ANNOTATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS
VOL. 110

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1892

THEODORE F. DAVIDSON
REPORTER

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2 ANNOTATED ED. BY
WALTER CLARK

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3 Iredell Eq.	"	38	"
4 Iredell Eq.	"	39	"
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6 Jones Law	"	51	"
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8 Jones Law	"	53	"
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4 Jones Eq.	"	57	"
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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1892

WILLIAM JOHNSTON v. A. J. DERR, ADMINISTRATOR.

Evidence—Fraud—Mistake.

In an action to recover the amount due upon a note executed by husband and wife, the husband alleged, by way of defense, that he affixed his name to the instrument only for the purpose of signifying his assent to its execution by his wife, and that his name, as joint obligor, was the result of mistake on the part of the draftsman, or was procured by the fraud of the payee: *Held*, that evidence tending to show that the land, for the purchase of which the note was given, was subsequently conveyed to the wife; that the wife was a free trader; that the payee failed to present the claim to the administrator of the husband within the time prescribed by law; that at the time of the execution of the note the husband was ill from a disease which soon afterwards resulted in death, was incompetent to establish the allegations of fraud and mistake.

APPEAL, at February Term, 1891, of MECKLENBURG, from *Merrimon, J.*

Action to recover money due on a joint promissory bond (2) executed by Mrs. M. K. Barkley and her husband, James A. Barkley, the intestate of the defendant Derr. Judgment was rendered against Mrs. Barkley. The defendant administrator, in his answer, relied upon the defense that the bond was signed by his intestate only for the purpose of signifying his assent, in writing, to his wife's promise, and that it was erroneously drawn as a joint bond by the mistake of the draftsman, or procured to be so drawn by the fraud of the plaintiff.

Judgment for plaintiff, and defendant appealed. The other material facts are stated in the opinion.

P. D. Walker for plaintiff.
Clarkson & Duls (by brief) for defendant.

DAVIS, J. The execution of the bond is admitted, but the defendant administrator says "that the plaintiff had the bond and other papers prepared and sent to Mrs. Barkley, and that by mistake or inadvertence of the draftsman, or by fraudulent direction of the plaintiff, the said bond was erroneously drawn; that the mark of defendant's intestate was made to said bond . . . upon the statement made to him that it was not his bond, but he must sign it to give force and effect to his wife's signature thereto, and that he was thus fraudulently induced to sign the same in ignorance of its contents, and he asks that the same be reformed and corrected."

The execution of the bond being admitted, the burden is on the defendant to show the alleged fraud or mistake.

Upon an examination of the record, we are unable to find any evidence of fraud or mistake sufficient to go to the jury; on the contrary, the evidence offered by the defendant himself, if believed, precludes even a suspicion of mutual mistake or fraud on the part of the plaintiff, for it appears from that evidence that the bond was not
(3) prepared by the plaintiff, as alleged, or at his instance, and sent to Mrs. Barkley, but it was prepared by the defendant's own agent and executed before Mr. Williams, a justice of the peace, at the house of the defendant, and that the plaintiff was not present. He gave no direction about the matter, but the original obligation to make title was to the husband, and at the request of the defendant's intestate, as appears from the testimony offered by him, this was changed and title made to Mrs. Barkley, and the plaintiff took notes and a mortgage on the land to pay for it. The bond declared on is executed jointly by Mrs. Barkley and her husband, and upon its face purports to be a joint promise or obligation to pay money; but the defendant administrator says the promise by the husband to pay was made by mistake or procured by fraud, and his signature was only to signify his consent to his wife's promise, and he cites numerous authorities to show that a married woman cannot bind herself by an executory contract except in the mode prescribed by law. This will be conceded, and needs no discussion. But that does not show that the husband cannot make a joint promise with his wife, and the question before us is not whether Mrs. Barkley is bound by her promise, but whether the husband made and was bound by his joint promise. He certainly was under no disabilities, and could both consent in writing to his wife's promise and join in the promise, which he did, as appears from the bond.

Counsel say that his Honor erred in excluding the question, "What did Johnston do with the land?" (asked for the purpose of showing that the trade was that of the wife, and not of the husband). We are unable to conceive how the question, or any answer that can possibly be given to it, can tend to show that there was mistake or fraud in the execution of the bond to the plaintiff. The land, at the request of the defendant's intestate, was conveyed to the wife, and the note and mortgage taken by the plaintiff to secure payment, and the papers so executed speak for themselves, and the question was properly (4) excluded as irrelevant.

It is alleged that his Honor erred in permitting the plaintiff to show that Mrs. Barkley was a free trader. We are unable to see how it was immaterial, upon the question of fraud or mistake in the execution of the bond by the husband, whether she were a free trader or not; but the defendant insisted that his intestate signed the bond only to signify his assent to his wife's promise, and the evidence was offered to show that, being a free trader, his assent was not necessary. At all events, we cannot see how any injury or wrong was done to the defendant by showing the fact that she was a free trader; he was not prejudiced thereby, and the exception cannot be maintained.

It is further insisted for the plaintiff that the judge below erred in refusing to allow him to show that the plaintiff failed to present the claim for payment after he had advertised for claims to be presented against the estate of his intestate as required by law. It is not relied upon as a defense, in the answer, that the claim was not presented for payment within the time prescribed, but the defendant insists that it is evidence that the plaintiff did not consider James A. Barkley liable on the bond. The bond speaks for itself, but it is conceded, as contended by the defendant, that it may be attacked for fraud, or corrected by the court in case of mutual mistake; but we are unable to see how the evidence tends to show fraud or mistake, and there was no error in excluding it.

The defendant says there was error in excluding the declarations of James A. Barkley, made at the time of the execution of the bond, while he was sick. His Honor said he had no recollection of any question calling for the declaration, but that the defendant, in his case on appeal, might have the benefit of it, as asked and excluded. Plaintiff's counsel insists that an exception cannot be taken in this way. Without expressing any opinion as to the action of his Honor, who was manifestly fair in settling the case on appeal, the papers were (5) prepared and executed by the defendant's intestate in the absence of the plaintiff and sent to him, and we cannot see how declarations made in his absence would be competent to show mistake or fraud on

the part of the plaintiff. It is not alleged in the pleadings, nor is it pretended, that James A. Barkley was, from sickness or any other cause, incapable of executing the bond sued on; and the question was incompetent. No such declarations made, in the absence of the payee, by the maker of a note payable at a future day can be heard to invalidate the note.

Counsel for the defendant laid much and earnest stress upon the fact that James A. Barkley "was in the last stage of Bright's disease of the kidneys," and it is insisted that he would not make a promise to pay under such circumstances. It is shown by the defendant's own witness that his intestate executed the bond at his own house in the absence of the plaintiff, and we are unable to see how his sickness could tend to prove mistake or fraud on the part of the plaintiff.

There is no error of which the defendant can complain.

No error.

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(6)

J. W. B. WATSON v. W. T. SMITH, TRUSTEE.

Will—Executory Devise—Remainder—Assignment of Contingent Interest.

1. A testamentary disposition will never be construed to be an executory devise if it is possible to give it effect as a remainder.
2. Under a devise to W. for life, and at his death to such child or children of W. that might then be living, and should he die without issue, then to G., concurrent contingent remainders were created for the use of the children of W. and the said G., the latter to take effect in the event the limitation to the former should fail to take effect.
3. An assignment of an interest in an executory devise or contingent remainder will be enforced in equity, if free from fraud and founded upon a valuable consideration.

CONTROVERSY submitted without action at Spring Term, 1892, of WAKE; *Connor, J.*

The question presented arose in the construction of item 15 of the will of Dr. J. O. Watson, which was in the following words:

"Lastly, all the rest and residue of my estate, real and personal, not herein and hereby disposed of with effect, I do hereby devise and bequeath as follows: After paying all of my just debts, legacies, and funeral expenses, and the charges for settling my estate and executing this will, I give the whole unto my nephew, John W. B. Watson, to have and to hold to him and his use for and during the term of his life, and at his death the said estate, both real and personal, shall belong to

such child or children of the said John W. B. Watson as may be living at his death, or the issue of any child who may predecease him. And if the said John W. B. Watson should die without issue living at his death, then the said estate, both real and personal, shall belong in fee simple and be equally divided amongst George W. Watson, William H. Watson, Henry B. Watson, and Owen L. Dodd, and (7) their heirs forever."

His Honor being of opinion with the plaintiff, gave judgment accordingly, and the defendant trustee appealed.

G. V. Strong for plaintiff.
F. H. Busbee for defendant.

SHEPHERD, J. The particular provision in the will of J. O. Watson, the construction of which is involved in this controversy, is by no means a stranger to this Court. In *Watson v. Watson,* 56 N. C., 400, the Court declared that the land being limited by way of contingent remainder to persons not *in esse,* it had no power to order a sale for the purpose of converting it into more beneficial property. In *Watson v. Dodd,* 68 N. C., 528, it was held that the contingent interest of one of the devisees expectant upon the death of the life tenant without issue could not be subjected to the payment of his debts. The question now presented is whether the interests of such devisees are assignable by deed, either in law or equity. The limitation was to John W. B. Watson for life, and at his death to such child or children of the said John as might then be living; but should he die without issue living at his death, then to be equally divided between George W. Watson, William H. Watson, Henry B. Watson, and Owen L. Dodd, and their heirs forever. What interests did these last named persons take under the will? In the first of the cases above cited it was said that the limitation was to John for life, with a contingent remainder to such of his children as might be living at his death, and that the persons above mentioned were to take by way of executory devise in the event of a failure of issue upon the death of the life tenant.

In the latter case it was suggested, though not decided, that (8) the limitation to these persons was a contingent remainder. In this view we entirely concur. An executory devise is strictly such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules in limitations in conveyances at common law; but it is never construed to be such if it is possible that it should take effect as a remainder. Fearne Con. Rem., 368, 393. The limitation in question does not take effect after the limitation to the expectant issue, but upon the regular determination

of the particular life estate, and therefore must be a remainder. It is true that the limitation to the issue is also a remainder in fee, and it is a rule of law that no remainder can be limited after a fee; but, as we have seen, the other limitation is not expectant upon the determination of the estate limited to the issue, but upon the determination of the estate of the life tenant without issue.

In *Goodright v. Dunham,* 1 Doug., 265, the will was in these words: "I give my messuage, etc., to my son, J. S., for life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them." It was determined that "both devises were contingent remainders in fee." See, also, *Loddington v. Kyme,* 1 Ld. Raymond, 203; *Bannister v. Carter,* 3 Bro. Parl. Ca., 64. *Goodright v. Dunham, supra,* is exactly in point. As in our case, the limitation is of two concurrent fees by way of remainder as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail *to vest in interest,* and it is called a limitation by way of remainder on a contingency with a double aspect.

In deference to the discussion of counsel, and in view of the apparently conflicting judicial utterances upon the subject, we have deemed it best to determine the precise character of the limitation; but
(9) we really do not see how it is essential to a proper disposition of this case. Taking the limitation to be either a contingent remainder or an executory devise, we are of opinion that the interest of George W. Watson and others was at least "a possibility coupled with an interest" (*Watson v. Dodd, supra*), and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity. In the above case, *Pearson, C. J.,* seems to consider that it is an executory contract, which will be specifically enforced upon the happening of the contingency upon which the remainder is to vest. It is possible that he had in mind the assignment of a mere possibility, such as the expectancy of an heir at law, as in *McDonald v. McDonald,* 58 N. C., 211. In *Bodenhamer v. Welch,* 89 N. C., 78, it is held that such an interest may be assigned (we suppose that an equitable assignment is meant), and we are of the same opinion; but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue; and this is all that is necessary (according to the stipulations in the case agreed) to entitle the plaintiff to the relief he asks.

The plaintiff, the life tenant, has by the assignment acquired an equitable right to the interest of the said remaindermen. He is a single gentleman, about 80 years of age, and the defendant is willing to take

the risk of his marrying and leaving issue, provided the assignment of the remaindermen is effectual to bind them and their heirs. We have seen that such is its effect, and the judgment must be

Affirmed.

Cited: Foster v. Hackett, 112 N. C., 555; *Clark v. Cox,* 115 N. C., 96; *Whitesides v. Cooper, ib.,* 574; *Taylor v. Smith,* 116 N. C., 534; *Wright v. Brown, ib.,* 28; *Brown v. Dail,* 117 N. C., 43; *Bird v. Gilliam,* 121 N. C., 328; *Sain v. Baker,* 128 N. C., 258; *Gray v. Hawkins,* 133 N. C., 4; *Bowen v. Hackney,* 136 N. C., 192; *Kornegay v. Miller,* 137 N. C., 662; *Smith v. Moore,* 142 N. C., 299; *Beacom v. Amos,* 161 N. C., 367; *Hobgood v. Hobgood,* 169 N. C., 490; *James v. Hooker,* 172 N. C., 782, 783; *University v. Markham,* 174 N. C., 343; *Thompson v. Humphrey,* 179 N. C., 52; *Bourne v. Farrar,* 180 N. C., 137.

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(10)

C. P. VANSTORY v. A. G. THORNTON.

Constitution—Homestead—Jurisdiction.

1. It is the purpose of the Constitution in providing a homestead that the homesteader shall have secured to him, as against his creditors generally, real property *not exceeding in value $1,000.*

2. When a homestead has once been duly allotted, its character in respect to *value* and *extent* becomes thereby fixed, and cannot be changed by subsequent allotment.

3. But when the homestead has once been designated, and the homesteader subsequently puts substantial improvements thereon in the form of buildings, whereby a value much greater than $1,000 is imparted to the property, his creditors have the right to have the money or property so placed on the homestead applied to the satisfaction of their debts.

4. The right of the creditor to proceed against the property so added to the homestead is not by execution, but by an action invoking the equitable jurisdiction of the courts.

ACTION, heard upon complaint and demurrer at May Term, 1891, of CUMBERLAND; *Armfield, J.*

The complaint alleges, in substance, that the defendant's homestead and personal property exemption were duly laid off to him on 20 April, 1885; that the homestead embraced the land specified; that afterwards the dwellings and buildings so laid off were burned and destroyed; that at the time of the said laying off the plaintiff was not a creditor of the defendant; that after such buildings were so burned and destroyed, the

defendant erected on the said homestead land a large and valuable dwelling-house, making the land and dwelling thereon of the value of $2,500; that afterwards the plaintiff obtained his judgment for $978.20, and interest and costs in the Superior Court of the county of Cumberland, against the defendant and another, and the same was duly docketed on 6 May, 1889; that this judgment has not been paid; (11) that an execution was issued thereupon, and the same had been returned unsatisfied; that the said land and premises have not, in legal effect, ever been laid off to the defendant as and for his homestead; that the plaintiff never had any notice of the laying off of the same; that the improvements on the said land have been placed there since the laying off of the said homestead, etc. The plaintiff demands judgment that the defendant's homestead be reappraised and laid off to him, and that any surplus of the premises be sold to satisfy the plaintiff's said judgment, and for general relief, etc.

The defendant demurs to the complaint, and assigns as ground of his demurrer that the said premises were laid off to him, as appears by the complaint, on 20 April, 1885, as and for his homestead, and he is entitled to have the same exempt from sale under execution or other final process, etc., by virtue of the Constitution, etc. The court sustained the demurrer, and gave judgment accordingly. The plaintiff excepted and appealed.

T. H. Sutton for plaintiff.
R. P. Buxton for defendant.

MERRIMON, C. J., after stating the case: The Constitution (Art. X, sec. 2) provides that "every homestead and the dwellings and buildings used therewith, not exceeding in value $1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of $1,000, shall be exempt from sale under execution or other final process obtained on any debt," etc. Thus the Constitution defines and limits what shall constitute the *homestead* in this State exempt from sale under execution or other final process. Such exemp- (12) tion does not extend to certain excepted cases, that need not be mentioned particularly here. The Code, secs. 502, 524, prescribes how this homestead shall be valued and laid off to the person entitled to have the same.

It is to be observed, in the present connection, that a distinct and clear part of the purpose of the clause above recited is to provide that the homestead, wherever situate, and the dwelling and buildings used

therewith, shall be so exempt; but such exemption does not extend to the whole of the debtor's homestead, unless it be of value less than $1,000. The provision is express and clear in its terms that the homestead is so exempt, *"not exceeding in value $1,000,* to be selected by the owner thereof." He is entitled to have and enjoy that much, not more, of his homestead, exempt from such sale for the time and in the way prescribed.

When and as soon as his homestead so exempt is valued and completely laid off to him, it is permanently ascertained and established, and cannot "thereafter be set aside or again laid off by another creditor." The Code, secs. 504, 523; *Gulley v. Cole,* 96 N. C., 441; *Gulley v. Cole,* 102 N. C., 333; *Thornton v. Vanstory,* 107 N. C., 331. It is so established as to *extent* and *value,* as well as in other respects, and cannot be extended as to quantity or enlarged as to value by a revaluation under the statute or otherwise, because the Constitution expressly provides and declares that it shall not exceed the value specified, not simply at the time of valuation, but ever thereafter while the exemption prevails. The purpose is to exempt that much, and no more. There is nothing in the terms of the clause of the Constitution above recited, or in the nature of its purpose, or in the statute pertinent, that suggests or implies any purpose to give the debtor in any way or manner a larger exemption from such sale than that expressed with so much clearness and precision in the Constitution. There is certainly nothing appearing, in terms or by reasonable implication, that makes manifest a purpose to allow the debtor to erect for any purpose buildings (13) of great value on the land so exempt, and thus enhance its value three, five, ten, or one hundredfold, and by such means shield such property from his creditors. The fair, just, and reasonable implication is that the homestead exempt must continue substantially as to its value as it was at the time it was laid off to the debtor. Otherwise, he might have and enjoy the exemption of a homestead of the value of $2,000 or $10,000, instead of simply $1,000. To allow more would be to defeat the just purpose of the Constitution and subvert common justice.

When, therefore, the defendant constructed upon the land laid off to him as his homestead, exempt from sale under execution or other final process, a dwelling-house or other buildings that became part of the land, thus making it of much greater value than $1,000, he did so in his own wrong as to his creditors, including the plaintiff. The law does not allow him to have and enjoy a homestead as against his creditors of greater value than $1,000. The property, including money, that he had beyond his homestead and personal property exemptions he was bound to apply to the payment of his debts. Hence, the plaintiff is entitled to have so much of the property as he had placed upon and

made part of his homestead as substantially made the land of greater value than $1,000 applied to the satisfaction of his debt so far as the same may be adequate for the purpose. As we have seen, the defendant could not shield his property, whether money or other things, from the just demands of the plaintiff by making it part of his homestead.

It is not to be understood, however, that the homestead may be disturbed for slight enhancement of its value, as by ordinary repairs, slight improvements, such as clearing land in the usual course of husbandry, and the like. Such increase must be substantial and extraordinary to warrant interference such as that here indicated.

(14) The plaintiff cannot, however, enforce his demand by the ordinary process of execution against property, because the homestead of the defendant is not liable to sale under such execution, and the sheriff cannot see and sell such part of the defendant's property as he improperly, as to the plaintiff, put upon and made part of his homestead. This must, in some appropriate way, be ascertained and sold before it can be applied to the payment of the plaintiff's debt. The defendant admits, by his demurrer, for the present purpose, that he has substantially increased the value of his homestead, to the prejudice of the plaintiff. He thus admits that he has property that he unjustly refuses to apply to the satisfaction of the plaintiff's judgment. He has property that he ought to so apply, and he refuses to do so.

If it shall turn out that the defendant has increased the value of his homestead to the prejudice of the plaintiff, as the latter alleges, the court will have power to direct all proper accounts to be taken, to appoint commissioners to ascertain what additional value has been imparted to the homestead by the improvements placed upon it, and to direct a sale of the excess as to the best advantage of the parties. If some part of the land must be sold, it will be because of the wrongful conduct of the defendant. He cannot justly complain at this course of equitable procedure, because he, in his own wrong as to the plaintiff, put his property, which he ought to have devoted to the satisfaction of the plaintiff's judgment, upon his homestead in such way as to confuse and confound the same with the homestead. He cannot be allowed to take advantage of his own wrong. The court, in the exercise of its chancery jurisdiction, has ample power to reach his property within its jurisdiction subject to the payment of his debts, however situate or in whatever condition, and apply the same to such purpose in appropriate cases.

(15) No doubt, the Legislature might provide a statutory remedy to meet cases like the present one. That it has not seen fit to do so cannot abridge the jurisdiction of a court of equity to grant such relief in the way we have indicated.

There is error. The judgment must be reversed and the demurrer overruled, and further proceedings had in the action in accordance with this opinion.

Error.

Cited: S. c., 112 N. C., 202, 203; *Shoaf v. Frost,* 116 N. C., 677; *S. c.,* 121 N. C., 258; *McCaskill v. McKinnon,* 125 N. C., 184; *Sash Co. v. Parker,* 153 N. C., 133.

JAMES ADAMS, ADMINISTRATOR, v. HENRY HOWARD, ET AL.

Administration—Sale of Land for Assets—Amendments—Setting Aside Sales.

An administrator in 1860 filed a petition to sell land for assets; the heirs of the intestate were made parties, the infants being represented by guardian *ad litem;* license was granted to sell subject to widow's dower, and the land not covered by dower was sold, report made, and sale confirmed. In 1866, without further orders or notice—the guardian *ad litem* having died—the administrator sold the reversion in the land covered by the dower, the heirs at law being present, but the record did not show any report or confirmation. The proceeding had never been transferred to the Superior Court; but in 1882 the purchaser filed a petition stating the facts and asking an order amending the record *nunc pro tunc,* and for confirmation, which was granted. The heirs were not parties to this petition. It appeared that the sale and purchase were in good faith, and the proceeds properly applied in the administration. In 1891 the heirs made a motion to set aside the sale: *Held*—

1. That the sale in 1866 was authorized by the license of 1860.
2. That while there was irregularity in the failure to report and confirm the sale of the reversion, and the heirs at law should have been made parties to the proceeding to amend and confirm in 1882, yet the court, under the circumstances, did not commit error in refusing to set aside the sale.

MOTION to set aside sale of lands, heard upon appeal from (16) clerk, by *Whitaker, J.,* at October Term, 1891, of WAKE.

It appears that David Smith died in the county of Wake about October of 1860, and James Adams was appointed and qualified as administrator of his estate; that at November Term, 1860, of the late court of pleas and quarter sessions of said county the said administrator filed his petition against the heirs at law of his intestate to obtain a license to sell all the intestate's real estate, subject to his widow's dower, to make assets to pay debts. Four of these heirs were then above the age of 21 years; several others were infants of tender years, and the clerk of the court was appointed guardian *ad litem* for them. The adult heirs accepted service of the petition and the clerk, as guardian, accepted

service thereof for his wards. The prayer of the petitioner was allowed; the administrator sold the land, except the reversion of the dower land, reported the sale, and the same was confirmed, the purchase money afterwards paid, and the administrator directed to make title to the purchaser, which he did.

In 1866 the administrator, not having sold the reversion in the land allotted to the widow for her dower, without further order sold the same after due advertisement, and Rufus Smith, one of the heirs, purchased the same in good faith for the fair price of $200, and paid the same. There was no report of this sale to the court, so far as appears of record, and there was no service of notice of the same on the defendants; the guardian of the infants was then dead. After such sale Rufus Smith sold and assigned his bid to Moses C. Utley in good faith and for a fair price.

The proceeding in the court of pleas and quarter sessions was never formally transferred to the Superior Court, as allowed by the statute (The Code, sec. 944), but on 3 October, 1882, the said Moses C. Utley, assignee of the said Rufus Smith, filed his petition in the Supe-
(17) rior Court of said county, before the clerk thereof, stating substantially the facts above stated; that the said sale of 1866 was, in fact, reported and confirmed by the court, and praying that the proceeding in the court of pleas and quarter sessions be transferred to the Superior Court; that the record be amended *nunc pro tunc* as to the report of the last mentioned sale and the confirmation thereof, and that the administrator be directed to make title to him, etc. The clerk, having heard evidence and found the facts, allowed the motion to amend, etc.

The defendants, except Rufus Smith, moved as heirs at law, before the Clerk of the Superior Court on 16 April, 1891, to vacate and set aside the last mentioned order of the clerk. The said Moses C. Utley resisted this motion, and made a counter motion that the record as to the said sale made by the administrator in 1866 be amended, if need be, etc. The clerk heard divers affidavits on both sides, found the facts, and made his order thereon as follows:

"In consideration of the foregoing facts, which are found by the court from the inspection of the record and the affidavits filed in the cause, it is adjudged that the motion to vacate and set aside the order made by Charles D. Upchurch, clerk, on 3 October, 1882, be not allowed, and that the proceeding for that purpose, instituted by defendants, be dismissed, and the costs of the same be taxed against them."

The defendants appealed to the judge, who, in term-time, approved the findings of fact by the clerk and affirmed his judgment. The defendants, except Rufus Smith, excepted and appealed to this Court.

R. H. Battle and S. F. Mordecai for plaintiff.
J. B. Batchelor and S. G. Ryan for defendants.

MERRIMON, C. J. According to the pertinent statutes and practice prevailing at the time the plaintiff filed his petition to obtain a license to sell all the land of his intestate to make assets to pay debts, the late court of pleas and quarter sessions had complete jurisdiction (18) of the parties, including the infant defendants, and of the subject-matter of the petition. The petition alleged that a sale of all the land of the intestate was necessary, and the court granted the prayer thereof, and directed a sale of the whole of the land specified therein except the "widow's dower." The administrator at once duly sold this land, except the reversion of that part so allotted to the widow. As to that sale, no question is made.

Afterwards, in 1866, the administrator, acting upon the same grant of license, sold the said reversion in good faith and for a fair price, one of the heirs, and a defendant, being the purchaser. That sale was duly advertised, but no special notice of it was given to the present appellants, though they were in fact present at the sale; nor was any fresh license granted.

A fresh license was not necessary, that first granted authorized the sale. It is insisted, however, that the sale of the reversion was never reported to the court and confirmed, and, therefore, there was a fatal irregularity. We think there was irregularity, but it ought not to be treated as fatal in this case. The statute (The Code, sec. 944), the provisions of which were in force during and before 1882, authorized the transfer of the proceedings in the court of pleas and quarter sessions to the Superior Court for proper purposes. It does not appear affirmatively that it was so transferred, but the appellee filed his petition in the Superior Court in 1882, praying the court to so transfer the same, alleging and suggesting that the matter of the petition had not been completed, that the sale of the reversion in 1866 had been made, reported to and confirmed by the court, and no proper entry of the same had been made; and asking that the record be amended *nunc pro tunc* so as to show the same, and that the administrator be directed to make title to the land to him. The court (the clerk) allowed the motion. It clearly treated the matter of the petition as trans- (19) ferred. It was identified by the appellee's petition and the order of the court; these had direct reference to it and, for the purposes intended, was in effect transferred, and must be so treated. If this were not so, it might yet be transferred for proper purposes. The matter of the petition was of the nature of a special proceeding under the present method of civil procedure, as to which the clerk might act as and for

the court in making the order of transfer, and making appropriate orders in and about the same, as in other cases out of term-time. The Code, secs. 132, 944.

Notwithstanding the long lapse of time, the court might in a proper case allow such amendment to be made *nunc pro tunc,* but regularly it should be done only upon notice to parties to the proceeding or action. It is irregular to hear and act upon such applications without such notice, and, ordinarily, an order making such amendments of importance will be set aside. We think, however, the court ought not to disturb the order in question, or at all interfere in the matter of the petition. As we have seen, the court had jurisdiction of the parties and the subject-matter. The property was sold for a fair price. The appellants were present at the sale, and though some of them were infants, several of them were of age, and all had a common interest as heirs of the intestate. Those of age had motives to object to irregularities and to resist and prevent any fraudulent practice. The proceeds of the sale were applied regularly in the administration of the estate of the intestate. It is not alleged or suggested that there was fraud on the part of the administrator or any other person in the sale of the property or the application of the proceeds of the sale. The administration was closed and the appellants (most if not all of them) received respectively his or her small share of the assets remaining to be distributed to the next of kin. The administrator has died. After the lapse of twenty years, the appellants ask to set the sale aside for irregularities, without
(20) showing that they have been at all prejudiced by them, or at all.

It was earnestly suggested on the argument that the appellants might have shown that a note or claim against the estate was not due, was barred by the statute of limitations, or had been paid. They might have had ample remedy against the administrator in that case in the final settlement of the estate; and, besides, if a sale of the real property was unnecessary, in whole or in part, this should have been shown at the time the license to sell the same was granted. Moreover, the appellants should have taken advantage of irregularities in apt time—within a reasonable time. Some of them, it is true, were infants, but their coheirs, brothers and sisters, interested like them, might have objected to irregularities years before they did.

The motion is without merit, and the court properly denied it.

Affirmed.

Cited: Sledge v. Elliott, 116 N. C., 715; *Morris v. House,* 125 N. C., 557, 562; *Rackley v. Roberts,* 147 N. C., 208.

R. M. NIMOCKS v. THE CAPE FEAR SHINGLE COMPANY.

Judgment, Confession Without Action—When Should be Vacated—Corporation.

1. Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for cause appearing in the record, or the record omits some essential element, it will be set aside or quashed.

2. A corporation may confess judgment, without action, in or out of term; but the record should show that the officer or person who represented the corporation in the proceeding was duly authorized to act, and that he did act under the direction of his principal.

3. A confession of judgment by the treasurer of a corporation under a resolution adopted at a meeting of a majority of the stockholders, without the approval of the directors and against the protest of the minority stockholders, is without authority, and should be quashed.

MOTION to set aside judgment confessed, without action, heard (21) before *Whitaker, J.*, at August Term, 1891, of HARNETT.

The court found the facts to be as stated in the following affidavit:

"J. E. Taylor, being duly sworn, says that he is president of the Cape Fear Shingle Company; that he owns $4,900 of the capital stock of the said company; J. M. Hodges is treasurer of said company and owns $4,900 of said stock, and W. E. Murchison is secretary of said company and owns one share of $100, and James P. Hodges owns one share of $100, making in all $10,000, which is the capital stock of said company; that the by-laws of the company prescribe that the special meetings of the company must be called by the president upon ten days notice to each stockholder; that he was at the mill of the company, near Little River Academy, just about dark on 18 June, 1891, when he received a message by a colored boy from J. M. Hodges to come up to his house, about 2½ miles from the mill; that he went there at once, accompanied by L. Grimm; that he found at the house of J. M. Hodges, J. P. Hodges, and W. E. Murchison. J. M. Hodges told affiant that he had sent for him to have a meeting of the stockholders of the company, in order to confess judgment to R. M. Nimocks for $1,250, to A. E. Rankin & Co. for $261, to Walter Watson for $198, to A. H. Slocumb for $200. The affiant told him he would not agree to confess the said judgments, and would have nothing to do with the meeting. The affiant told W. E. Muchison that the meeting was illegal, on account of the (22) shortness of the notice and not being called by the proper person. That he thereupon left the house and refused to participate in the said meeting, and that he has never said or done anything since to ratify it,

and that he still insists that the meeting was illegally convened, and that its proceedings were illegal, null and void. He further says that certain judgments in favor of A. R. Watson, W. W. Allen, and E. A. Lewis, in sums amounting to about $500, have been, since then, entered and recovered in justice's court, and executions issued and placed in the hands of the sheriff, and he holds the said property under and upon said executions."

The plan of organization contained the following provision:

"ARTICLE 5. At same time that officers are elected there shall be in the same manner chosen two directors, whose duty it shall be to manage and superintend the operations of the company, to employ labor, make purchases for the company and sell its manufactures, accounting with the treasurer for the proceeds of such sale."

The court being of opinion that the confession of judgment was unauthorized, adjudged that it was void, and directed it to be set aside, from which plaintiff appealed.

F. H. Busbee for plaintiff.

J. W. Hinsdale and W. E. Murchison for defendant.

MERRIMON, C. J. A corporation, in or out of term-time of the court, may confess a judgment in favor of a party without action, as allowed by the statute (The Code, secs. 570, 572); but to do so effectually the statutory requirements must be strictly observed in all material respects. This method of obtaining judgment is out of the ordinary course of procedure and subject to abuse. Not infrequently such judg-
(23) ments are made the instrumentality for effectuating fraudulent transactions and giving fraudulent preferences to particular creditors. To prevent and guard against such mischief, the statute prescribes certain requisites that must be observed, else the judgment will be void. *Sharp v. R. R.*, 106 N. C., 308.

Ordinarily, a judgment of this nature will not be set aside for mere irregularities in and about the same, because the judgment is confessed, and the party confessing the same must be deemed to have waived irregularities. But if the judgment appears to be void for cause appearing or failing to appear upon the record, the court will quash the entry purporting to be a judgment, upon the ground that it improperly appears on the record. It can serve no proper purpose, may mislead interested persons, and it encumbers and defaces the record.

In this case the statement in writing of the claim upon which the judgment in question is founded is informal, but it might be treated as sufficient in substance. It does not, however, appear, as it should do, that the directors of the defendant ordered and directed its treasurer or

agent to confess the judgment; nor does it appear that the clerk endorsed upon the statement and entered upon his judgment docket a judgment of the court for the amount confessed, as required by the statute. (The Code, sec. 572.) It appears only that a majority of the stockholders of the defendant held a meeting—not upon notice as required by its by-laws—and directed the treasurer to confess a judgment for a sum of money specified. This was done against the will and in the absence of a minority of the stockholders, and against their protest. They refused to attend the meeting so called.

