v. Byrd,* 119 N. C., 485; *Walton v. Bristol,* 125 N. C., 428; *McLamb v. McPhail,* 126 N. C., 221; *Tiddy v. Graves, ib.,* 622; *S. c.,* 127 N. C., 505; *Hallyburton v. Slagle,* 130 N. C., 482; *S. v. Jones,* 132 N. C., 1047; *Perkins v. Brinkley,* 133 N. C., 159; *Hodgin v. R. R.,* 143 N. C., 95; *Richardson v. Richardson,* 150 N. C., 553; *Sipe v. Herman,* 161 N. C., 111; *Jackson v. Beard,* 162 N. C., 144; *Satterwhite v. Gallagher,* 173 N. C., 529; *Freeman v. Belfer, ib.,* 588; *Kilpatrick v. Kilpatrick,* 176 N. C., 184; *Freeman v. Lide, ib.,* 437.

(515)

W. A. JONES v. T. J. COFFEY.

Curtesy, Tenant by—Possession, Adverse—Limitations, Statute of—Husband and Wife—Damages—Mesne Profits—New Trial.

1. A tenant by the curtesy *initiate* has not such estate in the land of his wife that will put in operation the statute of limitations against either the husband or wife in favor of one claiming title by adverse possession.
2. In an action to recover land, the plaintiff will not be entitled to recover for rents and damages for a longer period than three years preceding the commencement of the suit, except in those cases where the defendant sets up a claim for improvements.
3. Where there has been error by the court below in respect to one issue incidental to the others, and which does not affect the others, this Court will direct a new trial only as to that issue.

ACTION brought for the recovery of a tract of land, tried at the Special June Term, 1891, of WATAUGA, before *Hoke, J.*

The action was commenced 18 March, 1889. The plaintiff offered as evidence of title:

1. Grant from the State to Samuel Patton, dated 10 December, 1852, for the land in controversy. 2. A deed from Levi Hefner and wife, Mary, and D. E. Kaylor and wife, Sarah, bearing date 12 January, 1882.

Evidence was offered to show that the only heirs at law of said Samuel Patton were said Mary Hefner and Sarah Kaylor, his daughters, who were infants when their father died, and were both married before arriving at the age of twenty-one years, and are living with their husbands still. There was evidence offered by plaintiff tending to show that Samuel Patton died in 1853, while the defendant offered testimony to show that he died in 1850.

The defendant offered evidence to show that one Townsend executed a deed for the *locus in quo* in March, 1854, to one Wiley (516) Gaither, who immediately took possession and occupied the land until May, 1861, or perhaps till 1863.

Defendant requested the court to charge the jury:

1. If the *feme* grantors married and had issue born alive during the coverture, their husbands became tenants by the curtesy *initiate,* and adverse possession of the land by the defendant, and those under whom he claims, for seven years continuously, would take away the title of the husband, and plaintiff could not recover.

2. Upon the marriage, the husband became seized of an estate in the land during the coverture, and after issue born alive they were seized of an estate for their own lives, which is derived from the reversion, and an adverse possession for seven years would toll the estate of the husband, though it would not affect the reversion.

3. The burden is on the plaintiff to show that the grantee Patton was the ancestor of the *feme* grantors. It is a latent ambiguity, and plaintiff must remove it. He must show a good title against the world.

The court declined to give the first and second instructions prayed for, and gave the third.

The court, after reciting the different positions contended for by the different parties, and adverting to the evidence in each, among other things not excepted to, charged the jury as follows:

1. That the burden of the issues was on the plaintiffs, and they must satisfy the jury by a preponderance of the evidence that the grantee of the State, Samuel Patton, was the father of plaintiff's *feme* grantors —Mary Hefner and Susan Kaylor—and that Samuel Patton died before the adverse entry and occupation by Gaither, and his title descended to his children, who were infants, and continued such during all the time said adverse occupation continued. Then the adverse claim and possession by Gaither, under the circumstances, would have (517) no effect on that title, etc.

2. That as the first and second prayers for instructions by plaintiff, if there was evidence on which to predicate them, the position would not avail defendant, because the plaintiff claimed and offered a deed conveying to him the right and interest of the wives.

3. On the question of damages, plaintiff could recover a fair rental value for the property, and any spoil or injury done same during the adverse occupation by the defendant, and as far back as the beginning of the plaintiff's title, on 12 January, 1882, provided defendant had occupied and possessed the land from the commencement of such title in 1882, and from such time down to the time of trial.

Defendant excepted to the refusal of the court to give the first and second prayers for instructions, and, also, to the charge of the court on the question of damages, for that the plaintiff was permitted to recover damages for more than three years before action brought.

There was verdict and judgment for plaintiff, and appeal by defendant.

No counsel for plaintiff.
G. N. Folk (by brief) for defendant.

AVERY, J. In *Cecil v. Smith,* 81 N. C., 285, *Justice Dillard,* for the Court, said: "The husband has not, under the present Constitution and laws, nor has he had since the act of 1848 (passed 1 March, 1849), any interest in the real estate of his wife, which he could sell or lease for life, or any less term of years, except by deed joined by the wife and with her privy examination, and as to the sale of any supposed interest of the husband in the lands of his wife by execution against him, it was declared by said statute, which is still in force and brought forward in Battle's Revisal (ch. 70, sec. 33), that the same should be null (518) and void in law and equity." The same statute is still in force *in totidem verbis* except the words "in law and equity" at the end of the section, which are mere surplusage. Code, sec. 1840; *Walton v. Parish,* 95 N. C., 259; *Taylor v. Apple,* 90 N. C., 343; *Young v. Greenlee,* 82 N. C., 346; *Manning v. Manning,* 79 N. C., 293.

In *McCaskill v. McCormac,* 99 N. C., 548, the Court speaking of the right of the husband or tenant by curtesy, after the wife's death, say: "But we think it is settled by abundant authority that the purpose of the act was to protect the wife, leaving the right of the husband, and of course, his liabilities, unimpaired and unrestricted after her death."

Whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife as tenant by curtesy *initiate* which is subject to sale under execution, and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land or rents except as her properly constituted agent. Constitution, Art. X; *Manning v. Manning, supra,* and *ib.,* 300.

The husbands of the two *femes covert* under whom plaintiff claims had no estate in the land in controversy so as to start the statute running against them. *Thompson v. Wiggins, ante,* 508, and *Walker v. Long, ante,* 510. The wives having been married to their husbands, in 1867, though issue had been born to both, were at all times the present owners of whatever estate descended to them from their father before

marriage, and, as they were both infants when the father died and the disability of coverture supervened and has continued to the present time, the statute has never been put in motion against either of them, unless their ancestor Patton was alive when Gaither took possession in 1854. The court instructed the jury that the burden was on the plaintiff to satisfy them that Samuel Patton died before the occupation by Gaither, which began in 1854 under a deed, the (519) loss of which was shown, and continued till 1861.

The plaintiff, having offered deeds from both of the heirs of Samuel Patton, in which their husbands join, is, therefore, the owner of all of the present and prospective interest of his grantors.

Our statutes (secs. 474, 475 and 267 (5) of The Code) provide that a plaintiff who prevails in an action involving the title or right to the possession of land, may recover also in the same action the clear annual value of the land and damages for waste or injury to the premises up to the time of trial, but the defendant is not liable for rents accruing or waste or other injury committed for any period previous to three years before suit was brought, except when the defendant prefers a claim for improvements. *Sherrill v. Connor,* 107 N. C., 630; *Reed v. Exum,* 84 N. C., 430; *Whissenhunt v. Jones,* 78 N. C., 361. We think that there was error in the instruction given to the jury that they might allow as damages the fair rental value, and for any spoil as far back as 12 January, 1882, although the summons was not issued till 1889. But it is not necessary or proper that the verdict should be disturbed as to the other issues. The defendant has not shown that the jury were misled to his prejudice in passing upon them. A new trial will be awarded therefore, only as to the issue involving the damages.

New trial as to issue of damages.

Cited: Thompson v. Wiggins, ante, 509; *Taylor v. Taylor,* 112 N. C., 137; *S. v. Jones,* 132 N. C., 1048; *Hodgin v. R. R.,* 143 N. C., 95; *Richardson v. Richardson,* 150 N. C., 553; *Jackson v. Beard,* 162 N. C., 116; *Kilpatrick v. Kilpatrick,* 176 N. C., 184.

(520)

J. H. YOUNT v. F. F. MORRISON ET AL.

Mortgage—Power of Sale—Executors and Administrators.

1. The executor of a mortgagee may exercise the power of sale contained in the mortgage when the deed in terms confers such power upon the mortgagee and his executors. The act of 1887, ch. 147, was intended to confer the power of sale upon executors and administrators when such power is not given in the deed.

2. The reception of irrelevant testimony will not be sufficient to warrant a new trial when it can be seen it was harmless.

ACTION, tried at August Term, 1891, of IREDELL, *Armfield, J.*, presiding.

The complaint alleges that the plaintiff is the owner and entitled to have possession of the land described therein; that the defendant is in possession thereof and unlawfully withholds the same from him, etc. The answer denies such allegations, except as to the possession, which it is alleged is lawful, etc. It is further alleged therein that the husband of the *feme* defendant was the owner in fee of the land, and he and she, on or about 14 March, 1878, executed a deed of mortgage of the same to Franklin Gay, to secure a debt due from her husband to him for $600; that $96 of this debt was paid on 14 March, 1880; that on 22 December, 1885, the said Gay having died, leaving a will, his executor, John B. Holman, sold the land by virtue of a power contained in said will, and the *feme* defendant bid the same off at the price of $900; that since she so bought, the mortgage debt has been paid and the mortgage discharged, but she never received a deed for the land; that the plaintiff at the time he purchased any pretended interest in the land, had full knowledge of her rights as such purchaser, etc.; and the answer demands judgment that the said Holman and others make deed to her, etc.

Among other appropriate issues which the court submitted to
(521) the jury is the following, to which they responded in the negative: "Did the defendant Mary E. Morrison purchase said land under the mortgage and at the mortgage sale, as she alleges in her answer?"

On the trial the plaintiff put in evidence the mortgage deed referred to, which contained a power authorizing the mortgagee Gay and his executor to sell the land for the purpose of the mortgage. He then proved the death of the mortgagee; the appointment and qualification of J. B. Holman as executor of his will. He further put in evidence a deed from the said executor to C. L. Summers, who purports to have been the purchaser of the land for him. This deed was objected to on

the ground that the power of sale mentioned could only be executed by the heirs at law of said Gay, and not by the executor of his will. The court declined to sustain this objection, and this is assigned as error.

The plaintiff then put in evidence a deed in trust for the land from said C. L. Summers to himself.

The defendant introduced one Stevenson, and proposed to prove by him that a day or two before the mortgage sale by Holman, at which *feme* defendant claimed to be purchaser, said C. L. Summers told him the arrangement had been made for the defendant Mary E. Morrison to purchase the land as a home for herself and her children, and that he, Summers, was going to pay it for her; said Holman having already testified for the plaintiff that no money was paid at said sale; that Mrs. M. E. Morrison, the defendant, was the bidder, and that he took the note of said C. L. Summers for the purchase-money and returned the mortgage marked satisfied, to E. F. Morrison, the mortgagor. Upon plaintiff objecting to this evidence the same was excluded, and the defendant excepted.

The plaintiff, testifying in his own behalf, was asked what E. F. Morrison, husband of *feme* defendant, and who had put (522) in no answer, said to witness two or three years after the mortgage sale, about the wife's purchase of this land in controversy at the mortgage sale. The defendant objected to this evidence; objection overruled.

The evidence admitted as against E. F. Morrison only, he being at the time of said declaration proposed to be proved living upon the land with his wife, the *feme* defendant, and witness proceeded to state that E. F. Morrison told him that C. L. Summers had fixed things now to suit himself, and that said Summers might take what was his own, referring to defendant M. E. Morrison and her children, and he, E. F. Morrison, was going to Texas; that he would give up the land without trouble, and that he had but recently heard of his wife's claim upon said land.

Mary E. Morrison appealed.

M. L. McCorkle for plaintiff.
No counsel contra.

MERRIMON, C. J., after stating the case: The appellant's principal contention is that the executor of Gay, the mortgagee, had not power under and in pursuance of the mortgage deed to sell the land in controversy, and execute to the purchaser a deed effectual to pass the title thereto to Summers. This objection is untenable. The deed of mortgage expressly empowered Gay or his executor to sell and convey the

land, and there is no reason in legal contemplation why this might not be done. In and by the deed the mortgagor and mortgagee agreed that the latter might execute the power, and if for any reason he could or should not do so in his lifetime, his executor after his death might. He made his will and therein appointed an executor; he died and the executor, Holman, qualified as such, sold and conveyed the land by deed, and thus the power was sufficiently executed. To provide that (523) an executor shall execute a power designates with certainty the person to be charged for the purpose. If no executor had been appointed, then the appellant's objection might have had some force at the time the deed was executed. *Demorest v. Wynkoop,* 3 Johns, Ch. 145; 2 Jones Mort., sec. 1786.

The statute, however (Laws 1887, ch. 147), expressly confers upon the executor of a deceased mortgagee all the powers, rights and duties he had to enforce the mortgage. This statute applies to cases where the executor is not mentioned in the power. In this case, the executor was in terms authorized to execute it.

The evidence rejected, offered by the appellant, so far as appears, was not pertinent for any proper purpose. She alleges in her answer that she bid the land off at the sale, and that it was thereafter paid for and the mortgage discharged, but she does not at all allege that she paid for it or that she gave her note or other obligation for the purchase-money; nor does she allege that Summers gave his note for the purchase-money and afterwards paid the same at her instance, and took the deed for the land for her benefit and that of her children, or that he agreed to do so. Much of this testimony was mere hearsay, and none of it was pertinent in any aspect of the pleadings. It was properly rejected.

The testimony of the plaintiff objected to, but admitted, on the trial, was, in view of the findings, scarcely pertinent, but it was harmless.

In no view of the case, as it appears to us, was the appellant entitled to a verdict or judgment.

Judgment affirmed.

(524)

A. D. BRAWLEY, ADMR., v. S. J. BRAWLEY, ADMR., ET AL.

Administrator—Statute of Limitations—Sureties.

An administratrix was appointed in 1870, and died in 1877, before closing the administration; in 1889 an administrator *de bonis non* was appointed, who brought an action against the sureties of the first administrator for breach of the bond of their principal: *Held*, that there being no one *in esse* from the death of the first administrator till the qualification of the administrator *de bonis non* who could sue, that time should not be counted in applying the statute of limitations.

DAVIS, J., dissented.

ACTION, tried at August Term, 1891, of IREDELL, *Armfield, J.*, presiding.

It appears that the intestate of the plaintiff died and his widow, Malinda C. Brawley, was duly appointed and qualified as administratrix of his estate on 27 August, 1870, and took upon herself the burden of administering the same. Afterwards she died, in 1877, and the plaintiff was appointed and qualified as administrator *de bonis non* of her said intestate on 4 November, 1889. There had been no final settlement of the estate in her hands.

The plaintiff brought this action against the sureties of the bond of said administratrix, alleging breaches of the condition thereof, in that she did not account and administer the estate in her hands, as she was bound to do, etc., and he demanded judgment that an account be taken of the administration and for the sum of the bond sued upon, to be discharged upon the payment of such sums as the plaintiff may be entitled to have, etc.

The defendants, among other defenses alleged, pleaded the statute of limitations, that the claim is old and stale, barred by the lapse of time, and upon these grounds resisted the order of reference, etc. It further appeared that the plaintiff was the son of the said administratrix—was of age when she died, and there had been (525) no time since her death, when the defendant Johnston might not have been sued.

The court was of opinion that there was no statutory bar, and entered an order directing a reference to take an account, etc. Thereupon the defendant excepted, and appealed.

Armfield & Turner (by brief) for plaintiff.
D. M. Furches for defendant.

MERRIMON, C. J. It is important to observe that this action is not brought against the administrator of the intestate of the relator, nor,

she having died in 1877, is it brought against her administrator, but it is brought only against the sureties to her bond as administratrix, and the plaintiff demands judgment that they account with him and pay such sum of money as his predecessor administratrix ought to have accounted for and administered in her lifetime, according to law.

Now, although there had been no final auditing of her account and filing of the same, as required by law, still she might, certainly after the lapse of two years next after her qualification, have been sued by any person interested for the purpose of compelling her to a settlement of the estate wherewith she was charged. Code, sec. 1402.

But the statute of limitations could not protect her until six years next after the "auditing of his (her) final accounts by the proper officer and the filing of such audited account, as required by law." Code, sec. 154, par. 2; *Vaughan v. Hines,* 87 N. C., 445; *Walton v. Pearson,* 85 N. C., 44; *Woody v. Brooks,* 102 N. C., 334; *Kennedy v. Cromwell,* 108 N. C., 1.

It is very different, however, as to the defendants sued as sureties to the bond of the administratrix. As to their case, the statute
(526) (Code, sec. 155, par. 6) prescribes that "an action against the sureties of any executor, administrator, collector or guardian on the official bond of their principal," must be brought "within three years after the breach thereof complained of." See the cases cited, *supra.*

It appears in this case, however, that there was no administrator *de bonis non* until the plaintiff became such on 4 November, 1889, and, hence, there was no one who could bring an action to compel the defendants to an account. It is insisted for the relator that, therefore, the statute invoked does not bar the relator's action. This seems to us to be fatal to the defendants' plea of the statute. This Court has repeatedly decided that the time lapsing while there is no one *in esse* who can sue, cannot be counted against the claimant when he comes into existence and brings his action, and the adverse party seeks to avail himself of the statute of limitations. This rule is just and reasonable. It would be essentially wrong to allow a party not in existence, and who could not sue, to be prejudiced by lapse of time. He should have fair opportunity to assert his right when he is competent to do so.

The defendants cannot reasonably complain in this case, because they might, and they ought, if no one else interested would have the estate of the intestate of the relator wound up, to have done so themselves. It was important to them that it should be done, and, if need be, one of them might have become administrator *de bonis non.* They were in default that they did not act promptly. It is no sufficient excuse to say that some other interested person ought to have so adminis-

tered. So no doubt some such person ought to have done, but his neglect cannot excuse the defendants. The law intends that the estate of a deceased person shall be administered as it prescribes. These and other decisions settle the rule as stated above. *Buie v. Buie,* 24 N. C., 87; *Jones v. Brodie,* 7 N. C., 594; *Godley v. Taylor,* 14 N. C., 179; *Grant v. Hughes,* 94 N. C., 231; *Long v. Clegg, ib.,* 763; (527) *Baird v. Reynols,* 99 N. C., 469; *Brittain v. Dickson,* 104 N. C., 551.

Affirmed.

Cited: Culp v. Lee, post, 678; *Burgwyn v. Daniel,* 115 N. C., 119; *Koonce v. Pelletier, ib.,* 235; *Fisher v. Ballard,* 164 N. C., 328.

H. Z. SHERRILL v. THE WESTERN UNION TELEGRAPH COMPANY.

Telegraph—Pleadings, Exhibits Attached to—Reasonable Conditions —Action in Lieu of Demand—Real Party in Interest—Parties.

1. Where a complaint states that a copy of a telegraph message is attached, which copy has the message written upon a blank printed form containing certain conditions, such blank with the message and conditions thereon forms a part of the complaint.
2. A condition by a telegraph company that it will not be liable for damages unless the claim is presented in sixty days after sending the message is not a condition limiting the liability of the company or the time within which action must be brought, and is a reasonable one, except in cases where the message was never delivered.
3. Where a telegraph message was never delivered, an action instituted within sixty days after notice of nondelivery is a sufficient compliance with a condition providing that the company will not be liable for damages where the claim is not presented within sixty days after *sending* the message.
4. Plaintiff can maintain an action against a telegraph company for the nondelivery of a telegraphic message which was sent by his sister, whom he had left in charge of his house, to his father whom he was visiting, telling the father to inform plaintiff of the illness of one of his children. The plaintiff, on the face of the message, is the real party in interest.

ACTION, heard before *Armfield, J.,* upon complaint and demurrer, at August Term, 1891, of IREDELL.

The complaint alleged:

3. That at the time, hereinafter to be mentioned, the plaintiff (528) was in Iredell County and State of North Carolina, at his

father's, Franklin Sherrill, on a visit; that at his home in Max, Indiana, he left M. C. Sherrill, his sister, and housekeeper, his wife being dead, and a daughter named Lou, all in good and sound health.

4. That on 1 December, 1890, at the office of said corporation, in the city of Lebanon, State of Indiana, the said M. C. Sherrill caused to be delivered to the agent and employee of said corporation, to be sent to the said Franklin Sherrill at Statesville, State of North Carolina, for the use and benefit of H. Z. Sherrill, this plaintiff, the following telegraph message:

MAX, IND., 1 December, 1890.

To MR. FRANKLIN SHERRILL,
Statesville, N. Carolina:
Tell Henry to come home. Lou is bad sick.

M. C. SHERRILL.

Tel. answer quick, it's paid for here. 16 paid $3.50. Gt. Spcl Dely.

That Henry named in said message was the plaintiff in this action. A copy of said telegraph message is hereto attached and asked to be taken as part of this complaint.

5. That, in consideration of the sending of said message over the wires of said company, said corporation was paid, out of the funds of this plaintiff, the sum of $1.18, the regular charge for such message, and the further sum of $3.50 for a special delivery of said message to Franklin Sherrill, where the plaintiff then was.

That said corporation contracted for special delivery, and took the charges therefor, as it had the right to do.

6. That said message, as above set forth, was received at the (529) office of said company in Statesville, State of North Carolina, on said 1 December, 1890, but the same was allowed, through the gross negligence of said company, to remain in said office without delivering the same, or attempting to do so, and still remains undelivered to any one.

7. That, by the carelessness and gross negligence of said company and corporation in not delivering said message, as it had contracted to do, telling him of the sickness of his daughter, this plaintiff failed to know that his said daughter was sick, and was unable to be with her in her last hours. That his said daughter died on 6 December, 1890, and was buried, all unknown to this plaintiff, by reason of such negligence of defendant, he having, on 9 December, 1890, received the first information concerning her condition. That she was under age and living with him, unmarried, at said time.

8. That by reason of the gross negligence and wilful conduct of said corporation in the failure to deliver said message, this plaintiff has suffered great damage, both in body and mind."

The defendant in this action demurred:

1. That it appears, from the complaint, that there was a condition attached to said contract that the defendant should not be liable for damages for any breach thereof unless the claim therefor was presented in writing within sixty days after sending said message, and the complaint does not allege that the claim upon which this action is founded was presented to the defendant in writing within sixty days after the said message was sent, nor does it appear from the complaint that any demand for said claim was made upon the defendant at any time prior to the bringing of this action.

2. That this complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant, in that it appears from the face of the complaint that the message in question was sent by one M. C. Sherrill to one Franklin Sherrill, (530) and not to the plaintiff, and it is not alleged in the complaint that the said Franklin Sherrill was the agent of the plaintiff to receive and communicate said message to the plaintiff, nor does it appear from the complaint that there exists any privity between this plaintiff and the said Franklin Sherrill in respect to the alleged contract for sending the said message, nor that there was any contract between the plaintiff and defendant in respect to the said message, nor that any contractual relations existed between the plaintiff and defendant growing out of this alleged contract between the said M. C. Sherrill and the defendant under which the said message was sent.

3. That the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant in this, that it fails to show that there existed any relationship between the plaintiff and defendant whereby the plaintiff is entitled to recover of the defendant any damages he may have suffered by reason of the alleged negligence of the defendant in failing to deliver the message mentioned therein.

The demurrer was overruled, and the defendant having excepted, appealed.

Bingham & Caldwell (by brief) and M. L. McCorkle for plaintiff.
Jones & Tillett (by brief) for defendant.

CLARK, J. The complaint states, "a copy of the said telegraph message is hereto attached and asked to be made a part of the complaint." This "copy" is a copy of the telegraph blank with the message written

thereon, and contains the proviso on the margin, "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The (531) contention of the plaintiff that nothing is thereby made a part of the complaint except the words of the message itself is unfounded. The words of the bare message itself were already set out in the complaint, and there could have been no object in attaching another copy. The words must be taken to refer to the "copy" as actually attached, which is a copy of the contract between the parties, evidenced by the blank message written thereon and the printed stipulations on the margin.

The stipulation that the company will not be liable unless the claim is presented "in writing within sixty days," is not a stipulation restricting the liability of the telegraph company for negligence. *Massengale v. Tel. Co.*, 17 Mo. App., 257. If it were, it would be void, as was held in *Thompson v. Telegraph Co.*, 107 N. C., 449; *Smith v. Telegraph Co.*, 83 Ky., 104; *Gillis v. Telegraph Co.*, 61 Vt., 461; 15 Am. St. Rep., 917, in which last case numerous authorities are cited. But this stipulation is rather against the neglect of the plaintiff in not making known his cause of complaint within a reasonable time. It is a reasonable requirement, enabling the company to inquire into the nature and circumstances of a mistake in or of the delay or nondelivery of the message, while the matter is still within the memory of witnesses. In view of the number of telegrams constantly passing over the wires, some such stipulation is absolutely necessary to protect the company from imposition. It is not a statute of limitations restricting the time within which action may be brought. This stipulation has been held reasonable in many decided cases cited by Freeman in his Notes, on p. 471 of 71 Am. Dec., as well as by a very recent case, *Telegraph Co. v. Dougherty* (Ark.), 11 L. R. A., 102. The period of sixty days has also been held a reasonable time in many cases (with scarcely any to the contrary), which are collected by *Judge Thompson* in his recent work, "The Law of Electricity," sec. 247. Such stipulation relieves (532) the telegraph company "from no part of their obligations. They are bound to the same diligence, fidelity and care as they would have been required to exercise if no such agreement had been made," since all that the stipulation requires is that the plaintiff should give notice of his loss "in season to enable the defendant to ascertain the facts." *So. Exp. Co. v. Caldwell*, 21 Wall., 264. There are, however, circumstances in which the stipulation for sixty days would be unreasonable, as was pointed out by *Judge Speer* in the U. S. C. C. in a late case, *Johnston v. Telegraph Co.*, 33 Fed., 362, as, for instance (as was the fact in that case as in this), where a prepaid message has never

been delivered. The Court goes on to say that a stipulation of thirty days after the message is *sent* would be unreasonable in such case, for the failure of the company to deliver it would deprive the plaintiff perhaps of all notice that a telegram had been sent to him, and the company could prevent all redress by holding the telegram till after the time within which it is stipulated that the demand on them must be made. In the case before us it is set out in the complaint that the company "contracted for special delivery and took the charges therefor," and that the message has never been delivered. The plaintiff has made no demand before suit brought, but the general rule that the commencement of an action is equivalent to a demand applies to cases of this kind. Thompson on Electricity, sec. 256. If, therefore, the action was begun within sixty days after knowledge by the plaintiff of the failure to deliver the message, it would be such compliance with the stipulation as could be required in a case where a message was not delivered at all. If not brought within such time, the plaintiff is barred by his own negligence in not presenting his claim within the specified time. It does not appear in the complaint when such knowledge came to the plaintiff, but it does appear therein that the message has not been delivered at all. Hence, the demurrer because the plaintiff did not present his claim within sixty days after the message was *sent,* was properly overruled. If defendant (533) wishes to insist that plaintiff did not give notice of his claim within sixty days after knowledge of the nondelivery, he must set this up by answer.

It appears in the complaint that the telegram was sent by his sister, whom the plaintiff had left in charge of his house in Indiana (his wife being dead), in regard to the illness of his daughter, its cost was prepaid out of plaintiff's funds, and it was directed to his father, at whose house, in this State, he was on a visit, "for the use and benefit," it is alleged, "of the plaintiff," and defendant contracted to deliver it at such house by special delivery. The telegram requested the father to tell the plaintiff to come home, that his daughter was very ill. The plaintiff, could, therefore, maintain the action both because the sister was his agent for the purpose of sending the telegram, and also because the plaintiff was the beneficial party in the contemplation of the contract of sending the message, since it was on its face sent for his benefit, and he was the party who alone would be injured by its negligent delay or nondelivery, and it is averred that the defendant received the message to be transmitted "for the use and benefit of" the plaintiff. The demurrer on the second and third grounds was, therefore, properly overruled. *Young v. Telegraph Co.,* 107 N. C., 370;

Adams v. Telegraph Co., 16 Am. St. 924; *Burton v. Larkin*, 36 Kan., 246.

Affirmed.

Cited: S. c., 116 N. C., 655, 658; *Lewis v. Tel. Co.*, 117 N. C., 438; *Roberts v. Ins. Co.*, 118 N. C., 434; *Cigar Co. v. Express Co.*, 120 N. C., 350; *Lyne v. Tel. Co.*, 123 N. C., 133; *Cashion v. Tel. Co.*, 123 N. C., 270; *Kennon v. Tel. Co.*, 126 N. C., 236; *Mfg. Co. v. R. R.*, 128 N. C., 283; *Meadows v. Tel. Co.*, 132 N. C., 42; *Bright v. Tel. Co., ib.*, 324; *Bryan v. Tel. Co.*, 133 N. C., 607; *Hunter v. Tel. Co.*, 135 N. C., 466; *Jones v. Water Co., ib.*, 554; *Dayvis v. Tel. Co.*, 139 N. C., 83; *Kernodle v. Tel. Co.*, 141 N. C., 445; *Helms v. Tel. Co.*, 143 N. C., 395; *Holler v. Tel. Co.*, 149 N. C., 344; *Sykes v. Tel. Co.*, 150 N. C., 432; *Austin v. R. R.*, 151 N. C., 139; *Deans v. R. R.*, 152 N. C., 172; *Forney v. Tel. Co.*, 152 N. C., 494, 495; *Barnes v. Tel. Co.*, 156 N. C., 154; *Alexander v. Tel. Co.*, 158 N. C., 479; *Penn v. Tel. Co.*, 159 N. C., 314, 315; *Ellison v. Tel. Co.*, 163 N. C., 12; *Hartsell v. Asheville*, 164 N. C., 196; *Lytle v. Tel. Co.*, 165 N. C., 505; *Betts v. Tel. Co.*, 167 N. C., 79; *Forney v. R. R., ib.*, 642; *Bennett v. Tel. Co.*, 168 N. C., 498; *Mason v. Tel. Co.*, 169 N. C., 230, 231, 233; *Culbreth v. R. R., ib.*, 725.

(534)

ELI HINSON v. J. L. POWELL ET AL.

Malicious Prosecution—Probable Cause—Evidence—Assignment of Error.

1. In an action for malicious prosecution it was in evidence that the defendant had caused the plaintiff to be twice arrested and tried upon the same charge, and upon each trial there had been an acquittal; the defendant offered testimony to show the motive of the justice who tried the last case which induced him to give the judgment: *Held*, to be incompetent.
2. Although the defendant had probable cause for the first prosecution, yet if he instituted the second for the same offense, and without additional evidence to that produced on the first, there was an absence of probable cause, which *prima facie* established malice as to that charge unless rebutted.
3. A general assignment of error to the charge of the judge will not be considered. It is not required that an exception to the charge shall be specifically noted at the time, but it is the duty of the appellant to make specific assignment of error in the charge in the case on appeal.

ACTION, to recover damages for alleged malicious prosecution tried at March Term, 1891, of COLUMBUS, before *Armfield, J.*

The plaintiff introduced evidence tending to show that he was arrested on a warrant of a justice of the peace issued at the instance of the defendant, J. L. Powell, charging him with disposing of mortgaged property. The warrant was executed "on the plaintiff by the sheriff who read it to him and told him when and where to appear for trial before the justice next day, but the sheriff did not lay hands on him or require a bond for his appearance. The case was tried before T. J. Emery, the justice of the peace, who, after hearing the evidence, adjudged the plaintiff not guilty, and dismissed the case at the cost of the defendant Powell. After this trial the defendant Powell, on being told that public opinion was against him in the matter, said that he intended to have the plaintiff up for disposing of this property (535) on every Saturday until the next court, in order to afford amusement for the boys." It was further in evidence that the plaintiff was arrested a second time on the same charge, and in the same manner, on a warrant issued by Justice Morrison upon the affidavit of defendant J. L. Powell. The action was removed for trial before Justice Stanley, who, after hearing the evidence (which was about the same as that introduced on the first trial), adjudged the plaintiff not guilty, and dismissed this second action at the cost of the prosecutor.

It appeared in evidence that the plaintiff had disposed of a black horse, which, together with his crop and other property, he had mortgaged to Powell & Co., the defendants; that he received for said black horse a gray horse, which plaintiff testified was worth more than the black horse, and immediately tendered the gray horse to defendant's agent, who told plaintiff to take it home and gather his crop with it.

Defendant J. L. Powell testified that he knew nothing of this tender until six months afterwards, and that the debt secured in the mortgage had never been paid. He also testified that in suing out the two warrants for defendant he acted under the advice of his attorney, and without any malice or ill will towards the plaintiff. But a witness for plaintiff testified that after the dismissal of the first warrant, and before the issuance of the second, the witness told defendant J. L. Powell that his attorney was advising him wrong, and he had better get another attorney; and that the said defendant replied that he did not need any lawyer, that he was lawyer enough himself to attend to this case.

A witness for defendant testified that the gray horse aforesaid was tendered to himself as agent of the defendants by plaintiff, upon condition that he would enter a credit of $100 on defendant's debt, which he declined. Defendant offered to prove by Justice Stanley, who tried the last warrant, the motive that induced him to dismiss said warrant. The plaintiff objected. His Honor sustained the objection, and excluded the testimony, and defendants excepted. (536)

His Honor instructed the jury that there was no evidence against the defendants, R. H. Powell and A. E. Powell, and directed a verdict for them; and charged the jury, among other things, that the plaintiff, before he would be entitled to recover, ought to satisfy them by a preponderance of the testimony that defendant had wilfully and maliciously prosecuted the plaintiff without probable cause, and caused him to be arrested and restrained of his liberty; that although they should find that the sheriff did not, in fact, lay hands on plaintiff or require of him a bond, yet, if the manner of executing the warrants was as testified to by plaintiff, it amounted to an arrest, and if it was procured by the defendant J. L. Powell with malice and without probable cause, plaintiff was entitled to recover of him some damages, and amount was for them to determine; that probable cause was a question of law to be decided by the court, and that when defendants sued out the first warrant and prosecuted plaintiff before Esquire Emery, that defendant had probable cause and plaintiff could not recover for this prosecution; that as to the second warrant, and trial before Esquire Stanley, if the jury should find, from the evidence, that the testimony produced by the defendant against the plaintiff on the second trial was the same as that introduced by him on the first trial, and defendant was in possession of no additional evidence tending to show plaintiff's guilt at the second trial and it had appeared in evidence at the first trial that plaintiff, in disposing of the mortgaged property, had acted in good faith and without intent to defeat the rights of the mortgagees, then in this second proposition, tried before Esquire Stanley, the defendant J. L. Powell had acted without probable cause, and that the want of probable cause was evidence which *prima facie* established malice on the part of the defendant, but that this might be rebutted by the defendant,
(537) and it was for them to say, whether the evidence of the defendant himself, that he had acted without malice, or any other evidence in the case, was sufficient to rebut the presumption of malice arising from the want of probable cause, if they should find such want of probable cause from the evidence, and upon the instructions given them above upon that subject.

The defendant excepted to the charge as above set forth, though no special instructions were asked.

There was a verdict for plaintiff against J. L. Powell.

Motion for a new trial. Motion overruled. Judgment and appeal.

D. J. Lewis and J. B. Schulken (by brief) and W. G. Burkhead for plaintiff.

French & Norment (by brief) for defendant.

DAVIS, J., after stating the case: The first exception presented is, that his Honor excluded the testimony offered by the defendant to prove the motive that induced Justice Stanley, who tried the last warrant, to dismiss the same. It is alleged in the complaint, and admitted in the answer, that upon both the first and second trials the plaintiff was adjudged not guilty, and the warrants were dismissed at the cost of the prosecutor. The entry of the judgment must speak for itself, and unless reversed, is conclusive. It has been held that a juror will not be heard to impeach a verdict of a jury, but the testimony for that purpose must come from some other source. *S. v. Smallwood,* 78 N. C., 560; and we know of no authority, and counsel for appellant cite none, that will warrant a judge or justice of the peace to state the motive by which he was governed in rendering his judgment. The judgment is conclusive. *Davie v. Davis,* 108 N. C., 501, and the cases there cited. If it be said that on a trial before a magistrate the merits of the prosecution were not inquired into, the answer is that it was (538) perfectly competent for the defendant upon the trial in this action to justify his prosecution, not only by showing the guilt of the plaintiff, but by simply showing that he had a probable cause for prosecuting him, and the exception cannot be maintained.

The second exception was "to the charge as above set forth." No special instructions were asked for. The charge is set out at length, and contains several distinct propositions of law applicable to the several phases of the evidence, as the jury may find the facts to be, and this exception is general. This Court has said: "A general exception to the charge without assigning errors specifically, will not be considered in this Court." *McKinnon v. Morrison,* 104 N. C., 354, and the numerous cases there cited.

But counsel for the defendant say: "The Court cannot intend to hold, in *McKinnon v. Morrison,* that where the judge improperly lays down the law to the jury, you not only have to except, but that you have to except specifically, for some of the cases cited by the Court in that case held expressly the other way." We think counsel misapprehend *McKinnon v. Morrison,* and the cases cited. It is not required that the exception shall be specifically noted at the time, for the whole charge may be deemed excepted to, but it is "the duty of counsel to make specifically an assignment of errors in the charge when making up the case on appeal." *Lowe v. Elliott,* 107 N. C., 718; *S. v. Black, post,* 856. This has not been done, but it is not improper to add that we have examined carefully the charge of the judge before whom this action was tried, in the light of the error specifically alleged in the brief of counsel for the appellant, and we can see no error of which the defendant can complain. His Honor expressly instructed the jury that the

defendant had shown probable cause for the first warrant, and the plaintiff could not recover for that, but he submitted the question
(539) fairly to the jury upon the second warrant, and we think that there was abundant evidence to support the verdict of the jury upon that prosecution. There is no error.

Affirmed.

Cited: S. v. Best, 111 N. C., 643; *Coble v. Huffines,* 132 N. C., 401; *S. c.,* 133 N. C., 424.

D. L. GORE v. R. B. LEWIS AND WIFE.

Usury as a Defense—Custom to Supersede Law—Unsatisfactory Report of Referee—Practice.

1. In an action to recover judgment upon notes secured by mortgage and for a foreclosure of the mortgage, the defense of usury may be pleaded, and if established, the plaintiff forfeits the entire interest. The rule is otherwise when the debtor comes into court asking equitable relief; he must then do equity by paying legal interest.
2. The custom of merchants will not be permitted to modify the usury laws.
3. Exceptions to an unsatisfactory report of a referee will be disregarded, and the court below directed to recommit, with instructions to restrict the account in accordance with the opinion of the Supreme Court.

ACTION, heard before *Armfield, J.,* at March Term, 1891, of COLUMBUS, upon exceptions to the report of a referee.

Both parties appealed.

S. C. Weill for plaintiff.

W. G. Burkhead and D. J. Lewis for defendant.

MERRIMON, C. J. The plaintiff brought this action to recover the money due upon two promissory notes executed to him by the defendant, one for $250 due 1 March, 1887, the other for $500 due 1
(540) March, 1888, both bearing interest at the rate of eight per centum per annum, and to foreclose a mortgage of the defendant's real and personal estate made to secure these notes. The defendant admits the execution of the notes and mortgage, but he alleges that they are founded upon a usurious consideration, and hence the plaintiff has forfeited the entire interest which the notes carry with them.

This is not a case where the debtor comes into the court asking equitable relief against the usurious debt or transaction of the defendant. The fact that the plaintiff asked the court for a decree of foreclosure did not deprive the defendant of his legal statutory defense. In such case, the plaintiff would be required to pay the honest debt and the lawful rate of interest, upon the just maxim that he who asks equity must do equity. *Purnell v. Vaughan,* 82 N. C., 134; *Manning v. Elliott,* 92 N. C., 48. But in cases like the present, the strict rule of law applies. The creditor seeks to recover and enforce payment of his usurious debt, and the defendant, alleging the usury as matter of defense, is entitled to have the full measure of it as allowed by the statute (Code, sec. 3836), which provides that "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section (that fixing the rate of interest) when knowingly done, shall be deemed a forfeiture of the entire interest which the note, or other evidence of debt carries with it, or which has been agreed to be paid thereon." And such defense may be alleged and proven in this and like actions to recover judgments upon the mortgage debt and foreclose the mortgage by a sale of the property. *Arrington v. Goodrich,* 95 N. C., 462; *Grant v. Morris,* 81 N. C., 150.

The case as it comes to us is not very intelligible. The exceptions of the plaintiff and defendant to the report and amended report of the referee are confused. It seems that the facts found proved the alleged usury, but it likewise appears that the court allowed the (541) plaintiff interest at the ordinary rate upon the principal of his debt, upon the ground, it seems, that the plaintiff was entitled to interest upon his debt purged of the usury. This is error. If usury is not proven, then the plaintiff is entitled to interest at the rate of eight per centum per annum, as that rate is stipulated for in the notes. If the defense of usury shall be proven, then, the plaintiff will forfeit the interest under the statute.

It seems that the plaintiff insisted that a custom of merchants in the city of Wilmington, where he resides and does business as a merchant, warranted the taking of interest in a way that was greater than that allowed by the statute and stipulated for in the notes. This contention is without foundation. Such custom, whatever it may be, cannot supersede or modify the statute. It was possible that such custom might in some possible view of the case go to show that he did not, in fact, "knowingly" take, receive or charge an unlawful rate of interest.

As we see the reports of the referee and the exceptions thereto, they are not satisfactory, and we deem it proper, with a view to justice, to overrule and disregard the exceptions of the parties and direct the court below to set the judgment aside, and recommit the report to the referee

with instructions to make inquiry and report as to the alleged usury, and restate the account in accordance with this opinion. *Grant v. Bell,* 90 N. C., 558; *Burke v. Turner,* 89 N. C., 246; *McCampbell v. McClung,* 75 N. C., 393.

Both the plaintiff and defendant appealed, and what we have said applies to and disposes of both appeals. Judgment reversed and action Remanded.

Cited: Moore v. Beaman, 111 N. C., 331; *S. c.,* 112 N. C., 560; *Riley v. Sears,* 154 N. C., 517; *Owens v. Wright,* 161 N. C., 131, 141; *Noland v. Osborne,* 177 N. C., 17.

(542)

J. B. CORNELIUS ET AL. v. V. Y. BRAWLEY.

Will, Execution and Probate—Evidence—Witness—Issues—Judge's Charge.

1. Upon the trial of an issue *devisavit vel non,* the form of the issue, "Is the paper-writing propounded . . . and every part thereof the last will and testament of the deceased?" is in accordance with the precedents, and proper.
2. The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valuable papers of the deceased.
3. An instruction to the jury that the burden of establishing the authenticity of the script offered as a will was upon the propounders, and the proof thereof must be "affirmative and *direct,*" was correct, and a substantial compliance with a prayer for instruction that such proof must be "affirmative and *distinct.*"
4. Where the proof showed that the script propounded as a holograph will was found in a small drawer of a bookcase, in the room which the alleged testator occupied at his death, with his deeds and other papers, held to be such a finding "among the valuable papers of the decedent" as will, in connection with the other evidence required by the statute in respect to handwriting, authorize its probate.

Devisavit vel non, tried before *Graves, J.,* at February Term, 1891, of IREDELL.

The paper-writing, bearing date 5 July, 1888, together with a paper appended as a codicil, bearing date 5 March, 1889, purporting to be the last will and testament of W. J. Brawley, deceased, is without subscribing witnesses. It was propounded as the will of said decedent by the persons named as executors therein, and was admitted to probate *ex*

parte, by the clerk of the Superior Court of Iredell County, on 10 May, 1889, upon the oath of one J. M. Shook that the said will and codicil thereto were found among the valuable papers and effects of the said W. J. Brawley after his death, and upon the oath of J. B. Cornelius, J. W. A. Kerr and M. D. Hobbs, that the name of (543) W. J. Brawley subscribed thereto, and the said will itself and the codicil thereto, and every part thereof, is in the handwriting of said W. J. Brawley. On 6 November, 1889, a *caveat* thereto was filed by V. Y. Brawley, a son of the deceased, whereupon an issue as to the validity of the instrument, was drawn up and sent to the Superior Court for trial before a jury, in the following form: "Is the paper-writing propounded by J. B. Cornelius and T. O. Brawley, and every part thereof, together with the codicil attached thereto, the last will and testament of W. J. Brawley, deceased?" without exception thereto.

When the cause came on for trial the caveator tendered the following as the proper issues raised by the allegations made by the propounders and the caveator as shown by the record:

1. Was the paper-writing bearing date 5 June, 1888, and purporting to be the last will and testament of W. J. Brawley, deceased, together with the paper appended as a codicil thereto, bearing date 5 March, 1889, found among the valuable papers and effects of said decedent, at or after his death?

2. Is said paper-writing, together with the paper appended as a codicil, and every part thereof, in the handwriting of W. J. Brawley?

3. Did the alleged testator intend said paper-writing, together with the paper appended as a codicil, and every part thereof, to be his last will and testament?

The court declined to change the issue, and directed the trial to proceed on the issue made up by the clerk. Caveator excepted.

The propounders offered Mrs. N. M. Brawley as a witness, to show where the script was found. The caveator objected to the competency of the witness, on the ground that she is the widow of decedent named as a legatee and devisee in the proposed paper-writing, and not having dissented from its provisions, is excluded from showing (544) any fact that would constitute publication of the script. Caveator further objected that witness could not be allowed to testify under section 2147 of The Code. Objections overruled, and the caveator excepted, and the witness testified:

"I have seen this paper before. The next day after Mr. Brawley was buried I found this paper in the little drawer of the bookcase, where he kept his deeds, and where his deeds were when I found the paper. I handed it to Mr. Shook to read."

Cross-examined.—"I did not examine any other papers that were in the drawer where I found this paper at the time I found it. I knew where Mr. Brawley kept his deeds. His deeds were tied up in a bundle. I cannot tell what deeds they were. I did not examine the other papers, but saw they were his deeds. I do not remember that I took hold of any other papers in the drawer than this one. I did not read them. I made no other examination; saw the deeds were there when I took the will out."

J. M. Shook, a witness for the propounders, testified: "I live a quarter of a mile from where W. J. Brawley lived. I was at his house the next morning after his burial. I have seen this paper before; saw it first on the morning after his burial. It was in an envelope handed to me by Mrs. Brawley. I broke the seal and read it. It is in the same condition now as when I first saw it."

Cross-examined.—"I believe T. O. Brawley handed me the envelope containing the will. I was on the porch and Mrs. Brawley and T. O. Brawley went in the house. I saw them go to the desk, or bureau, but did not see the drawer opened. I saw them through the window. I do not know of my own knowledge where the will was found, but T. O. Brawley brought it out of the house and handed it to me."

This witness also testified that he knew the handwriting of
(545) W. J. Brawley, and that both papers, that dated 5 June, 1888, and that dated 5 March, 1886, together with the signatures of both, were in the handwriting of said W. J. Brawley.

Three other witnesses, J. H. Thompson, J. B. Cornelius and M. D. Hobbs, testified to the same effect as to the handwriting of the script, including both papers and the signatures thereto, and every part thereof. Propounders then read the script as set out in the record, and rested.

Caveator introduced no testimony, and requested the court to instruct the jury as follows:

2. "Even if the jury should be satisfied from the testimony that the script and every part thereof is in the handwriting of the deceased, that would not be sufficient to satisfy them that it was intended by the deceased as his last will and testament; the burden is on the propounders to further show that the paper was found among the valuable papers and effects of the deceased, at or after his death, by affirmative and direct proof; and such fact cannot be found by the jury, unless the testimony as to where it was found proves the fact affirmatively and distinctly.

3. "If the jury believe that the witness, Mrs. N. M. Brawley, did not examine the papers in the drawer, where she testifies she found the paper-writing after the death of deceased, in order that she might know what papers were in the drawer, and of what value they were at

the time, she is not a competent witness to prove the fact that the papers in the drawer at the time were valuable. Her opinion as to their value, when she is not able to inform the jury what the papers were, is not conclusive of that fact, and does not comply with the requirement of the law as to the degree of proof; that the fact of their value should be shown affirmatively and distinctly."

These requests were refused, except as embodied in the charge of the court, which was as follows: (546)

In order to make proper proof of such a will, these facts must be proven, and proven in the way pointed out by the law: first, that the paper-writing is in the handwriting of the alleged testator; and, second, by direct and affirmative proof that it was found after his death among the valuable papers. The first must be proven by at least three witnesses, and the other proven so as to satisfy the jury by a preponderance of the testimony. Bearing these guides and directions in mind, you must now consider the issue presented to you. The first fact to be ascertained is whether the paper-writing is in the proper handwriting of W. J. Brawley, and whether that fact has been proven by three or more witnesses, as required by law. If the propounders have failed in this, you need not go any further, but if by three witnesses or more the propounders have proven the paper-writing to be in the proper handwriting of W. J. Brawley, then you must inquire whether it was found among his valuable papers.

If the papers were found in a small drawer in the desk or bookcase in the room which W. J. Brawley had occupied at the time of his death, and with his deeds and other papers, then in law it was found in such place as the law recognizes as among his valuable papers. As to whether the paper was found among the valuable papers of W. J. Brawley, you must consider the testimony of Mrs. Brawley, and also the testimony of the witness Shook as to what he saw. You will remember Mrs. Brawley said the papers were found in a sealed envelope in a little drawer in the desk or bookcase in the room occupied by Brawley at the time of his death, with his deeds and other papers. The burden of proving the facts required to be shown under the statute rests on the propounders, and the facts must be proven affirmatively and directly that the paper-writing is in the handwriting of W. J. Brawley, and that it was found among his valuable papers. You must be satisfied that the paper-writing is in the handwriting of Brawley, (547) and you must also be satisfied that the paper-writing was found among the valuable papers of W. J. Brawley before you can find for the propounders. If you are satisfied that the paper-writing is all and every part of it in the handwriting of W. J. Brawley, and that it was found inclosed in a sealed envelope in a small drawer in the desk or

bookcase in the room occupied by W. J. Brawley, and in the same drawer in which he kept his deeds, and in which there was a bundle of deeds tied up when the paper was taken out of the drawer, then you ought to answer the issue "Yes." But unless you are satisfied that the paper is in the handwriting of W. J. Brawley in all its parts, and that it was found among his valuable papers, your answer should be "No."

The jury answered the issue "Yes."

Motion for a new trial, by caveator, assigning error as follows:

First. That the court erred in refusing to submit the issues tendered by caveator.

Second. That the court erred in not holding that the witness, Mrs. N. M. Brawley, not having dissented from the provisions of the paper-writing, was entirely incompetent to prove the fact of the finding thereof by reason of her interest as legatee and devisee, and in holding that she should be admitted to prove such fact under section 2147 of The Code.

Third. That the court erred in refusing to instruct the jury as asked for by caveator in his second prayer for instructions.

Fourth. That the court erred in refusing to instruct the jury as asked for by the caveator in his third prayer for instructions.

Fifth. That the court erred in charging the jury that the fact (548) of finding the paper-writing among the valuable papers of decedent after his death must be proven so as to satisfy the jury by a preponderance of the testimony.

Motion denied. Judgment for the propounders, from which caveator appealed.

Armfield & Turner (by brief) for propounders.
Hugh W. Harris (by brief) for caveator.

CLARK, J. The issue submitted arose on the pleadings, and was such as afforded either party opportunity to present any view of the law arising upon the evidence through the medium of pertinent instructions, and was therefore sufficient (*Humphrey v. Church, ante,* 132; *McAdoo v. R. R.,* 105 N. C., 140; *Denmark v. R. R.,* 107 N. C., 187; *Leach v. Linde,* 108 N. C., 547), and indeed, follows the precedents in such cases, Eaton's Forms, 282.

The issues suggested by appellants presented rather evidential than constitutive facts, and were properly rejected. *Grant v. Bell,* 87 N. C., 34; *Patton v. R. R.,* 96 N. C., 455.

The widow, who was named as a legatee and devisee in the will, was properly held competent to prove that it was found, after the testator's death, among his valuable papers. Code, sec. 589, removes disqualification on account of interest. The witness is not disqualified under sec-

tion 590, for she does not testify as to any personal transaction or communication with the deceased, nor is she affected by section 1350, which applies only to attesting witnesses to the execution of the will. *Hampton v. Hardin,* 88 N. C., 596. Indeed, as to them, section 2147 expressly provides that the attesting witness, who is also a beneficiary under the will, shall be admitted as a witness to prove its execution or validity. The disqualification imposed is not upon him as a witness, but to receive benefit under the will attested and proven by him. So that if the witness here had even been an attesting witness to the will, the court would have been compelled to admit her as a witness. *Ves-* (549) *ter v. Collins,* 101 N. C., 114.

The charge as given was a substantial compliance with the prayers for instruction, so far as they were proper to be granted. The appellant cannot, therefore, justly complain. *McDonald v. Carson,* 94 N. C., 497.

Nor is there any merit in the exception that the court told the jury that the finding of the paper-writing among the valuable papers of decedent, after his death, must be proven so as to satisfy the jury by the preponderance of the evidence. It is true the appellants had introduced no evidence to contradict the evidence offered to show such finding, but they had assailed such evidence on the ground of the interest of the witness, and the alleged uncertainty of her testimony. This paragraph of the charge was a mere laying down of the general legal principle which the court afterwards applied to the case in hand by telling the jury that the burden was on the propounders to prove "affirmatively and directly" that the paper-writing was in the handwriting of the deceased in all its parts, and that it was found after his death among his valuable papers, and that if the jury were not satisfied as to those matters they should answer the issue in the negative. It would not be just to detach a sentence or paragraph of a charge thus from its context. The charge is clear, intelligent and, we think, correct. The instruction that the proof of the facts above referred to must be "affirmative and direct," is a sufficient compliance with the prayer that it should be "affirmative and distinct," which counsel insists on because it was used in *St. John's Lodge v. Callender,* 26 N. C., 335. In the opinion in that case both expressions are used by *Ruffin, C. J.,* and they are treated by him as synonymous.

No error.

Cited: Collins v. Collins, 125 N. C., 103; *McEwan v. Brown,* 176 N. C., 252.

(550)

B. W. NASH, TRUSTEE, v. JULIUS E. SUTTON ET AL.

Churches—Religious Societies—Trustee—Jurisdiction—Appeal.

1. A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the *cestui que trust.*
2. In the absence of such trustee and a governing body authorized to appoint, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest.
3. A trustee of a religious society instituted a special proceeding, in which he demanded judgment that certain other trustees should be removed and that a lost deed should be set up and a trust therein declared. A demurrer for misjoinder of causes of action was sustained by the clerk, and affirmed on appeal by the judge: *Held,* (1) that there was no error in sustaining the demurrer; (2) that the question of jurisdiction being involved in the appeal from the clerk, the plaintiff, on the hearing thereof, would not be allowed to abandon the causes of action of which the clerk could not take cognizance, and rely upon that of which he had jurisdiction in order to acquire a status in the court in term-time.

SPECIAL PROCEEDINGS, heard by *McIver, J.,* at chambers at Kinston, N. C., 2 September, 1891, on appeal of the plaintiff from the judgment of the clerk, of LENOIR, in sustaining the demurrer of defendants and dismissing the action.

The petition of the plaintiff alleged, in substance:

That on or about the ____ day of _____, 1872, the defendants, Julius E. Sutton and wife, Nansetta Sutton, executed unto B. F. Sutton, Jr., and others, trustees of the Baptist church at Hickory Grove, Lenoir County, a deed of trust conveying the described land; that said deed was duly probated and recorded, but the records contain-
(551) ing the registry were destroyed in the burning of the courthouse, about the ____ day of _____, 1878, and there is now no copy of said deed in existence, and the original deed is lost or destroyed; that the said trustees entered into and accepted the trust, and took possession of the lands as above conveyed, for the use and benefit of the said Baptist church and Baptist denomination, and for the use and benefit of the members thereof; that the various Baptist churches in the counties of Wayne, Duplin, Pender, Greene and Lenoir organized the Union Association of the Baptist churches, and the church at Hickory Grove became a member; that this plaintiff was, at the time of the organization of the said Union Baptist Association, a member of the

Baptist church at Hickory Grove, and is still a member of said Baptist church at Hickory Grove; that the said defendant trustees "on or about the ____ day of _____, 1885, contrary to the law in such cases made and provided, and contrary to their most solemn religious covenants and agreement, violently and unlawfully abused their most solemn trust as trustees of the Baptist church at Hickory Grove, and did unlawfully connive with, aid and abet and unlawfully make attornment, and did unlawfully affiliate and join with, and render possession of said Baptist church at Hickory Grove to the Methodist Protestant denomination, and the said defendants do so now unlawfully hold the said church and premises, contrary to their most solemn trust and obligation, and contrary to the law in such cases made and provided, and are incompetent to execute said trust according to its true intent and meaning."

That the plaintiff was duly appointed as agent and sole trustee of Union Baptist Association on 2 October, 1886, with power to act in the premises. "Wherefore, this plaintiff prays that a summons may be issued by this Court to the said defendants to show cause, if any they have, why an order should not issue from the court to the county commissioner, and procession the above said lands, and (552) the court declare the right, title and interest of this plaintiff on behalf of himself and other *cestuis que trustents* under the above said deed of conveyance, and the court remove said trustees and appoint one or more trustees to execute said trust according to its true intent and meaning."

The defendants demurred to the complaint, and assigned as ground thereof, among others:

3. For that there is a misjoinder of several distinct and independent causes of action: (1) to have the land processioned, and the contents of the lost deed declared; (2) to have a trust estate in said lands declared in favor of plaintiff; (3) to have the defendants' trustees removed, and to have one or more trustees appointed in their stead.

The third ground of demurrer was sustained by the clerk, and on appeal to the judge the judgment was affirmed, and plaintiff appealed.

H. E. Shaw for plaintiff.
George Rountree and W. R. Allen for defendant.

AVERY, J. The statutes in reference to religious societies (Code, ch. 54) provide amply for securing the title to lands once conveyed for a church site for the benefit of the people constituting the congregation that worship in it. The legal estate vests in the trustees to whom it may be conveyed for the use of a church, congregation, denomination

or society, or *"in case there shall be no trustees,"* then in the congregation, etc., respectively, *according to such intent.* Section 3665.

To the end that the higher courts and governing corporate bodies of the various religious denominations may have the oversight of such property and manifest some interest in repairing, improving and using it, they are empowered to appoint trustees to hold property con-
(553) veyed for the benefit of particular congregations, on failure of those originally appointed, or where none are appointed, and also to hold such lands as may be donated, devised or bought for the use of such governing bodies. Section 3667.

If the plaintiff was appointed a trustee by a body of the denomination, which, as he alleged, was authorized to make such appointments, he would have the right to maintain an action before the proper tribunal to restore a lost deed, which conveyed lands to trustees who have proved faithless to their trust and attempted to wrest property from the original beneficiaries and turn it over to others. When a proper proceeding is instituted, the law is not powerless in the presence of any such fraud. It is not our province to know or decide judicially whether congregational government or representative government prevails in any given denomination. Where the authority is claimed for a body under their system of church government, such an allegation must be treated as true and acted on, if it be distinctly alleged and admitted by demurrer or otherwise. If the authority does not exist, the question of power may be tried on an issue raised by an answer.

On the other hand, where, as a fact, there is no higher governing body in any denomination than the congregation, every member has such a beneficial interest as would enable him, in behalf of his brethren and associates, to maintain an action to restore a lost title deed for the church at which he worships, and for the removal of trustees who have attempted to defraud their beneficiaries, and for the substitution of others or the adjudication that the title is in the congregation at large. Code, sec. 185.

The plaintiff brings the action as a trustee appointed by the association, and neither he nor any other member of the congregation joins as equitable owners under the conveyance.

If the action had been brought originally in the Superior Court at term time by the plaintiff in such capacity that he could show himself a party in interest, as alleged, he would be entitled to set up the
(554) lost deed and have the faithless fiduciaries of his church removed.

But when he elected to apply to the clerk for the removal of the trustees, and for an order to procession the land, and likewise set up a lost record, he could not on the hearing of an appeal involving the very question of jurisdiction, rightfully insist, according to the construction

given by this Court to The Code, that the judge should ignore a well founded exception to the clerk's ruling, and dispose of all matters in controversy as if the summons had been returnable in term. *Capps v. Capps,* 85 N. C., 408. Neither does the later statute (Laws 1887, ch. 276) apply in this case. The purpose of that act was to provide, in all cases where a special proceeding should be brought from the clerk to the court in term to pass upon an issue of law or try an issue of fact, that the higher tribunal might at its discretion pass upon without remanding any question involved in the controversy of which the clerk might take cognizance, if the cause were sent back. But it was not contemplated by the Legislature that under its provisions a party who should be *coran non judice* before the clerk, could take advantage of his own mistake or purposely make it in order to obviate a well grounded objection to the jurisdiction, and secure by indirection what he could not obtain directly, a hearing before the judge as a court of original jurisdiction, just as if he had brought an action instead of a special proceeding.

If the plaintiff can establish the authority of the religious body under which he claims to act as trustee, to clothe him with the functions of that place, he can institute and maintain in the Superior Court at term an action to restore the lost deed and to have the faithless trustees removed, because if he is rightfully appointed, the legal estate would vest in him under the statute (section 3667) upon either the death or removal of the original trustees to whom the land was conveyed. On the other hand, as a member of a congregation, all of whom it is in- (555) convenient to join, he may maintain an action under section 185 of The Code, if the system of government shall prove to be congregational, because the statute provides that the beneficial interest in lands given for churches shall at all events vest in the members of the congregation, and on failure of trustees, and when no provision is made for that contingency by a higher governing body, the legal estate (under section 3665) also vests in the congregation. There was no error, therefore, in the judgment of the court sustaining the demurrer to the jurisdiction of the clerk to restore a lost deed.

Affirmed.

Cited: S. c., 117 N. C., 235.

CHRISTIAN ISLEY v. JOHN BOON ET AL.

Evidence—Records.

Secondary evidence is admissible to show the contents of records of courts when the loss or destruction of such records has been established.

ACTION to recover land, tried at March Term, 1891, of ALAMANCE, *Boykin, J.*, presiding.

On the trial it became material for the plaintiff to produce in evidence the record of a special proceeding, and the following is so much of the case stated on appeal for this Court in respect thereto as need be reported:

The plaintiff proposed to show a sale of the land in controversy by E. S. Parker, administrator of Samuel Adams, deceased, on 3 April, 1876 (under special proceeding taken by him in the Superior Court of Alamance County, for the purpose of creating assets for the (556) payment of debts of his intestate), to John Ireland, the last and highest bidder, and a deed made on 5 January, 1881, to the heirs at law of the said John Ireland, who had theretofore died intestate, after having paid the whole of the purchase money for the said land to the administrator, Parker.

To establish such special proceeding, the plaintiff put in evidence two summonses issued by the clerk of the Superior Court of Alamance County, bearing date 27 November, 1875, entitled *E. S. Parker as administrator of Samuel Adams v. John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety,* both of which had been served; also the petition of *E. S. Parker, administrator of Samuel Adams, deceased, against John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety,* filed in said court, praying for a license to sell the real estate described in the petition, the same being the land in controversy in this action, as the property of Samuel Adams, deceased, to create assets for the payment of the debts of his intestate, subject to the right of dower of the widow of said deceased, which said petition was verified before the clerk of said court on 20 January, 1876. Plaintiff also introduced an order directing publication to be made in the *Alamance Gleaner,* a paper published in Alamance County, for six weeks.

The plaintiff then introduced the clerk of the Superior Court of Alamance County who testified that the two summonses, together with the petition of E. S. Parker, administrator of Samuel Adams, deceased, and the order of publication, which were introduced by the plaintiff, were (records) found by him in the office of the Superior Court of Alamance County. He also proved that W. A. Albright was his immediate prede-

cessor in the clerk's office, and that he well knew his handwriting, and that the signature to the two summonses and, also, to the verification to the petition and the signature to the order for publication, were his handwriting. Witness also testified that the case of *E. S. Parker, administrator of Samuel Adams, deceased, against John Adams, John Boon and wife, Robena, Jacob Hicks and wife, Piety,* ap- (557) peared in the summons docket of said Superior Court, and further, that he had made diligent search in his office for the order of sale, the report of sale, the decree confirming the sale by E. S. Parker as administrator to John Ireland, or any other papers or records belonging to said case in said office, but was unable to find such, and that he found no other entry of the case upon docket or records other than the statement of the case and the issuing of the summons. He stated that he found no minutes, or memorandum, or order upon said records.

The plaintiff then introduced E. S. Parker, the administrator of Samuel Adams, deceased, and after exhibiting a written notice to the defendants that the plaintiff would offer parol evidence of the existence of the records and orders and proceedings in the special proceeding for the sale of the land of the said Samuel Adams, deceased, and the loss or destruction of said records, and of the plaintiff's purpose to show the contents thereof by parol, proposed to prove by him the issuing of the summons hereinbefore mentioned and the fact of the filing by himself, in the office of the clerk of the Superior Court, of the petition, hereinbefore mentioned, for the sale of land to make assets, and an order for publication, and that the said petition and order were in his handwriting and signed by him as attorney and petitioner, and were the original papers they purported to be. Plaintiff further proposed to prove by said witness the existence of an order adjudging that publication had been made for the defendant John Adams, a nonresident, and of a decree of the said court in the said special proceeding directing him, as the administrator of Samuel Adams, to sell the land described in his petition at public auction at the courthouse in Graham, to the highest bidder, for cash, after duly advertising the same, and that the proceeds of the sale be assets in his hands for the payment of debts, it being adjudged that there was no personal estate of said intestate with which to pay debts; also, that he made said sale, after due ad- (558) vertisement, on 3 April, 1876, at the courthouse in Graham, when and where John Ireland became the purchaser at the price of $50.50, and paid the purchase-money down, and that he made no report of said sale to the court; also, a decree of the court made confirming said report and sale and directing the said administrator to make title in *fee* to the purchaser; and further, proposed to prove by said witness that the said John Ireland having died soon thereafter, after having

paid for said land, he made and executed a title deed to the heirs at law of the said John Ireland, deceased, being the grantors named in the said administrator's deed, which deed was made on 5 January, 1881. And plaintiff further proposed to prove by said Parker that he afterwards saw, on several occasions, said special proceeding, petition and other orders, order of sale, report of sale and decree confirming said sale, etc., in the clerk's office as records of said court, and knew that all of said orders did exist and were on file in said office, and that diligent search has been made since in said office for them. Upon objection by the defendants to the proposed evidence of the witness E. S. Parker, as hereinbefore set forth, the court sustained the said objection and refused the proposed evidence, to which ruling of the court the plaintiff excepted.

The plaintiff then proposed to introduce in evidence the deed executed by E. S. Parker, administrator of Samuel Adams, to J. R. Ireland, W. F. Ireland, Samuel Ireland, W. S. Caffey and wife, Caroline, C. Isley and wife, Louisa, for the land in controversy, bearing date 5 January, 1881, which deed has been duly proven and registered, and insisted upon the title derived from said deed, as well as recitals contained therein, as evidence of the existence of the record and
(559) other proceedings recited in said deed under the law and the maxim, *"omnia prasumuntur rite esse acta."*

The court, upon objection of the defendants, refused to admit the evidence offered, and the plaintiff excepted.

Upon the intimation of the court, the plaintiff submitted to nonsuit and appealed.

L. M. Scott for plaintiff.

W. P. Bynum, Jr. (by brief), J. B. Batchelor and J. A. Long for defendant.

MERRIMON, C. J., after stating the case, proceeded: The evidence proposed and rejected on the trial must be accepted for the present purpose as true, because it was material, and if it had been submitted to the jury they might have believed and so treated it.

The facts showed that material parts of the record of the special proceeding referred to had been lost or destroyed. The clerk of the court, the proper custodian of the record, made diligent search in his office for such parts of it as were alleged to have been lost, and he was unable to find them. It must be taken that he made such search where, regularly, they ought to be, and generally through his office, where he might hope to find them. *McKesson v. Smart,* 108 N. C., 17. He failed to find them, if they ever existed. They were lost or destroyed. It

is not suggested that they were not, nor did the court found its opinion upon such supposition.

Then, if the parts of the record specified were lost or destroyed, it was clearly competent to prove on the trial by secondary evidence such loss or destruction, and also what the nature, meaning and purport of such lost parts were. It has been so expressly decided. In *Mobley v. Watts,* 98 N. C., 284, *Justice Davis* said: "If the *record is lost* and is ancient, its existence and contents may sometimes be presumed, but whether it be ancient or recent, after proof of the loss, its contents may be proved like any other document, by secondary evidence, where (560) the case does not from its nature disclose the existence of other and better evidence." This case, it seems to us, plainly comes within what is said and decided in the case just cited. Indeed, it is well settled that where the record is lost, and it appears that it existed and its purpose and contents appear, it may be proven on the trial of any action where it becomes material, by secondary evidence. The loss or destruction of the record should, however, be made to appear clearly before receiving such second evidence. *Stanly v. Massingill,* 63 N. C., 558; *Yount v. Miller,* 91 N. C., 331; *Hare v. Holloman,* 94 N. C., 14.

There is error. The judgment of nonsuit must be set aside, and the case disposed of according to law.

Error.

Cited: S. c., 113 N. C., 250; *S. c.,* 115 N. C., 195, 198; *Thompson v. Lumber Co.,* 168 N. C., 228.

DECYRUS AVERITT v. JACOB ELLIOTT.

Deed, Void and Voidable—Mortgagor and Mortgagee—Sale—Equity of Redemption—Pleading.

1. A mortgagee who purchases at his own sale, directly or indirectly, takes the legal estate thereby acquired subject to the mortgagor's equity of redemption; such sale is voidable, but not void.
2. Where a mortgagee purchased at his own sale, and then conveyed to a third party, who brought an action to recover possession, to which the mortgagor (defendant) interposed a general denial: *Held,* that the legal estate having passed to the plaintiff, he was entitled to recover, the defendant not having set up in his answer the facts which he insisted made the sale void.
3. The rule that, in an action to recover land, any deed offered in support of the title set up may be attacked on the trial without pleading the matter of attack, does not extend to deeds which are effectual to pass title until they are avoided in some proper proceeding.

(561) ACTION for possession of land, tried at the November Term, 1890, of CUMBERLAND, before *MacRae, J.*

The complaint was in the usual form adopted in such cases, and the answer contained only a general denial of the allegations of title and right to possession and damages for detention. In addition to the three issues involving these denials, the following was submitted by the court, numbered 4, viz.: "4. Was the sale by John Averitt under the mortgage, and the bidding in by Nimocks, and assignment of the bid to the plaintiff, an arrangement by which the land was bid in for John Averitt?"

The plaintiff offered in evidence:

1. A deed from Jacob Elliott and wife to James A. Gainey, agent, 7 March, 1883, and a note secured thereby, and an assignment of the same to John Averitt, 2 February, 1884. This deed and assignment covered the land in the complaint.

2. A deed from John Averitt and wife to Decyrus Averitt, the plaintiff, executed 1 February, 1886, reciting sale, etc., under the mortgage.

Plaintiff rested.

The defendant offered in evidence a deed for the same land from Decyrus Averitt to George A. Guy, 29 September, 1888.

Jacob Elliott the defendant, testified at great length, admitting that he had bought the land in controversy from Gainey, and given the mortgage to secure the payment of the purchase money; that he had paid a large part of the same—some to Gainey and some to John Averitt (in money and cotton); that he had no notice of the sale under mortgage; that he had never paid any of the money or cotton as rent for the land, but always to be applied upon the mortgage debt.

And other testimony was offered by defendant, tending to corroborate him.

The plaintiff, in reply, offered a deed from George A. Guy
(562) and wife to Decyrus Averitt, 19 December, 1888, prior to the beginning of this action, for the same land.

The judge instructed the jury (among other things):

"This action was brought by Decyrus Averitt to recover the possession of a tract of land in the county, which he claims to own by virtue of a deed from John Averitt and wife, dated 1 February, 1886, which recites a sale of the land under a power granted in a mortgage made by the defendant, Jacob Elliott and wife, to James A. Gainey, and an assignment of the mortgage and debt secured thereby by Gainey to John Averitt; the purchase by Nimocks, a transfer of his bid to the plaintiff, and payment of the purchase money by him. The defendant, admitting that he executed the mortgage to Gainey, and that the debt secured in said mortgage has not been paid in full, says that the plaintiff has no

right to recover the land from him, because there never has been a fair sale of the land under the mortgage, and therefore that the deed from John Averitt and wife to plaintiff conveys no title to the land."

The presiding judge then went on at length, and instructed the jury upon the law governing the case.

The plaintiff excepted to that portion of the charge which has been set out.

The jury responded to the first and second issues "No," and to the fourth issue "Yes."

Rule for new trial for errors alleged. Rule discharged.

Judgment for defendant. Plaintiff appealed.

J. W. Hinsdale for plaintiff.
T. H. Sutton for defendant.

AVERY, J. Where a mortgagee of land purchases at his own sale, directly or by an agent, though he may convey to the agent and have the latter reconvey to him, the effect is to vest the legal estate in the mortgage in the same plight and condition as he held it under the mortgagee, subject to the right of the mortgagor to redeem. (563) *Joyner v. Farmer,* 78 N. C., 198.

The sale by the mortgagee is not void, but only voidable. *Joyner v. Farmer, supra.* The mortgagee has the right to recover possession at any time, as against the defaulting mortgagor, in an action brought for the purpose, whether he has fraudulently put forward an agent to buy at his own sale or not. *Wittkowski v. Watkins,* 84 N. C., 458.

If John Averitt bought at his own sale, and then conveyed to the plaintiff Decyrus Averitt, the legal estate passed to the latter, upon which he was entitled to recover in an action involving title and right to possession only. *Joyner v. Farmer, supra.* If the mortgagor wished to avoid the sale on the ground of fraud, he ought to have alleged the fraud in his answer. It was not sufficient simply to prove it. It is essential that there shall be *allegata* in the answer, as well as *probata* on the trial, in order to make available an equitable right or other new matter as a defense. *Willis v. Branch,* 94 N. C., 143; *Rountree v. Brinson,* 98 N. C., 107; *Montague v. Brown,* 104 N. C., 165; *Ellison v. Rex,* 85 N. C., 77. As the issue was submitted to the jury, the defendant might have been allowed, in the progress of the trial, to amend his answer and set up the fraudulent purchase as a defense. The court will doubtless permit him to amend before another trial, so that, with due notice, the facts may be fully developed by both parties. *Willis v. Branch, supra.* But as the plaintiff has excepted to that portion of the charge in reference to the fourth issue, and as it appears that the de-

fendant has relied solely upon the inability of the plaintiff to show the legal title in himself, a new trial must be awarded.

This is in accordance with the uniform rule adopted by this Court.

It is true, as suggested by counsel, that a deed may be directly
(564) attacked on trial of an action for possession for incapacity in the maker, fraud in the *factum,* because void under 13 and 27 Elizabeth, or because it was executed in the face of a statutory prohibition. *Mobley v. Griffin,* 104 N. C., 112; *Gilchrist v. Middleton,* 107 N. C., 679; *Helms v. Green,* 105 N. C., 259. But the deed offered by the plaintiff was not void, but voidable. It left in the defendant an equitable right which could have been avoided only by the mortgagor and his heirs, and which might be confirmed by the mortgagor by release, or conduct amounting to an abandonment, or working an estoppel *in pais. Joyner v. Farmer, supra.*

For want of specific allegations setting up the defense that the plaintiff claimed under a fraudulent conveyance, a new trial will be awarded.

Error.

Cited: Owens v. Mfg. Co., 168 N. C., 399; *Fleming v. Sexton,* 172 N. C., 253.

J. P. McLEAN, GUARDIAN, v. JAMES BREESE ET AL.

Guardian and Ward—Lunatics—Accounts and Settlements—Vouchers —Disbursements—Evidence.

1. When any item in the account of a guardian is contested, evidence of the regularity and necessity of the expenditure should be required, and the facts found in relation thereto.
2. To make a voucher presumptive evidence of disbursement under the statute (Code, sec. 1401) it is necessary that it should state the time the expenditure was made, on what account, and other facts from which it can be reasonably inferred the payment was a proper one.
3. The law will not permit the property of a lunatic to be applied to the payment of his debts, unless a sufficient part thereof has been retained for the support of his wife and infant children.
4. If a guardian, in good faith, pays the just debts of his wards without prejudice to his estate, he is entitled to be credited with the amount thereof in the settlement of his account.

(565) ACTION, heard upon exceptions to the referee's report at November Term, 1890, of CUMBERLAND, *MacRae, J.,* presiding.

The defendants' exceptions were overruled, and they appealed from the judgment confirming the report.

W. A. Guthrie for plaintiff.
J. W. Hinsdale for defendants.

MERRIMON, C. J. The late ward of the plaintiff was a lunatic many years next prior to his death in 1886, and this action is brought against his administrator and others, the widow and next of kin, to compel a settlement of the plaintiff's accounts as guardian.

The record is imperfect and confused. It appears that a summons was issued and served, but neither the complaint nor answer appears, and the order of reference is scarcely discernible. The report of the referee is not satisfactory. The findings of fact in respect to several disbursements of money are imperfect, and it is impossible to see whether or not several items of the account should or should not have been allowed. The grounds of exception are that certain of the expenditures and disbursements were not for the benefit of the ward's wife and infant child, were not necessary for their support, and were not authorized by law.

Evidence should have been required, and the facts found as to each item of the account questioned, and particularly, for the present purpose, as to the nature, purpose and application of the expenditures and disbursements in question. The facts going to show that they were or were not proper ones should be found, and it should appear that all expenditures and disbursements were such as the law allowed. It was not sufficient, for example, that the plaintiff produce sundry vouchers for expenses incurred in going to and from the asylum to see the ward. It should have appeared when these vouchers were questioned, that such visits were necessary, and the expenses reasonable. And (566) so of other items of the account.

It is true, as insisted for the plaintiff, that the statute (Code, sec. 1401) makes vouchers presumptive evidence of disbursements actually made, but not of their nature and purpose and the necessity for them, when the same are not expressed in them. To make such vouchers presumptive evidence, they should state with reasonable particularity the purpose of them—on what particular account they were made, the time, etc.—so as to make it appear by them, that the expenditure or disbursement was a proper one.

The property of the lunatic in the hands of the guardian is in *custodia legis,* and all sales of such property to pay debts of the ward due or owing by him at the time he became a lunatic, should be made by the guardian with the sanction of the court, obtained as by the statute pre-

scribed. *Adams v. Thomas,* 81 N. C., 296; *Adams v. Thomas,* 83 N. C., 521.

The law intends that the debts of the lunatic shall be paid, if he has property sufficient for the purpose, after retaining a sufficient part thereof for the reasonable support of his wife and infant children. Property for the latter purpose ought not to be sold, and will not be with the sanction of the court. But where the lunatic has a surplus beyond that amount, property may be sold by order of the court, and assets so arising may be applied to the payment of the lunatic's debts by the guardian. And so when the latter has money that came into his hands not so needed for the support of the lunatic and his family, he may in good faith pay debts of the ward, but he should be sure that the debts are justly due and such as ought to be paid, otherwise he will not be allowed credit in his account for disbursements on such account.

The guardian must be held to a strict and just account as to the property of his ward, and, if, by his neglect, or failure to observe the requirements of the statute in caring for and making sale of the
(567) same, the estate of the lunatic shall sustain damage, he will be required to account therefor in all proper ways and connections. When, however, he in good faith pays debts that ought to be paid, and by so doing, the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respect. The guardian always fails to observe statutory requirements affecting him, at his peril. It is his duty to observe statutory regulations, and in all things, in good faith, to have in view the good and just advantage of his ward.

Several of the exceptions were properly abandoned in this Court. We think that those must be sustained as to vouchers numbered respectively in the account stated by the referee, as 2, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, and as to that designated "sundry trips to Raleigh on account of ward." As to the vouchers thus designated, the referee must be required to inquire more particularly as to the nature and purpose of, and the necessity for, the expenditures and disbursements embraced by them, to the end the Court may see and determine that they were substantially such as the law allowed to be made. To the end that such further inquiry may be made, and the judgment modified thereupon, if need be, let this opinion be certified to the Superior Court.

Remanded.

Cited: S. c., 113 N. C., 390, 392.

(568)

M. FOLB & CO. v. THE PHŒNIX INSURANCE COMPANY.

Contract—Insurance—Evidence—Custom.

An insurance policy contained a stipulation that if the assured should thereafter make any other insurance (whether void or not) on the property therein specified, without the consent of the insurers indorsed on the policy, it should be void. In an action to recover the amount of the policy the defendant relied upon a breach of this stipulation, and offered testimony tending to prove that the agent of another company prepared a policy on same property, which he tendered to the plaintiffs and demanded the payment of the premium; that the plaintiffs promised to pay it, but never did; that the said policy was duly entered in the books of the second company, and that it was the custom of insurance companies to write policies and hold them for convenience of insured until the premiums were paid: *Held*, these facts did not constitute evidence sufficient to be submitted to the jury upon the issue on the breach of the condition.

ACTION, tried at May Term, 1891, of CUMBERLAND, *Armfield, J.*, presiding.

The plaintiff brought this action to recover the sum of $1,500, which the defendant, by its policy of insurance, agreed and promised to pay them in case of loss of their goods therein specified, by fire, in the contingency and as therein provided and stipulated. The policy contained among others, a clause in these words: "Or if the assured shall have or shall hereafter make any other insurance (whether void or not) on the property herein specified, or any part thereof, without the consent of the company written hereon, then and in every such case this policy is void." In the answer the defendant alleged as a defense, among other things, "that after the issuing of the policy of insurance set out in the complaint, the plaintiffs made other insurance on the property specified without the consent of the defendant written upon the said policy and in violation of its express terms, and thereby rendered said policy void." On the trial the defendant introduced a witness (569) who testified in its behalf as follows: "I am an insurance agent; as such I wrote a policy for plaintiffs on the goods destroyed, and the subject of this suit, in the Continental Fire Insurance Company, dated 8 November, 1889."

Witness further testified that he tendered this policy to the plaintiffs both before and after the fire which consumed the goods, and demanded the payment of the first premium specified in said policy; that the plaintiffs promised to pay, but did not do so, and witness never delivered this policy to plaintiffs, and that after these tenders witness received a telegram from his company instructing him not to deliver this policy to plaintiffs. Defendant then offered to prove by that witness that the

books of his company, which he had with him, in court, showed that this policy had been regularly issued, and a record made on said book. Upon objection by the plaintiffs' counsel, this evidence was excluded by the court, and the defendant excepted.

Defendant then offered to prove that it was the custom of insurance companies to write policies and hold them for the convenience of the assured until the premiums were paid. On objection of plaintiffs' counsel this was excluded, and defendant excepted.

Defendant then offered to prove that after the fire which destroyed the goods, the plaintiff demanded of this company (the Continental) the amount of this last policy, to recover the loss. Upon objection by plaintiffs' counsel, the testimony was excluded by the court, and the defendant excepted.

This was all the evidence in the case tending to show that plaintiffs had taken out other insurance on the property in violation of the terms of the policy sued on. His Honor submitted to the jury the first issue upon the evidence as to the value of the goods, with instructions to which there were no exceptions. As to the second issue, "Did the plaintiffs, after issuance of the policy sued on, take out other insur-
(570) ance on said stock of goods without the consent of the defendant indorsed on the said policy?" his Honor instructed the jury that there was not sufficient evidence to justify them in finding this issue in favor of the defendant, and directed them to answer this issue "No," which they did. Defendant excepted.

There was a verdict for plaintiffs on the first issue. The court gave judgment, and the defendant appealed.

T. H. Sutton for plaintiffs.
J. W. Hinsdale for defendant.

MERRIMON, C. J. It seems to us very clear that there was no sufficient evidence produced on the trial to go to the jury to prove that the plaintiff did "make any other insurance, whether valid or not, on the property" specified in the policy sued upon, subsequent to the date of its execution. Accepting the evidence produced as true, it does not appear from it, unless by mere vague inference, that the plaintiffs, before the loss by fire, requested the defendant's agent to supply them with subsequent insurance; nor does it appear that it was agreed between the parties that the defendant should do so. At most, it appears only that the plaintiffs thought of getting additional insurance, and that the defendant's agent sought to induce them to do so. It does, however, appear affirmatively that they did not receive the policy tendered them, and that they did not pay the premium demanded; if such arrangement

had been feasible, the agent of the defendant did not agree that the policy tendered by him should become the property of the plaintiffs, and he would hold it for them until they should pay the premium. It does not appear that there was any purpose of the parties to observe a very unbusiness-like and unreasonable "custom of insurance companies to write policies and hold them for the convenience of the insured. until the premiums were paid." The mere fact that defendant's (571) books "showed that this policy had been regularly issued and a record made in said book," was not evidence to prove a contract of insurance; nor was the mere fact that the plaintiffs demanded of the company the payment of the supposed additional insurance, evidence of such contract. The evidence went to prove that the contract of insurance contemplated—talked about, thought of—was to be made in the ordinary way by executing a proper policy. There was not the slightest evidence of a purpose to make a merely verbal contract. The alleged contract, behind which the defendant seeks to find shelter, was never consummated; nor was what was said as to it in any sense binding upon any party; nor did it come within the meaning or purpose of the clause of the policy sued upon, and relied on as a defense by the defendant.

Judgment affirmed.

McPHAIL BROS. v. J. H. JOHNSON.

Action, Splitting—Jurisdiction—Contract.

Under a contract which stipulated that the defendant was to receive "the entire output" of a mill, and pay the plaintiff a certain price per thousand for all lumber sawed, "as it was taken from the saw," the plaintiff made successive deliveries of lumber, the value of each delivery being less than $200, but the aggregate value was greater than that amount: *Held*, that while the plaintiff might have maintained an action before a justice of the peace for the value of each delivery as it was made, having postponed his suit until the whole sum became due, he could not split the cause of action and thereby confer jurisdiction on the justice of the peace.

ACTION, tried at May Term, 1891, of CUMBERLAND, before (572) *Armfield, J.*

The facts necessary to an understanding of the opinion are as follows:

This was one of three civil actions commenced and tried at the same time in the court of a justice of the peace of Cumberland County, in all of which plaintiffs recovered judgment, and the defendant appealed to the Superior Court.

The actions were founded upon a written contract between the defendant and the firm of H. Wade & Co., the latter firm having assigned their interest to plaintiffs.

Plaintiffs alleged that the whole of said contract had been performed before the bringing of the said three actions, and that there was then due to plaintiffs on said contract, or for work done thereunder, a sum largely in excess of two hundred dollars, but as the contract had been performed by several deliveries of lumber at different times, which several deliveries were respectively under $200, that they had a right to split up their account and bring their several actions for sums respectively less than $200, though aggregating more than $200, in the court of a justice of the peace.

The following is a copy of the part of the contract material here:

"4. The said James H. Johnson is to receive the entire output of said mill, and pay the said H. Wade & Co. the sum of two dollars and fifty cents per thousand feet for any and all lumber so sawed, as it is taken from the saw, and sawed according to bills furnished, in a workmanlike manner."

His Honor intimated that, as the whole amount claimed by plaintiff was due when these three actions were commenced, that the plaintiffs could not split up their cause of action as they had attempted to do, so as to give jurisdiction to the justice.

In deference to this opinion of his Honor, plaintiffs took a (573) nonsuit, and appealed to the Supreme Court.

T. H. Sutton for plaintiffs.

G. M. Rose for defendant.

MERRIMON, C. J. The alleged indebtedness of the defendant to the plaintiffs accrued from time to time, and at divers times, under and by virtue of a single contract, whereby H. Wade & Co. agreed to supply the defendant with "the entire output" of a lumber mill, and they completely performed their part of such contract. The sum of money demanded by the plaintiffs was much more than two hundred dollars, and to facilitate the collection of their debt they subdivided their claim, so as to bring each part of it within the jurisdiction of a justice of the peace. They contend that they had the right to do so, because they supplied the lumber from the mill at divers times and on various accounts. This contention is not well founded. The indebtedness having accrued, was single—a whole—one debt, arising out of a single contract that possessed a single purpose—the supply of lumber. This case clearly comes within what is said and decided in *Jarrett v. Self,* 90 N. C., 478; *Moore v. Nowell,* 94 N. C., 265; *Kearns v. Heitman,* 104 N. C., 332.

If, however, the delivery under the contract was made by distinct installments, an action would lie for the amount due for the same at once. But when more than one such installment has been delivered, but one action lies for the whole amount due on account of same.

Affirmed.

Cited: Simpson v. Elwood, 114 N. C., 529; *Smith v. Lumber Co.,* 140 N. C., 377; *S. c.,* 142 N. C., 30.

(574)

JOHN FISHER v. HENRY BULLARD.

Burning Woods—Penalty—Jurisdiction—Venue.

The Code, sec. 191, providing that actions for the recovery of penalties must be brought in the county where the cause of action arose, applies to those actions of which the Superior Court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace.

APPEAL, from a justice of the peace, tried at May Term, 1891, of CUMBERLAND, *Armfield, J.,* presiding.

F. R. Cooper for plaintiff.
No counsel contra.

CLARK, J. This was a civil action, begun before a justice of the peace in Cumberland County against a defendant residing in said county, to recover the penalty of $50, incurred under The Code, secs. 52, 53, by any one setting fire to any woods not his own property. The woods burnt lay wholly in Sampson. The defendant moved to dismiss for want of jurisdiction, which was refused, and judgment given against him. On appeal to the Superior Court, the motion was renewed in that court on the same ground and allowed.

The Code, sec. 871, forbids a justice to issue process to any county other than his own, unless there is more than one *bona fide* defendant, and one of them shall reside in another county. That not being the case here, a justice of the peace in Sampson could not reach the defendant so that the case might be tried there, unless he happened to be caught in Sampson. The provision for indorsing warrants issued in another county (The Code, sec. 1136) is restricted to criminal cases.

The justice of the peace in Cumberland having jurisdiction of the person of the defendant, by service of process upon him, (575)

and of the subject-matter—a penalty of fifty dollars—was a proper officer before whom to bring the action, unless there is some statute forbidding it. It is claimed that this is done by The Code, sec. 191, which provides that an action for the recovery of a penalty must be brought in the county where the cause of action arose. But it must be noted that section 191 is in The Code, chap. 10 (commonly known as the Code of Civil Procedure), which is applicable to proceedings in the Superior Courts. Section 871, *supra,* is in chapter 22 of The Code, which relates to justices' courts. By section 840, rule 15, The Code of Civil Procedure, respecting forms of action, parties to actions, times of commencing actions and service of process, is made applicable to justices' courts. By sections 849, 853 and 889, the provisions of The Code of Civil Procedure as to arrests and bail, attachments and claim and delivery, were made applicable to such proceedings in the justices' courts, but we do not find any statute making the provisions of The Code of Civil Procedure as to place of trial (in which is the above section 191) applicable to trials before a justice.

The justice of the peace in Cumberland County, therefore, had jurisdiction, and in granting the motion to dismiss there was

Error.

Cited: Dixon v. Haar, 158 N. C., 342.

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(576)

FORSAITH MACHINE COMPANY ET AL. v. HOPE MILLS LUMBER COMPANY ET AL.

Findings by Court—Appointment of Receiver—Sales—Distribution of Proceeds—Parties.

1. Where findings upon which a court appointed a receiver were not reduced to writing until three or four days after the order was made, the order will not be disturbed where it does not appear that defendant suffered from such delay.
2. Where it is clear from the evidence and admissions of the parties that it is a case where a receiver should be appointed, and that defendant is insolvent, and all the property must be sold to pay the debts, an order appointing receivers and directing them to sell all the property of the defendant is proper.
3. In disposing of the motion for a receiver, the court properly declined to pass on questions of fraud raised by the pleadings.
4. Where defendants did not consent that the court should direct the receivers to pay certain judgments, admitted to be just and valid, it was error to order their payment.

5. Where defendant did not demur on the ground that a proper party defendant was not joined, an objection by defendant on that ground will not be sustained.
6. Where the affidavits and exhibits offered by plaintiffs raised questions which should be submitted to a jury, the court properly refused to pass on such questions.

APPEAL, from January Term, 1891, of CUMBERLAND, *Boykin, J.*, presiding.

The plaintiffs are creditors of the defendant corporation, having debts for very considerable sums of money. In the complaint they allege their debts; that they have a mortgage of the defendant's property, both real and personal, of large value, to secure the same; that the defendant company and its officers fraudulently prevented the registration of their mortgage until after it had confessed fraudulent judgments for divers large sums of money in favor of certain of its officers and stockholders, and had executed and registered a mortgage of all its (577) property in their favor, and likewise a deed of trust conveying their property, to secure fraudulent debts, etc. They further allege that the defendant is insolvent, and that certain judgments in favor of parties named are valid and just, and executions upon them have been levied upon the defendant company's personal property. The purpose of this action is to foreclose the plaintiffs' mortgage, to have the judgments mentioned confessed, and the second mortgage, and deed of trust executed by the defendant company declared fraudulent and void, etc.

The defendants admit some of the material allegations of the complaint, confess and avoid others, and deny the alleged fraud, and aver that the judgments and mortgage and deed of trust complained of are honest, etc. In the course of the action the plaintiffs moved for a receiver to take charge and control of the defendant company's property, real and personal, and to collect debts due it, etc.

The court heard the motion upon the complaint, answers, and affidavits used in support of and in opposition to it, and upon finding the facts, allowed the motion and appointed receivers, charged to take all the property, both real and personal, of the defendant company into their possession and control, to sell the same, to collect all debts due it, to pay out of the fund collected certain judgments admitted to be just and valid, etc.

The defendants appealed, assigning error as follows:

1. That his Honor failed to find the facts upon which his judgment was based.

2. That by reason of his failure to find the facts the appellants could not specify their exceptions to the said judgment.

3. That the judgment directs the sale of real estate not levied on, and that the proceeds of same be applied to the payment of
(578) judgments in favor of Wallace McPherson and the Enterprise Lumber Company, which are prior to the judgments in favor of the Hope Mills Manufacturing Company, R. M. Nimocks, S. H. Cotton, and H. C. Gadsby and R. M. Nimocks.

4. That there is a defect of parties defendant, in that J. T. Gardner, trustee in deed of 9 May, 1891, has not been made a party to the action.

5. That the plaintiffs' affidavits and exhibits offered raised issues of fact which should have been submitted to a jury.

T. H. Sutton for plaintiffs.
J. W. Hinsdale for defendants.

MERRIMON, C. J., after stating the case: The first exception is groundless. It appears from the record that the court did find the facts very fully from the evidence in favor of and against the motion for a receiver, and upon such findings based the order appealed from. It seems that the appellants objected that such findings were not reduced to writing at once before or after the entry of the order appointing the receivers. It was not essential that this should have been done. It was sufficient that it was done within a reasonable time, though it would be better that it should be done as promptly as practicable. The case settled on appeal states that the facts were stated by the court "within three or four days after the entry of the order, and sent to counsel." It does not appear that the appellants suffered any prejudice by such brief delay. Moreover, this is a case in equity, and it becomes the duty of this Court to review the evidence and findings of fact of the court below with a view to see and determine that the order complained of was or was not a proper one. So that here the appellants have ample opportunity to make their objections to the order appealed from.
(579) This Court has complete authority, in cases equitable in their nature, like this, to examine the whole matter of the motion in question, and to direct a reversal or modification of the order of the court below, if there be error.

We fully concur in the findings of fact by the court below. The evidence and admissions of the parties fully warrant them. It is clear that the facts present a case in which a receiver should be appointed to take charge of the property of the defendant corporation, and collect the debts due it, pending the litigation. The order appointing the receivers directs them to take immediate "possession of the property, real and personal, of said Hope Mills Lumber Company, and sell the same

at public or private sale to the best advantage," and also to collect all the debts due it, and out of the proceeds of such sales or collections to pay certain specified judgments admitted to be just and valid, and hold the surplus subject to the further order of the court.

Ordinarily, it is not proper to finally settle questions raised by the pleadings or the rights of the parties, in cases like this, in disposing of a motion for an injunction or a receiver pending the action. This should be done when the case is finally heard upon the whole merits of the matter in litigation, when the case, in every material aspect of it, is thoroughly scrutinized, and the rights of the parties settled and determined. Motions in the course of the action for an injunction, a receiver, and the like, are intended to serve some important incidental purpose pending the action, and the court looks into the case to see if there is reasonable ground for granting them. It generally and properly leaves the final decision of important questions as to the rights of the parties until the final hearing. Hence, it was not necessary or proper at the present stage of the action to decide the questions raised as to the validity of the judgments confessed by the defendant corporation, and the mortgage and deed of trust executed by it in favor of certain of its officers and stockholders, and other important (580) questions. These must be left to be determined at the final hearing.

Ordinarily, the receiver appointed pending the action, particularly as to real estate, should simply be directed by the court to take care of and let the property in proper cases, collect the rents, etc., and to collect debts, and hold funds coming into his hands, subject to the order of the court, from time to time, and when the action is determined. But there are cases in which it is expedient and very proper to direct a sale of the property, both real and personal. The court should always be careful to see, however, that a proper case is presented for the exercise of such power, and to see particularly that the owner of the property cannot be unduly prejudiced by a sale thereof. It should have in view the rights and advantage of all the parties, as nearly as may be. In this case it is very certain that the defendant corporation is insolvent, and all its property must be sold to satisfy the numerous debts of creditors, parties to the action. There appears no reason, therefore, why the property—all of it—shall not be sold at once, the fund arising from such sale to be held under the order of the court, to be distributed to the parties entitled to have it upon the final hearing and disposition of the case. No party on this account can suffer prejudice, and it is important that the property should be owned and used by some person for the practical purposes to which it is devoted. The court therefore properly directed a sale of the property, both real and

personal; but the sale of the real property should be made with due care, and with the express sanction of the court. Sales of it should be reported to the court, and confirmed, and title made in pursuance of its order. This is important to the creditors, as well as to the purchasers, for obvious reasons.

The defendants did not consent that the court should direct the receivers to pay the judgments specified in the order. Indeed, it seems that they objected upon the ground that some of them have (581) judgments that should be first paid; and it may possibly so turn out—it may not. We are therefore of opinion that the court should not have directed the receivers to pay the judgments referred to. It might do so by consent, but consent is not given. The property should, under the circumstances, be sold as above indicated, and the fund arising from all sources held under the direction of the court until the court shall upon the final hearing direct its application to be made.

The defendants did not demur upon the ground that a proper party defendant was not before the court. If need be, that party may yet be brought into the action for any proper purpose.

The fifth exception is unfounded. The court expressly declined to pass upon the questions of fraud raised. These, and other questions affecting the whole merits, will be disposed of upon the final hearing.

The order appealed from must be modified as indicated in this opinion, and, thus modified, affirmed. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Affirmed.

Cited: Nimocks v. Shingle Co., 110 N. C., 231; *Pearce v. Elwell,* 116 N. C., 597; *Rosenbacher v. Martin,* 170 N. C., 237.

W. L. LOWE v. J. A. ELLIOTT ET AL.

Evidence—Negligence.

In an action by an employee to recover for injuries alleged to have been received in consequence of defective machinery used by his employer, the fact that after the injury the defendant substituted machinery of different material and adopted additional precautions in its use is no evidence of negligence.

ACTION, tried before *Philips, J.,* at the Spring Term, 1890, of CATAWBA.

It was in evidence that the defendants were manufacturers of furniture, operating a large factory and much machinery, in the (582) city of Charlotte, North Carolina, on 13 September, 1888, and that on that day the plaintiff, who is a painter, was at work on the second floor of defendants' building above the machinery, in what is known as the finishing department, under one Britt, who had contracted to finish defendants' furniture. Directly under the floor upon which plaintiff was at work was run and operated various machinery, among which was what is known as a cutter-head, which consisted of a cast iron wheel about ten inches in diameter, and two or three inches in thickness, with knives inserted for doing certain work in preparing lumber for bedsteads. It weighed between twenty and thirty pounds. While the plaintiff was at work on this second floor, the cutter-head, which was being revolved by machinery, broke, and a piece of it was thrown upward through the floor upon which plaintiff was at work, and cut off the plaintiff's leg so as to make amputation above the knee necessary. The plaintiff alleged that defendants negligently had and used defective machinery, and that the cutter-head was negligently made of defective material, and was defectively and negligently constructed and placed, and that the defendants knew, or could, by due diligence, have known of such defects, and that they employed incompetent servants and negligently run their machinery. The defendants contend that if the machinery was defective or made of defective material, they did not know it, nor could they, by due diligence, have known it, and that they did not employ incompetent servants or negligently run their machinery.

The following were issues submitted, with the responses thereto:

1. Did the defendants have and use defective machinery, as alleged in the complaint? Yes.

2. Did defendants know, or could they, by due diligence, have known of such defects? No. (583)

3. Was the plaintiff injured by the defective machinery of the defendants? Yes.

4. Did the defendants negligently run their machinery? Yes.

5. Was the plaintiff injured by such negligent running? Yes.

6. Did the defendants employ incompetent servants? No.

7. What damage is plaintiff entitled to? Two thousand dollars.

The plaintiff introduced a witness who stated that the cutter-head that broke and caused the injury was made of cast iron, and that it had been replaced by another. The plaintiff's counsel then asked this question: "Of what material was the other made?" Defendants objected

to this question. Plaintiff's counsel stated that it was asked to show that the cast iron cutter was defective, and that the defendants could have discovered that a cast iron wheel was insufficient to run 4,480 revolutions a minute. Question admitted, and defendants excepted.

The witness answered: "The other cutter-head was made of brass. I don't know that a brass wheel is stronger than an iron one."

No counsel for plaintiff.
L. L. Witherspoon (by brief) and P. D. Walker for defendant.

SHEPHERD, J. Under the view which we have taken of this case it is unnecessary to pass upon the alleged inconsistencies in the findings of the jury, and all of the objections urged against the rulings of his Honor.

In view of the findings upon the second and sixth issues, it was necessary for the plaintiff to have the fourth issue found in his
(584) favor, and to this end he was permitted, against the objection of the defendants (for the purpose of showing negligence by running the "cutter-head" at an excessive speed), to prove that, after the accident, the defendants substituted another "cutter-head" made of brass, and that they ran this at a much lower rate of speed.

In *Morse v. R. R.*, 11 Am. & Eng. R. R. Cases, 168, the Court, after remarking that such evidence had been admitted by them in some previous cases, deliberately overruled such former decisions. The Court say that "it forms no basis for construing such act as an admission of previous neglect of duty. A person may have exercised all the care which law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." *Dougan v. Transportation Co.*, 56 N. Y., 1; *Sewell v. Cohoes*, 11 Hun, 626; *Baird v. Daily*, 68 N. Y., 547.

While we do not say that there may not be peculiar cases in which such testimony may be relevant, we are entirely satisfied with the above reasoning as applicable to the facts of the present case. The testimony was improper, and probably had a very important influence with the jury in making up their verdict.

Error.

Cited: Myers v. Lumber Co., 129 N. C., 254; *Aiken v. Mfg. Co.*, 146 N. C., 328; *Tise v. Thomasville*, 151 N. C., 282; *Pearson v. Clay Co.*, 162 N. C., 225; *Boggs v. Mining Co., ib.*, 394; *Shaw v. Public Service Corp.*, 168 N. C., 620; *McMillan v. R. R.*, 172 N. C., 856; *Muse v. Motor Co.*, 175 N. C., 469; *Farrall v. Garage Co.*, 179 N. C., 392; *Bailey v. Asheville*, 180 N. C., 646.

(585)

R. G. McQUAY v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Evidence—Instructions.

If the evidence upon an issue of negligence is direct, leaving nothing to inference, and if believed, established the fact sought to be proved, the judge may instruct the jury that if they believe the witness they should find for the plaintiff or defendant, as the case may be; but where the testimony is in conflict and capable of different interpretations, it should be submitted to the jury with appropriate instructions to consider all the circumstances in arriving at a verdict.

ACTION, to recover damages received by reason of the negligence of defendant's agents and servants, tried at Spring Term, 1891, of MECKLENBURG, *Merrimon, J.*, presiding.

The plaintiff testified: "On 18 November, 1889, I was in Charlotte; came in a buggy; I had business beyond defendant's crossing of East Second street. This street is about sixty feet wide, and defendant has some ten or twelve railroad tracks across it at this point. As I approached the first track there was a train loaded with lumber across it; I waited a few minutes till it moved off slowly. When this train was out of the way, I started across; there was one box car, by itself, about two-thirds of the way across the street on the north side going east; after I had gone around that car, there were four or five tracks across the street and then there was a space. On next line of tracks there were three or four box cars standing on the south side of the street, These box cars were standing far enough across the street to cut off the view of any danger beyond. I had to go around these cars. They were at least half-way across. I went around south end of first car and north end of the second. After I got around the second car, I was right on defendant's engine. It was on the east side of the tracks and furthest away from where I entered upon the tracks. (586) I stopped a few moments; do not know how long, not more than a minute or two. The engine backed off north. It was standing square across the track and there was no chance of going around it. When they had cleared the street and I started, the steam commenced exhausting from the engine. The mare I was driving did not seem to mind

the engine much until the steam began to exhaust, and then she became unruly and unmanageable. She ran from the track and ran into a mule. The mule was a little piece from the track, twenty-five or forty steps, and was going the same way I was. The buggy wheel struck the mule; the mare tore loose and tore the buggy to pieces until it was worth nothing, and threw me out on my face; the mare ran on sixty or seventy-five yards and stopped on a rock-crossing and broke one of her forelegs; she was worth one hundred and twenty-five dollars; after her injury, she was not worth more than ten or fifteen dollars. The buggy was worth forty dollars. After I passed the second car, I was in twenty or thirty feet of the engine. The box cars obstructed my view. The engine was standing still when I first saw it; it moved very soon after I stopped. The engineer was sitting in the window looking towards me. This was right at the depot. There is no other crossing near that place. There is one at Trade street and at the institute. I had crossed there before. The mare was never scared at the train, but when the steam began to exhaust she took fright."

Henry Holt, for defendant, testified: "I am flagman at East Second street; was there when plaintiff crossed. Just as soon as the engine pulled over, the plaintiff passed right on across. There was nothing to prevent plaintiff from seeing the engine cross the street. Mr. Mebane, one of the shifting engineers, was running the engine and was about one hundred yards down the track, above the crossing when (587) plaintiff crossed. The engine was making a noise just like it usually did. There was but one car on the street. It was on the C., C. & A. track. After the plaintiff crossed the C., C. & A. there was nothing to prevent his seeing. There were a few cars on the Augusta track, but none between him and the engine. Plaintiff was clear across all the tracks before his horse began to run. He ran down against a mule and broke the buggy. The engine was shoving cars back up towards Trade street. The cars crossed the street first and then the engine. I did not tell the plaintiff to stop, did not flag him, because he was crossing over and there was nothing in the way. I had the flag in my hand; the track was clear; there was nothing to hinder a man from going across. The engine was one hundred yards above, going back—it was just exhausting, not more than common, not more than enough for the engine to do her work. I did not hear the engine making more noise than common."

There was further evidence offered by each party in support of these witnesses.

Among other instructions asked by defendant was the following:

8. "If the jury believe the evidence, the plaintiff could have extricated himself from any danger after he saw the engine, and if he could have

done so and failed to do it, and took the risk of the engine's frightening his horse, he cannot recover unless the engine made unusual and unnecessary noises, and if they believe no such unusual and unnecessary noise was made, the answer to the second issue should be, 'Yes.' "

The court declined to instruct the jury, that "if they believed the evidence, the plaintiff could have extricated himself from any danger after he saw the engine," but told them, that it was for them to say, after the evidence, whether "the plaintiff could have extricated himself from any danger after he saw the engine." The other part of defendant's eighth special instructions was given, and defendant excepted (588) to the modification made by the court.

Another special instruction prayed for by defendant was:

9. "If the jury believe the evidence of plaintiff's witness, Levi Presson, the plaintiff cannot recover."

This instruction was also refused, and defendant excepted.

The jury answered the first issue, "Yes," the second issue, "No," and the third issue, "$400." There was judgment accordingly, and defendant appealed.

P. D. Walker for plaintiff.
G. F. Bason for defendant.

SHEPHERD, J. The defendant conceded that it was guilty of negligence, but alleged that the plaintiff, by his own negligent conduct, had contributed to the injury of which he complained. The only exception insisted upon is the refusal of the court to charge the jury that "if they believed the evidence, the plaintiff could have extricated himself from any danger after he saw the engine."

"When the evidence is direct, so as to leave nothing to inference, and the evidence, if believed, is the same thing as *the fact* sought to be proved, the judge is at liberty to instruct the jury, that if they believe the witness, they should find for the plaintiff or for the defendant." *Gaither v. Ferebee,* 60 N. C., 303.

Applying this principle to the testimony before us, we are of the opinion that the ruling of his Honor was correct, and that the proposition embodied in the instruction prayed for was an inference to be made by the jury from all the circumstances in evidence. We think that "two reasonable and fair-minded men" (*Deans v. R. R.,* 107 N. C., 686) might have reached different conclusions, or at least have been left in serious doubt as to whether the plaintiff could have extricated himself, as alleged.

Affirmed.

Cited: Wetherington v. Williams, 134 N. C., 280.

(589)

THOMAS L. EMRY AND WIFE V. THE RALEIGH AND GASTON RAILROAD COMPANY.

Negligence—Diligence—Instructions to Jury.

1. What is negligence and what is reasonable diligence are, when the facts are ascertained, questions of law to be declared by the court. When the facts are involved in conflicting evidence, the court should submit the testimony to the jury, with instructions that if they found a state of facts to be true it was, in law, negligence or want of reasonable diligence, or *vice versa.*

2. In an action against a railroad company for damages from overflow of land on which plaintiff had a brickyard, the overflow being alleged to result from the inability of the waterway under a bridge built by defendant to carry off the water at times of heavy rains, the plaintiff testified that previous to the time he placed his brickyard at the place the overflows did not occur every year, but did occur at an average of four years in five; the defendant asked the court to instruct the jury that upon plaintiff's evidence he was guilty of contributory negligence, which was refused, and the court charged the jury that if the circumstances were such that a man of ordinary prudence would have placed the brickyard at that place, it would not be contributory negligence: *Held,* to be erroneous.

AVERY, J., dissenting.

ACTION, tried at Fall Term, 1890, of HALIFAX, *Whitaker, J.*, presiding.

The plaintiffs brought this action to recover damages for alleged injuries to the *feme* plaintiff's land, brickyard and brick, situate on the same, a short distance above the place where the defendant's railroad crosses Chockeycotte Creek on an arched culvert. It is alleged that this culvert was too small to allow the water of the creek to pass freely through it in times of freshet, and that the free flow of the water was obstructed by it, and the water became ponded and made to flow back upon plaintiff's land, whereby the injuries complained of were occasioned, etc. The answer denied most of the material allega-

(590) tions of the complaint, and alleged contributory negligence on the part of the plaintiffs, in that they negligently placed their brickyard and brick at a place where they knew, or had good reason to believe, the same would sustain injury from overflow of the stream, etc.

The pleadings raised issues of fact, and many were submitted to the jury, and among them, this one: "9. Was the plaintiff guilty of contributory negligence in putting her bricks on said land?"

On the trial, the court asked the witness (the husband of plaintiff) to state whether or not water was backed by the culvert upon his land every

year since he owned it, so as to damage his crops and brickyard, or whether this ponding back of water was done at intervals, some years there being no ponding back of water.

The defendant objected to this question as irrelevant. The objection was overruled, and the defendant excepted, and the witness answered, this did not occur every year, but did occur about on an average of four out of five years.

The defendant, among other special instructions, asked the court to tell the jury, "that upon plaintiffs' own evidence, they were guilty of contributory negligence."

As to the ninth issue: "Was the plaintiff guilty of contributory negligence in putting her bricks on said land?" the court charged the jury that if they should find that circumstances were such that a man of ordinary prudence would have put his bricks on the land, then the plaintiff would not be guilty of contributory negligence, but if they should find that the circumstances were such that a man of ordinary prudence would not have put his bricks on the land, then the plaintiff would be guilty of contributory negligence. To this the defendant excepted.

As to the fourth issue, the court charged the jury that if they should find that the water was ponded upon the brickyard by the culvert, they would answer this issue "Yes," unless they should also find that the rainfall on this occasion was so extraordinary and (591) excessive that it could not have been reasonably expected to fall, considering all the circumstances, and especially the history of the stream, would a prudent man have anticipated such a flood as caused the damage. To this the defendant excepted.

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

R. O. Burton, Jr., for plaintiffs.
J. W. Hinsdale and W. H. Day for defendant.

MERRIMON, C. J., after stating the case: It is not the province of the jury to ascertain and determine what is negligence, or what is reasonable diligence. It is too well settled in this State to admit of serious question, that such questions are questions of law to be decided by the court when the pertinent facts are ascertained, or are admitted, or the evidence is to be accepted as true. When, however, the facts are to be found by the jury from conflicting evidence upon issues of fact submitted to them, as must happen perhaps in most cases, the court should submit the evidence to them with appropriate instructions as to the varying aspects of the evidence. It should carefully instruct them that if they found one state of facts, then there is negligence;

if a second, then there is no negligence; if a third, then there is or is not; if a fourth, there is or is not as the case may be, and so on, meeting every reasonable material aspect of the evidence and the facts accordingly as they may be found one way or another. This must be so, else the jury must frequently be left to decide legal questions oftentimes of great moment, and of difficult solution. It is not the province of the jury, but that of the court, to decide all legal questions arising in the course of an action, whether in the trial of the issues of fact or otherwise, and it is the duty of the court, as far as practicable, never
(592) to leave the jury to guess at random as to what the law is, and as to its application. It is no doubt sometimes difficult where the evidence is voluminous and conflicting, presenting varying aspects of it, to apply the law satisfactorily. Nevertheless, it is the duty of the court to do so as thoroughly as practicable. In such cases, he brings into use his talents, tact and great learning as a judge.

It is not sufficient or proper to instruct the jury to consider and determine whether "a prudent man" would or would not do the matters and things in question, and to be governed by their best judgment in that respect. This would practically leave it to them to decide what did or did not constitute negligence or reasonable diligence in the case before them, whereas they should receive the law from the court, and finding the facts, apply them to the instructions they so received, and not otherwise. The jury may not decide whether there is or is not negligence in view of the evidence and facts before them, by deciding what, in their judgment, "a prudent man" would think of the facts, and how he would probably act upon them.

The authorities which fully support what we have just said are numerous, and we cite several of them to which ready reference may be made. Whatever may be said in possible cases *obiter,* we think that not a single case decided by this Court can be found to the contrary. *Herring v. R. R.,* 32 N. C., 402; *Biles v. Holmes,* 33 N. C., 16; *Heathcock v. Pennington, ib.,* 640; *Avera v. Sexton,* 35 N. C., 247; *Smith v. R. R.,* 64 N. C., 235; *Anderson v. Steamboat Co., ib.,* 399; *Pleasants v. R. R.,* 95 N. C., 202; *Sellars v. R. R.,* 94 N. C., 654; *Aycock v. R. R.,* 89 N. C., 321; *Wallace v. R. R.,* 98 N. C., 494; *Smith v. R. R.,* 99 N. C., 241; and there are numerous cases to the like effect.

In this case, the defendant expressly alleged contributory negligence of the plaintiff, and an appropriate issue in this respect was
(593) submitted to the jury. The defendant requested the court to instruct them, "that, upon the plaintiff's own evidence, they are guilty of contributory negligence." The court declined to give such instruction, but told the jury, referring to the ninth issue, that "if they should find that circumstances were such that a man of *ordinary pru-*

dence would have put his bricks on the land, then the plaintiff would not be guilty of contributory negligence; but if they should find that the circumstances were such that a man of ordinary prudence would not have put his bricks on the land, then the plaintiff would be guilty of contributory negligence." In this there is error. The jury were left to decide that there was or was not negligence, accordingly as they might think "a man of ordinary prudence" might do one way or the opposite thereof in view of the facts. The evidence of the husband plaintiff was direct to the point, and the court should have told the jury that if they believed this evidence, there was or was not contributory negligence.

It is insisted, however, that the error is harmless because the jury found, in effect, that there was no contributory negligence, and that, in legal contemplation, there was none. We cannot concur in this view of the matter. The court asked the plaintiff husband on the trial "whether or not the water was backed by the culvert upon his land every year since he owned it, so as to damage his crops and brickyard, or whether the ponding back of water was done at intervals, some years there being no ponding back of water." The witness said in reply, "This did not occur every year, but did occur about an average of four years out of five years." It seems to us clear, and we cannot hesitate to decide, that no prudent business man would place and keep his brickyard and brick kilns at a place like that in question, where he would hazard the loss or serious injury described by the plaintiff four years out of five. No such enterprise could succeed, much less afford its owner profit, when it so frequently and so certainly en- (594) countered such losses. A prudent business man would establish his business elsewhere, and seek his remedy for injury to his land. The evidence tended to show that the plaintiffs had known for many years of the overflow and back-water of which they complain, but, nevertheless, they persisted in their hazardous enterprise. They, in a proper case, have their remedy against the defendant for injury to their land occasioned by its default and negligence, but they cannot be excused from contributory negligence, where they for years continued to prosecute a business—that of manufacturing brick—which they knew, or had strong reason to believe, would encounter injury occasioned by the negligence of the defendant, of which they complain. They contributed directly to their own injury when they kept their brickyard and kilns at a place where they knew that the business of the defendant would give rise to injury to them. The plaintiffs are entitled to their remedy for injury to their land. They may establish such lawful enterprise on their own land as they see fit, but when the defendant negligently interferes with their enterprise to their injury, they must be careful not

to contribute to their own injury, else they must take the consequences of their imprudence. The negligence of the defendant cannot warrant contributory negligence of the plaintiffs. The defendant's insufficient culvert caused the flooding of plaintiff's land. The latter well knew of this for years; still they put their brick kilns where they had strong reason to believe they too would be flooded, and injured or destroyed. They thus contributed to their own injury. The injury was occasioned directly by the conjoint acts of both parties.

SHEPHERD, J., concurring: The defendant prayed the court to instruct the jury that upon the plaintiffs' own evidence there was contributory negligence, and we have held that the instruction (595) should have been given. This is sufficient to dispose of the appeal, but as the case goes back for a new trial, and the other question which has been presented and so extensively discussed will very likely arise, it is proper that it should now be passed upon.

No principle is more firmly established by this Court than that negligence and ordinary care are mixed questions of law and fact. If the facts are undisputed, it is for the court to decide; if they are controverted, or if the inferences to be drawn from them are doubtful, the jury must find such facts or inferences and the court must instruct them as to the law applicable to the same. In many of the States a contrary view prevails, and it is held that such a "broadcast" charge (as *Pearson, J.,* characterizes it in *Avera v. Sexton,* 35 N. C., 247) as the general principle of "the prudent man" must be given to the jury. This rule is not applied alone to those cases in which no special instructions are asked, but prevails generally, because, with some exceptions, the standard of duty, as embodied in such a general proposition, is to be applied to the various phases of the evidence by the jury, and they are thus practically, in many instances, constituted the sole judges of what is or is not negligence and ordinary care. That such is not the law in North Carolina, is so manifest that it is hardly necessary to cite the numerous decisions of this Court in which the principle stated has been most emphatically and unqualifiedly repudiated.

Judge Battle, delivering the opinion in *Brock v. King,* 48 N. C., 45 (after citing many decisions in which the principle is explicitly denied), said: "After these repeated decisions, so recently made, we may well adopt the language of the Court (*Ruffin, C. J.*) in *Beale v. Roberson,* 29 N. C., 280, upon an analogous subject. 'It would seem then, that making a question of this subject, must be regarded as an attempt to move fixed things, and cannot be successful.'" In support of a contrary view, we are referred by counsel to *Farmer v. R. R.,* 88 (596) N. C., 564. A perusal of that case will show that the point

under consideration was not presented to the court, but that the decision turned not upon the form of the charge, but simply upon the question whether the defendant would be liable for negligence where the plaintiff's negligence contributed to the injury, the court holding that the defendant would be liable, notwithstanding the plaintiff's preceding negligence, if the defendant, by the exercise of proper care, could have avoided the injury. This was also held in *Gunter v. Wicker,* 85 N. C., 310, and it will be noted that the prayer for instructions in that case, and those given by the court, contained no such general proposition as contended for, but were based entirely upon certain particular phases of fact which arose upon the testimony. Neither was the point decided in *Turrentine v. R. R.,* 92 N. C., 638. In that case the court, in speaking of such care as a prudent man would and ought to take for his safety, was not discussing the form of the charge (for the charge and instructions do not appear in the case), but only "the counterpart of the rule, as declared in *Gunter v. Wicker, supra; Owens v. R. R.,* 88 N. C., 502; *Farmer v. R. R., supra; Aycock v. R. R.,* 89 N. C., 321."

In *Troy v. R. R.,* 99 N. C., 298, the exceptions involving the question we are considering were not pressed, and were therefore, not discussed by the court. Neither is the question raised in *McAdoo v. R. R.,* 105 N. C., 140, and *Deans v. R. R.,* 107 N. C., 689.

There are many cases like the foregoing in which the court, in passing upon instructions to juries, speaks of the rule of the prudent man as a standard of duty whereby negligence and ordinary care are to be measured and determined. It is necessary in expressing its opinion in such, and indeed in nearly all cases that it should revert to general principles of law, but it is difficult to understand how, in doing this, they are to be considered as authorizing such general principles to be charged to the jury. An example may be found in *Avera* (597) *v. Sexton, supra,* where *Ruffin, C. J.,* states the general rule of the prudent man, and applies it for the guidance of the court to the facts, but expressly declares that such a rule should not be submitted to the jury.

It will be seen, therefore, that no decision of this Court has been produced in which the point has been expressly decided in support of the position contended for. On the other hand we have a long and unbroken line of decisions in which the very question was presented and decided to the contrary.

In *Biles v. Holmes,* 33 N. C., 16, the plaintiff sued for damages by reason of injuries to a slave, resulting from negligence of a want of ordinary care by the defendant. There was no prayer for special instructions, and the court charged the rule of the prudent man. *Pearson, J.,* delivering the opinion, said: "What amounts to ordinary care is a

question for the court. The judge below erred in leaving it to the jury. Whether the proof establishes particular facts is for the jury, but what is the legal effect of these facts, supposing them to exist, is for the court. Accordingly, it is settled that ordinary care, reasonable time and probable cause, the facts being admitted or proved, are questions of law. *Herring v. R. R.,* 32 N. C., 402; *Swaim v. Stafford,* 25 N. C., 286. If these were not questions of law, no rule would ever be established, and the legal effect of certain facts, like their existence, would in all cases depend upon the finding of a jury, with no mode of having its correctness judged by a higher tribunal." Here we have a case in which the question was directly presented, and the principle of the decision has been repeatedly recognized in a number of cases. In *Heathcock v. Pennington,* 33 N. C., 640, the action was also for injuries to a slave by reason of the negligence of the defendant. No special instructions were asked, and the court left the question of ordinary care to the jury. The Court said (*Ruffin, C. J.*) that it is "erroneous to leave the question of due care to the jury, since it is the province
(598) and *duty* of the court to advise them on that point, *supposing them to be satisfied of certain facts.*" For this position *Biles v. Holmes* is cited, and the Court said that "the judgment would be reversed if the verdict did not appear to be what it ought to have been if the court had given the proper direction." In *Hathaway v. Hinton,* 46 N. C., 243, the plaintiff sued an overseer of the public road for special damages for injuries arising by reason of the defendant's failure to keep the road in proper repair. No special instructions seem to have been asked, and the court charged the rule of the prudent man. The Court (*Battle, J.*) said "there can be no doubt the judge ought to have decided the question himself, as has often been ruled by this Court," and a new trial was granted. To the same effect is *Glenn v. R. R.,* 63 N. C., 510. These cases are clearly in point, and are cited with approval in *Brock v. King, supra; Pleasants v. R. R.,* and many other decisions. Indeed, this Court has gone so far as to hold that, even in the absence of a prayer for special instructions, the court cannot leave the question of reasonable skill and due care in a physician to a jury. *Woodward v. Hancock,* 52 N. C., 384. The Court said: "A division of the question in such cases, between the court and jury, is now considered settled, and, therefore, where there is a state of facts conceded or proved, it becomes the duty of the court to draw the conclusion as matter of law. *If there be a conflict of testimony presenting different views of the case, it is in like manner the court's duty, upon these views, to draw the proper conclusions.*" In *Smith v. R. R.,* 64 N. C., 235, the Court said (*Reade, J.*) that "where the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the court; where the facts are

in dispute, the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and leave the jury to apply the law to the facts as they find them." In a case between these very parties, in 105 N. C., 48, this Court took (599) occasion to declare that charging the rule of the prudent man "is not consistent with the decisions of the court on that subject."

From these and other cases that might be cited, it must be regarded as absolutely settled by a long line of judicial decisions, that such a general charge is not permissible in North Carolina. Whatever may be the decisions in other States, and whatever the text-books may say upon the subject (and some of these amount to but little more than a collection of such decisions), we cannot see how (even if persuaded that our rule should be relaxed in some instances) we can reverse what has long been regarded as settled law in this State. It would, indeed, seem like "an attempt to move fixed things"; and we think that if any change is desirable, it should be made by the Legislature, "for it is an established rule," says Blackstone (1 vol., 70), "to abide by former precedents where the same points come again in litigation, as well to keep the scales of justice even and steady and not liable to waver with every new judge's opinion." *Stare decisis et non quieta movere.* It is true that precedents may not be followed when "flatly unreasonable or unjust," but we can see no reason for reversing the uniform decisions of this Court, extending through a period when it was adorned by some of the greatest jurists in this country, simply because these views are not in accord with a number of decisions from other States, which decisions, in many instances, are not even consistent with each other.

We do not feel that we are imposing any additional burdens upon the judges by adhering to the principle as established in this State, and when it is said that the judge is to charge the jury as to the various phases arising upon the testimony, I do not understand that the Court is prescribing any rule which at all differs from that laid down in *McKinnon v. Morrison,* 104 N. C., 354; *Boon v. Murphy,* 108 N. C., 187, and other cases.

A mere omission to charge as to a particular aspect of the testimony when not specially requested so to do, is no more (600) ground for a new trial in cases of this character than in others. Where, however, there is a total failure to charge the law, or where a proposition of law is submitted to the jury, and is not corrected by the verdict, it is ground for a new trial.

Believing that the entire current of judicial decision in this State is in favor of the principle as declared in *Biles v. Holmes, supra,* I cannot concur in any view, however plausible or ingenious it may be, which looks to such a radical change in our law.

As I have remarked, if the law, as established, is to be abrogated or modified, the Legislature, and not the court, should take the responsibility; and certainly should this be so when we are asked by counsel to reverse our own decisions upon the authorities from other States. If such force is to be given to the decisions of foreign courts, we may at once abandon all hope of having anything settled as law in North Carolina.

I am authorized to say that the *Chief Justice* concurs in this opinion.

AVERY, J., dissenting: I do not concur with my brethren, especially in the sweeping and unqualified rule laid down in the opinion, that it is error in any and every conceivable case, on the part of a *nisi prius* judge to define ordinary care as that which would have been exercised by an ideal prudent man, acting in the conduct of his own affairs, in the place of the person or corporation charged with negligence, and to leave the jury to determine whether, under all the surrounding circumstances disclosed by the evidence, such person attained to the standard of due care furnished by the definition. It is universally conceded that where the facts are undisputed, and but a single inference can (601) be drawn from them, the question of culpable negligence is one addressed exclusively to the court. On the other hand, it is equally well established that where the testimony is conflicting in material aspects, or where fair minds may deduce more than one conclusion from an admitted state of facts, it is the province of the jury to pass upon an issue or issues involving the alleged negligence, and the duty of the court upon request of counsel, preferred in apt time, to instruct the jury, whether, upon any given hypothesis arising out of any phase of the evidence, the alleged negligence would be shown to be the proximate cause of the injury.

But I do not concur with the Court in the opinion that where counsel ask for no instruction, even though "the evidence is voluminous and conflicting," and presents many varying aspects, it is the duty of the trial judge to apply the law to every phase of the testimony "as thoroughly as practicable" (or as it can be done).

If the action had been brought to enforce a contract set out in a complaint, and various witnesses had contradicted each other as to many facts and circumstances tending to show on the one hand that the defendant did, and on the other that he did not, assent to such agreement, in the absence of any special requests from counsel it would not have been error to tell the jury that a contract was an agreement upon a sufficient consideration to do or not to do a particular thing; that an agreement involved the consent of two minds, and it was the province of the jury, looking at all of the testimony to determine whether the defend-

ant assented to the agreement declared upon as the basis of the action. If such charge had been excepted to upon the ground that, in some particular aspect of the evidence not mentioned by the court, there was in law no assent on the part of the defendant to the agreement, a fatal objection to the sufficiency of his exception would have been found in the principle stated for the Court by the present *Chief* (602) *Justice* in *Morgan v. Lewis,* 95 N. C., 296, that "the court is not required to present possible aspects of the facts in their bearing on an issue, certainly not when they are not requested to do so;" or the still more explicit statement of the rule by the same learned *Justice* in *Brown v. Calloway,* 90 N. C., 119, that "if the court fails to charge the jury *especially upon a point, when there are more* than one presented by the evidence, *this is not error, unless it was requested to give the charge.*"

In the leading case of *McKinnon v. Morrison,* 104 N. C., 363, *Justice Clark,* for the Court said: "When the error is an *omission to charge as to some particular aspect of the case,* it cannot be assigned as error and become the subject of review, unless an instruction was asked for and called to the attention of the court." Cited in *Taylor v. Plummer,* 105 N. C., 58; *Helms v. Green, ib.,* 265; *McFarland v. Improvement Co.,* 107 N. C., 369; *S. v. Fleming, ib.,* 909. The language of *Chief Justice Smith,* delivering the opinion of the Court in *S. v. Bailey,* 100 N. C., 334, is, that "error can not be assigned and become the subject of review in an omission or neglect to give 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." *Judge Gaston,* in *Brown v. Morris,* 20 N. C., 565, cited in all of the later cases, stated the same principle still more tersely when he said "a refusal (to charge upon a particular aspect) may constitute error, but mere omission does not." In *Terry v. R. R.,* 91 N. C., 243; *Justice Ashe,* in construing section 412 (3) of The Code, said: "But it by no means dispenses with the rule that instructions must be asked upon points omitted by the court in the charge, and it is no error to omit these unless asked to charge upon them." *Justice Clark,* in *Boon v. Murphy,* 108 N. C., 187, said: "To permit a party to ask for a new trial . . . for an omission to charge in every possible aspect of the case, would tend not so much to make a new trial a full and fair determination of the controversy, as a contest of ingenuity between counsel." The effect (603) of making actions involving a question of negligence exceptions to the rule applicable in all other cases would be to subject the tact and learning of the judge to the most trying tension in this particular class of trials, leaving counsel to rest upon their oars till after verdict, and then tax their ingenuity to point out as error any conceivable aspect

of the evidence in which it would have been practicable to present another principle of law applicable to a particular phase of the testimony which the court omitted to mention. To require our judges to give in every case, where the evidence is voluminous and conflicting, as thorough and exhaustive statement of every combination of circumstances growing out of it, together with explicit instructions as to the law of negligence applicable to every such phase, would be to subject them to a burden never before, in my judgment, imposed upon a *nisi prius* judge by any statute or rule of practice.