Ordinarily, a corporation should act through its properly constituted board of directors, or its officers or agents duly authorized to do particular acts, such as confessing a judgment. That the officer or agent was authorized to have the judgment confessed as directed should appear to the clerk of the court in some way, as by a properly authenticated certificate of the proceedings of the directors of the company, and this should be filed with the statement in writing of (24) the claim upon which the judgment is founded. This perhaps would be the better course. It may be that all the stockholders in meeting assembled, informally called, might authorize a judgment to be confessed by the corporation; but an order made irregularly by a majority of the stockholders at a meeting not regularly called, and without the sanction of the board of directors, would not be sufficient. A corporation may confess a judgment as above indicated, but it must appear that it did so; that it authorized its agent in its behalf, and by its direction, to have the judgment properly entered as allowed by the statute. It does not appear that the defendant directed that a judgment be entered against it, nor does it appear that what purports to be a judgment was confessed and entered according to law. *Duke v. Markham,* 105 N. C., 131.

Affirmed.

Cited: Bank v. Cotton Mills, 115 N. C., 525.

A. H. SLOCUMB v. THE CAPE FEAR SHINGLE COMPANY.

Judgment, Confession of—Jurisdiction.

A judgment by confession without action, founded on contract, in the Superior Court, for a sum not in excess of $200, is void for want of jurisdiction.

MOTION to set aside a judgment, heard at August Term, 1891, of HARNETT, before *Whitaker, J.*

The judgment which gave rise to the controversy was for the sum of $200, and purported to have been confessed by the defendant company before the clerk of the Superior Court of Harnett, in favor of the plaintiff. The court held that the judgment was null and void, and so declared, and the plaintiff appealed. (25)

James C. MacRae and F. H. Busbee for plaintiff.
J. W. Hinsdale and W. E. Murchison for defendant.

AVERY, J. Eliminating all irrelevant matter with which the record is confused and cumbered, we find when we uncover the real issue that but a single question is involved, and the controversy is in a nutshell: Conceding that an officer of a corporation has general authority from the company to confess judgment, is he empowered to go before the clerk of the Superior Court and, by a formal compliance with the requirements of the statute, submit to such judgment by confession for $200, or a smaller sum? We think not. The Constitution, Art. IV, sec. 27, confers upon justices of the peace jurisdiction of "civil actions founded on contract wherein the sum demanded shall not exceed $200 and wherein the title to real estate shall not be in controversy."

Consent of parties may change the venue for trial, but cannot give jurisdiction to a tribunal the exercise of which, by express provision of law, is conferred upon and limited to another court.

Affirmed.

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(26)

F. P. BREWER v. THE UNIVERSITY OF NORTH CAROLINA.

Will—University—Trust—Proceedings Supplementary to Execution.

A testator devised to the trustees of the University of North Carolina a fund wherewith to establish a professorship of agricultural chemistry; a contest as to the validity of the will having arisen, a compromise was agreed upon by the parties interested, whereby the will was admitted to probate and the trustees received a certain sum—less than the amount of the original bequest—in settlement: *Held*—

1. The University had the capacity to take and execute the trust created and imposed by the will.

2. That it took the fund received, not by virtue of the compromise, but under the will.

3. That it took the fund for the purpose of trust, and not for its general business purposes, and therefore it was not subject to any proceeding to apply it to the debts of the University.

PROCEEDING supplementary to the execution, to subject to the payment of the plaintiff's judgment so much of a fund bequeathed to the defendant by the last will and testament of Mary A. Smith, deceased, as may be necessary for that purpose, heard before *Connor, J.*, at chambers, in Raleigh, 16 January, 1892.

It appears that the said Mary A. by her will devised and bequeathed "to the trustees of the University of North Carolina, to be invested by that corporation in the safest practicable manner," the second half of the residue of her large estate, and directed with particularity that "a professorship of agricultural chemistry be established, or such chair as shall teach both the science of chemistry and its experimental and practical application to the useful arts, and especially to the art of agriculture and cultivating the earth," and that the fund arising from such investment be devoted to its support.

After the death of the testatrix there arose a contest as to the (27) validity of her will, and pending the litigation in that respect the parties interested in the same, including the defendant, agreed upon terms of compromise, whereby the will was established and the sum of $39,000 was decreed to be due and paid to the defendant under and by virtue of the bequest to it of the will.

The plaintiff contends that under this will the sum of money due to the defendant was much greater than that last mentioned, and that the will did not operate as the testatrix intended; that the defendant did not take this sum of money under and by virtue of the will, but by virtue of the compromise mentioned; that it does not hold the fund thus arising in trust for the purpose specified in the will, but for its general business purposes; and therefore he is entitled to have so much thereof as may be necessary devoted to the satisfaction of his judgment.

The court decided otherwise, and gave judgment in favor of the defendant. Thereupon, the plaintiff excepted and appealed.

T. R. Purnell for plaintiff.
R. H. Battle and S. F. Mordecai for defendant.

MERRIMON, C. J., after stating the case: The defendant has ample power and authority and it is capable in all pertinent respects to take, receive, have, own and possess property, both real and personal, to be used for, applied and devoted to the purposes for which it is created, as the donors thereof may direct by will or otherwise. Constitution, Art. IX, sec. 6; The Code, secs. 2610, 2630.

It was therefore competent for the testatrix named to make the bequest mentioned to the defendant for the particular purpose specified in connection therewith. The defendant has and holds the fund charged

with a trust for that purpose, and not for its general business purposes. The fund cannot be applied or made subject to the
(28) payment of its debts, whether the same be reduced to judgment or not. The defendant is charged with it only for the purpose to which the donor devoted it.

When the will of the testatrix was established by the proper orders and judgment of the court, the defendant became entitled to have the fund bequeathed therein to it, not by virtue of any compromise, as suggested by the plaintiff, but by virtue of the will. Neither the defendant nor the court had power to change the nature or purpose of the bequest. The court had authority, in a proper case, to determine what it was, give effect to it, and enforce the trust provided by it, but it could not change the intent and purpose of the testatrix. That the defendant failed for any cause to get all the fund bequeathed to it could not change the nature or purpose of so much of it as it did receive. It may well be that it had the power, with the sanction of the court, to make a compromise as to litigation about the will, but it could not change its provisions, or the intent and purpose of the testatrix. These must remain and have effect.

Affirmed.

Cited: Moore v. Pullen, 116 N. C., 287.

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(29)

THE PATAPSCO GUANO COMPANY v. JOHN R. TILLERY.

Contract—Quantum Valebat—Counterclaim.

1. In an action upon a promissory note given in pursuance of a contract for the sale by payee of a specific article of merchandise, the maker may set up by way of counterclaim that the article furnished was not in compliance with the contract of sale, and that he was thereby damaged.
2. In such action the plaintiff is entitled to judgment for the value of the article furnished, although it was not of the character stipulated in the original contract of sale; it appearing from the verdict that the defendant had used it, and had suffered no injury.

APPEAL at Fall Term, 1891, of HALIFAX, from *Bryan, J.*

Action upon promissory note of the defendant for $418, due 1 March, 1888, executed to the plaintiff's agent, who endorsed the same to it. The defendant admitted the execution of the note as alleged, but alleged as a counterclaim that the consideration thereof was the plaintiff's agreement to supply him with "ten tons of genuine Peruvian guano";

that it failed to deliver such guano, but did deliver that quantity of an inferior fertilizer of value not greater than $15 per ton; that he was greatly endamaged, put to costs, etc. It appears that the defendant used the fertilizer he so received, and the jury found by their verdict that it was of the value of $32 per ton. They further found that the defendant had not suffered damage. The court gave judgment in favor of the plaintiff for $320, interest and costs. The defendant demanded judgment in his favor upon the verdict, upon the ground that the jury found that the plaintiff did not deliver Peruvian guano. Both parties appealed. The court gave the jury pertinent instructions, to which there was no exception by the defendant at the time of the trial, or after the verdict, or after the judgment, until his statement of the case on appeal; and the exceptions stated, except one, were based upon the ground that the court had failed to explain the law as appli- (30) cable to the evidence as to the measure of damage.

R. O. Burton for plaintiff.
W. H. Day for defendant.

MERRIMON, C. J., after stating the case: The court gave the jury pertinent instructions, and if the defendant desired that they be modified, or that others in addition be given, he should have asked for the same at the time of the trial. It would be unreasonable, unjust, and vicious practice to allow a party to complain after verdict and judgment (the court having given the jury appropriate instructions), that it had failed to give possible instructions that it might and perhaps would have given if they had been called to its attention at the proper time. The law as to procedure and practice is just and very practical, and will not indulge possible or speculative objections, especially when not made appropriately or in apt time.

The charge of the court as to the alleged damage to the crop of the defendant could not prejudice him, whether correct or not; it was favorable to the defendant, as he had offered no testimony upon that question.

The defendant was not entitled to judgment upon the ground that the plaintiff failed to deliver to him Peruvian guano, as it agreed to do. This action is not founded upon the original parol contract in that respect alleged by the defendant, but upon the latter's promissory note. The defendant alleges a counterclaim and seeks to recover damages from the plaintiff on account of its failure to deliver such guano according to the contract, and to set his recovery against the note sued upon. As the note grew out of the alleged contract in respect to the guano, the defendant might, under the present method of civil procedure, allege

(31) his counterclaim and avail himself of his recovery, if any, as he seeks to do. His counterclaim is, in effect, a cross-action to recover damages from the plaintiff occasioned by its breach of the contract that gave rise to the note. The rights of the parties in such case may be settled in the same action. The Code, sec. 244; *Iron Co. v. Holt,* 64 N. C., 335; *Lutz v. Thompson,* 87 N. C., 334; *Hurst v. Everett,* 91 N. C., 399; *Wilson v. Hughes,* 94 N. C., 182. We do not, however, mean to say that if the plaintiff had sued upon the original contract, and the defendant had received and used the inferior fertilizer, he could not recover the value of the latter. Any question in that respect is not now presented.

The plaintiff in its appeal insists that it is entitled to have judgment for the amount of the note sued upon, upon the grounds that the defendant cannot avail himself in this action of his alleged counterclaim, that he accepted and used the fertilizer sent to him, and that the jury found that he sustained no damage. We have just seen that the defendant might allege and have benefit of his counterclaim. It is true, the jury found, in response to one issue submitted to them, that the defendant sustained no damage. This seems to imply that he sustained no damage as to his crops; that the fertilizer received and used served as good a purpose as the "genuine Peruvian guano" would have done, if it had been sent by the plaintiff and used by the defendant. But the jury found, in response to another material issue, that the fertilizer so sent and used was worth but $32 per ton. This is much less than the price per ton agreed to be paid for the Peruvian guano. The defendant did not agree to accept the cheaper fertilizer in lieu of it, and he was justly entitled to have the cheaper article at its fair market value; he might have gotten it at that price. The jury expressly found that the plaintiff failed to supply the Peruvian guano, but did supply a cheaper article.

(32) The findings of the jury are not so direct, formal, and regular as they should be, but the court could readily learn from them the sum of money the plaintiff ought to recover; it did so, and this is sufficient.

What we have said disposes of both appeals.

No error.

Cited: Woodridge v. Brown, 149 N. C., 303; *Sewing Machine Co. v. Burger,* 181 N. C., 253.

THE CITY OF RALEIGH v. J. A. PEACE.

Municipal Corporations—Assessments—Taxation—Constitution.

1. Special assessments for local municipal improvements are not within the restraints imposed by Article VII, section 9, of the Constitution, but the rule of uniformity must be observed.

2. Such assessments are founded upon the principle that the land abutting upon the improvement receives a benefit over and above the property of the citizens generally, and should be charged with the value of such peculiar benefits.

3. The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities; and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for or the manner of making such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle.

4. The ordinance under which this assessment was made provides for a taxing district and a proper apportionment; and even if the character was invalid, the said ordinance is fully sustained by the general act. The Code, sec. 3803.

5. It seems that section 4, Article VIII, of the Constitution, requiring that the Legislature shall provide for the organization of cities, towns, etc., and "restrict their power of taxation, assessment, etc., does not apply to special improvements of this character. Even if it did, an act of the Legislature authorizing an assessment is not void because it does not prescribe all of the particulars relating to such assessment. It is sufficient if it authorizes a fair and equitable method of ascertaining the peculiar benefits conferred upon the property, and apportioning the costs between the abutting owners.

6. The powers to enforce the collection of such assessments are limited to the specific property presumed to be benefited, and do not authorize a personal judgment against the owner of the property; and, therefore, so much of the act, in this case, as provides that a judgment rendered for the amount alleged to be due might be docketed and enforced as other judgments, is invalid.

MERRIMON, C. J., and DAVIS, J., dissenting.

ACTION to recover of defendant an amount of money expended (33) by the city for paving one-third of Fayetteville Street in front of the lot owned by the defendant on said street, between Morgan and Martin streets, tried before *Winston, J.*, at April Term, 1891, of WAKE.

The following facts were agreed upon:

1. In June, 1888, after notice to defendant, as provided in section 60 of the charter of said city, and in the ordinance named below, that he was required by an ordinance of the board of aldermen to have the

street in front of his real property paved, and after refusal of defendant to have such paving done for more than thirty days after notice, the plaintiff paved 58⅓ yards on Fayetteville Street, in front of defendant's property, said paving being worth and having cost $1.20 per yard.

2. That defendant was notified and demanded as aforesaid by plaintiff to pave said 58⅓ yards, pursuant to said ordinance and section 60, and the number of yards demanded to be paved was one-third of said street in front of defendant's property. All of said street in front of said property was paved, so that said 58⅓ yards did not comprise all the paving done on said street.

3. The defendant was at the time of notice and paving aforesaid, and now is, the owner of said property in front of which the paving was done.

4. That after the paving was done by plaintiff, the plaintiff demanded of defendant the payment of the value and cost of same, and payment was refused.

(34) 5. That on 28 February, 1890, summons in said action having been prior to that time duly issued and served upon defendant, a justice of the peace, before whom it was returnable, rendered judgment in favor of plaintiff for $70, with interest from 1 July, 1888, the same being the value and cost of the paving; and the defendant appealed to the Superior Court.

Section 60 of the charter of said city is as follows: "That every owner of a lot, or person having as great an interest therein as a lease for three years, which shall front any street on which a sidewalk has been established shall improve, in such manner as the aldermen may direct, such sidewalk as far as may extend along such lot, and on failure to do so within twenty days after notice by the chief of police to said owner, or, if he be a nonresident of the county of Wake, to his agent, or if such nonresident have no agent in said county or his personal notice cannot be served upon the owner or agent, then after publication of a notice by the chief of police for thirty days in some newspaper published in Raleigh, calling on the owner to make such repairs, the aldermen may cause the same to be repaired, either with brick, stone, or gravel, at their discretion, and the expense shall be paid by the persons in default. Said expense shall be a lien upon said lot, and if not paid within six months after completion of the repairs, such lot may be sold, or enough of the same to pay such expenses and cost, under the same rules, regulations and restrictions, rights of redemption and saving, as are prescribed in said charter for the sale of land for unpaid taxes. The board of aldermen shall have power to require every owner of real estate in the city to pave one-third of the street or streets in

front of his or her land, in such manner and with such material as the street committee of the board of aldermen may direct, and to enforce such requirement by proper fines and penalties; and upon the failure of such owner to do such paving, the city may have same done, and the costs thereof may be assessed upon the property of such (35) delinquent and added to the taxes against him or her, and collected in the same manner that other taxes or assessments are collected, or judgment may be taken by the city, before the mayor or any justice of the peace, or in the Superior Court of Wake, for the cost of such paving, and when docketed in the Superior Court of Wake such judgments shall have the same lien as is possessed by other judgments docketed in said Superior Court, and be enforced in like manner."

Ordinance referred to is as follows:

"*Resolved,* That the owners of real estate on Fayetteville Street, between Morgan and Martin streets, be and are hereby required and directed to pave so much of said street as lies in front of their respective lots from the curbing of the sidewalk to the pavement laid by the city on said street, being one-third of the said street, in such manner and with such material as the street committee of the board may direct, to wit, with rubble-stone. And if any owner shall fail for the period of thirty days after written notice from said committee to do such paving, then the same shall be done by the city for $1.20 per square yard at the cost of such delinquent, as provided in section 2 of an act of the General Assembly of 1887, entitled 'An act to amend the charter of the city of Raleigh,' ratified on 7 March, 1887, and made a part of this case."

The court found, as a further fact, that all the other property owners along Fayetteville Street were likewise required by plaintiff, under like authority as they seek to exercise in this case, to pave one-third of the sidewalk in front of their respective buildings, and that the cost of said paving was reasonable. The court rendered judgment for plaintiff.

The defandant excepted to the judgment, upon the ground that the same was not warranted by the Constitution and laws of this State, and appealed.

J. N. Holding for plaintiff.
G. V. Strong and A. Stronach for defendant.

SHEPHERD, J. While we are of the opinion, for the reasons (36) hereinafter stated, that the particular judgment rendered in this action cannot be sustained, yet, as the validity of the ordinance under which the assessment is made is drawn in question, and as it is of great importance that it should be passed upon by this Court, we deem it our

duty to consider this and such other points that are presented in the record as may be necessary to an intelligent disposition of the present and perhaps other cases which may arise upon the subject.

(1) The authority of the Legislature, either directly or through its local instrumentalities, to exercise the taxing power in the form of local or special assessments, has been so firmly established by judicial decision in this and other states of the Union that it can hardly, at this late day, be considered an open question; but as it seems to be controverted by the argument of counsel, it may not be improper to state in a general way the principle upon which it is founded, as well as to refer to some of the multitude of authorities in its support.

Judge COOLEY, in his work on Taxation (606), says that special assessments "are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it."

"The *rationale* of the system," says Mr. Burroughs, "is that the purpose is a public one which justifies the levy of the tax, but the benefit of the improvement is not only local, but also specific, benefiting particularized property, and therefore the tax may be levied on this
(37) property, which receives a benefit over and above other property in the State. . . . An assessment for improvements is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement." The Law of Taxation, 460.

Judge Dillon (2 Municipal Corp., 753n) quotes with entire approval the language of *Slidell, C. J.*, in *Municipality No. 2 v. Dunn*, 10 La. Am., 57. The Chief Justice says: "I must repeat my conviction that the system of paying for local improvements wholly out of the general treasury is inequitable and will result in great extravagance, abuse, and injustice. I think the system of making particular localities which are specially benefited bear a special portion of the burden is safer and more just to the citizens at large by whose united contributions the city treasury is supplied. What is taken out of the treasury is out of the pockets of the proprietors."

Speaking of special assessments, the Supreme Court of Missouri, in *Lockwood v. St. Louis* (24 Mo., 20), said that "their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. . . . General

taxation for a mere local purpose is unjust; it burdens those who are not benefited, and benefits those who are exempt from the burden."

These assessments are not to be confounded with the exercise of the right of eminent domain (Cooley Const. Lim., 498; 2 Dillon Munic. Corp., 738; Lewis on Eminent Domain), and it is also to be observed that while they are taxes in a general sense, in that the authority to levy them must be derived from the Legislature, they are nevertheless not to be considered as taxes falling within the restraints imposed by Art. V, sec. 3, of the Constitution, although the principle of uniformity governs both. *Shuford v. Comrs.*, 86 N. C., 562; (38) *Cain v. Comrs.*, 86 N. C., 8; *Busbee v. Comrs.*, 93 N. C., 143; Cooley Const. Lim., 498; 2 Dillon Munic. Corp., 755, *et seq.*

The principle deducible from the foregoing quotations finds a striking illustration in the facts of the present case. The district improved by the pavement embraces only a part of one street, and while the improvement may add very greatly to the convenience and comfort of all of the citizens, it at the same time confers upon the abutting real property an enhanced pecuniary value out of all proportion to the benefits enuring to the public at large. Would it be just that all should be taxed alike, and that the owner of property in a remote part of the city be compelled to contribute as much towards the particular improvement as those whose lands are thus peculiarly benefited? This would savor very much of the "forced contributions" of the olden time, which are so generally denounced as obnoxious to the principles of free government, and the bare statement of the proposition shocks all sense of justice and furnishes its own refutation. It is, therefore, pre-eminently just, as well as the duty of the law-making power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred, and it is for the very purpose, as we have seen, of accomplishing this end, and of preventing so great a perversion of the taxing power, that these local or special assessments are almost universally resorted to. It is true that the power to levy such assessments is sometimes abused, and that some of the methods adopted have been judicially condemned, but the existence of the power itself is as well established as it is possible by judicial decision to establish any legal principle whatever. *Wilmington v. Yopp*, 71 N. C., 76; *Cain v. Comrs., supra; Busbee v. Comrs., supra;* 2 Dillon Mun. Corp., 761; Cooley Const. Lim., 506; 1 Hare Am. (39) Const. Law, 301; Elliott on Roads and Streets, 370.

(2) We will now consider whether the power of the Legislature was properly exercised in the case before us.

It is a general rule everywhere conceded that the discretion of the Legislature in levying taxes, when exercised within constitutional limits, is conclusive; but in respect to special assessments the principle is

questioned, and it is urged that these, not being strictly taxes, and not subject as such to the restraints imposed by the Constitution, but being founded solely, as some authors say, upon the principle of betterments of the property to the extent of the improvement, the courts should not surrender the power to review an arbitrary decision of the Legislature, either as to the necessity for or the beneficial character of a particular improvement, or the manner in which the benefits are to be ascertained and assessed. That the judicial power has been successfully invoked in some instances will appear from the cases of *Sealy v. Pittsburg,* 82 Pa. St., 360; *Washington Avenue,* 69 Pa. St., 352, and other decisions cited in the notes to section 753 of volume 2 of Dillon on Municipal Corporations.

Ruffin, J., in *Shuford v. Comrs., supra,* says that such assessments "are committed to the unrestrained discretion of the law-making power of the State, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantages it may derive therefrom." The latter part of the sentence very clearly implies the power of the courts to interfere to some extent, and in this we very heartily concur, but it is not essential in this case that we should define and mark the limits of this power, and it is sufficient to say that, according to all of the authorities, the Legislature or its duly authorized instrumentalities are primarily, at least, the judges in respect to the particulars mentioned, and that their decision will not be disturbed unless it clearly appears that there is an absence of power, or that the particular method prescribed for the assessment of the peculiar benefits to
(40) the abutting property is so plainly inequitable as to offend some constitutional principle.

The power to make such assessments must be clearly authorized by the Legislature, but it is not necessary, and "of course not to be expected—indeed, it is scarcely conceivable—that the Legislature should, in conferring authority upon local bodies, specify in minute detail the incidents of the power. The courts generally hold that necessary incidental and subordinate powers pass with the grant of the principal power. Any other ruling would make it practically impossible to frame statutes capable of reasonable enforcement. In matters of street improvements and local assessments, as in kindred matters, it is generally held that a power clearly conferred in general words will carry all the incidental authority essential to the execution of the power in ordinary and appropriate methods." Roads and Streets, 374. It is urged that all of these subordinate incidents should be provided for in the act granting the power, because of section 4, article VIII, of the Constitution, which requires the Legislature to provide for the organization, etc.,

of incorporated towns, etc., "and to restrict their power of taxation, assessment, borrowing money," etc.

Similar provisions have, upon the best authority, been held inapplicable to assessments of this character. They are construed, says Judge Dillon (Mun. Corp., 778), "not to apply to special assessments by municipal corporations made by authority of the Legislature for local improvements." The restrictions in such cases are to be found in those general principles of the Constitution which protect the liberty and property of every citizen. Even if such a provision did apply, it is not easy to understand how the duty to restrict the power requires that all of the incidents of its exercise shall be prescribed by the Legislature. Neither is it essential that the act of the Legislature, or an ordinance made under its authority, should expressly state that the contemplated improvement is necessary (Roads and Streets, 385), nor (41) is it required that the act should expressly declare that the assessments are to be made according to the benefits conferred. Both of these are implied from the very nature of this species of taxation, and that this is so is apparent from the action of the court in upholding such assessments under acts which make no reference to such particulars. *Cain v. Comrs., supra; Shuford v. Comrs., supra; Busbee v. Comrs., supra.*

Viewed in this light, we can see no objection to the ordinance under consideration. It very clearly provides for a taxing district, to wit, "Fayetteville Street, between Morgan and Martin streets," and it further provides that upon the failure of the abutting owners to comply with its requirements, the city may make the designated improvements at the cost of $1.20 per square yard. This provision, as to the cost (which is found by the court to be reasonable), very plainly implies that the expense of the improvement in the entire district had been previously estimated, and thus we have an apportionment between the abutting owners and the city (the latter paying one-third), and also an apportionment as to the remaining two-thirds between the abutting proprietors according to the frontage. No objection is urged as to the apparently equitable adjustment between the city and the abutting owners, but it is insisted that the frontage rule is an improper method of ascertaining the benefits which enure to the respective lots, and that these should be estimated by the actual appraisement of each.

We have seen that such assessments are based upon the principle of benefits to the abutting property, but the manner of estimating such benefits is not confined to actual appraisement by appraisers appointed for that purpose. This would seem to be a very fair and equitable rule, but its practical working in some instances has led to injustice, and if the Legislature, acting, as it is presumed to do, upon information

(42) as to the situation and character of the property, the depth of the lots, etc., chooses, in effect, to make an appraisement itself by the adoption of a standard like the frontage rule, it is not easy to understand why in such cases the same measure of justice may not be attained.

In *Hamet v. Philadelphia,* 65 Pa. St., 155, it was said by *Judge Sharswood,* delivering the opinion, that "Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities of the lots differing in situation and depth. Appraising their market values, and fixing the proportions according to these, is a plan open to favoritism or corruption, and other objections." Even where the latter rule is adopted, the buildings should be excluded from the valuation, "as the improvements (says Judge Cooley), while increasing largely the market value of the land, do not usually perceptibly increase the value of the buildings erected upon it." Laws of Taxation, 649. If the buildings are not to be considered (and this is undoubtedly true), we can very readily conceive how the frontage rule may be quite as efficacious as any other in ascertaining the benefits—that is, the enhanced pecuniary value—where from the similarity in situation, etc., of the different lots there can be no gross inequalities. The same eminent authority also states (638) that the two methods of assessing benefits between which a choice is usually made is by assessors or commissioners appointed for that purpose, or by "an assessment by some definite standard fixed upon by the Legislature itself, and which is applied to the estate by a measurement of length, quantity, or value." In speaking of assessments by the front foot, he says (644) that "Such a measure of apportionment seems at first blush to be perfectly arbitrary and likely to operate in some cases with great injustice; but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits, much more than value could (43) be, and perhaps approaching equality as nearly as any other estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may be lawfully made the basis of apportionment." Similar language is also used by the same author in his work on Constitutional Lim., 506, and cited with approval in *Yopp v. Wilmington, supra.*

In the well-considered work on Roads and Streets, 396, by Elliott, it is said that "The system which leads to the least mischievous and unjust consequences is that which takes into account the entire line of the way improved, and apportions the expense according to the frontage; for it takes into consideration the benefit to each property owner that accrues from the improvement of the entire line of the way, and does not impose upon one lot owner an unjust portion of the burden."

The principle is also fully sustained by the following authorities, which are only a part of the large number that might be cited: Burroughs Law of Taxation, 469; 2 Dillon Munic. Corp., 752, 761, 809; 2 Desty Tax., 1263; *Pennock v. Hoover,* 5 Rawls, 291; *Magee v. Com.,* 46 Pa. St., 255; *Covington v. Boyle,* 6 Bush., 204; *S. v. Elizabeth,* 30 N. J., 365, and 31 N. J., 547; *S. v. Fuller,* 34 N. J., 227; *Wilder v. Cincinnati,* 26 Ohio St., 284; *Parker v. Challis,* 9 Kans., 155; *Meenan v. Smith,* 50 Mo., 525; *Whiting v. Quackenbush,* 54 Cal., 306; *Palmer v. Stumpf,* 29 Ind., 329; *Allen v. Grew,* 44 Vt., 174; *Motz v. Detroit,* 18 Mich., 495; *King v. Portland,* 2 Ore., 146; *Cleveland v. Tripp,* 13 R. I., 50; *White v. People,* 94 Ill., 604; *Sheley v. Detroit,* 45 Mich., 431.

Before proceeding further, we will examine the cases cited in support of the contrary view.

In *S. v. Jersey City,* 8 Vroom, 37 N. J. L., 130, the assessment was for grading, excavating, and filling in the street, and the court held that in such cases the same uniformity could not be had as in *paving.* The principle of assessment by the frontage as to the flagging of sidewalks was approved; and, at the same term, in *S. v. Passaic* (44) *Village,* 68, it was declared that "There would be no injustice in assessing the improvement of opening, grading, guttering, and curbing upon the entire frontage according to the number of lineal feet. . . . There is no rule that condemns such method of assessment without proof of its injustice."

In *McBear v. Chandler,* 9 Heisk., 349, the "equality" clause of the Constitution was applied, which we have seen is contrary to the ruling of this Court and the overwhelming weight of authority in the other states.

In *Norfolk v. Ellis,* 26 Gratt., 224, the principle was approved; and while in *Woodbridge v. Detroit,* 3 Mich., the court was divided, in the later case of *Moltz v. Detroit,* 18 Mich., it distinctly recognized the front foot basis, if authorized by the Legislature.

Peay v. Little Rock, 32 Ark., decides against the rule, but the decision seems to have been influenced by Illinois cases, which turned upon the peculiar provisions of the Constitution of that State, which Constitution, we learn, has since been changed in this respect, and recent decisions sustain the rule.

In *Williamsport v. Beck,* 128 Pa. St., 147, the assessment was for repaving, and the court recognized the rule as to the cost of the original paving.

In *Clapp v. Hartford,* 35 Conn., 96, the charter was not complied with, and the cases cited from Missouri do not controvert the rule, but simply construe it as it should be applied under certain statutes referred to.

Thus it appears that even the industry of the intelligent counsel has failed to produce any authority where the general principle was fairly presented and condemned, while nearly if not indeed all of the cases cited by them tend very strongly to its support.

(45) It is insisted, however, with much earnestness that conceding that the ordinance prescribes a valid method of apportionment, still it cannot be sustained unless the power to make it is conferred by the Legislature, and that such power has not been conferred upon the city of Raleigh. This position is founded upon the idea that the charter does not create or authorize the creation of a taxing district, but simply charges the abutting owner with the whole cost of the improvement in front of his lot, and that there being an absence of authority to make any apportionment according to benefits, the ordinance is void. The imposition of such a charge has been condemned by some authorities and sustained by others. Without pausing to determine how this may be, and conceding for the purposes of the discussion that the charter bears the construction insisted upon, and that such an assessment is for that reason invalid, we are, nevertheless, of the opinion that the ordinance is fully supported by legislative sanction. In chapter 62, section 3803, of The Code (Towns and Cities), it is provided that the commissioners or aldermen "may cause such improvements in the town to be made as may be necessary, and apportion the same equally among the inhabitants by assessments of labor or otherwise." Here we have a very comprehensive power granted the commissioners or aldermen for the improvement of streets, and the authority to *apportion* the cost of the improvement is not only implied by the power to make "assessments" (Anderson Law Dict., Bouvier Law Dict. Assess.), but is expressly conferred.

Now, if it be granted (as we think it should be) that the general act is deficient in that it does not provide for the enforcement of such assessments against abutting real property, still it is good as far as it goes, and is not repealed by the charter as amended, unless inconsistent therewith. The Code, sec. 3827. If it be said that the charter conflicts as to that part which requires the whole cost to be charged against the abutting property without any apportionment, and if, as contended,

(46) such a provision is void, it would be impotent to work a repeal of that part of the general act which does authorize such apportionment. If it does not conflict, then of course the general act may supplement the special act, and the two may be construed in *pari materia*. So, taking it either way, the authority to apportion the cost according to benefits, as provided in the ordinance, would be supported, and the power to collect the assessments, being expressly granted, and the manner of collection prescribed, it must follow that, in the total

absence of anything to show an abuse of power or any gross inequalities, the assessment in question may be enforced.

We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. It is true that in *Yopp v. Wilmington, supra,* such a judgment was rendered, but the point was not presented and passed upon by this Court, the only question decided being the validity of special assessments of this character, and not the manner of their enforcement. We feel at liberty, therefore, to examine into the constitutionality of the act authorizing the judgment in question, and in doing so we cannot better express our views than by quoting the language of Mr. Elliott: "It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the superadded value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere; for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefited cannot be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local (47) assessments; and yet if there is a personal liability, the assessment may be enforced although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. . . . The decisions which declare statutes imposing a personal liability upon the landowner unconstitutional are, in our judgment, so strongly entrenched in principle that they cannot be shaken." Roads and Streets, 400. Such, also, is the opinion of Judge Cooley (Taxation, 675), who says that "In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he then held liable for a deficiency in the assessment, the injustice, not to say the tyranny, is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur."

The foregoing reasons are entirely conclusive to our minds, and are well sustained by authority. *Higgins v. Ansmus,* 77 Mo., 351; *Neenan v. Smith,* 50 Mo., 525; *Macon v. Patty,* 57 Miss., 378; *Cran v. Tolono,*

96 Ill., 255; *Jaffery v. Gough,* 36 Cal., 104; *Broadway v. McAtee,* 8 Bush., 508; *Burlington v. Quick,* 47 Iowa, 226; *Green v. Ward,* 82 Va., 324.

The act provides that the judgment of the justice of the peace may be docketed in the Superior Court, "and shall have the same lien as is possessed by other judgments docketed in said Superior Court, and be enforced in like manner." The judgment authorized being a personal one, we know of no principle by which it can be so modified and shaped in a justice's court (which has no equitable jurisdiction) as to make it a charge against the abutting land only. It is to be observed, however, that another method of collecting is provided by the amendment to the charter. It provides that the assessment may be "added to the
(48) taxes against him or her, and collected in the same manner that other taxes or *assessments* are collected." We can see no reason why this assessment may not be enforced against the abutting land under this provision of the said amendatory act.

We are therefore of the opinion with his Honor, that the assessment is valid, but we do not think it can be enforced by a personal judgment against the defendant. For this latter reason we conclude that the judgment should be reversed.

MERRIMON, C. J., dissenting: I concur in the judgment, but not in the opinion, of the court, and will state some of the grounds of my dissent.

The Constitution (Art. VIII, sec. 4) provides that "It shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to *restrict* their powers of taxation, *assessment,* borrowing money, contracting debts, and loaning their credit, so as to prevent *abuses in assessments* and in contracting debts by such municipal corporations." This highly mandatory provision is significant and very important. Its leading purpose is to specially require the Legislature to provide for the organization of cities and towns and to restrict, restrain, keep within prescribed limits the great powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, conferred upon them, and thus prevent oppressive taxation, burdensome city debts, arbitrary assessments, wild schemes of extravagance, and other like abuses. The purpose expressly declared is "to *prevent abuses in assessments and in contracting debts*" by cities and towns. Long continued public experience in every direction pointed, and still points, to the great necessity for this organic provision, its wisdom, and the importance of a strict observance of it. The legislative duty is expressed in clear, explicit, and imperative terms. Cities and towns must not be left to exercise unrestricted and

arbitary powers of taxation and assessment. On the contrary, (49) such powers must be restricted and defined by statutory authority, else they cannot be exercised at all. The Legislature has no authority to confer upon cities and towns unlimited power to impose taxes or to make assessments. The statute purporting to confer such power would be inoperative and void, because in contravention of the letter and purpose of the Constitution. The power of assessment, in its most general sense, is very broad, indefinite, and arbitrary in its nature and application. It may be made a terrible engine of injustice and oppression, as long experience has shown. It is the more dangerous, and therefore to be the more guarded against, because the law and the decisions of the courts in respect to it are unsettled, the latter being greatly in conflict. Oftentimes the party complaining against oppression and grievous wrong growing out of it has found no adequate remedy. The purpose of the provision just recited is to prevent such evils. The Legislature is specially required to restrict, limit, and define such power when conferred upon cities and towns in this State. A statute purporting to confer the general power of assessment is void, because not allowed or tolerated by the Constitution. A statute conferring such power should and must prescribe the extent and the method of the exercise of the same. Towns and cities cannot be allowed to exercise and apply it at their will and pleasure, nor arbitrarily. Statutory regulation must exist to prevent this evil. Surely so important a constitutional provision should have effect, and the courts should enforce it in appropriate cases.

Now, it seems to me clear and palpable that the statutory provision under which the plaintiff city undertook to make and enforce its *ordinance* in question is violative of the constitutional provision above recited, in that it purports and intends to confer upon the plaintiff the unrestricted arbitrary power of assessment, and goes beyond that, in requiring assessments to be made not simply against the property supposed to be specially benefited by the street improved but as (50) well against all the property, both real and personal, of the owner thereof and against him personally, thus empowering the plaintiff, in effect, to take the property of the citizen for public uses without compensation. These are the very grievous evils intended to be suppressed and prevented. The organic provision recited means this, or it practically means nothing.

In substance and effect, the statute in question purports to confer upon the plaintiff unrestricted authority to require every owner of real estate situate in it "to pave one-third of the street or streets in front of his or her land," as it may require, and if such owner fails to do so, then it may make such pavement and assess and charge "upon the prop-

erty of such delinquent" the costs of such paving, to be "added to the taxes against him or her and collected in the same manner that other taxes or assessments are collected," or the plaintiff may sue the delinquent for such costs, obtain judgment therefor, docket the same, and thus obtain a judgment lien and enforce it by a sale of the delinquent's property as in ordinary cases.

It seems that it was not the purpose of this statutory provision to confer upon the plaintiff power to impose a tax on the property of owners of real estate situate within it as prescribed for the purpose of paving the streets. But if such were its purpose, it would be void, because in that case it would be violative of the Constitution (Art. V, sec. 3; Art. VII, sec. 9), which requires that the levy of all taxes, whether for the purposes of the State, counties, townships, cities or towns, "shall be *uniform and ad valorem* upon all property in the same, except property exempted by" the Constitution. Plainly, the costs of paving the streets in the case provided for is not upon the *ad valorem* value of the taxpayer's property. Moreover, such levy is not general or *uniform;* it is confined to a class of taxpayers who own real
(51) estate situate within the town. The Constitution contemplates and intends that all taxes imposed upon property shall be *uniform* and *ad valorem* upon the property of all persons liable to pay tax, and not upon a part of them, or upon a class or classes owning particular kinds of property subject to taxation.

It is, however, seriously insisted that the real purpose of the statutory provision is to confer upon the plaintiff power to pave the street in the case specified, and assess the real property in front of which the paving was done, and which received special benefit from it, with the costs of such paving. If such purpose was intended, it is not expressed by the statute, nor is there any appropriate provision for effectuating it.

Assessments are commonly called a species of taxes, but they are not so properly denominated, certainly not in this State. The Constitution provides and establishes with much precision a system of taxation for all public purposes, and how the legislative power in that respect shall be exercised; but that system does not in terms, or by implication, embrace or refer to the power of assessment. This power is distinct from that of taxation, and is not limited by constitutional restraint otherwise than as above indicated. The word *assessment* as employed in the Constitution has reference to what are commonly designated as *local assessments,* generally of money, for the purposes of some local improvement, and "are imposed only upon those owners of property who in respect to such ownership are to derive a special benefit in the local improvements for which they are expended, and are not within the restraints put upon general taxation." *Cain v. Comrs.,* 86 N. C., 8. The power and rights

to make such assessments are founded upon the benefits, or supposed benefits, such property derives specially from the public improvements, beyond the benefit derived generally by the community. Government has authority to compel every one whose property derives special benefit from local public improvements to pay, in addition to his (52) ordinary taxes, charges, assessments, expended in making such improvements, equal to such special benefits. That power is not unreasonable or unjust. Every citizen should pay his proportion of taxes as the money price for the benefits he derives from government in the protection of his life, liberty, and property, and general advantages incident thereto, and when his property derives special benefits not common to the whole community from local public improvements, he should pay for the same to the extent of, but not beyond, such special benefits. In such case the owner of the property cannot reasonably or justly complain, because his property has been so benefited. It may happen in possible cases that the assessment is too great, or in some aspects of it not strictly just; but this is not attributable to the law or its purpose, but to its erroneous or imperfect administration in particular cases. But such power is great, indefinite, not precisely defined in its nature and limits, and hence subject to very great abuses. It is therefore that the organic provision requires this power to be restricted and carefully guarded.

No assessment should exceed the special benefit to the land deriving the same, and all methods of assessments that work a different result are defective and objectionable. To the extent that it exceeds such benefit, the owner's property is, in effect, taken for the benefit of the public without compensation, and to that extent it is violative of fundamental right. Hence, a statute whose terms and effect produce such a result would be void. It is intended in this State that the statute granting such power shall guard against such oppression and injustice by appropriate restrictions.

The assessment, in its nature, must be made against the property so specially benefited, and not against other property of the owner, or him personally, because the assessment is founded solely upon such benefit to the property particulary benefited. That property, and that alone, must be assessed. The owner may pay the assessment and (53) thus relieve his land from the charge, but if for any reason he will not, then the land may be sold to satisfy the same, but no other part of the delinquent's property may be sold for such purpose, nor in that case would he be chargeable personally or otherwise on that account. This must be so, because the land so benefited, and none other, may be charged with the assessment. Can it be that the public may benefit and assess a particular lot of land and afterwards sell it, and part or all of

the owner's other property, to satisfy the assessment, and still perhaps have a charge against him personally for an unpaid balance of the same? A proposition so arbitrary, unreasonable, and oppressive shocks every sense of right and justice. A statute that purports to authorize the property of the owner of the land so assessed, other than that land, to be sold by legal process to satisfy such assessment is inoperative and void, because it, in effect, undertakes to allow the arbitrary appropriation of the owner's property to the use and purposes of the public without compensation to the owner thereof. The statute cannot authorize the sale of property other than that so specially benefited. That property alone is subject to be assessed. *Neenan v. Smith,* 50 Mo., 525; *Taylor v. Palmer,* 31 Cal., 240; Cooley on Taxation, 472.

An essential element of such assessments is that they must rest upon the principle of uniformity as to all property subject to and affected by them, and especially they should be so regulated in respect to making them as to charge the property of each owner benefited by the same public improvement in proportion as such property is so benefited, and as to the costs and character of the same. They must, in their nature, affect all property subject to them alike in all material respects, and a statute authorizing them to be made should so require by proper regulations and restrictions. *Busbee v. Comrs.,* 93 N. C., 143. The Legislature has no power to allow arbitrary assessments to be made, or
(54) to grant power that may be so exercised. As we have seen, it is expressly made its duty to *restrict the power of assessment* conferred upon cities and towns, "so as to prevent *abuses in assessments.*" It may not leave such corporations at large to make assessments as they will. A statute so providing is inoperative and void, because it fails to provide appropriate and reasonable restrictions as the Constitution requires in express and mandatory terms, and such is its clear purpose.

The statute under which the plaintiff claims to exercise authority to make the assessment in question in broad terms undertakes to confer upon it general power to pave one-third of any one or all of its streets in front of a lot of land abutting upon the same, and to assess the cost of the paving against the property of the owner thereof. It is not required to observe uniformity in any respect in making such assessments. They may be made without any reference to the special benefit the paved street may extend to the lot on account of which they are made, and without reference to the cost of the paving done. The assessment as to one lot deriving small benefit may be a sum of money equal to two or three times the value of such benefits, while the assessment as to another lot, deriving much greater benefit, may be greatly less than the former. The cost of the pavement in front of one lot may

be double or treble that in front of another, and the assessment as to both may be precisely the same. The plaintiff is not restrained in these or any respect; no restraining regulations are prescribed for its government therein to be observed by it. The whole unrestricted power of assessment is sought to be conferred. It may make assessments at its will. This the Constitution does not allow or sanction.

The *ordinance* of the plaintiff in question well illustrates the truth, force, and importance of what has just been pointed out. It is in large measure purely arbitrary. It requires the assessment to be made without regard to the special benefit the paved street extends to the lot on account of which it is made, and without reference to the (55) real cost of the paving done. It requires uniformity only in a single respect, that of the cost of paving a square yard, and this is based upon mere estimate, and is wholly arbitrary; it might just as well have been fixed at a greater or less sum, so far as the particular property assessed is concerned. If the cost of paving a square yard in front of a lot is less than that specified, the assessment is the same as if it had cost that or double that sum, and the cost is the same whether the pavement is of greater or less or no special benefit to the lot.

The statute does not require the assessment to be made against the lot benefited, as it should do, in any case; it directs that it be made "upon the property of such delinquent (the owner of the property who failed to pay the sum of money demanded for the paving), and added to the taxes against him or her." This language is plain and broad. It cannot be said that it should and may be construed as directing the assessment to be made against the property—the lot benefited specially. The plain terms do not so imply, nor was it so intended, as plainly appears from the further provision that the assessment shall be "collected in the same manner that other taxes and assessments are collected." This implies that any of the delinquent's property may be sold to satisfy it. As we have seen, the assessment must be made against the particular property benefited, and if the owner will not pay the sum charged, then that property, and no other, may be sold to satisfy it.

The statute further prescribes that the plaintiff may sue and obtain judgment against the delinquent owner of the property assessed, docket the same, and sell any of his property to satisfy it. The reasons why this cannot be done have already been pointed out. Such directions of the statute in effect provide for taking indirectly the (56) delinquent's property for the use of the public without compensation to him. It allows property not liable for such assessment to be sold to satisfy the same. It thus practically confiscates the delinquent's property to the use of the public.

Nor does the general statutory provision (The Code, sec. 3803) in respect to towns and cities confer upon the plaintiff power to make such assessments as that here in question, even if it were applicable. It prescribes that the commissioners of towns and cities "may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants by assessment of labor or otherwise." The power thus vaguely sought to be conferred as to assessments like that in question here is quite as objectionable as the power intended to be conferred by the clause of the plaintiff's charter in question. It intends to confer the vague power of assessment without restriction, restraints, or direction of any kind or in any respect; it leaves the plaintiff to make assessments as it will; it may arbitrarily assess by the front foot, the square yard, the actual cost, by or without reference to a uniform rule, with or without reference to the benefit of the property charged; it may make a general charge for the whole paving done, and charge each owner of the land his or her proportion of the whole cost. This statute does not make the assessment a lien upon the property assessed, nor does it prescribe how the property may be sold to satisfy the assessment. Any proceeding to sell it, unless by a decree of a court, will be arbitrary and unauthorized. The very purpose of the constitutional provision is to prevent the exercise of such unbridled power, and save the property owner from unjust discrimination and oppression for which he can have no remedy. It is not sufficient to say that this plaintiff will not unjustly or unreasonably exercise such power. It may do so, other cities and towns may do so—no doubt have done so to a greater or less extent. The Constitution wisely does not intend that they shall have, be charged with, or exercise such great power without restraint
(57) or limitation of any kind. It commands the Legislature to restrict such power. It seems to me that if its provision to which I have referred has not the meaning and purpose I have attributed to it, then it has no practical meaning and is a dead letter, serving no purpose.

In my view, this case depends upon the proper interpretation of the constitutional provision I have cited and commented upon, and not upon a vast multiplicity of conflicting and confusing decisions of courts out of this State in respect to the general power of assessment. An important part of the purpose of the Constitution is to rid the people of this State of uncertainty and confusion in respect to the power of assessment, and the serious evils incident thereto.

In my judgment, the statute in question fails to restrict and regulate the power of assessment it purports to confer upon the plaintiff,

as required by the Constitution, and hence, it had no power to make or enforce its ordinance in question.

DAVIS, J. I concur in the above opinion of the Chief Justice.

PER CURIAM. Reversed.

Cited: Greensboro v. McAdoo, 112 N. C., 361, 2, 7; Hilliard v. *Asheville,* 118 N. C., 851; *Broadfoot v. Fayetteville,* 121 N. C., 423; *Hutton v. Webb,* 124 N. C., 755; *Asheville v. Trust Co.,* 143 N. C., 366, 367; *Kinston v. Loftin,* 149 N. C., 256; *Kinston v. Wooten,* 150 N. C., 298, 299; *Schank v. Asheville,* 154 N. C., 41; *Tarboro v. Staton,* 156 N. C., 507, 518; *Tripp v. Comrs.,* 158 N. C., 186; *Justice v. Asheville,* 161 N. C., 73; *Lewis v. Plot Mountain,* 170 N. C., 110; *Marion v. Pilot Mountain, ib.,* 120; *Canal Co. v. Whitley,* 172 N. C., 102; *Felmet v. Canton,* 177 N. C., 54; *Pate v. Banke,* 178 N. C., 142; *Morganton v. Avery,* 179 N. C., 551; *Cmrs. v. Sparks, ib.,* 584.

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(58)

E. C. KNIGHT v. ALBEMARLE AND RALEIGH RAILROAD COMPANY

Negligence—Instructions to Jury—Evidence.

1. When the pleadings and proofs develop several aspects of the case upon which the right to recover depends, it is error to single out one and to charge the jury particularly in respect thereto, and give only general instructions as to the others—especially where special pertinent instructions have been requested.
2. What is negligence is a question of law for the court when the facts are ascertained; and when the evidence is conflicting, the court should instruct the jury that it is or is not negligence, accordingly as they might find the facts to exist.

APPEAL at Fall Term, 1891, of EDGECOMBE, from *Bryan, J.*

The complaint alleges that the plaintiff planted and produced crops in 1887, 1888, and 1889 on a tract of land situate on and near Coneto Creek; that the said defendant constructed a bridge over and across said creek and a part of its roadbed so negligently, and so kept and maintained the same during said years, as to obstruct and prevent the free and natural flow of the water of said creek, and thereby ponded the same upon the plaintiff's said crops and greatly endamaged them, etc.

The answer denies the material allegations of the complaint; alleges that the said creek is a low, flat swamp of little fall, having a very sluggish current with a shallow run about the middle; that the water is ponded, if at all, by a county road embankment; that the said swamp and creek are full of trees, swamp undergrowth, logs, rafts, and accumulated trash, all of which greatly obstructed and retarded the flow of the water through said creek; that the ponding complained of was also occasioned by extraordinary rainfalls, etc.

On the trial the defendant, among other things, asked the court to instruct the jury as follows:

12. "If you are satisfied by the testimony that the lands and
(59) crops were damaged at the alleged times, then you will find what damage there was, and then what caused it: whether it was done by the following causes taken and acting together, or by one or more of them, that is, the obstruction by the county road, the insufficiency of the creek as a drain in itself, the want of sufficient ditching, the effect of bad crop seasons and extraordinary rainfalls, the obstruction by the railroad, the want of sufficient cultivation, and the obstruction to the water by the trash, logs, rafts, and trees in the creek. If you find there was such damage, and that the railroad caused it in part, then it becomes your duty to ascertain what part of the damage was caused by the railroad; and if the plaintiff, it being his duty to do so, has not satisfactorily shown and proved to you what part was caused by the railroad, you will find that there was no damage."

The court declined to give such instruction, but told the jury, in directing them upon the issue as to damages, that "If the damage sustained by the plaintiff is due to the embankment of the public road, or any part of it is due to that cause, or any *other* cause than the negligent construction of the railroad embankment, the defendant is not liable for such damage."

The defendant excepted.

There was evidence tending to prove "that the swamp of the creek is very low and full of trash, trees, tree-tops, logs and rafts; the water in it flows very slowly; the water is held back and checked in its flow by the trees, tree-tops, trash, logs and obstructions in the old canal." The defendant alleged contributory negligence, and an appropriate issue in that respect was submitted to the jury. There was evidence of such negligence.

There was a verdict and judgment thereon for the plaintiff,
(60) and the defendant appealed.

No counsel for plaintiff.
John L. Bridgers (by brief) for defendant.

MERRIMON, C. J., after stating the case: There was evidence on the trial tending to prove that the flow of the water of the creek mentioned was obstructed, retarded, and ponded back in some considerable measure by the trees, tree-tops, trash, logs, and like obstructions. This evidence was pertinent and important, and the court should have appropriately directed the attention of the jury to it, as it did particularly direct their attention to other pertinent evidence; especially it should have done so in compliance with the defendant's special request. Although the defendant may not have been entitled to the whole of the instruction asked for and denied, still the court should have given so much thereof, or the substance of it, as it was entitled to have. The court instructed the jury in the course of its charge that "If the damage sustained by the plaintiff is due to the embankment of the public road, or if any part of it is due to that cause, or any other cause than the negligent construction of the railroad embankment, the defendant is not liable for such damage." This, we think, was not a sufficient compliance with the defendant's request. Taking the latter, the evidence and instruction thus given, it may have been, perhaps was, misleading to the jury. The court directed their attention specially "to the embankment of the public road" as an obstruction to be considered, and also to *"any other cause"* of obstruction as to which there was evidence, but as it had expressly denied the special instruction asked for, based in part upon the evidence in respect to obstructions caused by "the trash, logs, rafts, and trees in the creek," the jury may have supposed that these did not constitute obstructions to be considered by them, otherwise the court would have men- (61) tioned them, just as it did the embankment, which was also mentioned in the special instruction. As the court directed their attention specially and gave prominence to one cause of obstruction specified in this instruction, and did not in that connection, or at all, mention other similar prominent causes so specified, the jury may have believed that the latter were not such obstructions as they ought to consider. The omission (no doubt inadvertent) may have misled the jury; and hence there is error.

In respect to the alleged contributory negligence of the plaintiff, the court instructed the jury that "The rule of law is that if the circumstances were such that *a man of ordinary care and prudence* would have planted and cultivated his crop upon said lands, then he was not guilty of contributory negligence." In this there is error. What is negligence is a question of law, to be decided by the court when the facts are ascertained, accepted as true, or admitted; and when the evidence is conflicting the court should tell the jury that there would or would not be negligence, accordingly as they might find

the facts to be in varying aspects of the evidence. *Emry v. R. R.*, 109 N. C., 589, and the cases there cited.

If the court should fail, in complicated cases, to instruct the jury as to every possible aspect of the evidence, this would not be error, unless the complaining party should ask it to do so. Such cases are, in this respect, not different from other cases. But the court should, as in other cases, be careful to present every just, distinct view of the evidence to the jury, with appropriate instructions as to the law applicable.

The defendant is entitled to a

New trial.

Cited: *Kahn v. R. R.*, 115 N. C., 641; *Chesson v. Lumber Co.*, 118 N. C., 69; *Baker v. R. R.*, 144 N. C., 42; *Marcom v. R. R.*, 165 N. C., 260; *Smith v. Tel. Co.*, 167 N. C., 256.

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(62)

STATE EX REL. J. H. BOOTHE v. CHARLES D. UPCHURCH ET AL.

Clerk Superior Court—Receiver—Bonds, Official—Surety.

When the clerk of the Superior Court is appointed receiver of a minor's estate under section 1585 of The Code, he takes and holds the funds by virtue of his office of clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect, and it is not necessary to obtain leave of the court before commencing an action for such failure.

ACTION by relator against C. D. Upchurch, clerk of the Superior Court of Wake, and his sureties on his official bond, to recover money placed in his hands as receiver of relator's estate during his infancy, and afterwards misapplied by said clerk, heard before *Connor, J.*, at February Term, 1892, of WAKE.

The relator became of age shortly before the end of the clerk's term of office, and immediately (in September, 1890) demanded the money due him. The defendant receiver then promised to settle, but subsequently, and before this action was brought, told relator, in response to a second demand, that he had used the money.

The sureties on the bond filed answers; the clerk did not answer. The sureties now insist that the complaint does not state facts sufficient to constitute a cause of action, and that the relator was not entitled to recover on the evidence. It was in evidence, and was admitted, that at January Term, 1889, of the court (a former guardian

of the relator having been removed by an order in a proceeding instituted by the solicitor on relation of the State, and C. D. Upchurch having been appointed "receiver as clerk of the Superior Court"), the said clerk, as receiver, made his report, which showed a balance in his hands due the relator of $968.74, and that no part of the same had been paid. Upon an intimation from the court that the jury would be instructed that as the fund had passed into the hands of the clerk, in his capacity of receiver, they would respond to the issue, fixing the damages "Nothing," instead of $968.74, as insisted by the relator, the said relator submitted to judgment of nonsuit and (63) appealed.

R. H. Battle, S. F. Mordecai and W. J. Peele for plaintiff.
T. R. Purnell for defendant.

AVERY, J. Laws of 1844 (Revised Code, secs. 14, 15) empowered the court of equity "to appoint the clerk and master or some discreet person a receiver to take possession of the ward's estate," in cases where a guardian should be removed. After that court was abolished, it was provided by Laws 1868 (Bat. Rev., ch. 53, sec. 22) that "the judge of the Superior Court should, in such cases, have the power to appoint some discreet person" to discharge the same duty, and that statute remained unaltered until 1 November, 1883, when section 1585 of The Code took effect. It seems that the Code Commissioners were induced by the decision in *Kerr v. Brandon,* 84 N. C., 128, which was rendered about the time when the act empowering them to codify the laws was passed, to prepare the amendment to the act of 1868, which is incorporated in said section, and which authorizes the judge to appoint "the clerk of the Superior Court or some discreet person."

The principle laid down in that case was that where the law under which a clerk or any other bonded officer should be appointed to discharge a fiduciary duty, authorized the court by its terms to appoint him in his official capacity, the order of the court, made in pursuance of such provisions of the statute, should be construed to impose upon him a trust for the faithful discharge of which the sureties on his bond should be bound. *Cox v. Blair,* 76 N. C., 78; *McNeill v. Morrison,* 63 N. C., 508. It is manifest that the sureties are liable to answer for the default of an officer designated in an order as "C. D. Upchurch, clerk of the court," empowered by the order (64) of the court as receiver to take charge of an infant's estate. *Board Education v. Bateman,* 102 N. C., 52. Those defendants who are his sureties do not seem seriously to deny their ultimate liability for any breach of the bond which may be shown to have been committed by their principal; but they contend that this action was

brought prematurely, and rely upon *Atkinson v. Smith,* 89 N. C., 72, to establish the position that the plaintiff could not maintain an action against the receiver, upon his bond, except where the pleadings set forth the fact that leave had been granted by the court to institute the suit.

No one will contest the soundness of the general proposition that where a creditor of an insolvent corporation or of an insolvent individual proposes to sue a receiver appointed by an order of court and placed in charge of the assets of the company, or the property taken out of the hands of the person, he must first obtain leave of the court to bring such action. In *Atkinson v. Smith, supra,* the solicitor on the relation of the State had brought the action against the guardian, and pending that suit, in which an account was being taken, the court appointed a receiver who filed bond with the usual condition. Subsequently, in the same action, on motion of the ward, who had meantime arrived at the age of 21, an account was taken of the administration of the fund by the receiver appointed. Upon the coming in of the report, showing that the receiver had failed to account for a certain sum, the court ordered the report to be confirmed, and further ordered the receiver to pay the sum so ascertained to be due into court, and that in default of such payment in thirty days the ward should have leave to sue on the bond.

In the case under consideration it must be remembered; (1) that the plaintiff has not made a motion in the original cause, but has brought an independent action against the sureties as well as
(65) the principal; (2) that the clerk is not an ordinary receiver, whose power is derived solely from the appointment of the court, and the bond which the plaintiff seeks to subject is not one executed under the supervision of the appointing power, but that the relator brings his action for a breach of an official bond growing out of infidelity in the discharge of a trust covered by its conditions, which bind him "to account for and pay over according to law all moneys which have come or may come into his hands by virtue or color of his office, or under an order or decree of a judge." The Code, sec. 1883.

The fact that this fund passed into the hands of Upchurch by virtue of an order of the court places no one injured by his default in misappropriating it at a disadvantage in proceeding to hold his sureties accountable, as compared with a plaintiff in execution, whose collected debt had been paid into court, and appropriated by the said officer to his own use, because both funds are alike covered by the express conditions of the bond, the sureties having obligated themselves by the same instrument to answer for both or either of the misappropriations mentioned.

The obligation of the defendant sureties to pay grows out of their agreement to answer the defaults of various kinds of which the clerk might be guilty, including misappropriation of any fund placed in his official care "by an order of court." Judge Graves, at January Term, 1889, ordered a certain fund to be turned over to C. D. Upchurch, as clerk, whereupon the law and the express terms of the bond placed that fund upon precisely the same footing as any other money entrusted to him under color of his office. We cannot concede that the clerk discharges this trust as the creature of the court, and under the rules applicable to ordinary receivers; but we think he holds the money *virtute officii* as clerk, and that a ward may proceed, on reaching maturity, as summarily as may any other person who is secured in the same way, against his sureties as well as himself. (66) *Board of Education v. Bateman, supra.*

It is not contended that this restriction operates upon any other class of persons who may have lost by the misappropriation of fiduciary funds by the clerk. The statute (The Code, sec. 1883) provides that every person injured by the neglect, misconduct, and misbehavior of any clerk of the Superior Court, etc., may institute a suit or suits against the officer and the sureties upon his "bonds for the due performance of his duties." The law gives in express terms the right to bring one or more suits upon one or more of the bonds to "every injured person," not on leave from the court, but absolutely and unconditionally so soon as the breach occurs, except that it is to be instituted in the name of the State. Conceding, therefore, that it may have been necessary to ask the leave of the court before commencing a suit to subject the bond of "another discreet person" who had been appointed at the instance of the solicitor, and had filed his bond as receiver in the court subject to the approval of the judge, it is manifest that the Legislature did not intend to place the clerk under the special protection of the court, where he misappropriats the funds of infants, and thus tie the hands of a class of persons upon whom the law looks with peculiar favor, while all other injured persons may reap the reward of their diligence and promptness in proceeding against him.

If the law would, under any circumstances, impose the duty of giving preliminary notice of the purpose to institute an action of this kind, to the clerk, other than that implied in the demand for settlement, it would seem that the answer to the relator's second demand, that he had used the money, would dispense with the necessity for it in this case.

A trustee who has misappropriated a fund can claim no indulgence

on the ground that he needs time to prepare for a settlement, when he admits the breach of the bond; nor can his sureties in such
(67) a case insist that needless cost has been incurred by bringing a suit without notice.

We think that in intimating that the action had been prematurely brought there was

Error.

Cited: Black v. Gentry, 119 N. C., 504; *Hannah v. Hyatt,* 170 N. C., 638.

WILLIAM ROBERTS v. Z. DICKEY

Costs—Processioning.

1. The report of processioners should specify with reasonable precision the contentions of the parties, so that the matter in dispute and the conclusion arrived at may be made clear.

2. Upon setting aside the report of processioners, it is error to render judgment for costs; that can only be done upon the final determination of the matter.

PROCESSIONING PROCEEDING, heard upon exceptions to report, at January Term, 1891, of DURHAM, *Boykin, J.*

This is a processioning proceeding begun by the plaintiff. A jury of freeholders was appointed as allowed by the statute (The Code, sec. 1928), and they took action and made report, whereof the following is the substance:

"It was demanded by the processioner of the plaintiff to say where he claimed the dividing line between him and defendant to be located, to which he responded, on the north side of a wagon road leading west from said Mountain Creek, from a sweet-gum on the east bank of the creek running west to a double white-oak, claimed as Moore's corner. And a like demand being made on defendant, he responded, on the south side of said road.

"After examining the deeds of plaintiff and defendant and a
(68) plat of the land of the late W. P. Mangum, examining the premises, and having various surveys made, we were unable to come to any conclusion, and reassembled on the next day on the premises and heard further testimony, and made further examinations, and had other lines surveyed, but came to no conclusion, and adjourned without fixing another day. We were notified by the special processioner to meet again on 22 May, 1890, on the premises, and accord-

ingly met, and, hearing further testimony, proceeded to establish the dividing line between the parties as follows: Beginning at fast rock and pointers 32 links south of the double white-oak claimed as Moore's corner by the plaintiff; thence along a chopped line south 89¼ degrees east to the middle of said creek to a point a little north of the ford of the creek, indicated by pointers, ash, maple and black-gum. Thereupon, the jury find that the plaintiff failed to establish a line as claimed by him," etc.

The plaintiff filed exceptions to this report, as follows:

1. That the jury failed to specifically set out the contentions of the defendant so as to show what land, if any, was recovered by the plaintiff, and the material facts in reference to the dispute, and the ground of their own conclusions.

2. That the jury ignored all the evidence in the cause, and arbitrarily made a line in a place where no line had ever been before, and not according to the contentions of either party, and in a place where it is admitted that there was no line.

The court sustained the exceptions and directed the clerk to proceed according to law, giving judgment against the defendant for the costs of the report. The defendant excepted and appealed.

J. Parker for plaintiff.

J. W. Graham and W. W. Fuller for defendant.

MERRIMON, C. J., after stating the case: The report is very indefinite and unsatisfactory. It fails to specify, with reasonable precision, what lines the parties respectively claimed and where they were. What the matter in dispute was cannot be seen from it. The (69) contentions of the parties should appear so that what the jury determined can be seen and understood, and, as well, so that the parties may readily present their objections to the action of the jury and that of the processioner. The report goes little beyond designating a line. *Porter v. Durham,* 90 N. C., 55; *Forney v. Williamson,* 98 N. C., 329; *Euliss v. McAdams,* 101 N. C., 391. The court properly sustained the exceptions and set aside the report, and directed further action. This much of the judgment must be affirmed.

We are of opinion, however, that the court ought not to have given judgment against the defendant for the costs of the report. The costs in processioning proceedings are regulated specially by the statute (The Code, secs. 1927, 1928). When the land is processioned without controversy, the "fees of the processioner and clerk shall be paid by the proprietor of the land" processioned. But in case of controversy, as in this case, and as contemplated by section 1928, cited above, "the

party against whom the decision is made shall pay all costs." The statute so expressly provides, and the general statutory regulations in respect to costs do not apply.

The controversy is not yet ended, and the court cannot see who is liable for the costs.

The judgment in respect to costs must be reversed, and the case disposed of according to law.

AFFIRMED as to setting aside report. REVERSED as to costs.

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(70)

B. E. THOMPSON v. THOMAS W. TAYLOR ET AL.

Lien—Contract—Married Woman—Evidence.

1. The separate estate of a married woman cannot be subjected to the satisfaction of a lien for improvements thereon, although the improvements were made with her knowledge, unless the contract upon which the lien is based was executed by her in the manner prescribed by law.

2. In an action to enforce such lien it was not error to exclude evidence that the improvements were made with the knowledge of the married woman and that she subsequently used them, there being no allegation of fraud or other evidence of a valid contract with her.

APPEAL from a justice of the peace, tried before *Whitaker, J.*, at Spring Term, 1891, of NASH.

The plaintiff claims pay for a balance due on an account against the husband defendant for work and labor and material furnished to build a house on the land of the *feme* defendant, and he seeks to enforce his lien upon the land of the *feme* defendant, filed in the office of the Superior Court clerk of Nash County.

The *feme* defendant denies that she made any contract with the plaintiff. She says that Thomas Taylor had a house built on her land, but he did not contract in her name for the building of the same, nor had he any authority to do so, and whatever is due to the plaintiff is due from the defendant Thomas Taylor, and he and his creditors have her permission to remove the house from her land; but she denies that she or her land is in any way liable for the plaintiff's claim.

The issues submitted, by consent, to the jury were:

1. Is *feme* defendant liable for the account claimed by plaintiffs?

2. Is her land, or any part thereof, subject to lien for the (71) payment of said account?

The following evidence was offered by plaintiff:

"The plaintiff testified that he furnished the lumber to build the house on the land of *feme* defendant and also worked on the house, and that there is due for the same the sum of $98.54."