It will be conceded that the question, whether an undisputed state of facts, from which only a single inference can be drawn, is sufficient in law to show that a homicide was excusable on the ground that it was committed in self-defense is one for the court exclusively; yet it does not follow that it is error where the testimony is conflicting, or the possible inferences deducible from it are numerous, to leave the jury to determine whether a man of ordinary courage, standing in the position of the prisoner, had reasonable ground to apprehend great bodily harm at the hands of the deceased, and whether he inflicted the injury in order to protect himself from such bodily harm, without giving in detail every conceivable combination of circumstances growing out of the testimony, even where counsel fail to request more specific instructions.

If the criterion of the prudent man is as well established as
(604) a test of negligence as that of the man of ordinary courage is of self-defense in homicide, as I propose presently to show, it will be impossible, it seems to me, to offer any satisfactory reason why this Court should depart from principle in holding that a jury are never deemed in law capable of determining what is an exercise of ordinary care, where only a question of liability for damages is involved, while it is their province, where the facts are in doubt, in all cases to decide what would be the conduct of a man of ordinary courage, though a death of infamy upon the gallows may follow their finding. I think, therefore, that the sweeping rule laid down by the Court not only leads to a radical change in the rules of practice, but to a departure from a principle established by the current of authority in our own as well as other courts, and clearly founded upon reason.

Ordinary care is defined to be such care as men of ordinary prudence, sense and discretion usually exercise under the same circumstances in the conduct of their own business or affairs. *Shaw v. R. R.*, 8 Gray, 45; 2 Wood on Railroads, sec. 301. The degree of care depends upon the hazards and dangers incident to the business in which it is to be exercised, and consequently greater care and skill are required of railroad companies than of carriers transporting goods by coaches, wagons or street cars drawn by horses. *Wagner v. R. R.*, 51 N. Y., 497. "The

degree of care required in any case must have reference to the subject-matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise under the same circumstances." *Ibid.* Mr. Wood, section 202, says: "It may be well to say here that the various expressions found in cases as to the degree of care to be observed by a railway company, in reference to the condition of its roadway, bridges, carriages, engines, etc., after all resolve themselves into the simple rule that it must use reasonable care, and that the degree of care to be exercised must be commensurate with the nature of the business and the possible dangerous consequences to the lives (605) and limbs of passengers if it is remiss in the performance of this duty, and the question whether it has exercised such care or not is for the jury." *McIntyre v. R. R.,* 47 Barb., 523. *Judge Campbell,* in *R. R. v. Huntley,* 38 Mich., 537, stated the rule to be, that "if they (railroad companies) exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them." "This practically means (says Mr. Wood, 1089) that if the company exercise such care and vigilance as a prudent man under like circumstances would exercise, it has discharged its duty, otherwise it would be meaningless and would *call upon the jury* to say *what railroad companies* were prudently managed and what were not."

In the last edition of Sackett's Instruction to Juries, 347, the following formula in reference to an issue of negligence is approved: "You are instructed that in determining the question of negligence in this case, you should take into consideration the situation and conduct of both parties at the time of the alleged injury as disclosed by the evidence, and if you believe from the evidence that the injury complained of was caused by the negligence of the defendant's servants, as charged in the declaration, and without any greater want of care and skill on the part of the plaintiff *than was reasonably to be expected from a person of ordinary care, prudence and skill, in the situation in which he found himself placed,* then the plaintiff is entitled to recover."

To sustain this rule the author cites Cooley on Torts, sec. 674; Wharton on Negligence, sec. 304; *R. R. v. True,* 88 Ill., 608; *Brown v. R. R.,* 50 Mo., 461; *Cooper v. R. R.,* 44 Iowa, 134. A comparison of the language cited, with the instruction given in the court below and excepted to by defendant, will show that it was substantially the (606) same as that set forth by Sackett as a formula.

The principle, as stated by Cooley on Torts, 630, sustains the same view. He says: "All these circumstances are to be taken into account when the question involved is one of negligence, for negligence in a

legal sense is no more nor less than this: the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury." The same author says, at page 668: "The question (for the jury) will often be, *does the defendant appear to have exercised the degree of care which a reasonable man would be expected to exercise under like circumstances?*" and at page 675 cites *Tuff v. Warman,* 5 C. B. (N. S.), 585, in which a similar rule is laid down. The rule, as stated in 1 Shearman & Redfield, sec. 53, is still more explicit: "In very many cases the law gives no better definition of negligence than the want of *such care as men of ordinary prudence or good men of business would use under similar circumstances.* Of course this raises a *question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass,* even though no evidence of usage were given, for they may *properly determine the question by referring to their own experience and information.* Indeed they must do so, since express evidence on such points is usually not admissible. Consequently a case of this kind must *be left to the jury,* even if there is no conflict of evidence, *unless indeed there is evidence enough to decide this point, as well as all other questions in the cause.*"

Beach, Contributory Negligence, p. 23, says: "Ordinary care is generally, therefore, a question of fact. . . . The law prescribes as a standard of conduct, to which all men must conform at their peril, *the conduct of an ideal average prudent man,* whose *equivalent for practical purposes the jury is generally taken to be, and whose* (607) *culpability or innocence is the supposed test.* . . . Specific rules for specific cases are taking the place of the general rule that one must use ordinary care and prudence; but *whenever no such rules have been* laid down we *revert* to the original theory, and decide the case upon the only remaining rational principle, that *ordinary care is to be held to mean that measure of prudence and carefulness that the average prudent man might be expected under the circumstances to exercise.*"

"The law considers," says *Justice Oliver Wendell Holmes, Jr.,* "what would be blame-worthy in the average man, the man of ordinary intelligence and prudence, *and determines liability by that.*" The Com. Law, p. 108.

I may add to these citations from well-known text-writers, many leading cases decided by the courts of England, and most of the courts of our States, that are referred to by the authors to sustain their views; but will add only a few references. *R. R. v. Beatty,* 73 Texas, 592; *Hoffman v. Water Co.,* 10 Cal., 413; *Wolf v. Water Co., ib.,* 541; 16

A. & E., 402; *Reynold v. Burlington,* 52 Vt., 300; *R. R. v. Gower,* 85 Tenn., 465; 4 A. & E., 22.

I do not admit that this consensus of authority can be successfully met and overcome by the assumption that this Court has fallen into a particular groove from which it cannot be extricated except by such legislative action as will place us in line with most of the courts of the States, as well as the courts of England. On the contrary, I maintain that, though there is some conflict among the older decisions as to the rule governing actions brought to recover for negligence, all of the leading cases, decided for twenty years, where the question was even indirectly raised, have been in accord with the principle that where the evidence is conflicting and voluminous, and no instructions are asked, the court may fall back upon the original rule, as stated by Beach, and let the jury put themselves in the place of the average prudent man, as they would on a trial for murder be instructed to look at the testimony from the standpoint of an ideal man of ordinary (608) courage situated as the prisoner was when the killing was done.

It is true that there are *dicta* in three or four cases in which the abstract proposition is stated that the rule of the prudent man is not to be submitted as a guide to the jury, but these *obiter* statements are in conflict with principles which underlie numberless decisions of this Court, unless explained by the fact that, in those particular cases, instructions were asked or facts were undisputed. In *Farmer v. R. R.,* 88 N. C., at p. 567, it appears that the plaintiff requested the following instructions: "If the plaintiff was guilty of negligence in turning his mule out, yet if the defendant by the exercise of proper care could have avoided the injury, the plaintiff is entitled to recover." The appeal was in part from the refusal to give this instruction, which was held to be error. *Justice Ashe,* delivering the opinion of the Court, said: "But conceding that negligence was imputable to the plaintiff in turning his mule out of his lot, as described by the witnesses, still it was the duty of defendant to exercise proper care to avoid the injury, for it has been held by this Court that, 'notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of defendant, an action will lie for damages. *Gunter v. Wicker,* 85 N. C., 310. . . .' The *instruction asked by the plaintiff and refused by the court was almost in the identical language of this decision,* and when the court *declined* to give it, the *jury may possibly have been misled by the inference reasonably to be drawn from the refusal.*" In that case it was declared to be error to refuse to allow the jury to pass upon the question whether, by the exercise of ordinary care (or that which a prudent man would have exercised under similar circumstances) the

defendant could have avoided the injury. This was not said
(609) *obiter,* but bore directly on the point raised. In our case it is held to have been error to allow the jury to pass upon the question whether a man of ordinary prudence would, under the circumstances, have put his brick upon the land where the *feme* plaintiff's brick were destroyed, because "the jury were left to decide that there was or was not negligence, according as they might think a man of ordinary prudence might do, one way or the opposite thereof, in view of the facts." If the question whether the defendant, in the one case, could, by exercising the care which a prudent man occupying its place would have exhibited, might have avoided an injury, was one of fact for the jury, it is difficult to distinguish the question of plaintiff's negligence from that of a defendant, and determine upon what principle it falls peculiarly within the province of the court to refuse any such test as applicable to contributory negligence only. If such is the standard or criterion by which a jury may determine whether a defendant railway company has exercised ordinary care, why may not the same test be applied by the jury to the question whether an injury is due to the concurrent negligence of a plaintiff? Yet, as we shall see, the case of *Farmer v. R. R., supra,* does not stand alone in support of the right of the jury upon the point mentioned by *Justice Ashe,* if the negligence of both parties must be passed upon under the same general rule.

In *Owens v. R. R.,* 88 N. C., 507, *Chief Justice Smith,* delivering the opinion of the Court, said: "The rule of liability has its modifications, even where there is mutual negligence, for if the plaintiff was negligent, and the defendant by the use of ordinary care could have avoided doing the injury, he will nevertheless be subject to the action; and so, if the defendant was negligent, and the plaintiff by the use of ordinary care could have escaped the injury, the latter is not entitled to recover. . . . The question was simply as to the character or quality
(610) of the intestate's own act, as determined by the attending circumstances, and, as there is no presumption when all the facts are disclosed that proper care was used, so there is none that it was wanting, and the transaction should have been committed to the jury to find how the fact was. . . . The jury should be left free to determine the essential fact on which the defendant's liability depends." The *essential question was previously declared to be, whether the intestate "was watchful and used due care"* (such as a prudent man would have exercised), "and the collision could not have been prevented by the use of such appliances as were at command."

Where the question of liability on the part of a railway company for negligently killing cattle has arisen, this Court has uniformly held that

it was the province of the jury, in cases where the evidence was conflicting, or fair minds might deduce more than one inference from it, to determine *whether the locomotive engineer could, by keeping a proper outlook, or by proper watchfulness, or by the exercise of ordinary care,* have discovered that the cattle were on the track in time to avert the danger by using the appliances at his command—ordinary care being, according to all the authorities, synonymous with that which an ideal prudent man would have exhibited under similar circumstances.

In *Turrentine v. R. R.,* 92 N. C., 641, *Chief Justice Smith,* for the Court, said: *"The question for the jury,* in the words of an eminent English judge, is 'whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own *negligence or want of ordinary and common care and caution,* that but for such negligence and want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not, as but for his own fault, the misfortune would not have happened,'" etc. A new trial was awarded in that case, because the jury had not found whether (611) the plaitniff had exercised ordinary care, as it was their province to do, yet if ordinary care is that usually exercised by the prudent man similarly situated, how can a court possibly avoid leaving a jury to test the question of care by the standard laid down by every text-writer?

Suppose that a trial judge tells a jury, as he unquestionably must often instruct them, that the liability of a railway company depends upon the question to be decided by them on the evidence, whether the engineer could, by the exercise of ordinary care, notwithstanding any negligence on the part of the plaintiff, have avoided killing cattle or inflicting an injury on a person, and the jury should return for special instruction as to what is meant by *ordinary care.* The judge must respond that it is such care as the average prudent man would exhibit under like circumstances, because the law furnishes no other reply for him. Thus it is that practically the rule of the prudent man is always passed upon in both classes of cases mentioned. The jury are left to determine, in actions for waste and against bailors, whether a prudent owner in *fee* would have cleared land under similar circumstances. *Shine v. Wilcox,* 21 N. C., 631; *Sherrill v. Connor,* 107 N. C., 630; *Morriss v. Cass,* 10 Kansas, 288. Does reason or public policy forbid the adoption of a similar rule in trying issues of negligence?

The principle established in *Gunter v. Wicker, supra,* that the liability of a party often depends upon the question to be decided by the jury, whether a defendant, by the exercise of ordinary care (or that

which characterizes the ideal prudent man), is also approved in *Deans v. R. R.*, 107 N. C., 686; *McAdoo v. R. R.*, 105 N. C., 140; *Lay v. R. R.*, 106 N. C., 410, and numerous other cases. I do not concur with the Court in the view that in all the cases where this question has been decided by the jury, they have usurped the functions of the court
(612) and passed upon an issue of law by determining what constituted negligence. When the facts are undisputed, and but a single inference can be drawn from them, it is the duty of the court to instruct the jury whether, if the evidence is believed, the defendant was justifiable or excusable in beating or killing his adversary; but it has never been insisted on that account that where the testimony was conflicting, the application by the jury of the test question, whether a man of ordinary firmness or courage would have deemed it necessary to strike the blow if similarly situated, necessarily involved the assumption by the jury of the right to say what did or did not constitute self-defense as a question of law. It seems to me that reason, authority and public policy combine to deter us from adopting a peculiar principle, and an anomalous rule of practice in actions involving the law of negligence, when there is no sufficient reason for distinguishing such cases, and when, with the increasing number and growing business of railway companies, these peculiar and complex rules must be so often applied. I assume that the Court does not intend to overrule the whole line of cases in which it is held not to be error to omit to give instructions not asked, and that, therefore, the rule laid down in this case, that it is the duty of the court to apply the law as far as practicable to every aspect of the evidence, whether in response to or in the absence of requests, and that it is error to omit to state any practicable view of the law applicable to the testimony, is not a general one, but applies only where an issue of negligence is involved.

Of the cases cited from our own reports, and relied upon to sustain the doctrine laid down by the Court, it appears upon examination of them, that either upon an undisputed state of facts or upon the most favorable view of the evidence, or "supposing all the evidence to be true," the Court held that there was or was not negligence in the following,
to wit, *Herring v. R. R.*, 32 N. C., 402; *Avera v. Sexton*, 35
(613) N. C., 247; *Heathcock v. Pennington*, 33 N. C., 642; *Smith v. R. R.*, 99 N. C., 241; *Smith v. R. R.*, 64 N. C., 236; *Anderson v. Steamboat Co., ib.*, 399; *Sellars v. R. R.*, 94 N. C., 654. The material facts seem to have been admitted in *Biles v. Holmes*, 33 N. C., 16. On the other hand, the exception passed upon was to the refusal to give either instruction on a particular phase of the evidence, or the general instruction that negligence either was or was not proved in any view of the testimony in *Aycock v. R. R.*, 89 N. C., 324; *Wallace v. R. R.*,

98 N. C., 494, as well as in *Avera v. Sexton,* and others of the cases already distinguished.

In *Pleasants v. R. R.,* 95 N. C., 195, this Court expressly declared that no exception had been taken below that could be entertained on appeal, and, of course, all that was said in the unnecessary discussion of points raised for the first time in the appellate court was *obiter,* and is not binding as authority. *Perry v. Scott, ante,* 374. The abstract statements in *Heathcock v. Pennington* and in *Biles v. Holmes, supra,* are not to be treated as authoritative, because both cases were decided upon the undisputed testimony, but are to be considered as qualified by the peculiar character of the evidence. It will not be contended that in a case where prayers for instruction were preferred, or where the facts were undisputed, or the material facts were not controverted, the question was fairly raised whether, in the absence of any specific requests for instruction and upon voluminous and complicated evidence, giving rise in its varying aspects to different legal conclusions, the trial judge was bound to work out every reasonable hypothesis arising out of perhaps almost endless combinations of parts of the testimony, and present the law applicable to every such phase. If it is not practicable to pass upon every possible combination of conflicting testimony, by what rule are we to define the limit to which it is practicable to work out these intricate problems? What rule shall we offer to the diligent *nisi prius* judges as an infallible guide in conducting such trials? They know that omissions to give charges upon the trial of all actions (614) not involving a question of negligence are not subject to exception, but the boundary line of error must necessarily cover every conceivable omission where such a question is raised, under the law, as established in the case at bar, and the rule will therefore impose upon them unusual, and, I think unnecessary burdens.

I regret all the more that the necessity arose for differing with the Court, because the case might have been disposed of upon the other ground, in which a majority have concurred, that, in the most favorable view of the evidence the loss was directly due to the plaintiff's negligence in placing his brick in an exposed place. While, however, it was not essential, it was the right of the Court to pass upon every point fairly raised, and I do not question its exercise. It is true, that had the decision rested upon that ground alone, I would not have concurred with my brethren, for two reasons: First, it was my understanding that the brickyard had been removed from its former location, and that the fact was conceded. I prefer, however, not to extend this fruitless discussion by stating my second ground of objection to the position referred to.

I must not, and I think will not, be understood as maintaining that the doctrine established in England, and in many of the most respectable courts of America, that the jury can determine as a rule whether there was negligence, prevails here, in view of our own adjudications; but I do contend that where the facts are voluminous and the testimony conflicting, or the inferences numerous, the trial judge should not be held to have erred for failing to give suppositititious instructions *ad infinitum,* though correct as legal propositions, any more where a railroad company has killed a man than where one citizen has slain another. I insist that the opinion of the Court establishes not only a peculiar but an indefinite rule in a particular class of cases, and makes it almost impossible (615) to avoid error in a long complicated case involving many conflicts in the evidence upon various points, and tends therefore to delay and defeat the ends of justice.

In a somewhat extended investigation, I have failed to find that such a burden has been imposed upon *nisi prius* judges under the rules of practice prescribed in any other State.

PER CURIAM. New trial.

Cited: Knight v. R. R., 110 N. C., 61; *Dibbrell v. Ins. Co., ib.,* 214; *Whitford v. New Bern,* 111 N. C., 277; *Knight v. R. R., ib.,* 86; *Waters v. Nelson,* 112 N. C., 95; *Haynes v. Gas Co.,* 114 N. C., 209; *Bottoms v. R. R., ib.,* 715; *Joyner v. Roberts, ib.,* 392; *Kahn v. R. R.,* 115 N. C., 641; *Russell v. Monroe,* 116 N. C., 728; *Sherrill v. Tel. Co., ib.,* 657; *Chesson v. Lumber Co.,* 118 N. C., 68; *Russell v. R. R., ib.,* 1110; *Hinshaw v. R. R., ib.,* 1055; *McCracken v. Smathers,* 119 N. C., 620; *Ruffin v. R. R.,* 142 N. C., 127; *S. v. Yellowday,* 152 N. C., 797.

GRAY J. TOOLE v. LAURA TOOLE.

Divorce—Evidence—Declarations of Husband—Contradiction.

In an action for divorce for adultery, by husband against wife, it was competent for the plaintiff to ask a witness, on cross-examination, if "she did not hear the plaintiff, before that day, forbid the defendant to go with P. (with whom the alleged adultery was committed) or to go where he was," as tending to show the adulterous intercourse, to contradict a former witness who testified that plaintiff had invited P. to his house, and as sustaining plaintiff's allegation that the adulterous intercourse was without the consent or connivance of plaintiff, and it was not incompetent as being the declarations and admissions of husband and wife under The Code, secs. 588, 1351.

TOOLE *v.* TOOLE.

ACTION, tried before *Merrimon, J.*, at February Term, 1891, of MECKLENBURG.

The plaintiff was the husband of the defendant, and he brought this action against her to obtain a divorce from the bonds of matrimony, because of her alleged adulterous intercourse from time to time with Henry Palmer. The defendant broadly denied the material allegations of the complaint.

On the trial there was evidence tending to prove the adulterous intercourse as alleged. A witness for the defendant, Lizzie Toole, testified:

"I am a daughter of Laura Toole. I remember Friday the day of the fuss, and I was at home on that day—all day. I re- (616) member seeing Doll Abernathy pass. The plaintiff had Henry Palmer hired to work for him, and had invited him to his house. He asked him to stay there with the children when my mother was at Chapel Hill on a visit. I was there, at home, on Friday, in August, when Ed Webb came for the dinner."

Lizzie Pemberton was examined by the defendant, and on her cross-examination, this witness was asked by the plaintiff's counsel, if she did not hear the plaintiff, before that day, forbid the defendant to go with Palmer or to go where he was. This evidence was offered to show that defendant's association with Henry Palmer was not by consent of plaintiff, and to contradict the witness Lizzie Toole.

This question was objected to by the defendant. The objection was sustained, and the plaintiff excepted.

The jury returned a verdict as set forth in the record. The plaintiff moved for a new trial, upon the ground that his Honor erroneously excluded the question propounded to the defendant's witness, Lizzie Pemberton, on cross-examination, and which is stated above. The motion was overruled, and the plaintiff excepted.

There was judgment for the defendant, and the plaintiff appealed.

P. D. Walker for plaintiff.
C. W. Tillett for defendant.

MERRIMON, C. J. The question which the court declined to allow the witness Pemberton to answer on the cross-examination, by implication sufficiently suggested the nature and purpose of the evidence it was intended to elicit. It was expected that this witness would state, in substance, that the plaintiff had forbidden his wife, before a time specified, to go or associate with the person named, or to go where he was. The evidence of other witnesses went to show that the (617) plaintiff had reason to suspect his wife and the person named were unduly intimate. We think that such evidence was relevant and

competent. It tended, in some measure, to contradict the witness Toole. It was not probable that the plaintiff would have the man, whom he had reason to suspect was too intimate with his wife, to work for him, and that he invited that man to his house and to stay there with his children. It would have tended also to prove the alleged adulterous intercourse. There was evidence tending to prove that after the plaintiff had forbidden his wife to go with Palmer, she did so. A good, innocent wife would not have gone or associated with him after such forbiddance, she would more probably, thereafter, have avoided him. That she so associated with him afterwards, tended to strengthen the other evidence of the alleged adulterous intercourse.

The proposed evidence was competent in another point of view. The plaintiff alleges that the adulterous intercourse alleged was "without the consent, connivance or procurement of the plaintiff." This the answer denies. The issue thus raised was material, and though it was not submitted, the court might or ought to have submitted it as the evidence bore upon it. The evidence proposed and rejected tended to show that the plaintiff did not connive at the defendant's lascivious intercourse with Palmer. The evidence was not hearsay, it related to what the plaintiff said directly to the defendant at a time designated upon a subject germane to the matter in question.

The evidence was, in no proper sense, that of the plaintiff or the defendant, and, therefore, incompetent under the statute (The Code, secs. 588, 1351). It was evidence of a third person, and competent in the aspects of the case above pointed out.

Error.

Cited: S. c., 112 N. C., 156; *S. v. Randall,* 170 N. C., 761.

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(618)

F. C. YOUNG v. THE VIRGINIA AND NORTH CAROLINA CONSTRUCTION COMPANY.

Negligence—Trial—Expression of Opinion.

1. It was not negligence to use a green round pole as a lever for raising and leveling the roadbed of a railroad, although "jacks" and other instrumentalities might have been effectively employed; and therefore the defendant was entitled to the instruction "that if the jury find that the defendant company was using the ordinary lever used in such cases, and that the same, if used carefully by the laborers, was safe, and not dangerous, and the plaintiff was injured by the careless use by his fellow-

servants, it is not negligence of the company, and the plaintiff cannot recover."

2. It was prejudicial to defendant for the court to tell the jury that he knew of no direct testimony tending to show plaintiff's knowledge of the character of machinery used by which he was injured, and of his consent to its use, when plaintiff was present and saw the pole used, and the manner of its use; and the error was not cured by leaving it to the jury to say what were the facts, after having called their attention to the contention of defendant's counsel in regard to these facts.

ACTION, tried before *Merrimon, J.*, at Spring Term, 1891, of MECKLENBURG, brought to recover damages for injury to the plaintiff occasioned by the alleged negligence of the defendant.

In the complaint it is alleged:

Third. That the "boss" or "superintendent" who had entire control and charge of the hands at work, one Captain Catlett, was, the day the injury was complained of, raising cross-ties, etc., and leveling the roadbed, etc. That in raising the cross-ties certain machines or tools, known as "jacks," were used, but they were abandoned on account of their being unsafe and defective on account of their long use and on account of the defective material of which they were made; that the screws of said "jacks" were worn out; that Captain Catlett, who had the entire control of the work and hands, abandoned the use (619) of the "jacks" and, instead of getting new and safe "jacks" to do the work, as he had done before, procured a green round pole to be cut of some kind of wood believed to be oak wood, and, with cross-ties underneath, used the round pole as a lever to lift a cross-tie upon which the iron rail was nailed. That the said "boss" aforesaid ordered and commanded the plaintiff to assist and aid in raising the cross-tie before mentioned commanded and ordered him and some of the plaintiff did not know of the unsafe, defective and inadequate implement used, nor did he know of the unsafe, defective and inadequate manner used in doing the work. That he was ordered and commanded to come from the gravel train where he had been working with other hands, and before he had time to discover the unsafe, defective and inadequate implement used to do the proposed work, and the unsafe, defective and inadequate manner in which it was to be done, the said "boss" before mentioned commanded and ordered him and some of the other hands to take hold and to pry the cross-tie, etc.; that he took hold of the pole, with the other hands, and did as ordered and commanded to do, and the pole, which was round and unsafe, defective and inadequate to do the work, slipped and fell with the men, on the leg and thigh of the plaintiff, injuring him severely, crushing and mangling him to his great damage. That the defendant knew that the implement

used for said work was unsafe, defective and inadequate, and the manner in which it was used was unsafe and dangerous and not suitable for the purpose.

Fourth. That at the time aforesaid, and while the plaintiff was employed and engaged in his duties and occupations as a workman on the gravel train, the said pole which was used in prying as before mentioned, and the manner in which it was used, was unsafe, defective, dangerous and not suitable for the purpose and that the injury
(620) complained of was not by any fault or negligence of the plaintiff.

The answer denied the material allegations of the complaint, and alleged contributory negligence.

The court submitted to the jury the following issues, to which it responded as indicated at end of each:

1. Was the plaintiff's injury caused by the negligence of the defendant? Ans.: "Yes."

2. Was the plaintiff guilty of contributory negligence? Ans.: "No."

3. Did the plaintiff know, or have good reason to know, the nature and character of the implement used by him, and consent to use the same? Ans.: "No."

4. What damage has he sustained by reason of such injury? Ans.: "$2,500."

On the trial, the defendant requested the court to give the jury the following special instruction: "1. That if the jury find that the defendant company was using the ordinary lever used in such case, and that the same, if used carefully by the laborers, was safe, and not dangerous, and the plaintiff was injured by the careless use of his fellow-laborers, it is not the negligence of the company, and the plaintiff cannot recover."

The court modified this instruction, "leaving it to the jury to say whether the lever, under the circumstances, was a proper implement to use," and as-thus modified, gave it.

On the third issue, his Honor told the jury that he knew of no witness who gave direct testimony tending to show that the plaintiff knew, or had good reason to know, of the nature and character of the implement used by him, and consent to use the same, and called upon defendant's counsel to point out such evidence, and thereupon the defendant's counsel argued that from the nature of the injury, and the manner in which it was inflicted, and from the fact that the plaintiff could see the lever and the way it was being used, was evidence from which
(621) the jury should infer that he had such knowledge, and the court called the attention of the jury to this contention of defendant's

counsel, and left it to them to say whether, in this view of the evidence, the plaintiff had such knowledge. Defendant excepted.

The court entered judgment for the plaintiff, and the defendant appealed.

H. Clarkson for plaintiff.
C. B. Watson and P. D. Walker for defendant.

MERRIMON, C. J. The complaint alleges that at the time the plaintiff sustained the injuries complained of, the defendant's laborers (he being one of them) were engaged in "raising cross-ties, etc., and leveling the roadbed," etc. Now, in view of the nature of such employment, and the pole used as a lever in the connection as described in the complaint, and accepting all the evidence in respect to its use as true, we think the court ought to have told the jury that the pole was an appropriate implement, and not dangerous for the purposes to which it was applied. All the evidence pertinent went to show that the laborers were engaged in raising the track of the road, and that they used a pole to prize it up, placing the end of it under a cross-tie. In its nature the application and use of the pole was simple and appropriate, and the evidence went to prove the same fact. That "jacks" or other instrumentalities might have been employed effectively to raise the track, did not make it negligent to employ the lever—another appropriate means. The court ought not, therefore, to have modified as it did, the instruction the defendant requested it to give the jury.

The third issue submitted to the jury had reference to whether or not the plaintiff had knowledge of the nature and use of the pole as a lever. As to this, the court "told the jury that he knew of no witness who gave direct testimony tending to show that the plaintiff knew or had good reason to know of the nature and character (622) of the implement used by him, and consent to use the same, and called upon defendant's counsel to point out such evidence." We think there was such evidence, and that what the court said in that respect may have misled the jury to the prejudice of the defendant. They saw that the court was of opinion that there was not such evidence, and after the colloquy with counsel, they saw that the court was still not well satisfied as to its character. This, no doubt, impressed the jury. There was certainly evidence that the plaintiff was present, the pole was there plainly to be seen, as was also its purpose and application; he was directed to join in its use and he did so. Surely these facts constituted some evidence tending to prove that he knew of the character of the pole he aided in using, and that he consented to help in the use of the same. The pole and its use were simple, easy to be seen and understood

at a glance. It may be, however, that the plaintiff did not observe them with scrutiny, though there was evidence that he and the other laborers were cautioned to be careful. But be this as it may, there was evidence appropriate and pertinent to go to the jury without such possible prejudice as to its character and sufficiency.

There is error, and without adverting to other exceptions, we are of opinion that the defendant is entitled to a new trial, and so adjudge.

Error.

Cited: Baker v. R. R., 144 N. C., 42; *Nail v. Brown*, 150 N. C., 535; *Marcom v. R. R.*, 165 N. C., 260; *Smith v. Tel. Co.*, 167 N. C., 256.

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(623)

S. J. HOOKS AND J. E. BLACK v. JAMES A. HOUSTON AND W. H. A. KLUTTZ.

Payment—Jurisdiction of Justices—Witnesses—Corroboration—Trial —Instruction not Asked—Exceptions to Charge.

1. It was not error to refuse to strike out the defendant's answer and to give judgment for the plaintiffs, in an action on a bond begun before a justice, where the defense was payment, upon the ground that the settlement of a partnership account was required, of which the justice did not have jurisdiction, when the defendant testified that upon selling a half interest in a partnership between himself and the assignor of the plaintiffs it was agreed that his half interest in two bags of cotton belonging to the partnership should be applied to the payment of the bond, as the defense was not predicated upon such settlement, but upon the agreement that the cotton should be specifically applied to the payment of the bond sued on.
2. For the same reason it was error to refuse to permit the plaintiffs to show that, upon an accounting before the justice, the defendant was indebted to the plaintiffs outside of the bond sued on.
3. Where defendant's testimony was contradicted by that of the plaintiff, it was proper to permit him to be corroborated by showing by his wife that he made statements to her similar to those testified to on the trial.
4. The failure to give instructions not asked is not error.
5. A general exception to the charge cannot be considered.

APPEAL from a justice of the peace, and tried at Spring Term, 1891, of MECKLENBURG, before *Merrimon, J.*

The plaintiffs seek to recover the sum of $42.50, with interest at eight per cent, from 30 March, 1880, alleged to be due by note of de-

fendant made payable on that day to H. A. Kluttz, and indorsed to plaintiffs for value after maturity. The execution of the note was not denied, but the defendant relied upon the plea of payment and, as a witness in his own behalf, testified in substance that he paid the note in cotton at Kluttz's gin, which was sold by Kluttz and applied to the payment of the note. Upon cross-examination, he testified (624) in substance that he and Kluttz entered into partnership to gin cotton, in which he was to have half; that by agreement one Tharrell was to take his place in the partnership, and he was to "come out;" that up to this time they had sold three bales of cotton, and two remained, one-half the proceeds of which was his. He had testified that the cotton weighed about 900 pounds, and brought about ten and a half cents per pound. Counsel for plaintiffs moved the court to strike out the defendant's plea of payment, and render judgment for the plaintiffs, "upon the ground that the justice's court had no jurisdiction to settle partnership matters." Motion refused, and plaintiffs excepted.

There was further testimony by defendant on cross-examination in regard to the sale of cotton, and money collected for bagging and ties to the amount of $60 to $75, of which the defendant used only one dollar; and the defendant testified that Kluttz never asked him to pay the note; that he was notified by the plaintiffs in 1887 that they had the note, and that he was solvent at all times.

The plaintiffs renewed their motion, which was again refused, and they excepted.

Plaintiffs then introduced Kluttz as a witness, who testified, in substance, that he and defendant were partners to gin cotton; that he saw Tharrell and proposed "to sell out to him," when Tharrell told him he had "bought out Houston"; that Houston sold out without his knowledge; that he went to Houston for a settlement but could not get it; that there were two bales of cotton left at the gin, and Houston told him to sell it and pay the creditors, which he did; that nothing was said about applying Houston's interest in the cotton to the payment of the note—"all went to the use of the firm; total amount of note is now due and nothing has been paid." There was further testimony by this witness tending to show that the partnership had no been settled, and that the defendant sold out his interest to Tharrell for ten dol- (625) lars, without the knowledge of Kluttz, and that nothing was said about applying the cotton to the payment of the debt sued on.

Plaintiffs' counsel then offered to prove by T. J. Renfrow, the justice who tried the case, that on the trial before him Kluttz and Houston both produced itemized statements of their respective claims in regard to the partnership business, and that witness made a calculation and found twelve cents in favor of plaintiffs outside of note sued on. Wit-

ness nor parties cannot produce their statement, and witness cannot recollect what the items were, and has destroyed the statements and calculation, and can only state the balance he found due defendant.

Objected to; objection sustained, and plaintiffs excepted.

Defendant then introduced Mrs. Houston, who testified as follows: "When my husband sold out he told me the two bales of cotton were left there to pay the note. Mr. Kluttz was not present at the time."

Plaintiffs objected; objection overruled, and plaintiffs excepted.

"I asked Mr. Kluttz what was the difference between Mr. Houston and himself?" He said "Nothing or very little."

In addition to the exceptions which appear in the record, "plaintiffs except to the charge, and allege as error his Honor's leaving the question of payment to the jury instead of instructing them that there was no evidence, or not sufficient evidence, to go to the jury that Kluttz agreed to take the cotton in payment of the note." To the issue, "Did defendant pay the note or bond sued on by the plaintiffs?" the jury responded "Yes." There was judgment for defendant, and plaintiffs appealed.

H. Clarkson for plaintiffs.
C. W. Tillett for defendant.

(626) DAVIS, J. The first exception is to the refusal of his Honor to strike out the defendant's answer and give judgment for the plaintiffs, upon the ground that the justice of the peace had no jurisdiction to settle partnership matters. This is not an action to settle a partnership. It is to recover money alleged to be due by note, which had no connection whatever with the partnership between Kluttz and the defendant, for it appears from the statement of the case on appeal that the note was given on 30 March, 1880, and the partnership was entered into in September, 1881, more than a year thereafter. The question whether the note had been paid or not, in no way depends upon the fact whether the partnership dealings had been settled or not. If it was agreed that Tharrell should take the place of the defendant as partner, and the cotton should be taken by Kluttz in payment of the note, as testified to by Houston, it makes no difference, so far as the note is concerned, whether the partnership was settled or not. The testimony of the defendant tended to show, not that the note was to be paid upon the settlement of the partnership, but by cotton belonging to the defendant then in the possession of the assignor of the plaintiffs, who took the note after its maturity. The defendant relied upon the plea of payment, and he is not seeking to establish a counterclaim growing out of unadjusted partnership dealings of which a court of a jus-

tice of the peace would have no jurisdiction, and the case of *Love v. Rhyne,* 86 N. C., 576, and cases cited by counsel for plaintiffs, have no application, and the first exception cannot be maintained.

The second exception is to the exclusion of the testimony of the witness Renfrow, that upon the settlement of the partnership dealings the defendant owed Kluttz twelve cents. That could have no bearing upon the question whether the note had been discharged by the proceeds of the cotton, as testified to by the defendant, and was properly excluded.

The third exception is to the testimony of Mrs. Houston, as to the statement the defendant Houston made to her, when he sold (627) out as partner, in the absence of Kluttz. The authorities cited by counsel for plaintiffs abundantly establish the rule of evidence, that the declarations of one party made in the absence of the other are incompetent as original substantive evidence, but counsel agree that it was offered and admitted, not as substantive evidence, but only as corroborative of the witness Houston, and that it was competent for this purpose hardly needs citation of authority. *S. v. Whitfield,* 92 N. C., 831, and authorities there cited.

The last exception was to the charge of his Honor in failing to instruct the jury that there was no evidence that Kluttz agreed to take the cotton in payment of the note. There was a conflict in the evidence, and that of the defendant tended to show that the note was paid in the manner stated, and we think his Honor submitted the question fairly and properly to the jury. Besides, the well settled rule that failure to give instructions not asked is no ground for error, the exception is a general one to the whole charge, and cannot be considered. *McKinnon v. Morrison,* 104 N. C., 362, and the numerous cases there cited.

Affirmed.

Cited: Burnett v. R. R., 120 N. C., 518; *Allred v. Kirkman,* 160 N. C., 394.

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(628)

D. H. PEELER v. A. A. PEELER ET AL.

Frauds, Statute of—Husband and Wife—Evidence—Burden of Proof—Consideration.

1. Where a conveyance from an insolvent husband to his wife is attacked for fraud, the *onus* is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed.

2. When the wife has offered testimony sufficient to satisfy the jury of the existence and validity of the consideration, the burden of showing fraud in the transaction is shifted to the attacking party; and if the jury shall then be satisfied that the conveyance was made by the husband to the wife to hinder, delay, or defeat his creditors, and this purpose was known to and participated in by the wife, it is their duty to find that it was fraudulent, although a valuable consideration passed.
3. A conveyance made with the intent to hinder, delay, or *defeat* a creditor in a recovery of any part of his debt is an intent to *defraud* within the meaning of the statute of frauds.
4. It was in proof that the husband, when he made the alleged fraudulent conveyance to his wife, was not worth more than five hundred dollars apart from the property in controversy; that his creditor, having indulged him for a long time, gave him notice that he must settle by a day named; that there was an agreement to arbitrate, pending which the conveyance was made, the debtor not reserving property sufficient to discharge the debt: *Held*, evidence proper to be submitted to the jury upon the *bona fides* of the deed.
5. Evidence that after the execution of the deed the husband and wife proposed to reconvey a portion of the land and another tract in satisfaction of the creditor's demand was incompetent.

ACTION, brought to set aside a deed made by the male defendant to his wife for fraud, and for possession of the land conveyed by said deed, tried at the August Term, 1891, of CLEVELAND, before *Hoke, J.*

The plaintiff sold and conveyed the land in dispute to his son, A. A. Peeler, and took the note of the latter for the purchase-money. He ultimately sued for a balance due in April, 1889, obtained judg-
(629) ment and soon after caused execution to be issued thereon. At the sale under the execution the plaintiff bought, taking the sheriff's deed, bearing date July, 1889. Meantime the defendant A. A. Peeler, in February, 1889, executed a deed for the land to his wife and codefendant, A. C. Peeler, the consideration being a debt which he alleged he owed her.

The material portions of the charge to which defendants excepted were as follows:

Was the deed of February, 1889, from A. A. Peeler to his wife a fraudulent deed?

The burden of the issue is on the plaintiff. The presumption is that a transaction is honest, and when a party alleges fraud, the law puts upon him the burden of proving his allegation.

When, however, a grantor is proved to be insolvent, and has made a deed for a large part of his property to his wife, leaving himself not sufficient to pay his debts, and such wife comes in court claiming to be a *bona fide* purchaser, the law requires the jury to look upon the transaction with suspicion, and to give the matter close scrutiny, and re-

quires her under such circumstances to make her claims good, and to satisfy the jury, by a preponderance of the evidence, that she has paid a fair price for the land; that the consideration is not pretended but real, and if it is claimed to have been made in the payment of an honest debt, the wife must satisfy the jury that the debt was a real debt, as claimed, for the purchase price of the land.

Now if you are satisfied, by a preponderance of the evidence, that the husband was indebted to plaintiff in a large amount—two thousand dollars and more—and that he was insolvent, and under such circumstances conveyed the property to his wife in payment of his debt to her, but with intent to hinder and delay, or defeat plaintiff in the recovery of his debt, and the wife participated in this purpose of (630) his, or if she knew it was being done by him to hinder or delay the plaintiff in collecting his debt, then the deed would be fraudulent, even though there was a valid consideration.

If, however, the fraudulent purpose existed on his part, and such purpose was not participated in by the wife, and not known to her, then the deed would be good. To vitiate the deed the fraudulent purpose must have existed with both the grantor and grantee—the husband and the wife—or it must have existed with the husband and been known to the wife. The notice to the wife does not mean she must know, as a matter of law, the deed was fraudulent, but did she know of the circumstances which the law says makes the deed fraudulent, if it was so, on part of the husband.

The defendant excepted to his Honor's charge in the following particulars:

1. In that his Honor charged the jury as follows: "In the case at bar you are instructed to regard this alleged purchase by his wife with suspicion, and give the matter a careful scrutiny"; and afterwards charged the jury, if they believed the evidence that "there was a *bona fide* debt of the husband to the wife, and if such debt was given for the land, then suspicion arising from the relationship would be removed, and the question would be decided upon the first principle that he who alleges fraud should prove it."

2. That his Honor did not charge, as requested by defendant, that if the jury believed the evidence the deed alleged to be fraudulent was made in payment of such *bona fide* debt.

3. That his Honor did not charge that if the jury believed that there was a previous verbal agreement between the husband and wife, that the husband should convey to the wife so much of the land in controversy as would pay her debt at the price of ten dollars per acre; that his Honor charged the jury that "if the husband conveyed the property to his wife in payment of his debt to her, but with (631)

intent to hinder or delay or defeat plaintiff in the recovery of his debt, and the wife participated in this purpose of his, or if she knew it was being done by him to hinder or delay the plaintiff in collection of his debt, then the deed would be fraudulent, and your answer to the first issue should be 'Yes.' "

There was a verdict for plaintiff, and from the judgment thereon the defendant appealed.

C. W. Tillett and W. J. Montgomery for plaintiff.
P. D. Walker for defendants.

AVERY, J., after stating the case, proceeded: Where an insolvent husband has conveyed land to his wife, and a preëxisting creditor brings an action to impeach the deed for fraud, the *onus* is upon her to show that a consideration actually passed in the shape of money paid, something of value delivered, or the discharge of a debt due from the husband to her. *Brown v. Mitchell,* 102 N. C., 373; Bump Fraud. Con., pp. 6, 318; *Stephenson v. Felton,* 106 N. C., 120; *Osborne v. Wilkes,* 108 N. C., 669; *Woodruff v. Bowles,* 104 N. C., 213; Bigelow Frauds, 136. To this extent she is required to assume a burden not placed upon other grantees. *Helms v. Green,* 105 N. C., 257.

When she offers testimony sufficient to satisfy the jury of the existence, validity and discharge of such previous debt by the conveyance, or shows in some other way that the deed was founded upon a valuable consideration, the burden shifts again and rests upon the plaintiff to show to the satisfaction of the jury the fraud which he has alleged as the ground of the relief demanded. *Brown v. Mitchell, supra; McLeod v. Bullard,* 84 N. C., 515.

But if, after turning the laboring oar over to the creditor, the jury are satisfied, upon a review of the testimony, that the husband executed the deed to her to hinder, delay or defeat a creditor in the collection of his debt, and that she participated in his purpose or knew (632) of his intent at the time, though the consideration may have been a valid preëxisting debt due to her, it is their duty to find that the conveyance was made to defraud creditors.

In the last clause of the statute (Code, sec. 1545; 13 Eliz., ch. 5, sec. 2) it is provided that as against a person whose debt, etc., "shall or might be in anywise disturbed, hindered, delayed or defrauded" by the covinous and fraudulent practices previously mentioned in the same section, viz., by conveyances executed "to the purpose and intent to delay, hinder and defraud creditors," such conveyances shall be void.

Counsel contended that the charge of the court was erroneous, in that the jury were told that if the husband conveyed the property in pay-

ment of her debt, but with intent "to hinder, delay or *defeat* plaintiff in the recovery of his debt, and the wife participated in the purpose or knew it was being done by him to *hinder* or *delay* the plaintiff in the collection of his debt," they would answer the first issue "Yes," and that they were not instructed in lieu of the charge given that the burden was upon the plaintiff to show to their satisfaction that the husband executed the deed for the purpose of defrauding the creditor as well as hindering, delaying or defeating the collection of his claim, and that the wife participated in the purpose on his part to defraud. We do not think that it was essential to follow the statute in the use of the word "defraud" and to couple it by the conjunctive with "hinder and delay," if the language used was not such as to lead to misinterpretation of the statute by the jury. In *Helms v. Green,* 105 N. C., 262, it was held that where one conveyed his land in order to evade the payment of any judgment that might be recovered in an action for slander, then pending against him, the deed was fraudulent as to existing creditors of the bargainor in the deed. Whether the intent in the mind of the grantor be to hinder, delay or defeat, it is a fraudulent purpose, and comes within the meaning of the statute, which was (633) evidently intended to make any convinous alienation of one's property of any kind, either to defeat the recovery entirely and thereby defraud the creditor of his whole debt, or to embarrass him by hindrances and delays, such as would drive him to litigation or give him other serious trouble in the recovery of what is due him. Indeed, the language of the statute is fairly susceptible of the construction that the conveyances, etc., described are to be deemed void as against creditors, not only when they are executed with intent to hinder or delay, but also when executed to defraud them by preventing the recovery of any part of the debt. If the husband had declared his purpose to be to embarrass and hinder the plaintiff in realizing his debt in order to induce him reluctantly to accept by way of compromise one-half of the debt in lieu of the whole, his purpose would have been manifestly fraudulent. If he could have accomplished this end, he would unquestionably have succeeded in perpetrating a fraud, but the fraud would have consisted in the intentional delay and hindrance, by which the creditor was induced to enter into an agreement favorable to the debtor's interests. A deed executed for the purpose of defeating the recovery of a just debt, due from the grantor, is a species of fraudulent conveyance. It is defined with sufficient accuracy by this description without expressing more specifically the idea that there must exist in the mind of the maker of the instrument, at the time of its execution, an intent to defraud.

Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the statute (Code, sec. 1548; sec. 6, ch. 5, 13 Eliz.). The law recognizes no disability on the part of married women which gives them the fruits of a
(634) fraud on the ground they are not, like persons *sui juris* in all respects, affected by actual notice of its perpetration. The instruction upon this point is substantially the same as that given in *Brown v. Mitchell,* 102 N. C., 364, and in *Woodruff v. Bowles,* 104 N. C., 210, that even where the wife pays a fair consideration for property conveyed to her by her husband, the conveyance is fraudulent in law, if at the time of its execution the wife knew that the husband's purpose was to put the property beyond the reach of a creditor and thereby defraud him.

The fact that the wife appeared to be the purchaser from the husband when he owed another debt to the plaintiff, for the payment of which he had made no provision, still threw such suspicion on the transaction as to call for close scrutiny, as would evidence of any other badge of fraud, notwithstanding the husband and wife may have come upon the witness stand, offered their explanation of it, and thereby removed the presumption that would have arisen from the suppression of evidence within their peculiar knowledge. *Helms v. Green,* 105 N. C., 251.

The defendants did not abandon, though they did not argue, the point raised by the second assignment of error. That there was testimony which threw suspicion upon the transaction and warranted the jury in finding that it was fraudulent, is manifest from a glance at the evidence sent up. The male defendant was not worth more than five hundred dollars apart from his interest in the land in controversy. His father, after indulging him for years as to the payment of the purchase-money, and permitting him to renew the original by substituting a number of notes falling due in successive years, notified the son in February, 1889, that payment must be made of the notes due, whereupon there was an agreement to arbitrate. But before the day appointed for a settlement in this way, the male defendant conveyed to his wife, without reserving property available and sufficient, ac-
(635) cording to the evidence, to discharge the debt to the plaintiff.

This testimony, without going further, was sufficient evidence of fraud to be submitted to the jury. His Honor left the question whether the transaction was explained by the defendants, and shown to be a sale by the husband to the wife for a valuable consideration, to the jury with a full, fair, able and explicit statement of the law bearing upon the evi-

dence. It would have been error to charge the jury that, upon the whole evidence, the issue should be found for the defendants, and they had no right to demand that the court should tell the jury, if they believed the testimony of the defendants, or either of them, the transaction was not fraudulent. The instruction was such as to give the defendants the full benefit of any explanation they had made, and they had no right to insist upon additional instruction, or prescribe the terms in which it should be expressed.

When the *feme* defendant was being examined as a witness in her own behalf, her counsel proposed to prove by her that after her husband executed the deed to her they proposed to convey to the plaintiff, by way of compromise, forty acres of the land in dispute and fifty acres owned by the husband in his own right, in satisfaction of his debt. On objection, the testimony was held to be irrelevant and inadmissible. This ruling was unquestionably correct. *Sutton v. Robeson,* 31 N. C., 380; 1 Greenleaf, sec. 192.

After careful scrutiny of the evidence and a consideration of all the exceptions, we think there was no error in the rulings of the court complained of.

Affirmed.

Cited: Bank v. Gilmer, 116 N. C., 703; *Mining Co. v. Smelting Co.,* 119 N. C., 418; *Redmond v. Chandler, ib.,* 580; *Cox v. Wall,* 132 N. C., 735; *Calvert v. Alvey,* 152 N. C., 613; *Sanford v. Eubanks, ib.,* 701; *Eddleman v. Lentz,* 158 N. C., 73.

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(636)

J. C. COWEN v. T. J. WITHROW ET AL.

Deed—Priority from Registration under Act of 1885.

Under Laws 1885, ch. 147, providing that no deed shall be effective to pass title as against subsequent purchasers but from the registration thereof, the purchaser at execution sale who registers his deed prior to a deed from the defendant in execution to his wife, which was executed before the sale, acquires the title to the land; and the wife, in possession of the land conjointly with her husband at the time of sale and of execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor, or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law.

COWEN *v.* WITHROW.

ACTION, for the recovery of land, tried before *Merrimon, J.*, at Fall Term, 1891, of RUTHERFORD.

The pleadings raised issues of fact that put in question the sufficiency of the plaintiff's title. On the trial he put in evidence a deed from the sheriff of Rutherford County to him, purporting to convey the interest and title of the husband defendant in the land. This deed was dated 3 December, 1888, and registered on the eleventh day of the same month. The plaintiff further put in evidence executions authorizing a sale of the land by the sheriff founded upon judgments docketed in that county before registration of the deed under which the defendant wife claims title.

The defendant wife put in evidence a deed from her said husband, dated 5 August, 1882, purporting to convey the same land to her, which deed was registered on 25 November, 1889. She also produced evidence tending to show that she was in possession of the land, living with her husband.

The plaintiff's counsel asked the court to charge the jury that, under Laws 1885, ch. 147, p. 233, providing "that no conveyance of
(637) land, or contract to convey, or lease of land, for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor; but from the registration thereof within the county where the land lieth," the plaintiff was entitled to recover the land mentioned in the pleadings.

The court refused to charge the jury as prayed, and the plaintiff excepted.

The plaintiff's counsel asked the court to charge the jury that the second saving clause of Laws 1885, ch. 147, providing "that no purchase from any such donor, bargainor or lessor, shall avail to pass title as against any unregistered deed executed prior to 1 December, 1885, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person, or by his, her or their tenants at the time of the execution of such second deed," etc., did not apply to judgment creditors, and those claiming under the sheriff's deed; but only to purchasers from the bargainor, grantor or lessor.

His Honor refused to give the instruction, and the plaintiff excepted.

The plaintiff asked the court to charge the jury, that if they believed P. J. Withrow was in possession of the land in December, 1888, and was living with her husband, and had been living with him prior to and at the time of the execution of the deed in 1882, that this was not the kind of possession contemplated in the second saving clause of section 1, chapter 147, Laws 1885; and further, that the possession of the wife was the

possession of the husband, and as the defendant P. J. Withrow claims title by deed from the defendant T. J. Withrow, registered 27 November, 1889, and the plaintiff claims title by sheriff's deed for the interest of T. J. Withrow in said land, registered 11 December, 1888, the plaintiff is entitled to recover. (638)

The court refused to give this instruction, and the plaintiff excepted.

There was evidence tending to show the actual possession of the land by the *feme* defendant, but there was no exception to the instructions of the court as to her possession. After verdict and judgment for the defendant, the plaintiff appealed to this Court.

Justice & Justice (by brief) for plaintiff.
J. A. Forney for defendants.

MERRIMON, C. J. We are of opinion that the court erred in refusing to give the jury the special instructions above set forth, as requested by the plaintiff, or the substance of them. The purpose of the statute (Laws 1885, ch. 147) is to require all conveyances of land to be registered as therein prescribed, and to render the same ineffectual without registration. The first clause thereof, material here, provides: "No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor; but from the registration thereof in the county where the land lieth." It seems to us clear that this case comes directly within the letter and purpose of this provision, unless it comes within the meaning of the proviso presently to be considered. The plaintiff was a purchaser of the land for a valuable consideration, and his deed was registered long before that under which the defendant claims. The title of the defendant husband had passed to the plaintiff before the *feme* defendant's deed became operative and effectual as against creditors or purchasers for value.

The statute cited, however, contains a proviso as to the clause above recited, which provides as follows: *"Provided further,* (639) that no purchase from any such donor, bargainor or lessor shall avail to pass title as against any unregistered deed executed prior to 1 December, 1885, when the person or persons claiming or holding under such unregistered deed shall be in the actual possession and enjoyment of such land," etc.

It is insisted that the *feme* defendant's deed comes within the saving purpose of this proviso. We do not think so. The saving extends only to cases where the purchaser is "from any *donor, bargainor or les-*

sor." The plaintiff did not *purchase from* a donor, bargainor or lessor in the sense of this proviso. He purchased at the sheriff's sale made under and in pursuance of executions to enforce and satisfy docketed judgments against the husband defendant, which were liens upon the land. The sheriff was not a donor or bargainor or lessor, he was the agent of the law to sell the property and pass the title of the defendant in the executions to the purchaser.

There is a substantial reason why the saving does not extend to purchasers at sheriff's sale. It is founded upon the "actual possession and enjoyment of such land" by the person claiming under the unregistered deed, "either in person or by his, her or their tenants at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed, actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder." Such actual possession and enjoyment of the land is treated as *notice* to a donee, bargainee or lessee. It is supposed that such persons will take notice of the land and have opportunity and be interested and disposed to see and make inquiries of those in possession as to the nature of their possession, their claim and title. But at the sheriff's sale, made not on the land but at the courthouse, a place
(640) perhaps distant from it, the purchaser has no opportunity, on the day of sale, to see it and learn who is in possession and the nature of his claim and title. Here the plaintiff purchased the land at the sheriff's sale. He may have purchased without notice, he may have purchased suddenly and without opportunity to see who was in possession thereof. It would tend to discourage such sales if purchasers at them were charged by the statute with such notice. Uninformed persons would not buy, or they would bid only nominal prices. The purpose of the law is not to discourage, but to encourage bidding at such sales. The saving clause in question does not contain this and like cases in terms, nor for the reasons stated does it do so by implication. Moreover, persons so claiming under an unregistered deed are charged with notice of docketed judgments against the donor, bargainor or lessor under whom they claim; they have constructive notice of the sheriff's sale of land, and it is their own laches if they fail to give notice at the sale of their claim and unregistered deed. They could not, might not, ordinarily have such opportunity or information as would enable them to give notice of their deed to subsequent donees, bargainees and lessees of the same land. It is not probable that a bargainor would give notice to the holder of the unregistered deed that he had sold the land a second time to another person.

The defendant's deed does not, therefore, come within the saving provision of the proviso, but does come within the clause of the statute first above recited.

Error.

Cited: S. c., 112 N. C., 740.

(641)

J. A. McCLURE v. OSCAR TAYLOR ET AL.

Will—Devisee—Construction of.

Lands under a devise, "I give and bequeath to my son two-thirds of my land on the lower part, including my dwelling-house and out-buildings, including two-thirds of the bottom and two-thirds of the upland; and the other third of my land I give and bequeath to the heirs of my daughter; I want it divided to the best advantage of both parties," must be partitioned according to the quantity and not value of the land.

SPECIAL PROCEEDINGS for partition instituted before the clerk of the Superior Court of RUTHERFORD, and heard before *Hoke, J.,* at chambers, 7 July, 1891.

It appears that Isaac D. McClure died leaving a last will and testament, which was duly proven. After therein disposing of his personal property he devises as follows: "I give and bequeath to my son J. A. McClure, two-thirds of my land on the lower part, including my dwelling-house and out-buildings, including two-thirds of the bottom and two-thirds of the upland; and the other third of my land I give and bequeath to the heirs of my daughter Mary Taylor. I want it divided to the best advantage of both parties."

This special proceeding is brought to have the partition of the land specified in this devise made between the plaintiff and the defendants, who are the heirs of Mary Taylor, mentioned in the devise. The plaintiff contends that the land is to be divided so as to allot and set apart two-thirds in quantity of the same to him, and one-third to the defendants. The defendants contend that, under a proper interpretation of the devise above recited, the one-third in value of land should be set apart and allotted to them, and two-thirds in value to the plaintiff.

The court adjudged that partition be made as directed in the devise according to quantity, and not according to the value of (642) the land. The defendants excepted, and appealed.

Justice & Justice (by brief) for plaintiff.

R. McBrayer for defendants.

MERRIMON, C. J. We think the court below properly interpreted the devise in question. When the testator simply devised to his son two-thirds of his land, including his dwelling house and out buildings, he had reference to its quantity without reference to its value. If he had thirds of his land, including his dwelling-house and out-buildings, he would have said so in terms or by some word or words indicative of such purpose. There are no words in the will, and particularly there are none in the devise, indicating a purpose to require it to be divided according to the value thereof. The particular provision that the land should be so divided as to give his son two-thirds of the "bottom" or low-land, including the dwelling-house and out-buildings, and also two-thirds of the upland, goes to show the purpose to divide it according to quantity. The clear purpose is to give the son (the plaintiff) and the defendants parts of both the low and upland. This could certainly be accomplished by dividing it according to quantity. If, however, the intention was to divide it according to the value thereof, it might be that the son would get none of the lowland, or he might get none of the upland, or he might get but part of the buildings; and so as to the defendants as to land. The clause, "I want it (the land) divided to the best advantage of both parties," implies simply that the dividing line shall be so located as to promote the advantage and convenience of the parties in the largest measure practicable. Nothing appears to show a purpose to make the devisees equal as to value in the proportions specified, or at all in that respect.

Affirmed.

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(643)

JAMES F. JOHNSTON v. JAMES E. LEMOND.

Action to Recover Land—Release of Mortgage—Judgment Liens.

Under an arrangement between mortgagor, mortgagee, and a third party, the mortgagee indorsed upon the mortgage a release of seventy acres of the mortgaged land sold to the third party, and upon the mortgage note a receipt of a certain sum, as being the amount received from the sale of said land to the third party; thereupon the mortgagor conveyed the seventy acres of land to the third party, who executed his note, secured by mortgage thereon, to the mortgagee for the purchase price. Subsequently the first mortgage was canceled of record: *Held*, that the legal title did not, by these transactions, revest for an instant even in the mortgagor, and docketed judgments against the mortgagor acquired no lien on the seventy acres of land.

ACTION, tried before *Hoke, J.*, at Fall Term, 1891, of MECKLENBURG.

The plaintiff brought this action to recover possession of the land described in the complaint.

The defendant denies the material allegations of the complaint. He alleges that the plaintiff claims title to the land by virtue of a sheriff's sale and deed made under and in pursuance of certain executions issued upon certain docketed judgments, which he contends constituted a first lien upon it. He further alleges that such lien is unfounded; that long before the said judgments were entered, to wit, on 1 January, 1884, the owner of the land, who was the defendant in the judgments, E. H. Hinson, executed to J. C. Barnhardt a deed of mortgage of the same with power of sale therein to secure certain large debts therein specified, and he claims to derive title to the land in question from the said mortgagee and mortgagor, etc.

On the trial the plaintiff put in evidence:

1. Several judgments against said E. H. Hinson, which were duly docketed in the Superior Court of said county in January (644) and February, 1887.

2. Executions which were duly issued from said court to the sheriff of said county on the said judgments, together with the return of the sheriff thereon, showing a levy upon the land in dispute, as the property of said E. H. Hinson.

3. Deed from the said sheriff to plaintiff, bearing date 6 January, 1890, conveying the said land to plaintiff in pursuance of the levy and sale, under the above mentioned executions.

4. Deed from said E. H. Hinson to J. M. Hinson, conveying the said land, dated 12 September, 1887.

5. Deed from J. M. Hinson to defendant, dated 30 January, 1888, conveying said land.

The defendant put in evidence, in support of his title:

1. Mortgage deed made by said E. H. Hinson to one J. C. Barnhardt, dated 1 January, 1884, and registered in said county on 15 January, 1884, conveying the real estate described in the complaint together with other real estate therein mentioned, to secure the sum of $3,000, with power of sale in case of default on or before 1 January, 1885.

2. Mortgage from J. M. Hinson to J. C. Barnhardt, conveying the land in dispute to secure the sum of $550, with power of sale, dated 12 September, 1887, and registered 21 September, 1887.

3. Deed from E. H. Hinson to J. M. Hinson, dated 12 September, 1887, and registered 21 September, 1887, conveying the land in dispute for the consideration of $470.

4. An indorsement in writing upon the original mortgage from E. H. Hinson to J. C. Barnhardt, above mentioned, which indorsement was in words as follows:

"I hereby release from the within mortgage seventy and one-
(645) half acres, adjoining the lands of J. W. Swaringen and others, and described within as the land on which B. S. Gray lived and sold to J. M. Hinson 12 September, 1887. J. C. BARNHARDT."

5. The indorsement on the note given by E. H. Hinson to J. C. Barnhardt, secured by the mortgage above referred to. Said indorsement was in the following words:

"$470. Received on the within note four hundred and seventy dollars, being the amount derived from the sale of seventy and one-half acres of land to John M. Hinson, being the place where B. S. Gray formerly lived.

"12 September, 1887. J. C. BARNHARDT."

6. Mortgage from the defendant J. C. Barnhardt, conveying the land in dispute to secure $350, dated 30 January, 1888, and registered 8 February, 1888.

This mortgage was paid and canceled of record on 8 November, 1888.

7. Deed from J. M. Hinson to the defendant, conveying the land in dispute, dated 30 January, 1888, registered 2 March, 1888, consideration $500.

The defendant then introduced J. C. Barnhardt as a witness, who testified as follows:

"I am the mortgagee in the mortgages made by E. H. Hinson and others. I recollect the time of the deed from E. H. Hinson to J. M. Hinson and the mortgage from J. M. Hinson to me. They were executed all at the same time. The transaction was fully understood by all. It had been going on for some time—two or three weeks or a month. The agreement was that E. H. Hinson was to convey the seventy and one-half acres of land to J. M. Hinson and J. M. Hinson was to give me his notes for $470, the purchase price of the property, and give me a mort-
(646) gage on the place to secure it. After the mortgage was made and the note was given, I gave E. H. Hinson credit for the amount on his original note and made the entry on the back of the mortgage as it appears. It was understood by all parties what was to take place. I had no agreement about it except I was to be secured. E. H. Hinson was to sell the land to J. M. Hinson in case I consented, and I was to be made safe. I would not have consented, but I obtained additional security at the time I took the mortgage from J. M. Hinson. E. H. Hinson said there was no judgment liens against him, except some in favor of his son and these would never give any trouble." (It appears from the judgment and executions introduced that the sale was not made under any execution in favor of E. H. Hinson's son).

"The land retained in E. H. Hinson's mortgage is worth $2,000 or more, and there is due me still on that debt $1,700, and interest at eight per cent, from January, 1891. I put the release on the mortgage at my house. E. H. Hinson was released on the note for $470. There was no agreement that I was to hold the title for the benefit of J. M. Hinson. The purpose of the agreement was that I was to part with all the interest I had under the E. H. Hinson mortgage and rely on the mortgage given by J. M. Hinson. There were additional lands put in the J. M. Hinson mortgage, and I also let J. M. Hinson have $80 additional.