The following questions were submitted to the witness, objected to by *feme* defendant; objection sustained by the court, to which plaintiff excepted, to wit:

1. Did *feme* defendant know that you were furnishing the lumber and labor for the building of this house?

2. Did you have any conversation with *feme* defendant while you were delivering the lumber and working on the house?

3. Was she present when the lumber was being delivered?

4. Did she live in the house after it was finished?

Thomas W. Taylor testified that he is the husband of *feme* defendant, and that the house was built upon her land, and that plaintiff's account is correct, and the amount claimed by him is due.

The following questions were propounded to this witness, to which the *feme* defendant objected; objections were sustained by the court, and the plaintiff excepted, to wit:

1. Did you and your wife live in the house after it was finished?

2. Was this house built at the request of your wife?

3. Did your wife know that the plaintiff was furnishing lumber to build the house?

The court then announced that it would hold that no lien could be created upon the separate real estate of *feme* defendant, except by an instrument executed according to the statute, and that mere silence would not estop her.

The plaintiff admitted that no such instrument had been executed, whereupon the court directed the jury to answer "No" (72) to each of the issues, to which the plaintiff excepted.

The plaintiff excepted to the judgment, upon the ground of error in his Honor's exclusion of the testimony offered, and in directing the jury to respond "No" to the issues as above indicated, and appealed from the judgment rendered.

G. W. Blount and F. A. Woodard (by brief) for plaintiff.
John Devereaux, Jr., for defendant.

DAVIS, J. No fraud is alleged or suggested, and it is too well settled to need discussion that no contract can bind a married woman, not a free trader, unless executed in the manner prescribed by law. *Farthing v. Shields,* 106 N. C., 289; *Weir v. Page,* 109 N. C., 220.

But the counsel for the plaintiff say: "We rely on *no promise* (express or *implied*) of the *feme* defendant, but upon the *law,* which

makes the contract for her, at least to the extent of having satisfaction out of her land to the extent of the value of the materials furnished and labor done in improving it."

Counsel say: "The statute on which we rely is that in The Code, sec. 1781, 'Every building built, rebuilt, repaired, together . . . with the necessary lots on which said building may be situated . . . shall be subject to a lien for work done on the same or material furnished.' Does coverture constitute an exception which will relieve the *feme* defendant's land from liability?"

The argument is an ingenious one, but counsel fail to note the words of the statute which subject the property only to "a lien for the payment of all debts contracted for work done on the same," etc. Evidently the contract must be made, not by the law, but by some one capable of contracting. The statute did not intend to give a lien to
(73) a person who officiously, and without contract or authority, builds a house upon the land of another.

The plaintiff, without the authority of the *feme* defendant, built the house upon her land, and he cannot hold her or her land responsible for his work and labor or material furnished.

No error.

Cited: Nicholson v. Nichols, 115 N. C., 202; *Weathers v. Borders,* 121 N. C., 388; *Ball v. Paquin,* 140 N. C., 94, 95; *Kearney v. Vann,* 154 N. C., 316; *Stephens v. Hicks,* 156 N. C., 244.

NOTE.—This has been changed by Laws 1901, ch. 617, now C. S. 2434; *Finger v. Hunter,* 130 N. C., 529.

GEORGE B. ELAM v. CALVIN BARNES.

Pleading—Demurrer—Motion to Dismiss—Cause of Action.

1. A motion to dismiss an action because the complaint does not state facts sufficient to constitute a cause of action is a demurrer, and should be disregarded unless it specify the particulars of the alleged defect. The objection may be taken *ore tenus* for the first time in the Supreme Court, or the Court may, *ex mero motu,* dismiss the cause; but if a motion is made by a party to dismiss, he will be required to specify the ground.

2. A complaint alleged that plaintiff had purchased a lot of tobacco from defendant, but the latter refusing to deliver, the former had it seized under a requisition in claim and delivery; that pending these proceedings a proposition was made by defendant and accepted for a settlement of all matters in controversy between them; that the terms of the settlement were complied with, and claimed damages for injuries to the

tobacco while defendant was resisting plaintiff's claim to possession: *Held*, not a good cause of action.

APPEAL at February Term, 1891, of VANCE, from *Whitaker, J.*

The facts necessary to an understanding of the questions decided are stated in the opinion.

T. T. Hicks and A. J. Harris (by brief) for plaintiff.
No counsel contra.

CLARK, J. The defendant, after answer filed, moved to dismiss the action on the ground that "the complaint did not state facts sufficient to constitute a cause of action." This is a demurrer, which can be taken at any stage of the proceedings, and the objection may (74) even be made for the first time in this Court. None the less, it is a demurrer, and should be disregarded unless it specify the particulars wherein the complaint fails to state a cause of action. This is required by The Code, sec. 240, which expressly provides that a general demurrer should not be considered. *Love v. Comrs.*, 64 N. C., 706; *George v. High*, 85 N. C., 99; *Bank v. Bogle*, 85 N. C., 203; *Jones v. Comrs.*, 85 N. C., 278. "The court below should have required the defendant to point out by his motion wherein the complaint failed to state a cause of action, and if he failed to do so, should have disregarded it." *Pearson, C. J.*, in *Love v. Comrs., supra.* It is true, notwithstanding such demurrer was erroneously allowed or disallowed below, it is still open to the defendant to renew it *ore tenus* here. *Hunter v. Yarborough*, 92 N. C., 68. If renewed here, and in the same defective form, this Court will require the demurrer to comply with the statute; but in fact it was not renewed here. There is, strictly speaking, only before us for review the action of the court below in erroneously sustaining a general demurrer.

It is true, the Court here will look into the record, and if there is a want of jurisdiction or a failure to state a cause of action, it will, *ex mero motu*, dismiss the action, for such defect cannot be waived. It is but fair, however, to the opposite side that the court below should require, as the statute demands, that the demurrer, even when made *ore tenus*, should point out the alleged defect, since it gives opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. This would seem to be the reason of the statute; at any rate, its provisions are (75) clear and should be observed.

Upon looking into the pleadings, we find that the complaint alleged the purchase of certain tobacco by the plaintiff of the defendant, which

the latter afterwards refused to deliver; whereupon the plaintiff took out claim and delivery proceedings, and while under such proceedings the tobacco was in the sheriff's hands, the complaint alleges that the defendant made an offer to the plaintiff to settle the matter on a specific basis, "and that all matters in controversy between them should be thereby settled." It is further alleged that the plaintiff accepted the offer, and that the terms thereof were fully complied with. Notwithstanding all which, the plaintiff still brings this action for alleged damage to the tobacco by its being hauled and rehauled, and loaded and unloaded when defendant was resisting the plaintiff's claim to possession of the tobacco, all of which was prior to the compromise and settlement by which it is alleged in the complaint that it was agreed "that all matters in controversy between them should be thereby settled."

Compliance with such settlement is averred, and no cause of action is set out which arose subsequent thereto. It is true that it is alleged that the defendant has brought suit against one George B. Harris, who was surety to the plaintiff for the payment of the purchase money of the tobacco, for an alleged deficiency in the amount by the original contract agreed to be paid. If so, the above alleged agreement of compromise and full settlement between the plaintiff and the defendant can be pleaded in bar to such action. The fact that the defendant has brought such action does not invalidate and set aside the compromise and settlement so as to entitle the plaintiff to maintain an action which upon his own averments is barred by the compromise and settlement. Let it be entered that the action is

Dismissed.

Cited: Ball v. Paquin, 140 N. C., 85; *Blackmore v. Winders,* 144 N. C., 219; *Garrison v. Williams,* 150 N. C., 677.

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*W. G. MAXWELL ET AL. V. R. BARRINGER.

Trust and Trustee—Statute of Limitations—Powers—Parties—Tenants in Common.

In 1870 defendant purchased land at sale under execution and took the sheriff's deed therefor, upon which he endorsed, under seal, an agreement that he held the land for the joint benefit of one M. and himself, subject to the condition that the lands were to stand as security for

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

a debt *due* himself and then a debt to one W., and after payments of purchase money any profits realized before all the lands were sold, when defendant sold as trustee at public sale for a fair price, and the purchaser failing to take payment, reconveyed to defendant, who settled with M.'s administrator, accounting with him for the share to which M. would have been entitled. In an action by M.'s heirs at law for an account and sale and partition: *Held*—

1. That defendant and M., by virtue of the agreement endorsed on sheriff's deed, became equitable tenants in common of the lands, and upon M.'s death his estate descended to his heirs at law.
2. That the defendant had no power to make the sale of lands after M.'s death, and his attempted sale was void, and the settlement with and payment to the administrator were not binding on the heirs of M.
3. That the defendant was the trustee of an express trust, and the statute of limitations did not bar plaintiffs' cause of action.
4. That M.'s administrator was not a necessary party to the action, though defendant was entitled to have him brought in if he so desired.

APPEAL at August Term, 1891, of MECKLENBURG, from *Hoke, J.*

On 2 July, 1870, certain lands belonging to J. J. Maxwell were sold by the sheriff of Mecklenburg under execution, when the defendant was the last and highest bidder, at the sum of $2,775, to whom the sheriff made deed, upon which the defendant made the follow- (77) ing endorsement:

"I, Rufus Barringer, hereby agree with F. H. Maxwell that I hold the lands herein described for the joint benefit of myself and said F. H. Maxwell, subject to the following terms and conditions, to wit: First, said lands are to stand security for a note of $1,486.69 of this date, given by Maxwell to myself, with 18 per cent interest until paid, and to secure a note of $300 to J. H. Wilson of this date, and then the said lands to stand for the balance of the purchase money so paid and receipted for by said Maxwell; and if any profits are realized over and above these sums, the same are to be equally divided between myself and the said F. H. Maxwell."

RUFUS BARRINGER. [SEAL]

Some time thereafter the defendant and F. H. Maxwell sold and conveyed a portion of the land to one Selby.

F. H. Maxwell died intestate in 1874, leaving plaintiffs his heirs at law, and John A. Young was appointed his administrator.

In the autumn of the last named year the defendant, in pursuance of an understanding with the heirs at law, or the greater number of them, with the administrator, advertised the unsold portion of the land for public sale; the sale was made and the land bought by one

Jarvis Maxwell, the agent of the parties in interest, under an agreement that he was to run up the bidding to a price which was thought to be a fair price, and if it was knocked down to him, he was to take it, pay the purchase money, and make what he could out of it, or, if he preferred, defendant was to take it off his hands at his bid. He took a deed from defendant, as trustee, and, after trying to resell,
(78) reconveyed to defendant, who charged himself with the purchase money, and subsequently settled with the administrator of F. H. Maxwell for the amount supposed to be due his intestate. The defendant was in possession from the time of his original purchase up to the beginning of this action. Jarvis Maxwell's deed to defendant was made 19 November, 1874.

The plaintiffs, in October, 1889, made demand upon defendant for a settlement of the trust, but defendant, alleging that the settlement had been made with the administrator, as hereinbefore stated, declined to recognize their demand, and this action was instituted to compel a settlement and a sale of the land and partition of the proceeds.

The following issues were submitted to the jury:

1. Was there a sale of the land by the defendant R. Barringer, in November, 1874, and a conveyance of the property to Jarvis Maxwell?

2. Was there a settlement between R. Barringer and the administrator of F. H. Maxwell in which defendant accounted for the value of Maxwell's interest in the property?

3. Was the price for which the land was sold, and for which defendant accounted, a fair value for the land?

4. Is plaintiffs' claim barred by the statute of limitations?

5. In the above settlement was the purchase price of the alleged sale accounted for by defendant?

The defendant moved to dismiss the action upon the grounds that the plaintiffs, suing as heirs of F. H. Maxwell, had no right to maintain the action, the administrator of F. H. Maxwell being the only person who had a right to call defendant to account for his interest in the matter in controversy, and that, at any rate, the administrator of F. H. Maxwell was a necessary party, and that it was not proper to submit any issues to the jury until the administrator was in court. His Honor overruled this motion. Defendant excepted.

His Honor instructed the jury to answer "No" to the first and fourth issues, and to answer the other issues "Yes." His Honor charged that the statute of limitations did not apply, as it was
(79) an open and express trust. Defendant excepted to the instructions as to first and fourth issues.

The defendant moved for judgment upon the issues so found under the instruction of his Honor, that the plaintiffs recover nothing by

this action, and for costs. This motion his Honor refused, and defendant excepted.

The defendant then moved for a new trial, for the reason that his Honor had erred in directing the jury to answer "No" to the first and fourth issues.

His Honor having refused the motion submitted for a new trial upon the first and fourth issues, the defendant moved for a new trial upon all the issues, because of error in the instruction given upon the first issue and upon the fourth issue.

This motion was also refused, and the defendant excepted. There was judgment for plaintiffs. To this judgment defendant excepted and appealed.

C. W. Tillett for plaintiffs.
P. D. Walker for defendants.

SHEPHERD, J. The plaintiffs are suing as the heirs at law of F. H. Maxwell, and they pray that an account be stated, that certain land be sold, and that the proceeds be divided between them and the defendant according to their respective interests.

It is insisted by the defendant that the said F. H. Maxwell had no interest in the land that was descendible to the plaintiffs as his heirs at law, and that if he had such an interest it was converted into personalty by virtue of an alleged sale made by the defendant, and that he has fully accounted and settled with the administrator (80) of said Maxwell for the proceeds of the same.

(1) We will first consider the nature of the interest which F. H. Maxwell acquired by virtue of the writing endorsed under the hand and seal of the defendant on the back of the sheriff's deed. It is there expressly declared that the defendant holds the land for the joint benefit of himself and Maxwell, but it is "to stand as a security" for a note of $1,486.69 and interest, given by Maxwell to the defendant, and also "to secure a note of $300 to J. H. Wilson of this date, and then the land to stand for the balance of the purchase money so paid and receipted for by said Maxwell."

We are very decidedly of the opinion that this vested an equitable estate in common in Maxwell, the land being charged with the payment of the indebtedness mentioned. It is true that it is provided that "If any profits are realized over and above these sums, the same are to be equally divided between (the defendant) and F. H. Maxwell," but we are unable to perceive how the addition of these words can have the effect of changing the character of such equitable estate. In view of the context, the word "profits" may well be construed to mean such sur-

plus as may remain should it be necessary to make a sale to satisfy the said indebtedness. *Smith v. Walser,* 2 B. & C., 401, cited by counsel, is not in point. There, A, a merchant, and B, a broker, agreed that the latter should purchase goods from the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses. It was held that this did not vest in B any share in the property purchased or in the proceeds of it. *Bailey, J.,* remarked that if A had agreed that B should have "that portion of the property itself, it would no doubt have become the joint property of the two." In our case the land seems to have been purchased by the defendant
(81) Maxwell, and there is, as we have seen, a declaration of trust that the defendant is to hold the *land* for their joint benefit.

Neither does *Sprague v. Bond,* 108 N. C., 382, apply. There a grantee of an absolute deed orally agreed to sell the land and divide the profits with the grantor. The grantee sold the land, and it was held that oral testimony was admissible to prove the agreement in an action by the grantor for an account of the profits. The Court at the same time declared that such an agreement could not, under the circumstances, be enforced as a trust against the land, because it was within the statute of frauds; but the sale having been voluntarily made by the grantee, a recovery was permitted because it related to the consideration only. The argument which assimilates this case to the one before us improperly assumes that Maxwell had no enforcible trust against the land; whereas we have seen that he had an equitable estate therein.

Parties owning land in common may agree that the profits, either before or after a sale, shall be equally divided, subject to any charges that they may impose upon their respective interests; but until there has been a conversion, either equitable or legal, their interests must necessarily retain the characteristics of real property, and as such be descendible to their heirs. There is certainly nothing in the declaration of trust that amounts to an equitable conversion; for even if a power of sale had been conferred upon the defendant trustee, there is nothing in the language used which either expressly or by implication makes it his imperative duty to sell, and "the equitable *ought* must exist before there can be any room for the operation of the maxim that equity regards that as done which ought to be done." 3 Pom. Eq. Juris., 1160; *Mills v. Harris,* 104 N. C., 626.

(2) It is insisted, however, that there has been a legal conversion by reason of a sale made by the defendant. We think that his Honor was warranted in instructing the jury that there was no sale to
(82) Jarvis Maxwell. First, we are of the opinion that the agree-

ment did not vest in the defendant a power of sale. It is very evident that shortly after the transaction the parties did not themselves conceive that such a power existed, as they both joined in a deed conveying a part of the land which they had sold to one Selby. This, however, does not determine the legal question, but is only referred to as showing the natural construction that should be put upon such very general language as that from which the power is said to be implied. It is true, as stated in Perry on Trusts, 766, that no particular form of words is necessary to create a power of sale. "Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without it, will necessarily create a power of sale in the trustee." We find no words here which show such an intention or impose such a duty. All that is said is that "If any profits are realized over and above these sums, the same are to be equally divided," etc. Nothing is said about a sale, the time when it is to be made, or the terms thereof; and if we are correct in our construction that Maxwell acquired an equitable estate, charged with certain indebtedness, it would be analogous to a mortgage or trust to pay debts which clearly, in this State, could not be foreclosed under such vague language, but would require a decree of court. *Council v. Averett,* 95 N. C., 131, and *Foster v. Craige,* 22 N. C., 209, cited by counsel, do not, in our opinion, sustain the contention of the defendant in favor of a power of sale.

Another reason in support of the ruling of the Court may be found in the fact that there was really no sale to Jarvis Maxwell, as it is plain from the testimony that he bought the land under the direction and as the agent of the defendant, and if it be conceded that there was a delivery of the deed by the defendant to the said Jarvis (which is not at all free from doubt), and if the naked legal title vested for an instant in him before he reconveyed to the defendant (83) the latter would still take the land charged with the trusts. Even if a stranger had acquired the legal title with notice, he would take it subject to the trusts; *a fortiori* would the trusts be binding on the trustees who purchased indirectly at his own sale. *Howell v. Tyler,* 91 N. C., 207; *Froneberger v. Lewis,* 79 N. C., 426; *Sumner v. Sessoms,* 94 N. C., 371; *Gibson v. Barbour,* 100 N. C., 197.

(3) It is further contended that although the defendant may have purchased at his own sale, it was only voidable, and that as the proceeds would be personalty, the administrator could ratify the sale, and that such ratification and subsequent settlement are a bar to the plaintiffs' claim. If, as we hold, an equitable estate in the land descended to the plaintiffs, it cannot be seen how the administrator was entitled to the proceeds. It is sufficient to say, however, in answer to the proposi-

tion that, there being no power to sell, the sale was void and not merely voidable, and therefore insusceptible of ratification by anyone.

(4) The defendant finally insists that the plaintiffs are barred by the statute of limitations. The defendant was the trustee of an express trust, and also an equitable tenant in common with the plaintiffs. His possession was not inconsistent with his relation to the plaintiffs, and there was no actual ouster or exclusive possession for twenty years. *Gilchrist v. Middleton,* 107 N. C., 681. Treating him either as a trustee or a tenant in common, the statute would not be put in operation until a demand and refusal, and there was none on the part of the plaintiffs or their ancestor. *Wright v. Cain,* 93 N. C., 296; *Davis v. Cotten,* 55 N. C., 430; *Huntly v. Huntly,* 30 N. C., 250; *Bruner v. Threadgill,* 88 N. C., 361.

(5) Under the view which we have taken, the presence of the administrator of F. H. Maxwell was not necessary to the determination of the issues submitted to the jury. If, however, his presence is deemed essential to a proper adjustment of the equities arising upon the
(84) accounting, he should, upon the motion of either the plaintiffs or defendant, be made a party. The Code, sec. 189.

So far as we are able to see, there appears to be no error in the directions given to the referee; but the defendant is not precluded from renewing his exceptions to these upon the coming in of the report.

Upon a consideration of all of the exceptions presented by the defendant, we are of the opinion that there is

No error.

Cited: *Hilton v. Gordon,* 177 N. C., 344.

H. E. SONDLEY v. CITY OF ASHEVILLE.

Appeal—Notice—Municipal Corporations.

1. The provision in the charter of the city of Asheville, declaring that as soon as practicable after receiving the report of a jury appointed to assess damages and benefits arising from laying out streets, the mayor shall call a meeting of the board of aldermen and submit the report to them, and if they are dissatisfied with any item thereof the city may appeal to the next term of the Superior Court, does not require that the board of aldermen shall come to a conclusion at the first meeting. The statute intends they shall have time for proper deliberation, and, therefore, where, after some consideration, the report of a jury was postponed for one week, the city did not thereby lose its right of appeal.

2. The "next term" of the court means that term which shall begin next after the expiration of the ten days allowed for service of notice of appeal.

MOTION to dismiss appeal from assessment of a jury, heard before *Merrimon, J.*, at August Term, 1891, of BUNCOMBE.

The facts are stated in the opinion.

W. W. Jones and F. A. Sondley for plaintiff. (85).
T. H. Cobb for defendant.

CLARK, J. The facts were found by the court, and upon the facts found the court dismissed the appeal. The exception to the judgment, therefore, presents for review the correctness of the order of dismissal upon such state of facts. It appears therefrom that the report of the jury to assess damages was filed on 18 February; that at the regular meeting of the board of aldermen, to whom the report was required by law to be made, held on 20 February, "the report of said jury was taken up and considered by said board," but though the plaintiff's counsel urged a decision that night, the board adjourned their final determination of the matter till the next regular meeting, which was on 27 February. At such meeting the board of aldermen approved the report, except as to the item of $2,000 assessed as damages in favor of the plaintiff, and ordered notice to issue to the plaintiff that on behalf of the city of Asheville an appeal was taken as to that item of damages. The notice was issued and served on 2 March. The next term of the Superior Court began on 9 March. The court dismissed the appeal on the ground that "no sufficient reason, indeed no reason at all, has been shown why the board adjourned the consideration of the report from 20 to 27 February, 1891. The mayor might have called a meeting of the board for a day early enough to have afforded ample time to act finally upon said report, and give ten days notice of appeal to the next term of the Superior Court as required by the city charter. Upon the foregoing facts, the court is of opinion that the city has been guilty of laches and has lost the right of appeal from the item of damages assessed in favor of the plaintiff; and it is therefore adjudged that the said appeal be dismissed; and for the reasons that have moved the court to dismiss the appeal, the application of the city, at this term, for a *recordari* in respect to said item of (86) damages, is denied."

The charter of the city provides: "As soon as practicable after receiving the report of the jury, the mayor shall call a meeting of the board of aldermen and submit the report to them, and if the aldermen shall conclude that the damages assessed by the jury are excessive,

they may decline to pay the same and discontinue the proposed improvement; . . . or if the aldermen be dissatisfied with any item in the report, then and in that case either party may appeal, on the item with which they are dissatisfied, to the next term of the Superior Court of Buncombe County, by giving the adverse party or parties ten days notice in writing."

When the report of assessment was made on 18 February, and a regular meeting was to be held on 20 February, there was nothing in the act or in the circumstances of the case or the nature of the proceedings, which required that an extraordinary meeting should be called prior to the regular meeting which was to be held on the next day but one. No reason is shown why the city should be put to the extra expense or the aldermen to the inconvenience, nor does it appear that the plaintiff suffered any damage by the extraordinary meeting not being called. At the meeting on the 20th the report was submitted to the board as required by the act. The act did not require that a decision should be reached at such first meeting. Something must be left to the intelligence, discretion, and presumed fair dealing of the board of aldermen of the city. The case states that they "considered" the report, but decided not to come to a final conclusion of the matter that night, and adjourned it for further consideration to another meeting, held a week from that date. This was no negligence, but on its face would show care and desire to arrive at a proper conclusion. It was not an unreasonable delay. There were many items in the report affecting many parties, and the case states that
(87) some of the other parties affected by the report were not present, and that the board adjourned, after a suggestion of their absence and presumably to give them an opportunity to be heard, to the next meeting, a week later, though the plaintiff's counsel, representing one of the parties affected by the report, insisted on an immediate decision. It is true, the judge finds as a fact that no good reason was shown to him for the postponement. But surely the board of aldermen, chosen by the people of a city to administer their affairs, upon the receipt of a report of this kind affecting many persons, after considering it and finding some of the parties concerned not represented, are vested with the discretionary power, for that or any other reason deemed good by them, to adjourn its consideration for a week, that they may be more fully advised. The board of aldermen were not the opposite party to the plaintiff. They were a judicial body vested with the duty of scanning the report and of saying if, in all its items and in all respects, it was fair and just to the taxpayers of the city and to the parties immediately interested in the report. Should they refuse to confirm any item of the report, the party affected or the city could

appeal. If the city appealed, the board would order notice of appeal to be given on its behalf, which was done here in due time. The duty devolved upon the board was a serious one. Had they been forced to decide hastily that night without full consideration, and had held that the $2,000 assessed in favor of the plaintiff was just and proper, the taxpayers of the city would have been saddled with the payment of that sum without any opportunity of redress, however exorbitant or unjust the amount might prove to be. While the act requires prompt consideration of such reports of assessments, there is nothing in the act nor in the authorities, nor in the reason of the thing, which debars a postponement of a final decision for so short a period for fuller consideration. We cannot see the surroundings and learn the reasons which prompted the board to take a short postponement of the matter.
We can see, however, on the record, that before the next meeting (88)
and during the week of postponement the board had secured a
deposit by parties interested, which, no matter how the action eventuates, will save the taxpayers from payment of any part of the assessment, provided the city, by taking an appeal, would give an opportunity to have the amount of the assessment reviewed by a Superior Court and before a constitutional jury. If it were law that when such reports of assessments are made (and they are necessarily frequent) the board of aldermen must at their first sitting, in hot haste and before rising, dispose of the matter, however desirous they may be of a short adjournment for further consideration, the result would be that, as a matter of safety, either the intended improvement must be abandoned or an appeal would have to be entered for the city in every case. Such was not the intent of the law, which contemplates a consideration of the report by the aldermen, who are charged with doing justice between the parties whose lands are condemned and the other taxpayers. Their decision as to any item is binding and conclusive if against the city, and it is only when they think that the amount assessed is too great that the city has opportunity to have the assessment reviewed on appeal by a court and a jury of twelve men. There is no suggestion of any detriment which the plaintiff received or could have received by the adjournment. We think, therefore, that the adjournment of the final consideration of the report from 20 February to 27 February was not unreasonable, and was within the discretion reposed by law in the board of aldermen.

But were it otherwise, it could have made no difference in this case, for the plaintiff could be in no better condition than if the decision is taken to have been made by the board at the first meeting of 20 February. The notice of appeal was served on 2 March, which was
within ten days thereafter, under the statute (The Code, secs. (89)

596 and 602), which "excludes the first day and includes the last." *Walker v. Scott,* 104 N. C., 481; *Barcroft v. Roberts,* 92 N. C., 249. Such service was made by the chief of police (who by the record is also city marshal), who by the charter of Asheville (secs. 97, 176, 201, and ordinance 759) was authorized to serve the notice as fully as the sheriff could have done. It was served on 2 March by leaving a copy with the plaintiff, as allowed by The Code, sec. 597 (2). Out of abundant caution, another notice of appeal was served the next day by reading it to the plaintiff. This was unnecessary. It is required as to the service of a summons (The Code, sec. 214), but not of a notice, The Code, sec. 597, *supra.*

The point most strenuously relied on before us was that the appeal must be "to the next term," and inasmuch as there was not ten days notice (which the appellee was entitled to have) between the time the notice of appeal was served on 2 March and the next term of the Superior Court, which began on 9 March, it is urged that therefore the city lost its appeal and all right to have the assessment reviewed. The provision for an appeal to the next term means no more than to the next term to which an appeal in orderly and regular course would go. If a case is tried before a magistrate within ten days before court, and the party appealing waits till the tenth day to serve notice of appeal, the appeal goes to the next succeeding term. The appellant is not cut out of an appeal, because The Code, secs. 565, 880, provides that the appeal must be to the next term. *Ballard v. Gay,* 108 N. C., 544; *S. v. Johnson,* 109 N. C., 852. In that case, too, the justice is allowed ten days in which to send up the papers after service of notice of appeal. The Code, sec. 878. If by reason of the ten days allowed to give notice of appeal and the ten days thereafter to send up the papers, if in fact the appeal is not docketed at the first term next immediately
(90) after the trial, the appellant would not lose his appeal. It goes up to the next term in orderly course of procedure. In like manner, an appeal to this Court stands for argument at "next term" after the trial below. *S. v. James,* 108 N. C., 792, and *Porter v. R. R.,* 106 N. C., 478. But it has been held that if the trial below was so short a time before the beginning of the next term here that by exercise of the statutory time for giving notice of appeal, serving and settling the case, the appeal is not docketed here till after the district to which it belongs is passed, the cause (except by consent under Rule 10, or an appeal in a criminal case) does not stand for argument till the next succeeding term, though it should, of course, under our rules, be docketed. *Avery v. Pritchard,* 106 N. C., 344.

In the present case, whether (as we have said) the board of aldermen had discretionary power to adjourn their decision from 20 Febru-

ary to 27 February or not, the service of notice of appeal on 2 March was in time. It was not the fault of the appellant that a term of the Superior Court began within ten days thereafter, and "the next term" must be held to be the next term beginning after the expiration of the ten days allowed to the appellee after the service of the notice of appeal.

The order of the court dismissing the appeal must be

Reversed.

Cited: *S. v. Edwards, post,* 512; *Barnes v. Saleeby,* 177 N. C., 259; *Howard v. Speight,* 180 N. C., 654.

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(91)

E. W. SMALLWOOD v. S. F. TRENWITH.

Judgment, Vacating—Fraud.

The remedy against a *final* judgment, on the ground of fraud, is by an independent action, and not by motion in the original cause.

MOTION to set aside a judgment as to the *feme* defendant, heard at Fall Term, 1891, of CRAVEN, before *Bryan, J.*

The *feme* defendant stated in her affidavit, as ground for granting the motion, in substance—

1. That she had no notice of the judgment rendered against her at May Term, 1888, till the notice was served on her, 19 June, 1891.

2. That she was not present at said May term, because of an agreement between her husband and the plaintiff under which he was to have three years longer to settle the mortgage.

3. That she did not consent to the rendition of the judgment against her, and if she was represented by attorney, he acted without authority.

4. That she had an interest in the land in her own right, separate and distinct from that of her husband, and that she did not set it up because of the representation of her husband as to the agreement with the plaintiff, and that it would be a fraud upon her rights to subject her property to pay her husband's debts.

5. That she was advised she had a good cause of defense, and (92) that the attorney who assumed to represent her was insolvent, said attorney being admitted to be insolvent.

The defendants had set up the alleged agreement for indulgence for three years in affidavits filed before the clerk, in answer to plaintiff's

affidavit and motion for leave to issue execution. From the clerk's order allowing execution to issue, the defendants appealed.

W. D. Clark for plaintiff.
W. D. McIver for defendants.

AVERY, J., after stating the case: The *feme* defendant seeks to set aside the judgment on the ground that she was fraudulently misled by her husband. Final judgment had been rendered in May, 1888, and that decree could not, at that late day, be attacked for fraud in the original, but only by instituting an independent action. *Carter v. Rountree,* 109 N. C., 29; *Smith v. Fort,* 105 N. C., 446.

The judge below found the facts material to a determination of her appeal from his refusal to set aside the judgment. It appeared from his findings that the judgment was final, and it followed as a conclusion of law that it could not be vacated on motion in the original cause. Conceding the truth of all that was alleged in her affidavit, she must still seek her remedy, if she has suffered any wrong, in a new action. *England v. Garner,* 84 N. C., 212; *ibid.,* 90 N. C., 197.

Affirmed.

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(93)

H. J. LOVICK v. THE PROVIDENCE LIFE ASSOCIATION.

Contract—Insurance—Forfeiture—Reinstatement—Damages.

1. In the absence of specific regulations in respect to the time within which an application for reinstatement of a policyholder, whose policy has been forfeited for nonpayment of dues, should be made, the policyholder has a reasonable time to do so, but he must be diligent.
2. There is a difference between a *reinstatement* and a *reinsurance*—the first being the revival of the original, while the latter is a new contract.
3. Although the person upon whose life the policy issued is at the time of the application for reinstatement beyond insurable age, he is, nevertheless, entitled to be reinstated upon paying past dues.
4. In an action for damages for breach of the contract for refusing to reinstate, plaintiff is entitled to recover the amount of the premiums and assessments paid by him.

APPEAL at February Term, 1891, of CRAVEN, from *Connor, J.*

The defendant corporation executed to the plaintiff its policy of insurance, whereby it insured the life of the plaintiff's father for the sum of $1,000, in consideration of certain premiums specified to be paid semiannually by the plaintiff, and also certain assessments when

made from time to time. This policy contained, among others, these provisions: "The contract between the parties hereto is completely set forth in this policy, the application therefor, and the by-laws of the association, taken together. . . . It is further declared and agreed that in case this obligation of the association under this contract be defeated by failure of any of the considerations, or by the violation of any of the covenants or considerations, of this contract, all payments which shall have been made to the association on account of this contract shall be deemed forfeited to the *association.*"

In the by-laws of the defendant it is provided, among other (94) things, as follows: "Only as many members as shall pay their mortality assessments within thirty days after date of notice shall be counted in determining the assessment basis of a death claim. Others shall be deemed forfeited in like manner as those who fail to pay annual dues, with opportunity for reinstatement on *similar conditions.*" It is further provided that "any member failing to pay his semiannual premium and *pro rata* assessment at the death of a member or members, within thirty days after date of notice or according to the terms stated in the notice, shall forfeit his or her membership and all moneys previously paid into the treasury of the association."

The plaintiff failed, as the court below held, to pay the premium due upon said policy on 15 June, 1889, whereupon the defendant declared that the plaintiff, on account of such failure, had forfeited and lost all right and claim under the policy, and had likewise forfeited to it all the premiums and assessments he had theretofore paid in pursuance of the stipulations therein contained. It appeared that the failure to pay this premium was occasioned by the inadvertent sending of a check to pay the same in a letter addressed to a former agent of the defendant. The plaintiff intended to pay it, and sent a check for the purpose within time for the defendant to get it, if the letter enclosing it had been properly addressed.

The plaintiff thereupon, on 8 July, 1889, applied to the defendant for "reinstatement" of his policy of insurance, the plaintiff having sent check on 28 June, 1889, to pay the unpaid premium. The defendant returned this check, saying: "I herewith return the check, as it cannot be accepted on account of the payment being overdue and the policy forfeited." In his application for "reinstatement" of his policy, the plaintiff said to the defendant, "The policy I hold is on the life of my father, and he is in perfect health and will get certificate (95) from any physician in this city as to my statement. Will also refer you to anybody in this place as to my standing. I merely make this statement to show you that I am not a speculator in the insurance business. Please try to get me right this time, and I will try to keep

right in the future." The defendant refused to grant this application, saying: "You were fully aware that Mr. Nicholson (to whom the letter was inadvertently addressed) was not collecting for the association and had no connection with it, and that you had for years past been paying direct to the office at Baltimore, under specific directions to do so. The fault is, therefore, clearly your own. I regret to say that it will be impossible for you to insure your father in the Provident (the defendant), on account of the fact that he is beyond the age at which we write insurance. Enclosed please find your checks." Nevertheless, the plaintiff received notice on 18 June, 1891, of quarterly dues of $1, and continued to receive notice of assessments for the months of July, September, and October of 1889, and sent checks for amounts. These checks, however, were all returned, the defendant saying in its letter of 17 July, 1889, "The policy has been forfeited and cannot be reinstated." The defendant said in its mortuary notices to plaintiff: "No payment will be received, reinstatement made after the last day of payment except upon the condition that the insured is alive and *in good* health."

Upon the foregoing material facts the court below held "that the plaintiff applied within a reasonable time, to wit, 8 July, 1889, to have his policy reinstated in defendant association, and offered to show that his father, Henry J. Lovick, the person upon whose life the policy was written, was alive and in good health; that said application was refused; that said refusal was wrongful, and that by reason thereof a cause of action accrued to the plaintiff, and that said policy has no surrender or other equitable value, nor does it contain any terms
(96) by means whereof its present value may be ascertained. The defendant having violated the terms of its contract by wrongfully refusing to reinstate the plaintiff, put an end thereto, and that plaintiff is entitled to recover the amount paid thereon, it not appearing what, if any, benefit the plaintiff enjoyed during the continuance of said policy." The court gave judgment in favor of the plaintiff for the aggregate of the premiums paid, with interest after 18 July, 1889, and for costs. The defendant excepted and appealed.

O. H. Guion for plaintiff.
G. H. Snow for defendant.

MERRIMON, C. J., after stating the case: When on the trial the plaintiff closed his introduction of evidence, the defendant demurred *ore tenus* thereto, and insisted that accepting and treating it as a true embodiment of the material facts of the case, the plaintiff could not recover, because he failed to pay a premium as required by the terms

of the policy of insurance in question, and by such failure this policy became absolutely forfeited and inoperative; and likewise all premiums and assessments paid by the plaintiff on account of the policy were forfeited to the defendant, and the latter was not bound to reinstate the plaintiff, or the policy, or continue it in force for any purpose. In our judgment, this contention is not well founded.

The court below decided that the policy was forfeited by the failure of the plaintiff to pay the premium, therein required to be paid, at the time it came due. No question in that respect arises here, as the plaintiff failed to prosecute his appeal taken. Then, was the plaintiff entitled under the contract of insurance to be reinstated as a policy-holder and have his policy continued in force upon the payment of the premium due and unpaid? We concur with the court below in holding that he was. The contract of insurance was not (97) wholly embraced by the policy. The latter expressly declares and provides that "The contract between the parties hereto is completely set forth in this policy, the application therefor, and the by-laws of the association, taken together." So that the by-laws of the defendant, in so far as they are pertinent, constitute part of the contract as much as if the same were set forth in the policy as part of it. The by-laws (Art. 11, sec. 2) provides that "others shall be declared forfeited in like manner as those who fail to pay annual dues, with opportunity for reinstatement on similar conditions." This provision is not very clear in its terms. It seems to be awkwardly and not of itself fully expressed. But taking it in connection with the immediately preceding clause, the policy and other provisions in respect to forfeitures provided, it must mean that in case of forfeiture of the policy the insured shall have "opportunity" to be reinstated as one of the insured and a member of the company, and have his policy continued in force upon the payment of all premiums, assessments, and any other dues unpaid. We cannot see any other intelligible meaning that may be attributed to it. The defendant's officers seem to give it this interpretation, except that they insist that it has the right to determine when the insured may have the benefit of "reinstatement" and when he shall not.

"Reinstatement" does not imply reinsurance, the granting or making of a new policy, a new contract of insurance; it fairly implies placing the insured, in respect and relation to the company, the policy, the whole contract of insurance, in the same condition that he occupied and sustained towards them next before the forfeiture was incurred. The provision is not that the insured may reinsure; he might do this without such provision. The purpose was to give him a valuable benefit, the benefit of such reinstatement, and secure it to him and as

part of the contract of insurance. The purpose was to save him from loss as to premiums and assessments paid, and from any dis-
(98) advantages he might be at in seeking reinsurance or other insurance in some other company. Otherwise, why so provide for such reinstatement? What advantage could arise from it? And why put such a provision in the contract if the defendant might, at its will and pleasure, refuse to allow such reinstatement? This provision is a substantial, a valuable part of the contract, that the insured has the right to avail himself of, and the defendant has no right to deprive him of it, any more than to deprive him of the insurance if no forfeiture had been incurred.

The terms and conditions of such reinstatement are not expressly specified, but the reasonable and just implication is, in the absence of expressed stipulations, that the insured shall be entitled to have the benefit of it upon the payment of all premiums, assessments, and other dues and costs made or tendered within a reasonable time next after the forfeiture. He must, however, be diligent, active, and vigilant under the circumstances in availing himself of it. Otherwise, he will be deemed to have been negligent and to have abandoned his right. Such provision does not imply that he may delay and insist upon such right at his convenience, will, and pleasure.

It was insisted on the argument for the defendant that the person whose life was insured by the policy was at the time of the forfeiture not within, but above, the insurable age, and therefore the plaintiff was not entitled to have such reinstatement. This contention grows out of the misapprehension of the nature and purpose of such reinstatement. As we have already said, it does not imply reinsurance or new insurance; it implies a revival and continuance of the contract of insurance forfeited, just as if there had been no such forfeiture. This is the very purpose contemplated and intended by the contract; other-
wise it means, and is worth, nothing practically. It is said in
(99) argument, Why would the defendant make such contract, and what is the contract as to the forfeitures worth to it? The answer is obvious: it encourages persons to take insurance in the defendant company, while it loses nothing, and only continues to insure the life it contracted and intended to insure. The forfeiture is important as a spur to the insured to be vigilant and prompt, and valuable to the company when the insured cannot or will not avail himself of the advantage of such reinstatement.

The plaintiff applied promptly for reinstatement, and the defendant wrongfully refused to reinstate him, and is chargeable with a breach of its contract with him. By such breach he is endamaged, at least, to the extent of the premiums and assessments he paid the defendant,

and which it seeks to deprive him of by putting an end to the contract. It cannot complain at the measure of damage allowed, and the plaintiff does not. *Braswell v. Ins. Co.*, 75 N. C., 8; *McCall v. Ins. Co.*, 27 Am. Rep., 558.

Affirmed.

Cited: *Burrus v. Ins. Co.*, 124 N. C., 13; *Hollowell v. Ins. Co.*, 126 N. C., 404; *Strauss v. Life Assn., ib.*, 976; *Gwaltney v. Assurance Soc.*, 132 N. C., 930; *Scott v. Life Assn.*, 137 N. C., 521, 527; *Green v. Ins. Co.*, 139 N. C., 313; *Caldwell v. Ins. Co.*, 140 N. C., 105; *Lane v. Ins. Co.*, 142 N. C., 60; *Hay v. Association*, 143 N. C., 258; *Brockenbrough v. Ins. Co.*, 145 N. C., 355; *Garland v. Ins. Co.*, 179 N. C., 72.

R. A. BLALOCK v. KERNERSVILLE MANUFACTURING CO.

Corporations—Stockholders—Assignment—Fraud—Evidence—Preference—Creditors—Reference.

1. A deed by a corporation formed under the general corporation laws of this State, conveying its property to a trustee for the benefit of its creditors, is not fraudulent *per se* because it contains a provision that the trustee may sell at private sale any of the property conveyed, at such prices as may be approved by the president and a majority of the board of directors, or because the president of the company is a preferred creditor; and while these facts are calculated to arouse suspicion and are evidence of fraudulent intent, they do not raise such a presumption of fraud as will impose upon the maker of those claiming under the deed the burden of rebuttal.

2. A corporation, unless restrained by some provision of its organic law, may purchase its own stock from holders thereof, and the latter are entitled to all the rights of other creditors of the corporation for the protection and enforcement of their demand for payment.

3. A conveyance by a corporation of its property in trust for creditors is not now void as to preexisting creditors, unless the latter shall bring suit to enforce their claims within sixty days after the registration of such conveyance, Bat. Rev., ch. 26, sec. 48, having been repealed by section 685 of The Code.

4. A corporation has the right to prefer a just debt due to one of its officers to those of other creditors.

5. In a reference involving the validity of a deed, the referee should find the facts one way or the other in respect to the *bona fides* of the conveyance, and that finding should either be reviewed by the trial court or submitted to a jury under a proper issue; and where the referee has failed to pass on this question, the proper practice is to move to recommit, with instructions to find the fact.

EXCEPTIONS to referee's report, heard at February Term, 1891, of FORSYTH, by *Bynum, J.*

This is a creditor's action brought against the defendant corporation, which was organized under and in pursuance of the statute (The Code, sec. 677). This corporation is indebted to divers creditors for considerable sums of money, and is insolvent. While it was so indebted, on 11 June, 1886, it executed a deed of trust to C. W. Hunt, which was duly registered, whereby it conveyed to him all its property of every kind whatsoever to secure a debt due to the Wachovia National Bank of Winston, and also a debt due to its president, T. C. Starbuck. This deed contains the following provision, declaring its purpose: "To have and to hold unto him, the said C. W. Hunt, as trustee aforesaid, in trust, nevertheless, that he shall use all due diligence in collecting all the aforesaid debts due the aforesaid company, and with full authority vested in him to sell any and all of said property of the Kernersville Tobacco Manufacturing Company at such prices at private sale as may be approved of by the president of said company
(101) and a majority of the directors; and the money arising from such sales and collections aforesaid the said trustees shall apply, first, to the payment of a debt due to the Wachovia National Bank of Winston, and after that is satisfied, then to the payment of said T. C. Starbuck for the amount of money paid by him as endorser aforesaid to said bank, with all the interest due him thereon, and to said Starbuck such money as he may pay to relieve the property from any prior legal lien; and any balance of money remaining in his hands, after making said payments, the said trustee shall apply in the payment of other debts of said company under the direction of the president and a majority of the directors, and such compensation to himself for his services as may be agreed on with said president and directors."

It is alleged and insisted that this deed of trust is void "as to the creditors of said corporation existing prior to or at the time of the execution of said deed." It is also alleged that it is upon its face fraudulent and void, because "it in reality confers upon the directors of the company the right to force a compromise or to withhold a settlement." All the debts embraced by the action existed prior to the execution of this deed. It is also alleged that it was executed with intent to defraud the plaintiff, etc.

In the course of the action, it appearing "that the controversy involved the examination of complicated accounts, it was ordered, without objection, that a referee hear evidence and to report his findings upon both law and fact." The referee took evidence, found the facts and the law, took and stated an account, and made report thereof. The appellant filed exceptions upon the ground that the referee failed to

find certain facts specified therein. He further filed the following exceptions:

"1. The defendants except to the conclusions of law of the referee, that the deed in trust executed by the company to C. W. Hunt, trustee, is void and inoperative.

"2. That the Kernersville Manufacturing Company and its stockholders are bound by the contract to purchase stock from (102) shareholders.

"3. That after payment of debts, the said stockholders who sold their stock are to be paid the purchase price thereof out of the assets of the company.

"4. That the referee held that the payment of the debt paid for the company by T. C. Starbuck as surety, as evidenced by the company's note and explained in the testimony, is postponed until all the stockholders who attempted to sell their stock and those who withdrew their money are paid in full, when he should have found that upon the payment by Starbuck of the bank debt he was subrogated to the rights of the bank, and should be paid in the same class with H. L. Shields and D. W. Harmon.

"5. That the referee did not find as a conclusion of law that the mortgage or deed in trust executed by the company is a valid and subsisting lien upon the property and effects of the company for the payment of the T. C. Starbuck debt."

The court overruled all the exceptions, confirmed the report, and gave judgment thereon, and T. C. Starbuck appealed to this Court, assigning as error that the court refused to sustain his exceptions.

C. Manly and R. B. Kerner for plaintiff.
C. B. Watson for defendant.

MERRIMON, C. J., after stating the case: The exceptions, based upon the ground that the referee failed to find certain facts which the appellant deemed important, are untenable. The objection, if well founded, was ground for a motion to recommit the report, with appropriate instructions to make inquiry and find that the facts did or did not exist. *Williams v. Whiting,* 92 N. C., 683; *Scroggs v. Stevenson,* 100 N. C., 354.

The shares of the capital stock of the defendant corporation (103) were the lawful subjects of purchase and sale, might be bought and sold in the market, and in the absence of statutory provision to the contrary, it might buy such shares for its own benefit from owners of them upon such terms as might be agreed upon, subject to the rights of its creditors in proper cases to resort to its capital stock, paid and

unpaid, as a trust fund out of which they may be entitled to have their debts paid. It is bound by its agreements with persons from whom it may purchase such shares of stock, and they may enforce the same by proper legal remedies, just as they might do in case of like agreements in respect to any other species of property. Hence, if it made its promissory note to one of its stockholders for the price or any part of it that it agreed to pay him for his shares of stock, he would have his remedy, so far as it is concerned, just as any other creditor would—certainly subject only to the possible rights of other creditors against him as a stockholder in some cases wherein he might be liable. If he were not liable to other creditors in some way as a stockholder, he would be on the same footing as such creditors. There is no just reason why he should not be. The defendant corporation is, therefore, bound to pay the stockholders respectively, whose shares of stock it bought, the several sums of money it agreed to pay for the same. So that the second and third exceptions cannot be sustained. Cook on Stock and Stockholders, secs. 311 and 312.

It appears that the appellant paid the bank mentioned, as surety for the defendant corporation, $525, and took the latter's promissory note to himself for that sum. In the judgment appealed from, the payment of this sum and interest thereon is postponed until after the payment of the sums of money adjudged to be paid to the stockholders who sold their shares of stock to the defendant corporation. In this there (104) is error. There is no reason, that we can see, why the payment of appellant's judgment should be so postponed. The debt due to him was on the same footing, as to the corporation, as were the debts due the stockholders who sold their shares of stock to it; the latter had no lien upon the corporation's assets, and we are unable to see that they have any peculiar equitable rights that entitle them to precedence in payment of the judgment in their favor. The mere fact that the appellant was president of the corporation ought not to prejudice him in favor of a stockholder whom it owed for his shares of stock.

We are also of opinion that the court erred in deciding that the deed of trust in question was inoperative and void. It seems that the court inadvertently founded its decision in part upon the statute (Bat. Rev., ch. 26, sec. 48). The report refers to it as the basis of the findings of law. That statute had been repealed before the time this deed was executed. The subsequent statute (The Code, sec. 685) was then in force and pertinent, and is materially different from the former one. After providing that a corporation may convey its property, it further prescribes: "But any conveyance of its property, whether absolutely or upon condition, in trust or by way of mortgage executed by any corporation, shall be void and of no effect as to the creditors of said corpo-

ration existing prior to or at the time of execution of the said deed, and as to torts committed by such corporation, its agents or employees, prior to or at the time of the execution of said deed: provided said creditors or persons injured, or their representatives, shall commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law." It is to be observed that such deed is to be void and of no effect only when the creditor brings his action to enforce his claim *within sixty days* next after its registration. Otherwise the deed, if not void for other causes, remains in force and effect for the proper purpose contemplated by it. The intention is to require the creditor to make his objection by appropriate legal action promptly, and thus prevent legal com- (105) plication and confusion that might result from much delay. If the creditor's action shall be brought within apt time, in such case the deed will be void. It appears in this case that the plaintiffs did not bring their action within sixty days after the registration of the deed, nor until after the lapse of several months thereafter. Nor does it appear that any such creditor took any steps to enforce his claim within the prescribed time. The plaintiffs allege in their complaint that they delayed the bringing of their action because the defendant corporation and its agents assured them that their debts would be paid. But if it be granted that such assurance or an express promise on the part of the corporation not to insist upon the proviso recited could be effectual for any purpose, it does not appear otherwise than by the mere allegation of the complaint that any such assurance or promise was given as alleged, or at all. The objection to the deed founded upon the statute is, therefore, untenable. *Duke v. Markham,* 105 N. C., 138.

We think, also, that the deed was not necessarily fraudulent and void *in law* because of matters and things appearing upon its face, and incapable of explanation by evidence *dehors* the deed. A deed is necessarily void for fraud appearing upon its face, when the facts constituting the fraud so appearing are so manifest and of such vitiating character as that they of themselves imply fraud that admits of no explanation or conclusion to the contrary—as then the deed plainly provides for the ease, convenience, and advantage of the maker thereof. *Booth v. Carstarphen,* 107 N. C., 395, and the cases there cited; *Palmer v. Giles,* 58 N. C., 75. The defendant corporation might honestly prefer one or more of its creditors, as it has done, if objections were not made to the deed within sixty days next after its registration by creditors existing at or prior to the time of its execution. We have seen (106) that such objection was not made.

The deed provides that the property shall be turned into cash with reasonable promptness and applied to the debts expressly men-

tioned and provided for therein, and that any surplus shall be applied to other debts; nothing is to be reserved or applied for the benefit of the defendant corporation. The mere fact that the trustee is to sell the property at private sale, with the approval of the president and a majority of the directors, and is required to apply any surplus of money coming into his hands to other debts of the corporation, not specially provided for, "under the direction of the president and a majority of the directors," does not necessarily render the deed void. The fund, the whole fund, less reasonable compensation to the trustee, is required to be paid to creditors. It may be that the sale was required to be made with the approval of the president and directors, as cautionary and with a view to the better advantage of the creditors, to prevent a sacrifice of the property. And so, as to paying the surplus to creditors, it may be that the honest purpose was to pay the same to the creditors supposed to have higher claims than others. These unusual provisions give rise to suspicion, and are evidence of a fraudulent intent, but they do not necessarily imply fraud incapable of explanation; they are not of themselves fraudulent *in law.* Nor do we think they raise a presumption of fraud that must render the deed void unless the corporation shall rebut such presumption. The deed upon its face contemplates that all the property embraced by it shall be faithfully devoted to the corporation's creditors. Apparently, the approval of the president and directors provided for is not intended to be an arbitrary one, but a reasonable one that must be exercised within a reasonable time; and so as to the application of the surplus. It may be so construed. The deed may have been made with fraudulent intent—it is so alleged in the complaint —but that it was or was not is a question that shall ordinarily (107) be decided by a jury. On the trial such unusual provisions would be evidence of the fraudulent intent, to be weighed by the jury. *Cannon v. Peebles,* 24 N. C., 449; *s. c.,* 26 N. C., 204; *Gibson v. Walker,* 33 N. C., 327; *Boothe v. Carstarphen, supra.*

As there was no objection to the order of reference, it was made by consent of the parties. *Grant v. Hughes,* 96 N. C., 177; *Smith v. Hicks,* 108 N. C., 248. It directed the referee to find the facts and the law. The order, though not very explicit, is broad and comprehensive, and the referee should have found that the deed was made with the fraudulent intent alleged, and such finding should have been reviewed by the court, or the court might, in its discretion, have submitted an appropriate issue to the jury; probably the latter would have been the safer and better course. The court ought not necessarily to have found that the deed was valid, as the appellant insists, but the referee should have found from the evidence that it was made honestly and in good faith, or that it was made with the fradulent intent alleged, and therefore void;

and the court, upon proper exception, should have reviewed such findings and given the proper judgment.

There is, therefore, error. The judgment must be modified in accordance with this opinion, except as to the deed of trust; as to it, the action may be recommitted to the referee with appropriate instructions, or the court may submit a proper issue to a jury.

Error.

Cited: Tilley v. Bivens, post, 344; *Hill v. Lumber Co.,* 113 N. C., 181; *Bank v. Cotton Mills,* 115 N. C., 516; *Harmon v. Hunt,* 116 N. C., 682; *Howard v. Warehouse Co.,* 123 N. C., 92; *Baggett v. Wilson,* 152 N. C., 182.

(108)

W. F. GRUBBS ET AL. v. THE VIRGINIA FIRE AND MARINE INSURANCE COMPANY.

Insurance—Agency.

1. A statement in an application for insurance that a clerk slept in the building insured does not constitute a continuing warranty that the assured would require the clerk to continue to sleep in the building; and the fact that no person was sleeping therein when the fire occurred did not avoid the policy, especially in the absence of evidence that the risk was prejudiced thereby.

2. A policy of insurance contained a stipulation that any additional insurance should be made known to the insurer and its consent endorsed thereon; otherwise, the policy should be forfeited. Additional insurance was obtained, with the knowledge of the soliciting agent of defendant, who had procured the original policy, and who endorsed the consent of his principal thereon by pasting the printed form used for such purpose by the company and which was printed by it, and the agent testified that he understood he had such authority: *Held,* there was evidence sufficient to go to the jury on the issue as to the consent of the company to such additional insurance.

APPEAL at Fall Term, 1890, of NORTHAMPTON, from *Whitaker, J.*

The plaintiff sued to recover the amount alleged to be due upon a policy of insurance issued to him by defendant, covering a house and a stock of merchandise therein at Seaboard, N. C.

Among other defenses, the defendant set up that the policy had been forfeited by the plaintiff: (1) because he had procured additional insurance with other companies on the same property without giving notice to defendant and having its consent endorsed on the policy, as was stipulated therein should be done; and (2) that the plaintiff had

contracted, at the time the policy was issued, that a clerk should sleep in the house, which it was insisted was a material fact, in that it made the risk less hazardous.

It was in evidence that Mr. Hay, of Raleigh, was the general
(109) agent of the defendant, with authority to appoint subagents, write and issue policies, and collect premiums; that he had appointed one Joyner as agent—"a soliciting agent"—at Seaboard, with power and instructions to fill up applications and forward them to the general agent, who, if approved, would issue policies and send them to the assured through the sub or soliciting agent. Joyner procured the insurance for the plaintiffs, forwarded their application, and, upon receipt of the policy, delivered it to plaintiffs, and subsequently gave permission to the plaintiffs to take out additional insurance in other companies, and endorsed the consent of the defendant on the policy by pasting thereon the printed form for that purpose which had been furnished him by the company. Joyner also testified that he understood he had the authority to endorse the consent.

There was a statement in the application that a clerk then slept in the house, but there was no agreement or warranty on the part of the plaintiffs that he should continue to sleep therein during the continuance of the policy.

There was judgment for plaintiffs, from which defendant appealed.

W. C. Bowen (by brief) and R. O. Burton for plaintiffs.
J. W. Hinsdale and W. H. Day for defendant.

CLARK, J. The learned counsel for the defendant properly and frankly concede that the principal defenses are, (1) other insurance taken out by plaintiffs without notice and without defendant's consent thereto endorsed on the policy; (2) breach of warranty that a clerk should sleep in the store.

As to the first defense, consent to the additional insurance was endorsed on the policy by the attachment of the usual printed form used by the company for that purpose and signed by its agent, who had
(110) procured this insurance. The jury found, in response to the issue submitted to them, that such additional insurance was made known to the defendant, and that the endorsement of its consent was authorized. It is sufficient for us to say that there was evidence sufficient to go to the jury tending to prove such finding. Though it was agreed that additional insurance should be made known to the company, and its consent thereto endorsed on the policy, it is not stated in the policy who, or that any particular officer or agent, should be authorized to accept notice of additional insurance and endorse defendant's consent

thereto upon the policy, or that such consent should be endorsed at the home office or other particular place.

As to the second ground of defense, there was a statement in the application that a clerk then slept in the store, but there was no agreement or warranty that a clerk should continue to sleep in the store during the continuance of the policy. There is evidence from defendant that whether the clerk slept in the store or not, it would not have affected the rate paid, and there is no evidence tending to show that the defendant was prejudiced by the failure of the clerk to sleep there. This was not a continuing warranty. *Aurora Ins. Co. v. Eddy,* 50 Ill., 106; *Schmidt v. Ins. Co.,* 41 Ill., 295; Wood on Ins., secs. 167, 168, 171, 176, and cases there cited. A case exactly "on all fours" is *Frisbie v. Ins. Co.,* 27 Pa. St., 325, in which these same words in the application, "clerk sleeps in store," were held to be merely a warranty *in presenti,* and not that a clerk should continue to sleep there.

These are the principal contentions. There were other exceptions sufficiently numerous and ingenious, but we fail to see, upon considering them, that the defendant has been deprived of any substantial right or benefit which he was entitled to upon the trial.

No error.

Cited: *Wood v. R. R.,* 118 N. C., 1065.

(111)

C. C. CLARK, JR. v. THE DELOATCH MILLS MANUFACTURING COMPANY.

Appeal—Notice—Process, Service of—Judgment, Vacating.

1. The notice of appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer.

2. The remedy against a judgment by default because of insufficient service of process is either by a special appearance and motion to vacate, or, in some cases, by *recordari.* The party seeking the relief cannot enter a special appearance for the purpose only of taking an appeal, and thereupon have the regularity of the service determined.

ATTACHMENT proceedings, heard (upon appeal from a justice of the peace) at Fall Term, 1891, of CRAVEN, before *Bryan, J.*

The plaintiffs moved before his Honor to dismiss the appeal.

The summons was issued in the justice's court on 7 August, 1891, and, at the same time, the affidavit of the plaintiff and warrant of attachment were made, and the said affidavit and an order of publication were

entered on 8 August. On the return day (7 September) of the notice the plaintiff appeared, the defendant not appearing. Judgment was rendered for plaintiff 18 September. Notice of appeal was served on the plaintiff and on the justice of the peace.

The plaintiff moved in the court below to dismiss the appeal for want of proper notice of appeal, and his Honor adjudged that the action be dismissed and that plaintiff recover his costs, from which defendant appealed to Superior Court.

The notice of appeal is as follows: "Take notice that W. D. McIver, attorney of defendant, entering a special appearance for the purpose of moving a discharge of the attachment granted, and for a dismissal of the action for want of proper service of summons, appeals to the
(112) Superior Court from the judgment rendered on 7 September, 1891, in favor of plaintiff for the sum of, etc., $92.13 damages and $6.80 costs, and this appeal is founded upon the ground that the said judgment is contrary to law and evidence."

The said defendant's attorney made affidavit that he served this notice upon the plaintiff and upon the justice of the peace by delivering a copy thereof to each.

W. W. Clark for plaintiff.
W. D. McIver for defendant.

CLARK, J. The defendant is a nonresident corporation. It was not served with process, and did not appear and answer at the trial before the justice. It had the right to appeal after notice of the judgment. The Code, sec. 876. It appears, however, that the defendant attempted to appeal, not from the judgment generally, but by a limited notice of appeal in the nature of a special appearance. We know of no authority or reason for such practice. An appeal must be from the judgment rendered. If, after the judgment, the defendant appearing specially for the purposes of the motion, had moved to set aside the judgment for defective publication, and the motion had been denied, an appeal would have carried up only that ruling (*Finlayson v. American Accident Assn.,* 109 N. C., 196); or the defendant might have applied for a *recordari* (*McKee v. Angel,* 90 N. C., 60; *Caldwell v. Beatty,* 69 N. C., 365); or if, appearing specially at the trial, the defendant had moved to dismiss, and on refusal of such motion had caused its exception to be noted, and had then proceeded to defend on the merits, it would not on an appeal have lost its right to insist on its special appearance. *Guilford v. Georgia,* 109 N. C., 310; *Plemmons v. Improvement Co.,* 108 N. C., 614. But here the defendant neither appeared specially
(113) at the trial and moved to dismiss nor made any motion after-

wards, but attempted to appeal specially, and to have the court pass upon a ruling as to the regularity of the publication, which the magistrate did not make nor was given by the defendant any opportunity to make. If the appeal had any effect at all, it was a general appearance by the defendant, and placed it regularly in court if not already there. It may be that the judge should have so held. But the plaintiff is not appealing from his failure to do so, and it is only open to us to say that the defendant cannot assign as error that the court held that an attempted appeal by counsel "appearing specially" for such purpose only was no appeal. If error, it is beneficial to the defendant, since it is now open to him to make a motion to set aside the judgment, if so advised, under The Code, sec. 220, or possibly for a *recordari* in the nature of a writ of false judgment. *Caldwell v. Beatty, supra.*

Besides this, the notice of appeal was not served at all—the appeal not having been taken in open court (The Code, sec. 877), and the notice not having been served by an officer. The Code, sec. 597; *S. v. Johnson,* 109 N. C., 852.

Affirmed.

Cited: King v. R. R., 112 N. C., 322; *Forte v. Boone,* 114 N. C., 177; *Smith v. Smith,* 119 N. C., 317; *Merrell v. McHone,* 126 N. C., 530; *Loven v. Parson,* 127 N. C., 302; *Johnson v. Reformers,* 135 N. C., 387; *Houston v. Lumber Co.,* 136 N. C., 329; *Scott v. Life Assn.,* 137 N. C., 517; *Allen v. R. R.,* 145 N. C., 41; *Warlick v. Reynolds,* 151 N. C., 612; *Thompson v. Notion Co.,* 160 N. C., 523; *Tedder v. Deaton,* 167 N. C., 480; *Lowman v. Ballard,* 168 N. C., 18.

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(114)

SAMUEL BACON ET AL. v. GREENLEAF JOHNSON ET AL.

Process—Service by Publication—Affidavit—When Judge Should Find Facts.

1. It is essential to the validity of summons by publication, that the affidavit upon which the order is to be based should set forth the facts upon which the alleged cause of action is founded, as well as those which disclose the necessity that the nonresident defendant should be made a party, with sufficient particularity to enable the court to see and determine that there is a sufficient cause of action and defendant is a necessary party thereto.

2. When the purpose is to allege a cause of action against a nonresident, it is necessary to set forth in the affidavit that he has property in the State.

3. Where the court, in refusing to set aside a judgment by default rendered upon service by publication, stated in its ruling that "no just or reasonable cause has been shown why said judgment should be set aside," it should have found the facts, in order that the correctness of this conclusion might be reviewed upon appeal.

MOTION to set aside judgment, heard at Fall Term, 1891, of CRAVEN, before *Bryan, J.*

It appears that the defendants were nonresidents of this State when, next before, and next after this action began, on 18 February, 1891. The summons was issued against them, and the sheriff returned the same endorsed, "Not to be found in my county."

Thereupon the attorney of the plaintiffs made his affidavit, the material part of which is as follows:

"That defendants, upon whom service of summons is to be made, cannot, after due diligence, be found within the State of North Carolina, and he is informed and believes they are residents of the State of Maryland; that a cause of action exists against them in favor of plaintiffs, and that they are proper parties to the same, which said action relates to real property in this State, to wit, specific performance of a contract to convey a tract of land lying in Craven County. Therefore,
(115) affiant prays that service of summons upon defendants be ordered by publication, as required by law in such cases."

Upon motion of plaintiffs, founded upon this affidavit, the court made its order directing that publication be made of the summons and notice to defendants in the *New Bern Journal,* a newspaper, for six weeks, requiring them to appear. Such publication was made, and, at Spring Term, 1891, of the Superior Court, the plaintiffs filed their complaint, and, the defendants failing to appear, they obtained judgment by default final for want of answer. At Fall Term, 1891, the defendants' counsel, appearing for the purpose of the motion, moved "to set aside and declare void and irregular" the said judgment, basing his motion upon these grounds:

1. That no service of summons or notice, according to the laws of North Carolina, was made upon the defendants, or any of them.

2. That the pretended service by publication is irregular and fatally defective.

3. That the judgment is inconsistent with the allegations of the complaint and not warranted by the same.

4. That defendants are nonresidents of the State of North Carolina, and desire to be allowed to defend the action as is provided in section 220 of The Code.

5. That defendants have a good and meritorious defense, both in law and in fact, to said action.

6. That said court is without jurisdiction to render said judgment on any constructive service of notice.

7. Any and all other defects or irregularities appearing in the record, which may properly be made to appear to the court.

The court denied the motion, and gave the following judgment:

"This cause, coming on to be heard at Fall Term, 1891, on motion of defendants to set aside the judgment heretofore rendered, under special appearance of counsel for the defendants for that (116) purpose, upon the ground that the judgment is void and irregular, and that they be allowed to come in and defend the action; and it being found as a fact by the court that on February, 1891, the plaintiffs were aware of the residence of defendants; and the court further finding as a fact that there was but one affidavit before it (the affidavit of Howard N. Johnson), and no oral testimony being heard; and the court further finding from said evidence, to wit, the record and the said affidavit, that no just or reasonable cause has been shown why the said judgment should be set aside as irregular and void, or that the defendants be allowed to come in and defend said action; and the court further finding as a fact that the defendants are nonresidents of this State:

"Now, on motion of O. H. Guion, the attorney of record for plaintiffs in this action, the motion of defendants to set aside the judgment, and to be allowed to come in and defend the action under section 220 of The Code, are both denied, and the defendants will pay the costs," etc.

From which judgment the defendants appealed.