"J. M. Hinson and defendant Lemond consulted me in their trade. Lemond bought the land from J. M. Hinson at $500. Nothing was said about retaining the legal title under E. H. Hinson's mortgage to me for the benefit of anybody. If I had known of the other judgment liens I would not have entered into the arrangement. J. M. Hinson's mortgage to me was satisfied by defendant Lemond giving his note and mortgage for the amount due on it. J. M. Hinson sold the other land in the mortgage and made a payment on his mortgage, reducing amount to $350. J. M. Hinson then sold the land in dispute to (647) defendant, conveyed it to him, and defendant executed his note and mortgage to me for this balance and I entered satisfaction of the J. M. Hinson mortgage. This satisfaction of Hinson's mortgage may have been entered some time ago. The deed from J. M. Hinson to J. E. Lemond and the mortgage of Lemond to me were one and the same transaction. Lemond paid off his mortgage to me in money and took up his note. He paid the money a short time before his mortgage was canceled."

J. E. Lemond, the defendant, testified: "I knew the land when it was sold to J. M. Hinson, and $470 was a fair price for it. J. M. Hinson made some improvements on it and I gave $500 for it. I paid Hinson $150, and Colonel Barnhardt $350. I had no actual notice of the judgment when I bought and paid the money."

This last statement was permitted, after objection by plaintiff.

John M. Hinson, witness for defendant, testified: "I sold the land to E. H. Hinson originally, and then I bought it back from him. Four hundred and seventy dollars was a fair price for the land. When I repurchased the land from E. H. Hinson I had no actual notice of the judgments."

This last statement was permitted, after objection by plaintiff.

It was agreed between the parties that his Honor might, upon the foregoing evidence, direct the verdict to be entered as seemed to him proper, and that if after further consideration of the questions of law reserved he should be of a different opinion, that he might then direct

the verdict to be changed. In accordance with this agreement, his Honor at first directed the first issue to be answered "No," but after hearing a full argument he directed the former finding to be set aside,
(648) and the first and second issues to be answered "Yes," and it was so entered.

There was a motion for a new trial. Motion denied, and defendant excepted. There was judgment for the plaintiff, from which the defendant appealed.

At the proper time, in the progress of the trial, the defendant asked the court to give the jury divers special instructions, and among them such as warranted the following, among other assignments of error.

1. That the verdict for the defendant was right, and the defendant should have had judgment thereon.

2. That if the evidence was believed, the answer to the first issue should have been "No," and the verdict should have been for him.

7. That by a proper construction of the indorsement of Barnhardt on the E. H. Hinson note and mortgage, it appears that Barnhardt sold the land therein described to J. M. Hinson and to the defendant, and the same in equity vested in J. M. Hinson and in the defendant, or at least that the said indorsement in writing operated as a contract between the parties that Barnhardt was to convey the said realty to J. M. Hinson and the defendant.

8. That the contract of Barnhardt thus to convey the *locus in quo* to J. M. Hinson and the defendant being outstanding, the *locus in quo* embraced in the contract was not the subject-matter of execution, and the plaintiff acquired no interest therein by virtue of his purchase at executor's sale.

Jones & Tillett (by brief) for plaintiff.
Burwell & Walker (by brief) for defendant.

MERRIMON, C. J., after stating the case: The validity of the mortgage from E. H. Hinson to J. C. Barnhardt of 1 January, 1884,
(649) is not questioned, and it embraced the land in controversy.

The alleged liens upon it of the docketed judgments underlying the plaintiff's title were created long after that mortgage was executed, and the plaintiff got no title by virtue of the sheriff's deed under which he claims, unless the mortgagee effectually discharged it as to this land and revested the title in the mortgagor. In that case the liens of the judgments attached and the title passed to the plaintiff.

We think the defendant was entitled to have the court instruct the jury that, if they believed the evidence, they should render a verdict upon the issues submitted to them in favor of the defendant, because

the land was not discharged of the mortgage in favor of the mortgagor, nor did the title revest in the latter. The title was in the mortgagee, coupled with the power of sale that authorized him to sell the land. An arrangement was made satisfactory to the mortgagor and to the mortgagee, whereby the latter in substance and effect, sold this particular tract to J. M. Hinson for $550. The land was not to be reconveyed to the mortgagor. The evidence tended to show that the transaction was in good faith, as did also the acts done to effectuate it. The mortgagee made this informal entry on the mortgage deed:

"I hereby release from the within mortgage seventy and one-half acres adjoining the lands of J. W. Swaringen and others, and described within as the land on which B. S. Gray lived, and sold to J. H. Hinson.

"12 September, 1887. J. C. BARNHARDT."

At the same time, and as part of the same transaction, he made this entry on one of the mortgage notes:

"$470. Received on the within note four hundred and seventy dollars, being the amount derived from the sale of seventy and (650) one-half acres of land to John M. Hinson, being the place where B. S. Gray formerly lived.

"12 September, 1887. J. C. BARNHARDT."

These entries were evidence, along with other evidence, to show the nature and purpose of the transaction, and such evidence tended to prove a sale of the land as just indicated. So far as appears, there was no purpose to revest the title in the mortgagor at all. There was no reconveyance or release to him, nor was there necessity that there should be. He did not pay the purchase-money—it was not paid for him, nor were there any words of reconveyance to him. The fact that he executed a deed for the same land to J. M. Hinson did not, in view of it, prove that he had the title—it only had the effect to conclude him as to all claim, equitable or otherwise, as mortgagor, and was not unreasonable or improper as a cautionary measure. The mortgagee failed to convey the legal title to J. M. Hinson. The entry on the mortgage deed made by him was no more than a pertinent memorandum in writing—it was not sufficient as a conveyance. Nor did the fact that the mortgagee took the note of J. M. Hinson for the purchase-money and a mortgage from him of the same land to secure the same, at all affect the transaction adversely. The mortgage debt was due to him, and it was competent for him to receive payment as he did in pursuance of an honest arrangement. It does not appear that the mortgagor derived any benefit from it, except the discharge of a part of the mortgage debt. If it be granted that the parties did not really fully understand the legal

effect of what they did, the evidence all goes to show that the title of the land did not revest in the mortgagor, nor was it intended that he should in any sense become the complete owner of it. If they (651) believed that the title ought to pass to J. M. Hinson through him, that was no more than a mistake that was not consummated, as it turned out. It is true that John M. Hinson said he repurchased from the mortgagor, but that plainly implies that the latter and he agreed that he should buy it from the mortgagee. He did not, and could not under the circumstances, buy it from the mortgagor—he could only buy it effectually from the mortgagee, and that he did, because the latter gave his assent and his consent to the arrangement as effectually as if he had originated it. If the title had revested in the mortgagor under misapprehension, it might be that the lien of the docketed judgment would have attached, as contended by the plaintiff. But there was no evidence to prove that it did revest for an instant, or at all.

It is unnecessary to advert further to several views of the case presented and elaborately argued by the counsel of the parties.

Error.

Cited: Moring v. Privott, 146 N. C., 564.

(652)

WILLIAM S. RHYNE v. C. L. TORRENCE.

Will—Codicil—Devise.

1. A codicil will not be interpreted to revoke or change distinct provisions in the will unless it appears from the terms used, or by clear implication, that it was the purpose of the testator to make such revocation or alteration.
2. A testatrix devised to her four daughters "four-eighths of all my estate for their natural lives, then to be equally divided among their respective children"; in a codicil she provided that her house and lot and farm should "remain as it is, so that all of them (her children) that wish can have a home on it, unless they wish to dispose of it otherwise": *Held,* that the codicil did not enlarge the life estate of the devisees under the will into fee-simple estates.

AVERY and CLARK, JJ., did not sit upon the hearing of this appeal.

ACTION, tried at Fall Term, 1891, of MECKLENBURG, *Hoke, J.,* presiding.

On 12 December, 1883, the defendant sold and undertook to convey to the plaintiff the tract of land described in the complaint with covenants of warranty of title in fee simple, and that he was seized and had the right to convey, etc. The plaintiff alleges that the defendant did not have such title, and that he is as a consequence endamaged to the amount of $1,667.50, etc.

The defendant denies the material allegations of the complaint, and alleges: That prior to the year 1868, the land in question was owned in fee simple by one Violet W. Alexander, who in that year died in the county of Mecklenburg, leaving a last will and testament, which was duly admitted to probate. That of the children of said Violet W. Alexander, mentioned in the said will, W. W. Alexander died in the lifetime of the testatrix and without children; the others were living at her death; that prior to 12 March, 1881, Dovey A. W. Cunningham, one of the daughters, and H. L. Alexander, one of the sons men- (653) tioned in said will, died intestate and without children; that on the said 12 March, 1881, the defendant purchased the land in question and received a deed in fee simple for the same, executed by S. B. Alexander, Julia S. Smith, M. S. Alexander, A. L. Alexander, I. L. Hayes and husband W. J. Hayes, Junius W. Hayes and wife, Lucy C. Hayes, and John W. Hayes; that of the grantors in said deed W. J. Hayes is the husbandof Isabella L. Hayes, and Junius W. Hayes and John W. Hayes are and were, at the making of said deed, the only children of Isabella; Lucy C. Hayes is the wife of Junius W. Hayes; all the other grantors are the children of the said testatrix who were living on 12 March, 1881, when the said deed was executed to this defendant; that at the time the said deed was made, S. B. Alexander had infant children, and still has, but none of the female grantors have children excepting Isabella Hayes, nor ever had any; that the land in dispute is the land mentioned in the codicil to the will of Violet W. Alexander, and therein called "my farm."

The following is a copy of so much of the will of the testatrix above named as is material here:

"I give and bequeath to my executors one-eighth part of my estate to have and to hold to them, the survivors and survivor of them, his heirs and assigns, upon the following trust, that is to say, upon trust that they, the said trustees, do from time to time, during the natural life of my daughter, Dovey A. W. Cunningham, pay and dispose of the annual profits arising therefrom upon her sole and separate receipts whenever they may think she stands in need of the same, and permit her to receive and take the profits to and for her sole and separate use and benefit, to the end and intent that this or any other part of my estate that may happen to fall to her part or portion may not be subject or

liable to the control, order, direction, debts or engagements of her
(654) husband, either present or future; and from and after the decease of my daughter Dovey A. W. Cunningham, it is my will that this one-eighth part be divided between all my children as hereafter prescribed. I give and bequeath to my daughters, Isabella L. Hayes, Mary S. Alexander, Julia S. Smith, and Alice L. Alexander, four-eighths of all my estate, both real and personal, for their natural lives for their sole and separate use, free from the control of any husband that they may have now or hereafter, then to be equally divided among their respective children, and if any of them should die not leaving children, then her or their portion to be equally divided among my children living and the children of my children dead, they representing their ancestors. I give and bequeath to my sons, H. L. Alexander, W. W. Alexander and S. B. Alexander, three-eighths of all my estate, both real and personal, to them and their heirs and assigns, to be equally divided, share and share alike, but if any of my sons shall die without having children or disposing of the same, then his or their share shall be equally divided among my daughters and sons as aforesaid equally, and their children by representation."

The following is a copy of the codicil to the will, parts of which are above recited:

"My house and lot, and all of my furniture and farm to remain as it is so that all of them that wish can have a home on it, unless they wish to dispose of it otherwise. My lands in Tennessee I will and bequeath to my son S. B. Alexander.

V. W. ALEXANDER." [seal.]

The plaintiff demurred to the answer, assigning divers grounds of demurrer.

The court sustained the demurrer upon grounds specified, and
(655) entered judgment for the plaintiff. The defendant excepted and appealed.

P. D. Walker for plaintiff.
C. W. Tillett for defendant.

MERRIMON, C. J., after stating the case: It is conceded that the defendant was not seized in *fee* of the land described in the complaint, and that there was a breach of his covenant specified as alleged therein, unless the codicil to the will above recited so enlarged the devise in the latter to the testatrix's daughters, Isabella L., Mary S., Julia S., and Alice L., as to give them estates in fee simple instead of for the term of their natural lives. So that we are called upon to interpret the codicil set forth above and determine how, in what respects, and to what extent,

it modifies and changes the will in respects affecting the cause of action, the subject of this action.

It is to be observed that the terms and purpose of the will are clear and unmistakable. The testatrix had eight children, five daughters and three sons, whom she recognized and provided for. She regarded her estate, both real and personal, as consisting of eight parts or shares. First, she provided for her daughter Dovey A. one share, one-eighth. This she devised to her executors in trust for this daughter, and they were charged to pay and dispose of the annual profits arising therefrom to her for her sole and separate use, as directed, during her natural life, and after her death that eighth was to go to her other sisters and brothers named. She, secondly, devised and bequeathed to her four daughters above named, four-eighths of her property, both real and personal, for their natural lives, for their sole and separate use, "and if any of them should die not leaving children, then her or their portion to be equally divided among my (her) children living and the children of my children dead, they representing their an- (656) cestors."

She, thirdly, bequeathed and devised to her three sons named, in *fee,* the other three-eighths of her property, both real and personal, with the limitation that "if any of my (her) sons shall die without leaving children or disposing of the same, then his or their share shall be equally divided among my daughters and sons as aforesaid, equally and their children by representation." It seems that a leading purpose was to keep her property after her death in her own family as nearly as practicable. Whether such dispositions were wise or best suited the convenience of the objects of her bounty or not, she had power to make them. They do not contravene any principle of law, and, hence, must operate as she intended, and be upheld by the courts in every pertinent connection. *Overman v. Sims,* 96 N. C., 451; *Galloway v. Carter,* 100 N. C., 111.

The testatrix certainly had power to revoke, modify or change these very clear dispositions of her property by a codicil, but it is a well settled rule that such clear dispositions of property will not be disturbed further than is absolutely necessary for the purpose of giving effect to the codicil. It may be said that a codicil is not a revocation of the will, except in the exact degree in which it is inconsistent with it, unless there be words of revocation. It must appear from the terms of the codicil, or from clear implication, that the purpose of it is to revoke or change distinct provisions of the will. 2 Jarm. Wills, 189, and notes (2 Am. Ed.); 2 Greenleaf, 681; Ire. Exrs., 6, 26, 27.

It is insisted here that the codicil under consideration had the effect and intends to enlarge the several devises of the will so that the several

devisees took estates in fee simple unaffected by any condition of limitation. We do not think it can receive such interpretation. There are no revocatory words in it, nor are there words that strongly im-
(657) ply revocation, except so much thereof as devises the lands of the testatrix in Tennessee to her son named. It is expressed in these words: "My house and lot and all my furniture and farm, to remain as it is, so that all of them that wish can have a home on it, unless they wish to dispose of it otherwise. My lands in Tennessee, I will and bequeath to my son S. B. Alexander."

The whole will manifests a fixed purpose of the testatrix to provide only for her children and to keep her property in their hands as far as practicable. This is especially so as to her daughters. She had a fond care for them—for all her children. The fair inference is, that she earnestly desired they should live and have a home together at the "old homestead," and hence, she expressed in a very brief codicil the wish that her "house and lot and all of my (her) furniture and farm to remain" as she left it, so that "all of them"—all of her children—"that wish can have a home on it"—on the lot and farm—"unless they"—her children—all of them—"wish to dispose of it otherwise." How "dispose of it otherwise?" Clearly we think "otherwise," as they might see fit according to their several and respective rights, estates and interests as created by and specified in the will. If they—the children—desired to abandon the home, they might do so; they might sell such estate as they respectively had; they might lease it for rent. Some of them might live there and pay rent to such as did not choose to live there. She did not express and desire to derange or modify the clear disposition of her property by the will. It does not appear from any expression or suggestion in the codicil that she had motive or purpose to do so. The reasonable inference is, that if she intended to change such distinctive disposition of her property, she would have said so in clear terms. She was at the time she executed it, advertent to the disposition of property—she distinctly and plainly devised to one of her sons her lands in Tennessee. And so if she had intended to
(658) change the devises to her other children she would have done so in like clear terms. Indeed, she must have done so, in order to have the codicil revoke, modify or enlarge the devises contained in the will. We cannot doubt that the interpretation of the codicil by the court below is the correct one, and we concur therein.

Affirmed.

THE LOOKOUT LUMBER COMPANY v. THE MANSION HOTEL AND BELT RAILWAY COMPANY.

Lien—Subcontractor—Parties.

1. A subcontractor may enforce his lien for labor or materials, as prescribed by The Code, sec. 1782 *et seq.*, against the owner of the property upon which the labor was performed, or for which the materials were furnished, though the contract with the principal contractor has not been completed, or even if it has been abandoned.
2. The lien of the subcontractor, when duly filed, has precedence of all other liens attaching to the property subsequent to the time the work was commenced or the material furnished.
3. The principal contractor is a necessary party to an action to enforce the lien of a subcontractor, but a trustee in a conveyance, subject to the lien, is not an essential party.

ACTION, tried before *Bynum, J.*, at Fall Term, 1891, of MCDOWELL.

It appears that F. T. Sanford contracted with the defendant to construct upon its land specified in the complaint and situate in the county of McDowell, a building for the purposes of a hotel for the price of $31,000, and the plaintiff, a subcontractor, furnished to the said Sanford for the purposes of said building materials of the value of $4,011.29, which sum remains due to the plaintiff, less $1,500 paid about 10 December, 1890; that on the last named day, the plaintiff duly notified the defendant that the said Sanford, contractor, (659) owed to it for such materials furnished and used in the building, the sum of $2,511.29; that at the time of such notification the defendant owed the said Sanford, as contractor, the sum of $9,025; that the plaintiff has demanded of the defendant and the said Sanford, before the bringing of this action, the money so due, and they have refused to pay the same; that on 11 August, 1891, and within twelve months next after so furnishing said materials so used, the plaintiff, for the purpose of creating and perfecting a subcontractor's lien upon the said land and building, for the sum of money so due it, duly filed in the Superior Court clerk's office of said county of McDowell its claim as required by the statute (Code, sec, 1784).

It further appears that on 10 August, 1891, the defendant executed to the said Sanford its promissory note, as such contractor, for the sum of $24,040.40, and executed to a trustee a deed conveying all its property, including said land and building, to secure the same; that the plaintiff had so notified the defendant of its claim against the said Sanford before the making of said note and deed; that said Sanford abandoned the completion of said building, left the State, assigned

said note and security to his wife, and she assigned the same to a bank in the State of Georgia for value; that the defendant is insolvent; that the building is not half finished, and is going rapidly to decay and ruin.

The plaintiff demands judgment for its debt, and the enforcement of its lien, etc.

The defendant insisted that, under the facts admitted, no sale of the property could be ordered by the court:

First. Because the contract between the Hotel Company and Sanford is still executory, and nothing could be sold except an equity of redemption, the legal title not being in the trustee, he not being a party to this action, and the legal title being outstanding, the court could not (660) authorize a sale and thus sacrifice the defendant's property by enforcing a sale of property clouded by this adverse claim.

Second. That the property could not be sold until the building was finished and the contract fully executed.

Third. That the remedy was against Sanford, and not against the Hotel Company.

Fourth. That no title could pass to the purchaser as against the right of Sanford, neither he, they, nor the trustee having been made parties to this action.

The court gave judgment for the plaintiff, and the defendant, having excepted, appealed.

J. C. L. Bird and G. F. Bason for plaintiff.

J. B. Batchelor and John Devereux, Jr., for defendant.

MERRIMON, C. J., after stating the case proceeded: The mechanic's lien, as provided and contemplated by the statute (The Code, secs. 1782, 1784, 1789) is "preferred to every other lien or encumbrance, which attached upon the property *subsequent to the time* at which the work was commenced, or the materials were furnished. The same statute (Code, sec. 1081) gives *"subcontractors and laborers* who are employed to furnish, or who do furnish, material for the building, repairing or altering any house or other improvement on real estate," "a lien on said house and real estate for the amount of such labor done or material furnished, which *lien* shall be *preferred* to the mechanic's lien now provided by law, *when notice thereof shall be given"* as prescribed and required.

Such subcontractor, labor or material man, who claims a lien as provided in the last mentioned section, "may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement *at any time* before the settlement with the contractor,

and if the said owner or lessee shall refuse or neglect to retain out of the amount due the said contractor under the contract (661) as much as shall be due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer or material man *may proceed* to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or a discharge of the lien herein provided." Code, sec. 1802. The notice thus required is intended to charge the owner or lessee of the land to withhold so much of the money due to the contractor as will pay the subcontractor's claim. If he fails to do so, he cannot avoid his liability by paying the contractor.

In order to create and perfect a lien, the subcontractor or laborer, must within twelve months next after the completion of the labor, or the final furnishing of the materials, file the notice of his claim in the office of the Superior Court clerk, as required by the statute (Code, secs. 1784, 1789). When the notice is thus filed the lien is at once established, and relates back to and is effective from the time at which the work was commenced, or the materials were furnished. The statute (Code, sec. 1782) so expressly provides, and, thus established, the lien is preferred to every other lien, including the mechanic's lien, that may have in any way attached to the property subsequently to that time. Code, sec. 1802; *Burr v. Maultsby,* 99 N. C., 263; *Pinkston v. Young,* 104 N. C., 102. The certain purpose is to protect the subcontractor or laborer as to his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, not simply subsequently to the filing of the notice of claim in the office of the Superior Court clerk, but as well subsequently to the time when the work was commenced or the materials were furnished.

In this case it is not questioned that the plaintiff had a claim as subcontractor—that he gave notice to the defendant, the owner of the land and building, and filed the same in the office of the Superior Court clerk, as required by law, on 11 August, 1891, the day next after the deed of trust was executed and registered, to secure a large (662) debt due from the defendant to the contractor Sanford. That that notice was thus filed after that deed of trust was registered, cannot prejudice the plaintiff's lien—it was preferred to the deed of trust—the filing of it within twelve months next after the materials were furnished perfected it as of the time they were so furnished. *Burr v. Maultsby, supra.*

That the contract between the defendant and Sanford was executory, and is not yet executed, cannot prevent the lien of the plaintiff or delay its enforcement, because the defendant failed, after notice to it, to retain out of the amount due the contractor a sum sufficient to pay the

plaintiff's claim and refused to pay it. In that case the plaintiff had the right to proceed at once to enforce its lien. Code, sec. 1802. The trustee, by virtue of the deed to him, took the legal title to the property subject to the lien of the plaintiff, and it was the duty of the defendant to discharge that lien, and if it would not, then the trustee might have done so. He had and was charged with notice of it.

There is nothing in the statute, nor is there any principle of justice, that postpones the enforcement of the plaintiff's lien until the building shall be completed and the contract fully executed. This may never be done. As we have seen, the purpose of the statute is to protect the subcontractor and the laborer effectually. The remedy was not simply against the defendant and Sanford, the contractor. They would not, or could not, pay the plaintiff's debt. The very purpose is to give a remedy against the property, not after all other remedies shall be exhausted, but when and as soon as the defendant refused to pay it after notice.

It might be better if the trustee had been made a party with a view to conclude him and those whom he represents, but he is not an essential party. The defendant might have asked to have him brought into the action, or he might have applied to be made a party. But (663) there is no reason why the land may not be sold under the order of the court to enforce and give practical effect to the plaintiff's lien. The land is charged with the lien, and may be sold notwithstanding the conveyance to the trustee. It is his duty to see that he has title and to protect it by such means as are properly within his power. It is his folly or neglect if he will not. If the land shall be sold properly to satisfy the debt of the plaintiff and discharge his lien, the title will pass, just as if it had been sold under execution to satisfy a duly docketed judgment which was a lien upon it. *Kornegay v. Steamboat Co.*, 107 N. C., 115.

We think, however, that the contractor, Sanford, should have been made a party defendant so that the plaintiff might have obtained judgment for its claim against him as well as the defendant. He is the principal debtor and the plaintiff must establish his claim against him. This it has not done and cannot do until he shall be brought before the court in a proper way and have his day in court. He might be able to allege and prove that the plaintiff's claim is unfounded, that he had paid it in whole or in part, or make other defense and thus avoid the lien.

He should have been, and must yet be, made a party, and have opportunity to make defense.

Error.

Cited: Lumber Co. v. Sanford, 112 N. C., 656, 658; *Clark v. Edwards,* 119 N. C., 119; *Dunavant v. R. R.,* 122 N. C., 1001; *Jones v. Williams,* 155 N. C., 188, 189, 194; *Roper v. Ins. Co.,* 161 N. C., 160; *Brick Co. v. Pulley,* 168 N. C., 375; *Granite Co. v. Bank,* 172 N. C., 357.

(664)

JOHN A. BOYDEN AND WIFE v. S. A. CLARKE.

Vendor and Vendee—Contract for Sale of Land—Privity—Estoppel Equitable—Negligence.

1. Neither the vendor nor the assignee of the vendee in an executory contract to convey land (the assignee having received the legal title from vendor) is estopped by false representations made by the vendee, while in possession, to a third party in relation to the boundary of the tract.
2. One who invokes the doctrine of equitable estoppel must show not only that he acted in good faith, but that he used reasonable diligence to ascertain the truth of the facts upon which he acted.

SHEPHERD, J., dissenting.

ACTION, for trespass upon land, tried at the Fall Term, 1891, of WATAUGA, before *Bynum, J.*

The plaintiff offered in evidence a grant from the State to Richard Greene, dated 26 November, 1802; then *mesne* conveyances from Richard Greene to Isaac Greene; from Isaac Greene to Elisha P. Miller; from the executor of Elisha P. Miller to James Steele; from James Steele and wife to Lewis Harris, and from Lewis Harris and wife to *feme* plaintiff, the last named deed bearing date 11 October, 1877.

Three issues involving the title, the trespass and damage were framed and the jury found in response to the first that the plaintiff was not the owner, thus disposing of the case.

The exceptions grow entirely out of the question whether the representation of a vendee of an adjacent tract to that bought by plaintiff and declared on in the action, that the common corner of the two tracts was at a certain point, induced the plaintiff to buy, and if he was misled by it, whether the assignee of the vendee, who subsequently paid the vendor the purchase-money and took the title to himself, was estopped to deny the truth of the representations. The other material facts are stated in the opinion. The plat, not being necessary (665) to an understanding of the questions discussed, is not printed.

R. H. Battle for plaintiff.
W. C. Newland for defendant.

AVERY, J. The defendant Clarke bought the equitable interest of one Sherrill, which the latter had acquired by a bond for title from James Harper and the payment of a part of the purchase-money. Clarke subsequently paid the residue of the purchase-money to the original vendor Harper, and took title to the tract of land, which the jury have found (under instructions as to locating the boundaries, which are not excepted to) covered the territory on which the trespass is alleged to have been committed. Their finding, in view of the instructions under which they acted, must be considered by us as conclusive of the fact, that the true location of the plaintiff's beginning corner is at pine No. 1 on the plat, as contended by the defendant.

The plaintiff claims however, that the defendant is estopped to deny that the common corner of his and the defendant's land, which is his own beginning corner, is at the point designated as pine No. 2 on the plat. This question is raised by a request to the court to charge the jury, that if at the time when the plaintiff John A. Boyden bought the adjacent tract for his wife the *feme* plaintiff, or before Sherrill, the defendant's assignor, who was in possession as the vendee of Harper, told him that the common corner of the two tracts was at the point indicated on the plat as pine No. 2, and therefore Boyden, believing the representation to be true, bought the land from Harris and paid the money for it, then the defendant Clarke would be estopped by the conduct of his assignor to deny the truth of the representations.

The testimony of Boyden, which bore upon this point, was as
(666) follows: "I had the land surveyed when I bought it in 1877;
W. W. Sherrill showed me the corner at pine No. 2; Sherrill was then claiming the adjoining lands to this tract under James Harper, and was in possession (these lands are designated in the plat as James Harper's grant, thirty-eight acres, 1848; James C. Harper, fifty acres granted 1848, and David Greene, twenty-five acres, granted 1847); these are the lands that Clarke is claiming under Sherrill since that date."

The court was not bound to give the instruction embodied in this prayer, because if we concede that there was such a privity in estate between Sherrill and Clarke that the misleading representation of the former would operate in any case to estop the latter, it would be essential to first show that Boyden acted upon them and placed himself in such a position that he must suffer loss unless they are treated as true and binding on Clarke. 2 Herman on Estop., sec. 945; Sedgwick & Waite, sec. 843; Bigelow on Estop., pp. 570, 638, 641; 2 Pom. Eq. Jur., sec. 812. But the plaintiff insists that as he bought immediately after Sherrill pointed out the corner to him, there was evidence tending to show that he was misled by the statement, and that it was error to refuse to submit that question to the jury, and he is entitled to have the benefit

of the point under another exception and his second assignment of error.

But passing over this question, or conceding, for the sake of argument, that if a privity in estate was shown to exist between Sherrill and Clarke, such that the representation of the former, if acted on by Boyden, would estop the latter, it would have been the province of the jury to determine, whether the inference could be fairly drawn from the fact that Boyden purchased immediately after his interview with Sherrill, that he was induced by the statement of Sherrill to make the purchase, it would be manifestly immaterial whether Boyden bought because he was misled as to the location, or for some other reason, (667) if in contemplation of law Sherrill and Clarke did not sustain such relations to each other as that the conduct of the one would bind or restrict the rights of the other. The defendant holds under James Harper, who conveyed to him all his right, title and interest in the land. Harper's lien could not have been impaired by the mistake or wilful misrepresentation of his vendee so as to deprive him of his right to sell under a decree for specific performance all of the land covered by the description in his contract. Clarke was the assignee of the equitable interest of Sherrill, but had no notice of the representation made to Boyden. Although Clarke bought the equitable interest of Sherrill, he does not hold in subordination to him, but to Harper, and is no more bound or restricted than was Harper, the vendor of Sherrill, because from the very nature of the transaction, Harper's security would be impaired unless he could give the purchaser either from Sherrill or at judicial sale a good title, and thus induce him to pay the purchase-money for the whole tract. It would be giving very great latitude to the doctrine of estoppel *in pais* if the mistaken or fraudulent statements of a vendee, occupying land under a contract of sale, were allowed to have the effect of establishing title by estoppel, as against the original vendor and the assignee of the original vendee, after the vendor had performed his contract by conveying to the assignee, both grantor and grantee being ignorant of the fact that any misrepresentation had been made.

"Privies," says Lord Coke, "may be comprehended under two general heads, privies in deed and privies in law; but are generally said to be of four kinds, 1st, privies in estate, as donor and donee; 2d, privies in blood, as heir and ancestor; 3d, privies in representation; 4th, privies in tenure, as landlord and tenant. Coke on Lit., 271*a*." But while we are dealing here with a species of estoppel, which is the creature of the courts of Equity and operates between the immediate parties and their privies, whether by blood, by estate or by contract (2 Pom. (668) Eq. Jur., sec. 813) it nevertheless, in this particular instance,

necessarily involves principles originating in the doctrine of tenures, because of the contention that there is a privity of estate. In law, the vendee is the mere tenant of the vendor, while in equity the vendee is the owner, and the vendor holds the legal estate to secure the payment of the purchase-money. The courts of Equity have never established the principle that the tenant could by his conduct *in pais* diminish his lord's estate by an estoppel operating on the superior, nor have they held that the vendee, because he is esteemed the owner in equity, could diminish the security of the vendor by his declarations, whether made ignorantly or fraudulently, or whatever might be the effect of such representation on others.

Assuming that Clarke now holds a deed from James Harper with full covenants of warranty and *seizin,* and that Boyden is declared to have title by estoppel on account of the conduct of Sherrill, Clarke, as an innocent purchaser, would be placed in a very strange and unfortunate position. It will be conceded that he could not recover for the loss of the strip of land from Harper or his heirs, because the misrepresentations of Sherrill, the tenant in law and vendee in equity of Harper, could not bind him. If he should sue Sherrill for damage, the all-sufficient answer to his demand would be that the assignment involved no warranty of title on the part of the latter. We cannot concede that such is the doctrine of equitable estoppel.

Where, however, a person invokes the aid of an equitable estoppel, on the ground that he has been misled, he must not only have acted in good faith, but it must appear that he has shown reasonable diligence in trying to ascertain the truth. 2 Pom. Eq. Jur., sec. 813; *Thomas v. Mosher,* 20 N. J. Eq., 257; *Royce v. Watson,* 73 N. Y., 597;
(669) *Wilcox v. Howell,* 44 N. Y., 398; *Moore v. Bowman,* 47 N. H., 494.

If a prudent person, in the exercise of ordinary care and occupying his position, would, by prosecuting his inquiries further or extending his investigations, have ascertained the truth before acting, relief would be refused on the ground of negligence. Applying this principle to our case, we find that the plaintiff's deed described his land as beginning on a white pine *stump,* it being the stump of a white pine tree, which was the beginning corner of what is known as "the old Isaac Greene one hundred acre tract of land, said corner being about thirty feet above the turnpike road, leading from Blowing Rock to Lenoir, and some fifty or sixty yards north of E. C. Pruden's cottage residence at Blowing Rock, and said corner being some twenty or twenty-five steps northeast of a bluff of rocks situated about from five to eight steps north of said turnpike road, and then runs east 148 poles to a cucumber on Alexander Martin's old line, the cucumber now being down; then north

107 poles to a red or Spanish oak on said line; then west 148 poles to a stake; then to the beginning, said tract of land being known as the old Isaac Greene place or tract."

It appears, from the testimony of Sherrill, that when the defendant Clarke proposed to buy, a survey was made preliminary to the purchase, and in order to locate the land which Sherrill had contracted to buy from Harper, Clarke caused a survey to be made of the calls of the old deed, under which Boyden claimed. But instead of accepting as true the statements of the proper location of the pine at the stump, as claimed by the plaintiff, Clark took the precaution to begin at the third corner, a red oak, which was still standing, and to reverse the calls and thereby fix the true location of the beginning corner. The plaintiff, John A. Boyden, who was present when the surveyors passed around to the last line, seems to have conceded that the line then run (and now found by the jury to be the true line) was properly located, claiming only that he held beyond it the land under fence and in his pos- (670) session up to the present time.

Guided by the principle we have stated, it is manifest that a court would not grant relief to the plaintiff, as against the defendant Clarke, when he might have ascertained the true location by running from a marked corner, as Clarke did. There was, therefore, no error in refusing to instruct the jury as to the estoppel *in pais*.

SHEPHERD, J., dissenting: I concur in the conclusion that, under the circumstances, there was no estoppel, but I do not assent to the reasoning of the court upon the other points discussed in the opinion.

PER CURIAM. Affirmed.

Cited: Dellinger v. Gillespie, 118 N. C., 739; *Cutler v. R. R.,* 128 N. C., 485.

A. C. ROBERTS ET AL. v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Witnesses—Competency, Code, sec. 590.

Plaintiff is a competent witness to testify as to a contract made with a deceased agent of a railroad company in regard to the company furnishing cars for the transportation of plaintiff's cattle.

ACTION, tried before *Brown, J.,* at Spring Term, 1891, of CHEROKEE. The plaintiffs alleged, as one cause of action, that the defendant

agreed to have in readiness and supply them with certain cars at a time and place specified, in which certain cattle were to be transported over the defendant's railroad to a place specified; that the defendant failed to keep and perform its agreement, etc., whereby the plaintiff sustained damage, etc.

(671) The defendant denied the material allegations of the complaint. This, among other issues, was submitted to the jury:

"2. If so, did the defendant fail to perform its contract as alleged in the complaint?"

On the trial, a witness for the plaintiffs (one of them) testified, among other things, as follows: "I made an agreement with defendant's agent at Jarrett's station to ship them (the cattle). I made a bargain with him; I think his name was Buchanan."

The defendant objected to any evidence on part of the plaintiffs to this transaction with the agent Buchanan, upon the ground that Buchanan is dead.

The objection was sustained, and the plaintiffs excepted.

The plaintiffs submitted to a judgment of nonsuit, and appealed.

Ben. Posey and Theo. F. Davidson for plaintiffs.

F. H. Busbee for defendant.

MERRIMON, C. J., after stating the facts: The obvious purpose of the evidence rejected was to prove the special contract of the defendant to supply certain cars at the time and place specified in the complaint, and that it failed to do so. The evidence was clearly relevant and competent for that purpose, and we are at a loss to see the ground of objection to it. Unquestionably, the statute (Code, sec. 590) did not apply, as seems to have been supposed. The plaintiffs (the witness was one of them) did not derive their "interest or title," or claim, from the deceased agent of defendant, by assignment or otherwise. That agent was a third party, and on the same footing as any other person having no interest in the present cause of action. *Howerton v. Lattimer,* 68 N. C., 370; *Thomas v. Kelley,* 74 N. C., 416; *Molyneux v. Huey,* 81 N. C., 106.

Error.

Cited: Gwaltney v. Assurance Society, 132 N. C., 929; *Walker v. Cooper,* 159 N. C., 538; *Bank v. Wysong Co.,* 177 N. C., 292.

(672)

J. W. COOPER v. A. W. WARLICK ET AL.

Partition—Defense Bond.

Where the defendant in a petition for partition pleaded *sole seizin*, it was error to strike out his answer without notice because no defense bond had been filed. He was entitled to a rule to show cause.

SPECIAL PROCEEDINGS for partition, begun before the clerk of the Superior Court of CHEROKEE, and heard upon appeal before *Brown, J.*, at chambers.

On 12 February, 1891, the return day of the summons, the defendants Warlick appeared by Mr. Ben Posey, their attorney, and filed answer to the plaintiff's petition claiming to be sole seized and possessed of the land and premises described in the petition, but failed to file the undertaking required by the statute, or to otherwise comply with the provisions of the statute so as to entitle them to answer. On 30 March, 1891, counsel for plaintiff appeared before the clerk and moved the court for an order striking out the answer of the defendants Warlick, and for judgment for plaintiff as prayed for in his petition, which motions were granted by the court without giving notice to defendants or their attorney.

The clerk granted the plaintiff's motion, struck out the defendants' answer, and gave judgment for the plaintiff, from which the defendants appealed. His Honor reversed the order of the clerk, and directed the clerk to give notice to the defendants of a day by which the defense bond must be filed or leave obtained, in manner required by law, to defend without bond. From which judgment the plaintiff appealed.

R. L. Cooper and F. P. Axley (by brief), and G. S. Ferguson for plaintiff.

Ben Posey and T. F. Davidson for defendant.

CLARK, J. The defendants having pleaded *sole seizin* could (673) have been required to file a defense bond under section 237 of The Code; *Vaughan v. Vincent,* 88 N. C., 116, unless they had obtained leave to defend the action without giving the bond. But his Honor properly held that "having accepted the answer and filed it on the day fixed for pleading, and no objection being made by the plaintiff," it was error in the clerk to strike out the answer, after it had been on file forty-two days, without notice to the defendants, and to give a summary judgment against them. The case comes within the spirit of the tenor of the decision in *McMillan v. Baker,* 92 N. C., 110. The

court below committed no error in setting the judgment aside and directing the clerk to give notice to defendants of a day by which the defense bond must be filed or leave obtained, in the manner required by law, to defend without giving it. It has, in like manner, been held that when the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. *Brittain v. Howell,* 19 N. C., 107; *Russell v. Saunders,* 48 N. C., 432; *Albertson v. Terry, ante,* 8. Indeed, it appears by defendants' affidavit, which is not denied, that they were, and are, still ready to file the requisite bond, if required to do so.

Affirmed.

Cited: Honeycutt v. Brooks, 116 N. C., 792; *Becton v. Dunn,* 137 N. C., 563; *Gill v. Porter,* 174 N. C., 570; *Shepherd v. Shepherd,* 179 N. C., 122.

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(674)

JOHN W. PARTON ET AL. v. M. S. ALLISON ET AL.

Dower, Assignment of —Jurisdiction.

1. The right to apply for allotment of dower by special proceeding under section 2111 of The Code is a legal right, personal to the widow, and cannot be transferred by assignment.
2. Where the right to a dower has been assigned before allotment, the assignee's remedy to enforce it is by civil action in term; the clerk of the Superior Court has no jurisdiction.

SPECIAL PROCEEDING for dower, commenced before the clerk of the Superior Court, of HAYWOOD, and heard upon demurrer at Fall Term, 1891, *Merrimon, J.,* presiding.

The petition alleged that one Owens had died seized of certain lands; that he left surviving him his wife, who was entitled to dower; that she had sold and conveyed her dower right to the petitioners, who now prayed that dower might be assigned them.

The defendants demurred, for that:

1. That the alleged right of dower is only a thing in action and cannot be assigned, so as to authorize the assignee to bring suit in his own name.

3. That this Court has no jurisdiction under the facts alleged in the petition, for that it is not alleged that the widow's dower has been

assigned, and before assignment it is only a thing in action not arising out of contract.

His Honor sustained the demurrer, and plaintiffs appealed.

W. L. Norwood, T. F. Davidson and J. M. Moody for plaintiffs.
G. S. Ferguson for defendants.

PER CURIAM: His Honor, in sustaining the demurrer to the (675) jurisdiction, was of the opinion that the right to "apply for assignment of dower by petition in the Superior Court as in other cases of special proceedings" (Code, sec. 2111) "is a legal right, and personal to the widow, and cannot be assigned to another; and that the sale by the widow of her right of dower, before dower was assigned to her according to law, was an equitable assignment of her right, to be enforced in a court of Equity by a civil action, and not by a special proceeding, and that the clerk had no jurisdiction." The ruling is supported by several decisions of this Court. *Potter v. Everitt,* 42 N. C., 152; *Tate v. Powe,* 64 N. C., 644; *Efland v. Efland,* 96 N. C., 488.

Affirmed.

Cited: S. c., 111 N. C., 430; *Summer v. Early,* 134 N. C., 235; *Drewry v. Bank.* 173 N. C., 667.

J. W. CULP AND WIFE ET AL. v. D. P. LEE, EXECUTOR OF THOMAS RUSSELL.

Will—Devise—Guardian and Ward—Administration—Statute of Limitations.

1. Under a devise, in a residuary clause, that the surplus of testator's estate should be equally divided between P., M., and the children of S., "share and share alike, to each and every of them, their executors, administrators and assigns absolutely forever," the devisees took *per capita,* and a child of S., born after the testator's death, was entitled to share with the other children.
2. If a guardian has received from an executor or administrator a less sum in settlement than was due, the ward may sue either the guardian or the executor or administrator for the unpaid amount; and the fact that a settlement had been made between the guardian and the executor is not conclusive in an action by the ward against such executor or administrator, its only effect being to impose the burden on the ward of showing that the settlement with the guardian was not a complete payment of the amount due.

3. Where an executor filed his final account in 1876, and the distributees, who then and until they became of age had a guardian, did not bring suit for an alleged balance due under the testator's will until 1891: *Held*, the action was barred by the statute of limitations.

(676) ACTION to recover a sum of money due the plaintiffs under the will of Thomas Russell, tried at the Fall Term, 1891, of MECKLENBURG, before *Hoke, J.*, who upon agreement of the parties found the facts, trial by jury being waived. The action was commenced in February, 1891.

It was admitted on the part of defendant that the *feme* plaintiff was twenty-two years of age and married before coming of age, and the male plaintiff twenty-five years of age at the time of trial, and on behalf of the plaintiff that D. P. Lee, executor of Thomas Russell, filed an account 19 December, 1876, in the clerk's office of said county, showing a balance in his hands of $1,310.46, which said sum was thereupon equally distributed among Philip J. Russell, Mary Russell and Charles Stanford, guardian for the children of Martha Stanford, in three equal parts.

Upon the pleadings, admissions and evidence, after argument by counsel, his Honor found, as conclusions of law:

1. That the children of Martha Stanford were entitled, under the will of Thomas Russell to participate *per capita* and not *per stirpes* in the distribution of the personal estate of said Thomas Russell.

2. That the child of Martha Stanford, born the day after testator's death, was entitled to share with the other children.

3. That plaintiffs' cause of action was not barred by the statute of limitations, and that the cause of action existed against the defendant.

The defendant excepted. Judgment was, thereupon, rendered for the plaintiffs, and defendant appealed.

The defendant assigned as error:

(677) 1. That his Honor found, from the evidence, that the plaintiffs' cause of action was against the defendant, and not against their guardian, Thomas Stanford.

2. That he found that the plaintiffs' cause of action was not barred by the statute of limitations.

3. That he found that Henry Stanford, the child of Martha Stanford, born after testator's death, was entitled to share in the distribution under the residuary clause of the will.

4. That his Honor found that under the will of said Thos. Russell, the children of Martha Stanford were entitled to take *per capita* and not *per stirpes*.

The clause in the will of Thomas Russell, pertinent to the questions decided, is set out in the opinion.

E. T. Cansler and J. A. Bell (by brief), and C. W. Tillett for plaintiff.

No counsel contra.

CLARK, J. 1. The direction in the residuary clause that the "surplus shall be equally divided and paid over to Phillip J. Russell, Miss Mary Russell and the children of my niece, Martha, wife of Charles Stanford, in equal portion, share and share alike, to them, and each and every of them, their executors, administrators and assigns absolutely forever," was properly construed as a devise *per capita,* and not to the children of Martha Stanford *per stirpes* as a class. The authorities, *Bryant v. Scott,* 21 N. C., 155; *Cheeves v. Bell,* 54 N. C., 234; *Harrell v. Davenport,* 58 N. C., 4; *Hill v. Spruill,* 39 N. C., 244; *Waller v. Forsythe,* 62 N. C., 353; *Harris v. Philpot,* 40 N. C., 329; *Lane v. Lane,* 60 N. C., 630; *Ward v. Stow,* 17 N. C., 509, and other cases cited by counsel, are in point. There is nothing in the will which takes this case out of the settled rule of construction. The intention of the testator expressed that the surplus should be "equally divided" between the beneficiaries, Philip Russell, Mary Russell and the (678) children of Martha Stanford, and that they shall take "in equal portion, share and share alike, to them and *each and every of them,*" points clearly to a *per capita* division among them.

2. The child of Martha Stanford, born the day after the testator's death, is entitled to share with the other children. *Barringer v. Cowan,* 55 N. C., 436.

3. If the guardian received for his wards a less sum than they were entitled to receive, it is true they can sue the guardian and his sureties for his default, but they have their election to sue either the guardian or the executor from whom he insufficiently collected the fund devised to them, or both. *Harris v. Harrison,* 78 N. C., 202; *Luton v. Wilcox,* 83 N. C., 21. It has been held that where a receiver, appointed to take charge of a ward's estate, makes a settlement with the guardian and executes a release to him, even under the direction of the court, such settlement and release are not conclusive against the ward. *Temple v. Williams,* 91 N. C., 82. The settlement made in this case by the defendant with the guardian of the plaintiffs, had no other effect than to put the burden on plaintiffs to prove that the settlement made by defendant with their guardian was not a full payment of the sum due them, and which the guardian should have collected in their behalf.

4. When the defendant filed his final account 19 December, 1876, it closed the trust as between him and the distributees, if *sui juris,* so

that the lapse of ten years certainly would bar an action against him. Code, sec. 158; *Wyrick v. Wyrick,* 106 N. C., 86. If not, indeed, six years. Code, sec. 154(2); *Vaughan v. Hines,* 87 N. C., 445; *Andres v. Powell,* 97 N. C., 155; *Kennedy v. Cromwell,* 108 N. C., 1. If the plaintiffs had been without a guardian to represent them, the statute would not have run against them, till one had been appointed, or the disability of non-age had been removed. *Brawley v. Brawely,* (679) *ante,* 524. But here, the guardian was appointed in November, 1873, and the defendant has been exposed to an action by him since the account was filed in December, 1876, more than ten years, and the principle applies that a cause of action barred against a trustee, is barred against the *cestui que trust* also. *Welborn v. Finley,* 52 N. C., 228; *Herndon v. Pratt,* 59 N. C., 327; *Clayton v. Cagle,* 97 N. C., 300; *King v. Rhew,* 108 N. C., 696. If the trustee, the guardian, was faithless, or negligent, he was liable on his bond to an action by his wards after their arrival at age. If at that time, the defendant had not become protected by the lapse of ten years from filing his final account, the plaintiffs could have brought action against him as well as the guardian, as we have said above. *Harris v. Harrison,* 78 N. C., 202.

Error.

Cited: Nunnery v. Averitt, 111 N. C., 395; *Culp v. Stanford,* 112 N. C., 668; *Cross v. Craven,* 120 N. C., 332; *Alexander v. Alexander, ib.,* 473; *Ex parte Brogden,* 180 N. C., 158; *Mitchell v. Parks, ib.,* 635.

JOHN R. GEER v. JANE GEER ET AL.

Evidence, Original Records—Deeds—Jurisdiction of Former Courts of Equity—Action to Recover Land—Recovery upon Equitable Title, —Deed without Seal.

1. The original record of an equity proceeding transferred to the Superior Court is competent evidence. A transcript in such case is not necessary.
2. An *ex parte* petition for partition was cognizable in the former courts of Equity.
3. That a deed is without seal does not affect its competency as evidence; this defect goes to its legal effect.
4. In an action to recover land, the plaintiff may recover upon the equitable title, although not pleaded, when the court would, in a direct proceeding, correct a formal defect, or where the dry legal title is outstanding in another; *aliter*, when extrinsic evidence is necessary to establish the equitable ownership. So, in this action, plaintiff may recover upon a deed of a commissioner of the court without seal.

GEER *v.* GEER.

ACTION to recover land, tried before *Merrimon, J.*, at Spring (680) Term, 1891, of RUTHERFORD.

The plaintiff offered in evidence what purported to be the original records in a suit, or proceeding, in the old court of Equity held for the county of Rutherford at Spring Session, 1866, and continuing for some time thereafter, having been transferred to the present Superior Court, in case of the heirs at law of John Geer. This was objected to upon the ground that the record being that of the old court of Equity, there should have been a transcript made for this Court. Objection overruled. Exception by defendant.

The plaintiff offered in evidence the petition filed in the cause at Spring Term, 1866, of said court of Equity, of which the following is a copy:

"The petition of William Geer and others, respectfully showeth unto your Honor that John Geer, Sr., late of said county, died intestate (leaving a widow who is now dead), leaving your petitioners his only heirs at law upon whom his real estate descended, between them equally to be divided as tenants in common, there being seven heirs as above represented. And your petitioners further show that the said intestate, at the time of his death, was seized of the following tracts of land, to wit: 'One tract known as the Costen tract, five hundred and twenty-nine acres; another tract known as the Lynch place, containing six hundred and fifty-seven acres; another tract known as the Larger tract, containing two hundred acres; another known as the Morris tract containing twenty acres. Some of the aforesaid lands are fine bottom lands and very valuable.' . . . Your petitioners further show that they desire the aforesaid lands to be disposed of in an equitable manner amongst them, either by partition or sale, as your Honor may think most beneficial to the parties," etc.

Objection by defendant, upon the ground that the petition did not state facts sufficient to give the court jurisdiction. It (681) being an *ex parte* proceeding, the parties could have effected a sale without invoking the aid of a court. Objection overruled. Exception by defendant.

The deed of M. O. Dickerson, clerk of the Superior Court, conveying the land in dispute, was offered by plaintiff, dated 15 August, 1878. It was admitted that this deed made by the clerk was not under seal. Defendants objected to its introduction as a deed, claiming that it was not a deed. The court ruled that the objection had respect rather to the legal effect of the paper than to its admissibility as evidence, and allowed the paper to be introduced and read. Defendant excepted.

Defendant asked the court to charge the jury, that as the deed above mentioned from the clerk was not under seal, the plaintiffs were not

entitled to recover, as the deed was defective. Refused. Exception by defendant.

The court held that the plaintiffs were entitled to recover upon an equitable title if they had shown such. Defendant admitted that plaintiff had the equitable title to the land, and was, in equity, the owner but excepted to this ruling, upon the ground that the plaintiff had not alleged any equitable claim in his complaint, and therefore could not recover upon failure of his legal title, and that the complaint did state facts sufficient to constitute a cause of action upon the evidence adduced. Overruled. Exception by defendants.

The defendants' admission that plaintiff was an equitable owner was made, reserving the benefit and right of their previous exceptions.

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

Justice & Justice (by brief) for plaintiff.

J. A. Forney for defendant.

(682) SHEPHERD, J. 1. We see no force in the first exception. It appears that the "suit or proceeding" in the old court of Equity was transferred to the Superior Court, and it being constituted there, it would seem very clear that a transcript was unnecessary. Constitution 1866, Art. IV, sec. 25; C. C. P. of 1868, secs. 400, 142; *Stanly v. Massingill,* 63 N. C., 558; *Mason v. Miles,* 63 N. C., 564; *Commissioners v. Blackburn,* 68 N. C., 406.

2. The objection that the "petition did not state facts sufficient to give the court jurisdiction," is equally untenable. It is true that the proceeding was *ex parte,* and that the parties might have united in a sale without invoking the aid of the court, but this did not prevent them from having a division or sale by judicial proceedings. The petition was filed by the heirs of John Geer, Sr., and after describing the land and the respective interests of the parties as tenants in common, it prayed that the land might "be disposed of in an equitable manner amongst them, either by partition or sale, as your Honor may think most beneficial to the parties," etc. The petition surely stated sufficient facts to confer jurisdiction, and it was expressly provided that such a proceeding was cognizable by a court of Equity. Rev. Code, ch. 82, secs. 1, 6. See also *Skinner, ex parte,* 22 N. C., 64.

3. The third exception to the admission of the "deed" of the clerk, because it had no seal, is also overruled. The court very properly held "that the objections had respect rather to the legal effect of the paper than to its admissibility as evidence."

4. The remaining exceptions, that the plaintiff could not recover upon said paper-writing, and that, admitting that it conferred the

equitable title, it was necessary that it should be pleaded as such, cannot, in our opinion, be sustained.

It has been fully settled that a plaintiff may recover in ejectment upon an equitable title (*Taylor v. Eatman,* 92 N. C., 601; *Murray v. Blackledge,* 71 N. C., 492; *Condry v. Cheshire,* 88 N. C., 375); and where, upon the face of record evidence, like that before us, the court would, in a direct proceeding as a matter of course, order (683) the correction of a merely formal defect in the execution of its decree, it is unnecessary (though perhaps the better practice) to set forth the facts in the pleading.

The same is true where it appears from the documentary evidence that the dry legal title only is outstanding in another, but where it is necessary to establish such equitable ownership by extrinsic testimony, then the facts should be pleaded, the rule being that whenever, in such cases, it was, under the former system, necessary to invoke the aid of a court of Equity, the facts necessary to warrant such equitable relief must now, under the present practice, be specifically set forth in the pleadings.

Affirmed.

Cited: Leatherwood v. Fulbright, post, 684; *Foster v. Hackett,* 112 N. C., 556; *Arrington v. Arrington,* 114 N. C., 118; *Cotton Mills v. Cotton Mills,* 116 N. C., 650; *Patterson v. Galliher,* 122 N. C., 515; *Griffin v. Thomas,* 128 N. C., 317; *Westfelt v. Adams,* 131 N. C., 380; *S. c.,* 135 N. C., 593; *Brown v. Hutchinson,* 155 N. C., 207; *Mull v. R. R.,* 175 N. C., 594; *Vaught v. Williams,* 177 N. C., 84.

L. B. LEATHERWOOD v. A. J. FULBRIGHT.

Action to Recover Land—Recovery upon Equitable Title—Pleading—Defective Cause of Action—Dismissal—Amendment in Supreme Court.

1. A complaint which states that the plaintiff is the equitable owner of land, but sets forth no facts in support of the equitable title, except that plaintiff has a bond for title from a third party, does not state a cause of action, and the action will be dismissed in the Supreme Court, upon motion.

2. If it had appeared, during the progress of the trial, that the evidence sustained issues embodying the averment of payment of the purchase-money by the plaintiff, an amendment would have been permitted in the Supreme Court, and the action would not have been dismissed.

(684) ACTION for the recovery of land, tried before *Merrimon, J.*, at Fall Term, 1891, of HAYWOOD.

Upon an intimation of the court that, upon the plaintiff's evidence, he was not entitled to recover, the plaintiff submitted to a nonsuit and appealed.

J. M. Moody and T. F. Davidson for plaintiff.
G. S. Ferguson for defendant.

PER CURIAM: The defendant moved in this Court that the action be dismissed for that the complaint did not set forth facts sufficient to constitute a cause of action. The plaintiff alleges that he is the equitable owner of the land, and demands possession of the same. No facts are set forth in support of this equitable title, except that the plaintiff has a bond from one Rogers to convey the land to him upon the payment of one thousand dollars. There is no allegation that he has paid any part of the purchase-money, or that he has ever been in possession. While it is true that one may recover upon an equitable title in an action in the nature of ejectment (*Taylor v. Eatman,* 92 N. C., 601), it is nevertheless essential that he should set forth the facts upon which the same is grounded. See rule as stated in *Geer v. Geer, ante,* 679. There is here nothing but an executory contract with no averment as to payment, and it is plain that no cause of action is stated.

Had the case proceeded to trial upon the merits, and upon evidence sustaining issues embodying the essential circumstances, a motion to dismiss would not be allowed. In that event, the court below, or this Court, would have ordered the pleadings to be amended so as to conform to the facts found. *Baker v. Garris,* 108 N. C., 227. Such is not the case here, and we think the motion should be allowed.

This renders it unnecessary to notice the ruling of the court (685) upon the insufficiency of the description in the bond for title.

The attention of counsel, however, is directed to the case of *Perry v. Scott, ante,* 374.

Dismissed.

C. W. PATTON v. CITY OF ASHEVILLE.

Dower—Vested Rights.

A widow who married since the common-law dower act is not entitled to dower in lands sold during coverture under execution for debts contracted prior to the dower act. And this is not changed because some of the debts under which the lands were sold were contracted subsequently. In this view, the dower act does impair the obligation of the contract between debtor and creditor.

AVERY, J., did not sit.

ACTION, tried before *Brown, J.*, at Spring Term, 1891, of BUNCOMBE.

Upon the facts agreed, there was a judgment for the defendant, from which the plaintiff appealed. The facts are sufficiently stated in the opinion.

W. R. Whitson (by brief) and T. F. Davidson for plaintiff.
C. A. Moore and F. A. Sondley for defendant.

CLARK, J. The husband of the plaintiff acquired the land in 1858. He was married to plaintiff in 1869, since the act restoring the common law right of dower. The land was sold in 1882, under execution issuing on judgments, a large part of which were obtained on debts contracted in 1860. Her husband having died since the sale, the plaintiff seeks in this action to have her dower laid off in the land which (686) has now been conveyed by the purchaser at the execution sale to the defendant.

We are unable to distinguish this case from the similar question raised as to the homestead, which has been settled by *Edwards v. Kearsey,* 95 U. S., 595; *ib.,* 79 N. C., 664, and succeeding cases in this State down to *Long v. Walker,* 105 N. C., 90.

When these debts were created in 1860, there was no dower or homestead which could be set up against the collection of the judgment under the execution issued thereon during the debtor's lifetime. If the plaintiff can now claim dower, it is solely under and by virtue of a statute enacted since 1860.

The Constitution of the United States prohibits any State from passing any act impairing the obligation of a contract. After the decisions above named, it should require no argument to show that the act giving dower in "all lands of which a debtor is seized at any time during coverture," is an impairment of the obligation assumed by a debtor as to debts created by him prior to the passage of such act. The obliga-

tion of the contract made by the debtor contracting a debt in 1860, was, not that the creditor should have a lien on his property; that could be done by giving a mortgage. Nor was it that the debtor could not alien his property; that would put restrictions on trade, which was against public policy. The law then in force recognized in the creditor no lien or power to prevent the alienation of land by the debtor, and he contracted with no such right. But the law then in force gave the creditor a remedy in the collection of his debt without let or hindrance from dower right in the widow or a homestead in the debtor himself, his widow or children. The statute passed after that time could not lessen or impair the extent of the remedy which the creditor pos-
(687) sessed at the time of the contracting of the debt.

The statute in force in 1860 did not permit the husband by a contract of marriage to settle on his wife's property in derogation of the rights of creditors. Rev. Code, ch. 37, sec. 25.

That the sale was made under several executions, some of which were issued on judgments obtained on debts contracted since the present dower and homestead were adopted, could not affect the title of the purchaser at such sale. He subsequently conveyed to the defendant. The debtor, as against the creditors, whose debts were contracted since the adoption of the homestead, was entitled to the value of his homestead out of the proceeds of such sale, after payment of the executions issued for debts contracted prior to the homestead. This was so held in favor of the husband of the plaintiff as to this very sale. *Wilson v. Patton,* 87 N. C., 318.

Where a debt is contracted since the passage of the present act, the widow of the debtor is entitled to dower (when not released in the manner required by law), and even though the debtor at the time of the creation of the debt was a single man. The parties contract with the knowledge that the creditor's remedy is subject to that contingency. But here, when the debt was made there could be no such matter in contemplation of the parties, and the act since passed could not restrict the creditor's remedy into narrower limits. As to them, when the sale was made in 1882 the plaintiff's husband being then alive, the plaintiff's dower was nonexistent and the purchaser at such sale acquired title to the property unincumbered by any right of dower. When these debts were made, the right of dower, which the wife of the debtor could acquire, was "in land of which the husband may die seized and possessed." The husband did not die "seized and possessed" of this land, and his widow's claim for dower therein was properly denied.

Affirmed.

Cited: Buie v. Scott, 112 N. C., 377.

(688)

ASHEVILLE STREET RAILWAY COMPANY v. CITY OF ASHEVILLE.

Injunction—Municipal Corporations—Contract with Street Railway Company.

1. Where a city, by authority of its charter, granted a street railway company the right to construct a branch road over a certain street, it cannot, by a subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent the completion of the road then in process of construction, injunction will issue restraining the city from such interference.
2. Injunctions which encourage enterprise and facilitate public convenience will be dissolved only in clear cases.

INJUNCTION, heard before *Merrimon, J.*, at chambers, 28 November, 1891.

The plaintiff corporation has power, and it is its purpose, to construct and operate street railways over the public streets and alleys of the defendant when, where and as the parties may agree. The plaintiff had permission and right to build and use such a railway on and along South Main street, and on 13 November, 1891, the defendant, by a proper resolution, extended and enlarged the rights of the plaintiff in such connection so as to allow it the privilege and right "to construct and operate a branch or branches of its railway across Valley street and Atkins street, or either of them."

The plaintiff having employed laborers, procured implements, materials and other things appropriate for the purpose, was proceeding to construct such branch railway when, on 14 November, 1891, the officers and agents of the defendant, without notice to the plaintiff, made an order, of which the following is a copy:

"Be it ordained, that all rights and privileges granted to the Asheville Street Railway Company by an order of this board (689) made on 13 October, 1891, be and the same are hereby, in all things, repealed and revoked. Be it further ordained, that the chief of police be and he is hereby instructed and directed and ordered to prevent the said Asheville Street Railway Company, its agents or assigns and all other persons, from in any manner interfering with any streets of this city, or in any manner building, erecting, or attempting to build or to erect any street railway or any railway over or across any street in this city; and that the said chief of police, with all other policemen of this city, and all other citizens, shall enforce this ordinance and all other ordinances in reference to said matters, under penalty of the law."

The defendant's police force immediately in pursuance of such order proceeded to execute the same, and forbade the plaintiff and its agents to proceed with its work, and threatened to arrest its agents and to use such force as might be necessary to accomplish that purpose. Thereupon the plaintiff brought this action, one purpose of which is to obtain relief by injunction pending the action.

The defendant by its answer admits some of the material allegations of the complaint, denies others and avers matters and facts to some extent, and in some respects, confessing and avoiding the plaintiff's cause of action.

The court heard the plaintiff's motion for an injunction restraining the defendant from such interference with its rights upon the complaint and answer, used as affidavits, and divers other affidavits, and upon consideration allowed the motion. The defendant excepted and appealed.

F. A. Sondley, T. F. Davidson and T. A. Jones for plaintiff.
T. H. Cobb for defendant.

MERRIMON, C. J., after stating the facts: The trespass com-
(690) plained of in this action is not an ordinary civil trespass, as to which the plaintiff may be compensated in damages. The defendant, a municipal corporation, possessed of large and important powers, undertook, as is alleged, arbitrarily to declare its contract with the defendant at an end, and assert its assumed authority by force. This it could not lawfully do. If the defendant was constructing or proceeding to construct its branch railway without authority, or in violation of its contract with the defendant, or in such way as to seriously interfere with or imperil the rights of the public, the defendant had its appropriate remedy, civil or criminal or both, through the courts. Its officers and agents misapprehended the nature and extent of its powers when it thus undertook to settle and determine its rights and those of the plaintiff and assert its authority. There is nothing in its charter or in legal contemplation that warrants such exercise of power. It can pass ordinances and make appropriate regulations and enforce them, establish a police force and employ the same for all lawful purposes, and do a multitude of important acts for the protection, convenience, comfort and safety of the people and their property, but it cannot, at its will and pleasure, rid itself of contract obligations and engagements, whether the same concern individuals or other corporations. It is subject to the jurisdiction of the courts in appropriate cases, and it must seek its remedy in like appropriate cases through the courts. It can exercise authority only in the respects and in the way prescribed by law.

The interference complained of did not simply affect the plaintiff; it affected in an important sense the public. The rights of the plaintiff were important, and concerned the public as well as itself. It appears that a principal purpose of the branch road which it was constructing when interfered with, was to reach important tobacco warehouses and facilitate the transportation of tobacco to and from them, and to extend and enlarge business in that connection and (691) locality. Such enterprise must not be interfered with or retarded for light or trivial causes. The law encourages and will protect just public enterprise, and will interfere to impede or arrest it but in cases where good and substantial cause is shown.

There is much of the evidence more or less in conflict. An examination of it satisfies us that the merits of the litigation are not free from doubt in important respects. It may be that the plaintiff has not constructed its branch road strictly as it had the right and was bound to do, and that to some extent it interferes with the street across or over which it has been or may be built. We think, however, that it cannot do any serious harm to allow it to be constructed, and if it shall turn out that plaintiff's right is not well founded, it may be required to change or remove its road as right and justice may require. This Court is not inclined to interfere with appropriate injunctions granted pending the action, especially when they encourage enterprise and facilitate the public convenience. It will interfere only in clear cases, and when it is probable that serious harm may result from the injunction. Moreover, it will not ordinarily pass upon the general merits of the action until the cause of action has been litigated upon its merits. *Navigation Co. v. Emry,* 108 N. C., 130, and cases there cited.

Affirmed.

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(692)

MARY E. CONLEY, ADMX., v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Pleadings—Motion to make more definite—Demurrer—Aider by Pleading.

1. A complaint in an action for wrongful death is fatally defective which alleges that plaintiff "was, by the wrongful act, neglect and default of the defendant slain and killed," in that the facts constituting the alleged negligence are not set out.

2. A demurrer "that the negligence complained of is not sufficiently and legally set out" is sufficient.

3. The motion to make a complaint more definite is addressed to the discretion of the trial judge.

4. *It seems* that a complaint against a common carrier for personal injuries should allege a contract of carriage upon a specific day.

5. Defective statements of causes of action and aider by pleading discussed by AVERY, J.

ACTION, heard upon complaint and demurrer, before *Merrimon, J.*, at Fall Term, 1891, of HAYWOOD.

The plaintiff complained as follows:

1. That the plaintiff is the administratrix of the estate of Robert B, Conley, deceased.

2. That on 24 August, 1890, and both before and since said time, the defendant, the Richmond and Danville Railroad Company, was and is operating and controlling a railroad leading from the city of Asheville, in Buncombe County, to Bryson City, in Swain County, and running locomotives and trains on said railroad, and doing a general business on said railroad as common carrier of both passengers and freight.

3. That on or about 24 August, 1890, Robert B. Conley, the intestate of the plaintiff, being then rightfully on a train of cars of the defendant, on his way to Waynesville, North Carolina, was, by the (693) wrongful act, neglect and default of the defendant, slain and killed.

4. That on or about 24 August, 1890, Robert B. Conley, the intestate of the plaintiff, being rightfully on a train of cars of the defendant, between Balsam Station and Waynesville, by the gross negligence of the defendant was slain and killed.

5. That by reason of the wrongful act, neglect and default of the defendant herein complained of, the plaintiff has been greatly damaged, to wit, the sum of ten thousand dollars.

The defendant demurred to the complaint for:

"That the negligence complained of is not sufficiently and legally set out.

"That it does not state facts sufficient to constitute a cause of action."

The court overruled the demurrer, and the defendant excepted.

The defendant then moved the court for an order requiring the plaintiff to set out in his complaint the facts constituting the negligence complained of, so as to enable it to intelligently make its defense. Motion overruled, and defendant excepted and appealed.

W. G. Ferguson (by brief) and G. S. Ferguson for plaintiff.

F. H. Busbee and J. M. Moody for defendant.

AVERY, J. The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of suits was abolished by the Constitution, Art. IV, sec. 1. But one who is brought into court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. Otherwise, (694) his property might be wrested from him under the form of law, not because of inability to overwhelm by the greater weight of evidence any *prima facie* proof offered by the plaintiff, but for the reason that the cause of action is so defectively stated in the complaint that the specific testimony necessary to meet it cannot be intelligently looked for and adduced. Suppose that, in fact, it were the purpose of the plaintiff administratrix to prove that intestate was thrown from the track by a passing engine "on or about 24 August, 1890," and subsequently died from injuries so received. It will be seen that the complaint leaves the day and the precise locality, as well as the circumstances alleged to have accompanied the act of inflicting the injury, indefinite. If such action were, in fact, groundless, as it might possibly be, how could the company know which of its servants to summon in order to meet the evidence to be offered? In ignorance as to the time or the precise place that would prove to be the scene of the alleged injury, it must summon all of its officers and servants, and suspend operations for a term of court, or temporarily fill the places of all by employing substitutes. We think that the defendant had the right to a statement sufficiently specific to so far inform it as to the nature of the action that it would not, without default on its part, lose the benefit of a complete defense, which it might possibly be in its power to make good but for the want of more definite information in the complaint. In this case it is consistent with the statement of the case to conjecture that the death of the intestate may be shown by plaintiff's testimony, if believed, to be due to the acts of the conductor or other employee of the defendant in shooting him or pushing him violently off the train, running the train over him, or throwing the train off the track. Death may be shown in the same way to have followed the injury immediately or after the lapse of days or months, and without notice of the claim for damages on the part of the plaintiff. It is just for (695) the courts to make such rules as will guard against possible infringement upon the rights of the citizen, and that can only be done by supposing that facts not inconsistent with the plaintiff's allegations do in reality exist. We consider this not a question involving a mere technicality, but a substantial right guaranteed to the defendant because

the company is protected as a citizen by the spirit, if not the letter, of our organic law. It might be that the death of intestate occurred immediately after the alleged injury, or after the lapse of days or months, and without notice to the defendant of the claim growing out of it. The plaintiff avers that he was rightfully on the train run by defendant, but it does not appear whether he had purchased a ticket and was there under a contract of carriage, or whether by a permit of some kind he was being transported without charge. As the names of the passengers are not recorded, the defendant would not be presumed to know what precise relation he sustained to the company as a carrier, yet it might be essential to have such information in order properly to defend the action.

It is contended for the plaintiff that if her complaint is not sufficient, this is at most a defective statement of a cause of action, not a case where the complaint does not state facts sufficient to constitute a cause of action; that the demurrer is not sufficiently specific in pointing out the defects complained of, and that the motion for a more definite statement after the demurrer had been overruled was addressed to the discretion of the judge, and his refusal to grant it is not reviewable here. If we should concede that the plaintiff had stated a cause of action, however informally or defectively, it seems that, under repeated adjudications of this Court, the refusal of the motion to make the complaint more specific would be addressed to the discretion of the judge in the court below. *Best v. Clyde,* 86 N. C., 4; *McGill v. Buie,* (696) 106 N. C., 242; *Thames v. Jones,* 97 N. C., 121.

If we were to concede that the second ground of demurrer is not sufficient because the complaint states a good cause of action defectively, we would still be confronted by the first ground of demurrer that "the negligence complained of is not sufficiently and legally set out," and we see no reason why this objection should be made more specific. The defendant is not required to state in terms what the complaint ought to have set out, because the trouble that it has encountered in preparing the defense grows out of the want of the information necessary to enable the company to do so. If it cannot state in detail how the negligence might have been declared, it is sufficient for it to indicate that the defects consisted in the failure to allege what, in law, constituted the negligence. If it had simply demurred for that the statement of the cause of action was defective, without the more specific ground that the defect consisted in the failure to set out the negligence complained of, we concede that the demurrer would not have been sufficiently specific. But this Court has repeatedly held that the allegations in a complaint do not constitute a statement of a cause of action for the want of some essential averment.

In *Tucker v. Baker,* 86 N. C., 1, the plaintiff alleged the execution of a note by one Murphy to one Harris, and that after allowing as a credit all payments that had been made, there was still due a sum sufficient to give the court jurisdiction, and that the defendant was his personal representative, yet the action was dismissed in this Court, *ex mero motu,* for failure to state that the plaintiff was the owner of the note. This ruling has been approved and followed in a number of cases since decided. *Jones v. Commissioners,* 85 N. C., 278; *McDougald v. Graham,* 75 N. C., 310; *Peacock v. Stott,* 101 N. C., 149; *ib.,* 104 N. C., 154; *Jackson v. Jackson,* 105 N. C., 433.

Without passing upon the second ground of demurrer, it is sufficient to say that, conceding that the complaint contains a (697) defective statement of what appears to be a good cause of action, we think the first ground of demurrer ought to have been sustained for the reasons given.

Going behind all of these questions, the plaintiff insists that a complaint, similar to and almost identical in its terms with that filed in this case, was approved by this Court in *Hardy v. R. R.,* 74 N. C., 734. In that case, as in ours, the defendant after answering, instead of demurring, moved the court to require the plaintiff to specify the acts of negligence upon which he relied, and excepted to the refusal to do so. But it seems that the defendant in his answer had so specifically set forth the acts of negligence complained of as to cure the defects in the complaint. *Garrett v. Trotter,* 65 N. C., 430; *Johnson v. Finch,* 93 N. C., 205; *Knowles v. R. R.,* 102 N. C., 67. The answer set forth "that on the day alleged in the complaint the said Arnold Hardee was on a train of cars of the defendant as a brakeman in the employment of the defendant. His duty required him to be on the platform to tend the brakes while the train was in motion. He was then, and had been for some time previous, in the employment of the defendant as brakeman receiving the rate of wages usually paid in that employment, and with a full knowledge of the risks incident to that service. The defendant denied that the intestate of the plaintiff was injured or killed by any wrongful act, neglect or default of the defendant, or of the section master, or of any one of the section masters of the defendant railroad or by any wrongful act or default of any of the servants, agents or employees of the defendant. It denied that the defendant committed any wrongful act, neglect or default in the selection or appointment of said section master, or that the negligent character of the section master was or ought to have been known to the defendant, or that he was a person of negligent character, and avers that he was a competent and careful person, of suitable skill and experience (698) for such an appointment. The defendant used due care, skill-

and diligence in the construction of its railroad, in keeping the same in repair, in ascertaining its condition, and in running its trains, and in the selection of its agents, servants and employees. It denied that the death of the intestate of the plaintiff was in any way owing to or caused by the negligence or carelessness of the defendant, its agents or employees."

After examining the foregoing summary of the answer set forth in the statement of the case on appeal, we are not surprised that the defendant's counsel do not seem to have insisted, either on the first hearing of the cause or upon the rehearing (76 N. C., 5), upon the motion to require a more specific statement, even if we treat the decision of the judge below not as an exercise of his discretion, but as based upon the doctrine of aider, then already laid down in *Garrett v. Trotter, supra.* It must have been a desperately defective complaint that could not have been cured by such a wholesale denial of every conceivable species of neglect.

The court should have sustained the demurrer, and have given the plaintiff leave to amend upon such terms as were deemed just.

Error.

Cited: Smith v. B. & L. Assn., 116 N. C., 111; *Allen v. R. R.,* 120 N. C., 550; *Moss v. R. R.,* 122 N. C., 892; *Harris v. Quarry Co.,* 131 N. C., 555; *McCoy v. R. R.,* 142 N. C., 387; *Womack v. Carter,* 160 N. C., 291; *Hensley v. Furniture Co.,* 164 N. C., 152; *Bristol v. R. R.,* 175 N. C., 510; *Ricks v. Brooks,* 179 N. C., 209; *Aman v. R. R., ib.,* 312.

THE SCOTTISH CAROLINA TIMBER AND LAND COMPANY v. SAMUEL BROOKS.

Tort—Conversion—Waiver—Action for Money Received.

The defendant took into his possession timber logs of plaintiff, sold some and converted others into lumber, which he also sold: *Held,* the plaintiff might waive the tort and maintain an action to recover the money realized from the sale by defendant.

APPEAL, from a justice of the peace, tried at March Term, (699) 1891, of BUNCOMBE, *Brown, J.,* presiding.

The plaintiff brought this action in the court of a justice of the peace to recover $200, money realized by the defendant for certain timber logs of the plaintiff, which, it is alleged, he took, used and sold, etc. The pleadings raised issues of fact. On the trial the evidence,

more or less conflicting, tended to prove that the defendant got, used and sold divers logs of the plaintiff; sold some of them and sold the lumber of others, and realized therefor a sum of money greater than $50, etc.

The following issues were agreed upon:

"*First.* Is the defendant indebted to the plaintiff for the proceeds of certain lumber sold by the defendant to the Asheville L. & M. Co.?

"*Second.* If so, in what sum?"

At the close of the testimony and argument upon the law, the court intimated its rulings as follows:

"*First.* That if the logs had been found by the defendant drifted upon his land, and had been taken by him in good faith and converted into lumber and sold, mixed with lumber and weather-boarding of his own, the plaintiff could recover only the value of the timber at the place where taken, to wit, on the river bank.

"*Second.* That the evidence was not sufficiently definite to designate what part of the proceeds of the sale of the lumber and weather-boarding sold by the defendant was derived from the timber of the plaintiff.

"*Fifth.* That the plaintiff, having waived a tort and sued for money had and received to its use, upon the entire evidence it was not entitled to recover in this action, and the jury would be instructed to respond to the issues in the negative."

Upon the announcement by the court of its rulings, plaintiff's counsel, in deference thereto, entered a nonsuit, excepted and (700) appealed.

C. A. Moore for plaintiff.
W. W. Jones for defendant.

MERRIMON, C. J., after stating the case: It appears from the record sufficiently that the plaintiff did not sue for a tort or the conversion of the logs mentioned in the pleadings; he waived the tort, as he might do, and "sues to recover the proceeds of the sale of certain logs," which the plaintiff alleged belonged to it, and which the defendant took, used and sold, getting the money therefor, etc. The purpose of this action is to recover that sum of money.

The plaintiff having waived the tortious taking of the logs, he might sue for and recover in the court of a justice of the peace such sum of money as the defendant realized and received for the same if that sum did not exceed two hundred dollars. The plaintiff might ratify the sale and demand the money which the defendant got for them. *Bullinger v. Marshall,* 70 N. C., 520; *McDonald v. Cannon,* 82 N. C., 245; *Wall v. Williams,* 91 N. C., 477; *Edwards v. Cowper,* 99 N. C., 421.

The action must, therefore, be treated only as one brought to recover the money, the proceeds of the logs which the defendant received.

Although the evidence produced on the trial was conflicting and not very satisfactory, still there was evidence relevant and pertinent to go to the jury to prove that the defendant got seventeen of plaintiff's logs, that he sawed part or all of them into boards; and to prove what quantity of lumber they made, and that the defendant got the money for them.

There were *data* in evidence from which the jury might with
(701) reasonable certainty have ascertained what sum of money the defendant received for them.

The evidence tended to prove that the defendant used the logs and got the value of them in cash. The mere fact that he sawed them into boards and received the value of them in the shape of lumber, could not destroy the fact that he got their value, as logs, in cash. As we have seen, there was evidence from which the jury might have ascertained that value. Hence, the court erred in intimating the opinion that, in any view of the evidence, the plaintiff could not recover.

There is error. The judgment of nonsuit must be set aside and the case disposed of according to law.

Error.

Cited: Brittain v. Payne, 118 N. C., 991; *Sams v. Price,* 119 N. C., 574; *Parker v. Express Co.,* 132 N. C., 131; *White v. Eley,* 145 N. C., 36; *Manning v. Fountain,* 147 N. C., 19; *Mitchem v. Pasour,* 173 N. C., 488.

J. N. BENNERS ET AL. v. WILLIAM RHINEHART.

Action to Recover Land—Evidence.

In an action to recover land, plaintiffs claimed under an execution sale of the property of L., alleging that they thereby acquired a one-sixth interest in the tract, but on the trial offered no other evidence of their title than a deed made by said L. and eight other persons to defendant for said land: *Held,* the plaintiffs were not entitled to recover, the evidence not being sufficient to show that L. had a one-sixth interest or a one-ninth share.

ACTION, tried at Fall Term, 1891, of HAYWOOD, *Merrimon, J.,* presiding.

The plaintiffs claimed an undivided sixth interest in the land sued for, but the only evidence offered by them of such interest was the

judgment against S. L. Love, the levy of an execution upon his interest in said land, the sale of his interest under said execution (702) to the plaintiffs, the sheriff's deed to the plaintiffs and the deed executed to the defendant William Rhinehart on 1 May, 1886, by Margaret E. Hilliard, W. L. Hilliard, M. A. J. Branner, J. A. Branner, M. H. Love and wife, Rebecca Love, S. L. Love and wife, M. S. Love, M. M. Stringfield and W. W. Stringfield.

There was no evidence that the defendant Rhinehart, up to the date of the execution of said last-mentioned deed, namely, 1 May, 1886, recognized any interest of said S. L. Love in said land or held possession under him. Nor was there any evidence that said S. L. Love ever had an interest in said land, except so far as said deed executed by him and others to the defendant operated to estop defendant to deny that he had an interest.

The issue prepared to be submitted to the jury was as follows:

"Are the plaintiffs the owners, as tenants in common with the defendant, of an undivided sixth interest in the lands mentioned and described in the complaint, and entitled to be admitted into possession of said land as such tenants in common with the defendant?"

The court intimated an opinion that the evidence did not, if taken as true, establish title in the plaintiffs to an undivided one-sixth interest in the land.

Thereupon the plaintiffs requested the court to allow them to amend their complaint and declare for an undivided one-ninth interest in the land. The court declined to grant this motion, saying that the evidence did not show an undivided ninth interest in the plaintiffs.

Upon these intimations of the court, and its refusal to allow the amendment moved for, the plaintiffs submitted to a nonsuit, excepted to all of said rulings of the court, and appealed.

G. S. Ferguson for plaintiffs. (703)
T. F. Davidson and J. M. Moody for defendant.

His Honor made but two rulings, and upon these the plaintiffs submitted to a nonsuit and appealed. We concur in the ruling that the plaintiffs had not shown that they owned a one-sixth interest in the land, and we are unable to see any error in the other ruling that the execution of the deed by S. L. Love, with eight others, was not in itself sufficient to show that he was the owner of one-ninth interest in the property conveyed. His Honor did not pass upon the question whether the plaintiff had acquired any interest at all in the land, and the other questions discussed are not properly before us for review.

PER CURIAM. Affirmed.

H. T. RUMBOUGH v. THE SOUTHERN IMPROVEMENT COMPANY.

Agency—Evidence—Instructions to Jury—Pleading, when Evidence—Counterclaim—Trial.

1. In an action seeking to charge defendant for the acts of one who was alleged to be its agent, there was no direct testimony of the agency, but plaintiff relied upon a variety of circumstances from which the agency could be inferred: *Held*, to be error, especially when specific instructions in that respect had been asked, to submit the question of agency to the jury as an open one.
2. Defendant set up a counterclaim, to which defendant made replication admitting the facts, but pleading matter in avoidance. On the trial neither party offered evidence of the facts averred in these pleadings: *Held*, (1) that the burden was upon the plaintiff to establish the facts alleged in the replication, and upon failure to do so defendant was entitled to judgment on the counterclaim; (2) that it was error to submit an issue involving the matter pleaded in the counterclaim; (3) it was not necessary in this case that the pleadings should be formally introduced in evidence to entitle defendant to judgment on his counterclaim.

ACTION, tried at November Term, 1890, of MADISON, *Philips, J.*, presiding.

(708) *W. Jones for plaintiff.*
F. A. Sondley and Theo. F. Davidson for defendant.

SHEPHERD, J. In order to fix the defendant with liability, it was incumbent upon the plaintiff to establish that W. E. Watkins, who accepted the bill of exchange, was the agent of the defendant, and that the acceptance of such a paper was within the scope of his agency. There was no testimony of any express authority, and the plaintiff relied upon the various circumstances in evidence from which such authority might be inferred. Without passing upon the sufficiency of the charge, had there been no prayer for special instructions, we are very
(709) clear that in view of those asked for by the defendant (embodying, as some of them do, correct principles of law applicable to phases of fact presented by the testimony), the court erred in submitting the question of authority as an open one to the jury.

Apart from this, however, we are of opinion that there was error in the action of the court in respect to the fourth issue, which was as follows: "Is the plaintiff indebted to the defendant by reason of counterclaim, and if so, in what sum?" The replication admitted the facts constituting the counterclaim and set up matter in avoidance thereof. The defendant asked the court to charge that the burden of

proof was on the plaintiff to establish the matter in avoidance, and also, that as he had introduced no evidence in support of the same, the issue should be answered in the affirmative. The court refused to so instruct, but told the jury that "the pleadings, in this case, were not offered in evidence, and unless they were so offered, they are not evidence. *Smith v. Nimocks,* 94 N. C., 243. There being no evidence before the jury on the counterclaim, the jury will answer the fourth issue, 'No.'"

Possibly his Honor placed his ruling upon the form of the issue, which by its terms involved the truthfulness of the allegations in support of the counterclaim, whereas the issue should have put in question only the matter in avoidance. But the defendant was not responsible for this, as his Honor refused the issues offered by counsel, and himself prepared those which were submitted. To these the defendant excepted, and if there be anything in their form which precluded the defendant from insisting upon his prayers for instruction as to the burden of proof, etc., he is surely not to be prejudiced thereby. It is true that the issue offered by the defendant upon this point was not materially different from that submitted by the court, but the exception was not merely to the refusal to submit this issue, but "to the issue (710) submitted."

The court, therefore, having taken upon itself the responsibility of preparing the issues, could not deprive the defendant of any right to which he was entitled on the face of the pleadings, and in this way put in issue matter which was admitted, and then refuse to charge that the burden was upon the plaintiff to establish the matter in avoidance. The decision cited has no application in this view of the case. The principle there declared applies only when the pleadings are to be used as evidence upon issues properly raised and submitted.

For these reasons, we think that there should be a new trial.

Error.

Cited: S. c., 112 N. C., 751.

M. A. GRANT v. J. S. GRANT ET AL.

Parent and Child—Personal Earnings of Son—Fraud—Husband and Wife—Fraud on Marital Rights—Appeal—Exceptions.

1. Where a son purchased his father's land at execution sale with the proceeds of his personal earnings (which were presumptively his father's) before his majority, it was error to instruct the jury that the land was purchased with the father's money.
2. That a defendant in execution said that he wanted his land sold, without assigning homestead, that he might avoid security debts; that his son purchased with the proceeds of personal earnings before his majority; that the father remained in possession for many years, cultivating the land and using it as his own; that he built a house upon it, had the land surveyed for division among his children, and asked that his wife should not be informed of the divisions, was evidence to be considered by the jury that the sale was a fraud upon the marital rights of the debtor's wife.
3. The appellant should except to the refusal of the judge to grant a new trial to have his decision reviewed.

(711) PETITION for dower begun before the clerk, transferred on issues to Term, and tried before *Hoke, J.*, at Spring Term, 1891, of MCDOWELL.

The plaintiff brought this special proceeding to obtain dower in the lands specified in the petition as the widow of E. H. Grant, who died intestate. The defendants are his heirs at law. In their answer they allege that the said intestate was not the owner of the lands at the time of his death or for a long time prior thereto. They allege that he acquired the same prior to 1867, and was married to the plaintiff prior to that time. The plaintiff made reply as follows:

That she admits there was a pretended sale made of the said lands by which several valuable tracts of land, worth several thousand dollars, were pretended to be sold under execution for the inconsiderable sum of $221.48 in favor of A. Burgin, administrator of J. L. Carson, against John D. Hall and E. H. Grant, but avers that the said pretended sale was made to defeat, hinder, delay and to defraud the creditors of the said E. H. Grant.

That she admits that J. W. Grant was ostensibly the purchaser, being the last and highest bidder at the said pretended sale, for $1,000, which was never paid by the said J. W. Grant, but she avers that the said J. W. Grant bid off the said land at said pretended sale under an agreement with his father, E. H. Grant, that the said J. W. Grant should buy the land and hold it in trust for the use and benefit of the

said E. H. Grant, and after his death then for the use and benefit of the heirs at law of the said E. H. Grant, with intent to hinder and defeat plaintiff of her dower.

That in pursuance of such secret trust, the said E. H. Grant lived upon the said land, used, occupied, enjoyed, controlled, took and received the rents and profits of the same until his death in March, 1889.

There was evidence that the intestate said he was surety for his brother, and didn't wish to pay that debt and a debt to one (712) Hall, and that was the reason he had let the land go to sale; that he continued to manage the lands and take the rents as before; that he had the land surveyed for division among his children, and asked that his wife should not be informed of the divisions; that the defendant James W. Grant never exercised any control of the land or claimed it as his own; that the land was worth some $5,000 or $6,000, and was sold for a debt of $273, and bid off by J. W. Grant at $1,000; that intestate built a dwelling house upon it subsequently to the sale; that there was evidence tending to show improper relations between intestate and one Polly Parker, whose daughter lived on a part of the land, but that the widow did not know but that she had bought it; that the land was sold at the instance of intestate, who requested that his homestead should not be allotted; that he told the sheriff the balance of the bid beyond the debt could be arranged, and that he need not bother about that; that he did not pay all of his debts; that the son purchased with the proceeds of his personal labor before he was twenty-one years of age.

The following issues were submitted to the jury, and they responded thereto as indicated at the end of each:

1. Were the lands of E. H. Grant bid off by the son in pursuance of an agreement and arrangement between the father, E. H. Grant and the son, J. W. Grant? Answer: Yes.

2. Was such agreement between them made with intent to defraud the creditors of the father? Answer: Yes.

3. Was such agreement between them made with intent to deprive the plaintiff of her dower? Answer: Yes.

4. Were the lands purchased at sheriff's sale paid for with the money of the father? Answer: Yes.

5. Were the lands purchased with the money of the father and under an agreement and arrangement that the same were to remain in fact the property of the father, and under his own control? (713) Answer: Yes.

In charging the jury on the fourth issue, among other things not excepted to, the court told the jury that the father was entitled to the

services of the child while the child was under twenty-one years of age, in the absence of any valid arrangement to the contrary; and in the present case, if the land claimed to be bought by J. W. Grant at the sheriff's sale, was paid for by money earned by J. W. Grant while he was under twenty-one years of age and living with his father, said money was the property of the father, and if this money so earned was the purchase price of the property, or the money so earned, together with other money supplied by the father, was the purchase money of the lands, they should answer the fourth issue, "Yes." That if the purchase price of the property was money belonging to J. W. Grant from other sources, and earned by him after he became twenty-one, then they should answer the issue, "No."

Defendants excepted.

Defendants moved for a new trial on the third issue, for that there was not sufficient evidence to support the verdict of the jury on that issue.

The court declined to allow the motion, gave judgment for the plaintiff, and the defendants appealed to this Court.

Batchelor & Devereux (by brief) for plaintiff.
G. V. Strong for defendants.

MERRIMON, C. J. The clear presumption is that the father is entitled to the earnings of his son until the latter arrives at the age of twenty-one years; and if he continues thereafter to remain with his father as a member of his family, the presumption is that his labor is gratuitous. He may, however, show the contrary. The ground of such presumption is, that the son received from the father parental
(714) support, protection, education, clothing and like suitable provisions, and his labor is, hence, due and belongs to the father, unless the contrary be shown. *Dobson v. McAdams,* 96 N. C., 149; *Young v. Herman,* 97 N. C., 280, and the authorities cited in these cases; *Winchester v. Reid,* 53 N. C., 377; the first exception cannot therefore be sustained.

It does not appear that the appellants excepted to the refusal of the court to grant the motion for a new trial, though it seems they may have intended to do so. The exception should appear. But clearly there was evidence bearing upon the third issue. The facts and circumstances attending the alleged fraudulent sale of the property and the occupancy and free use of the same after such sale by the husband intestate constituted evidence to go to the jury to prove the purpose to fraudulently defeat the right of the plaintiff, and it was the province of the jury

to determine its weight and effect. *McGee v. McGee,* 26 N. C., 105. The exercise of discretion on the part of the court in refusing to grant the motion for a new trial is not reviewable here.

Affirmed.

Cited: Whitaker v. Hamilton, 126 N. C., 465.

S. F. HARPER v. R. D. MCCOMBS ET AL.

Vendor and Vendee—Contract to Convey Land—Lien.

The vendor, in an executory contract to convey land, may, after the death of the vendee, maintain an action against the vendee's heirs at law and representatives to enforce his lien for the purchase-money without proceeding first against the administrator; and a purchaser at a sale made under a judgment in such action will acquire the legal and the equitable title of the parties.

SPECIAL PROCEEDING for partition, tried at Fall Term, 1891, (715) of BURKE, *Bynum, J.,* presiding.

It appears, from the case stated, that John R. Sudderth, at the time of his death in 1874, was the owner of the land presently to be mentioned; that he died intestate and that an undivided one-fourth interest in these lands descended to W. H. Powell and J. M. Powell; that about 1880 the latter contracted to sell and convey their said interest to W. S. Sudderth, when he should pay the purchase-money in full. The latter died in 1885 intestate, and the appellant was appointed administrator of his intestate. It seems that he paid part of the purchase-money in his lifetime. After his death the said Powells brought their action to recover the balance of the purchase-money due them, and to enforce their lien upon the land for the same. The appellant administrator of W. S. Sudderth, the heirs of the latter and his widow, were made parties defendant in that action, and therein, by consent of parties, a judgment was entered in favor of the plaintiffs for $300 and costs; the same was declared to be a lien upon the said one-fourth interest in the land, and it was directed that a proper deed be executed when the judgment and costs should be paid.

It further appears that the defendants in that action did not pay the said judgment, and an execution issued thereupon was returned unsatisfied. A second execution, with a *vend. ex.* clause, reciting the judgment lien was issued and the said interest in the land was sold, the

present plaintiff becoming the purchaser, and he took the deed of the sheriff for the same. Afterwards, and before the bringing of this special proceeding, the said Powells executed to the plaintiff, who so purchased at the sheriff's sale, a deed purporting to convey to him title in them for the said one-fourth interest.

The present plaintiff, who so purchased the said interest in the land mentioned, brings this special proceeding against the defendants, who are tenants in common with him, to compel partition of this (716) land. As to issues of fact raised by the pleadings, a jury trial was waived and "the case was submitted to the court, and tried upon the single question as to the validity of the title of J. F. Harper (the plaintiff) to a one-fourth interest in the lands described in the petition."

The appellant Hallyburton, administrator of W. S. Sudderth, asked the court to adjudge upon the facts agreed upon as above stated that the said one-fourth interest in the land, claimed by the plaintiff, "descended with the encumbrance of the unpaid purchase-money to the heirs at law of said W. S. Sudderth, and were to be administered if the needs of the estate required them for assets, in the ordinary course of administration" by himself, and that under the "consent judgment," above referred to, no special remedy was given the said Powells over other creditors of his intestate to collect their debt by execution; that the sum was to be paid in the regular course of administration. The court declined to so hold, but adjudged that the plaintiff had title for the said one-fourth interest, and gave judgment directing that partition be made, etc., and the said administrator appealed.

J. T. Perkins for plaintiff.
John Devereux, Jr., for defendant.

MERRIMON, C. J., after stating the case: The appellant administrator was allowed irregularly and improperly to come into this special proceeding and contest the plaintiff's title as one of the tenants in common of the land described in the pleadings. This was done by consent of parties, and as the court had jurisdiction of the parties and the subject-matter of the litigation, its orders and judgments will be operative and binding upon the parties to the record, but such practice and procedure should not be tolerated, much less encouraged by the courts. As we have repeatedly said, it is not simply irregular, but it is subversive of just procedure and good practice, and never fails (717) to give rise to more or less confusion and dissatisfaction. The record here is confused, and we have found it difficult to reach

the merits of the questions intended to be presented for our decision, if indeed, we have been entirely successful in our efforts to do so.

It is conceded that the Powells named had a vendor's lien upon the land described in the pleadings to the extent of the undivided one-fourth interest therein, which they sold to the intestate of the appellant in his lifetime. They had the right to enforce that lien in any appropriate action for the purpose, after as well as before the death of the vendee. They might have gone against the latter's administrator and compelled him to pay their debt if he had assets sufficient for that purpose, but they were not bound to do so. The administrator might—perhaps ought—to have paid their debt, but he failed to do so, and they properly brought their action against the heirs of the deceased vendee, his administrator and widow, to avail themselves of their lien. The court in that action had complete jurisdiction and authority to ascertain, declare and enforce the lien as it did so. It appears that a judgment for three hundred dollars and costs was entered, and therein the lien upon the land as to the one-fourth interest therein was declared, and afterwards that interest was sold in pursuance of the judgment by the sheriff. The plaintiff was the purchaser, he paid the purchase-money and took the sheriff's deed, which it must be assumed was a proper one. Afterwards the vendors, the Powells, executed a deed to the plaintiffs, as they might do, and thus the title of the intestate, whether equitable or legal, or that which descended to his heirs, passed to the plaintiff. Moreover, the heirs of the vendee, his widow and the present appellant, his administrator, were parties to that action, and are estopped as to any rights they may have had that came within the just scope of the action and the judgment therein. The very purpose of it was to ascertain and enforce the lien and conclude (718) the parties thereto.

It is true the heirs of the vendee might, at the appropriate time and in a proper way, have required his administrator to pay the balance of the purchase-money, if he had assets sufficient to be so applied, to the end they might have received the complete legal as well as the equitable title from the vendors, but they did not do so, and they, as well as the administrator, are concluded as above indicated.

No doubt, if the interest in the land was sold for a sum of money more than sufficient to pay the balance of the purchase-money and costs, the appellant might, if need be, by some appropriate proceeding, have availed himself of that surplus as assets for the payment of the debts of his intestate. It does not appear that there was any such surplus, and no question in that respect is presented.

Affirmed.

L. A. BRISTOL v. J. H. AND S. T. PEARSON.

Contempt, Practice in Proceeding for.

A decree was entered directing a trustee to disburse certain funds amongst creditors, one of whom, on behalf of himself and other creditors, obtained an order attaching the trustee for contempt in refusing to obey the directions of the court, from which the trustee appealed; pending the appeal, the moving creditor made an application to be allowed to abandon his motion, the counsel representing him also representing the other creditors: *Held*, (1) that the application to withdraw the proceeding on the contempt was improperly made in the court below while appeal was pending; (2) that being renewed in the Supreme Court it would be allowed as to that creditor, but the other creditors being parties to the proceeding, and not joining in the application to withdraw, the appeal would be retained as to them; (3) that the attachment for contempt was the proper remedy to compel obedience to the order of the court.

AVERY, J., dissents.

(719) MOTION to attach appellant plaintiff for contempt, heard at Spring Term, 1891, of BURKE, *Hoke, J.*, presiding.

The plaintiff, as assignee of certain property conveyed to him for the benefit of creditors named in the deed of trust, brought this action to have the property subject to the trust sold, and the proceeds of the sale thereof applied to the payment of debts of the creditors, according to their respective rights, etc., with the sanction and by order of the court, etc. In the course of the action, the court entered its decree directing a distribution of the fund in the hands of the plaintiff trustee to the parties therein specified.

Thereafter John A. Dickson, one of the defendant creditors, gave notice to the plaintiff of a motion to be made in the action to attach him for contempt of court in that he had disobeyed the order of the court, etc. The motion was afterwards made, and the following is so much of the affidavit offered and considered by the court in support of the same as need be reported:

3. That it was ordered by the court that the said L. A. Bristol, assignee, pay over one-half of the proceeds of sale of said specified property to J. H. and S. T. Pearson, and apply the remainder of said sum to the parties whose names are specified and mentioned in the report of G. P. Erwin, referee, filed in said cause. That notwithstanding the order of the court, the said L. A. Bristol, assignee, in contempt of court, and in defiance of the advice of counsel, paid over to the said J. H. and S. T. Pearson the sum of twenty-one hundred and ninety-six dollars, when he should have paid him only the sum of seventeen hundred

(less their part of the cost), and his doing so has prevented the other creditors, who should have received their *pro rata* share of said fund, from being paid, as the order and decree of the court directed. Wherefore, the other creditors, whose names are specified in said report of said referee, pray the court that the said L. A. Bristol, assignee, be attached for contempt of court, and ordered and directed to distribute the fund received by him in accordance with the former (720) decrees in this action.

The court having found the facts of the matter, "being of opinion that the payment, as made by the assignee (the plaintiff), was in wilful disobedience of the decree of the Superior Court heretofore made, gave judgment attaching the assignee as for contempt," and the plaintiff, having excepted, appealed to this Court.

Pending the appeal in this Court the said Dickson, who made the affidavit to support the motion to attach the plaintiff, moved in the court below to be allowed to withdraw and abandon the motion to attach, and his motion was there allowed, and a transcript of the record thereof was presented here at the time the appeal was called for argument, and, also, a motion was made here to allow him to withdraw and abandon his motion.

J. T. Perkins and John Devereux, Jr., for plaintiff.
S. J. Ervin for defendant.

MERRIMON, C. J., after stating the case: After the appeal was taken, bringing the whole matter of the motion into this Court, it was irregular and improper to make the motion in the court below to withdraw and abandon the motion to attach, because the appeal brought the same here until it should be disposed of in some appropriate way. The court below did not have such control of the matter as to make an effectual disposition of it.

The application of the defendant appellee John A. Dickson to be allowed to abandon the motion to attach the plaintiff must be allowed, and an entry to that effect made in the court below. But this allowance cannot affect the motion as to other intended creditors, because the motion was applied for and allowed at the instance of and for the benefit of the others as well as his. They were parties to the action, and the notice of the motion was signed by Dickson "for (721) himself and other creditors," and the affidavit in support of the motion purported expressly to be for their benefit. Moreover, the counsel who made the motion represented all the interested creditors, and no one of them made any suggestion or opposition to it. Thus

they being before the court and so represented by counsel, were at once parties to and participating in the motion for their benefit; they were subject to the order of the court in that respect and concluded by its order, and they were as well liable for costs. The motion was made at their instance and for their benefit as well as the same for Dickson. The affidavit made by the latter was sufficient to serve the common purpose of all the interested creditors. Who they were was shown by the record, and that was a sufficient designation of them in connection with the motion. So that the appeal must be disposed of upon its merits, in the absence of a motion of the appellant to dismiss or withdraw it.

It was found as a fact and admitted, as appears from the case settled on appeal, that the plaintiff assignee had intentionally and wilfully disbursed the funds in his hands wherewith he was charged otherwise than as by the decree and express order of the court. Obviously, the court had authority to enforce its orders, decrees and judgment by attachment, when the parties complained of were before it. It is a legitimate and approved method of enforcing its orders, as well as the order of and respect due the court. *In re Davies,* 81 N. C., 72; *Bond v. Bond,* 69 N. C., 97; *Thompson v. Onley,* 96 N. C., 9; *In re Patterson,* 99 N. C., 407.

Affirmed.

(722)

THE STATE v. W. A. FRENCH AND GEORGE R. FRENCH.

Constitution—Taxation—License—Interstate Commerce.

The tax imposed on merchants and other dealers by the Act to Raise Revenue (ch. 323, sec. 22, Laws 1891), of one-tenth per centum of their purchases, is not a tax on *property,* but upon the "occupation" of buying and selling goods *in the State;* it is expressly authorized by the Constitution of North Carolina, and is not in conflict with the Federal Constitution, notwithstanding the merchandise bought and sold is purchased from persons in other States.

CRIMINAL ACTION, begun before a justice of the peace and carried thence by appeal to the criminal court of NEW HANOVER, where it was tried before *Meares, J.,* at July Term, 1891.

The jury returned the following special verdict:

"During the six months ending 30 June, 1891, the defendants, William A. French and George R. French, were merchants residing in the city of Wilmington, in the county of New Hanover and State of North Carolina, and as copartners in trade were engaged in the business of

buying and selling goods, wares and merchandise under the firm name and style of George R. French & Sons; that during the said six months the defendant purchased in other States, and brought into the State of North Carolina and there sold, a large quantity of goods, wares and merchandise which were not farm products; that during the said six months the said defendants made no purchase of goods, wares or merchandise of any kind within the State of North Carolina; that all of the purchases so made by them out of the State were articles not specially taxed by the act of the General Assembly of said State, ratified 9 March, 1891, and entitled "An Act to Raise Revenue"; and that the said defendants, not being transient dealers, did not within (723) ten days after 1 July, 1891, deliver to the clerk of the board of county commissioners of said county of New Hanover a sworn statement nor any statement of the total amount of his purchases out of the said State for the preceding six months, ending 30 June, 1891."

His Honor having instructed the jury that upon the facts found by them the defendants were guilty, the jury returned a verdict of *"Guilty."* It was adjudged that each of the defendants be fined the sum of one dollar and to pay the costs in this prosecution. From this judgment the defendants appealed.

The Attorney-General and A. M. Waddell for the State.
George Davis and George Rountree for defendants.

CLARK, J. By the Act to Raise Revenue (Laws 1891, ch. 323, sec. 22), it is enacted as follows: "Every merchant, jeweler, grocer, druggist, or other dealer, who shall buy and sell goods, wares and merchandise of whatever name or description, not especially taxed elsewhere in this act, shall, in addition to his *ad valorem* tax upon (724) his stock, pay as a license tax one-tenth of one per centum on the total amount of his purchases in or out of the State (except purchases of farm products from the producer) for cash or credit, whether such persons herein mentioned shall purchase as principal or through an agent or commission merchant."

The special verdict brings the defendants completely within the provisions of the act, and finding, among other facts, that the defendants purchased goods in other States, brought them into this State and sold them here, but made no purchases within this State.

The policy or advisability of such taxation rests with the legislative branch of the government alone. The sole question committed to the courts is as to the constitutional power of the Legislature to lay the tax.

It is conceded by the learned counsel of the defendants that such tax is not a property tax, but as truly stated on the face of the act is a

license tax for the privilege of carrying on the business specified. Such license tax is not prohibited by the Constitution of North Carolina, but is expressly authorized by section 3, Article V thereof. *Albertson v. Wallace,* 81 N. C., 479; *S. v. Cohen,* 84 N. C., 771. Nor is this mode of taxation forbidden by the Fourteenth Amendment to the United States Constitution, which guarantees to all persons the equal protection of the law. It has been repeatedly held that the Fourteenth Amendment in nowise affects the right of the State to adjust its system of taxation in accordance with its own Constitution: "to classify property for taxation, subjecting one kind of property to one rate of taxation and another kind to another rate, distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property." *Insurance Co. v. New York,* 134 U. S., 594 (606); *R. R. v. Pennsylvania, ib.,* 232 (237). Both of these cases are cited and approved by the same court in a very recent case, (725) *Express Co. v. Seibert,* in which the opinion was filed 4 January, 1892.

The defense, indeed, rests its case upon the position that the tax, so far as it respects goods purchased in other States and brought into this State, is void, as being in violation of the Federal Constitution, Art. I, sec. 8, which gives to Congress the power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes."

Under the decision of the Supreme Court of the United States, if the "business," the carrying on of which is made liable to the tax, was that of interstate commerce, such as the offering for sale, or selling goods in one State to be shipped to the buyer who is in another State, as in *Robbins v. Shelby Taxing District,* 120 U. S., 480 (known commonly as the "Drummers'" Case), or if this impost was laid on the transportation of passengers or freight from one State to another (State Freight Cases, 15 Wallace, 232; Freight Discriminating Cases, 95 N. C., 428 and 434), or the transmission of telegrams across State lines (*Leloup v. Mobile,* 127 U. S., 640), such tax would be inhibited. But the business here subjected to the privilege tax is neither, by the terms of the law nor in its purport, to be gathered by any reasonable construction, "interstate dealings." The tax is not on any dealings between the parties outside of the State and the defendants within the State, nor on the transportation of goods into the State. The "business" taxed, and intended to be taxed, is that of "buying and selling goods, wares and merchandise," i.e., carrying on a mercantile business *in this State.* The fact that such trade or occupation exercised in this State, is carried on in goods, wares or merchandise which had their origin out of the State, cannot make it "interstate commerce." The commerce is "intrastate." It is carried

on in this State between the defendants and other parties in the State. It is an occupation or trade exercised here under North Carolina laws, and protected by them from violence and illegal interference from robbery and thieves. Should the purchaser of "goods, (726) wares and merchandise" from the defendants, subsequently ship the goods to another State, this would not make the dealing between them "interstate," even though the defendants, at the time of such sale, knew of the buyer's intention to so ship the goods. *Brown v. Houston,* 114 U. S., 622. Neither, for like reasons, could the fact that the "occupation" taxed deals in merchandise, some or all of which originated elsewhere than in North Carolina, make it "interstate" traffic. *Woodruff v. Parham,* 8 Wall., 123. The interstate dealings were terminated when the goods were delivered at the store of defendants. The "business" subsequently carried on of vending and disposing of them is intrastate traffic, upon which the State can levy its license tax. The tax is not laid on the purchases nor on the sales. It is laid as a "license tax" on every "merchant," etc., who shall "buy and sell goods, wares and merchandise," evidently meaning to tax the *occupation* of carrying on such business *in this State.* As a mode merely of graduating the tax by some approximation to the volume of business done (which is just), it is provided that such license tax shall be "one-tenth of one per centum on the total amount of purchases in or out of the State." In the late case of *Maine v. R. R.,* 142 U. S., 217 (opinion just filed), this is adverted to, and the Court say: "This ruling (of the court below, which is reversed) was founded on the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was, in effect, the imposition of the tax upon such receipts, and, therefore, an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied, and we are unable to perceive in that resort any interference with transporta- (727) tion, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed, as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to the receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected, and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or in fact. They constitute, as said above,

simply the means of ascertaining the value of the privilege conferred. This conclusion is sustained by the decision in *Insurance Co. v. New York,* 134 U. S., 594." And the Court goes on to cite with approval from the latter decision the following: "The validity of the tax can, in no way, be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows."

The tax in our case is not on the business of buying goods out of the State, but on the business of buying and selling goods *in* the State irrespective of the place of origin of the goods, and the extent of the purchases whether "in or out of the State," is only referred to as a basis by which to measure the tax which shall be levied on the business proportionate with such approximation to its volume. It is admitted that there is no *discrimination* against goods bought out of the State, and the sole question is whether the State in taking, as the basis of a license tax, the value of the goods dealt in, must exclude the value of the goods manufactured or raised out of the State. If this were (728) so, no license tax could be imposed for merchandising in this State when the articles dealt in were manufactured in other countries or other States, or were the products of a soil other than our own, leaving the full weight of the tax to fall upon the privilege of dealing in articles manufactured, or the products of the soil in this State. This would require a *discrimination* against our own citizens, and is not within the letter or spirit of the Constitution. The power of the State to exact a license tax from its own citizens doing business in its borders is beyond question, and a discrimination *in favor* of nonresidents is as much forbidden as a discrimination *against them,* by the United States Rev. Stat., 1977: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, etc., and shall be subject to like punishments, pains, penalties, *taxes, licenses* and exactions of every kind, and to no other."

The rule deducible from the authorities seems to be that if the dealings or transactions are between parties in different States, or the transportation of freight or passengers from one State to another, a tax by State law is prohibited, irrespective of whether there is "discrimination" or not; but where the tax is on an "occupation" carried on in a State, or on property therein, the State has power to levy the tax, unless it "discriminates" against the articles brought from other States, with the sole exception that the sale of such articles in the original package cannot be taxed by the State. Even this exception, which is laid down

in *Leisy v. Hardin,* 135 U. S., 100, is strongly controverted by the able dissenting opinions of *Justices Gray, Harlan* and *Brewer,* in that case.

DAVIS, J., concurring: The statute under which the defendants are taxed makes no discrimination in favor of the citizens of the State against the citizens of property of other States, and in my opinion the only purpose of the framers of the Federal Constitution was to prevent any discriminations which local interest might suggest in favor of resident citizens of a State against nonresident citizens. I do not think it was the purpose of the Constitution of the United States to confer upon Congress, by enactment or upon the courts by construction, any authority to give nonresident citizens doing business in another State rights, privileges or exemptions which may be lawfully denied to resident citizens who are taxed to support the State, and to protect nonresident as well as resident citizens in the discharge of their business. I think a provision of the Constitution conferring upon Congress the power to discriminate by exempting nonresident citizens doing business in a State from duties or burdens which may be lawfully imposed on resident citizens engaged in the same business, would have shocked the most ultra advocate of Federal power; and I do not think that one of the thirteen States would have sanctioned a Constitution granting such authority to the Federal Government directly or by any fair implication; and the Federal Government has no powers except those delegated by the Constitution expressly or by fair implication. (729)

Affirmed.

Cited: S. v. Stevenson, post, 730, 731; *S. v. Lee,* 113 N. C., 681; *S. v. Caldwell,* 127 N. C., 527; *Collier v. Burgin,* 130 N. C., 636; *Lacy v. Packing Co.,* 134 N. C., 572; *Dalton v. Brown,* 159 N. C., 180; *Smith v. Wilkins,* 164 N. C., 140.

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(730)

THE STATE v. J. C. STEVENSON AND J. A. TAYLOR.

Constitution—Taxation—License.

The exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for the license tax imposed by the Act to Raise Revenue (ch. 323, sec. 22, Laws 1891) is not a discrimination against the products or citizens of other States; nor is it in violation of the provisions of the Constitution of North Carolina which require uniformity of taxation.

STATE *v.* STEVENSON.

CRIMINAL ACTION, tried at July Term, 1891, of the Criminal Court of NEW HANOVER, *Meares, J.*, presiding, similar to that of *State v. French, ante,* 722, except that the jury found in the special verdict these additional facts:

"That during the said six months the said defendant also bought and sold within the said State large quantities of goods, wares and merchandise, including farm products which were not purchased from the producer. And that all of the purchases so made, both in the State of North Carolina and out of it, were of goods, wares and merchandise not specially taxed by the act of the General Assembly of the State aforesaid, ratified 9 March, 1891; and that the defendants, not being transient dealers, did not, within ten days after 1 July, 1891, deliver to the clerk of the board of county commissioners of the said county a sworn statement of the total amount of their said purchases for the preceding six months, ending 30 June, 1891."

From a judgment against defendants they appealed.

The Attorney-General and A. M. Waddell for the State.
George Davis and George Rountree for defendants.

CLARK, J. The defendants, merchants residing and doing (731) business in this State, have bought out of the State and have brought into the State and sold goods not being farm products purchased from the producer, and have bought in the State and sold farm products which were not purchased from the producer. They refused to list them under Schedule B, section 22, of the Revenue Act, and they contend the act is void and unconstitutional because:

1. "It denies to the defendants the equal protection of the laws. U. S. Cons., XIV Amendment, sec. 1." It has been repeatedly held that the XIV Amendment was not intended to "compel a State to adopt an iron rule of equal taxation," or "to prevent it from adjusting its system of taxation in all proper and reasonable ways." *R. R. v. Penn.,* 134 U. S., 232 (237); *Ins. Co. v. New York, ib.,* 594 (606). Both these cases are cited and approved in *Express Co. v. Seibert,* 142 U. S., 339. The XIV Amendment certainly has no application to a case like the present, as we have held in *S. v. French, ante,* 722.

2. "In so far as it applies to goods purchased outside of the State, it is a 'regulation of commerce among the States.' U. S. Cons., Art. I, sec. 8, p. 3." This point was also presented and passed upon in the case of *S. v. French, ante,* 722. It is sufficient to say that the tax is not on "interstate" dealings, but on the occupation of carrying on a mercantile business in this State; and instead of levying a fixed sum, irrespective of the quantity of business done, the statute graduates the tax

according to the amount of purchases, "whether made within or without the State." If the defendants had removed here from another State, while there could be no tax on their transportation here they would be liable, after their arrival, to a license tax on their "occupation" if there were no discrimination. In the same manner, if they brought goods with them, this would not prevent a property tax on goods or a license tax on the trade or occupation in which such goods were used, provided there was no discrimination on account of the (732) place of the origin of the goods.

3. "It discriminates against the products of other States, and is repugnant to the United States Constitution, Art. IV, sec. 2, par. 1." The act makes no discrimination against products brought from elsewhere. It is couched in general terms, and exempts purchasers of farm products from the producer, wherever raised, from being taken into account in ascertaining the basis upon which the amount of the license tax is graduated. This is neither necessarily, nor within reasonable construction, a discrimination against farmers in other States. Florida oranges, northern corn, wheat and apples and other farm products of other States, are ordinarily largely dealt in, and the amount of the purchases thereof from the producers are omitted, equally with similar purchases of farm products raised in this State, in adjusting the amount of license tax required by the act. It is true that a law professing to be nondiscriminating on its face may, from the circumstances, and in its application, be held to be really discriminating, and hence unconstitutional, as in the meat and guano inspection cases. *Brimmer v. Rebman,* 138 U. S., 78; *Minnesota v. Barber,* 136 U. S., 313; *Fertilizer Co. v. Board of Agriculture,* 43 Fed., 613. But these were cases of taxation or prohibition. The provision before us is only an exemption. It does not tax the nonresident farmer or put him at any disadvantage, as compared with the farmer residing in this State. This point has recently been considered by *Seymour, J.,* in the United States District Court for the Eastern District of North Carolina in a very able opinion construing this very statute (*Ex parte* Brown, 48 Fed., 435), the reasoning in which case in this aspect of it seems to us satisfactory and conclusive.

4. "That it violates the principle of uniformity in taxation. Constitution of North Carolina, Art. V, secs. 5 and 6."

This is a privilege tax on a trade or occupation, and is authorized by the Constitution of North Carolina (Art. V, sec. 3) (733) in addition to the *ad valorem* tax on property. *Albertson v. Wallace,* 81 N. C., 479; *S. v. Cohen,* 84 N. C., 771. It was in the discretion of the Legislature to impose either a specific tax or one graduated by the extent of the business done. *S. v. Powell,* 100 N. C., 525. Such tax is uniform when it is equal on all persons in the same class.

Gatlin v. Tarboro, 78 N. C., 119; *S. v. Powell, supra.* Graduating a merchant's license tax by the amount of his purchase of a certain class of goods, and not by the amount of his total purchases, is not imposing unequal taxes on the goods. It is merely a mode of graduating, according to the wisdom and discretion of the Legislature, the amount of the license tax for carrying on any specified occupation.

But treating it as a "classification," this law puts all merchants dealing in farm products purchased from the producer in one class, and all merchants not dealing in farm products purchased from the producer in another class, and treats all in each class alike. There is no discrimination in either class. The power to select particular trades or occupations and subject them to a license tax cannot be denied to the Legislature—nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform. "It may be different upon a dealer in whiskey by retail from that on a wholesale dealer; or a dealer in whiskey from what it is on a dealer in grain," etc., says *Judge Rodman* in *Gatlin v. Tarboro, supra,* and so it may, of course, be different on a dealer in farm products purchased from the producer from that on a dealer in other goods." Indeed, there can be, strictly speaking, no uniform, proportional, and *ad valorem* tax on all trades, professions, franchises and incomes, taken together, because they are so dissimilar that there is no practicable means of arriving at what should be a uniform tax common to them all. How could (734) a tax be "uniform" or proportional between the profession of law or medicine, livery stable keepers, merchants, keepers of ferries, etc.? The Legislature could lay a franchise tax on some callings, and it would not be illegal because some other occupation was not taxed. It could lay a fixed tax on some occupations and graduate it on others by the volume of business done, or in any other mode it may deem fit. *Ins. Co. v. New York,* 134 U. S., 594. It is within the legislative powers to define the different classes and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation as "classified" by legislative enactment.

The act provides, "every merchant, jeweler, grocer, druggist or other dealer, etc., shall pay as a license tax one-tenth of one per centum on the total amount of purchases in or out of the State (except purchases of farm products from the producer)." This language makes no discrimination in favor of or against any merchant, jeweler, grocer, druggist or other dealer. On the contrary, it taxes the business of each alike, and exempts each alike from the necessity of listing his purchases of farm products from the producer. The act, in our opinion, is not obnoxious

for any of the reasons urged against it, and the judgment of the court below should be

Affirmed.

Cited: Rosenbaum v. New Bern, 118 N. C., 96, 99; *S. v. Carter,* 129 N. C., 561; *Lacy v. Packing Co.,* 134 N. C., 572; *Land Co. v. Smith,* 151 N. C., 75; *Dalton v. Brown,* 159 N. C., 180; *Mercantile Co. v. Mt. Olive,* 161 N. C., 124; *Smith v. Wilkins,* 164 N. C., 140; *Bickett v. Tax Commission,* 177 N. C., 436.

(735)

THE STATE v. A. C. WESSELL.

Constitution—Taxation—License.

One who engages, on his own account, in the business of buying and selling sewing machines in this State is required to pay the tax and obtain the license prescribed by chapter 323, section 25, Laws 1891, notwithstanding the machines were manufactured in another State.

ACTION, tried at July Term, 1891, of the Criminal Court of NEW HANOVER, *Meares, J.,* presiding.

The jury returned the following special verdict:

"That the defendant A. C. Wessell did engage as principal and on his own account in the business of selling sewing machines in the County of New Hanover and State of North Carolina without having first obtained a license therefor, and without having paid to the State Treasurer the tax of $250 for the privilege of engaging in said business, and that said sewing machines were manufactured by the Remington Sewing Machine Company, a corporation doing business and resident in the State of New York, and shipped by them to the defendant on the defendant's account in the aforesaid county and State."

Thereupon, the court adjudged the defendant to be guilty, and he appealed.

The Attorney-General for the State.

J. B. Batchelor and John Devereux, Jr., for defendant.

CLARK, J. It is found by the special verdict that the defendant was engaged on his own account in the business of selling sewing machines in the county of New Hanover, without having first obtained a license

therefor nor having paid the tax of $250 required by the State
(736) law for the privilege of exercising such occupation. It is further found that the sewing machines were manufactured by a corporation in Pennsylvania, and shipped by it to the defendant on the defendant's account.

We fail to see how this can come within the purview of the constitutional provision that Congress has power "to regulate commerce among the States." There is no tax laid on the dealings between the manufacturer in Pennsylvania and the defendant. The tax is laid on the occupation in which the defendant is engaged of selling sewing machines to parties in this State. It can make no difference whether he has previously obtained the machines from a manufacturer within this State or out of it. Indeed the identical point now presented was before the United States Supreme Court in *Machine Co. v. Gage,* 100 U. S., 676, and the Court held that a State law, imposing an annual tax upon "all peddlers of sewing machines without regard to the place of growth or produce of material or of manufacture," was not in violation of the Constitution of the United States.

Affirmed.

Cited: S. v. Caldwell, 127 N. C., 527.

THE STATE v. C. F. RAY.

"Scalpers"—Railroad Ticket Brokers—Statute—Indictment.

The statute (ch. 290, sec. 1, Laws 1891) declaring that it shall be unlawful for any person except the duly authorized agents of railroad companies to sell or deal in railroad tickets is directed against such unauthorized persons as engage in the business of buying and selling tickets; and therefore, where the indictment charged and the proof showed only the sale of one ticket, the sale did not come within the mischief sought to be remedied.

NOTE.—*S. v. Clarke* (appeal from the criminal court of Buncombe) presented the same question, and was disposed of in the same manner.

(737) INDICTMENT, tried at October Term, 1891, of BUNCOMBE Criminal Court, *Carter, J.,* presiding.

The indictment charges that the defendant "did, on 1 September, 1891, and on other days both before and since that date, unlawfully and wilfully sell to one A. M. Smith, of the county and State aforesaid, a cer-

tain railroad ticket issued by a railroad company, to wit, the Pennsylvania Railroad Company, he, the said C. F. Ray, not being a duly authorized agent of said railroad company, and without having exhibited his authority to sell said ticket, contrary to the form of the statute," etc.

The defendant pleaded not guilty, and on the trial the jury rendered a special verdict, the material part of which is as follows:

"C. F. Ray, the defendant above named, did, on 1 September, 1891, wilfully sell to one A. M. Smith a certain railroad ticket issued by a railroad company, to wit, the Pennsylvania Railroad Company, the said Ray not being a duly authorized agent of said railroad company and not having exhibited his authority to sell said ticket."

Thereupon, the court adjudged that the defendant was guilty, and gave judgment against him, from which he appealed to this Court.

The defendant excepted upon the following, as well as other grounds:

1. It is not alleged or found that the defendant sold or dealt in railroad tickets, but simply that he sold a single railroad ticket.

2. That the defendant is not guilty upon the indictment and special verdict.

The Attorney-General and F. H. Busbee for the State.
F. A. Sondley for defendant.

MERRIMON, C. J. The defendant is indicted for a violation (738) of the statute (Laws 1891, ch. 290, sec. 1) which prescribes "that it shall be unlawful for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company, and it shall be the duty of said agent to exhibit his authority to sell or deal in said tickets, and the company whose agent he is shall be responsible for his acts as such agent. That any violation of this law shall be a misdemeanor."

The important words that limit and define the grievance thus prohibited are "to sell or deal in tickets issued by any railroad company." These words imply not simply the sale of a single such ticket as a person may have or obtain not of purpose to sell the same, but the practice or business of selling such tickets for others, or buying and selling them as ordinarily done by "ticket dealers or ticket brokers." If the purpose had been to forbid the sale of a single ticket that a person might have and could not use himself, the appropriate terms used would have been, "no person shall sell any ticket issued by a railroad company," or "it shall be unlawful for any person to sell any ticket issued," etc., or the like broad and sweeping terms. The phrases, "to sell tickets, to deal in tickets," imply, in business parlance, the business of selling or

buying and selling such tickets; they imply not particulars—simply a sale—but a multiplicity of such sales in the sense of a business. The buying and selling of tickets issued by railroad companies to persons traveling over their roads by "ticket dealers" is a common and serious grievance to such companies, and the purpose of the statute is to remedy that evil. It does not extend to the simple sale of a ticket an individual may happen to have that he cannot use. Such sale does not come within the mischief to be remedied.

That the statute (secs. 2, 3) requires such companies "to redeem the unused portions" of certain classes of such tickets, does not ex-
(739) tend or enlarge the meaning, and the purpose of the section above interpreted. This requisite is intended simply to provide and facilitate a measure of justice and fair-dealing between such companies and passengers over their respective roads. The scope and purpose of a penal statute cannot be enlarged by mere implication. Such purpose must appear by its terms or necessary implication.

In this case the indictment fails to charge the offense prescribed and defined by the statute. It charges the sale of a single ticket, and fails to charge that the defendant sold or bought and sold, or dealt in such tickets, as a business, as it should have done. The special verdict of the jury is in harmony with the imperfect indictment. The court ought, therefore, to have adjudged that the defendant was not guilty, and that he go without day. The judgment must be reversed, and judgment entered in favor of the defendant as indicated.

Error.

THE STATE v. JOHN BOYCE.

Landlord and Tenant—Privity—Estoppel—Evidence—Trespass—Statute.

1. The prosecutrix, claiming to be the owner of a tract of land containing about thirty acres, leased seven acres thereof, embraced within fixed lines, to the defendant, and especially forbade him to cut timber from that part of the tract not included in the lease, but the defendant, while his term was subsisting, did cut timber on the land in defiance of prosecutrix's prohibition, and being indicted therefor under section 1070 of The Code, on the trial offered to prove that the true title was not in prosecutrix but in one H., by whose authority he committed the alleged trespass: *Held*, (1) There was no privity, and hence no estoppel, between the prosecutrix and the defendant as to the land not embraced in the lease. (2) The testimony offered to prove title in H. was competent not only for the purpose of showing the good faith of defendant, but as well

for the purpose of showing H. was the rightful owner and that the prosecutrix was not. (3) While, ordinarily, the title to land cannot be litigated in criminal actions, indictments under the statute cited are exceptions.

2. The objections and operation of the statute discussed by MERRIMON, C. J., and SHEPHERD, J.

DAVIS and AVERY, JJ., dissenting.

CRIMINAL ACTION, tried at Spring Term, 1891, of BURKE, *Hoke,* (740) *J.,* presiding.

The evidence tended to prove that in October of 1887 the prosecutrix leased to the defendant for the term of three years seven acres of land, "indicated by certain natural points and objects" that fixed the limits thereof, the same being a part of a larger tract containing thirty-five acres, and he was expressly forbidden to cut any timber outside of the land leased to him. The evidence further tended to prove that the prosecutrix claimed to have title to the land by virtue of a deed from her father, and that the defendant, while his said lease was current, cut certain shingle-blocks upon the land, outside of that embraced by his lease, etc.

The defendant offered in evidence a grant to one Hemphill, embracing the land above mentioned, "dated in 1857, and to show that, in fact, the said Hemphill was the actual owner of said land and at that time entitled to the possession" thereof, and that the father of the prosecutrix had no title to the same, or any part thereof. He offered further to prove that he was authorized and employed by the said Hemphill to cut the shingle-blocks mentioned on the land, and that he did cut them as his agent and employee, etc.

The court admitted this "evidence for the purpose of showing that the defendant was a *bona fide* claimant of said land, but would not admit it for the purpose of proving title in Thomas L. (741) Hemphill, or disproving the title of" the prosecutrix. The defendant excepted "and proceeded to introduce the evidence for the purpose of showing that he was a *bona fide* claimant and acted in good faith," etc. There was evidence tending to show title to the land in Hemphill; that he employed the defendant to cut the shingle-blocks, and that the latter cut them as his employee, etc.

The defendant requested the court to instruct the jury that if Hemphill was the owner of the land, and the defendant cut the shingle-blocks as his employee and by his instructions, then defendant was not guilty. The court refused so to charge, and defendant excepted.

The court instructed the jury that the defendant having taken the lease and entered upon the land embraced by it, "the law would not permit him, during the continuance of the lease and the relation grow-

ing out of it, to assume a position antagonizing the right and title of defendant's lessor, and that so far as the defendant in the case is concerned, they would consider the prosecutrix as the owner of the property, and the defendant having admitted that he cut and carried away the wood and timber from said land outside of the seven acres leased, without the consent of the prosecutrix, and after being forbidden to do so by her or her agent, his guilt or innocence would depend on the good faith of his claim of right."

The court further instructed the jury, that if the defendant cut the timber under the honest belief that he had the rightful authority so to do, he would not be guilty, etc.