O. H. Guion for plaintiffs.
W. L. Williams (by brief) for defendants.

MERRIMON, C. J., after stating the case: The service of the summons or notice as original process in the action by publication must be made strictly in accordance with the requirements of the statute (The Code, secs. 218, 219). This method of service of process and giving the court jurisdiction is peculiar, and out of the usual course of procedure. The statute prescribes, with particularity and caution, the cases and causes that must exist and appear by affidavit to the court in order that it may be allowed. The court must see that every prerequisite (117) prescribed exists in any particular case before it grants the order of publication. Otherwise the publication will be unauthorized, irregular, and fatally defective, unless in some way such irregularity shall be waived or cured. *Spiers v. Halstead,* 71 N. C., 209; *Windley v. Bradway,* 77 N. C., 333; *Wheeler v. Cobb,* 75 N. C., 21; *Faulk v. Smith,* 84 N. C., 501.

The statute cited above, among other things pertinent here, prescribes and requires that in order to obtain an order that service of notice of the action be made by publication, it must appear by affidavit "that a cause of action (exists) against the defendant in respect to whom service is to be made, or that he is a necessary party to an action relating to real property in this State" in a case wherein that party "is a nonresident of this State but has property therein, and the court has jurisdiction of the subject of the action," or that "the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein." Such prerequisites must appear, in their substance, at least. It is not sufficient to state generally that a cause of action exists against the defendants, or that they are necessary parties to the action. A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary parties to the action, should be stated, so that the court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine the legal question as to whether there is a cause of action or not. Nor is it sufficient to state that the party is a necessary party to an action to compel specific performance of a con-
(118) tract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it. Otherwise the party demanding the order will determine that he has a cause of action, while the statute requires the court to do so upon facts appearing by affidavit. *Claflin v. Harrison,* 108 N. C., 157, and the cases cited *supra.*

The affidavit upon which the order of publication was made in this case failed to state the facts on which the plaintiff relied to constitute his cause of action, and other facts to show that the appellants were necessary parties. The court failed to see and determine upon evidence appearing, as required, that there was a cause of action, and that the defendants were necessary parties to the action for some proper purpose. Nor did it appear that the defendants had property in this State. This is material when the purpose is to allege a cause of action against the defendant. The order of publication was, therefore, improvidently granted. Publication was not made according to law, and the court should have set the judgment complained of aside. It does not appear that the irregularity was cured or waived in any way.

We may add, also, that the court should have found the facts upon which it founded its conclusion "that no just or reasonable cause has been shown why the said judgment should be set aside as irregular and void, or that the defendants be allowed to come in and defend said action," etc. It may be that the court erroneously decided that there was no legal cause, and exercised its discretion upon that ground in refusing to allow the appellants to make defense. Whether there was such cause or not is a question of law, and the decision of the court in that respect is reviewable in this Court. The court recites in its judgment that it finds from "the record and the said affidavit that no just or reasonable cause has been shown," etc. It should have found the facts and set them forth in the record, so that its decision of the question of law arising upon the facts might be reviewed. In the (119) absence of demand that the facts be found, it might not be error to fail to set the findings of fact forth in the record. But the contentions of the defendants in this case imply a demand that the facts be found. The court drew its conclusions from facts not set forth. *Utley v. Peters,* 72 N. C., 525.

The judgment must be reversed and further proceedings had in the action according to law.

Reversed.

Cited: Mullen v. Canal Co., 114 N. C., 10; *Balk v. Harris,* 122 N. C., 66; *Rhodes v. Rhodes,* 125 N. C., 192; *Lemly v. Ellis,* 143 N. C., 208; *Page v. McDonald,* 159 N. C., 43; *White v. White,* 179 N. C., 602.

W. O. WINSLOW v. S. Q. COLLINS ET AL.

Jurisdiction—Removal of Causes to Federal Courts.

When the petition and bond required by the act of Congress regulating the removal of causes from State to Federal courts have been duly filed, the jurisdiction of State courts ceases at once; and hence, where such petition and bond were offered, but before any order was made thereon, the plaintiff was permitted to amend his complaint in such way as would deprive the Federal court of jurisdiction, there was error.

MOTION to remove cause to Federal court, heard before *Brown, J.,* at Fall Term, 1891, of PERQUIMANS.

At the appearance term, the plaintiff having filed his complaint alleging two distinct causes of action, one for $2,000 and the other for $600, the defendants in apt time presented their petition and an appropriate

bond in that connection, praying that the action be removed to the Circuit Court of the United States in and for the Eastern District of North Carolina, upon the ground that the plaintiff is and was at the time of bringing this action a citizen and resident of that State,
(120) and the defendants were ever at such times citizens and residents of the State of Virginia. At once, and before the court had made any order, the plaintiff moved that he be allowed to enter a *nolle prosequi* as to his second cause of action, and to reduce his first cause of action to a sum less than $2,000. The court allowed the first part of the motion and denied the second, and gave judgment denying defendant's application to so remove the action; and they, having excepted, appealed to this Court.

T. G. Skinner and J. H. Blount (by brief) for plaintiff.
No counsel contra.

MERRIMON, C. J. Plainly, if the court had not allowed the amendment of the complaint as to the second cause of action alleged, the Circuit Court of the United States might have taken jurisdiction of the action upon the ground of the diverse citizenship of the parties, and that the matter in dispute exceeded, exclusive of interest and costs, the sum of $2,000. Hence, but for that amendment, the defendants were entitled to have their application to remove the action allowed. So that the question raised by the assignment of error is, Had the court authority to entertain and allow the motion of the plaintiff to amend the complaint after the application to remove the action was made? We think this question must be answered in the negative.

It appears from the case stated on appeal that the "defendants when the case was called, presented to the court their written petition for its removal to the Circuit Court of the United States, and tendered the bond required by law in such case, and at the same time filed their bond and petition with the clerk." It must, therefore, be taken that the petition and bond were filed in the action as required by law at the time the same were brought to the attention of the court. There was no
(121) objection to the sufficiency of the petition or the bond. The court took notice of the application thus made, and at once "the plaintiff's counsel arose and asked to be heard before any order was made" in respect thereto. The statute pertinent (24 U. S. Stat. at Large, ch. 373, sec. 1) prescribes that when and as soon as such petition and bond are filed in an action, "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit." The intention so expressed is that the jurisdiction of the State court shall cease at once upon the application sufficiently made for the

removal of the action. The latter in its conditions in all respects at that time must be removed. It is not intended that the State court shall, after that time, have control of the action for the purpose of changing its nature or condition, or the form thereof, or the pleadings therein, in any respect whatever. It then ceases to have jurisdiction and has no authority to make any order, decree, or judgment in the action. This is settled by many decisions of the Supreme Court of the United States, several of them much like this case. *Kanouse v. Martin,* 15 How., 198; *R. R. v. Koontz,* 104 U. S., 5; *R. R. v. Dunn,* 122 U. S., 513; *Steamship Co. v. Tugman,* 106 U. S., 118; *Kern v. Huidekoper,* 193 U. S., 485; *Marshall v. Holmes,* 141 U. S., 589.

In this case it appeared from the petition and the record that the action might be removed, and there was no objection to the sufficiency of the bond tendered and filed. It must be taken that it was sufficient. This being so, the jurisdiction of the court below at once ceased. The order of the court was not essential to the removal nor to put an end to its jurisdiction. This has been repeatedly decided. *Kern v. Huidekoper, supra; Ins. Co. v. Dunn,* 19 Wall., 214; *Stone v. South Carolina,* 117 U. S., 430. Hence, also, the order allowing the amendment striking out the second cause of action was unauthorized and without force. *Kanouse v. Martin, supra;* Speer Rem. of Causes, sec. (122) 47; Foster Fed. Pr., 385; Dillon Rem. Causes, pp. 66-68.

The court ought, therefore, to have made an appropriate order directing the removal of the action into the Circuit Court of the United States.

The order allowing the amendment of the complaint must be reversed, and an order directing the removal of the action entered according to law.

Reversed.

Cited: Coffin v. Harris, 141 N. C., 709; *McCulloch v. R. R.,* 149 N. C., 311; *Corporation Commission v. R. R.,* 151 N. C., 450; *Higson v. Ins. Co.,* 153 N. C., 37; *Cox v. R. R.,* 166 N. C ., 659; *Powell v. Watkins,* 172 N. C., 247.

A. C. VANN ET AL., EXECUTORS OF JOSEPH NEWSOM, v. JOHN F. NEWSOM.

Frauds, Statute of—Vendor and Vendee—Judgment—Betterments—Will—Election—Limitations, Statute of.

1. The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments.

2. A devisee is not compelled to make an election until he has had an opportunity to determine on which side his interest lies; but there must not be such unreasonable delay as to injure rights acquired by others.

3. Where the devisee of a tract of land charged with the payment of a legacy had been in possession, under a verbal promise from the devisor to convey, for several years before the death of the testator, made no election until more than three years, and when he was sued by the executors to enforce the charge: *Held*, that he might then make his election, and was not barred by the lapse of time from setting up his claim for betterments.

4. In such case the decree should direct a sale of the land, and that the proceeds should be applied, first, to the satisfaction of the sum ascertained to be due the defendant vendee for betterments, and then, if there is a surplus, to the payment of the amount charged upon the land by the will.

(123) APPEAL at Fall Term, 1891, of HERTFORD, from *Brown, J.*

The complaint states that the plaintiff's testator, Joseph Newsom, died in 1886, and that by section 4 of his will he devised to the defendant, John F. Newsom, the tract of land whereon he lived, in Hertford County charged with the sum of $400, with interest from 31 May, 1884, to be paid in a reasonable time after the death of the testator, and that the defendant claims and occupies the same under the will, but has failed and refused to pay the said sum charged upon it after demand by plaintiff. Wherefore, plaintiff demands judgment that the land be sold under order of court to pay said sum, with interest and costs.

The defendant, among other things in his answer, alleges that he is the only son of the testator, and lived with his father from infancy until several years after his majority; that he worked on the farm as a common laborer, etc; that his father, being desirous of compensating him and of starting him in life, made a verbal gift of the land to the defendant and promised to execute to him a sufficient conveyance therefor; that defendant desiring to build, and not having a deed for the land, purchased an adjoining tract and was about to build on it, when his father urged him to build on the land he had given him, saying that defendant would show a lack of confidence in him not to do so, as he had given the land to defendant; that defendant, relying upon said verbal gift, and being influenced by said statements of his father, entered upon the land, erected valuable buildings thereon, etc.; that no conditions were annexed to the gift, and since 1877 the defendant has been in the actual, open, notorious, and adverse possession of the same, claiming it as his own, etc.; that the heirs at law of the testator are necessary parties to the action. Wherefore, defendant demands judgment that plaintiffs recover nothing, and for judgment against them for the sum of $874.38, with interest, etc.

In the plaintiffs' reply they say, among other things, that the (124) indebtedness, if any, as alleged as a counter-claim, became due

more than three years before the commencement of the action and is therefore barred by the statute.

The issues submitted, and the responses thereto, were:

1. Did Joseph Newsom, the testator, charge the land with $400, as alleged? Yes.

2. Did defendant refuse to pay the same upon demand made by plaintiff? Yes.

3. What is the actual value of the rents and profits, exclusive of improvements from the time of the probate of the will up to the trial? $85.

4. Did testator make a parol gift of the land, some years prior to his death, to defendant, as alleged in the answer? Yes.

5. If so, did defendant, in consequence thereof and in the testator's lifetime, place valuable improvements on the land; and if so, what is the value of the improvements? $3,000.

6. What was the actual value of the land at the commencement of this suit, exclusive of improvements? $330.

Thereupon the court adjudged that defendant is entitled to a lien on the land for $2,915, and that he is entitled to the possession of the land until said lien is paid; that plaintiffs are entitled to a second lien thereon for $400, with interest, etc. It is further adjudged that the land be sold by commissioners, etc., the sale to be reported to the next term of court. From which plaintiffs appealed.

The last clause of the will is: "I devise to my son, John F. Newsom, the tract of land on which he now resides in fee, subject to this condition, that he pay over to my executors, in a reasonable time after my death, $400, with interest at 6 per cent from 31 May, 1884, the same being an advancement, and shall be a charge on the land (125) herein devised."

No counsel for plaintiffs.

B. B. Winborne (by brief) for defendant.

AVERY, J. "Where a plaintiff declares upon a verbal contract void under the statute of frauds, and the defendant either denies that he made the contract or sets up another and a different agreement, or admits the oral agreement and pleads specially the statute, the plaintiff cannot recover." *Browning v. Berry,* 107 N. C., 231; *Morrison v. Baker,* 81 N. C., 76; *Young v. Young, ibid.,* 91; *Gulley v. Macy,* 84 N. C., 434; *Bonham v. Craig,* 80 N. C., 224; *Holler v. Richards,* 102 N. C., 545; *Cox v. Ward,* 107 N. C., 507; *Dunn v. Moore,* 38 N. C., 364. When equitable relief could not be granted in what was technically known as an action at law, though a vendee, who had taken posession of land under a parol contract for the purchase, and had enhanced its value by making permanent improvements, could not enforce the

contract in a court of equity, he could, when the vendor brought ejectment to oust him, invoke the aid of a chancellor to restrain further proceedings at law until the vendor reimbursed the purchase money paid under the verbal agreement, and compensated the occupant holding the land under it for the additional value imparted to the property by the improvements. *Baker v. Carson,* 21 N. C., 381; *Albea v. Griffin,* 22 N. C., 9. In *Baker v. Carson, Chief Justice Ruffin* called attention to the fact that the court of equity was not asked to enforce the agreement, but to prevent fraud by restraining the defendant "from the exercise of her legal power to turn him out of house and home unless she will consent to do what conscience requires: make him an equivalent for the worth of his labor, dishonestly taken to herself." That labor was expended in improving a tract of land in which the plaintiff,
(126) Baker's wife, was a tenant in common in the remainder, and which he was induced to improve under a promise from the life tenant, who was his wife's mother, that she would convey to him her interest. In that case, therefore, a parent, by making a parol gift for the purpose of benefiting a child, had, as in our case, induced the expenditure of money which enhanced the value of the land donated.

The same relief was granted and the same principle was recognized under The Code practice by allowing an equitable counter-claim for improvements to one holding under a verbal agreement for the purchase of land. *Daniel v. Crumpler,* 75 N. C., 184; *Pope v. Whitehead,* 68 N. C., 191; *Wetherell v. Gorman,* 74 N. C., 603; *Pitt v. Moore,* 99 N. C., 85; *Hedgepeth v. Rose,* 95 N. C., 41. In *Daniel v. Crumpler* the Court said: "It is settled law in this State that although a parol agreement to convey land is void by our statute, yet if the vendee, in reliance on it, pays the purchase money and makes improvements, he cannot be evicted until the vendor repays the purchase money and makes compensation for the value of the improvements." A similar principle was announced by the present Chief Justice in *Tucker v. Markland,* 101 N. C., 422, where he said for the Court: "It seems that, having paid the money, he took possession of the land in pursuance of his supposed right under the voidable contract of purchase, and with the sanction of the vendor. It would be inequitable and against conscience to allow the latter to turn him out of possession thereof without restoring his outlay in cash, and for valuable improvements put on the land while so in possession." That such contracts are only voidable, and may be ratified in writing, or repudiated at the option of the vendors, is recognized and established by numerous other authorities besides the case of *Tucker v. Markland, supra.*

The question discussed in *McCracken v. McCracken,* 88 N. C.,
(127) 283, is not, as was suggested in the brief of counsel, raised in this

case. If the defendant had brought the action to enforce the parol contract, the relative position of the parties would have been the same as in that case. But the defendant chose to hold the possession of the land, upon which he had entered in 1878, under the verbal agreement of his father to convey, from his father's death in 1886 till 4 October, 1889, when this action was brought by the executors of the father's will, who then for the first time acted upon the repudiation of the agreement by the father in the will. The agreement being not void but merely voidable, the defendant was guilty of no laches in awaiting the action of the executors or the residuary legatees for three years after the father's will, in which he repudiated the agreement, was proved. The defendant was under no legal duty or obligation to become the actor and bring suit against the proper parties to have his claim for betterments declared a lien upon the land and enforced as such, until the legatees or the executors had manifested a purpose to enforce the charge upon the land imposed by the will. He waited but one year beyond the limit prescribed by law for the personal representative, in the absence of good reason for postponement to settle the estate.

There is no direct testimony to show that the defendant elected to take under the will. He was not compelled to elect until he had opportunity to determine on which side his interest would lie. *Dunlap v. Ingram,* 57 N. C., 178. In the absence of statutory provision on the subject, the time in which the right of election must be exercised is not limited definitely, but there must not be such unreasonable delay as to injure rights acquired by others. *Tibbetts v. Tibbetts,* 19 Bes., 663; *Cooper v. Cooper,* 77 Va., 198; *McCracken v. Findley,* Sneed, 195.

It does not appear from the statement of the case or the find- (128) ings of the jury when or how he manifested his purpose to claim compensation for the permanent improvements made by him. But if he deferred to do so till this action was brought, or until the preliminary demand for the amount of the legacy charged upon the land was made, the delay affected no after-acquired right in the land, nor did it tend in any way to prevent the executors or legatees from enforcing their rights under the will. Had he brought his action for betterments, he would have incurred the risk (which the majority of the Court seem to have considered fatal in *McCracken v. McCracken, supra*) of meeting and overcoming the plea of the statute of frauds offered by parties who were not under that obligation to do equity which is imposed on those who ask it. 3 Pom. Eq. Jur., secs. 1238 to 1243. If the action for betterments had been brought and the act of 1819 had been specially pleaded in bar of recovery, the question so ably discussed in *McCracken v. McCracken, supra,* would have been again directly brought before us for review. *Dunn v. Moore,* 38 N. C., 364. The

jury found that the defendant entered a parol gift and promised to convey, as in *Baker v. Carson, supra,* upon a tract of land worth at that time $330, and placed upon it improvements valued at $3,000. These facts constitute a case differing from *Baker v. Carson* only in this, that in our case the parol gift was from a father to his son of an estate in fee simple, while in *Baker v. Carson* the gift of a life estate in land was made by a mother to a daughter's husband to induce him to settle upon it.

The right of the defendant rests on a well established principle of equity which has been recognized by this Court and affirmed by our statute (The Code, sec. 476). *Daniel v. Crumpler* and *Baker v. Carson, supra.* It does not appear that the defendant accepted any benefit under the will, or that his conduct was inconsistent with a purpose on his part to await the action of the executors or the devisees, and, (129) when they should move, to set up his claim for betterments and ask to have it declared a lien superior to that of the legacies made a charge upon it. The defendant is neither seeking to enforce the parol promise nor to recover damages for nonperformance; therefore, in any view of the case, he had a right to demand that the executors should not be allowed to bestow as a bounty of the testator the price of the land until the enhanced value imparted by the improvements which the testator induced him to make had been paid for by those claiming under the will, or out of the rents of the land upon which it was a first lien. As the courts of equity, under our former practice, restrained proceedings to acquire possession in such cases, and under the new procedure refused their aid to oust a parol vendee or donee until satisfied in some way as to the securing of such compensation for the occupant, so, upon the same principle, a devisor who, by giving land to his son unconditionally, induced the latter to enhance its value by improvements, may repudiate the agreement in his will; but if the land is to be converted into money under its provisions, the donee must be declared in the decree of sale entitled, in any event, to a first lien for the additional value imparted to the land by permanent improvements placed upon it during his occupancy under the agreement. The Court, it seems, was governed by the principle laid down in *Hedgepeth v. Rose, supra,* in adjuding that no rent should be allowed until the permissive occupancy terminated, and that the defendant should hold the possession until the sum allowed by the jury for betterments, after deducting the value of rents found in the same way, should be satisfied. But in adjusting the equities upon that plan, there was no provision for ascertaining the value of accruing rents, in case the defendant should remain in possession, and

for applying it, as it accrued, in discharge of the balance due him upon the claim which constituted a lien, and to secure which he was to hold the premises. Our case, however, presents entirely a dif- (130) ferent question from those which the learned judge evidently followed in framing the judgment, and is somewhat analogous to that of *Pitt v. Moore, supra,* in the fact that there was another charge upon the land subjecting it to liability to be sold.

It seems to us just and equitable that the land should be sold by a commissioner under the direction of the court, and upon confirmation of the sale and payment of the amount of the bid should pass to the purchaser, under the deed of the commissioner, discharged of all liens. The defendant can bid up to the full amount of the balance of his claim, after deducting the sum due for rents. If the land should fail to bring more than the amount due him, he will become the owner by virtue of his purchase, if the court confirm his offer, and will occupy precisely the same status as if the testator had ratified his parol agreement by executing a conveyance before his death.

If the land should sell for a sum more than sufficient to discharge the defendant's lien, the excess, after satisfying the costs out of it, should be applied to the payment of the legacies made a charge upon the land by the terms of the will. The plaintiff cannot be prevented by a void agreement from selling, when the equitable right of the defendant can be protected either by allowing him to receive the land or retain the money. The defendant having established his disputed right to betterments, is entitled to recover costs under the statute (The Code, sec. 528). *Cook v. Patterson,* 103 N. C., 127. The sureties on the prosecution bond would be liable for as much of defendant's costs as should not be satisfied out of the excess of the bid over the balance due for betterments.

The judgment below will be modified in accordance with the principle stated. The appellant must be charged with the costs of the appeal.

Modified and affirmed.

Cited: North v. Bunn, 122 N. C., 769; *Vick v. Vick,* 126 N. C., 127; *Kelly v. Johnson,* 135 N. C., 649.

(131)

J. L. SIKES v. JACOB WEATHERLY ET AL.

Negligence, Excusable—Judgment, Vacating.

1. Husband and wife, being sued for the recovery of land, the wife requested her husband to employ counsel to defend the action, which he promised to do, but being an ignorant man, failed to give the matter attention, and judgment by default was rendered: *Held*, to be excusable neglect on the part of the wife, and the judgment against her was properly vacated, although she may not have been a necessary party to the action.

2. Where the facts urged in support of a motion to vacate a judgment in some aspects shows surprise or excusable neglect, the court below may, in its discretion, allow or deny the motion, and the exercise of this discretion is not reviewable.

MOTION to vacate a judgment, heard at Spring Term, 1891, of TYRRELL, *Bryan, J.*

The plaintiff brought this action against the defendants therein, husband and wife, to Spring Term, 1890, of the Superior Court of the county of Tyrrell, and at Fall term of that court next thereafter obtained judgment by default final for want of an answer. At the next succeeding term the *feme* defendant moved to set aside this judgment upon the ground of surprise and excusable neglect, as allowed by the statute (The Code, sec. 274). The court heard and disposed of the motion upon affidavits of the parties, finding the facts and giving judgment as follows:

"It appearing to the court: (1) that on the .... day of ....., 188...., the defendant Jacob Weatherly, without the signature or consent of his wife, executed a certain mortgage to the above plaintiff upon the tract of land mentioned therein, which was worth between $300 and $500, and was all the land her husband owned at that time, and he was greatly embarrassed with debt at that time; (2) that the land was sold under the said mortgage without the knowledge or consent of his wife, Alethia Weatherly, for the sum of $50 (the mortgage debt being $49); was purchased by J. C. Meekins, Sr., who held a second mortgage for $25, and who conveyed the same to Jesse L. Sikes, the above plaintiff, who paid said Meekins the amount of his debt; (3) that Jesse L. Sikes then brought suit to the Spring Term, 1890, against the defendant Jacob Weatherly and wife for possession of said land at Fall Term, 1890, and obtained judgment by default final against defendants for said land; that the defendant's husband is an ignorant man, and after the summons were served upon him and his wife in the above cause, his wife talked with him about the case, and he promised her to employ counsel, and because of such reliance took no steps in the matter per-

sonally; (5) that her husband, through his ignorance and negligence, failed to give the case any attention, or to employ counsel, and judgment by default final was taken against the defendants; (6) that the sum of $50 is all that is due upon the mortgage debt aforesaid. It is considered by the court that the judgment heretofore rendered in this case be and the same is set aside and revoked."

From this judgment the plaintiff appealed, assigning as error that the facts do not show surprise or excusable neglect; and that the appellee wife was not a necessary party to the action and had no interest in the land, the subject of it.

Grandy & Aydlett (by brief) for plaintiff.
J. H. Blount (by brief) for defendant.

MERRIMON, C. J., after stating the case: The findings of fact by the court are not reviewable here, and these plainly show that the appellee was the wife of her codefendant; that she requested the latter to employ counsel and make defense for her, and she expcted he would do so; that he promised that he would; that he was ignorant and negligent and failed to employ counsel or give the action any attention. The wife might reasonably ask her husband to employ counsel for (133) her and rely upon his promise to do so; it was fit and proper that he should. That he so failed might well surprise her and make excusable neglect to give attention to the action on her part. It does not appear that she connived at or knew of such neglect. On the contrary, it appears that she intended to make defense, and that she might do so successfully.

As the facts, in some reasonable aspect of them, constitute surprise and excusable neglect, it was in the discretion of the court below to allow or deny the motion, and its exercise of discretion in such respect is not reviewable here. The case of *Nicholson v. Cox,* 83 N. C., 48, is nearly directly in point. This case cites *Vick v. Pope,* 81 N. C., 22, and distinguishes the latter from it. The other case of *Neville v. Pope,* 95 N. C., 350, cites and approves Nicholson v. Cox, supra, and points out the ground upon which it was not applicable in that case.

That the appellee may not have been a necessary party to the action, and may not have had any interest in the land, is no reason why she should not have the right to set aside the judgment of which she complains for the causes stated. The plaintiff saw fit to make her a party for some reason, and she had the right to make defense, and prevent a judgment against her if she could that might in some way prejudice her. It seems that the purpose in making her a party was to conclude her as to the land, the subject of the action. The plaintiff

deemed the judgment important, else why not consent to abandon the judgment as to her? Why was she made a party?

It does not appear that the court set aside the judgment as to the defendant husband, as suggested by the brief of plaintiff's counsel. He was not a party to the motion and not affected by it, so far as appears.

Affirmed.

Cited: Marsh v. Griffin, 123 N. C., 669; *Norton v. McLaurin,* 125 N. C., 187; *Koch v. Porter,* 129 N. C., 136; *Osborn v. Leach,* 133 N. C., 428; *Bank v. Palmer,* 153 N. C., 504; *Creed v. Marshall,* 160 N. C., 398; *Lumber Co. v. Cottingham,* 173 N. C., 327.

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(134)

JACOB HULSE v. WILLIAM BRANTLEY ET AL.

Burden of Proof—Trespass Quare Clausum—Appeal.

1. In an action for trespass *quare clausum fregit* the burden is upon the plaintiff to prove title or actual possession of the *locus in quo.*
2. The burden is on the appellant to show that he was prejudiced by an erroneous instruction to the jury.

APPEAL at February Term, 1891, of BEAUFORT, from *Bryan, J.*

Trespass *quare clausum fregit.* The plaintiff alleged that he was, on 1 November, 1888, in the rightful possession of the *locus in quo;* "that on said day, and on various occasions between that day and the beginning of this action, and while the plaintiff was in the lawful adverse possession of said land, the said defendants unlawfully and forcibly broke and entered upon the plaintiff's land" and committed the trespass complained of, etc.

The defendants broadly denied that they cut timber or trespassed otherwise on the plaintiff's land; they admitted that they entered upon a part of the land described in the complaint, "but deny that the plaintiff has any right, title or interest in the land whereon they have entered"; they allege that they have "been in the actual, exclusive, and notorious possession twenty-five years under known and visible boundaries as shown by deed," etc.; that the plaintiff has trespassed on their lands, etc.

On the trial the court submitted this issue to the jury, and it was responded to in the negative:

1. "Was the plaintiff in possession of the land described in the complaint at the time of the alleged trespass?"

The plaintiff put in evidence a deed from Thomas H. Brantley and his wife to him, dated 13 January, 1886; and a deed from Bryan Whitford to said Brantley, dated 26 March, 1861, and both these deeds embraced the land described in the complaint. He fur- (135) ther produced evidence tending to prove that he had possession of this land. It did not appear that the title to the land was out of the State.

The defendants put in evidence several deeds, but these deeds were not made to them or any of them. They also introduced evidence tending to prove that they were in the actual possession of the *locus in quo* at the time specified in the complaint, and ever since, and many years before that time.

At the close of the testimony the plaintiff moved for judgment upon the ground that the evidence produced by the defendants was not sufficient to rebut that of the plaintiff, and if true, they had offered no deed to themselves embracing any part of the land claimed by him.

The court denied the motion, and the plaintiff excepted.

The court gave the following among other instructions to the jury:

1. Actual possession of land consists in exercising that dominion over it and making that profit from it of which it is susceptible in its present state; but these must be charateristic of ownership, and they will not be sufficient if they are done at such long intervals and are consistent with the character of a trespasser.

2. In this case the burden is upon the plaintiff to satisfy you that he was in possession of the land: These issues are to be decided according to the weight of the testimony, and not from caprice, whims, or upon speculation.

The plaintiff excepted and moved for a new trial, upon the ground that there was no evidence to go to the jury to prove the actual possession of the defendants of the *locus in quo*. Judgment for defendants. Plaintiff appealed.

No counsel for plaintiff.
W. B. Rodman (by brief) for defendants.

MERRIMON, C. J., after stating the case: It did not appear on the trial that the title to the land in controversy ever passed from the State by grant or otherwise. So that, in any view of the evidence, the plaintiff failed to show title in himself thereto by proving color (136) of title and actual possession within known and visible boundaries for seven years. He produced evidence tending to show that he and the person under whom he claimed exercised control over and did

acts of ownership on the land embraced in the *locus in quo,* by cutting timber and otherwise at intervals before the time of the alleged trespass. It might, however, be well insisted that the evidence, taken as true, did not prove that he then or at any time had actual or, indeed, any possession. The evidence tending to prove actual possession was meager and not satisfactory, and he failed to show any title by conveyance. *Ruffin v. Overby,* 105 N. C., 78. There was evidence, though not very definite and full, tending to prove that the defendants had actual possession of the *locus in quo* at the time of, long before, and ever since the alleged trespass. One witness testified, among other things, that "William Brantley and his wife and Lewis, the defendants, are now in possession of the land. I don't know when Mrs. Brantley took possession. I think it was during the war, as she and her family have been there ever since." There was other evidence tending more or less strongly to prove such possession.

There was clearly evidence of the defendants to go to the jury to prove that the plaintiff did not have the possession of the *locus in quo* at the time of the alleged trespass or at any time, and that the defendants then and long before that time had actual possession thereof, and it was the province of the jury to determine its weight. If they had such possession, and the plaintiff failed to show title in himself
(137) or possession, it was not necessary that the defendants should show title otherwise, or any deed, as contended.

The whole charge of the court to the jury is not before us, and we cannot see the precise bearing and application of the instructions complained of by the appellant. The first one is not precise, and perhaps not entirely accurate in all respects, but in view of the evidence we cannot see that the plaintiff suffered prejudice from it. The burden is on him to show that he did. The second one is not objectionable. The plaintiff alleged that he had possession, and this the defendant denied. The burden was on the former to prove his material allegation thus put in issue. The latter clause of this instruction was cautionary, and not misleading or confusing to the jury. It does not so appear.

No error.

Cited: Fisher v. Owens, 132 N. C., 689; *Alexander v. Savings Bank,* 155 N. C., 128; *Brewer v. Ring,* 177 N. C., 485.

WILMINGTON AND WELDON RAILROAD COMPANY v. B. I. ALSBROOK.

Taxation, Exemption from—Contract—Privilege—Corporation—Construction of Charter—Railroads, Consolidation of.

1. The power of taxation being essential to the life of government, exemptions therefrom are regarded as in derogation of sovereign authority and common right, and will never be presumed.

2. The grant of an exemption from taxation must be expressed by words too plain to be mistaken; if a doubt arises as to the intent of the Legislature, that doubt must be resolved in favor of the State.

3. The grant of an exemption from taxation without some consideration or equivalent therefor received by the State does not constitute a contract, but a privilege merely, which may be recalled at the pleasure of the Legislature.

4. The consolidation of a railroad not exempt from taxation with one which is exempt does not extend the exemption to the property of the former, in the absence of clear, unmistakable provisions to that effect in the law authorizing the consolidation.

5. The exemption from taxation claimed to have been granted in ch. 78, Laws 1833-34, incorporating the Wilmington and Raleigh Railroad Company (now the Wilmington and Weldon Railroad Company), if valid at all, is confined to the "main line"—from Wilmington to Halifax—and does not extend to or embrace any "branch roads" which that company was authorized by its charter to construct or acquire.

6. The acquisition of the Halifax and Weldon Railroad by the Wilmington and Raleigh Railroad Company (now the Wilmington and Weldon Railroad Company) under the act of 1835-6, did not merge the first named road in the main line of the latter, and hence the property thereby acquired is not entitled to claim the exemption from taxation alleged to have been granted in the charter of the Wilmington and Weldon Railroad Company.

7. The rolling stock of the Wilmington and Weldon Railroad Company used upon the branch roads, or roads otherwise acquired, ascertained by a *pro rata* standard based on the relative lengths thereof to the whole line, is liable for taxation.

MERRIMON, C. J., dissenting.

MOTION made by the plaintiff for an injunction in an action in HALIFAX, until final hearing, restraining the defendant from proceeding to enforce the collection of certain taxes assessed against its property, heard by *Connor, J.*, at chambers in Wilson, N. C., on 30 December, 1891.