There was a verdict of guilty and judgment thereupon, from which the defendant appealed.

The Attorney-General for the State.
S. J. Ervin for defendant.

(742) MERRIMON, C. J., after stating the case, proceeded: The defendant is indicted for a violation of the statute (Code, sec. 1070) which prescribes as to offenses like that charged, that "If any person, not being the present owner or *bona fide* claimant thereof, shall wilfully and unlawfully enter upon the lands of another, and carry off or be engaged in carrying off, any wood or other personal property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person . . . shall be guilty of a misdemeanor."

It is to be observed that the person who may be charged with the offense thus prescribed, must be a person, first, who is not the owner of the land from which the wood or other personal property shall be taken, or, secondly, a person who is not a *bona fide* claimant thereof. A charge against such owner or *bona fide* claimant cannot be sustained at all. Evidence must be produced on the trial to prove that the prosecutor, or the person charged to have been injured, was the owner of the land at the time of the carrying off of the wood or other personal property—that he was at least then in possession thereof by himself or another, claiming it as his property. Surely, then the defendant has the right to show first, if he can, that he is the owner of the land, and therefore not subject to such charge. How can he do this but by showing in some proper way that he himself is the owner? He has the clear right to show title in himself if he can. And, secondly, if he cannot show perfect title, he has the further right to prove facts which show that at such time he was the *bona fide* claimant thereof. The offense created is of such nature as to render it necessarry for the

defendant, and to allow him, to show title to the land in himself, or to prove that he was the *bona fide* claimant of the same. The purpose of this statute is not to prevent a simple trespass on the land affecting merely the possession, but to prevent the taking of wood and other personal property as prescribed, that belongs to the owner (743) of the land, or of which he has the control, care and keeping, from the land of which he is the owner in some way. It is no part of the purpose of the statute to prevent the real owner, though not in possession, from asserting his rights to have possession, control and benefit of it in any lawful way within his power, or to prevent such owner out of possession from taking it in any proper way, and taking from it as he may see fit wood and other property that may belong to him. The chief purpose is to prevent persons who have no right or title to the land, and no *bona fide* claim to it, from carrying from it wood and other personal property not their own. This statute (Laws 1866, ch. 60) was first enacted soon after the late civil war, to prevent and suppress a very common public grievance then prevailing, which is pointed out in *S. v. Crawley,* 103 N. C., 353.

An essential quality of the offense so prescribed is, that it shall be committed by some person *other* than the owner of the land or a *bona fide* claimant thereof, and that it shall be done wilfully or unlawfully, and it must be so charged in the indictment. Hence, if the owner of the land sends his servant or employee on the same to cut timber and take the same off, such servant would not be guilty of the offense. In that case he would not take it wilfully and unlawfully in contemplation of the statute. This is so because the owner had the right to send his servant to cut and take the timber from his own land.

In this case the court instructed the jury that the prosecutrix, and not Hemphill, "was to be regarded as the owner of the property; notwithstanding this, defendant still could not be convicted if his claim of right was made in good faith," etc., and the evidence of title to the land in Hemphill was received only as tending to show such good faith on the part of the defendant. In this there is error.

The evidence of title in Hemphill should have been received, not simply for the purpose of showing good faith of the de- (744) fendant, but as well for the purpose of showing title to the land in Hemphill. If the latter was the owner of the land, as the evidence in one view of it tended to prove, then the defendant was not guilty, because he cut the shingle-blocks under the direction of and for such owner, and in this view no question of good faith could arise. As we have seen, the defendant had the right to prove that the prosecutrix was not the owner of the land, that Hemphill was, at the time he cut and took the timber, and he could show such facts by producing evidence

of his title. He could not make such defense otherwise. In *S. v. Crosset,* 81 N. C., 579, the defendant was indicted under a somewhat similar statute (Code, sec. 1120), and he was allowed to show title to the land in question in a railroad company, under and for whom he did the acts for which he was indicted. See also *S. v. Bryson,* 81 N. C., 595; *S. v. Crawley, supra; S. v. Winslow,* 95 N. C., 649.

If Hemphill had been indicted with the defendant, or alone, is it not clear that he might have shown that the land was his, and he thus had the right to cut the timber? And if he should show title, would not this be a good defense for himself and his servant? How could he show that the land was his, he being out of possession, but by producing evidence of his title? Can it be possible that he might, under the statute, be convicted for cutting and taking his own timber from his own land? It is said that he might be excused in that case upon the ground that he was a *bona fide* claimant. The jury might not believe he was such claimant. If he was the owner of the land he could defend himself successfully without being exposed to the hazard of showing what the jury might or might not regard as a *bona fide* claim; he had the right to place his defense upon the higher and safer ground that he was the owner of the land. If he showed title it was the duty of the (745) court to instruct the jury to render a verdict of not guilty. In that case the law concluded that he had the right to cut the timber because it was his own, he was not simply a *bona fide* claimant, he was the absolute owner.

It is conceded that, ordinarily, the title to land does not come in question in criminal actions, but the statute creating the offense charged here is such, in its nature and purpose, as in possible cases like the present one, to make the guilt or innocence of the defendant depend upon the title to the land from which the wood or other property may have been taken. If the act charged was done by the owner thereof, he could not be guilty, nor would he be if, being out of possession, he should go upon it and cut and carry away timber. The statute does not forbid the mere going upon the land, it does not prohibit the simple invasion of the prosecutor's *possession* thereof, it only forbids persons, not the *owner* or the *bona fide* claimant thereof, to carry from it wood or other property. The owner being out of possession of the land could not, in the nature of the matter, defend himself as *owner* otherwise than by showing title. *S. v. Roseman,* 66 N. C., 634; *S. v. Hanks, ib.,* 612, and the cases cited, *supra.*

The evidence tended to prove that the prosecutrix was in possession and the owner of the land from which the defendant removed the shingle-blocks mentioned, but it did not go at all to prove that he was her tenant as to that part of the land from which the blocks were taken.

It only went to prove that he was her tenant as to certain seven acres thereof particularly described by natural boundaries of the larger tract. If it be granted that the defendant could not be allowed, in a case like this, to deny that the prosecutrix was the owner of the seven acres as to which he was tenant, he was not so concluded as to other parts of the land, including that from which he cut the shingle-blocks, because as to that he was not her tenant. As to that there was no agreement or relation of any nature that concluded him for any pur- (746) pose, or prevented him from denying her title thereto. He might admit and agree that the prosecutrix was the real owner of the seven acres that he leased from her, but he might also deny that she had any title or right to the balance of a tract she claimed to be hers. The evidence was direct that the defendant leased certain seven acres ascertained, and he was admonished not to cut timber elsewhere. *Kissam v. Gaylord,* 46 N. C., 294; *Fisher v. Mining Co.,* 94 N. C., 397, and the cases there cited.

It is insisted that the possession of the defendant of the seven acres of land so leased to him was that of his landlord, the prosecutrix, and that such possession extended to and embraced that of the whole tract claimed by her, and therefore the defendant is concluded or estopped to deny the title of the prosecutrix to the land situate beyond and outside of the land embraced by the lease. Such possession did so extend as to the prosecutrix as to wrongdoers, but it did not as to the defendant. He had no possession or right or benefit of possession beyond the boundary of the land leased to him; nor was there any obligation resting upon him arising from the contract of lease, or by implication of law, to hold possession of any land beyond such boundary. There is no reason of policy, nor is there principle or authority that warrants such contention. *Lamb v. Swain,* 48 N. C., 370; *Scott v. Elkin,* 83 N. C., 424, and the cases last above cited.

The defendant is entitled to a new trial.

SHEPHERD, J., concurring: On the trial the defendant offered to show that he acted under the authority of one Hemphill, and that the said Hemphill was the owner of the land upon which the alleged trespass was committed. The court excluded this testimony except for the purpose of showing the good faith of the defendant, and the jury were instructed that they could only consider it in that view. (747) The defendant was not satisfied to have his liberty endangered by what the jury might capriciously find upon the question of good faith, and insisted that he had the right to prove and rely upon the actual legality of his conduct.

Ordinarily, on the trial of indictments for the disturbance of the

possession, such as forcible trespass and forcible entry, and also for the removal of fences, injuries to buildings and similar cases, the title to land is not permitted to be litigated, although, in some instances, the practical application of the principle has not been entirely free from difficulty. The rule, however, does not grow out of the doctrine of estoppel, but is founded on the reason that the offense is treated as one against the actual possession, which possession is regarded as sufficient evidence of ownership. But where, as in this case, there is no actual possession on the part of the prosecutrix and no evidence of title, or the right of possession in her beyond the possession of the defendant himself, it is not easy to understand how, even in the cases mentioned, a conviction could be sustained.

But the statute before us is of quite a different character, and by its very terms the title is necessarily put in issue. It requires that the person indicted must not be "the *present owner* or *bona fide* claimant of the land," and that the property carried off must be "the property of the owner of the premises or under his control, keeping or care." If the act be done with a felonious intent, it is larceny, and if without such intent, it is a misdemeanor. Considering the peculiar wording of the statute and its highly penal character, and especially in view of the fact that under it one may be indicted for larceny (in which case it is always competent to show the real ownership), it is not seriously contended that the defendant may not show title in himself or in those under whom he claims.

This very important right, however, is controverted in the
(748) present case by reason of the application of the rule of practice known as estoppel, and which has hitherto been considered as peculiar to the trial of civil cases. To say the least, its application to criminal trials of this character would be unusual, but conceding, for the sake of the argument, that it obtains in all its rigor on the criminal side of the docket, I am wholly unable to understand how it applies to the present case. If, as contended, the estoppel grows out of the relation of landlord and tenant, how is it possible that the tenant can be convicted of an unlawful entry upon his own premises?

"The tenancy does not exist until there has been an entry by the tenant, and when the entry is made," says *Justice Ashe,* in *Barneycastle v. Walker,* 92 N. C., 198, "the estate is absolutely vested in him (the lessee) as if by grant for the period of time mentioned in the lease," and it is there decided that he may maintain an action of tort if the landlord enter and dispossess him. So, too, he may indict the landlord if he enters and removes a fence from the premises (*S. v. Piper,* 89 N. C., 551), and on the other hand, the tenant is not indictable if he

tears down or injures a building on the same. *S. v. Mace,* 65 N. C., 344; *S. v. Whitener,* 92 N. C., 798.

This is too plain to require the citation of authority, but the difficulty seems to have been surmounted on the argument by treating the defendant as a tenant for all of the purposes of a criminal prosecution, and stripping him of that character for the purposes of his defense. This position seems to be based upon the idea that the primary object of a contract of lease is to build up the constructive possession of the landlord within the boundaries of some, perhaps, unregistered or unknown deed under which he claims, and that the supposed inconvenience resulting from an interruption of this mere incident is to override every other consideration and to work a material change in what are everywhere regarded as the principal and essential features of such a contract. (749)

The defendant never leased the land upon which the alleged trespass was committed, but it is argued that inasmuch as he leased a specific part of the same tract, and as his actual possession of this part was a constructive possession of the whole, he is thereby estopped to deny the landlord's title to that portion which is outside of the boundaries of his lease. Now, it is quite clear that the estoppel of a tenant is founded only on the possession, and that this possession must be actual is evident from the fact that the relation is not established until entry, and it must of course be the actual possession which the *"landlord delivers."* Taylor Landlord & Tenant, sec. 706. The possessession must necessarily be coextensive with the estoppel, and if the estoppel works against the defendant as to the outside land, there can be no escape from the conclusion that the possession must also accompany it and protect him from being treated as a trespasser. To hold otherwise would offend the principle of mutuality which lies at the foundation of every estoppel. The logical outcome, therefore, of the argument is that the defendant cannot be indicted at all, no matter how frequent and destructive his depredations may be. Notwithstanding such an anomaly, it is argued that he should be convicted as a trespasser, and evils are suggested as likely to ensue upon a failure to hold him to criminal responsibility.

The only way to punish such offenders under the statute is to follow the principle laid down in the decisions of this Court, the works of eminent text-writers, and other authorities, and these abundantly establish that, although the possession of a part by a tenant will give constructive possession of the whole to the landlord, yet, as between the landlord and tenant, as to the outside land, there is no privity, and without privity there can, of course, be no estoppel. This is directly

sustained in *Scott v. Elkin,* 83 N. C., 424, and also *Lamb v.*
(750) *Swain,* 48 N. C., 370. So in Taylor Landlord and Tenant, sec. 707, it is stated that "the estoppel of the lessee does not extend to other lands of the lessor not included in the demise;" and in Lawson on Rights and Remedies, it is laid down that "accepting a lease for part of a tract does not estop the tenant from denying the landlord's title to the residue of the tract." See also *Coal Co. v. Price,* 81 Pa. St., 156; *Wilborn v. Whitfield,* 44 Ga., 51; *Pederick v. Searle,* 5 Serg't & Rawle, 236.

In opposition to these well settled principles there is, I think, an entire absence of authority. The cases cited to the effect that where a tenant occupies, in connection with his tenancy, lands outside of the lessor's, he is presumed to hold for the benefit of his landlord, do not, in my opinion, bear upon the question. It is a mere presumption, usually raised between the landlord and others, and may always, says Mr. Washburn, be rebutted, 1 Real Prop., 590.

In reference to the evils suggested by a contrary ruling, the answer may be found in the language of *Ruffin, C. J.* (*Lenoir v. South,* 32 N. C., 239), that "the law cannot suppose that an owner will not look to the condition of his property" and expel intruders. There is no more reason why he should not guard against the encroachments of his tenants than those of his neighbors or others. Again, it is not true that a tenant can attorn and give a stranger the benefit of his constructive possession, for just so soon as he steps beyond the boundaries of his lease he may be treated as a trespasser, indicted under this very statute and expelled from the premises. The constructive possession by reason of his legitimate occupancy inures to the benefit of the landlord, and is added to the restored possession in the computation of time in ripening the title. Furthermore, if the tenant has such a possession of the outside land as will estop him, the landlord, as I have remarked, will not only be prevented from indicting him as a trespasser, but it is not easy to understand how he can deprive him of the possession by
(751) a civil action or otherwise, until the expiration of the term.

Apart from all this, and independent of the principle of estoppel and possession—its necessary attendant—I cannot see how the defendant can be convicted, if there be, as is contended, any privity as to the outside land. It will be observed, that in order to sustain the indictment, it was necessary to show that the prosecutrix was the owner of or entitled to the possession of the land upon which the alleged trespass was committed. If there was any evidence of this (and there seems to have been none except the statement that the father had conveyed it to her) it was not submitted to the jury, and his Honor seems to have held that such proof was unnecessary on the ground that by reason of

the defendant's possession of a part, she was in the constructive possession of the whole. The case was made to depend, so far as the prosecutrix's ownership was concerned, solely upon the possession of the defendant. Now, as I have before stated, if a constructive possession is sufficient to show title in order to convict the defendant, he surely ought not to be deprived of it for the purpose of his defense. But the difficulty is still more apparent when we consider that the possession of a part is not technically the constructive but the *actual possession* of the whole; for, says *Ruffin, C. J.,* "constructive possession is such a possession as the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody. . . . But when the owner is actually possessed, by residence, for instance (and I will add, or by his tenant), of a part of a tract of land, he is *actually possessed of the whole.*" *Graham v. Houston,* 15 N. C., 237. So, according to the principle invoked, we have the case of a person being convicted of an unlawful entry upon land of which he is in the actual lawful possession. *Indeed, it seems to be conceded that he is not a trespasser,* and yet it is urged that he may be indicted as such. The Court is not prepared to make a departure which introduces a rule that deprives the landlord of swift and efficient remedies (752) against the tenant who trespasses upon adjacent unleased land, and, besides all this, is not only opposed to our own decisions, but the standard text-writers and other authorities on the subject. The Court is of opinion that, as between the landlord and tenant, there is no privity as to the outside lands where the leased premises are specifically defined by metes and bounds, and that as to such outside lands the defendant may be treated, under the statute, as any other trespasser; and if he fails to establish his defense by showing title or good faith, he may be convicted and punished as such.

For these reasons, I am of opinion that there was error in applying the doctrine of estoppel, and that there should be a new trial.

DAVIS, J., dissenting: I am unable to concur in the opinion of the Court. It is not pretended that the defendant was the owner of the land, and whether he was a *bona fide* claimant was a question for the jury. I think his Honor properly admitted the evidence as to Hemphill's title only as competent to show the *bona fides* of the defendant, and excluded it for the purpose of trying, in this criminal action, the question of title between the prosecutrix and Hemphill. If the defendant was acting *bona fide,* it was sufficient for him to admit it for the purpose of showing this fact. Good faith to his landlord would not permit him to conspire with an adverse claimant of the land to enable that claimant to try indirectly the title in a criminal prosecution. If he was act-

ing in good faith, it made no difference whether Hemphill was the owner or not, he could not be convicted under the statute; and so, if he was not acting in good faith, but collusively with an adverse claimant of the land, not in possession, that would not, in my opinion, protect him against the prosecution of the claimant in possession, and it is (753) not denied that the possession was in the prosecutrix. The fact that the defendant was unwilling to rest his defense upon the *bona fides* of his claim, but sought to establish Hemphill's title, was a circumstance that justified the jury in finding that he was not acting *bona fide*. I am unable to see what possible service the deed to Hemphill could be to the defendant, except to show the *bona fides* of his claim, and for this purpose his Honor admitted it, but the defendant was not satisfied with that. However willing he seems to have been to act collusively with Hemphill against his landlord, it is perhaps to his credit that he was not willing to go so far as to perjure himself by swearing that he was a *bona fide* claimant. If it be said that there is no evidence of fraud and collusion, I answer: the facts seem to me to warrant the conclusion of fraud, and the jury were very evidently of that opinion, or they would, under the charge of his Honor, have rendered a verdict of not guilty.

AVERY, J., dissenting: The prosecutrix demised to the defendant for the term of three years, by verbal agreement, seven acres of land designated by a well defined boundary line, of a tract of thirty-five acres held by her under one deed. The prosecutrix pointed out to the defendant, when the contract was made, not only the boundaries of the demised premises, but those of the tract of which it constituted a part, and at the same time she forbade him from cutting any timber outside of the limits of the seven acres. Subsequently, and during the term, the defendant did cut down and carry away trees on the thirty-acre tract outside of the demised premises, and, when indicted (under section 1070 of Code,) offered in evidence a grant to one Hemphill, dated in 1857, embracing both the land leased to him and that on which he cut the timber trees for shingle-blocks, and also parol testimony tending to show (754) that he was authorized and employed by said Hemphill to cut down the trees. The court admitted the testimony for the purpose of showing that he acted under a *bona fide* claim of right. The defendant excepted to the refusal of the court to allow the jury to consider the said grant as evidence of title in said Hemphill, and of right on the part of the defendant to enter as his servant, employee or lessee.

The appeal raises two questions:

First. Is it competent for one indicted for a trespass under this statute, to prove title in himself or his lessor by exhibiting a chain of

title deeds, or does the issue of his guilt or innocence depend rather upon the holding of actual or constructive possession by the prosecutor on the one hand and his own good faith on the other?

Second. Is the lessee of a definite portion of a large tract of land, held by his lessor under the same title deed under which the latter holds the demised premises, estopped during his term from setting up against the lessor an adverse title to any part of the territory covered by such deed?

If the law should furnish an affirmative answer to the second interrogatory, this case would be disposed of.

Though feudal tenures have been long since abolished, the reciprocal duties of landlord and tenant and the relations which the law recognizes that they sustain to each other, had their origin in part in that system, and are not easily understood without recurring to its principles. Fealty was, in the middle ages, another name for fidelity. A tenant for years was sworn to be faithful and to render the customs and services due to his lord. 1 Coke on Lit., 67*b*. Where one held land of a superior, the obligation of the lord was to protect the tenant in his immediate possession; the corresponding duty of the tenant was to defend the right of his lord, not simply to the fields and woodland within the boundaries of the land in his actual possession, and under his immediate care, but to the outside limits of his lord's estate in which it was located. 2 Bl., 46. Mr. Chitty (note 2 Bl., 46) says, that a man could not free himself from this feudal dependence except by renouncing (755) all claim to the land which he was holding and surrendering the possession to his lord. In that early day, when the system prevailed in its original form, the suggestion that a tenant could step over the line of his actual possession, but still within the bounds of the land of the lord under whom he held, and under a lease from a rival lord of a neighboring manor destroy a grove in sight of his home, would have cost the tenant his head, and after the destruction of such tenures would have been considered a breach of good faith and inconsistent with the subsisting relation to his landlord. A man could not be a faithful vassal and fight under two banners. A servant who, when he was placed in charge of a castle, surrendered a bridge, covered by the fire of his archers on the road by which an enemy was approaching it, would have been thrown from the battlements as a traitor. It is because the rule which forbids the tenant to dispute the title of his landlord had its origin in feudal principles, that text-writers agree in saying it is not an estoppel growing out of a contract. One of the evidences that it originates in the idea that there is an obligation on the part of the tenant, inseparable from the very relation he sustains, to be faithful to his landlord, is found in the fact that it is often enforced against

persons not capable of contracting. *Wilson v. James,* 79 N. C., 349. Hence, it is often said that the law, in order to punish fraud (which is, in all its forms, but a species of bad faith), imposes upon those who were slaves, infants or *femes covert* when a tenancy began, the condition that they will not be permitted to deny the title of him under whose permission they acquired possession until they shall have surrendered the premises to him. 2 Kent. Com., 240.

We find that a discriminating text-writer (Sedgwick and Wait, L. & T., sec. 352) in laying down the rule that a tenant must ordi-
(756) narily surrender possession before he can deny the title of his landlord, says: "If the rule were otherwise, no person would be safe in parting with the possession of his land. . . . If any defect existed in the claim of his title, or the muniments of title had been lost or destroyed, or the witnesses who were conversant with the facts affecting it, had died or were absent from the country, the owner would be practically precluded from letting the property. The possession of land by a servant, a tenant (certainly until the whole of the purchase-money is paid) inures to the benefit of the master, landlord or vendor, in the absence of a counter adverse possession upon some part of the tract, to the outside limits of the deed under which such master, landlord or vendor claims. *Brown v. Brown,* 106 N. C., 460; *Ruffin v. Overby,* 105 N. C., 85; *Scott v. Elkin,* 83 N. C., 424; *Williams v. Wallace,* 78 N. C., 354; Wood on Lim., sec. 260. Such is the privity between persons standing in these relations to each other, that if one who has been a tenant of a few acres of a large tract held by his landlord, takes a bond for title and contracts with the latter to pay a certain price for the land demised until the purchase-money is paid, if not until the land is conveyed to the vendee, the possession, both as tenant and vendee, inures to the benefit of the vendor to the outside boundaries of the deed under which he holds. But after the execution by the vendor to the vendee of a deed for the definite boundary contracted for (if not upon the performance of the condition of the bond by payment of the whole of the purchase-money), the possession becomes adverse to the vendor as well as to all others. *Ruffin v. Overby, supra;* Wood on Lim., secs. 259, 260.

If there is no other adverse possession within the limits of the landlord's deed, the tenant holds for his benefit constructive possession of the whole boundary. Wood on Lim., secs. 259, 260; *McLean v. Smith,* 106 N. C., 172. The actual possession of Boyce was confined to
(757) seven acres, and had he occupied the seven acres without trespassing outside for seven years continuously, it would have inured to the benefit of the prosecutrix under her deed for thirty-five acres from her father, and have matured her title (supposing the title to have

been out of the State) against all persons not laboring under some disability. *Ruffin v. Overby* and *Scott v. Elkin, supra; Lenoir v. South,* 32 N. C., 237. If another person had entered claiming adversely to the prosecutrix on any part of the thirty-five acres, then the result would have been the constructive possession of the unoccupied land covered by both titles, supposing both to be seated upon the lappage, would have been drawn by the older title to the occupant holding under it. *McLean v. Smith, supra.* If the defendant Boyce was at liberty to act under the authority of Hemphill in cutting timber trees, so that the act itself would amount to an actual adverse possession for the purpose of maturing title, he might, upon the same principle, under a lease from Hemphill, executed after his entry under the prosecutrix, have inclosed a field and thereby *have changed the nature of his own constructive possession by an attornment,* while occupying the land under his old lease, and thus have placed himself in the attitude of holding two adverse and conflicting possessions at the same time. The supposed case would present an unprecedented legal problem that would be difficult of solution, unless we extended the benefit of the estoppel on the tenant to the limits of the possession held constructively for the landlord's benefit instead of limiting its application to the demised premises. The prosecutrix could, as between herself and Boyce, restrict his right to cut timber to the seven-acre tract, and forbid his trespassing beyond its boundaries, without depriving herself of the benefit of the constructive possession, which grew out of his occupancy as a tenant of any part of the thirty-five acre tract, and extended to the whole of that tract, until some other person entered and took actual possession by title paramount within its boundaries. *Scott v. Elkin,* 83 N. C., 426; *Ruffin v. Overby, supra; Brown v. Brown,* (758) *supra.* It would be a legal anomaly if the tenant himself could destroy the privity existing between himself and the prosecutrix, divest the benefit of constructive possession out of her and transfer it to another claimant by accepting a lease outside of the demised premises, but within the boundary of his lessor's deed under which he is occupying. And yet, entering as servant and employee of the adverse claimant, his possession, if he is not estopped, would be equivalent to an actual possession by such claimant in his own person. *Williams v. Wallace, supra.* A man takes actual possession and acquires with it the benefit of constructive possession by the occupancy of his vendee, his tenant or his servant to the same extent as if he had himself entered upon the premises. *Qui facit per alium, facit per se.* In *Brown v. Brown, supra, Justice Davis,* delivering the opinion, says: "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 deeds in determining whether colorable title has matured into a perfect title by possession." He further says: "That up to the time of taking the deed the vendor sustains the same relation to the vendee as if his contract with the latter had been for the lease instead of the purchase of the premises." Tiedeman R. P., sec. 181. Supposing that Hemphill had the older title, which included within its bounds the whole thirty-five acre tract conveyed to the prosecutrix by her father, and that the term had been for seven years instead of three, then it is clear that by an occupancy for the entire term as her tenant, her colorable title to the whole boundary conveyed by her father would be matured against Hemphill. *Green v. Harman,* 15 N. C., 158; *Williams v. Miller,* 29 N. C., 186. But at the very moment when a tenant or servant of Hemphill acquired actual possession of the lap-
(759) page, then *eo instanti* the benefit of Boyce's occupancy would have been restricted to the actual *possessio pedis. McLean v. Smith,* 106 N. C., 176; Wood Lim., sec. 259. If Boyce was not estopped from defending under the title of Hemphill when indicted for a trespass not amounting to an actual possession, it would inevitably follow that he would not have been estopped from entering as the tenant of Hemphill and clearing a field just across the line of the seven acres, but within the limits of the thirty-five acre tract. Yet the effect of entering into such relation with Hemphill would be to transfer to him the constructive possession, not only of all the tract of the prosecutrix outside of the seven acres, but all inside of the demised premises, except so much as he had actually inclosed. If he could become the tenant of Hemphill at all without surrendering his possession under the prosecutrix, his tenancy must carry with it all the benefits that the law attaches to such a relation, and in the case supposed would enable the new landlord, by virtue of it, to deny his possession under the former lease *in toto* and confine its benefits to the prosecutrix to his actual *possessio pedis* at the place of his original occupancy. If he could become his tenant at all, then, after occupying under a lease from her for six years and three hundred and sixty-four days, he could build for Hemphill a hog pen just outside of the seven but within the thirty-five acres, and restrict his lessor's possession through him to the inclosure made for her. *Lenoir v. South,* 32 N. C., 237; *McLean v. Smith, supra.* There is no middle ground, the estoppel must be coextensive with the constructive possession of the tenant and not confined to the limits of the demised premises, or we must concede the right of the tenant in a case of lappage to take a new lease of the holder of the older title and enable his new landlord to maintain what he is estopped to say, that his original lessor had no title inside of the premises by her except to the extent of the territory actually occupied. Suppose that a civil

action had been brought by the prosecutrix after the tenant had (760) held over as her tenant from year to year for seven years on the seven acres, against the same tenant for a trespass in clearing and cultivating under a lease from Hemphill just outside of the boundary of the seven acres, and Hemphill had been allowed to defend as landlord. Upon proof that Boyce entered into possession of the boundary of the seven acres on the three hundred and sixty-fourth day of the seventh year, he would be made tenant of both parties. By his last adverse entry his possession would become adverse to himself, and the constructive possession that he had held for nearly the statutory period would, by his own act, pass out of him in one capacity and vest in him in another capacity. Then, if he could take a lease from Hemphill at all, he must take it with all of its incidents, including the divesting of his actual possession in all of the seven acres, not under fence, out of the prosecutrix and vesting it, as well as the constructive possession outside, in Hemphill, the holder of the older title. An occupancy by Hemphill, if he had the other title, must have drawn the constructive possession out of the prosecutrix, except where she had actual possession. If Boyce could occupy as his tenant at all, it must *ex necessitate* have the same effect as the entry of Hemphill. If any court of appeals, which recognizes the English common law as the foundation of its doctrine of tenures, has ever admitted that a tenant, by his own act, could hold adversely to himself and thereby deprive his original lessor of a benefit incident to his tenancy, even inside the limits of his original lease, I have been unable, by diligent effort, to find it. If such shifting of fealty could have been considered as treachery and punished with death in the middle ages, the tolerance and encouragement of the act now, by giving it the sanction of the law, indicates, to my mind, that we have not improved upon the ideas of our rude and uneducated ancestors in enforcing fidelity in one of the most important relations incident to civilized society. Our tenure in North Caro- (761) lina, it is true, has been compared to that of tenants by socage, because military service is not incident to it. But there can be no doubt that the rule of honest dealing, which bound every tenant to be true to his landlord, and gave the latter all of the actual benefits incident to the tenancy till the relation ceased, is one of the features of our system that had its origin in the exalted ideas of mutual fidelity due from the one to the other, which extended to every species of tenure in the middle ages.

Estoppels operate between parties and privies. If Boyce had died during the term, his heirs at law would not have been allowed to deny the title of the prosecutrix to the demised premises without first surrendering possession to her, and neither he nor they can be allowed

to attorn to a stranger as to any land of which the tenancy gives them constructive possession, without opening the door for fraud upon the rights of landlords. This proposition would seem to be familiar learning, but the heirs of Boyce would occupy the same relation that he sustains to the prosecutrix. Suppose that they were holding over, and when she was on the eve of instituting summary proceedings to eject, they should suddenly go outside of the seven acres and inclose a field under a lease from Hemphill, before taking that lease they would be estopped from denying her title, and certainly could be ejected from the whole seven-acre tract. But after taking the lease under Hemphill, the holder of the older title, they would hold under him up to their inclosure, and therefore the estoppel would be limited by their own act to the *possessio pedis,* instead of the boundary of the lease. We cannot alter the rule to meet this case. If they would hold at all, they would, as the tenants of Hemphill, stand in his shoes and hold with all the incidents attaching to his occupancy.

In the case already supposed, that the land of the prosecutrix was entirely covered by a paramount title of Hemphill, it would be
(762) a manifest fraud upon the rights of the original lessor if Boyce should take advantage of his lessor by transferring the benefit of constructive possession. The English courts have gone a step further than any court has done in this country, and have established the principle—which discriminating text-writers seem to think correct—that where a lessee occupies, in connection with his tenancy, land not only outside of the demised premises, but outside of his lessor's boundaries, and by such possession acquires title, the presumption is that he occupied for his landlord, and the benefit of the possession inures to the lessor. Tiedeman R. P., sec. 199; *Lloyd v. Jones,* 15 M. & W., 579; *Harrison v. Murrill,* 8 C. & P., 327; *Lisburne v. Davies,* 10 C. & P., 259; *Lewis v. Reese,* 6 C. & P., 610. The lease carries with it an implied covenant on the part of the lessor for the quiet enjoyment of the demised premises during the term. It is equivalent to a stipulation that the lessee shall not for the time be disturbed by act of the landlord or the paramount title of a stranger. Tiedeman Real Prop., sec. 187; 1 Smith's L. C., 185.

The reciprocal obligation resting upon the lessee is, that he shall not, by his own act, in attorning to the holder of the paramount title even as to the land over which his lessee acquires constructive possession by his occupancy, reduce the area over which the landlord's possession extends to the limits of his own actual inclosure, and thereby make it impossible for the landlord to perform his contract for quiet enjoyment to the outside boundaries of the premises described in the lease.

Being in privity with the lessor, there is a mutual obligation which

estops the lessee from doing an act inconsistent with the covenant to which the former is bound to him by the implication growing out of the tenancy. A sub-lessee is also in privity with the original lessor, and can hold him to the implied covenant for quiet enjoyment. Is there no corresponding restriction upon a sub-lessee, which pre- (763) vents him from putting both his immediate lessor and the landlord to disadvantage by entering into an agreement with the holder of the paramount title as to land outside of the demised premises, but covered by the landlord's deed, under which he claims the land demised? There is no force in the suggestion that what has been said is in conflict with the principle stated in *Scott v. Elkin, supra.* The lessee Boyce, as in that case, was "only in (actual) possession of the part embraced in the contract" (the seven acres), and was positively forbidden, in fact, to use timber outside of it but within the boundaries of the deed under which the prosecutrix claimed, while he held constructive possession for her to the outside limit of that deed.

This is the application of the doctrine laid down in *Scott v. Elkin, supra,* to our case. But we are confronted with the further question, not whether the right of the tenant by virtue of the lease extends, as between him and his landlord, outside of the demised premises, but whether he is estopped from shifting the benefit of the constructive possession incident to his tenancy by accepting a lease from the holder of the title paramount against whose claim he holds his landlord bound to protect him. I think that the defendant was estopped from showing title paramount in Hemphill as evidence that he was not a trespasser, and that he had no reason to complain of the liberal ruling of the court that the jury could consider the deed offered in passing upon the question of good faith.

If, in this particular case, the defendant is precluded by his relation as tenant from offering evidence of title paramount, it would be unnecessary to pass upon the vexed question whether in the trial of all indictments under section 1070, it is competent to show title in another than the prosecutrix, whether the title becomes material only in certain peculiar cases, or whether the guilt or innocence of a person charged depends in all cases upon proof of actual or constructive possession. (764)

As to the other point in the case, I fully concur with my brother *Davis,* and deem it unnecessary to add anything to what he has said in support of his view.

PER CURIAM. Error.

THE STATE v. W. T. CUTSHALL.

Fornication and Adultery—Conviction of One Party—Extradition.

1. Where a special verdict, in an indictment for fornication and adultery, found that the defendant for some time lived with a woman as man and wife, under a marriage which was bigamous as to him, and that so soon as the female discovered the previous marriage of the defendant she separated herself from him, and would not have lived with him if she had known the facts, the defendant was properly convicted.
2. In fornication and adultery, one defendant may be convicted and the other acquitted, as the offense is a joint one in the physical acts only, there being no necessity to charge or prove a joint criminal intent, and hence the absence of the criminal intent may be shown in the defense of either, and upon being shown as to one, it cannot inure to the benefit of the other. (*S. v. Mainor*, 28 N. C., 340, overruled in respect to this point.)
3. A prisoner who voluntarily agrees to accompany an extradition agent cannot thereafter object to the absence of the warrant of extradition from the Governor of the State in which he was arrested.

MERRIMON, C. J., dissenting.

INDICTMENT against defendant and Susan E. Pickard for fornication and adultery, tried before *Meares, J.*, at August Term, 1891, of MECKLENBURG.

The defendant alone was on trial.

Before the plea of not guilty was entered, the defendant moved that court refuse to take cognizance of the criminal action, on the (765) ground that the defendant W. T. Cutshall was brought here from the State of Tennessee upon a requisition for bigamy, issued by the Governor of North Carolina upon the Governor of Tennessee, for the execution of which one C. W. Rivenbark was appointed agent for this State. That in proof of said allegation it was shown that said State agent went to Tennessee with said requisition; that upon the arrival of said C. W. Rivenbark at Knoxville, Tenn., he found the defendant under arrest and in the custody of the deputy sheriff, who had arrested him upon a telegram upon the said charge of bigamy; that said Rivenbark appealed to the defendant not to require him to apply to the Governor of Tennessee to get an indorsement of said requisition from the Governor of Tennessee, as it would only operate as a delay in taking the defendant; and requested the defendant to come to North Carolina upon the requisition as it stood, on the ground that the grandson of the said Rivenbark had died in North Carolina, and he, Rivenbark was anxious to return to North Carolina as soon as possible; that Cutchall agreed to and did come with said C. W. Rivenbark to North Carolina.

This motion was overruled by the court and the case ordered to proceed, to which ruling the defendant excepted.

Upon the plea of not guilty, the jury rendered the following special verdict:

"That before 9 February, 1890, the defendant Cutshall represented to one Susan E. Pickard that he was a single man, and she being a single woman induced her thereby to enter into a marriage with him, she, the said Susan, fully believing him, the said Cutshall, at the time of the making of said representations and when the marriage was entered into, to be a single man. That the defendant Cutshall and the said Susan E. Pickard were married in York County, S. C., on said day, the ceremony being performed by a regularly ordained minister of the Gospel; that after the said marriage was celebrated, the defendant and said Susan E. Pickard cohabited for some time as man and wife in the county of Mecklenburg and State of North Carolina, (766) and before the finding of this bill; that at the time they so cohabited, and whilst cohabiting, the said Susan E. Pickard honestly believed that the defendant was her lawful husband, and the jury find that she would not have so cohabited with defendant but for such belief; the jury further find that the defendant, when he and said Susan E. Pickard were married, and whilst they cohabited together, was a married man, and that said Susan E. Pickard immediately upon ascertaining that fact dissolved the connection.

"Upon the foregoing facts, the jury are ignorant as to whether the defendant be guilty or not guilty of the offense charged against him, and thereupon pray the advice of the court thereon. And for their verdict they do say that if upon the whole matter the court shall be of opinion that the defendant is guilty, they so find; otherwise, they find him not guilty."

The court upon the foregoing special verdict, instructed the jury that the facts so found constituted the offense as charged in the bill of indictment, as to the defendant W. T. Cutshall, and thereupon the jury rendered a verdict of guilty as to said W. T. Cutshall, in manner and form as charged in the bill of indictment.

There was a judgment upon the verdict, from which the defendant appealed.

The Attorney-General for the State.
J. A. Forney for the defendant.

CLARK, J. The special verdict finds that the defendant not being legally married to his codefendant (who was not on trial), lived with her for years as man and wife. The interesting question is not now

before us, whether he is not also guilty of bigamy when he has gone through the ceremony of marriage with her in another State,
(767) having at the time a lawful wife living. The State has chosen to prosecute him for fornication and adultery, the court below adjudged him guilty on the special verdict, and the appeal presents the correctness of that ruling for review.

It is true that fornication and adultery is a joint act. It must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse. But it is not essential to show that both parties had a guilty intent. It is sufficient if both parties participated in the unlawful sexual intercourse. This is demonstrated frequently in practice by placing one defendant on trial when nothing need be proven as to the other defendant, who is not on trial, beyond the incidental fact that it is shown as against the party on trial that the unlawful and habitual sexual intercourse existed between them. Nor can it make any difference that here it affirmatively appears that the party not on trial had no guilty intent, for if the guilty intent of both parties is essential to the conviction of the party on trial, the burden would always be on the State to prove it. But in truth, all that is necessary to be shown (when only one is on trial), is that there was illicit and habitual sexual intercourse by the party on trial with the person of the opposite sex, charged in the indictment. There is nothing in this which conflicts with the authority of *S. v. Mainor,* 28 N. C., 340 (though even that is somewhat questioned in *S. v. Rinehart,* 106 N. C., 787), which holds that if one is put on trial and acquitted, the other cannot be convicted. The reason there given for this (if valid) is that the verdict of acquittal establishes against the State that there was no illicit sexual intercourse between the parties, or, in the words of the decision, "that there has been no joint *act.*" But there may, without countervailing that authority, well be, as in this case, an unlawful sexual intercourse wherein one party has a guilty intent, and the other, through ignorance of the facts, not have such intent. The intercourse may be illicit as to both, but perhaps criminal as to one only. It
(768) would be strange, indeed, if the defendant, who has violated the law flagrantly and intentionally for years, by living as man and wife with a woman he knew was not his wife, should not be guilty of the offense of fornication and adultery, because he added to his offense the fraud of making a good woman falsely believe that she was his wife. This case also differs from *S. v. Mainor, supra,* in that here neither were both parties on trial, nor had one been previously tried and acquitted.

In *Alonzo v. The State,* 15 Tex. App., 378, it is said: "While it is true that to constitute adultery there must be a joint physical act, it is

certainly *not* true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery was complete. Thus, if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. But suppose the other party was not mistaken as to such fact, but on the contrary, well knew the true fact which rendered the connection illicit, would this party be regarded as guilty of no offense because the mistaken party was innocent?

"Suppose a father and his daughter are indicted for incestuous intercourse with each other. Upon the trial of the daughter it is conclusively proved that at the time of committing the physical act she was an idiot, or that she was wholly ignorant of the relationship (769) between herself and her father, without any fault of hers; of course, in either of these cases, she would be acquitted. Would it not be monstrous to hold that because of her innocence, the beastly father must go unpunished for his unnatural crime? Such cannot be the law, and such, we believe, is not the law as declared by the weight of authority."

In Missouri it has been held, in a case of incest, where one party had knowledge of the relationship and the other was ignorant of it, that the former may be convicted and the latter acquitted. *S. v. Ellis,* 74 Mo., 385. Bishop, Stat. Crimes, sec. 660, says that when the woman is too drunk to give consent, the man may be prosecuted for rape or adultery, at the option of the prosecuting power. In 2 Whart. Cr. Law, it is also said that the woman may be innocent because irresponsible (for any cause), though the man may be guilty; to same effect *S. v. Saunders,* 30 Iowa, 582; *S. v. Donovan,* 61 Iowa, 278; *Com. v. Bakerman,* 131 Mass., 577.

The fact is not to be lost sight of that in an indictment for fornication and adultery, the State is not called on to prove a criminal intent. The case is made out when it is shown that a man and woman not being married to each other habitually engage in sexual intercourse. That this is "lewd and lascivious" is not required to be shown, but is an inference of law from the facts proved, as with "malice" in indictments

for homicide, even though in the latter case an intent must be charged. As to this offense, no intent is required to be charged or proved. Indeed, when the habitual sexual intercourse is shown, the law casts the burden of showing marriage on the defendants (*S. v. McDuffie,* 107 N. C., 885; *S. v. Peeples,* 108 N. C., 769), both as to this offense and in bastardy proceedings. Either party may avoid such legal conclusion by showing that he, or she, was insane, idiotic, or without
(770) fault ignorant of the facts. But such defense of a want of intent cannot inure to the benefit of the other party, who had the intent. It is otherwise, under *S. v. Mainor, supra,* if the *act* of unlawful sexual intercourse between the two, which it is incumbent upon the State to show, is found in the negative as to one of the two parties charged.

This distinction must exist: (1) Because in the nature of things the State can show no intent except that of an habitual engaging in unlawful sexual intercourse by the parties charged; (2) if the State must show the guilty intent beyond the intent to do the act, the parties not being married to each other, those who lived in illegal habitual sexual intercourse, believing it to be lawful, as Mormons, free-lovers, and the like, would not be indictable; (3) a party who lived in such habitual adulterous intercourse with an idiot or insane person, or who might induce another person to go through the ceremony of marriage before one who was not authorized to celebrate it, by falsely pretending to the other party that the celebrant was a proper officer, would be guilty of no offense. It would always be easy in indictments for this offense to show a pretended ceremony before some one not an officer, and that the woman believed him to be such, and neither party (if this were law) could be convicted. The man could thus have the benefits of matrimony, without its responsibility as to offspring or the public.

In the present case the male defendant has grossly violated the law, and has sinned against the woman as well as the law, and her simple, unsuspecting "faith" in his honor and truth cannot "be imputed to him for righteousness," though it may be so as to herself, if she was innocent of "contributory negligence" and made reasonable inquiry.

Speaking for the majority of the Court, the case of *S. v. Mainor, supra,* cannot be sustained on reason, since one may be put on trial for this offense and acquitted for lack of proof, and when the other is tried the proof may be ample, and there can be no estoppel
(771) as to the State *in favor* of a party not on trial (*S. v. Caldwell,* 8 Baxter (Tenn.), 576), as there is none *against* him when put on trial for this offense after conviction of the other party. *S. v. Parham,* 50 N. C., 416. Or when both are on trial together, there may be ample proof as to one by confession, as in *S. v. Rinehart, supra,* which

cannot be evidence against the other. *S. v. Mainor, supra,* stands alone. Dr. Wharton (2 Cr. Law, 1738) expressly refers to it, and says that it cannot be sustained either by authority or reason. Indeed, however, as we have said, the decision in *S. v. Mainor* is placed on the ground that "the record affirms that there was no joint act." Here there is no verdict establishing, as to the woman, that she did not have illegal habitual sexual intercourse with the man. On the contrary, it is expressly found that she did. If she is withdrawn from liability by her lack of knowledge of the facts, he can receive no shelter or benefit from an exculpatory matter in which she does not share.

This offense differs from an indictment for conspiracy, in that the latter requires the concurrence of two or more *minds.* No act whatever need be shown. *S. v. Brady,* 107 N. C., 822. Hence, if the indictment charges two persons with a conspiracy, and by a verdict the nonconcurrence of one mind is shown, there can be no conviction of the other defendant. The offense is mental and lies wholly in the intent. But fornication and adultery is a joint physical act. No intent is charged, and, of course, none need be proven. If the joint *act* is shown, the nonparticipation of the mind of one of the parties will not relieve the other. Hence, in a late case under the Virginia statute, of fornication and adultery (which defines the offense *verbatim* in the language of our statute), it is held that either party can be *indicted* alone in a separate bill. *Scott v. Commonwealth,* 77 Va., 344. This would not be permissible as to conspiracy, or any other offense where the concurrence of two persons in the intent, and not merely in the act, must be alleged and proven. An offense on "all fours" with this (772) is the crime of incest, which is, in every particular, the crime of fornication and adultery with the sole addition of the relationship of the parties, and as to that offense the authorities all agree that one may be convicted when the other, from lack of mind or ignorance of the facts, may properly be acquitted. When the habitual sexual intercourse between persons not married to each other is in proof, such intercourse is "lewd and lascivious," nothing else appearing. If by lack of mind, or want of knowledge, it is not so as to either party, it is none the less still "lewd and lascivious" as to the other.

As to the other plea, it is sufficient to say that the defendant came back to the State voluntarily, not upon extradition papers, and the point intended to be raised in that regard is not presented.

MERRIMON, C. J., dissenting: The statute (Code, sec. 1041) defines and forbids "fornication and adultery" in these words: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misde-

meanor." To constitute the sexual intercourse thus prohibited, the act or acts must have the quality of lewdness and lasciviousness, not simply on the part of one, but both of the parties. The offense complete is their joint act in all material respects and cannot be otherwise committed. The Court has so repeatedly decided. In *S. v. Mainor,* 28 N. C., 340, it was held that as one of the parties charged with this offense was found guilty and the other not guilty, no judgment could be entered against the former. *Chief Justice Ruffin,* saying for the Court: "The farthest the courts have gone is to allow one of the parties to be tried by himself and convicted, and then judgment is given against that party, because, as to him, the guilt of the other party is found as well as his own. But when the one has been previously
(773) tried or acquitted, or where both are tried together and the verdict is for one, the other cannot be found guilty, for he cannot be guilty since a joint act is indispensable to the crime of either, and the record affirms that there was no such joint act." To the same effect is *S. v. Parham,* 50 N. C., 416. In *S. v. Lyerly,* 52 N. C., 158, it was decided that where two are indicted for fornication and adultery, and one of the parties was taken and put on his trial, and there was a general verdict of guilty, there might be judgment against him. *Manly, J.,* saying for the Court, that "it is true the offense cannot be committed except by more than one, but the general verdict of guilty finds the guilt of the woman as well as the guilt of the defendant, as against the latter. The extent to which the cases have gone is where one only is convicted, and others *acquitted,* there can be no judgment." These cases have been oftentimes recognized in material respects, and no one of them has ever been overruled. In the recent case of *S. v. Rinehart,* 106 N. C., 787, *S. v. Mainor* and *S. v. Parham, supra,* are expressly cited for the purpose I here cite them, and approved. While there are decisions in other States not in harmony with them, it seems to me that this Court ought to be governed by and adhere to its own decisions, made repeatedly and by judges of very great ability, learning and experience. They long ago settled the interpretation of the statute creating and defining the offense under consideration, and the Legislature, it must be presumed, had knowledge of such decisions and has not seen fit to change or modify the statute in any material respect. In my judgment it is too late to overrule what has been so decided, and start upon a new line of interpretation that will end we know not where. Possible cases of enormity cannot warrant a departure from an interpretation of the statute so well settled.

It seems to me that the decision in this case necessarily, in effect, overrules the cases cited *supra.* The jury rendered a special verdict.

The facts found as to the male defendant, the appellant, who alone was put upon his trial, tend strongly to show that he was (774) guilty of the much graver crime of bigamy. But as to the female defendant, who was not put upon her trial, the facts found by the verdict show that she was not guilty. She was innocent—she thought that the male defendant was her lawful husband, and as soon as she became sensible of his perfidy and crime she ceased to live with him. She did not, in a legal sense—that of the statute—"lewdly and lasciviously associate, bed and cohabit together" with him. As she was not guilty of the offense charged in any view of it, how, in view of the statute and the cases cited above, can the appellant be guilty of the particular offense charged? I am unable to see.

Incest was not an indictable offense in this State until it was made so by recent statute (Code, secs. 1060, 1061, Acts 1879, ch. 16, sec. 12), and it is materially different from that under consideration. *S. v. Keesler,* 78 N. C., 469. It makes the mere act of carnal intercourse between the male and female classes of persons specified indictable, and no doubt one of the parties might be convicted and the other acquitted. But the statute in respect to fornication and adultery does not, as we have seen, make the simple act of sexual intercourse indictable. To create this offense, the male and female not being married to each other, must "lewdly and lasciviously associate, bed and cohabit together." There must exist the common purpose and knowledge of it to be lewd and lascivious in the association, bedding and cohabiting forbidden, else the offense is not complete. If the facts are as the jury found them to be, it would seem that the appellant should have been indicted for bigamy, and not for the offense charged in the indictment. The argument that a bad man *may* escape, cannot have force here.

PER CURIAM. No Error.

Cited: S. v. Cutshall, 110 N. C., 552; *S. v. Cody,* 111 N. C., 726; *S. v. Lawson,* 123 N. C., 744; *Moore v. Palmer,* 132 N. C., 977; *S. v. Simpson,* 133 N. C., 679; *S. v. Blackley,* 138 N. C., 622; *S. v. Connor,* 142 N. C., 708; *S. v. Ray,* 141 N. C., 713.

(775)

THE STATE v. JEFF. LINGERFELT AND JAMES SWANSON.

Arrest—Bail—Principal and Surety—Recognizance.

1. Bail in criminal, as well as civil, actions have the right to pursue their principal and arrest him at any time or place; they may, if necessary, break and enter his house or pursue him into other States for that purpose, and they may depute these powers to an agent. No process is needed, the principal being regarded by the law as at all times in the custody of the bail.
2. The fact that the recognizance has been forfeited and a conditional judgment against the sureties has been entered, will not deprive them of their right to arrest and surrender their principal.

INDICTMENT for murder, tried at Fall Term, 1891, of CHEROKEE, before *Merrimon, J.*

The defendants were charged with the murder of Marion Cole in the county of Cherokee, in July, 1891. It appeared in evidence that the deceased was indicted for violation of the United States revenue laws in the Circuit Court of the United States for the Eastern District of Tennessee, and had given a bond, with the usual condition in such case, with one of the defendants as surety thereto, to make his personal appearance before said court in Knoxville, Tennessee, at the time mentioned therein. He failed to appear, and thereupon it was considered by the court that said deceased and his sureties forfeit and pay to the United States "the sum of one thousand dollars, according to the tenor of their bond, unless they appear and show cause to the contrary," and it was ordered that a *scire facias* issue.

There was much evidence upon the trial in the court below, but it is not necessary to the understanding of the opinion of this Court to report it.

The prisoners asked the court to charge the jury:

3. That Swanson was one of the bail of the deceased and had a right to pursue him into this State and capture him, and that that right continued until final judgment was rendered against him, and
(776) that he and his co-surety had the right to appoint Lingerfelt as their agent to capture or aid in capturing the deceased.

4. That defendants had the right to use so much force as was necessary to capture deceased.

7. That Lingerfelt had a right to make the arrest and was clothed with the same power for doing so as an officer; that he had a right to arrest him peaceably if he could and forcibly if he must, and if, in making the arrest, he used no more force than was necessary to do so, he was not guilty.

His Honor refused to give these instructions, and charged the jury:

1. That there was no evidence in the case to show that the prisoners had authority or the right to arrest the deceased.

The prisoners excepted. There was a verdict of guilty as to both defendants, and they appealed from the judgment pronounced.

The Attorney-General for the State.
W. W. Jones and Ben Posey for defendants.

SHEPHERD, J. The only exception necessary to be considered is addressed to the charge "that there was no evidence in the case to show that the prisoners had authority or the right to arrest the deceased." Our first impression was in favor of the view taken by the court below, but upon an examination of the authorities (which were probably inaccessible to his Honor) we are of the opinion that the sureties on the bail bond of the deceased had the right to arrest him in this State, and that they could appoint an agent to make such arrest or to assist in doing so.

It is insisted that the "bail only represents the court from which his authority emanates, and where the court has no power to arrest, the bail has no power to arrest." Such, indeed, is the language of Mr. Wharton (3 Vol. C. L., sec. 2976), but the only authority he (777) cites is from Canada, where it was held that the bail could not follow his principal from New York and arrest him in the British dominions. This it was said would be dangerous to the national independence of Canada.

As between the States, however, a different rule applies, and the distinction is sustained by the highest authority.

In *Nicolas v. Ingersoll,* 7 Johns., 145, the point was elaborately discussed, and the Court said that "the power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bail-piece is not a process, nor anything in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail on surety given. It cannot be questioned but that bail in the common pleas would have a right to go into any other county in the State to take his principal; this shows that the jurisdiction of the court in no way controls the authority of the bail, and as little can the jurisdiction of the State affect this right, as between the bail and his principal."

It was also decided that the bail might "depute to another to take and surrender their principal."

In *Parker v. Bidwell,* 3 Conn., 84, it was decided that "bail, or a person deputed by him for that purpose, may take the principal in an-

other State or wherever he may be and detain him or surrender him into the custody of the sheriff." See also *S. v. Mahon,* 1 Harrington (Del.), 368.

In *Republica v. Gastor,* 2 Yeates (Pa.), 263, the Court said: "The passage from Vattel (quoted on the argument) applies merely to nations entirely independent of each other. . . . In the relation in which the several States composing the Union stand to each other, the bail in a suit entered in another State have a right to seize and take the principal in a sister State, provided it does not interfere with (778) the interest of other persons who have arrested such principal. But where actions have been brought against the party previous to such seizure, the same right does not exist; nevertheless, if they have originated them by collusion with the defendant and merely to protect him from being surrendered by his bail, the court, on good grounds, would interfere and prevent such improper practice."

The principle asserted is not restricted to bail in civil cases, but applies equally to recognizances in criminal prosecutions. Its application to such cases is explicitly recognized in *Reese v. United States,* 9 Wall., 13; *Taylor v. Taintor,* 16 Wall., 371, and other cases. Upon this general principle, the Court, in the case last cited, remarked: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their right in person or by agent; they may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. . . . In 6 Modern, 231, it is said: 'The bail have their principal on a string and may pull the string whenever they please, and surrender him in their discharge.' The right of the bail in civil and criminal cases are the same."

It is urged by the Attorney-General that the right, when exercised in another State, may be attended with inconvenience and trouble, but with the qualifications stated in *Republica v. Gastor, supra,* it is not plainly apparent how any evil may result. Be that as it may, the principle is firmly established by a uniform course of judicial decisions, both State and Federal, and until the Legislature sees fit to regulate the manner in which the bail from another State is to exercise (779) his rights, we do not feel at liberty (especially in a case of life and death) to assume the exceptional position that the common law method as generally recognized in the United States does not apply in North Carolina.

It is urged, however, that the recognizance having been forfeited by the default of the principal to appear in the Tennessee Court, the right of bail to take his principal was extinguished. It will be observed that the judgment was only conditional, and that a *scire facias* was ordered to be issued. It has never been understood in this State, nor do we understand the common law, that such a judgment has the effect contended for.

The right of the bail to take his principal in a criminal case before final judgment, and to produce him in court in mitigation of the penalty, is generally recognized in North Carolina, and we have been referred to no authority where the contrary has been held.

It is entirely clear that payment by the bail in criminal cases does not discharge the principal from his obligation to appear in court, and it is intimated, even in that case, that the government, by way of subrogation, will lend the sureties its aid "in every proper way by process and without process to seize the person of the principal and compel his appearance."

However this may be, we are clearly of the opinion that a mere conditional judgment, like the one before us, does not deprive the sureties of the remedies which previously existed in their favor.

In view of the ruling of the court that the prisoners (one of whom was a surety and the other his alleged agent) had no authority to arrest the deceased, it became immaterial to instruct the jury as to the manner in which the alleged authority was made known to the deceased, and whether such authority, in the absence of its denial, or a demand, should have been exhibited after the deceased was fully informed by the agent of its character, and no objection being made to its (780) validity. *S. v. Garrett,* 60 N. C., 144.

These and other points bearing upon this phase of the case were not, for this reason, we presume, explained to the jury, nor discussed before us on the part of the State.

It is entirely clear from the record, as well as the argument of the Attorney-General, that the ruling in question was based upon the principle we have considered, and there being error in this it must necessarily follow that the prisoners are entitled to a new trial.

Error.

Cited: S. v. Schenck, 138 N. C., 564; *Pickelsimer v. Glazener,* 173 N. C., 634; *S. v. Finch,* 177 N. C., 605.

THE STATE v. JOHN W. DAVIS.

Bigamy—Indictment—Evidence—De Facto Officer—Juror, Qualification of—Variance—Instructions to Jury.

1. To disqualify a juror of the regular panel for nonpayment of taxes it must appear that the failure to pay the taxes was for the fiscal year preceding the annual revision of the jury list at which such juror was drawn.
2. Upon the trial of an indictment for bigamy, it was not error to refuse to charge the jury that they could not convict unless they were satisfied, beyond a reasonable doubt, that the magistrate who solemnized the first marriage was duly appointed and qualified; it was sufficient proof of his official character to show that he was an officer *de facto*.
3. It is not necessary, in an indictment for bigamy, to set out the name of the first wife, nor to negative that she had been divorced from defendant.
4. The indictment charged the marriage to have been to Dixie Marshall, and the evidence showed her name to be Lee Emma Dixie Marshall: *Held*, to be no variance, as there was evidence that she was known to defendant and others by the name given in the bill.
5. The evidence showing that there were a number of eye-witnesses to the marriage, and a certified copy of the license with return indorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid.
6. An indictment for bigamy which charges that defendant "wilfully, unlawfully, and feloniously, being a married man, did marry one W. during the life of his first *wife*," sufficiently avers the first marriage.

(781) INDICTMENT for bigamy, tried at Fall Term, 1891, of ASHE, *Bynum, J.*, presiding.

The Attorney-General for the State.
W. W. Bower for defendants.

CLARK, J. The challenge to the juror was properly overruled. The cause was tried at August Term, 1891, of ASHE. The regular jurors were, therefore, drawn from the list revised by the commissioners at their session on the first Monday in September, 1890. They could not then have thrown out a juror for "not having paid his taxes for the fiscal year ending June, 1890," since that tax list did not go into the sheriff's hands before such meeting in September, 1890. Laws 1889, ch. 218, sec. 39. The commissioners of the county were required to revise the list in September, 1890, by selecting the names of such persons of good moral character and of sufficient intelligence as shall "have paid tax for the preceding year," i.e., the fiscal year ending June, 1889. This has often been decided. *S. v. Carland*, 90 N. C., 668; *S. v. Haywood*, 94 N. C., 847; *Sellers v. Sellers*, 98 N. C., 13; *S. v. Gardner*,

104 N. C., 739. Laws 1889, ch. 559 cannot affect the case whether that act, which provides for a quadrennial instead of an annual revision of the jury list, be held not to take effect till 1892, or shall be construed to also forbid annual revision between the date of the act and 1892, since in the latter case it would merely make the revision of 1888 valid till 1892, and could not disqualify a juror for not having paid his taxes for the fiscal year 1890. (782)

The second, third and fourth prayers for instructions, which were refused, each contained the proposition that the defendant could not be convicted unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was "a duly appointed, qualified and acting justice of the peace." They were, therefore, properly refused. It was sufficient to show that such justice was a *de facto* officer. It was not essential to show that he was "duly appointed and qualified." There was, therefore, no error in refusing the fifth prayer as to the presumption of such magistrate being out of office until shown he was again "lawfully inducted into office." In *S. v. Robbins,* 28 N. C., 23, which was an indictment for bigamy, it is said, "In the case of peace officers and justices of the peace it is sufficient to prove that they acted in those capacities even in case of murder." In that case, as in this, the marriage was solemnized by a person who had been acting openly and notoriously before and after the marriage as a justice of the peace, and it was held that it was to be taken that he was at such time a justice "until the contrary be shown." In *Burke v. Elliott,* 26 N. C., 355, it was said by *Ruffin, C. J.,* "Hines, whether regularly appointed or not, was acting in the office of constable at the time and had been for six months before, and therefore his acts in office were valid. It is a settled principle that the acts of officers *de facto* are as effectual, as far as the rights of third persons or the public are concerned, as if they were officers *de jure.* The business of life could not go on if it were not so." In *Gilliam v. Reddick, ib.,* 368, the same eminent judge speaks of this principle as "a well settled and ancient rule of law." These cases have always been followed and never questioned, but we need not quote further than the recent case of *S. v. Lewis,* 107 N. C., 967, in which the subject was reviewed with a wealth (783) of authorities by *Mr. Justice Avery.* In the present case, the evidence of the alleged justice having acted as such openly and notoriously for a long period before and after the marriage, was plenary and uncontradicted. The evidence offered by the journals of the Legislature to show that his name did not appear among the justices of the peace elected by that body, did not show even that he was not a justice *de jure,* since justices of the peace in certain cases are appointed by the Governor, and in others by the clerk of the Superior Court.

The sixth prayer for instruction was: "If you find from the evidence that the name of the woman to whom the defendant is alleged first to have been married is Lee Emma Dixie Marshall, the bill of indictment charging that he was married to Dixie Marshall, it is a variance that is fatal." This the court gave, but added, "unless you find that she was known as Dixie Marshall, and was so known and acknowledged and married by defendant." There was ample evidence to show that she was known as Dixie Marshall, and there was no error in this of which the defendant could complain. Indeed, it was not required to allege the name of the first wife at all. Whart. Cr. Law, 1714, and cases there cited. On a motion for a new trial the defendant further excepted, because the court instructed the jury that if the marriage "license was exhibited to the justice, it would be presumed that the ceremony was regular and fulfilled the requirements of the law," and that there was no evidence that such license was exhibited to him. There were eye-witnesses who testified to the marriage, and a certified copy of the marriage license, with the usual certificate, filled up by the justice who had married the defendant, was in evidence. We find, therefore, no error in this instruction. The second ground of error assigned on the motion for a new trial is, in effect, that the burden was on the State to fully satisfy the jury that the justice who married the defendant was a justice
(784) of the peace *de jure* "duly appointed." This has already been disposed of.

The defendant also assigned as error that the court failed to instruct the jury that if they had, on the whole evidence, a reasonable doubt whether the alleged justice of the peace, at the time of the first marriage was a "duly qualified justice of the peace" or "whether at the time of the second marriage defendant was of sufficient mental capacity to know the nature and consequence of his acts," they should return a verdict of not guilty. The court, instead, charged that "the burden was on the defendant to satisfy the jury, but not beyond a reasonable doubt, that he had not sufficient mental capacity to know right from wrong, and if they were so satisfied, they would acquit"; otherwise, they would proceed to consider the other questions presented. In this there was no error. *S. v. Haywood,* 61 N. C., 376; *S. v. Payne,* 86 N. C., 609.

The defendant further moved in arrest of judgment, "for that the indictment does not sufficiently aver the first marriage, but alleges it, if at all, by way of recital only." The indictment in this respect charges that the defendant "wilfully, unlawfully and feloniously, being a married man, did marry one Emma V. Warren during the life of his first wife Dixie Davis, whose maiden name was Dixie Marshall, he, the said John W. Davis, then and there well knowing that his said first wife was living, and he, the said John W. Davis, not having been

at the time of his second marriage lawfully divorsed from his first wife." The allegation is in substantial compliance with the statute, Code, sec. 988, and is warranted by the precedents. Indeed, it was not necessary to negative the divorce. *S. v. Norman,* 13 N. C., 222.

PER CURIAM. No Error.

Cited: S. v. Melton, 120 N. C., 593, 596; *S. v. Newcomb,* 126 N. C., 1106; *S. v. Yoder,* 132 N. C., 1118; *S. v. Goulden,* 134 N. C., 746; *S. v. Cloninger,* 149 N. C., 572.

(785)

THE STATE v. J. A. EASTMAN.

Roads and Highways—Public Square—Obstruction—Indictment.

1. An overseer is not essential to the existence of a highway.
2. A public square, in a city or town, within which is situated the courthouse, is a public highway, and an indictment for its obstruction, in which it is described as "a certain public square and common public highway," and giving boundaries, is not redundant.
3. The fact that the proper authorities have been empowered to sell a portion of a public square, the power not having been exercised, does not destroy its character of a public highway.

CRIMINAL ACTION, tried at Spring Term, 1891, of BURKE, *Hoke, J.,* presiding.

The indictment charged that the defendant at, etc., "unlawfully and wilfully did obstruct a certain square and common public highway there situated next and adjoining the courthouse in the said county-seat of Morganton, and leading to and away from, as well as around one side of the said courthouse, from Sterling street in said town on the southwest side of said courthouse into Green street on the southeast side of said courthouse, by then and there digging holes in, and erecting a line of posts in, upon and across said public square and common public highway over, upon and across which said public square and common highway the citizens of the State were and long have been accustomed to pass and repass, so that the citizens of the State were prevented from going in, upon and over said public square and common public highway for a long space of time, to wit, for the space of a day, and could not go, return, pass and travel as they ought and were accustomed to do, and had a right to do, to the great damage and annoyance and to the

common nuisance of the citizens and people of the State, and contrary to the peace and dignity of the State."

Defendant pleaded not guilty. Upon the trial there was a ver-
(786) dict of guilty, whereupon the defendant "moved to set aside the verdict on the ground that there was not sufficient evidence to justify and sustain it." Motion overruled.

The defendant then moved in arrest of judgment:

1. For redundancy, in that the bill attempted to charge the defendant with two distinct and separate offenses in one count, to wit, a nuisance in obstructing a public common, and an obstruction to a public highway.

2. For that the court had no jurisdiction of the offense of obstructing a public highway. Motion denied.

Thereupon the court entered judgment against the defendant, who, having excepted, appealed to this Court.

The Attorney-General and J. T. Perkins for the State.
John Devereux, Jr., for defendant.

MERRIMON, C. J. It would be better if the indictment were fuller and more precise in describing the "square and common highway" as part of the public square of the county of Burke on which is situate the courthouse of that county. Still it appears sufficiently to be seen and understood that the highway charged to have been obstructed by the defendant was part and parcel of that square.

The objection that the indictment is bad because it charges two distinct offenses is unbounded. It charges, and its clear purpose is to charge, that the defendant did obstruct a "certain public square and common public highway there situate," and charges facts descriptive of it—its location, bounds, the uses to which it is devoted, and how and where it was obstructed. It charges also the obstruction of the highway described, and though there may be some redundancy of facts charged and it might have been framed with greater technical precision and formality, it charges but a single offense with sufficient clearness to enable the court to see what it is, and the defendant to make any
(787) defense he may have. It does not charge, as suggested, the obstruction of the public square as "a public common," and the obstruction of a separate and distinct highway—it charges the obstruction of the public square as constituting a highway—as such square and highway. The redundancy of statement complained of does not confuse or obscure the charge in any substantial respect. The indictment is certainly sufficient in substance.

So much of such public square as is around and about the courthouse

and devoted to the purpose of a highway, becomes such, not simply by the use of it for such purpose, but as well by virtue of the statute which empowers the proper county authorities to purchase real property for proper public buildings, and to designate and direct the use of the same. Parts of it may be, and not infrequently are, devoted to the use of pedestrians, while other parts are used for and devoted to the purpose of passing and repassing, going to and fro, with carriages, wagons, carts, horses, etc., etc. The purpose is to enable all persons, the people, going to and from the courthouse to have ample and convenient public way and means to do so. This is a material part of the purpose of what is commonly and not inaptly called the "public square" of the county. It belongs to the county. The courthouse is erected upon it, and so much of it as is used for the moving about of the people constitutes and is a highway recognized, allowed and protected by the law. It belongs to the public, and they use it of right until public authority shall abolish it. Ordinarily, an overseer and laborers are not formally assigned to "work it" and keep it in order as in the case of a public road. But the board of commissioners of the county have charge and supervision of it, and it is their duty to keep it in repair and order to be used, and as well to protect it against invasion and injury that might be done by unwarranted intruders. An overseer is not essential to the existence of a highway. And though there be none, still no (788) one has the right or privilege to obstruct it. The statute (Code, sec. 2065) expressly makes it indictable to obstruct it, and the Superior Court has jurisdiction of such offense. The public square of a county around and about the courthouse being a highway, it is indictable to obstruct the same. *S. v. Long,* 94 N. C., 896; *S. v. Smith,* 100 N. C., 550; Elliott R. & S., 2, *et seq.*

The defendant insisted that "there was not sufficient evidence to justify and sustain" the verdict of guilty. If there was any evidence to go to the jury, it was their province to determine its weight and sufficiency to warrant a verdict of guilty. The court below might, in its sound discretion, set the verdict aside and grant a new trial, if it deemed the verdict against the weight of evidence, but the exercise of that discretion is not reviewable here. If the defendant meant to insist that there was not evidence to go to the jury, then his contention is certainly groundless. There was abundant evidence of witnesses, to which there was no objection, certainly so far as appears, tending to prove the charge as laid in the indictment. It may be that a material part of this evidence was not the best evidence and that it might have been excluded, if objection had been made in apt time, but no objection was made, and in the absence of objection it might properly go to the jury.

The learned counsel of the defendant brought to our attention the

statute (Pr. Laws, 1885, ch. 120, sec. 68), which confers upon the mayor of Morganton, in which the public square referred to is situate, to sell the part thereof to which the indictment has reference, and he insisted that it ought to be interpreted as abolishing so much of the public square as it refers to and embraces. Such defense, so far as appears, was not made or relied upon in the court below. The statute, if we could properly take notice of it, did not of itself abolish or pur-
(789) port to abolish the public square, it simply conferred upon the mayor power to sell it for the purpose and in the way prescribed, and it does not appear that he ever exercised the power or at all disturbed the use of it as a highway. In no aspect of it, as it appears to us, can it be treated as serving the purpose for which it is invoked here.

There is no error, and the judgment must be

Affirmed.

Cited: S. v. Godwin, 145 N. C., 464; *Haggard v. Mitchell,* 180 N. C., 261.

THE STATE v. J. A. LANCE.

Costs—Prosecutor—Judge's Finding Conclusive.

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned.

The defendant J. A. Lance and four others were indicted for ASSAULT AND BATTERY with deadly weapons upon J. H. Sumner, and tried at June Term, 1891, of the Criminal Court of BUNCOMBE, before *Carter, J.*

There was a verdict of not guilty as to the defendant J. A. Lance, and the solicitor consented to a verdict of not guilty as to the other defendants. The counsel for the defendants moved that J. H. Sumner be marked as prosecutor, whereupon the court made the following order:

"On the hearing of the testimony, the court being of the opinion that J. H. Sumner should be marked as prosecutor in this case, it is adjudged that he be so marked. The court being further of the opinion, from evidence on the trial, and the affidavits and testimony, that the prosecution of this case was both frivolous and malicious, and that the said prosecutor J. H. Sumner pay the costs of this case, and in

default of such payment that he be imprisoned in the common (790) jail of Buncombe County until the same is paid and then discharged according to law."

Whereupon the prosecutor Sumner appealed.

The Attorney-General for the State.
No counsel for defendant.

DAVIS, J. Under sections 737 and 1204 of The Code, in all criminal actions if the defendant be acquitted, *nolle prosequi* entered, or judgment arrested, if the prosecution shall appear to have been frivolous or malicious the court may order the prosecutor to pay the costs, whether marked on the bill or not; and, under section 738 of The Code, he may be imprisoned for the nonpayment thereof if the court, judge or justice before whom the trial was had "shall adjudge that the prosecution was frivolous or malicious." It is found as a fact by the judge below that the prosecution was both frivolous and malicious, and he adjudged that the prosecutor Sumner pay the costs, and this is conclusive. *S. v. Hamilton,* 106 N. C., 660.

No error.

Cited: S. v. Bailey, 162 N. C., 554; *S. v. Trull,* 169 N. C., 370.

THE STATE v. JOHN E. GRAY.

Forcible Trespass.

Where the defendant, who was on horseback, procured from the lady of the house a due bill by asking to see it, put it in his pocket, asserting his intention not to pay it, and when she demanded its return, he used rough language to her and carried it away, and she did not attempt to take it back because she was afraid, he was guilty of forcible trespass.

INDICTMENT for forcible trespass, tried before *Bynum, J.,* at Fall Term, 1891, of BURKE. (791)

The jury returned a special verdict in the following words:

The defendant John Gray stood a horse in Burke County in 1888 and 1889. S. A. Johnson had contracted with him for a season in each of said years at the sum of $10 for each year, the defendant insuring a colt for each year. There was no colt produced for the year 1888,

but was for the year 1889. During the year 1888 the defendant boarded with S. A. Johnson, and left without paying his bill, but giving his due bill for the same, payable to the wife of the said S. A. Johnson, in the following words and figures, to wit:

$5.90 due V. A. Johnson.

To board, five dollars and ninety cents, to be paid 1889, in April or May.

28 June, 1888. JOHN his (X) mark E. GRAY.

In the year 1890 the defendant rode up in the road to the fence surrounding the yard of the said Johnson and called. The wife of Johnson came out in the yard and defendant told her he had come to settle up in full all accounts. Mrs. Johnson then went in the house and got the due bill and went to the fence, remaining on the inside of the yard, defendant remaining on his horse on the outside of the yard. Mrs. Johnson said: "Your due bill is five dollars and ninety cents, which makes us owe you four dollars and ten cents." Defendant said, "Let me see the due bill," and reached from where he sat on his horse across the fence to Mrs. Johnson, who had the due bill in her hand. She did not refuse to let him take the due bill, as she supposed he wished to see if she had stated the amount correctly. She had, at the time, $4.10 with which to pay the balance for the season of 1889. Defendant
(792) said, "I have got the due bill now, and have been wanting it for some time," and put it in his pocket. Mrs. Johnson demanded it back several times, but he refused to give it back, saying he would not allow that due bill on the season of 1889. Mrs. Johnson then called one of her children to go for her husband, when the defendant started to ride off, telling her to tell her husband to meet him in Morganton; that defendant began using rough language to Mrs. Johnson when she demanded the due bill back; that she did not attempt to take it back from defendant, because she was afraid.

If, upon the finding, the court is of opinion that the defendant is guilty, then the jury find him guilty. If the court be of opinion that he is not guilty, then we find him not guilty.

The court being of opinion that the defendant was not guilty under the findings of fact, so stated to the jury, when the jury returned a verdict of not guilty.

It was adjudged that the defendant be discharged, and the State, having excepted, appealed.

The Attorney-General and S. J. Ervin for the State.
J. T. Perkins for defendant.

CLARK, J. In *S. v. Wilson,* 94 N. C., 839, and *S. v. Talbot,* 97 N. C., 494, it was held that though an entry on land was peaceable and even with permission of the owner, if, after getting upon the premises, the defendant uses violent and abusive language and does acts calculated to intimidate, he is guilty of a forcible entry; that though "not at first a trespasser he became such as soon as he put himself in forcible opposition to the owner."

Apply that to the case before us. The only difference is that here personal property was taken possession of peaceably, but carried off forcibly by intimidation and in a manner calculated to produce a breach of the peace. The defendant, who was on horseback (793) and who had ridden up to the premises of another, procures possession of a due bill of the lady of the house by asking to see it, he puts it in his pocket, asserting his intention not to pay it, and when she demands it back "he began," the special verdict states, "using rough language to her, and she did not attempt to take it back from him because she was afraid." When she sent one of the children to call her husband, the defendant rode off, carrying the paper with him.

In *S. v. Barefoot,* 89 N. C., 565, citing *S. v. Armfield,* 27 N. C., 207, it is held that forcible trespass is the taking personal property by force from the possession of another in his presence, and that it is not essential that the owner should forbid it if taken against his will; and in *S. v. Pearman,* 61 N. C., 371, it is said that it is not necessary that the owner should actually be put in fear if such taking is in a manner *calculated* to intimidate, alarm or put in fear, or to create a breach of the peace. Here the facts are found that the lady did forbid the carrying off of the property, demanding it back repeatedly, and that she did not attempt to take it back "because she was afraid."

The case differs from *S. v. King,* 74 N. C., 177, for in that case there was nothing calculated to intimidate or put in fear—no weapon or inequality of force—but bare words only, and it is not made to appear, as in the present case, that the prosecutor did not attempt to retake possession of the goods because deterred by inequality of force or being actually put in fear. This case is more nearly on "all-fours" with *S. v. McAdden,* 71 N. C., 207, where the defendant was held guilty who got possession of the prosecutor's cow peaceably in his temporary absence, but drove her off after his return against his remonstranee, he not offering actual resistance because of inequality of force. Upon the special verdict, judgment should have been entered against the defendant.

Error.

Cited: S. v. Woodward, 119 N. C., 838, 839; *S. v. Webster,* 121 N. C., 588, 589; *S. v. Tuttle,* 145 N. C., 489.

(794)

THE STATE v. JACOB RHYNE.

Evidence—Competency—Exception to Evidence.

1. In an indictment for embezzlement it is not competent for the defendant, on cross-examination of a witness who had testified that when he left the store there was a two-dollar bill in the drawer and that when he returned it was gone, to ask the witness if he told the defendant of the loss, and what was his explanation of it, the latter being the defendant's declaration in his own interest and not a part of the *res gestæ*.
2. A statement of the evidence expected to be elicited must accompany an exception to the refusal to admit it.

INDICTMENT for embezzlement under section 1014 of Code, tried before *Graves, J.*, at Fall Term, 1891, of GASTON.

The facts are stated in the opinion.

The Attorney-General for the State.
G. F. Bason for defendant.

CLARK, J. The State offered as a witness a clerk in the store of the prosecutors, who testified that on one occasion, when he went to dinner, there was a two dollar bill in the cash drawer; that when he left the store the defendant was the only clerk left there, and that when witness returned from dinner the two dollar bill was gone. On cross-examination, this witness was asked if he inquired of defendant upon his return to the store what had become of the two dollar bill, and if defendant gave any explanation. The evidence on objection was ruled out, and defendant excepted. There was much other evidence not objected to.

If the State had brought out that the defendant was accused of the crime, it would have been competent for the defendant to have rebutted the implied admission of guilt which might have been argued
(795) from his silence by giving his reply. *S. v. Patterson,* 63 N. C., 520; *S. v. Worthington,* 64 N. C., 594. But it was certainly not competent for the defendant to give in evidence the fact that he was so charged, for the purpose of giving his unsworn declarations when they were no part of the *res gestæ*. *S. v. Scott,* 8 N. C., 24; *S. v. Hildreth,* 31 N. C., 440; *S. v. Brandon,* 53 N. C., 463; *S. v. McNair,* 93 N. C., 628. He could not thus make testimony for himself. Had the defendant testified that the charge was untrue, he could have shown as corroborative evidence, either by himself or by this witness, that he made a similar statement when first charged. *S. v. Whitfield,* 92 N. C., 831. But this evidence is neither asked to rebut an implied admission from

his silence nor as corroborative evidence. The objection is further to be sustained on the ground that it is not stated what the defendant expected to show by the inquiry, and it does not therefore appear that he was injured by his exclusion. *Knight v. Killebrew,* 86 N. C., 400, and cases there cited. The other exception was abandoned on the argument.

PER CURIAM. No error.

Cited: Burnett v. R. R., 120 N. C., 518; *Stout v. Turnpike,* 157 N. C., 368; *S. v. Lane,* 166 N. C., 337; *S. v. Neville,* 175 N. C., 735.

THE STATE v. S. J. SKIDMORE.

Indictment—Felony—Quashing.

An indictment for obtaining goods by false pretense which does not charge the offense to have been feloniously done is defective, as the act of 1891, ch. 205, makes all offenses punishable with death or imprisonment in the penitentiary felonies; but the bill should not be quashed, the defendant should be held until a new bill is obtained.

This was an INDICTMENT, tried before *Graves, J.,* at Fall Term, 1891, of LINCOLN. (796)

The following is a copy of the bill of indictment:

"The jurors for the State upon their oaths present that S. J. Skidmore, late of Lincoln County, on 1 April, 1891, with force and arms at and in said county, devising and intending to cheat and defraud one D. F. Abernethy of his goods, moneys, chattels and property, unlawfully, knowingly, designedly did then and there falsely pretend to the said D. F. Abernethy, that there was nothing wrong with a certain mule then and there belonging to the said S. J. Skidmore, that the said S. J. Skidmore, or any one else knew of; whereas in truth and fact, as the said S. J. Skidmore then and there well knew, the said mule was deaf and poor of wind, which said pretense was false and the said S. J. Skidmore well knew it to be false; that by color and by means of the said false pretense, the said S. J. Skidmore did then and there unlawfully, knowingly and designedly obtain from the said D. F. Abernethy one mule of the value of fifty dollars ($50) and ten dollars in money of the goods and chattels of the said D. F. Abernethy, with the intent then and there to cheat and defraud the said D. F. Abernethy to the great damage of the said D. F. Abernethy, contrary

to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The bill of indictment was quashed upon the defendant's motion, and the State appealed.

The Attorney-General for the State.
No counsel for defendant.

CLARK, J. The indictment is sufficient in form under the ruling in *S. v. Burke,* 108 N. C., 750, and *S. v. Dixon,* 101 N. C., 741, and cases therein cited.

We apprehend, however, though the ground is not stated, that (797) the learned judge allowed the motion to quash because Laws 1891, ch. 205, makes all offenses which are punishable by death or imprisonment in the penitentiary, felonies, and the word "feloniously" is not used. *S. v. Purdie,* 67 N. C., 25. The bill was defective in that particular, but it was error to quash it when an offense of this magnitude was charged. The court should have held the prisoner, and given the solicitor permission to send another bill curing the technical and verbal defect. In *S. v. Colbert,* 75 N. C., 368, *Reade, J.,* says that the courts do not favor quashing indictments, and that indictments for treason, felony and the higher misdemeanors will not be quashed except where it appears that the court has not jurisdiction, or the matter charged is not indictable in any form. The reason is that to quash in such cases would release recognizances and cause delays, and that it would be trifling with public justice to quash for verbal defects in grave cases in which the public have an interest, when the irregularity or deficiency could be cured in a few moments and without postponing the trial to another term, by sending the witness before the grand jury with a more accurately drawn bill. Accordingly, in that case, while the Court held the indictment insufficient, it also held that it was error in the court below to quash, and sent the case back with directions that the solicitor should send a more perfect bill. This was approved by *Ashe, J.,* in *S. v. Knight,* 84 N. C., 789, in which case, though the Court on appeal arrested the judgment for a defect in the indictment, it held that the court below properly refused to quash the bill. Both cases have been cited and approved in *S. v. Flowers, post,* 841, and are supported by the highest authority elsewhere, as cited in that case.

Error.

Cited: S. v. Caldwell, 112 N. C., 855, 856; *S. v. Bryan, ib.,* 849; *S. v. Lee,* 114 N. C., 846; *S. v. Shaw,* 117 N. C., 765; *S. v. Bunting,* 118 N. C., 1200; *S. v. Harwell,* 129 N. C., 551, 555; *S. v. Taylor,* 131 N. C., 714; *Baker v. R. R.,* 144 N. C., 40; *S. v. Brown,* 170 N. C., 715.

(798)

THE STATE v. JOE AVERY.

Burning Cotton—Malicious Injury to Personal Property.

One who burnt cotton, secured in a railroad car, cannot be convicted under the statute making it a misdemeanor to burn or destroy any other person's cotton, etc., in a stack, hill, or pen, or *secured in some other way out of doors. It seems* that he would be guilty of malicious injury to personal property.

INDICTMENT, tried before *Bynum, J.*, at Fall Term, 1891, of BURKE.

The indictment charges that the defendant at, etc., "wilfully and unlawfully did burn and destroy twenty bales of cotton, the property of the Dunevant Cotton Manufacturing Company, which said cotton being then and there secured on a car, the property of the Richmond and Danville Railroad Company, against the form of the statute," etc. The defendant pleaded not guilty. On the trial it was in evidence that the defendant and two other small boys were playing in a box-car loaded with cotton, standing on a railroad at the depot at Morganton; that the defendant lighted a candle and fastened it in the floor and near the cotton, when one of the boys was about to put it out, and he prevented him, saying he would watch it. The cotton was soon on fire and it and the car were burned and destroyed. There was also evidence of threats made by the defendant that he would get even with the railroad company, if he had to burn the depot, for cutting off his leg, etc.

The defendant requested the court to instruct the jury "that unless the cotton was out of doors, the defendant cannot be convicted, and the cotton not being out of doors he cannot be convicted."

There was a verdict of guilty, and the defendant moved in arrest of judgment upon the ground that it appears by the indictment that the cotton charged to have been burned was cotton in bales (799) secured in a car, and the statute alleged to have been violated has no application; that it applies only to cases where cotton and other things therein specified burned or destroyed, are "out of doors;" that is, in the field, etc., The court denied the motion and entered judgment against the defendant, and he excepted and appealed.

The Attorney-General for the State.
John Devereux, Jr., for defendant.

MERRIMON, C. J., after stating the facts: The statute (Code, sec. 985, p. 5) as amended by the subsequent statute (Laws 1885, ch. 42) provides that "any person who shall wilfully burn or destroy any other

person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill or pen, or secured in any other way, *out of doors,* grass or sedge standing on the land, shall be guilty of a misdemeanor," etc. In our judgment, the statute plainly refers to and embraces only cotton and the other things specified therein, not within doors—not housed and thus secured, as in a barn, gin-house or the like. It refers to cotton and the other things secured in any other way "out of doors" in the field—"on the land"—the farm where they were produced, or some other land, so as in some way secured without doors—without the barn, gin-house or other like inclosure. The words "in a stack, hill or pen," "out of doors," "the grass or sedge standing on the land," applied to the several things specified in their connection, are apt and appropriate to refer to and imply such things so situate and secured "out of doors." The purpose is to protect such things so exposed and imperfectly secured "out of doors" in the fields, on the farm, "the land," of the person who owns or has control of them. In any reasonable view of their meaning,
(800) application and connection, they cannot refer to and embrace cotton stored in a railroad car standing on a railroad track at a depot, whether to be thus and there secured temporarily or shipped to some other place. Cotton and the other things specified secured in a car on the railroad are not secured in some other way out of doors on the land, in the sense of the statute. When thus secured on the car they have been taken from the place—the land—where they were securd "out of doors" and are on the way to market to be used, or on the way to be again housed or secured in a stack, hill or pen, or in some other way "out of doors." The burning or destruction of such things on a car does not come within the mischief to be remedied by the statute—the burning or destruction of them when they are ordinarily secured out of doors.

The indictment should appropriately in the proper connections, charge that the cotton or other thing burned or destroyed was in a stack, or as otherwise in a way described secured "out of doors." In this case it fails as to matter of substance to charge the offense defined by the statute. It does not charge, in substance or effect, that the cotton in some way described was secured "out of doors"—it simply charges the burning on the railroad in a railroad car. For the reasons stated this is not sufficient.

It seems that the Legislature supposed and intended that the statute (Code, sec. 985, pp. 6, 7), in respect to burning barns, gin-houses and other buildings, would be sufficient to protect grain, cotton and the like stored in them indoors on the land. This appears to be a case in which the defendant might appropriately have been indicted for malicious in-

jury to personal property as defined by the statute (Code, sec. 1082), but in no view of the present indictment will it suffice to charge that offense.

CLARK, J., dissenting: The statute (Code, sec. 985, par. 5) makes it indictable to wilfully burn or destroy any of the ar- (801) ticles therein named when "in a stack, hill or pen, or *secured in any other way* out of doors." The expression "out of doors" means simply "not in a house." If in a house, then these articles are protected by paragraphs 6 and 7 of this section in regard to burning barns, gin-houses and other buildings. This subsection 5 was intended to protect them when not so housed, but "in a stack, hill or pen, *or otherwise secured.*" The article here, cotton, is one of those enumerated. It was "out of doors," that is, not in a house. Though not in a hill, stack or pen, it was "otherwise secured," and is properly charged in the indictment as "then and there secured in a car, the property of the Richmond and Danville Railroad Company." It seems conceded, in the opinion of the court, that property of the description named is not protected against burning when off the premises where grown, except in those cases where an indictment would lie for injury to personal property. Code, sec. 1082. If this is so, the defendant who has been found guilty of the "wilful and unlawful" burning of twenty bales of cotton secured out of doors has been guilty of no offense, because the cotton was in transit and off the farm where grown, and he and others would be at full liberty to "wilfully and unlawfully burn or destroy" the vast amount of farm produce daily in transit on railroads and other conveyances, or camped out at night in the country wagons, covered and uncovered, which brings such a large part of the farm produce mentioned in this subsection to market. I do not think so broad a *"casus omissus"* was left by the law-making power. There are no words in the statute restricting its application to the burning and destruction if done on the farm, and the courts are not called on, by a fair and reasonable interpretation of the statute, to leave farm produce "secured out of doors" unprotected if it is being moved from the place of its production, for section 1082, *supra,* does not make any burning or destruction (802) indictable if done merely "wilfully and unlawfully." The words "on the land" are not in the original section; and in the amendment to it they only refer to "grass or sedge" standing "on the land."

PER CURIAM. Error.

Cited: S. v. Huskins, 126 N. C., 1072.

THE STATE v. R. D. BROWN.

Roads and Highways—Street—Municipal Ordinances—Evidence—Criminal Responsibility.

1. The right of a traveler to go *extra viam* upon adjacent lands is confined to those cases of inevitable necessity or unavoidable accident, arising from recent causes producing temporary and impassable obstructions to the highway.
2. As a general rule, one cannot justify a violation of the criminal law upon the plea of necessity, except where the act was done in protection of his life, person, or health.
3. Defendant being indicted for violation of a city ordinance prohibiting driving vehicles upon sidewalks, offered evidence to show that the street, on account of mud, was in such a condition that he could not drive a loaded wagon, with safety to its load, over it except by going on an unpaved sidewalk, and that particular street was the only one available for his business; the defendant admitted that he knew the condition of the street before he started his wagon: *Held*, that these facts constituted no defense, and proof of them was properly rejected.

INDICTMENT for a violation of a city ordinance, tried on appeal from the mayor of Winston, at the Spring Term, 1891, of FORSYTH, before *Bynum, J.*

The ordinance imposed a penalty for driving or leading horses on a sidewalk, and it was admitted that the defendant's driver,
(803) under his order, drove his wagon partly on a sidewalk for a distance of ninety feet along the street. The defendant relied upon the necessity, growing out of the impassable condition of the streets on account of the mud for a number of yards as a defense.

The defendant excepted to the refusal of the court to permit him to prove that he could not drive a loaded wagon along the street without going on the sidewalk with safety to the load or his wagon. The court permitted defendant's counsel to ask him, "If the condition of the street at that place was not of such dangerous character that the traveler's person or property would have been endangered unless he used the sidewalk or partially used the sidewalk." The defendant admitted that he knew the condition of the street before he started his loaded wagon along it, and in answer to the last question, said only *"that the boxes of tobacco would have to have been unloaded, as the team could not pull it."*

There was evidence tending to show that there was no other possible way from defendant's building to haul out his tobacco, except by the south street over which he hauled it, the street north of it being wholly

impassable. The sidewalk where the defendant drove upon it was not paved.

The defendant excepted to the refusal of the judge to charge that he was not guilty in driving upon the sidewalk to avert danger to his person or property, and to the refusal of the court to admit testimony offered.

Motion for new trial. Appeal.

The Attorney-General for the State.
C. Manly for defendant.

AVERY, J. It is admitted to have been the well settled law in England, that where a highway became obstructed and impassable from temporary causes, a traveler might go *extra viam* upon the adjacent land without subjecting himself to liability in an action of trespass brought by the owner. 2 Bl. Com., 36; *Bullard v. Harrison,* 4 (804) M. & S., 387, 393; *Taylor v. Whitehead,* 2 Douglass, 744-748, This extraordinary rule was subsequently recognized by the courts of this country, and the right to do with impunity what would ordinarily subject a person to liability in an action for damages, was generally held to rest upon the doctrine of necessity. *Campbell v. Race,* 7 Cush. (Mass.), 408.

The right on the part of the traveler is, according to the definition of *Bigelow, C. J.,* "confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway." *Campbell v. Race, supra.*

When a traveler has notice of the existence of the obstruction, and can reach his destination with his vehicle by another route which is more circuitous but not unreasonably long, he will not be permitted, merely for the sake of convenience, to pass, without incurring liability in a civil action, by the more direct way over the land of an abutting proprietor. *Fandley v. City of Cincinnati,* 2 Dis. (Ohio), 516. The objection that the rule licenses the taking of private property for public use without compensation, is met by the argument that the grant of the easement in the highway carried with it the right in a case of supreme necessity to pass over adjacent land.

The principle has been heretofore invoked, so far as our investigations have extended, only for the purpose of avoiding responsibility for damages in civil actions. The rule is said to have originated in England at a time when there were no public officials who were liable to indictment or to respond in damages for permitting the highways to become impassable.

Where there is a town ordinance forbidding persons to lead or drive horses along the sidewalk, which is the portion of the street in-
(805) tended for the use of pedestrians, and a violation of the ordinance is an indictable offense, and where at the same time the commissioners of the city are liable criminally for failure to keep the streets proper in passable condition for vehicles of all kinds, an individual who deliberately and with full notice of the state of the street, loads his wagon and drives along it to the dangerous point, will not be allowed to evade punishment for violating the letter of the law, on the ground that it was absolutely necessary to do so in order to escape danger to his property which he has wilfully put in peril. Especially will this principle hold good in a case like that at bar where, in order to avert danger, the traveler insists that he may drive upon the sidewalk and make it impassable for foot passengers, to whose exclusive use it is by law devoted, and escape liability under an indictment on the plea of necessity, when he could have unloaded his tobacco even after his team was in the mud, and have moved the wagon back or forward. Pedestrians have rights that are intended to be protected by such ordinances, and among them that of carrying their wares as well as passing safely by the public footway. The man who transports his goods on wheels must, when the street proper becomes impassable, join the caravan of footmen till such time as those charged with the duty can be induced or driven to repair it, rather than rush his team over the sidewalk and render it also perilous or disagreeable for the larger number of persons for whose comfort and convenience the protective ordinance was passed, merely in order to ship his goods more rapidly. The fact that the footway had not been paved made it only more susceptible to injury from hauling heavily loaded wagons over it, and rendered it more important to pedestrians that the ordinance should be rigidly enforced. In our geographical location, where the climate is milder, carriages are not often subject to delay by immense blocks of snow and ice, suddenly deposited in highways, as in the colder regions of the
(806) northern and northwestern States of this country, or in the higher latitude of England, and while our public roads are often rendered temporarily and for short distances impassable on account of sudden washes, no case involving the claim of right on the part of a traveler to go *extra viam* has hitherto arisen in this State. Mud rather than ice or snow is the common enemy of those who travel our highways on foot or in carriages; but it must be only in exceptional instances that mud or anything, except a sudden wash, renders highways absolutely impassable. It is usually held to be the duty of the traveler to remove brush or other slight obstructions to his passage along a public road, when he can do so with little trouble or delay, rather than go

upon the premises of the adjacent owner. The law provides generally, as far as it is practicable, for the uninterrupted use by wagon and carriages of that portion of the highway intended as a passway for them; but it is the duty of the owners of such vehicles to beware, in the exercise of their own rights, not to infringe upon those of other citizens, just as the same limit is fixed by the law to the enjoyment of their own exclusive property. *Sic utere tuo ut non alieum laedas.*

But the particular question presented by this appeal is whether there were such circumstances shown, looking at any and every phase of the evidence, as would, if believed, have justified the violation of the criminal law on the ground of necessity. It is admitted that the defendant's conduct brought him within its letter; but it is contended that the evidence offered takes the case out of its spirit.

Whether the authorities of a town are guilty of nuisance in placing an actual obstruction upon the streets, or by reason of their failure to repair, they are indictable at common law, and usually under some statute also. Elliott R. & S., p. 493; *S. v. Wilson,* 107 N. C., 869; Code, sec. 3803. Evidence that the defendant's teamster drove his team upon the sidewalk, if believed, made a *prima facie* case of guilt, (807) and it was incumbent on the defendant, if he relied upon the defense that it was necessary, "to show that it was done under circumstances that rendered it lawful," or excusable. *S. v. Wray,* 72 N. C., 253. Wharton (C. L., sec. 90*c*), in treating of homicide through necessity, says: "But it must be remembered that necessity of this class must be strictly limited. It exists only when the act in question is necessary for the preservation of life, or the preservation of the life of relatives of the first degree." The same author (sec. 90*d*) takes issue with writers who have maintained that the accused could not set up as a defense a necessity that was the result of his own culpable act. He limits the right of such wrongdoers to avail themselves of that defense when accused of homicide in extreme cases, such as that of one who carelessly sets fire to a house and runs over and crushes another in the attempt to escape the flames; or that of a thief who falls overboard while engaged in stealing fish from a boat, and in the struggle for life upsets the boat and causes another to be drowned.

The violation of the letter of the law has been excused in criminal cases generally on no other ground except that a human being was thereby saved from death or peril, or relieved from severe suffering. *S. v. McBrayer,* 98 N. C., 619; *Randall v. R. R.,* 107 N. C., 753. In *S. v. Wray, supra,* it was found as a fact that it was absolutely necessary for the safety of a patient that the druggist should furnish her brandy on the physician's certificate. The facts, found, as a special verdict, established the necessity for administering it as a medicine, yet this

Court in *S. v. McBrayer, supra,* declared that the extreme limit to which necessity could be made available as a defense was marked in *S. v. Wray.*

Wharton (sec. 2441) maintains that in such cases nothing short of an exception in the statute would excuse a sale, even to a sick person, in violation of the letter of the law. But, accepting the doctrine
(808) laid down in *S. v. Wray, supra,* as the true interpretation of the law, the defendant has failed to offer any testimony to show that he or his driver was in danger of death or bodily harm or injury to health which could not be averted except by driving the team over the sidewalk. The admitted violation of the letter of the ordinance, therefore, could not have been declared excusable on the ground that the wagon or horses were in a position of peril, in which the defendant had knowingly and purposely placed them, and from which he could, according to his own statement, have relieved them by unloading the wagon and turning it and the team back or moving them forward. In answer to the direct question, the defendant would not say that the person of himself or driver was in peril, from which neither could escape except by driving on the sidewalk. On the contrary, he said the wagon and horses could not pass without unloading. It was the duty of the city authorities to repair the portion of the streets intended for the passage of wagons, but their failure to do so did not justify the defendant, though it may have been his only route for transporting his tobacco to a warehouse or shipping point, in defying the law making it indictable to violate a city ordinance, and in disregarding the rights of pedestrians, protected by the penalty imposed under such by law. If the law were as contended for the defendant, it might indeed be possible to drive a wagon, if not a coach, through many criminal laws and statutes made to protect the premises of landowners from unnecessary invasion. We must not be understood as holding that when there is no liability to indictment for going *extra viam,* there may not be instances where the highways are temporarily rendered impassable by the mud, and where all of the circumstances may be such that the abutting proprietor cannot recover in an action brought against one
(809) who passes out of the public road and over his premises far enough to avoid the dangerous point.

In the case at bar, if the judge below erred it was in stating the law more favorably to the defendant than the testimony in any aspect justified him in doing. There was no testimony that the person of the defendant was put in peril, and no necessity for submitting that question to the jury.

The motion for a new trial is refused, and the judgment

Affirmed.

Cited: Tate v. Greensboro, 114 N. C., 404; *S. v. Smith,* 117 N. C., 810; *S. v. R. R.,* 119 N. C., 821.

THE STATE v. J. A. DAVIS ET AL.

Forcible Entry.

Where the defendant and four others, one with a crowbar, after declaring their purpose, and being forbidden by the prosecutor, went to a shop one hundred yards away and broke open the door and took possession, they were guilty of a forcible entry, and this though the prosecutor had leased the shop from defendant, and upon the expiration of the term, without surrendering the possession, had leased for another term from defendant's cotenant.

INDICTMENT for forcible entry, tried before *Graves, J.,* at Spring Term, 1891, of IREDELL.

It is found by the special verdict that the prosecutor was in possession and daily use of a blacksmith shop; that he had come from his home that morning intending to work in the shop that day, and while standing at a mill, about one hundred yards from the shop, the defendant, Davis, with a crowbar, and the other four defendants, came down to a point half-way between the mill and the shop; that leaving the other defendants there, Davis approached the prosecutor and demanded the key of the shop, which was refused, and Davis then indicated his purpose to open it by force, and prosecutor forbade it. The (810) defendants then went to the shop, prized the door open, threw down a part of the chimney, displaced the bellows, and took possession. The prosecutor had rented the shop for two years from defendant Davis, but the term having expired, he had, without surrendering possession, leased the premises from one Morrison, who was a cotenant of the premises with Davis; that while defendants were at the shop, the prosecutor's son was present at the shop. The prosecutor himself went to the miller's house, in seventy-five yards of the shop; he testified that he was not afraid of the defendants, but did not go to the shop because he feared it might lead to a difficulty.

The court adjudged the defendants not guilty on the special verdict.

The Attorney-General for the State.
Bingham & Caldwell (by brief) for defendants.

CLARK, J., after stating the facts: The question was discussed before us whether this was a case of forcible entry or forcible trespass. In *S. v. Jacobs,* 94 N. C., 950, attention is called to the fact that forcible trespass applies to personal property and forcible entry to land, but the distinction has not always been adverted to, and it is not very material what the offense is called in argument if the indictment sufficiently charges a violation of the criminal law and it is proven by evidence. *S. v. Evans,* 27 N. C., 603; *S. v. Dunn,* 839 *post.*

To constitute either offense, there must be either actual violence used or such demonstration of force as was calculated to intimidate or tend to a breach of the peace. It is not necessary that the party be actually "put in fear." *S. v. Pearman,* 61 N. C., 371. It is sufficient if there is such a demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of (811) the peace. *S. v. Pollok,* 26 N. C., 305; *S. v. Armfield,* 27 N. C., 207. Such demonstration of force may be a "multitude" or by weapons. *S. v. Ray,* 32 N. C., 29, citing *S. v. Flowers,* 6 N. C., 225; *S. v. Mills,* 13 N. C., 555.

The statute (Code, sec. 1028) provides "no one shall make entry into any lands and tenements or term for years but in case where entry is given by law; and in such case not with strong hand nor with a multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." The same in effect was the common-law rule, "where the entry is lawful it must not be made with a strong hand or with a number of assailants; where it is not lawful, it must not be done at all." 2 Whart. Crim. Law (9th Ed.), 1093. Following the analogy as to riots, three persons have been held enough to support the averment of a "multitude." *S. v. Simpson,* 12 N. C., 504. If a breach of the peace did not actually take place it was doubtless due to the defendant Davis' declaration of his purpose to enter, backed with a sufficient force to accomplish it, in spite of the prohibition of the prosecutor. *S. v. Smith,* 100 N. C., 466.

The prosecutor need not have been on the exact spot; that he did not get closer than seventy-five yards was, he says, to avoid a breach of the peace. The defendants had shown themselves able by their numbers to render his closer approach of no avail. He forbade them, and in effect was present. In *S. v. Lawson,* 98 N. C., 759, it was held that where the prosecutor was fifty or seventy-five yards distant when he forbade the entry, and the defendants persisted notwithstanding in making such entry, they were guilty; that it was not necessary for the party in possession to be on the very spot. Besides, in this case the son of the prosecutor, after the prohibition to the defendants given by his father, was present at the shop when being forced open by them. The

title to the premises could not be called in question. The offense (812) is the high-handed invasion of the *possession* of another, though such other need not be at all times personally present on the premises if in actual exercise of authority and control over the same (*S. v. Bryant,* 103 N. C., 436), and if present in person or by some member of his family at the time of the entry and forbidding it.

It is true that when the premises are withheld by one having a bare charge, or custody, as a servant or a mere trespasser or intruder, the owner may break open doors and forcibly enter if unnecessary force is not used. Whart. Cr. Law, 1087; 1 Russ. Crimes (9 Ed.), 420; 2 Bish. Cr. Law, 501. But a landlord who violently dispossesses a tenant whose lease has expired is guilty of forcible entry (Whart. Cr. Law (9 Ed.), 1087), and a cotenant may commit the offense of forcible entry if the other cotenant is in possession and resists. 2 Bish. Cr. Law, 501. So whether the prosecutor is treated as a tenant holding over or as the lessee of the cotenant, the taking the shop out of his possession by a multitude of persons in the manner stated, he being present and forbidding, made the defendants guilty.

This case differs from *S. v. Mills,* 104 N. C., 905, which is relied on by the defendants. In *S. v. Mills* the defendant, accompanied only by an old negro man, went to the house and entered against remonstrance of the prosecutor, but without violence, or the display of weapons, or numbers or other signs of force calculated to intimidate or create a breach of the peace, and the Court held, citing *S. v. Covington,* 70 N. C., 71, and *S. v. Lloyd,* 85 N. C., 573, that "mere rudeness of language or slight demonstrations of force against which ordinary firmness is a sufficient protection," was not indictable. Hence, though there the prosecutor left to avoid a breach of the peace, the demonstration of force was not sufficient ground for such apprehension. Here there were five men, one of them armed with a crowbar. The language and conduct of the defendants indicated their purpose to take possession of the shop by force, though the prosecutor forbade them. This (813) case differs also from *S. v. Laney,* 87 N. C., 535, in that there, though the entry was made by numbers, there was no one *present and forbidding* the entry, hence no danger of a breach of the peace by such entry, still the court intimated strongly that the defendants in that case were guilty of forcible detainer.

Upon the special verdict, the court should have rendered judgment against the defendants.

Error.

Cited: S. v. Woodward, 119 N. C., 838; *S. v. Webster,* 121 N. C., 587, 588; *S. v. Lawson,* 123 N. C., 743; *S. v. Leary,* 136 N. C., 580; *S. v. Jones,* 170 N. C., 756.

THE STATE v. RILEY PARKS.

Character—Evidence.

On the trial of an indictment for burning a barn, the defendant offered evidence to prove his good character; the State then introduced evidence, the defendant objecting, tending to show that defendant, shortly before the burning, made profane and violent declarations in respect to the disturbances in the neighborhood, and that a day or two after the burning, when defendant was arrested, he was found before daylight in company with several other persons, some of whom were armed with guns: *Held*, that although the evidence was slight and not very relevant, it was competent as bearing upon the character of the defendant, especially when the court charged the jury to consider it with great caution.

CRIMINAL ACTION, tried at March Term, 1891, of RANDOLPH, *Graves, J.*, presiding.

The Attorney-General for the State.
No counsel for defendant.

(814) MERRIMON, C. J. The defendant is indicted for setting fire to and burning a barn, the property of the prosecutor, in violation of the statute (Code, sec. 985, par. 6). He pleaded not guilty.

On the trial much evidence was produced, both by the State and the defendant. The latter produced evidence of his good character and thus put the same in question. A witness for the State testified that he had a conversation with defendant some time—how long did not appear—before the barn was burned, in which reference was made to the robbing of a house which had then been lately perpetrated, and the defendant said in that connection: "God damn them (referring to the robbers) to hell; there's going to be a battle in this neighborhood before three weeks, and I be damned if I care how quick it comes." No objection to this evidence was made until after it came out. Then the defendant requested the court to withdraw and exclude it. The court declined to do so, and the defendant excepted. This evidence was slight. It tended, not strongly, to show a threatening purpose and as well the character and disposition of the defendant in a light adverse to him. In its instruction to the jury, the court cautioned them as to such evidence, saying: "Evidence of threats, while admissible, is regarded as unreliable and ought to have little weight, unless clearly directed against" the party whose barn was burned. In view of the whole evidence, including that as to his character, produced by the defendant, that which the court refused to withdraw from the jury had slight relevancy and pertinency. It bore upon the character of the defendant, and in reply was competent.

The defendant was examined as a witness in his own behalf, and on cross-examination he was asked who were present with him at his mother-in-law's on the morning shortly before daylight when the officer arrested him for the alleged burning of the barn. (He objected to the question on the ground of incompetency, in that its purpose was to elicit immaterial evidence. The court declined to sustain the (815) objection. The defendant then testified that there were several persons (named), and two or three of them had guns, coming in the house. This evidence was also slight, still, in view of all the evidence, it had some bearing as tending, along with other evidence, to show the character of the defendant, he having put it in issue. But if this were not so, and the evidence was irrelevant, the mere fact that it appeared that the persons named were present, and two of them simply had their guns, did not tend, of itself, to prejudice the defendant. In that case, he ought to have shown at the proper time that it probably did prejudice him before the jury. The admission of merely irrelevant evidence is not ground for a new trial, unless it of itself tends to prejudice the complaining party, or it appears in some way that it probably did prejudice him.

Affirmed.

THE STATE v. CAPTAIN MATHIS.

Governor—Power to Pardon and Commute—Appeal.

The Governor, after conviction for a criminal offense, has the power to commute the sentence of the court, although an appeal is pending in the Supreme Court; and this fact being made properly to appear, the appellant will be allowed to withdraw his appeal.

MOTION in Supreme Court to withdraw appeal. The facts are stated in the opinion.

The Attorney-General for the State.
C. Manly for defendant.

MERRIMON, C. J. The appellant prisoner was convicted at (816) Spring Term, 1891, of WILKES, *Bynum, J.*, presiding, of the crime of murder, and there was judgment of death against him, from which he appealed to this Court. Pending the appeal, and before it was reached in its order to be heard and determined, the Governor com-

muted his sentence of death to imprisonment for life in the penitentiary. The prisoner accepted such commutation, and in pursuance of the same he is now imprisoned in the penitentiary. When the appeal was called in its order to be heard, the prisoner presented and exhibited before the court the order of commutation of his sentence duly made and signed by the Governor, and signified his acceptance of the same, and prayed the Court that he be allowed freely to abandon his appeal, and that the Court take no further notice of or action in and about the same.

The Attorney-General admitted the commutation of the prisoner's sentence and his acceptance of the same, and made no objection thereto, and prayed the court to make such disposition of the appeal as it might deem proper.

After the prisoner was convicted, the Governor had power and authority to commute the sentence of death against him to the lesser punishment of imprisonment for life in the penitentiary. Const., Art. III, sec. 6; The Code, sec. 1096. The appeal did not, as formerly, vacate the judgment of death pending the appeal. It remained in full force to be executed, unless the court should adjudge there was error therein, The statute (Laws 1887, ch. 191) so expressly provides, and hence no question such as that very seriously considered in *S. v. Alexander,* 76 N. C., 231, arises here.

It certainly appears to the Court that the Governor has granted such commutation of the prisoner's sentence; that the latter has accepted the same, and is now undergoing punishment in the penitentiary in pursuance of law in such cases. There is, therefore, no reason
(817) why he shall not be allowed to abandon his appeal. His application must be granted and

Appeal dismissed.

THE STATE v. WILLIAM FISHER.

Trespass—Evidence.

Defendant, the servant of a railroad company, after being forbidden, went with his wagons and teams upon the lands of the prosecutor for the purpose of depositing materials necessary for the construction of the road: *Held,* that the fact that the railroad company had purchased from the prosecutor a right of way for one hundred feet on each side of its track did not give it a right to enter on the lands beyond the right of way, and was no evidence of a reasonable belief on the part of defendant that he had a right to make such entry.

STATE *v.* FISHER.

CRIMINAL ACTION for violation of section 1120 of The Code, tried before *Graves, J.*, at February Term, 1891, of ROWAN, on appeal from a justice of the peace.

It was in evidence that the prosecutor, A. L. Lingle, was the owner of the lands in question and in possession; that defendant was in the employ of the Yadkin Railroad Company, then constructing its railroad from Salisbury to Norwood; that prosecutor's lands were on the line of said railroad; that said railroad company had purchased from prosecutor a right of way one hundred feet wide over its said lands, which had been conveyed to it by deed from prosecutor; that in the construction of its said road, said company had unloaded a lot of cross-ties on the right of way so purchased from prosecutor, to be used in the work of construction farther on; that defendant, as wagon-master of said railroad company and acting under its orders, entered upon the (818) lands of the defendant adjacent to said right of way, and with his teams removed said cross-ties from the right of way so purchased from prosecutor, and in so doing transported them over and across adjacent lands of prosecutor to a point farther on, where they were needed; that when defendant first entered upon said lands he obtained permission from prosecutor's wife, prosecutor being absent; that next day, on prosecutor's return, he went to where defendant was and had some conversation with him about the matter. Prosecutor testified that he forbade defendant from further hauling said cross-ties over his lands, saying, amongst other things: "This won't do," referring to his hauling the cross-ties over his lands. It was further in evidence that after this conversation, and during the same day, defendant continued to haul several loads of cross-ties over and across said lands of prosecutor.

Defendant offered in evidence that he acted in good faith under the order of his superiors in going upon the lands of prosecutor, and that he used the most natural and direct route in so doing.

Among other things not excepted to, his Honor instructed the jury: "The defendant claims that he was acting under a *bona fide* claim of right, and that, therefore, he could not be properly convicted. In regard to this the court instructs the jury that, taking all the evidence offered by the defendant to be true, this question does not arise. If the defendant went on the prosecutor's land, as he himself testifies, after he was forbidden, he is guilty, so the only question for you to determine, is whether the defendant was, in fact, forbidden to go on the land of the prosecutor, and whether he went after he was forbidden." Defendant excepted.

The court further instructed the jury: "It is not necessary that the word 'forbid' should be used. Any other form of expression which means the same thing is sufficient."

There was a verdict of guilty and judgment thereupon, from (819) which defendant appealed.

The defendant was duly charged criminally in the court of a justice of the peace, with having violated the statute (Code, sec. 1120), in that after the prosecutor forbade him to go upon his land, he went upon the same and hauled across the same cross-ties, without a license so to do. He was convicted in that court, and upon appeal he was afterwards likewise convicted in the Superior Court, upon the plea of not guilty. Thereupon he excepted and appealed to this Court.

The Attorney-General for the State.
No counsel for defendant.

MERRIWON, C. J. The defendant insisted that he went upon the prosecutor's land in good faith, believing and claiming that he had the right so to do as the agent of a railroad company named, and therefore he was not guilty. The court held otherwise, and this is assigned as error.

Unquestionably the railroad company had not the shadow of right to go upon the prosecutor's land and transport its cross-ties over the same, and no authority whatever to direct or authorize its agent or servant to do so. The statute (Code, sec. 1120) expressly provides that "if any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor," etc. The defendant is presumed to have knowledge of this statute, and the mere fact that he may have believed honestly that he had the right to go upon the prosecutor's land after he was forbidden to do so, as agent of the railroad company, as the evidence went to prove he did, could not at all excuse him from criminal liability, unless he had reasonable ground for such belief, and there was no evidence (820) from which the jury might so find. *S. v. Crawley,* 103 N. C., 353.

The court properly instructed the jury, in substance, that, if they believed the evidence, the defendant was guilty. *S. v. Bryson,* 81 N. C., 595.

Affirmed.

Cited: S. v. Glenn, 118 N. C., 1196; *S. v. Durham,* 121 N. C., 550; *S. v. Mallard,* 143 N. C., 667.

THE STATE v. P. M. MORRIS.

Trial—Discretion of Judge—Witness—Impeaching—New Trial for New Evidence.

1. It is within the discretion of the trial judge to permit the defendant to further cross-examine a witness, upon the close of the redirect examination.
2. In an indictment for slandering an innocent woman the husband of the prosecutrix was asked if he had not told a certain person that he had had sexual intercourse with his wife before his marriage, to which he answered "No.": *Held*, to be incompetent to contradict the witness; being collateral, the defendant was bound by his answer, and it was not pertinent to prove incontinence on the part of the prosecutrix, being hearsay.
3. Granting new trial for newly discovered evidence is within the discretion of the trial judge.

INDICTMENT for slandering an innocent woman, tried before *Graves, J.*, at Spring Term, 1891, of MONTGOMERY.

The Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J. The defendant is indicted for slandering an "innocent woman" in violation of the statute (Code, sec. 1113). He pleaded not guilty. On the trial the prosecutrix was examined as a witness for the State, and after she had been examined in chief, (821) cross-examined, and again examined by the State, the defendant asked to be allowed to ask the witness one question. The solicitor, not knowing the nature of the question, did not at once object. The defendant then propounded this question: "How many times witness and her husband had separated," and asked the cause. The court said, "You may ask that question if its purpose is to impeach the witness." The counsel said, "We want to show the cause of the separation." The court said, "I cannot go into that investigation now," and defendant excepted.

The defendant had had fair opportunity in the orderly course of the examination of the witness to propound all proper questions, and it was discretionary with the court to allow or disallow the question propounded to be put to the witness. The defendant had no right to protract the examination indefinitely, particularly as to matters that the witness ought to have been examined about upon the cross-examination.

The husband of the prosecutrix was examined as a witness for the State, and on cross-examination he was asked if he had not told a certain person, named, that he had had sexual intercourse with his wife, the

prosecutrix, before he married her. The witness denied that he had said so. The defendant then offered to show by himself and another witness that the husband said to them "that he would rather pay two dollars and a half and marry the woman (the prosecutrix) than have a bastard sworn to him."

Upon objection, the court excluded the evidence, and the defendant excepted.

The defendant was concluded by the answer of the husband witness to the question put to him, because it elicited matter wholly collateral to the purpose of the examination, and did not go to show bias. The evidence of the defendant rejected was, hence, not competent (822) to contradict the husband, and it was not pertinent to prove the incontinency of the prosecutrix. It was simply hearsay. *Kramer v. Electric Light Co.,* 95 N. C., 277, and cases there cited; *S. v. Glisson,* 93 N. C., 506.

The defendant moved for a new trial in the court below, assigning as ground for the motion that he had discovered since the trial important pertinent evidence that he could produce for his defense on another trial. The court in the exercise of its discretion denied the motion, and the defendant excepted. It is settled that such exercise and discretion is not reviewable. *Carson v. Dellinger,* 90 N. C., 226, and cases there cited.

Affirmed.

Cited: Black v. Black, 111 N. C., 306; *Burnett v. R. R.,* 120 N. C., 519; *S. v. Trull,* 169 N. C., 370.

THE STATE v. H. A. NASH.

Costs—Payment in Advance—Certiorari—Appeal.

In criminal actions, the clerk of the Superior Court cannot require that the costs of transcript upon appeal shall be paid in advance, although the defendant did not appeal *in forma pauperis,* and a *certiorari* will issue directing the clerk to send up the transcript which he holds for such prepayment.

MOTION in the Supreme Court for a *certiorari.* The facts are stated in the opinion.

The Attorney-General for the State.
L. C. Edwards for defendant.

CLARK, J. The defendant, who did not appeal *in forma pauperis,* but has executed his appeal bond, refused to pay the costs of the transcript of the record on appeal. The clerk thereupon declined to send it up. The application for *certiorari* therefore presents the (823) question whether, in criminal actions the clerk can require the cost of the transcript to be paid in advance. It is settled that in civil cases he can. *Andrews v. Whisnant,* 83 N. C., 446; *Bailey v. Brown,* 105 N. C., 127.

But in criminal actions it is otherwise. Code, sec. 3758, provides, "No officer shall be compelled to perform any services unless his fee be paid or tendered, *except in criminal actions.*" This inhibition against requiring payment of fees in advance in criminal actions, we think, embraces all services, including that in question.

We are strengthened in this view by the fact that it has been held that the appeal bond secures only the costs of the appellee, and not of the appellant. *Morris v. Morris,* 92 N. C., 142, and cases cited, and, hence, when such bond is dispensed with in civil cases, by leave to appeal *in forma pauperis,* the appellant may still be required by the clerk to pay for the cost of the transcript on appeal and his cost in this Court as well. *Martin v. Chasteen,* 75 N. C., 96; *Andrews v. Whisnant,* and *Bailey v. Brown, supra.*

The reason of this distinction is that section 212, allowing a party to *sue* as a pauper, exempts him from paying fees to any officer, but section 553, allowing an *appeal in forma pauperis,* is more restricted, and only exempts the appellant from giving bond to secure the appellee's costs, leaving him to pay his own costs, if exacted, if he chooses to appeal to another tribunal after having had gratuitous services from all officers in the lower courts.

If the same rule prevailed in criminal actions, it would follow that all appellants in such cases, as well as those appealing *in forma pauperis as others,* would be compelled to prepay the costs of the transcript and the costs in this Court, if demanded. Such is not our understanding of the statute. Code, sec. 3758.

An *instanter certiorari* should issue to bring up the transcript.

Motion allowed.

Cited: Broadwell v. Ray, 112 N. C., 192; *Sanders v. Thompson,* 114 N. C., 283; *Speller v. Speller,* 119 N. C., 358; *S. v. Deyton, ib.,* 883; *Caldwell v. Wilson,* 121 N. C., 424; *S. v. Neville,* 175 N. C., 740; *Dunn v. Clerk's Office,* 176 N. C., 51.

(824)

THE STATE v. H. A. NASH.

Assault with Intent to Rape—Conviction for Simple Assault—Punishment—Trial—Instructions.

1. Upon an indictment of a physician for an assault upon a seventeen-year-old girl, in that he took indecent liberties with her person, an instruction that "if he acted in good faith, as a physician, and did what he did as such, he is not guilty, otherwise he is guilty," is erroneous, in that she may have consented to the liberties, knowing his want of good faith.
2. Where there was a serious conflict between the testimony of the prosecutrix and that of the defendant, it was erroneous to restrict the jury to either the theory of the State or to that of the defendant, as they may predicate their finding upon an hypothesis not consistent with either theory.
3. In an indictment for an assault, with intent to commit rape, upon conviction for a simple assault, the punishment is restricted to a fine of fifty dollars or an imprisonment of thirty days, in the absence of "*serious injury*," which must be such physical injury as gives rise to great bodily pain; mental anguish alone is not *serious injury* within the purview of the statute.
4. On a charge of assault with intent to commit rape, the defendant may be convicted of simple assault.

INDICTMENT for an assault with intent to commit rape upon one Susan Goss, tried at the July Term, 1891, of GRANVILLE, before *Winston, J.*

The defendant was convicted of a simple assault, and it was (834) adjudged that he be confined in the county jail for a term of two years, from which judgment he appealed.

The Attorney-General and T. B. Womack and J. W. Graham for the State.

L. C. Edwards, B. S. Royster and J. T. Strayhorn for defendant.

AVERY, J. If it be conceded that where a physician induces a female to submit to an examination of her person, by the false and fraudulent representation that he is putting his hands upon her in good faith, for the purpose of diagnosing and treating a disease, when in fact his object is only to gratify a licentious desire, he is equally guilty, in contemplation of law, with one who takes the same liberties against her consent, and the avowed intention of gratifying his lusts, it is none the less a sound proposition of law, that whether the person charged with the assault be a physician or not, he may successfully meet such charge by showing to the satisfaction of the jury that, without resorting to falsehood or deception, he had the consent of a girl seventeen years old to

put his hand upon her person as he did. Whether his intention was to desist after fondling her or to have carnal intercourse with her, if she should continue to yield to him, he was not guilty if her consent was gained otherwise than by using his professional character to practice a fraud.

There was serious conflict in the testimony of the prosecutrix and the defendant as to what the latter actually did and said (835) at her bedside. The charge of the learned judge seems to have been founded upon the idea that the jury, in passing upon the facts, were so restricted that they must adopt either the theory of the State or that arising out of the defendant's testimony, and were not at liberty to take into consideration the whole of the evidence and predicate their finding upon an hypothesis not entirely consistent with the theory advanced or the testimony offered in support of it by either the prosecution or the defense. Counsel may have contended before the jury that another witness corroborated the testimony of the plaintiff to the extent of showing that the mother of the prosecutrix had expressed apprehension as to the consequence to her daughter of over-exertion on the previous afternoon. The jury may have concluded that, under the honest belief that the prosecutrix was suffering, and with the *bona fide* purpose of relieving her, the defendant first entered her room, but that, subsequently, on discovering a willingness on her part to submit to liberties, that, as she must have known, constituted no part of a legitimate medical or surgical examination, he determined to go further and did so with her assent plainly indicated. It appeared that two men, sleeping in the loft just above her, heard no outcry nor loud remonstrance, and the prosecutrix did not say that she called for any one; yet, though she told the defendant that she was not sick, needed no attention and pushed his hand away, she submitted, without objection made in a tone sufficiently loud to be heard in the loft, to liberties, accompanied by expressions of endearment and solicitations to go with him into the adjacent room, that counsel may have argued were inconsistent with the idea that she yielded only because he was conducting an examination as a physician authorized by her mother. The jury might have been influenced, too, by the fact that the father of the prosecutrix appeared, according to her testimony, at the door and saw the defendant going out of the room twice; that he subsequently neither asked nor received a full explanation from his daughter (836) for nearly two days after, though he ordered her to dress and go to his son's house on that night. The rule laid down by Wharton (Cr. Law, sec. 1156) is, that proof of the assent of the woman, given in ignorance of the fraud that was being practiced by the medical man, where the physician, under pretense of examination, has sexual intercourse,

will not constitute a defense to the charge of assault. The principle was first established in the cases of *Rex v. Stanton,* 1 Car. & K., 415, and *Rex v. Case,* 4 Cox C. C., 220. In the latter case the instruction given by the recorder and approved by the Court, was that "the girl *was of age to consent, and if they thought she had consented to what the prisoner had done,* they ought to acquit the prisoner, but if they were of opinion that she was *ignorant* of the nature of the prisoner's act and made no resistance, solely from the belief that she was submitting to medical treatment, they ought to find him guilty." In that case the physician actually had carnal intercourse with a girl of fourteen, who had been placed under his care by her parents for medical treatment.

We think that the questions whether the prosecutrix consented after being kissed and told that she was a sweet girl (even conceding the truth of her own statement) to the still greater liberties with her person, which she testifies that the defendant took, and whether, if she did consent, she was influenced to yield solely because she thought the defendant was making a medical examination of her person at the request of a parent, should have been fairly submitted to the jury; as, in *Rex v. Case,* the judge ought to have told the jury that, in one view of the evidence, the defendant was not guilty, as well as that in the other view, he was guilty of an assault. In *Rex. v. Case* it seemed to have been conceded, or not seriously disputed, that the girl of fourteen
(837) was innocent, and did not understand what the physician was doing. In the case at bar there was evidence tending to show that the prosecutrix was not of good character, and it was admitted that she was in her eighteenth year. The defendant had a right to demand that the attention of the jury should be directed to the question whether she understood the manifest purpose of one who kissed and fondled her, and knew that his conduct was not that of a physician making a medical examination in good faith, but still submitted quietly until her father appeared upon the scene. But in response to the requests of the defendant, the judge embodied his instruction upon this point in two or three propositions, culminating in the sentence: "If he acted in good faith as a physician, and did what he did as such, he is not guilty; *otherwise, he is guilty.*" So that the jury were not left at liberty to reach the belief, from the evidence, that though the defendant was not in good faith examining the prosecutrix as a physician, still that she understood and assented to what he did, or that she understood that he was putting his hands upon her with the purpose of gratifying his lusts, and made no objection because she was indifferent or ready to submit to what he did, if not to still greater liberties.

Without adverting to the other exceptions, either to the admission of testimony or to the charge, and deciding questions that may not be

raised upon another trial, it is perhaps best to advert to the exception to the judgment of the court. We think that there was error in imposing greater punishment than a fine of fifty dollars or imprisonment for thirty days, when the defendant was found guilty of a simple assault only. In all of the cases cited by the Attorney-General in support of the judgment, this Court laid stress upon the fact that the person assaulted suffered great bodily pain, though the physical injury did not prove permanent. In *State v. Shelly,* 98 N. C., 673, the opinion rested upon the ground that "the injury was not simply painful and humiliating, but disfigured the face seriously, bruised the eyes, closed (838) one of them entirely and probably permanently impaired the sight," and, therefore, that *serious damage* was done. The facts in *S. v. Roseman,* 108 N. C., 765, were that a female prisoner was whipped by a jailer with a buggy-whip, so as to cut the flesh on her back and arms. In *S. v. Huntley,* 91 N. C., 621, though the Court seems to have taken into consideration the mental anguish of the injured party, the reason for sustaining the jurisdiction of the Superior Court, which is made most prominent, was, that the physical suffering of the injured party "must have been severe for a day or two and more or less severe for several days." So that in every instance it has been declared essential, in order to give the Superior Court jurisdiction, that the bodily pain caused by the assault should be severe, if not permanent. The fact that in any given case the person injured must have endured mental anguish may aggravate the offense, but cannot, in the absence of physical injury giving rise to great bodily pain, constitute, within the meaning of the statute, "serious injury." There was no evidence in our case tending to show that the prosecutrix suffered from bodily pain at all. The cases cited are distinguishable from that at bar in the fact that the jury found that the defendant was guilty of the offense charged in the indictment, which was within the jurisdiction of the Superior Court. In our case the defendant was found guilty of a simple assault only, and the jurisdiction of the court is sustained on the ground that it is included in the higher offense with which he was charged.

For the error pointed out, the defendant is entitled to a new trial.

Error.

Cited: S. v. Albertson, 113 N. C., 634; *S. v. Hight,* 124 N. C., 846; *S. v. Battle,* 130 N. C., 656.

(839)

THE STATE v. GEORGE DUNN ET AL.

Indictment—Assault—Resisting Officer—Quashing.