The temporary restraining order, with the order to show cause, was made by *Brown, J.*, at Weldon, N. C., and was returnable before *Bryan, J.*, of the Second Judicial District, on 29 December, 1891, at New Bern,

N. C. By consent of the parties the motion was heard by *Connor, J.*, of Third Judicial District, as above set forth.

From the complaint, answer, reply, affidavits and exhibits the judge found the following facts:

By an act of the General Assembly of North Carolina, ratified
(139) 3 January, 1834, entitled "An act to incorporate the Wilmington and Raleigh Railroad Company," the plaintiff was incorporated and duly organized by complying with the provisions of the said act. 2 Rev. Stat., 335-347.

That the said corporation, by virtue of said act and amendments made thereto, to wit, an act ratified 15 December, 1835, entitled "An act to amend an act passed in the year 1833, entitled 'An act to incorporate the Wilmington and Raleigh Railroad Company,'" 2 Rev. Stat., 348, duly began, and during 1840 completed a railroad from the town of Wilmington to the town of Weldon on the Roanoke River, connecting with the Petersburg and Norfolk Railroad.

That at the session of 1833 of the General Assembly of North Carolina an act was passed and duly ratified, entitled "An act to incorporate the Halifax and Weldon Railroad Company." 2 Rev. Stat., 325-334.

That pursuant to the provisions of said charter, the said Halifax and Weldon Railroad Company procured its right of way, laid out and constructed the roadbed and road from the town of Weldon to the town of Halifax, a distance of about 10 miles and entirely in the county of Halifax. That the said corporation had no rolling stock, but permitted the Portsmouth Railroad Company during the year 1836 to run its cars over the roadbed and track.

That at the session of 1836 of the General Assembly of said State an act was passed and duly ratified, entitled "An act empowering the Halifax and Weldon Railroad Company to subscribe their stock to the Wilmington and Raleigh Railroad Company." 2 Rev. Stat., 334-335.

That purusuant to the provisions of the said act, the said Halifax and Weldon Railroad Company and the said Wilmington and
(140) Raleigh Railroad Company, on 14 February, 1837, entered into an agreement, a copy of which is hereunto attached and marked Exhibit "E."

That the provisions of said agreement were in all respects executed and carried into effect by the said corporations.

That by an oversight, the said agreement was not registered as by the provisions of the fourth section of said act was required. That at the session of 1874 and 1875 of the General Assembly of said State an act was passed and duly ratified, entitled "An act to allow the Wilmington and Weldon Railroad Company to execute the provisions of the fourth

section of chapter 42 of the acts of the General Assembly, passed at its session of 1836," etc.

That pursuant to the provisions of the said act, R. R. Bridgers, president of said Wilmington and Raleigh (now Weldon) Railroad Company, executed and caused to be recorded in the office of register of deeds in and for Halifax County, and in the office of the Secretary of State in said State, a paper-writing hereto attached and marked Exhibit "F."

That after the execution of the aforesaid agreement of 14 February, 1837, the said Halifax and Weldon Railroad Company ceased to exercise any corporate acts or maintain any corporate existence or organization, and its roadbed, track and right of way passed to and under the control of the Wilmington and Raleigh Railroad Company, and has ever since been under the said control and management as a part and portion of its main line of road. That at the session of 1867 of the General Assembly of said State an act was passed and duly ratified, entitled "An act to amend an act passed in 1833, entitled 'An act to incorporate the Wilmington and Raleigh Railroad Company.'" The provisions of the said amendatory act were, at a regular annual meeting of the stockholders of the said Wilmington and Weldon Railroad Company, held in the city of Wilmington, N. C., 13 November, 1867, adopted as an amendment to the charter of said company. (141)

That during the year 1882 the plaintiff began and completed a branch road connecting with its main road at a point near the town of Halifax in Halifax County, and running to the town of Scotland Neck in said county. That during the year 1890 the said branch road was extended from the said town of Scotland Neck to the town of Greenville, in Pitt County, and during the year 1891 said branch road was extended to the town of Kinston, in Lenoir County, being in all a distance of 85 miles.

That said branch road runs through the county of Halifax, a distance of 23½ miles. Whether this branch road was constructed pursuant to the provisions of section 21 of the original charter of the plaintiff company, or pursuant to provisions of the amendatory act of 1867, or either of them, does not appear. The plaintiff avering that said branch was built pursuant to the authority vested in it by its said charter in full compliance with the provisions and requirements thereof, the defendant denying this averment, in the absence of any proof by the plaintiff, the court, for the purpose of this hearing, finds as a fact that it is not shown that the said branch was built pursuant to the provision or amendments thereto. The said branch is operated and managed by the officers of the plaintiff company, and known as the Scotland Neck Branch of the Wilmington and Weldon Railroad.

In addition to the said Scotland Neck branch, the plaintiff company owns and operates, in the same manner, the following other branch roads in the State: The Clinton and Warsaw branch, 13 miles in length; the Nashville or Spring Hope branch, 18 miles in length; the Wilson and Fayetteville branch, 73.6 miles in length; the Tarboro branch, 17 miles in length, making a total of 206.6 miles, the main road being 162 miles in length. The said branch roads, except the Tarboro
(142) branch, have been built within the past ten years.

The plaintiff company also owns other investments in railroads and other properties, fully set forth in the affidavit of defendant B. I. Alsbrook.

The Railroad Commission for said State, pursuant to the provisions of the Revenue Act, ch. 323, Laws 1891, assessed the portion of the plaintiff's main road and rolling stock from Halifax to Weldon, being the portion thereof acquired from the Halifax and Weldon Railroad as hereinbefore set forth, for taxation at $161,709, and directed the commissioners of Halifax County to place the same upon the tax list of said county for the year 1891.

That said county commissioners, pursuant thereto, levied an *ad valorem* tax of ..... upon said railroad and rolling stock.

That said Railroad Commissioners, pursuant to the Revenue Act aforesaid, assessed that portion of the Scotland Neck branch lying in the said county for taxation at $147,911.72, and directed the said county commissioners as aforesaid to place the same upon the said tax list for said county for the year 1891 as aforesaid. The said county commissioners, pursuant thereto, levied an *ad valorem* tax of $..... upon said branch road and rolling stock. All of which will more fully appear by reference to the records attached to plaintiff's reply herein.

That said tax list was duly placed in the hands of the defendant, sheriff of said county, and he has demanded of the plaintiff payment of said taxes; the same being refused, he threatens to collect the same by distraint.

That the commissioners or officers whose duty it then was to make out the tax list and assess for taxation property in Arcadia, Dalmatia, and Rapids townships in Halifax County during 1869, placed upon the said tax list for said townships for said year the roadbed and rolling stock of plaintiff for the distance for which it passes through the
(143) said townships in said county and assessed the same for taxation.

That said tax list was placed in the hands of John A. Reid, the then sheriff of said county, for collection. That the portion of the plaintiff's roadbed and rolling stock, assessed for taxation by the Railroad Commissioners as hereinbefore set forth, is part of the said roadbed and rolling stock assessed for the year 1869, the same assessment

of 1869 including all of that portion between Halifax and Weldon acquired from the Halifax and Weldon Railroad Company, as hereinbefore set forth.

That at Spring Term, 1870, of the Superior Court of Halifax County, the plaintiff instituted an action against the said John A. Reid, sheriff as aforesaid, for the purpose of enjoining and restraining the collection of said tax assessed against its said property as aforesaid.

That said action was tried and finally determined at the January Term, 1873, of the Supreme Court of said State favorable to said plaintiff, all of which will more fully appear by reference to the transcript and judgment roll in said action entitled *The Wilmington and Weldon Railroad v. John A. Reid.*

The said record is set up by the plaintiff as an estoppel against the present defendant.

The court was of opinion that so much of the tax set forth in the complaint, or as is assessed against that portion of the plaintiff's roadbed and rolling stock lying and being between the towns of Halifax and Weldon, and called in said assessment the "Halifax and Weldon Railroad," is unconstitutional and void—the said property being exempt from any public charge or tax whatsoever by virtue of the several acts of the General Assembly hereinbefore set forth. It is thereupon adjudged that the defendant be and is hereby enjoined and restrained from proceeding to enforce the payment of said tax until the final hearing of this cause and the further order of the court herein.

That the tax assessed and levied as aforesaid against the plain- (144)
tiff upon the Scotland Neck branch is valid. That such branch road is not exempt from taxation under the provisions of the charter of said plaintiff company.

That it is thereupon adjudged that the restraining order heretofore made in this cause in respect to the said tax and the collection thereof be and the same is dissolved and vacated.

That the motion for an injunction in respect thereto be and the same is denied.

That the plaintiff and defendant each pay one-half of the cost incurred by this motion and the proceedings thereunder.

From so much of the foregoing judgment as refers to the Halifax and Weldon Railroad and enjoins the collection of the tax thereon, the defendant appealed to the Supreme Court.

From so much of the said judgment as refers to the Scotland Neck branch and refuses the motion for an injunction restraining the collection of taxes thereon, the plaintiff appealed to the Supreme Court.

Thos. N. Hill and W. H. Day for plaintiff.

R. O. Burton, E. L. Travis, and W. E. Daniel for defendant.

PLAINTIFF'S APPEAL

CLARK, J. The question presented by this appeal is the right of the State to tax the branch railroad from Halifax to Kinston, which was constructed by the plaintiff corporation in 1882, and in the succeeding years.

In *R. R. v. Reid,* 13 Wall., 264, it was held that the charter of the plaintiff, which was granted in 1833, exempted all its property from taxation. The correctness of that decision and its finality, at least in the aspect in which it was then presented to the Court, are not called
(145) in question by this litigation. The defendant, for the purposes of this case, concedes that it protects from taxation under State authority all the property of the main line of said road and such property as may be necessary for its successful operation; but it contends that this branch railroad, extending from Halifax to Kinston, 85 miles, is no part of the property necessary for the operation of the plaintiff company; that it was not contemplated by the charter of 1833, nor within the exemption conferred thereby, nor within the purview of the decision of the United States Supreme Court in *R. R. v. Reid, supra.* The Legislature and the Railroad Commissioners being of that opinion, the latter, under legislative authority, have assessed said branch railroad for taxation. Under proper proceedings the sum assessed on so much of said branch railroad as lies within the county of Halifax has been placed on the tax list for said county. The plaintiff obtained a restraining order against the collection of the tax, which the court below dissolved, and from the latter order the plaintiff appeals to this Court.

The right of taxation is the highest prerogative of sovereignty. Its exercise is necessary to the very life and existence of the State. Its possession marks—regardless of the nominal form of government—the real nature of the government, whether republican, monarchical, or aristocratic. It is the power of the purse to which the power of the sword is a mere sequence. It seems anomalous, therefore, that such a power should be capable of alienation in perpetuity by the Legislature in a free state, and that any portion of it could be irrevocably bargained away for any consideration to a corporation or any one else. More especially in a case like the present, where the contract is claimed to have been made by a Legislature elected for a term of one year, and the alienation of the taxing power is asserted to be perpetual, and that for countless ages,
(146) indeed till the final catastrophe of all things, succeeding generations are to guard and protect at their own expense the property of the corporation without receiving from it any of the contributions which all others are called upon to make for the maintenance and support of a civil government. A contract of such a nature, if it were

possible between private individuals, would be relieved against in any court of equity. The grant of a perpetual exemption from taxation has indeed been held invalid by courts of the highest respectability. *Brewster v. Hough,* 10 N. H., 138; *Mott v. R. R.,* 30 Pa. St., 9; *Bank v. Debolt,* 1 Ohio St., 591; *Knoup v. Bank, ibid.,* 603; *Parker v. Redfield,* 10 Conn., 490; and there are others. In *Mott v. R. R., supra,* the learned Chief Justice says that a sale "to one class of citizens of an exemption from all taxes forever, thus throwing all the public burdens upon others for all time to come, is such a plain, palpable, and open violation of the rights and liberties of the people, and such a clear case of transcending the just limits of legislative power, that the Judiciary is bound to pronounce such an act null and void." In *Brewster v. Hough, supra, Parker, C. J.,* holds the same views and points out the material difference between the right of the Legislature to grant land, or corporate powers, or money, and the right to grant away the essential attributes of sovereignty. The latter, he adds, cannot be subject-matter of a contract. To the same effect are the dissenting opinions of *Catron, J., Bank v. Knoup,* 16 How., 369, and other judges of the United States Supreme Court, in that and in other cases; and especially the notable dissenting opinions of *Chase, C. J.,* and *Miller* and *Field, JJ.,* in *Washington v. Rouse,* 8 Wall., 441. In that case the three judges named (by common consent the ablest men then on that bench) say through the distinguished judge who has so lately passed from among us, full of years and of honors: "We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever (147) the taxing power of the State. . . . If the Legislature can exempt, in perpetuity, one piece of land, it can exempt all land. It can as well exempt persons as corporations." They go on to say that rich men and rich corporations, with the appliances they are known to use, may obtain perpetual exemption "from taxation and cast the burden of government and the payment of debts on those who are too poor or too honest to buy such immunity"; and they say further, "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the court, and that the one we have here considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors shows that it has never received the full assent of this Court, and

referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must be finally abandoned.

This Court, with equal deference to the same authority, is constrained to say, in construing the Constitution of this State in force when the plaintiff's charter was granted, that it did not confer upon the Legislature the power to enact any law which was beyond repeal by its successors, nor as agents of the State was the power confided to them to alienate the sovereign right of taxation irrevocably by bargain or grant. The construction of a State Constitution by its highest court is admitted, by *Taney, C. J.,* in *Ohio v. Debolt,* 16 How., 431, to be binding on the Federal Judiciary, and he places the decision of that case, which sustains the exemption from taxation, on the ground that the decisions of the Supreme Court of Ohio on that subject had been conflicting,
(148) and choice had to be made between them. But there have been no conflicting decisions on this point in this State. It may be noted that the *Dartmouth College case* merely affirmed that a contract by a charter was binding on the State, but did not hold that alienation of the taxing power was subject to contract. The question, however, is not now necessarily before us. This taxation does not concern the "main line," and the defendant concedes, as he must, that the Supreme Court of the United States has decided that such grants of exemption from taxation, though perpetual, are valid if made for an equivalent, and if the contract of exemption is clear beyond a reasonable doubt. The unanimous view of the Court is significantly expressed by *Mr. Justice Field* in *Delaware Tax case,* 18 Wall., 206: "If the point were not already adjudged, it would admit of grave consideration whether the Legislature of a State can surrender this power and make its action in this respect binding upon its successors, any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the Legislature, that doubt must be resolved in favor of the State." The same high court has delivered repeated utterances of the same purport.

"The exercise of the taxing power is vital to the functions of government. Except where specially restrained, the States possesses it to the fullest extent. *Prima facie* it extends to all property, corporeal and incorporeal, and to every business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed, it must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim.

It is only when the terms of the concession are too explicit to (149) admit fairly of any other construction that the proposition can be supported." *Farrington v. Tennessee,* 95 U. S., 779.

"Neither the right of taxation nor any other power of sovereignty which the communities have an interest in preserving undiminished will be held by the Court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken." *Ins. Co. v. Debolt,* 16 How., 416.

Exemptions from taxation are regarded as in derogation of sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissmi juris. R. R. v. Thomas,* 132 U. S., 185.

In the leading case of *Bank v. Billings,* 4 Peters, 514, *Chief Justice Marshall* says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear. We must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by construction."

In *R. R. v. Dennis,* 116 U. S., 668, *Mr. Justice Gray* says: "The rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that neither the right of taxation nor any other power of sovereignty will be held by this Court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken; that exemption from taxation should never be assumed, unless the language used is too clear to admit of doubt; that nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of (150) the Legislature, that doubt must be solved in favor of the State; that a State cannot, by ambiguous language, be deprived of this highest attribute of sovereignty; that any contract of exemption is to be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require; and that such exemptions are regarded as in derogation of common right, and therefore not to be extended beyond the exact and express requirements of the grants, construed *strictissimi juris.*"

In the *Delaware Railroad Tax Case,* 18 Wall., 206, *Mr. Justice Field* said: "Before any such exemption or limitation can be admitted, the intent of the Legislature to confer the immunity or prescribe the limita-

tion must be clear beyond a reasonable doubt. All public grants are strictly construed; nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interest in any other rule; and with special force does the principle upon which the rule rests apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of sovereignty, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this Court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear. *Bank v. Billings,* 4 Pet., 561."

The plaintiff claims that its exemption is not only unlimited as to duration, but as to subject-matter, and that by its charter it has the right to build anywhere, at any time, branch roads whenever it shall be its pleasure so to do, and that such branch roads, wherever (151) constructed within the limits of this State, shall be forever exempted from payment of State, county, or city, or any other tax, and that such exemption extends to all rolling stock, shops, buildings, and other property which it shall use in connection with such branch railroads, whenever or wherever constructed, or to be hereafter constructed. Its claim is that the grant made by the State in the act of 1833 is unlimited as to time, and only limited as to extent by the area of the State, both as regards exemption from taxation and in the grant of the right of eminent domain. Already the branch roads built and operated are near 250 miles, while the main line as chartered from Wilmington to a "point on Roanoke River" is only 154 miles, and other branch extensions are in progress or in contemplation.

At present over 400 miles of railway and the property used therewith, worth probably ten or twelve millions, are claimed to be exempt, and this is small in comparison with what may come. Indeed, the plaintiff contends that it has the right, should it see fit, to parallel every tax-paying railroad in the State, now or hereafter to be built, with its nontaxable branches. This is far removed from the 100 miles of railway from Wilmington to Raleigh and its modest capital of $800,000 as contemplated in the charter. A claim so vast and comprehensive challenges attention and compels scrutiny.

We do not think that the claim thus put forward is plain "beyond a reasonable doubt," nor upon any fair, reasonable construction of the terms of its charter.

The charter, as originally granted, was for the construction of a railroad from Wilmington to Raleigh, a distance somewhat over 100 miles, with a capital stock of $800,000. An act passed in 1835 authorized a change of terminus to "some point on the Roanoke River," and an increase of the capital stock to $1,500,000, and the road was accordingly built to Halifax, 154 miles, and thence by acquisition (152) of the Halifax and Weldon Railroad it was extended to Weldon, a distance of 162 miles from Wilmington. It also authorized the company, as a part of its business, to own and operate steamboat lines and other vessels to Charleston "or elsewhere," and makes other important changes. This amendatory act contains no exemption from taxation. The question whether the radical change in the location, direction, and length of the proposed railroad was not, in effect, a new charter, and its acceptance a release from the exemption from taxation contained in the "original charter" (as it is termed in the amendatory act), is a question which was not presented in *R. R. v. Reid,* quoted above, and it is not necessary that we now consider it. Indeed, we think that a different inference might be drawn from it than that in *R. R. v. Commissioners,* 88 N. C., 519, but the learned judge who wrote that opinion based it on the ground that when *R. R. v. Reid,* 13 Wall., 264, was decided, "it was not suggested" that this radical alteration did not revoke the exemption. It might seem, perhaps, more just to say that the point, not having been presented, was *"res non judicata."* That case (*R. R. v. Reid*) was decided in this Court, *Pearson, C. J.,* delivering the opinion, on the ground that the exemption was not broad enough to cover the franchise, and the reversal in the United States Supreme Court was directed to that view of the case alone, this other not having been raised.

It is very certain that, by many adjudications, so radical a change of route would have released subscriptions made to the original company, and it would hardly seem reasonable that the Legislature meant to confer upon the corporation the right to a perpetual exemption from taxation of any number of lines by sea as well as by land, or to sanction an exemption for the large addition to the capital stock and to the length of the road without an express exemption from taxation (153) of such addition. *Scovill v. Thayer,* 105 U. S., 148; Morawitz, secs. 434, 447, 452. And if there was, in effect (by the act of 1835), a new corporation, the exemption from taxation ceased, since it is not expressly conferred. *Morgan v. Louisiana,* 93 U. S., 217; *R. R. v. Miller,* 114 U. S., 176.

We do not, however, deem it essential to discuss this further, as the question before us may be determined upon the words of the original charter. In that act (1833) the first twenty sections are taken up with provisions for the main line from Wilmington to Raleigh. The 21st

section gives authority to open books of subscription to construct branch roads, such subscription not to exceed $200,000, and to be applied exclusively to the construction of such branch roads.

Sections 22 and 23 are as follows:

"22. Be it further enacted, that all the powers, rights and privileges conferred by the preceding sections upon the said company, in respect to the main road and the land through which it may pass, are hereby declared to extend in every respect to the said company and the president and directors thereof in the laying out, in the construction, and in the use and preservation of said lateral or branch roads.

"23. Be it further enacted, that it shall and may be lawful for the said company to construct a branch to the main road as aforesaid, under the restrictions aforesaid, as soon as the main road has reached the point at which the branch road is intended to be joined with the main road; but they shall not, under any pretense whatever, apply the funds of the company to the construction of a lateral or branch road until the main road is completed, except they be subscriptions specifically made for the branch or lateral road."

The remainder of the charter, in effect, applies to the main line. Sections 21, 22, and 23, which have reference to the branch roads, seemingly having been interpolated, by way of amendment prob-
(154) ably, into the charter as originally drafted.

We do not think section 22 extends to the branch roads the exemption from taxation which is conferred upon the main line from Wilmington to Raleigh, which is granted by section 19, for several reasons:

1. The object of the bounty of the Legislature was to secure the building of a railroad from the capital of the State at Raleigh to its principal seaport at Wilmington. To secure that, the exemption conferred by section 19 is, so far as the language goes, clear and unrestricted; but the language in reference to the exemption of the branch roads is not unrestricted. Had it said "the powers, privileges and rights" conferred on the company "in respect to the main road and the lands through which it may pass" were extended to the branch roads, and stopped there, it would still be a question whether more was intended to be granted than the right to the exercise of the privilege of eminent domain; but the meaning is placed beyond doubt by the superadded words, "in the laying out, in the construction, and in the use and preservation of said lateral or branch road." These are words of limitation. They restrict the extension of the privileges of the main line to those specified purposes, and none of them by any construction can embrace and cover an exemption from taxation.

But, indeed, the point is a thrice adjudicated one. In *R. R. v. Comrs.*, 103 U. S., 1, the plaintiff company had conferred on it "all the powers and privileges necessary for its construction and repair," as were conferred by certain sections (named) of the charter of the B. and O. Railroad Company. One of the sections named conferred upon the B. and O. Railroad Company exemption from taxation. The Court holds that this exemption was "undoubtedly a privilege, but not necessary either to the construction, repair, or operation of a railroad," and hence the plaintiff company could not claim exemption from taxation. Where a railroad company was by its charter invested "for the purpose of making and using said road with all the (155) powers, rights and privileges, and subject to all the disabilities and restrictions" of another company which was perpetually exempt from taxation, it was held that a grant of immunity from taxation did not pass. *R. R. v. Gaines*, 97 U. S., 697. And to the same purport is *Morgan v. Louisiana*, 93 U. S., 217. So, in the present case, the privileges and rights of the main line are extended to the branch roads "in the laying out, in the construction, and in the use and preservation" of said lateral lines. These words do not embrace exemption from taxation. The provisions in regard to the branch roads are to be found in sections 21, 22, 23, and any references in other portions of the act (which is taken up with provisions as to the road proper) to exemption from taxation apply to the main road, and cannot control the manifest limitation as to the branch roads contained in this section.

2. It may be noted in passing that the branch roads, exceeding now by much the main line in length (being near 250 miles as against 154 in the line from Wilmington to Halifax), far exceed the $200,000 of branch roads contemplated by the act of 1833; and they do not appear to have been constructed, as there provided, by opening books of subscription specially for such branch roads. If this had been done, it is manifest that the 250 miles of branch roads were not constructed by means of the $200,000 subscription authorized for that purpose. Had the State intended to exempt the branch roads, it is apparent, from the limitation in section 21 of the capital stock for the purpose to $200,000, that it was not intended to authorize an unlimited number of miles of branch roads, and the consequent exemption of an unlimited quantity of capital from bearing its due share of maintaining the burdens of civil government.

3. An act passed in 1867 authorized the plaintiff to open books for subscriptions to build branch roads to the amount of $25,000 (156) per mile.

This might be deemed an extension of the right to build branch lines, but this act contains no exemption from taxation of the branch

lines or of the additional capital thereby authorized, and they would not be exempted if built thereunder. *R. R. v. Wright,* 116 U. S., 231; *R. R. v. Guffey,* 120 U. S., 569. The plaintiff does not contend that its branch lines have been constructed under the authority of that act.

4. The act of 1833, section 33, provides: "If the company shall not have completed the main road from Wilmington to Raleigh in twelve years thereafter, then the company shall forfeit so much of the rights and privileges hereby created as confer upon the said company the power of extending the said road above the point at which it shall be then constructed; but they shall not forfeit their property and privileges in any manner as to so much of the road as they have completed." None of the branch roads were either begun or finished within said twelve years. One of 16 miles in length was built in 1860, and the other since the adoption of the Constitution of 1868, which forbids the grant of exemption from taxation by requiring that taxation shall be uniform and *ad valorem.* If the branches were an integral part of the main line, their construction was not authorized after the lapse of twelve years. If they do not fall under that limitation, it is questionable whether the right to build them was not lost under the general act by "nonuser" for two years after the completion of the main line. Laws 1836, ch. 10; The Code, 688, 694. The branch roads of the plaintiff are not exempt from taxation, but it is not clear that their construction has been under warrant of law. If it be conceded that the construction of branch roads was authorized after such lapse of time, they could, in contemplation of the charter, be only such as are short feeders to the main line. The branch road from Halifax
(157) to Kinston, whose taxation is here immediately in controversy, is 85 miles in length, nearly parallel to the main line and connecting with five other railroads, and is certainly not such a branch; nor is the Wilson branch, some 150 miles in length, about as long as the main line (with 125 miles in this State), and which is to be used hereafter practically as the main line of the plaintiff's traffic. The failure of the State to collect taxes cannot be taken as an abandonment of its right. No such presumption exists against the sovereign. *R. R. v. Dennis,* 116 U. S., 665.

The decision in *R. R. v. Reid, supra,* is not, as claimed, an estoppel in this case, because it could only be such as to the matter there in controversy, to wit, the taxes levied for that year (1869), the collection of which is enjoined; and, besides, the action is not between the same parties. The decision named has not the force of a precedent, because the scope of that decision did not embrace the branch roads, all of which, except one short line, have been built since, and that one branch was not in the county the tax of which was enjoined. It is also not a

precedent even as to the main line, upon any material point which was not then raised or passed upon by the court.

The act of 1833 must be limited by the Constitution of the State then in force, which contained a provision forbidding "monopolies and perpetuities." The construction placed by State courts upon the Constitution and laws of a State are held binding by the Federal courts. Whether this provision has reference solely to the prohibition of restrictions upon alienation, or whether viewed in the light of the history of its adoption and judged by the context, it is meant, as has been suggested, to prohibit the grant by the Legislature of perpetual and exclusive privileges, is a matter which is not now before us, and which cannot be brought before us in this collateral manner. (158) It can be raised only by a direct proceeding by the Attorney-General, if so advised, in the nature of a *quo warranto* to test the validity of the charter on that ground. We forbear any expression of opinion, as the matter is not before us.

Affirmed.

DEFENDANT'S APPEAL

CLARK, J. The original charter of the plaintiff company was granted in 1833, under the name of The Wilmington and Raleigh Railroad Company, for the purpose of building a railroad from Wilmington to Raleigh. This act also authorized the construction of branch roads. By an amendatory act in 1835 the company was authorized to construct from Wilmington either to Raleigh or "to some point at or near the Roanoke River." This election was not then made, but at some subsequent period (it does not from the pleadings appear when) it was exercised by building to Halifax in lieu of to Raleigh. By the act of 1833 a branch road could only be built after the main line reached the point of junction; but by section 3 of the act of 1835 it is provided that the company may construct branch roads, under the rules and regulations set out in the act of 1833, "either before or after they have completed the main railroad aforesaid." In 1833 the Halifax and Weldon Railroad was chartered. Its charter contained no exemption from taxation. This road was completed its whole distance from Halifax to Weldon, a distance of 8 miles, but, having no rolling stock of its own, permitted the Portsmouth Railroad Company to run its cars in 1836 over its roadbed and track. In January, 1837, the Legislature passed an act authorizing the Halifax and Weldon Railroad Company to subscribe their stock to the Wilmington and Raleigh Railroad Company, and by an agreement between the two companies, executed 14 February, 1837, this was done, it being stipulated therein (159) that "the union of the two roads" should be made at the town of Halifax or as near thereto as practicable. By the act of 1837,

authorizing the consolidation, it is provided: "Upon the subscription of the stock held by the stockholders in the Halifax and Weldon Railroad Company, in the books of the Wilmington and Raleigh Railroad Company, all the property, real and personal, owned and held by the Halifax and Weldon Railroad Company, shall vest in and be owned and possessed by the Wilmington and Raleigh Railroad Company aforesaid, and be owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company is owned, held and possessed, and the road which may have been built or partly built by the Halifax and Weldon Railroad Company shall thenceforth be deemed to all intents, as well criminal as civil, a part of the Wilmington and Raleigh Railroad." Whether the proper construction and the effect of the provision that the property of the Halifax and Weldon Railroad shall be owned, held and possessed "in the same manner" that all the other property of the Wilmington and Raleigh Railroad Company is owned, held and possessed confers on the former an irrevocable exemption from taxation is the question presented by this appeal.

By the charter of the Wilmington and Raleigh Railroad Company its main line between Wilmington and Raleigh was exempt "forever from all taxation." The power of taxation being an element pertaining to sovereignty, the power of any legislature to alienate it, so as to bind forever all future legislatures, and thus perhaps cripple or embarrass unborn generations, has been much doubted; but it has been decided by the Supreme Court of the United States that it may be done if clearly expressed, and if granted in return for an equivalent received by the State. The Legislature subsequently, as stated, author-
(160) ized a change of terminus from Raleigh to "some point on Roanoke River," which by the election of the company was the town of Halifax; to which point it was built and there made the union of the two roads when it absorbed the Halifax and Weldon Railroad. The Wilmington and Raleigh Railroad Company, in their agreement with the Halifax and Weldon Railroad Company, agree upon "the union of the two roads" at Halifax. The latter was "a point on the Roanoke River," and thence the Halifax and Weldon Railroad ran up the river and parallel with it to Weldon. By virtue of the election made to change its terminus from Raleigh to Halifax, the plaintiff claims that the road from Wilmington to Halifax (instead of from Wilmington to Raleigh) became exempt from taxation. By the charter of 1833, while the main road between the two termini, Wilmington and Raleigh (afterwards Wilmington and Halifax), was exempted from taxation, the branch roads authorized by said acts were not exempted from taxation, as we have held in the plaintiff's appeal in this case. We think that

the question whether the act authorizing the Wilmington and Raleigh Railroad Company to acquire the Halifax and Weldon Railroad Company exempted the property thus acquired from taxation must be answered in the negative, for several reasons:

1. Though the earnest contention that the right of taxation being an inherent right in the sovereign people, and that no temporary agency, such as a legislature, elected for a term of one year, could alienate it or any part of it in perpetuity, and that their mandate only gives power to levy a tax or exempt from taxation during their term of office and until another legislature shall act, has not been sustained by the United States Supreme Court, still it holds that the alienation of so important a right will only be valid "when the grant is clear beyond reasonable doubt." *Mr. Justice Field* in *Delaware R. R. Tax Case,* 18 Wall., 206. And unless the grant is shown "by clear and unambiguous language, which will admit of no reasonable construction (161) consistent with the reservation of the power (of taxation), the exemption claimed must be denied." *Mr. Justice Gray* in *R. R. v. Dennis,* 116 U. S., 668.

2. If the act of 1837, authorizing the acquisition of the Halifax and Weldon Railroad Company's property, had the effect to create a new company, whose line became thereupon extended from Wilmington to Weldon, thereby securing the operation of a continuous road between those points, the new charter thus granted and all claims to exemption thereunder have long since expired. Such charter, if it be one, was granted 10 January, 1837, and was subject to the provisions of the general act, ratified 10 December, 1836, which provided that "No body corporate hereafter to be established in this State shall exist for a longer term than thirty years unless otherwise provided in the act creating the same." Laws 1836, ch. 10. *Railroad v. Maine,* 96 U. S., 499. If, however, this was not a new charter, it was not a contract, for the State received no equivalent or consideration therefor, nor any promise or obligation. It did not secure the building of a new railroad, for the building of the railroad from Wilmington to Halifax had already been contracted for by act of 1835, and the railroad from Halifax to Weldon had already been built and completed, and was being operated by the Portsmouth Railroad Company. The right granted the Halifax and Weldon Railroad Company to subscribe their stock to the Wilmington and Raleigh Railroad Company was therefore a mere privilege, a benefit sought for by them and granted by the State as a mere gratuity, and if the language used is broad enough to cover the property so transferred, with the exemption from taxation claimed under prior acts by the Wilmington and Raleigh Railroad Company, still, being

a mere privilege or gratuity, the State possessed the right to withdraw it and to tax the transferred property, as it has since authorized (162) to be done by several acts of the Legislature. The Code, sec. 3677; Laws 1891, ch. 323, sec. 6. This has often been held. In *Tucker v. Ferguson,* 22 Wall., 527, it is held that "An act of the Legislature exempting property of a railroad from taxation is not a contract to exempt it, unless there is a consideration for the act. An agreement where there is no consideration is a nude pact. The promise of a gratuity spontaneously made may be kept, changed, or recalled at pleasure; and this law applies to the agreements of states made without consideration, as well as to those of persons." To same effect are *Rector v. Howard,* 24 How., 300; *R. R. v. McGuire,* 20 Wall., 36; *R. R. v. Supervisors,* 93 U. S., 595; *Welch v. Cook,* 97 U. S., 541; Morriwitz Pr. Corp., secs. 1053 and 1054. In *R. R. v. Philadelphia,* 101 U. S., 528, *Mr. Justice Clifford* says: "Exemptions of this kind, however, are to be strictly construed, the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms, and that in order that it may be effectual, it must appear that the contract was made in consequence of some beneficial equivalent received by the State, it being conceded that if the exemption was granted only as a privilege, it may be recalled at the pleasure of the Legislature." Cooley Const. Lim. (4 ed.), 342; Cooley Taxation, 146.