1. It is not necessary that an indictment for resisting an officer should set out the process under which the officer was acting when resisted, it is sufficient if it charges the resistance to the officer while in the due execution of his office. In a proper case the court would order a bill of particulars to better enable defendant to prepare his defense.
2. Where an indictment for resisting an officer is defective, as such it ought not to be quashed if the defendant may be convicted thereon for a simple assault.

CRIMINAL ACTION, tried at March Term, 1891, of RANDOLPH, *Graves, J.*, presiding.

The prosecution was instituted under chapter 51, Laws 1889.

The bill of indictment is, in substance, as follows:

"The jurors present, etc., that George Dunn and his wife, Mrs. George Dunn . . . with force and arms . . . in and upon one J. A. Brady, then being one of the constables in the township of Brower in the county of Randolph and in the due execution of his said office, did make an assault; and him, the said J. A. Brady so being in the due execution of his said office, then and there wilfully and unlawfully did resist, delay, obstruct and hinder in discharging and attempting to discharge his duties as such constable, against the form of the statute, etc.

"And the jurors, etc., do further present . . . that the above-named defendants, with force and arms and with deadly weapons, to wit, with a wagon-tire of the weight of five pounds, did unlawfully make an assault upon one J. A. Brady, against the form of the statute," etc.

There was a *nol. pros.* as to the second count, and after verdict of guilty upon the first, his Honor, upon motion of defendants, arrested the judgment, and the State appealed.

(840) *The Attorney-General for the State.*
No counsel for defendant.

CLARK, J. There was error in granting the motion in arrest of judgment. It is not necessary, either under our statute (Laws 1889, ch. 51) nor at common law, that the indictment for resisting an officer should "set out the warrant so as to show the title of the cause and name of the party named therein under which the officer attempted to make the ar-

rest," when he was resisted, obstructed, etc., by the defendant. 1 Wharton, C. L. (9 Ed.), 650; *Bowers v. People,* 17 Ill., 373; *McQuail v. People,* 3 Gilm., 76. Indeed, the indictment in this case seems to be a substantial copy of the form in 1 Arch. Cr. Pr., 941. It is sufficient to charge the assault as made upon the officer, etc., he being "in the due execution of his said office," and that thereby the defendant did wilfully and unlawfully resist, hinder and obstruct said officer in the discharge of his duties as such. *Com. v. Kirby,* 2 Cush., 577. If there had been any technical reason that the warrant should name the title of the writ and the person to be arrested thereunder, when the officer was assaulted and resisted by the defendant, this was cured by the verdict. It was too late to object on that ground, after the merits had been passed on by a jury. But as we have seen, these details were matters of evidence, and need not be charged in the indictment. Had the defendant desired (as it seems he did not) this additional information to enable him to make a better defense, he should have moved the court before going into the trial for a bill of particulars. *S. v. Brady,* 107 N. C., 822.

Besides, the indictment was unquestionably good for the simple assault (*S. v. Goldston,* 103 N. C., 323), and if any offense was charged, though not the one intended, it was error to quash or arrest the judgment. *S. v. Evans,* 27 N. C., 603. If the indictment had been defective, except as a charge of a simple assault, the jurisdiction of the court might have been ousted by showing that the offense took place within twelve months before indictment found, but the judgment could not (841) be arrested on that ground, as the date alleged is not traversable, and the jurisdiction is in the Superior Court, unless it is shown in proof that the requisite time had not elapsed. *S. v. Taylor,* 83 N. C., 601.

The judgment in arrest must be set aside and the case remanded, that judgment may be pronounced upon the verdict.

Error.

Cited: S. v. Davis, ante, 810; *S. v. Pickett,* 118 N. C., 1233; *S. v. Van Pelt,* 136 N. C., 669; *S. v. Long,* 143 N. C., 676.

THE STATE v. D. L. FLOWERS.

Perjury—Indictment—Quashing—Removal of Trial.

1. An indictment for perjury, alleged to have been committed upon a trial in the court of a justice of the peace, is not defective because it sets out the name of the justice before whom the case was tried.
2. Although an indictment for perjury, which fails to allege that the defendant "knew the said statement to be false," or that "he was ignorant whether or not said statement was false," is defective, the court should not quash it, but the defendant should be held until a proper indictment is had.
3. The statute (Code, sec. 1159) authorizing two justices of the peace to sit together in criminal proceedings is in harmony with the provision of the Constitution, Art. IV, sec. 12, conferring power upon the General Assembly to allot and distribute judicial powers.
4. When a criminal action has been removed it will be presumed issue was properly joined before the order of removal was made.

CRIMINAL ACTION, heard at September Term, 1891, of WAKE, *Whitaker, J.*, presiding, upon motion to quash, which was allowed and the State appealed.

The indictment charged the perjury was committed "upon the trial of an action in the court of Robert Sanders and W. R. Creech, justices of the peace, in and for the said county acting and sitting to-
(842) gether."

The Attorney-General for the State.
F. H. Busbee for defendant.

CLARK, J. The indictment is drawn under chapter 83, Acts 1889, which provides a simple form of indictment for perjury. A motion to quash below was allowed, which action defendant's counsel seeks to sustain on the ground that the indictment charges the perjury to have been committed upon the trial of an action "in the court of Robert Sanders and W. R. Creech, justices of the peace, in and for said county, acting and sitting together," etc. We fail to see the force of the objection. If the names of the justices had been left out, the charge of the commission of the perjury "in a court of a justice of the peace" would have been a compliance with the statute. The addition of the names of the justices could not possibly prejudice the defendant in any manner, and really gave him additional information. Indeed, it is probably better, and certainly is fairer to the defendant that when the perjury is alleged to have been committed on a trial before a justice, the name of such

justice should be charged. At the most, though the names of the justices were not required to be charged, their use was mere harmless surplusage. Nor can there be more force in the argument that a court of two justices of the peace is a tribunal unknown to our Constitution. The Code, sec. 1159, authorizes two justices to sit together in criminal proceedings, and gives them the same "powers and duties" as are given to any justice sitting alone. The Constitution, Art. IV, sec. 12, empowers the General Assembly to "allot and distribute" the judicial power and jurisdiction which does not pertain to the Supreme Court "in such manner as they may deem best." It was, therefore, competent for the Legislature to thus bestow the "powers and duties" mentioned, on two justices as in like manner they have bestowed prescribed powers and du- (843) ties on three or five justices by the title of inferior courts, or on the indictment that the action in which the perjury is alleged to have been committed was a criminal proceeding, and of such the two justices, "acting and sitting together," as charged in the indictment, had as full jurisdiction as one justice sitting alone.

To quash the indictment for the harmless and really advisable addition of the names of the justices would contravene the explicit prohibition contained in The Code, sec. 1183, that no criminal proceeding, whether "by warrant, indictment, information or impeachment," shall be "quashed or judgment 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." *S. v. Burke,* 108 N. C., 750; *S. v. Haddock, post,* 873.

The form of indictment provided by the act in question has been sustained by this Court in *S. v. Gates,* 107 N. C., 832, and *S. v. Peters,* 107 N. C., 876. The effect of the act is not to change in any respect the constituent elements of perjury nor the nature or mode of proof. It only relieves the State from charging in the indictment the details, or rather the definition of the offense, and makes it sufficient to allege that the defendant unlawfully committed perjury, charging the name of the action and of the court in which committed, setting out the matter alleged to have been falsely sworn and averring further that the defendant knew such statement to be false, or that he was ignorant whether or not it was true.

Upon an inspection of the record we find that the indictment is in fact defective in that it does not, as required by said act (1889, ch. 83) allege either that the defendant "knew said statement to be false," or that he was "ignorant whether or not said statement was (844) true."

But such defect would not warrant the court below in quashing the indictment. In *S. v. Colbert,* 75 N. C., 368, which was an indictment

for perjury, the Court say, *Reade, J.*: "Quashing indictments is not favored. It releases recognizances and sets the defendant at large where, it may be, he ought to be held to answer upon a better indictment," though "allowable," he goes on to say, "where it will put an end to the prosecution altogether, and advisable where it appears that the Court has not jurisdiction, or where the matter charged is not indictable in any form. . . . It is, therefore, a general rule that no indictment which charges the higher offenses, as treason or felony or those crimes which immediately affect the public at large, as perjury, forgery, etc., will be thus summarily dealt with. . . . The example is a bad one, and the effect upon the public injurious, to allow the defendant to escape upon matters of form. . . . The indictment is very informal, and probably no judgment could be pronounced; but still the court had jurisdiction and the matter intended to be charged is a crime which greatly concerns the public, and therefore the defendant ought to have been held and tried upon a sufficient indictment. . . . There was abundant cause for his Honor's declaring the indictment informal and insufficient, but not for quashing." We have quoted at some length from the eminent judge, who was easily master of his profession, as he states clearly the reasons which govern the administration of justice in such cases. This case is cited and approved by *Ashe, J.*, in *S. v. Knight,* 84 N. C., 789, in which, though the Supreme Court arrests the judgment, it is held that the court below properly refused to quash. To the same effect are the best authorities. *S. v. Harper,* 94 N. C., 936; 2 Hawkins P. C., ch. 25, sec, 146; 1 Chitty Cr. L., 300; 1 Bishop Cr. Pr., sec. 452; Wharton Pl. & Pr., 386, 387; Arch. Cr. Pl., 66; *Rex v. Belton,* 1 Salk., 372. Indeed, quashing an indictment, however defective, is (845) never a matter of right. "The judges are in no case bound, *ex debito justitiae,* to quash an indictment, but may oblige the defendant either to plead or demur to it; and this they generally do where it is for a crime of an enormous or public nature, as perjury, forgery and like offenses." 2 Hawks P. C., sec. 146, ch. 25. In such cases if the bill is defective, the court does not squash, but holds the prisoner and permits the solicitor to send a new bill.

We are not inadvertent to the fact that this action was removed from another county, and though the record does not state that the plea of not guilty was entered, presumably such was the case, as in criminal actions an order of removal can only be made after issue joined. *S. v. Reid,* 18 N. C., 377; *S. v. Swepson,* 81 N. C., 571; *S. v. Haywood,* 94 N. C., 847. But it is, in the present instance, immaterial, for though after issue joined, it is too late for the defendant, as a matter of right, to move to quash, the court, in its discretion, can permit the motion (in

proper cases) to be made. *S. v. Eason,* 70 N. C., 88; *S. v. Miller,* 100 N. C., 543; *S. v. Sheppard,* 97 N. C., 401.

There was error in quashing the indictment, and this must be certified that further proceedings may be had according to law. The solicitor can, if so advised, send a better bill, curing the defect above pointed out. *S. v. Colbert, supra.*

Error.

Cited: S. v. Skidmore, ante, 797; *S. v. Caldwell,* 112 N. C., 856; *S. v. Lee,* 114 N. C., 846; *S. v. Harwell,* 129 N. C., 551, 555; *S. v. Burnett,* 142 N. C., 579; *S. v. Cline,* 146 N. C., 642; *S. v. Knotts,* 168 N. C., 180; *S. v. Turner,* 170 N. C., 702.

(846)

THE STATE AND GEORGIANA HUNTER v. T. R. WILLIAMS.

Appeal—Settlement of Case on Appeal—Trial—Inadvertent Remarks of Judge—Bastardy—Burden of Proof.

1. Although the failure of the judge to settle a case on appeal within sixty days after the courts of the district closed might subject him to a civil action for the penalty prescribed in the statute, he may, after that time, make up the case.
2. An appellant cannot complain that he was not notified of the time and place of settlement of the case when he did not request to be so notified.
3. That the judge spoke of a bastardy proceeding as an indictment did not prejudice the defendant when it was corrected in the charge.
4. In bastardy it was not error to charge that if the oral testimony offered by the prosecution and the defendant, taken together, left the minds of the jury in doubt, that then the presumption raised by the written examination of the woman would not be rebutted, and the defendant would be guilty.

PROCEEDING in bastardy, tried before *Boykin, J.,* upon appeal from a justice of the peace, at March Term, 1891, of ALAMANCE.

The State offered the affidavit of Georgiana Hunter, in which she stated, that she had been delivered of a bastard child on 21 June, 1889; that she was a single woman; that the said bastard child was liable to become a charge to the county, and that the defendant T. R. Williams was the father of the child.

The State then introduced the mother and other witnesses in behalf of the State, who gave evidence to show the guilt of the defendant.

The testimony being concluded, his Honor charged the jury, (847) and, in conclusion, said:

"In an issue of paternity in a bastardy proceeding, the written examination of the mother is presumptive evidence that defendant is the father of the child, and when such written examination is introduced by the State, as in this case, it devolves upon the defendant, by a preponderance of evidence, to show that he is not the father. Upon the failure of the defendant to show, by a preponderance of evidence, that he is not the father, it is the duty of the jury to convict. If the defendant has satisfied the jury, by a preponderance of evidence, that he is not the father of the child, then the jury should acquit. If, however, the oral testimony taken together, both for the prosecution and defendant, left the minds of the jury in doubt, then the presumption raised by the written examination would not be rebutted, and the defendant would be guilty." Defendant excepted.

In the opening of the charge to the jury, the judge inadvertently said that this was an indictment against the defendant in bastardy, but afterwards, in the charge, this mistake was corrected, and the judge stated to the jury that it was a proceeding in bastardy in which the defendant T. R. Williams was charged with the paternity of the bastard child of Georgiana Hunter, the prosecutrix, and that the issue was, "Is the defendant, T. R. Williams, the father of the bastard child in question?" Defendant excepted.

The jury returned a verdict of guilty. Defendant moved for a new trial, on the ground that the court erred in the parts of the charge to the jury as before recited. Motion refused, and judgment was rendered against the defendant, from which he appealed.

The Attorney-General for the State.
L. M. Scott and W. H. Carroll for defendant.

(848) CLARK, J. The appellant's case on appeal, with the exceptions filed thereto, was handed to the judge, who failed to settle the case within sixty days after the courts of the district had closed. The appellant now asks that his statement of case on appeal should be taken instead of the "case" as since settled by the judge, insisting that the judge, being liable to a penalty for the delay, cannot "settle" the case. It is sufficient to say, that though The Code, sec. 550, on the failure of the judge to settle the case in the prescribed time, permits an action against him for a penalty of $500 (if, indeed, he is liable at all in this case, as to which we express no opinion), that does not subject the appellee to lost his right to have the "case settled" by the judge upon disagreement. The appellant further insists that the judge should have

given him notice of time and place of settling the case. But it does not appear that he "requested" this when sending the case to the judge, as required by the statute, nor afterwards. A case exactly in point is *Walker v. Scott,* 106 N. C., 56.

It is not seen how the inadvertence of the judge in referring to the action as an "indictment" prejudiced the defendant, but if it could have had that effect, the error was cured by the judge correcting it in his charge. *S. v. McNair,* 93 N. C., 628.

The charge that if the oral testimony offered by the prosecution and the defendant, taken together, "left the minds of the jury in doubt, then the presumption raised by the written examination (of the woman) would not be rebutted and the defendant would be guilty," is correct. *S. v. Rogers,* 79 N. C., 609; Code, sec. 32.

Affirmed.

Cited: S. v. Cagle, 114 N. C., 839; *Cameron v. Power Co.,* 137 N. C., 103; *S. v. McDonald,* 152 N. C., 807.

(849)

THE STATE v. K. C. POPE.

Fornication and Adultery—Evidence.

Evidence that defendants, indicted for fornication and adultery, lived for some time in the house of male defendant, but occupied different rooms; that female defendant washed and cooked and performed other housekeeping duties; that she had two children when she went there, and one was born afterwards, but there was no other evidence of improper relations, or that the woman was unmarried, or that her children were bastards, was not sufficient to be submitted to the jury, and a verdict of guilty thereon should be set aside.

INDICTMENT against K. C. Pope and Nettie Dunn for fornication and adultery, tried before *Connor, J.,* at April Term, 1891, of EDGECOMBE.

The defendant Pope alone was on trial. There was a verdict of guilty and judgment, from which he appealed to this Court. The case on appeal is as follows:

Walter Pope, a witness for the State, testified as follows: "I lived in the house with the defendant up to about a year ago; there were four or five rooms in the house; the defendant Pope occupied a room by himself; the woman occupied a room connected with the house, but under a different roof. I lived there all the time the woman did, except the

last year; I never saw the defendant Pope in the woman's room, nor the woman in Pope's room; never saw anything suspicious between—no intimate relations between them. I never noticed any favor in the children; never heard Pope claim them or say whose they were. The woman had two children when she went there to live, and has given birth to one since she has been living there—at present a child in arms. She washed and cooked and did other work. Pope has no family and is sixty-seven years of age. The witness, the defendant Pope, the (850) woman and her older children all ate at the same table."

Joseph Hobgood, a witness for the State, testified: "Pope lives in Battleboro. I have been there several times to see him on business. I don't know anything about his living in fornication and adultery with Nettie Dunn."

At this point his Honor took charge of the witness' examination, and asked this question: "Did you notice the favor of this woman's children to any one?" To which the witness replied: "There are several sets of children there." His Honor then asked the witness, "What do you mean by several sets of children?" Witness answered, "I mean children gotten by Pope on women who lived there before this woman."

Counsel for defendant objected to this testimony, saying: "I did not interrupt your Honor in the course of your examination of the witness regarding his adulterous relations with other women, to interpose an objection to such testimony. I desire now to interpose an objection to that testimony, and to move your Honor to exclude the same."

His Honor replied, "Certainly, I will give you the benefit of the objection, and will instruct the jury as to its incompetency."

This was said to counsel in the presence of the jury, but it is not certain that the jury heard and understood the same. The defendant demurred to the evidence, for that there was no evidence of his guilt to go to the jury. His Honor submitted the case to the jury, and the defendant excepted. His Honor omitted to charge the jury that the testimony of Hobgood, above set out and objected to, was incompetent and was not to be considered by them in investigating the guilt of defendant. Exception.

Verdict of guilty, judgment, and defendant appealed.

The Attorney-General for the State.
J. B. Batchelor for defendant.

(851) DAVIS, J. The defendant demurred to the evidence, and insisted that there was no evidence of guilt sufficient to go to the jury. There was no evidence in the case on appeal that the woman was a single woman; nor was there any evidence that her child, born while

she lived at the house of defendant Pope, was a bastard child; nor was there any evidence, other than indirect and inferential, that the defendants were not husband and wife. There was no evidence sufficient to go to the jury, and the defendant is entitled to a new trial.

It is but just and due to the able, accurate and conscientious judge before whom the case was tried, to say that the defendant's case on appeal was served upon the solicitor for the State, and no amendments were suggested or objections made by him. It did not appear in the evidence in the case on appeal that the woman was unmarried, or that the child born at defendant's house was a bastard. The solicitor may have overlooked or failed to advert to the evidence, but if he had no evidence other than that set out in the case on appeal, he ought not to have prosecuted the defendant; but we will not do the learned judge who tried the case the injustice to suppose that the case contained all the evidence, or that he would have permitted a verdict of guilty upon the evidence set out.

Error.

(852)

THE STATE AND ALICE WELLS v. P. P. ALIAS PLUMMER JOHNSON.

Appeal—Practice.

1. Where one enters a special appearance and moves to dismiss, and excepts to the refusal of the motion, his subsequent general appearance does not waive the original defects.
2. In an appeal from a justice of the peace to the Superior Court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days, both upon the justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge in his discretion permits the notice to be given at the trial, the appeal should be dismissed.

PROCEEDING in bastardy, tried upon appeal from a justice of the peace, before *Boykin, J.*, at August Term, 1891, of DUPLIN.

When the case was called for trial, the defendant moved to dismiss the appeal for want of notice to him. Upon said motion his Honor found the following facts:

That the proceeding was instituted before a justice of the peace of Duplin County, and was tried before him on 4 March, 1891; that upon said trial the defendant was acquitted and judgment rendered in his favor; that no notice of appeal was given at trial; that on 10 March, 1891, the complainant, Alice Wells, served written notice of appeal on the justice who tried the case; that a notice of appeal signed by the complainant was handed to the defendant by a negro man, not a party

and not an officer, between 4 March and the said August Term, 1891; that shortly after said 4 March, 1891, a notice corresponding with the said description was in possession of one of the defendant's attorneys, and said attorney admitted that said notice had been sent to him, by mail, by the defendant.

The defendant was present in court with all his witnesses, who (853) had been duly subpœnaed.

Upon the above facts, his Honor held that the defendant had sufficient notice of the appeal, and overruled the motion, and the defendant excepted.

There was a verdict and judgment against the defendant, from which latter he appealed.

The Attorney-General for the State.
W. R. Allen for defendant.

CLARK, J. The court having refused the motion to dismiss, the defendant pursued the proper course in having his exception noted "to save his rights," and proceeding with the trial. *Spaugh v. Boner,* 85 N. C., 208. The final judgment being against him, the appeal now brings up the exception for review. The subsequent general appearance for the purpose of the trial did not waive his exception for the refusal to dismiss. *Suiter v. Brittle,* 90 N. C., 20.

On the facts found, his Honor erred in finding that there was sufficient service. The statute requires (unless the appeal shall be taken at the trial) that notice of appeal shall be served in ten days after judgment. As has been said, the burden is on appellant to show service within the prescribed time. *Finlayson v. Am. Accident Co., ante,* 196; *Spaugh v. Boner,* 85 N. C., 208; *Sparrow v. Trustees,* 77 N. C., 35. The facts found do not show any service on defendant within that time, and the attempted service by one not an officer, "between 4 March and August Term," was not only too late, but was not legal service of a notice required by The Code, sec. 597. A *subpœna* may be served by any person not a party to the action, and proven by his oath (Code, sec. 597, 4), but the exception serves to prove the rule that service must be made by an officer, unless service is accepted. If the service of a notice is not legally made, service in any other mode is void. *Allen v.* (854) *Strickland,* 100 N. C., 225. The fact that defendant's counsel had, soon after 4 March, a notice sent him by the defendant, is not only indefinite as to time, but seems explained by the other evidence that such a paper had been handed defendant by one not an officer. The requirement of service by an officer is not only statutory but reasonable, as it prevents disputes like this, as to whether there has been

service or not, as is likewise the requirement that service must be within ten days, for a party should not be indefinitely held in suspense, but should know when the matter is at an end. Any hardship which might, under any circumstances, be entailed on an appellant by failure to serve notice in a legal manner and within the statutory time, is removed by the discretion reposed in the appellate court to permit notice to be given after that time. *Marsh v. Cohen,* 68 N. C., 283; *R. R. v. Richardson,* 82 N. C., 343; *West v. Reynolds,* 94 N. C., 333. It seems there were not such circumstances in this case, as the court did not put an end to the controversy by permitting the notice to be given then and there, as it might have done.

It is, however, contended that notice having been served on the justice, no notice to appellee was required. We have an express decision to the contrary (*Green v. Hobgood,* 74 N. C., 234), which is recognized in principle by *Marsh v. Cohen* and *R. R. v. Richardson, supra,* and *Richardson v. Debnam,* 75 N. C., 390. Besides, both the reason of the thing and a reasonable construction of the statute support this view. The notice to the justice is to send up the papers and transcript, the notice to the appellee is to have his witnesses and be ready for trial, as the cause stands for trial at the first term of the Superior Court. Code, secs. 565, 880; Superior Court Rule, 24. The statute (Code, sec. 876) requires service of notice of appeal within ten days, but nowhere provides directly on whom it may be served, except that, inferentially, it recognizes in the next section that it should be on both the justice and the appellee, as it provides when the appeal is taken at the trial and the adverse party is present, the appellant is not required to give written notice "either to the justice or to the adverse party." (855) It would be unreasonable to fasten upon every party who gains a cause in a magistrate's court the duty of inquiring or watching out if an appeal may not be sent up. When the appellant does not crave an appeal at the trial he should, at least, give the opposite party notice, and must do so within ten days, except that when process is not personally served and defendant does not appear and answer, he can serve notice of appeal in fifteen days after notice of rendition of judgment. Code, sec. 876. A party in court is fixed with notice of all orders and decrees taken at term, for it is his duty to be there in person or by attorney (*Clayton v. Jones,* 68 N. C., 497); but he is not held to have notice of orders out of term (*Hemphill v. Moore,* 104 N. C., 379; *Branch v. Walker,* 92 N. C., 87; Code, sec. 546); nor of orders before the clerk; *Blue v. Blue,* 79 N. C., 69. The same rule applies to appeal from the Superior Court, as to which, if the appeal is taken after the term is over, notice must be served on the appellee and within ten days. Code, sec. 549, as amended by Laws 1889, ch. 161.

There having been no service of notice of appeal, as required by statute, upon defendant within ten days, and his Honor not having exercised his discretionary power to relieve the appellant of the consequences and to permit notice to be given at the trial, there was error in refusing the motion to dismiss. The power to relieve from the failure to give due and proper notice of appeal is vested in the wise discretion of the presiding judge, and should only be exercised when there are facts and circumstances which would make it a hardship on the appellant not to permit it to be done. The policy of legislation and of the courts is to "require litigants to be diligent in prosecuting appeals from justices of the peace, and to prevent parties from using" such "as means of causing useless delay." *Avery, J.,* in *Ballard v. Gay,* 108 N. C., 544.

Let this be certified, that the appeal from the justice may be dismissed in the Superior Court.

Error.

Cited: Clark v. Mfg. Co., 110 N. C., 113; *S. v. Price, ib.,* 601; *Sondley v. Asheville, ib.,* 89; *S. c.,* 112 N. C., 696; *Davenport v. Grissom,* 113 N. C., 41; *Cummings v. Hoffman, ib.,* 268; *Forte v. Boone,* 114 N. C., 177; *McNeill v. R. R.,* 117 N. C., 643; *Smith v. Smith,* 119 N. C., 317; *Marion v. Tilley, ib.,* 475; *Pants Co. v. Smith,* 125 N. C., 590; *Riley v. Pelletier,* 134 N. C., 318; *Johnson v. Reformers,* 135 N. C., 387; *Blair v. Coakley,* 136 N. C., 410; *Peltz v. Bailey,* 157 N. C., 167; *Hunter v. R. R.,* 161 N. C., 505; *Luther v. Comrs.,* 164 N. C., 240; *Scott v. Jarrell,* 167 N. C., 365; *Tedder v. Deaton, ib.,* 480.

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(856)

THE STATE v. WILLIAM E. BLACK.

Certiorari—Appeal—Exceptions to Charge—Assault on Officer.

1. *Certiorari* will not issue to have exceptions to the charge incorporated in the case on appeal where it does not appear that they were assigned in the appellant's case on appeal.
2. The fact that the defendant's hogs were impounded under an invalid ordinance will not justify the defendant in making an assault upon the officer having them in charge.

CRIMINAL ACTION for assault with a deadly weapon, tried before *Boykin, J.,* at August Term, 1891, of MOORE.

It appears in evidence that defendant's hogs had been impounded by the town marshal of Carthage and were in his custody. The marshal and two of the town commissioners, who were near the pound, saw the

defendant going in the direction of the pound at night, and the defendant swore, in their presence, that unless the marshal turned his hogs out he would liberate them, and thereupon proceeded to the pound and attempted to break the pound to turn the hogs out. The marshal and the two commissioners came up, and the marshal ordered the defendant to desist; he refused to desist; the marshal threatened to arrest him if he persisted in breaking the pound. There was also evidence that the marshal flourished a pistol when he threatened to arrest the defendant, who, thereupon, assaulted the marshal with a piece of scantling drawn in a striking attitude within striking distance. The marshal had no warrant. The defendant offered to introduce the ordinance under which his hogs had been impounded, for the purpose of showing that said ordinance was void. The court refused to admit the evidence. The exception for such refusal is the only exception presented for review.

The case states that there was no exception to the charge. (857)

The defendant moved for a *certiorari,* as stated in the opinion.

The Attorney-General and J. B. Batchelor for the State.

W. C. Douglass and J. W. Hinsdale for defendant.

CLARK, J., after stating the facts: The affidavit in the petition for *certiorari* avers that a special prayer for instruction was asked in writing and in proper time, that it was refused and exception noted; but it is not alleged that such exception was set out in appellant's statement of case on appeal. As the appellant did not set it out as an exception in his case on appeal, he cannot complain that the judge did not incorporate it in the "case settled" by him.

In *Taylor v. Plummer,* 105 N. C., 56, it is said: "Exceptions noted on the trial and exceptions which, after the verdict, the losing party desires to assign to the charge, or to the refusal or granting of special instructions, must be set out by appellant in making out his statement of the case on appeal (as required by Code, sec. 550), or *they are deemed waived.*" Had the exception for refusal of the special instruction (if asked in writing and in apt time) been set out by appellant in making up his case on appeal (Code, sec. 550, and Rule 27, Supreme Court), and the judge had omitted such prayer and the exception for its refusal from the "case settled," a *certiorari* would lie to have them incorporated. *Lowe v. Elliott,* 107 N. C., 718.

By not setting out such an exception in his statement of case on appeal, the appellant has waived the right to insist on it.

The only exception stated in the case on appeal is to the refusal to admit the town ordinance in evidence, which was offered for the purpose of showing its invalidity. For the purpose of the exception it must be taken that the hogs were impounded under an invalid (858)

ordinance, but they were in the custody of the officer and the owner had no right to take the law in his own hands and regain possession of his property by violence and by tearing down the pound. The officer had a right to forbid him, and to prevent the property being taken out of his custody by force.

This is not a case where the officer is on trial for using excessive force. Nor is it a case where property is attempted to be taken under a void warrant and the owner resists by force. For all that appears, the hogs were taken on process valid on its face, which the officer was compelled to execute, though issued, possibly, without sufficient legal ground; but that was not a matter for the officer to decide nor the defendant. It was a matter to be settled by the court. Besides, the hogs had been taken previously, and were in the peaceable possession of the officer.

The case presented is as to the right of the defendant to tear down the town pound to regain possession of his hogs (taken possibly under an illegal ordinance) after being forbidden to do so, and his right to assault the officer who bade him desist, and who, when the defendant did not stop, with a flourish of his pistol had threatened to arrest him. That the defendant made an assault is uncontroverted. The defense set up by the exception that the hogs had been taken under an invalid ordinance is not sufficient. The defendant, after being forbidden by the officer, should have desisted and have sought to get back his hogs by lawful process. He had no right to regain them by means of a breach of the peace. "Two wrongs will not make a right."

In *S. v. Hedrick,* 95 N. C., 624, an arrest was made by one who had been illegally deputed to serve a warrant in a civil action. On the party arrested attempting to escape, another party tripped up the acting officer who was pursuing, it was held that such other party was (859) guilty of an assault. In *S. v. Armistead,* 106 N. C., 639, it is said that no one has a right to take a prisoner from the custody of an officer on the ground that such prisoner is unlawfully in arrest, since the lawfulness of the arrest must be inquired into without resort to force. The property being committed to the custody of the officer by process of law, he had the right to arrest without a warrant any one attempting to take it from him. *Brady v. Hodges,* 99 N. C., 319. The exigency would not permit him to get a warrant, for while he was off looking up an officer to issue it, the property with whose safe-keeping he was charged would be taken.

PER CURIAM. No error.

Cited: Hinson v. Powell, ante, 538; *S. v. Rollins,* 113 N. C., 733; *Cameron v. Power Co.,* 137 N. C., 102; *S. v. Scott,* 142 N. C., 583.

THE STATE v. JOHN W. NEAL.

Highway—Failure to Work—Warrant—Negative Averments.

The warrant against one for refusing to work on a public road must negative the payment of one dollar in discharge of the defendant's liability.

CRIMINAL ACTION for failure to work on a public road, tried on appeal from a justice of the peace, before *Winston, J.*, at August Term, 1891, of ORANGE.

The facts are sufficiently stated in the opinion.

The Attorney-General for the State.
W. A. Guthrie for defendant.

SHEPHERD, J. The warrant simply charges that the defendant "wilfully refused to attend and work on the public road after being lawfully warned, contrary to the form of the statute," etc.

There is nothing to negative the payment of one dollar in discharge of the defendant's liability to perform the labor required (860) of him. No amendment was asked at any stage of the trial, either before or after verdict, and upon conviction the defendant moved in arrest of judgment.

It is expressly decided that the motion should have been allowed. *S. v. Pool,* 106 N. C., 698; *S. v. Baker,* 106 N. C., 758. The insufficiency of the warrant was not, we presume, called to the attention of his Honor, the argument before him being addressed to the constitutionality of the act under which the defendant was prosecuted.

Error.

Cited: S. v. Yoder, 132 N. C., 1113; *S. v. Green,* 151 N. C., 729.

THE STATE v. ROANOKE RAILROAD AND LUMBER COMPANY.

Obstructing Highway—Railway Crossing—Indictment—Variance—Arrest of Judgment in Supreme Court.

1. An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing is fatally defective if it does not charge the manner of the misuse of the plank, as plank may be used for such a purpose.

2. It is a fatal variance in an indictment for obstructing a highway at a railroad crossing to prove that the defendant permitted for some time a dangerous hole to remain in the crossing.
3. Judgment will be arrested in the Supreme Court if the indictment is defective, although no motion in arrest was made in the court below.

CRIMINAL ACTION, tried before *Bryan, J.*, at May Term, 1891, of BEAUFORT.

The defendant is indicted for obstructing a public road. The indictment charges that he "unlawfully and wilfully did obstruct said
(861) public road by placing in and across it certain plank where the road of said corporation (the defendant) crossed the said public road, so that the good citizens of the State could not, nor cannot now, cross and recross over said public road with their teams, as they were accustomed to pass and repass, and so continues to impede and obstruct said road, to the common nuisance," etc.

The defendant pleaded not guilty.

On the trial but one witness was examined, and the material parts of his testimony were, that "the defendant's road crosses this public road; the company did not have enough plank; it was elevated eight or ten inches above the public road; between the track of the defendant's road and the platform which sloped to the track was a hole. This hole was eight or ten inches deep from top to bottom; it was not safe for teams. I think the elevation above the road was eight or ten inches—might have been less. The hole was on the north side of defendant's road; the hole was there about April or May, 1890; the plank had slipped down, leaving the hole; the plank was well up to the railroad, when I first saw it; the lumber road was not down there more than two or three months before I saw it; it was there some time before there was any hole; the hole was as much as four inches wide."

There was a verdict of guilty, and judgment for the State. The defendant, having excepted, appealed to this Court.

The Attorney-General and C. F. Warren for the State.
J. H. Small for defendant.

MERRIMON, C. J., after stating the facts: Accepting the evidence of the single witness for the State as true, there was a substantial variance between the charge as laid and the proof. The charge was the obstruction of the public road mentioned "by placing in and across it certain plank" at the place specified. The proof was, in substance, that
(862) a dangerous hole in the crossing was permitted to be and continue for a week or two, occasioned by the slipping down of a plank from its place. The constituent facts charged were widely differ-

ent in their substance and meaning from those proven. The indictment charged one offense, that proven was, in substance, as to the constituent fact, a distinct and different one. In such case, the court should direct the jury to render a verdict of not guilty.

We are further of opinion that no offense is sufficiently charged in the indictment.

The defendant is a railroad company, and constructed its railroad across the public road specified in the indictment. This it had the right to do in such way and manner "as not to impede the passage or transportation of persons or property along the same," restoring such road so crossed "to its former state or to such state as not unnecessarily to have impaired its usefulness." Code, secs. 1710, 1957, pars. 5, 20, 54. In constructing such crossing, it might appropriately and reasonably use plank, timber, earth, etc., to make the same such as the statute allows and intends, and as the public ease, convenience and safety require. It might lawfully use such things in forming and securing the incline on each side of the railroad track, so as to provide an easy and safe passway across it for carriages, wagons, horses, etc.

It was not, therefore, unlawful *per se* for the defendant to use plank about the crossing in question. Hence, the indictment ought to charge appropriately the misuse or misapplication of the plank in placing it across the public road at and about the crossing in such a way and manner as to constitute the offense of obstructing the public road, or that the same was allowed by the defendant to become ruinous, out of repair, and in such unlawful condition as to constitute the offense. The material facts should be charged with such fulness as to show the complete offense.

In this case the offense is not so charged. Indeed, no offense (863) is sufficiently charged. How the plank was misused or misapplied at the crossing does not appear, nor is it charged that the defendant suffered it to become ruinous, out of repair and in such improper condition as to obstruct the public road. The court ought, therefore, to have quashed the indictment before the defendant pleaded. Or failing to do that, it should, after verdict, have arrested the judgment. The counsel of the defendant in this Court insists that the judgment of the court below should be reversed and judgment there arrested. We are of that opinion, and so direct. The court seeing the whole record, including the indictment, should have entered such judgment as in law ought to have been rendered thereon. That it did not, is error. Although a motion in arrest of judgment was not made in the court below, it may be made here, because this Court sees the whole record and takes notice of errors appearing in the record proper, though not regularly assigned in the court below. It must appear from the record that, in some

aspect of it, the judgment rendered is warranted. Here it does not appear that any offense is charged. The trial and verdict were immaterial and nugatory.

Judgment arrested.

Cited: S. v. Newberry, 122 N. C., 1077.

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(864)

THE STATE v. L. W. VAN DORAN.

Practicing Medicine—Indictment—Abandonment of Exceptions—Constitution—Police Power.

1. An indictment which charges that the defendant did practice, *or* attempt to practice, medicine, etc., is not defective because of the use of the disjunctive conjunction.
2. To constitute the offense of practicing medicine under the act of 1881, without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician.
3. That act is constitutional, being the exercise of the police power of the State, and the proviso that it shall not apply to midwives nor to nonresident consulting physicians does not bring it within the inhibition of Constitution, Art. I, sec. 7, prohibiting exclusive privileges.
4. While a patent medicine vendor is not within the statute, yet one who holds himself out to the public as a physician, makes diagnoses of diseases, etc., cannot protect himself because he administers medicines prepared by himself.
5. The abandonment of exceptions to a bill of indictment for a misdemeanor, by a statement in defendant's brief, is a waiver of the defects.

SHEPHERD, J., dissenting.

CRIMINAL ACTION for the statutory offense created by chapter 181, Laws 1889, tried at the Spring Term, 1891, of WASHINGTON, before *Bryan, J.*

The indictment was in form as follows:

"The jurors for the State, etc., . . . present that L. W. Van Doran, in Washington County, on 1 March, 1891, unlawfully and wilfully did practice, or attempt to practice, medicine or surgery, the said L. W. Van Doran not then and there having produced and exhibited before the clerk of the Superior Court of said county a license obtained from the Board of Medical Examiners of the State of North Carolina, or a diploma issued by a regular medical college prior to 7

March, 1885, nor made oath that he was practicing medicine or (865) surgery in the State prior to said 7 March, 1885, and not then and there having obtained from the said clerk of the court a certificate of registration, and not then and there having a temporary license so to practice medicine or surgery, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

It was in evidence that the defendant claimed to have graduated at a medical college in Chicago, and to have lost his diploma. There was no evidence of a license from the Medical Board of North Carolina, but the defendant had applied to the clerk to be registered as a physician and his application had been refused.

The Attorney-General for the State.
A. O. Gaylord (by brief) for defendant.

AVERY, J., after stating the facts: Where a statute makes two or more distinct acts, constituting separate stages of the same transaction, indictable (as in the case at bar, the acts of practicing, or attempting to practice, medicine), both or all may be charged in a single count of the indictment. 1 Wharton Cr. Law (7 Ed.), sec. 390; 10 A. & E., 599*d*; *S. v. Bordeaux,* 93 N. C., 560; *S. v. Parish,* 104 N. C., 680.

If the distinct acts, representing the successive stages of the transaction, were connected in the statute by the word "or," it was in accordance with the settled precedents in drawing the indictment to couple the independent clauses by using the word "and" instead of following closely the language of the statute and using "or." Bish. on Stat. Cr., sec. 244; S. v. Harper, 64 N. C., 129.

The reason for discarding the disjunctive and substituting the conjunctive, was, that usually the alternative charge left the (866) defendant in such doubt as to the nature of the offense which he was held to answer, that he could not intelligently prepare his defense; as where an indictment charged property alleged to have been stolen in *"A or another,"* giving the prosecutor the opportunity to sustain the charge by proving the property in any human being in the world, instead of averring that it was the property of A *and* another (who was shown by the proof to be his partner). *S. v. Capps,* 71 N. C., 93; *S. v. Harper,* 64 N. C., 130.

But upon the maxim, *cessante ratione cessat et ipsa lex,* the better rule seems now to be that "or" is only fatal when the use of it renders the statement of the offense uncertain, and not so when one term is used only as explaining or illustrating the other, or where the language of the law makes either an attempt or procurement of an act, or the act itself, in the alternative, indictable. 1 Wharton, C. L., sec. 294;

U. S. v. Potter, 6 McLean, 186. Where it is manifest that the defendant cannot be embarrassed by uncertainty in preparing his defense by reason of the use of the disjunctive instead of the conjunctive, if the form ordinarily used in drawing the indictment should be treated as an established precedent essential in all cases, it would be an arbitrary and unreasonable rule. Taking the language of the statute, under which the indictment in *U. S. v. Potter, supra,* was drawn, as an illustration, it would be difficult to explain how the accused would be put to disadvantage or left in doubt in making his preparation to meet the accusation, because he was charged with "cutting or causing to be cut," and was uncertain whether the State would offer testimony tending to prove the commission of the one act or the other, when all the authorities concur in stating the rule to be that if the usual precedent had been followed, and the language employed in the indictment had been "cutting *and* causing to be cut," the prosecution could have sustained the
(867) charge by proof of either act, thus leaving the defendant in equal uncertainty. 10 A. & E., *Indictment,* 16(h); *S. v. Keeter,* 80 N. C., 472; Bishop, Stat. Crimes, sec. 244; *S. v. Ellis,* 4 Mo., 475; *S. v. Locklear,* 44 N. C., 205; Wharton, Cr. Pl. & Pr., sec. 252.

But if we admit (as many authorities tend to prove) that where no statute affecting procedure has been passed to modify it, it is a rule of law that charges of the acts representing the different stages of the same transaction must be coupled by the word "and" in the indictment, still giving a fair interpretation to our curative act (Code, sec. 1183), we think that the charge is expressed "in a plain, intelligible and explicit manner" (certainly as definitely as in the old prescribed precedent), that sufficient matter appears in the indictment to enable the court to proceed to judgment, and, therefore that it should "not be quashed." *S. v. Rhinehart,* 75 N. C., 58; *S. v. Walker,* 87 N. C., 541; *S. v. Lane,* 26 N. C., 113; *S. v. Wilson,* 67 N. C., 456; *S. v. Sprinkle,* 65 N. C., 463; *S. v. Parker, ib.,* 453. The defendant moved in arrest of judgment, because the indictment failed to specify upon what particular person he practiced medicine or surgery. The governing principle to be applied in passing upon the sufficiency of the averments in an indictment, is that the nature of the offense charged should appear so explicitly and plainly from its terms as to leave the defendant in no well founded doubt in preparing to meet the accusation. The indictment is framed under section 5, chapter 181, Laws 1889. It is not essential that the prosecution should show, in order to convict under the statute, that the defendant ever prescribed for or practiced upon a particular patient, but it would be sufficient to prove that he held himself out to the public as a physician or surgeon and invited or solicited professional employment from any who might need or desire such service.

If the defendant merely held himself out to the public as a (868) physician or surgeon, he was guilty of the offense created by the statute. It would be unreasonable, therefore, to declare that the indictment, upon its face, is defective, because the charge is not more specific in describing the manner of practicing or attempting to practice. The precedents found in the books and used in prosecutions, under similar statutes, tend to sustain our position. Bishop's Forms, secs. 996 to 1000. The offense seems to be described with sufficient certainty in the language of the law, and no extrinsic proof is needed to bring it within its terms. This indictment is not analogous to the charge of disposing of mortgaged property, drawn under the Laws 1873-4 and 1874-5, because in that case, as the Court declared, the words "dispose of in their literal sense were worse than a drag-net, and, taken with reference to the subject at hand, they might mean disposition by removing from the county, concealing, selling or by actual consumption of such as were fit for food." *S. v. Pickens,* 79 N. C., 652. Besides, there were certain extrinsic facts that it was essential to aver and prove. *S. v. Barnes,* 80 N. C., 376. The offense is charged in the indictment in such terms that the defendant cannot be guilty of it without being brought within the express meaning of the statute, and this has been declared a test of its sufficiency in such cases. *Young's Case,* 15 Grattan (Va.), 664. It has been stated, as an established rule, that where an offense is prohibited in general terms in one section of the statute, and in another and entirely distinct section the acts of which the offense consists are specified, it is not necessary that anything but the general description should be set out in the indictment. *S. v. Casey,* 45 Me., 435.

Where the very nature of a charge is such as to involve the idea of attempting to engage in a business, or unlawfully engaging in a business prohibited by statute, there is not the same reason for specifying the act, as where the allegation is, and the specific proof must be that the accused was guilty of a single unlawful act, which would constitute a distinct offense as often as the act might be repeated. Bishop (869) Stat. Crimes, sec. 1037; *People v. Adams,* 17 Wend., 475. Thus, if the defendant were indicted for retailing, every distinct sale to the same or different persons would constitute a criminal offense, while separate indictments would not lie for every attempt to practice, or every separate solicitation of practice, within the statutory period. *S. v. Bryan,* 98 N. C., 644.

It is too late to question the constitutional validity of a statute enacted in the exercise of the police power of a State, and purporting to protect the public against imposition and injury to health by requiring that persons who engage in the practice of medicine shall submit to an examination conducted by learned physicians, and shall produce a license

from such competent masters of the medical science. Cooley Const. Lim., 596 (star page).

The proviso to section 5 (under which the bill is drawn) declares that "this act shall not apply to women pursuing the avocation of midwife, nor to reputable physicians or surgeons resident in a neighboring State and coming into the State for consultation with a registered physician of this State." The comity thus extended to reputable physicians, who have probably been subjected to some suitable test of competency (under the laws of the States in which they reside) before being permitted to practice, is widely different in its nature from the attempt to grant the exclusive privileges coming within the inhibition of Article I, section 7, Constitution of North Carolina. The proviso to the section is merely an exception to a restrictive or prohibitory law, inserted through courtesy to sister States upon the assumption that they have provided amply for the protection of the health of their citizens by legislation similar to ours, and with the further safeguard that our own registered physicians alone have the power to extend this courtesy to nonresidents, upon whose opinions they may place a high estimate.

At the request of the solicitor the court charged the jury that if
(870) "the defendant attended any sick person, examined the condition of such sick person and prescribed the medicine of his own make for the sick person, and held himself out to the public as competent to prescribe the medicine of his own make, in those cases wherein it was the proper remedy in his opinion, and did prescribe it in such cases, the defendant had violated the criminal law," and should be found guilty. A witness testified that the defendant examined his throat, diagnosed the disease, declaring it to be catarrh, said he would cure the witness for ten dollars, and prescribed and furnished some pills that he had been selling as a proprietary medicine. Another witness testified that the defendant stated, when on trial before the justice of the peace, that he was a practicing physician in Washington County. Mr. Armistead testified that the defendant told him that he had a right to practice medicine and intended to do it; that he did not understand the defendant to say that he used only his own proprietary medicine. Dr. Murray visited Mrs. Mathews and found the defendant in attendance upon her, when he said that he had as much right to practice medicine as Dr. Murray, a registered physician, had. He had medicine in the sick-room and said he was giving it to the patient, who was having fits—Indian hemp and pulsatilla. The defendant, when examined in his own behalf, said that he had been called to see plenty of sick people, and "after examining them," if it was appropriate, prescribed his medicine.

We think that the instruction embodied the law applicable to the testimony bearing upon the charge. An unlicensed person, claiming to be

a physician and holding himself out to the world as such, cannot, after examining a patient who has asked his services, diagnosing the disease, fixing an amount or price for which he will cure the patient and giving him a prescription, evade the law by proving that the medicine administered was a proprietary remedy prepared and sold by him. If such were the law, a pretender, with a half dozen or more medicines (871) of his own manufacture, and marked as nostrums suitable for certain classes of disease, might declare himself a graduate in medicine and capable of curing diseases of all kinds, after examining the patient and determining which one of his ready-made preparations would prove the panacea to meet the particular symptoms, might administer it and thus defeat and evade this salutary law passed for the purpose of preventing quacks from masquerading as trained medical men. A vendor of patent medicines who does not pretend to diagnose disease and determine which of his remedies is proper in a particular case, is not a violater of this statute; but that avocation cannot be used to shelter one who is practicing medicine and holding himself out as a physician, and who varies his prescriptions to meet symptoms discovered on his own examination.

We think that the evidence warranted the judge in giving the instructions asked by the solicitor, and in adding that if "the defendant had practiced in the county (Washington) within two years without first having registered and obtained a certificate, that is, prescribed for sick persons, or held himself out to the public as a physician or surgeon, he was guilty." *S. v. Bryan, supra.*

Defendant's counsel in his brief, says, after enumerating the exceptions to which we have adverted, that all others are abandoned. He does not insist upon the motion to quash for want of the negative averments that the defendant was not a reputable physician, etc., and his abandonment must be considered as complete a waiver as an agreement to cure the defect, if any, except by amendment, would have been.

SHEPHERD, J., dissenting: Fully sympathizing as I do in all reasonable efforts to free the administration of the criminal law from the refinements of needless technicalities, I am nevertheless unable to concur with my brethren in sustaining the indictment in the present (872) case. The defendant is indicted under section 5, chapter 181, Laws 1889, which makes it a criminal offense for any person to "practice, or attempt to practice, medicine or surgery in this State," without having first registered, and in other respects complied with the law. It thus appears that the statute has expressly created two offenses, viz., the commission of the inhibited act, and the attempt to commit it. These offenses are so distinct that in the latter the greater particularity is re-

quired in the indictment, this Court having conclusively settled, in *S. v. Colvin,* 90 N. C., 717, that in such indictments some overt act of the accused, which, in the ordinary course of things, would result in the commission of the particular offense, must be alleged and proved.

The offenses being distinct, it seems quite clear to me that they cannot be charged with the alternative, and I am unable to find a single authority in which such an indictment has ever been sustained. In addition to the elementary works on the criminal law, we have express decision of this Court that such a bill is fatally defective. *S. v. Harper,* 64 N. C., 130. Even the very statute (Code, sec. 1183), which does away with formal objections, etc., provides that the offense shall set forth "in a plain, intelligible and explicit manner;" and how it can be said that this requirement is complied with by charging the defendant, as Mr. Archbold puts it (Crim. Practice & Pl. 278), "with having done so or so."

It is true that there are some authorities which hold that the use of the disjunctive is not fatal when the acts represent successive stages of one criminal transaction, as when the charge is "cutting or causing to be cut," but it must be noted that these cases relate only to one distinct offense, and rest upon the idea that one part is used only as ex-
(873) plaining or illustrating the other.

Mr. Wharton (Crim. Law, sec. 294) shows that the weight of authority is even against this practice, for he says that if the charge is "in the disjunctive, as that he murdered *or* caused to be murdered, forged *or* caused to be forged, burned *or* caused to be burned, sold spirituous *or* intoxicating liquors . . . it is bad for uncertainty." After citing some few American decisions to the contrary, he remarks that "the principle in those cases seems to be that 'or' is only fatal when it renders the statement of the offense uncertain, and not so when one term is used only as explanatory of or illustrating the other." It is very difficult to understand how the mere charge that one attempted to do an act can explain or illustrate that act when already completed.

I think that we should adhere to the well settled rule that alternate charges of distinct offenses ought not to be sustained.

PER CURIAM. No error.

Cited: S. v. Bryant, 111 N. C., 695; *S. v. Wynne,* 118 N. C., 1207; *S. v. Call,* 121 N. C., 645, 646, 649; *S. v. Welch,* 129 N. C., 580; *St. George v. Hardie,* 147 N. C., 96; *S. v. Siler,* 169 N. C., 317; *S. v. Ratliff,* 170 N. C., 709; *S. v. Stephens, ib.,* 748.

THE STATE v. SPENCER HADDOCK.

Slander of Women—Indictment.

An indictment for slandering an innocent and virtuous woman, charged that defendant "did, by words spoken, declare in substance that said L. B. was an incontinent woman": *Held*, a sufficient description of the offense charged, notwithstanding the alleged slanderous words were not set out.

CRIMINAL ACTION, tried before *Whitaker, J.*, at the June Term, 1891, of PITT.

The defendant was indicted for attempting to injure and de-
(874) stroy the reputation of an innocent woman, under section 1113 of The Code.

The indictment was as follows:

"The jurors for the State upon their oaths present, that Spencer Haddock, late of the county of Pitt, on 26 May, 1891, at and in the county of Pitt, attempting, wantonly and maliciously to injure and destroy the reputation of one Lany Booth, being an innocent and virtuous woman, did by words spoken, declare in substance that the said Lany Booth was an incontinent woman, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

The counsel for defendant moved to quash the bill of indictment, which motion was allowed and the State appealed.

The Attorney-General for the State.
No counsel for defendant.

DAVIS, J. By section 1113 of The Code it is made a misdemeanor for any one to "attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency." The defendant is indicted under this section, and the only question presented for our consideration is, does the indictment "express the charge against the defendant in a plain, intelligible and explicit manner?"

If it does, it is sufficient. See Code, sec. 1183. The indictment follows the very language of the statute; but it is said that the indictment should set forth the words "spoken," and the circumstances under which they were spoken, in order to enable the court to see whether they amount to a charge of incontinency, and to enable the defendant to know what he is to answer.

The charge is clearly and distinctly made, in the very language
of the statute, that he wantonly and maliciously attempted to in- (875)

jure and destroy the character of Lany Booth, an innocent and virtuous woman. Whether she is an innocent and virtuous woman, and whether he has attempted, by words spoken, to injure and destroy her character, are matters for proof.

It is not necessary to set forth the words by which the attempt was made. The offense is created by statute, and it is sufficient if the indictment follows the words of the statute. *S. v. George,* 93 N. C., 568, and cases cited. The Legislature has thought wise to relax the stringency of the common law requirements in indictments under which defendants frequently escape trial and punishment by informalities and refinements. Code, sec. 1183, *supra.*

In *S. v. Eden,* 95 N. C., 693, an indictment, in form precisely like this was before this Court in which there was a motion in arrest of judgment. That was the defendant's appeal, and a new trial was awarded because of error in instructions to the jury upon the evidence, but the court refused to arrest the judgment. It is true that the form of the indictment was not passed on, but *Smith, C. J.,* said: "We do not find it necessary to pass upon the form of the indictment, . . . since we propose to dispose of the appeal upon the ruling to which the first exception is taken, with the remark that similar forms of indictment have been heretofore before this Court, and acted on without objection, for these alleged defects." *S. v. Eden, supra,* and cases there cited.

Error.

Cited: S. v. Flowers, ante, 843; *S. v. Shade,* 115 N. C., 758; *S. v. Hester,* 122 N. C., 1052; *S. v. Mitchell,* 132 N. C., 1036; *S. v. Fulton,* 149 N. C., 487; *S. v. Whedbee,* 152 N. C., 784.

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THE STATE v. BENJAMIN WHITFIELD.

Evidence of Declarations and Confessions—Duress.

A declaration made by one charged with a criminal offense, to the officer who then has him in custody and handcuffed, is not thereby rendered incompetent as evidence. To constitute the duress which will exclude such declaration, it must appear that it was elicited by some offer or threat calculated to arouse hope or fear in the mind of the person making it.

INDICTMENT for larceny of two oxen, tried at the Fall Term, 1891, of PITT, before *Connor, J.*

Other testimony having been offered tending to prove the guilt of

defendant, the solicitor was allowed to show that after the defendant had been arrested on a justice's warrant and committed to jail to await a trial upon the charge upon which he was then arraigned, he was taken by virtue of a writ of *habeas corpus ad testificandum,* under custody, to Williamston to testify in the Superior Court of Martin County.

R. W. King, the sheriff's deputy who took defendant in custody to Williamston, testified as follows: "I was conveying defendant from Greenville to Williamston under an order from *Judge Connor* to testify in a case from Martin. He was in custody charged with the offense for which he is now being tried. I offered him no inducement to talk about it, nor said to him that it would be better for him to tell about it. I was riding along the road in a buggy with him; he had one handcuff on and was tied to the buggy. I had the warrant upon which he had formerly been arrested in my pocket; I did not tell him that I had the warrant. He knew that I was going to bring him back. He said to me that he bought the steers from a man by the name of Sam Sheppard, near Great Swamp, for twenty dollars, and offered to sell them for twenty-two dollars. He said that his mother had given him (877) thirty dollars to trade upon. I asked him why he did not try to get his cattle back after he got out of jail. He said his friends advised him not to do so, and that he had learned that it might give him some trouble. He said that he went to Roper City and Baltimore, and then came back to Martin. He was arrested by the sheriff of Martin."

To these declarations the defendant objected, for that he was under arrest and handcuffed at the time. The court overruled the objection, for that it appeared from the statement of the deputy sheriff, without contradiction, that the said declarations were voluntary. Defendant excepted.

Defendant testified and introduced evidence to show that he bought the oxen from Samuel Sheppard along the public road at Great Swamp, and that he used money loaned him by his mother.

There was evidence both corroborative and contradictory of the defendant's statements.

Verdict of guilty; motion for new trial for error in admitting testimony of King; overruled; appeal.

The Attorney-General for the State.
No counsel for defendant.

AVERY, J., after stating the facts: The facts that a defendant was in arrest and secured by a handcuff placed on one hand and connected by a chain with the buggy in which he was riding in company with the officer, who had in his pocket the warrant under which he had been

committed to jail on a charge of larceny, do not of themselves constitute duress so as to exclude any material declaration made to the officer in reference to the commission of the crime of which he is accused. Unless, in such case, it appeared to the Court that the defendant was induced to make the confession or declaration by some advanta-
(878) geous offer or by threats or actual force, by arousing hope or exciting fear in his mind, it was not error to admit the testimony of the officer. *S. v. Sanders,* 84 N. C., 728; *S. v. Bishop,* 98 N. C., 773; *S. v. Graham,* 74 N. C., 646; *S. v. Efler,* 85 N. C., 585; *S. v. Howard,* 92 N. C., 772.

There was no error. The judgment below must be
Affirmed.

Cited: S. v. Edwards, 126 N. C., 1052; *S. v. Horner,* 139 N. C., 606; *S. v. Lowry,* 170 N. C., 734.

THE STATE v. EDWARD TELFAIR.

Assault, Secret—Evidence of Identity.

Upon the trial of an indictment for a secret assault, prosecutor testified that he was shot in the evening by some one standing behind a fence about six steps distant; that he could see a person at that time of the day for fifty yards, and he saw the person who shot as he ran off; that his size, complexion, and appearance was that of defendant; that his assailant wore a shirt like that worn by defendant on the preliminary trial two days afterward. It was also in evidence that the tracks made by the assailant corresponded with the shoes worn by defendant: *Held,* that the evidence of the identity of the defendant was sufficient to be submitted to the jury and warrant a verdict of guilty.

INDICTMENT for a secret assault (drawn under chapter 32, Laws 1887), tried at the Fall Term, 1891, of PITT, before *Connor, J.*

The prosecutor testified, among other things, that the defendant lived near him in the same township, in Pitt County; was known to him and had traded at his store, and that on 26 May previous he was going from his home to his store, about 7:30 p.m., when some one, who was standing behind a fence, fired a gun loaded with B. B. and buckshot, one of the shot striking witness, others passing through his
(879) clothes and still others lodging in the trees near by the witness. The person did not move till the witness inquired who it was,

and then he ran off. The witness stated that he recognized a dark-checked shirt which the person was wearing; that he saw a colored boy of about the size and height of the defendant and clean shaven, and that on the second morning afterwards, when the defendant was brought to trial, he was wearing a dark-checked shirt, exactly like the one worn by the person who shot him, and that the gun used was a single-barrelled musket.

As soon as the justice of the peace, Mr. Laughinghouse, could be found on the next day, the prosecutor procured a warrant for the arrest of defendant, and then examined the track and found it was made by a number seven shoe that had been run down. The shoe worn by the defendant at the trial was run down.

On cross-examination the prosecutor stated that he could have seen a man one hundred yards away when he was shot; *that the defendant was about six steps from him when the shot was fired,* and he could see *at that place fifty yards, and he saw the defendant as he started to run.* The witness testified also that a shoe exhibited to him on the trial was the one he saw next day.

Mr. Laughinghouse, the justice of the peace, testified that he asked the prosecutor the next day why he thought that the defendant shot him, and prosecutor replied that he knew it by his size and the color of his shirt, which the prosecutor described to him. The witness also testified that he placed the shoe given him by the officer in one of the tracks near the alleged place of shooting and it fitted the track exactly, and he afterwards tried it on defendant's foot and it was of the same size that he wore.

Mr. Holliday testified that the track where the person appeared to be standing was eleven inches long, where he was running eleven and one-fourth inches long (it being in evidence that defendant wore a number seven shoe and that the length of that number was eleven (880) inches). That witness further testified that the defendant was working in a field where he could see him, on the day before the shooting, and left the field a considerable time before the usual hour of quitting work.

The witness stated that he recognized the shoe exhibited at the trial as the one worn by defendant the day before the shooting. The shoe which the defendant used in chopping cotton was run down. The shoe shown on the trial was cut across the toe (the prosecutor having testified that the cut across the toe appeared at the trial to be fresh). A diagram showing the positions of the prosecutor and the person who shot him, the roads, location of tracks examined and of the store and home of the prosecutor and the home of defendant.

The defendant's counsel offered no testimony, and asked the court to instruct the jury that the evidence makes, at best, nothing more than

a weak probability of defendant's identity as the person who committed the assault. To the refusal so to charge, defendant excepted. Verdict of guilty. Defendant appealed.

The Attorney-General for the State.
No counsel for defendant.

AVERY, J., after stating the facts: The defendant's request for instruction was equivalent to a demurrer to the strongest phase of the testimony which is presented in the foregoing summary, of those facts tending to establish his guilt. This evidence, together with other testimony tending to explain or contradict it, which is not necessary to set forth here, should, unquestionably have been submitted to the jury to determine whether they entertained any reasonable doubt of the defendant's guilt. There is no exception to the terms of the charge,
(881) which seems to have been conceived in a spirit of fairness, if not of liberality, towards the prisoner.

The testimony of the prosecutor, if not sufficient of itself to go to the jury on the question of identity, is strengthened by proof that defendant's shoes, which had been run down, fitted in the tracks made by the person who committed the assault and also on the foot of defendant. Besides, one witness, Holliday, swore to the absolute identity of the shoes worn by the defendant on the afternoon just before the shooting, when he left the field at an unusual hour, and the shoes exhibited on the trial, and which the officer making the arrest testified that he found in the defendant's house. The prosecutor testified that the size, height, complexion and appearance of the man who shot, were those of the defendant according to his best judgment, and that the shirt worn by the person who shot him at a distance of six steps was, in his opinion, that worn by the defendant on the preliminary trial two days after, it being possible for the witness to see a man plainly fifty yards, looking from his standpoint, when shot, in the direction in which his assailant stood and subsequently ran. These facts, admitted by the request in the nature of a demurrer, were sufficiently strong to make it the duty of the judge to submit them to the jury, and to warrant the verdict of guilty returned by them. The contradictory and explanatory testimony elicited from the witness was presented, or might have been presented, to the jury on the argument by counsel in their bearings upon the question of guilt. It was the province of the jury to weigh all of the evidence, which we assume they did.

A review of the testimony (which, as it is insisted, is insufficient to justify the verdict), and a comparison of it with that held to be sufficient to go to the jury in other cases, will show that testimony not so satis-

factory has been held sufficient to sustain a verdict of guilty. (882) *S. v. Atkinson,* 93 N. C., 519; *S. v. Powell,* 94 N. C., 965; *S. v. McBryde,* 97 N. C., 393; *S. v. Christmas,* 101 N. C., 749.

Placing the most liberal construction upon the evidence, the prosecutor testified to the positive identity of the shirt worn by the prisoner at the trial, two days after the shooting, with that worn by the person who shot him, and corroborated this opinion by the statement that his assailant was about the same height, size and complexion, and, like the prisoner, was clean shaven, and that he made the track subsequently examined by the witness with what appeared to be a run-down shoe. The identification of the shoe worn by him on the previous afternoon and fitting it in the track by other witnesses, form, together with the prosecutor's evidence, a network of circumstances so strong as to leave no room for question as to the correctness of his Honor's holding that there was testimony which it was his duty to submit to the jury.

We have not construed the language used by the prosecutor on his cross-examination according to its literal meaning, but have interpreted his whole statement together.

Stokes said, among other things, "I could see fifty yards at that place. Defendant was about six steps from me when he shot. I saw him as he started to run." Taking this detached statement literally, and construing it without reference to the qualifying language used by the witness, it is an absolute assertion that he recognized the defendant when he started to run immediately after firing the gun. Whether the prosecutor claimed to have identified the defendant at that moment and gave the description of the dress, size and complexion solely for the purpose of corroborating his positive claim of recognition, or whether his opinion of the identity of his assailant and the accused was founded upon, instead of being justified by, the description he has given, in either view there was testimony which took the case beyond that pale within which the court could discuss its weight. *S. v. Perkins,* 104 N. C., 710. The evidence was not clearly inconclusive as to the defend- (883) ant's guilt, and it would have been error to have so held and to have withdrawn the case from the consideration of the jury. *S. v. Dixon,* 104 N. C., 704.

Affirmed.

Cited: S. v. Harris, 120 N. C., 579; *S. v. Carmon,* 145 N. C., 486.

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FRAUD.