The Halifax and Weldon Railroad was already constructed and was being operated by the Portsmouth Railroad Company. If, therefore, the act authorizing its transfer to the Wilmington and Raleigh Railroad Company can be construed as conferring upon it an exemption from taxation, a quality which did not before attach to the transferred property, such grant of exemption was a mere privilege, not a contract with the State, and therefore revocable. This case differs from *Humphrey v. Pegues,* 16 Wall., 244, for, there, no inducement had been sufficient to procure the road to be built till the exemption was (163) granted, and on the faith of that grant it was built.

3. The authority given the Wilmington and Raleigh Railroad Company to acquire this additional property would not *per se* exempt it from taxation, since the necessity for the passage of such act shows it was not such property as it was authorized to acquire under, nor for the purpose of, its original charter, for which it was granted, *i. e.,* for constructing a railroad from Wilmington to Raleigh. The words in this act, that upon the acquisition by the Wilmington and Raleigh Railroad Company of the Halifax and Weldon, the road built by it from Halifax to Weldon "shall thenceforth be deemed to all intents, as well criminal as civil, a part of the Wilmington and Raleigh Railroad Company," mean simply that the railroad from Halifax to Weldon

became fully and completely the property of the Wilmington and Raleigh Railroad Company. But that did not confer exemption from taxation, for the said company would own fully and completely its branch roads, which were not exempt. The exemption must depend upon the other words of the act, the language of which is that the property acquired from the Halifax and Weldon Railroad Company must be held "in the same manner" as the other property of the company. This does not necessarily, beyond a reasonable doubt, mean that it is clothed with the same immunity from taxation. Exemption from taxation is an immunity, not a part of the *habendum*. "In the same manner" doubtless referred to section 14 of the charter of the Wilmington and Raleigh Railroad Company, which specified that the property should be held in fee simple, and to the other provisions specifying the uses which the company should make of its property. *R. R. v. Georgia,* 92 U. S., 665.

4. If it were true, however, that "in same manner" refers to privileges and immunities granted to the company, as well as to the manner of holding its property, still, as certain of its property was exempt from taxation, and certain other of its property was not exempt (as we have held), to which class of its property does "in same manner" refer? By the settled rules of construction above quoted, the newly absorbed railroad must be assimilated to the property (164) not exempt.

5. It will be noted that the act of 1837 does not authorize the Halifax and Weldon road to be made a part of the "main line" of the Wilmington and Raleigh road; it became the property of and a part of the Wilmington and Raleigh road; but so it would if it was acquired as a branch or connecting road. There is nothing in the act inconsistent with its being a part of a branch line, which, the year before, by the act of 1835, the Wilmington and Raleigh road had been authorized to construct "before constructing the main line." Indeed, the retention in this act of 1837 of the title "the Wilmington and Raleigh" company would indicate as much. A branch from some point on the Wilmington and Raleigh road (as chartered) to Halifax, and then extended by this purchase to Weldon (so as to connect by such branch with other roads), would not be as long a branch road as some other branch roads which this company has constructed and is now operating; nor would the fact that the company, some years later (after having elected to change its terminus to Halifax), did construct its road to Halifax, and used the Halifax and Weldon road to connect with other roads northward, make it in law a part of its "main line," so as to exempt it from taxation. We know, as a current fact, that the same company, having built a branch road from Wilson through Fayette-

ville southward, has made arrangements by which that branch road, in point of fact, will henceforth be the "main line"; but in law and in purview of its charter the "main line," so far as exemption from taxation is concerned, is restricted to the road between its termini as authorized by its charter—Wilmington and Halifax. The action of the corporation in using and operating the road from Halifax to Weldon,
(165) and from Wilson to Fayetteville, as integral parts of its through line, was justified by the march of events; but that does not make these additional roads part of its "main line" from Wilmington to Halifax so as to exempt them from taxation.

That twenty years after the act authorizing the acquisition of the Halifax and Weldon road the name of the Wilmington and Raleigh Railroad Company was changed to the Wilmington and Weldon Railroad Company has no bearing on this question, though it has no doubt led to the misconception concerning it. That act (Pr. Laws 1854-55, ch. 235) has no clause of exemption. It may have made the road from Halifax to Weldon a part of the main line from Wilmington to Weldon, but it did not make it a part of the main line of the Wilmington and Raleigh road, which extended from Wilmington to Halifax, and which only was exempted from taxation. The consolidation of a railroad whose property is exempt from taxation with one whose property is not so exempt does not extend the exemption to the entire consolidated property in the absence of a clear and unmistakable provision in the act to that effect. *Delaware Tax Case,* 18 Wall., 206; *Tomlinson v. Branch,* 15 Wall., 406; *R. R. v. Georgia,* 92 U. S., 665.

The exemption here claimed is the perpetual exemption from all taxes, State, county, and municipal, of the railroad from Halifax to Weldon by virtue of an exemption from taxation of the road from Wilmington to Raleigh, and of the subsequent act authorizing the consolidation with it of the road from Halifax to Weldon, which latter had already been built and completed without any exemption from taxation in its charter. The act of consolidation makes no reference, as we hold, to the exemption being extended to the absorbed road, and had it done so it would have been a mere privilege, having been granted without any consideration or benefit received by the State in exchange. While the act does provide that the newly acquired property shall be to all
(166) intents the property of the Wilmington and Raleigh Railroad Company, it does not make it a part of the main line, and there is nothing which shows that it was not to be used as a branch road, or a connecting road; and, indeed, the latter seems to have been the purpose, as the name of the Wilmington and Raleigh Railroad Company was still retained. If to be used as a branch or connecting road, the property clearly was not intended to be exempt. It could hardly have

been intended to make a railroad from Halifax to Weldon a part of a main line, either from Wilmington to Raleigh, or from Wilmington to Halifax, which were the authorized termini. In the absence of a clear, unambiguous intent to extend the exemption from taxation to the railroad from Halifax to Weldon, and of any consideration or benefit derived by the State, if it was so intended, the enormous and unusual grant of a perpetual exemption from all civil dues for the maintenance of government, while claiming the benefit of the protection it extends, cannot be upheld by any surmise or inference as to the probable intention of the Legislature when it conferred upon the plaintiff company the privilege of acquiring the Halifax and Weldon road.

For these reasons we think that the judgment of the court below, so far as it holds that the line from Halifax to Weldon and the property used therewith are forever exempt from taxation, should be reversed.

The *pro rata* part of the rolling stock, commensurate with such part of the road proportioned to the length of the whole line operated by the plaintiff, is also liable to taxation.

As already stated in the plaintiff's appeal, the decision in *R. R. v. Reid, supra,* is not, as claimed, an estoppel in this case, because it could only be such as to the matter there in controversy, to wit, the taxes levied for that year (1869), the collection of which is enjoined; and, besides, the action is not between the same parties. The decision named has not the force of a precedent, because the scope of that decision did not purport to embrace the question of law which is now presented, but which was not then raised or passed upon by the court.

Error. (167)

MERRIMON, C. J., dissenting: Without here stating at length the reason for it, I am of opinion that the State cannot by contract or otherwise irrevocably part, in whole or in part, with one of its essential attributes, as, for example, the power of taxation. I am therefore of opinion that the Legislature had not power to exempt perpetually and irrevocably the plaintiff's property from taxation, as it undertook to do; but the Supreme Court of the United States expressly decided otherwise in *R. R. v. Reid,* 13 Wall., 264. That court had jurisdiction and authority to make such decision. That decision is authoritative and as well conclusive, unless the Court shall hereafter deem it necessary to overrule it and other like cases.

It is contended, however, that the case just cited does not embrace the "branch roads" of the plaintiff and the property appurtenant to

and connected therewith. It seems to me clear that this view is founded in misapprehension. It does not appear from what the Court said or decided. It said pertinently, "There is no difficulty whatever in this case. The General Assembly of North Carolina told the Wilmington and Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvements for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation."

The statute expressly allows the plaintiff to construct "branch roads." The capital stock taken to build them is made part of the capital stock of the company, and the owners of such stock are made stockholders of the plaintiff, and the branch roads constitute part and parcel (168) of its property. There is no provision of the plaintiff's charter that in terms, or by reasonable implication, excepts the "branch roads" from the clause that exempts its property from taxation. That clause is general, and provides and declares that "All the property purchased by the said president and directors, and that which may be given to the company, and the works constructed under the authority of this act, and all profits accruing on the said works and the said property shall be vested in the respective shareholders of the company and their successors and assigns forever, in proportion to their respective shares; and the shares shall be deemed personal property; and the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." The terms and phraseology thus employed are plain, broad, and sweeping, and the purpose is as broad as the language. They vest all the property, including "the works constructed under the authority of this act," in the shareholders of the plaintiff, and exempt the same from taxation. It is impossible for me to misunderstand the meaning and compass of a provision which, in my judgment, is so strong and plain. And the purpose is obvious—it was to encourage the building of the railroad and "branch roads" thereof reaching out short distances from the main road at a time when the building of railroads was in its infancy, and it was difficult to induce capitalists to invest their money in such enterprises.

I abstain from a general discussion of the subject, and regret that I am constrained to dissent from the judgment of the Court.

Cited: *S. c., post,* 437; *Chemical Co. v. Bd. of Agriculture,* 11 N. C., 137; *S. v. Womble,* 112 N. C., 872; *United Brethren v. Comrs.,* 115 N. C., 574, 579; *Comrs. v. Webb,* 160 N. C., 596; *Cox v. R. R.,* 166

N. C., 389; *Jackson v. Commission,* 130 N. C., 425; *S. v. Cantwell,* 142 N. C., 609, 615, 618; *Pullen v. Corporation Commission,* 152 N. C., 574, 579; *Comrs. v. Webb,* 160 N. C., 596; *Cox v. R. R.,* 166 N. C., 655; *Wagstaff v. Highway Commission,* 177 N. C., 360; *Brown v. Jackson,* 179 N. C., 371.

NOTE: This case was affirmed on Writ of Error, *R. R. v. Alsbrook,* 146 U. S., 279.

(169)

MARY RAY v. THE COMMISSIONERS OF DURHAM COUNTY ET AL.

Deed—Correction and Reformation—Purchaser for Value—Trust.

1. In 1867 P. executed a deed of which the operative words were "I do hereby give and grant to L. P. one lot of land . . . to contain two acres of land, reserving to myself possession during life": *Held,* in the absence of evidence that words of inheritance were omitted by mistake, to convey only a life estate; and there being nothing apparent in the contents of the instrument inconsistent with an intention to convey a life estate, a court of equity would not decree a correction for the purpose of conveying the fee.

2. The fact that the executor of the life tenant purchased the land from the representative of the vendor could not constitute him a trustee for the heirs or devisees of the vendee.

3. A purchaser for value and without notice will be protected against a latent equity to have a deed reformed.

ACTION removed from Durham and tried at August Term, 1891, of ORANGE, before *Winston, J.*

The plaintiff alleged that in 1873 one Lewis Pratt died leaving a last will and testament, in which it was provided as follows: "It is my wish and desire that my wife, Elizabeth Pratt, shall occupy the house she now has during her natural life. It is my wish and desire that my son Lewis Jenkins shall have the lot on which I now live at the death of my wife, the said Lewis Jenkins paying my daughter Mary Little (Mary Ray, the plaintiff) one-third of the cash valuation of the same or said lot." The said Lewis Jenkins was appointed executor of said will and duly qualified as such. The object of this action is to subject the said lot to a charge to the extent of one-third of its value, as provided in the will. The defendant denies that the plaintiff has any interest in said property, pleads an estoppel by former action, and adverse possession under color of title for over seven years. It appears that Lewis Pratt was a slave of W. N. Pratt, who, in recognition of

(170) his faithful services (as is indicated by his will of 1855 by which he provided that said Lewis should be free), did on 3 May, 1867, execute to him a deed conveying the said lot, which deed is as follows: "Know all men by these presents, that I, William N. Pratt, for and in consideration of the faithful services rendered me while a slave by Lewis Pratt (now a freedman), I do hereby give and grant unto said Lewis Pratt (freedman), one lot of land embracing the shop he now occupies and the house in which he resides, and to contain two acres of land, reserving to myself possession during my life. In witness whereof, I hereunto set my hand and affix my seal, this 3 May, 1867. W. N. Pratt."

It also appears that in 1873 John Burroughs as executor of W. N. Pratt, under the authority of his will, sold the said lot at public auction, when Thomas Webb became the purchaser, to whom a deed in fee was executed, said executor giving notice that he made no guarantee of title, and only sold the interest of W. N. Pratt; that in March, 1876, the said Webb conveyed the lot in fee to said Lewis Jenkins, who conveyed the same in fee to the town of Durham; and that in 1883 said town conveyed the same in fee to the defendant, the county of Durham.

It also appears that in 1876 Lewis Jenkins and Elizabeth Pratt brought an action against John Burroughs, executor of W. N. Pratt, and the heirs at law of said Pratt, for the purpose of reforming the said deed, alleging that the same was intended to convey a fee-simple estate, and that the words of inheritance were omitted by reason of the mistake or ignorance of the draughtsman. The defendants in that action denied these allegations, and after a reference to an arbitrator it was formally adjudged, at Spring Term, 1878, that the plaintiffs take nothing by their suit, the award being that the allegations as to mistake were not sustained by the evidence. The complaint and answer in said suit are made a part of the replication in the present action. His Honor rendered judgment in favor of the defend-
(171) ants, and the plaintiff appealed.

J. B. Mason for plaintiff.
J. S. Manning and J. Parker for defendants.

SHEPHERD, J., after stating the case: As the plaintiff claims under the will of Lewis Pratt, it is necessary to determine what estate the said Lewis had in the land which is the subject of this action.

It is insisted that he was the owner in fee simple because the jury found in the response to a part of one of the issues that W. N. Pratt "gave him the land described in the complaint, and in (the) manner therein stated as held and occupied by him." Turning to the com-

plaint, we find nothing which discloses the source of the alleged title; but assuming that the issue intended to refer to the replication, we are unable to perceive anything in that pleading which confers any title upon the said Lewis, except the deed executed to him in 1867 by W. N. Pratt, the owner in fee of the property. From 1855 up to the execution of the above mentioned deed, the said Lewis, it appears, was occupying the property by the permission of the owner, W. N. Pratt; and even had he been occupying it adversely and was capable of holding it, there being no color of title, and the period of his entire possession up to his death being less than twenty years, no presumption of ownership could have arisen.

It is clear, therefore, that the only title which the said Lewis had acquired was conferred by the deed executed by W. N. Pratt in 1867, and we must now inquire whether that deed was efficient to convey more than an estate for life. There being a total absence of words of inheritance, it is too plain for discussion that at law the deed conveyed but an estate for life, and there being no evidence that words of inheritance were omitted by mistake, it must follow (172) that the deed cannot be corrected unless upon an inspection of its contents the Court should, in the exercise of its equitable power, decree that it be reformed under the principle declared in *Vickers v. Leigh,* 104 N. C., 248. In that case the language of the deed was quite different from the one now under consideration. There, from the peculiar provisions which were fully discussed in the opinion of the court, it was plainly manifested that the grantor could have had no other intention than to convey an estate in fee. The same is true of the cases of *Saunders v. Saunders,* 108 N. C., 327, and *Moore v. Quince,* 109 N. C., 85. In the former the sale was by virtue of a power under a will, and it will be seen from the context of the deed that the evident purpose was to convey all the estate of the testator; besides, the word "heirs" was used in the warranty. In the latter case the conveyance was to the trustee and his executors and administrators and the purposes of the trust required that the trustee should take an estate in fee. Quite different is the case before us. Here there are no words of inheritance, and there is nothing whatever to indicate a purpose to convey the fee, except the simple reservation of the possession for the life time of the grantor. This, while affording a very strong inference that a fee was intended, is nevertheless entirely consistent with a purpose to convey an estate for life, the possession of the grantee being postponed until the death of the grantor. In the cases aboved cited the terms of the deed were clearly inconsistent with an intention to convey only an estate for life, and this, it would seem, is the principle upon which those decisions are founded. We are very sure that it does not extend

to a case like ours, and in this we are not only sustained by the older decisions, but also by the recent case of *Anderson v. Logan,* 105 N. C., 266, in which the *habendum* was as follows: " To have and to hold all of our interest in the above mentioned lot from ourselves,
(173) our heirs, and all that may claim under us and our assigns forever." There was no pleading alleging any ground for equitable relief, but the Court strongly intimated that had there been such pleading the language used would not bring the case within the principle declared in *Vickers v. Leigh, supra.* To hold that such a deed as the one before us warrants the Court in decreeing its correctness by a simple inspection of its contents would certainly be going far beyond any of our previous decisions, and we are not prepared to extend the doctrine beyond the limits of actual precedent.

This would seem to put an end to the case, but the counsel for the plaintiff very earnestly insists that because Lewis Jenkins, the executor of Lewis Pratt, about three years after the death of his testator, purchased the land for himself of one Thomas Webb (who had about three years previously purchased the reversion of the executor of W. N. Pratt), the said Lewis Jenkins, being executor, must have held the same as a constructive trustee and according to the terms of the will. It is not easy to understand, in the absence of any evidence to show a mistake in the deed, and where its terms are such that the Court will not upon its face decree its reformation, how the said Lewis Jenkins could in any sense be a trustee. The estate of the testator in the said property ceased upon his death, and no trust as to the same could have developed upon his executor. Conceding, however, that he was a constructive trustee, so that the purchase of an outstanding title would have enured to the benefit of his *cestui que trust,* and that there was some latent equity (such as the right to have the deed reformed), how is it possible that the defendant, a *bona fide* purchaser of the legal title, could have been affected therewith unless it were shown that it purchased with notice? There is no evidence of notice here. Plainly, the suit to reform the deed was no notice, as the executor of W. N. Pratt had conveyed to Webb before it was instituted. Neither
(174) was the possession of Lewis Jenkins, who purchased of Webb, constructive notice, as his possession was consistent with his legal title, and there is no evidence of any actual notice to the town of Durham, nor to its purchaser, the county of Durham. There was, then, no constructive notice by possession of anyone claiming against the legal title, and there was none by reason of the suit, for by a decree therein it had been adjudged that the deed conveyed but a life estate; and lastly, there is an utter absence of evidence to show any equity existing in the plaintiff or any one else, even if there had been actual notice of

any claim. Assuming, then, as we have done, that the plaintiff was not estopped by the former suit, she not being a party thereto, we are of the opinion, for the reasons given, that she cannot recover. We commend the zeal of counsel in his efforts to establish the rights of his client; but if these have been lost by reason of the death of witnesses or other adventitious circumstances, we do not see how we can grant any relief, especially as against the defendant, which for aught that appears is a *bona fide* purchaser without notice.

Affirmed.

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(175)

THE NORTH CAROLINA RAILROAD COMPANY v. W. H. J. GOODWIN.

Costs—Condemnation of Land.

The counsel fees authorized to be taxed in proceedings to condemn lands for railway uses under section 1946, *The Code*, can be allowed and taxed only in those cases where the Court, under section 1948, is directed to appoint an attorney to represent a party in interest who is unknown or whose residence is unknown.

PROCEEDING in the Superior Court of WAKE to condemn lands required by plaintiff in the construction of a branch of its road.

The defendant was a resident of Wake County, and received the amount of compensation awarded by the commissioners as damages to his property. Thereupon he made a motion for allowance of his counsel fees, to be taxed by the court. The clerk refused the motion, and upon appeal this judgment was affirmed by *Whitaker, J.*, and defendant again appealed.

E. C. Smith and W. H. Pace for plaintiff.
J. B. Batchelor and S. G. Ryan for defendant.

CLARK, J. By chapter 41, Laws 1879, the taxation of attorney's fees in the bills of cost, which had theretofore been allowed, was prohibited. In The Code of 1883 no provision for taxation of counsel fees was made except in section 1948, which permits such allowance to counsel appointed by the court to represent the rights of any party in interest who, or whose residence, is unknown, in proceedings to condemn real estate for railroad purposes. The reference in section 1946 to the "costs and counsel fees allowed by the court" is to such counsel fees as the court was authorized by law to tax, to wit, in the case mentioned in section 1948. In the present instance the counsel whose

(176) fees are sought to be taxed against the railroad company was not appointed by the court to represent the owner of an interest in real estate who, or whose residence, was unknown. The motion to tax an allowance in his behalf against the opposite party was therefore properly denied. The question of the allowance of counsel fees not against the opposite party, but out of a trust fund which he is employed to protect, is considered and discussed in *Chemical Co. v. Johson,* 101 N. C., 223; *Gay v. Davis,* 107 N. C., 269; *Mordecai v. Devereux,* 74 N. C., 673.

Affirmed.

Cited: Loven v. Parson, 127 N. C., 302; *Knights of Honor v. Selby,* 153 N. C., 208; *Durham v. Davis,* 171 N. C., 307; *In re Stone,* 176 N. C., 343.

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

Insurance—Contract—Waiver—Pleading.

1. An insurance policy, covering several distinct kinds of property, is not a single contract, but the assured may maintain an action to recover the amount insured upon any one of the articles specified, although he may have alleged a total destruction of all the property in his complaint.

2. The insured may also maintain an action for the amount insured upon some of the property, although the insured has demanded a reference to arbitration, under a stipulation in the policy as to the other insured items, it appearing that the insured had abandoned his claim as to them.

3. If a party relies for his recovery upon a waiver of some material condition or stipulation connected with the cause of action, he should set forth such waiver in his pleadings; but if in the progress of the trial it becomes necessary for him to establish a waiver of some incidental requirement on his part, not affecting the substantial merits of the action, he may prove it without having pleaded it.

(177) ACTION, tried at April Term, 1891, of WAKE, *Winston, J.* This action is founded upon a policy of insurance whereby the defendant insured the plaintiff as to certain property therein specified against loss by fire. The following is so much of the policy as need be reported:

This Policy of Assurance Witnesseth, That the Pioneer Manufacturing Company, having paid to the Phœnix Assurance Company of

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

London the sum of $84, for insurance from loss and damage by fire (subject to the agreements and conditions herein contained) of the property hereinafter described, in the place or places herein set forth and not elsewhere, to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely:

$166.66⅔ on the one-story frame, tin-roof, main factory building, with sheds and engine-room attached.

$1,066.66⅔ on fixed and movable machinery, including sawmill and fixtures, saw table, shafting, gearing, belting, and all tools and implements contained in above described building.

$533.33⅓ on engine and two boilers, including inspirator and connections, in engine-room attached to main building.

$26.66⅔ on water-tank and connections, about ten feet south of main building.

$66.66⅔ on frame, tin-roof shed, 20 feet north of main building.

$133.33⅓ on material manufactured and in process of manufacture, under shed and in storehouse attached.

$20.00 on frame, tin-roof, office building, about 20 feet from main building.

$20.00 on platform scales and fixtures, therein and thereto attached.

$66.66⅔ on frame, shingle-roof building, attached to shed above described, and used as storage-house.

. . . on plow and machinery castings contained in said (178) storehouse.

$2,100.00 1 year @ 4 per cent, $84.

All occupied by the assured for the manufacture of articles from hardwood, and known as the "Pioneer Manufacturing Company's Works," situated on grounds leased by them on west side of West Street, near North Carolina Railroad depot, in the city of Raleigh, N. C. It is understood that a night watchman shall be kept on duty during the life of this policy. $2,100.00 total. $13,650.00 additional concurrent insurance.

Now know all men by these presents, That from 2 October, 1886, at 12 o'clock noon, to 2 October, 1887, at 12 o'clock noon, the capital stock and funds of the said Phœnix Assurance Company of London shall be subject and liable to pay, reinstate, or make good to the said assured, . . . heirs, executors or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned, and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property.

The facts and grounds of exception necessary to an understanding of the opinion sufficiently appear in the latter.

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

R. H. Battle and S. F. Mordecai for plaintiff.
J. W. Hinsdale for defendant.

MERRIMON, C. J., after stating the case: The court properly declined to submit to the jury the issues of fact proposed by the defendant in respect to "the engine, two boilers with inspirator and connections." These things had been eliminated from the complaint before the trial began, for reasons that will presently be stated. They were not in question, and hence all such issues were immaterial. Indeed, it would have been improper to submit them, because they would have
(179) tended, more or less, to mislead and confuse the jury as to the inquiries they were charged to make.

The plaintiff alleged in its complaint the total loss by fire of the property insured by the policy sued upon, except an engine and two boilers, which were greatly damaged. Before the trial began the court allowed the plaintiff to enter on the record that it abandoned so much of its claim and demand as had reference to and embrace "the engine, two boilers, inspirator and connections." The defendant insisting that the cause of action was single and not divisible, excepted. This exception is not tenable. The policy of insurance sued upon embodies a single contract of insurance, but it does not insure the several articles and kinds of property specified and classified in it as constituting a single item and subject of insurance. It plainly, and of purpose, classifies and specifies numerous items of property and the sum of money for which they are severally insured, the purpose being to make order, convenience, and, in part at least, to enable the insured on the one hand to sue for and recover damages as to any of the several items, and, on the other hand, to the end the insurer may the more readily protect himself by showing that certain items were not destroyed, or were not wholly so, or were not injured at all. Although the plaintiff alleged a total loss of the property, if on the trial he could not prove such loss, he might prove a partial loss, that certain items specified were wholly lost, that others were injured and rendered valueless or partially so, and the defendant might show as a matter of defense that certain items or pieces of property were not destroyed, or only slightly damaged. The nature and terms of the contract of insurance in this case and the purpose of the action contemplate and intend that the plaintiff may recover, and the defendant may make defense as just indicated. The formal entry of abandonment of claim as to the particular things mentioned was really not necessary, but it did no harm or prej-

udice to the defendant; indeed, it served the good purpose of (180) putting controversy as to them out of the case; and thus out of the case, all issues as to them and all evidence bearing upon and in respect to them were unnecessary, irrelevant, and improper. The plaintiff formally ceased to claim damages under the contract on account of them.

The policy of insurance, among other things, provides that "If at any time differences shall arise as to the amount of loss or damage, or as to any question, matter or thing arising out of this insurance, every such difference shall, at the written request of either party, be submitted at equal expense to each of the parties, to two competent and impartial persons," etc. Differences arose as to the extent of loss and damage as to "the engine and two boilers, with the inspirator and connections," and the defendant demanded in writing that these differences be submitted as above provided. The plaintiff declined to so submit the same. Afterwards, in this action, it was decided that the plaintiff could not maintain its action until such submission had been made. (See *Manufacturing Co. v. Assurance Co.,* 106 N. C., 28.) The defendant insists that although the plaintiff abandons its claim as to the things last mentioned, it cannot maintain this action, because it so refused to submit the difference mentioned. But the policy does not so provide, nor, as we have seen, is there anything in the nature and purpose of the contract embodied in it that prevents the plaintiff from maintaining his action as to so much of the cause of action alleged as is not embraced by the defendant's demand that certain specified differences be submitted to arbitration. This action was not founded solely upon the latter account; its compass and purpose extended to all damages sustained by the plaintiff on account of all loss insured against by the policy. If the plaintiff could not for any cause recover as to loss sustained on a particular account, he might nevertheless recover as far as the merits of the case in his favor would allow. The fail- (181) ure to maintain the action successfully as to damages sustained on a single account, among many, did not necessarily put an end to it. It continued for all proper purposes. Nor did this Court decide otherwise when this case was before it by a former appeal. For the present purpose, it decided no more than that the action could not be maintained as to so much of the cause of action as was embraced by the defendant's demand that certain differences be submitted to arbitration. We cannot conceive of any just or even plausible reason why, as to a second cause of action or other separate item of damage sustained, the action might not be made available. Indeed, it ought to be continued until it completes its purpose as nearly as practicable. We are not called upon to decide whether the plaintiff could in any case maintain

a second action upon the same policy as to items of loss not embraced by this action, but embraced by the policy.

The defendant alleged in its answer that the plaintiff had failed upon demand to furnish it "with plans and specifications of the building destroyed," and "with plans and specifications of the one-story frame, tin-roof, main factory building with shed and engine-room," and that it also failed to furnish "the duly verified certificate of some reliable and responsible builder as to the actual cash value of the building insured immediately before the fire." The plaintiff on the trial produced evidence tending to prove that it had furnished proof of its loss as required by the policy, except in the respects above mentioned, and it also offered evidence tending to prove that it had furnished specifications of the buildings mentioned as far as it could by reasonable diligence do. It further produced evidence to prove that the defendant had waived the demands above mentioned. The court admitted evidence tending to prove such waiver, and submitted pertinent issues to the jury in that respect. The defendant objected to
(182) this evidence and the submission of such issues because there was no allegation of such or any waiver in the complaint, and further upon the ground that there was, as it insisted, no evidence of a waiver. Where a party relies upon a waiver of something required to be done incident to a cause of action, particularly in respects material and important, he should allege the same in proper connection in the pleadings, and it would be safer and better to do so in all cases. But where on the trial in the action he fails to prove sufficiently his compliance with some requirement that does not affect the real and substantial merits of the matter in controversy, there is no sufficient reason why he may not at once suggest and prove the waiver if he can, and thus help out his defective proofs. If the party offering such proofs had been negligent the court might decline to admit the same, and if the opposing party should be surprised, it might in a proper case allow a mistrial on just terms as to cost. The court might also allow appropriate amendments of the pleadings. Such practice can do no harm, and in many cases it might promote the ends of justice. It is quite in harmony with the liberal spirit of the Code of Civil Procedure made manifest in many of its provisions. In such case it is not necessary that a pertinent issue be submitted to the jury, but the court may do so, in its discretion, with a view to convenience and the more distinctive and intelligent ascertainment of the fact, unless where in possible cases a party might suffer prejudice from it.

The defendants' counsel insisted earnestly on the argument that there was no evidence on the trial of such waiver suggested by the plaintiff. We have carefully examined the evidence sent to this Court,

and are clearly of opinion there was such evidence, as well as evidence to the contrary. The jury, acting upon the whole, rendered their verdict upon the material issues favorable to the plaintiff.

The defendant propounded to the plaintiff, as it might do (183) under a provision of the policy, certain questions which it failed to answer. It is insisted that such failure is fatal to the plaintiff's recovery. This contention is unfounded. The evidence and information intended to be elicited by these questions were not pertinent or material on the trial. They related to the "engine and two boilers, including inspirator and connections." As we have seen, these things were eliminated from the action, and all inquiry concerning them was immaterial and irrelevant.

There are numerous exceptions, several of which were properly abandoned on the argument. The others are disposed of by what we have said, except such as are unimportant and plainly without merit.

No error.

Cited: *Wooten v. Walters, post,* 256; *Clegg v. R. R.,* 135 N. C., 154.

D. F. FORT ET AL. v. W. G. L. ALLEN ET AL.

Partition—Frauds, Statute of—Estoppel—Married Women—Deeds, Recital in—Election.

1. A parol partition of lands is a contract relating to lands within the purview of the statute of frauds, and therefore not binding.
2. One who accepts a deed is bound by its terms and conditions.
3. While a married woman will not be estopped by an oral agreement in respect to land, she will not be permitted to take benefit under a conveyance and repudiate the recited terms upon which it was made; and when she has an opportunity to disclaim the deed and does not do so, she will be deemed to have elected to take under it.
4. Recitals in deeds will operate as estoppels when the facts therein stated are of the essence of the contract, and where it is the intent of the party to place the existence of the facts beyond question.

EXCEPTIONS to referee's report, heard by *Boykin, J.,* at October (184) Term, 1890, of WAKE.

The plaintiffs alleged that they had acquired the entire interest in the lands mentioned in the complaint except one share (being one-sixth), which descended to the *feme* defendant, N. D. Allen.

They further alleged that this share was allotted and set apart to said defendant (being 44 acres) by metes and bounds; that said defendant accepted the same as her share in said land and entered into the exclusive possession thereof, and that afterwards the said 44 acres were conveyed to said defendant in pursuance of said oral agreement that it was to be in satisfaction of her share in the said land. That afterwards the male defendant, W. G. L. Allen, orally agreed to purchase the 83 acres described in the complaint, it being a part of the tract remaining after the 44 acres were allotted to the *feme* defendant; that the purchase money has not been paid and that the said defendant is in the possession of said land. They offer to execute title to said defendant upon the payment of the purchase money, and pray for specific performance, or, upon failure of said defendant to pay the purchase money, that the land be sold. They pray for other and further relief, etc.

The defendants deny that the *feme* defendant agreed to take the 44 acres of land as her part of the land, and they deny that the plaintiffs are the owners of the said 83 acres; they also claim that the *feme* defendant is the owner of 5 acres of the said 83 acres, and that before the commencement of this action they surrendered the possession of all of the said 83 acres except the 5 acres claimed by the *feme* defendant. They deny that there was any contract to purchase said land. They allege that all of the matters in controversy have been settled by arbitration and award. There was a reference under The Code, by consent of the parties, to R. H. Battle, Esq., whose report of

(185) the facts sufficiently sets forth the points presented for review.

There were several exceptions to the findings of fact as to want of evidence to sustain certain findings and the like, but as the evidence was not properly presented to the court, these exceptions were not considered and the cause was heard in this Court only upon the findings of fact by the referee, and the exceptions to his conclusions of law, all of which findings were confirmed by his Honor.

The findings of fact are as follows:

1. That under the will of David Fort, Sr., who died in 1863, Nancy Fort became seized of a life estate in a tract of land in Wake County, containing 273⅝ acres, and including the land in controversy in this action, and a remainder in fee was vested in his six children—D. F. Fort, one of the plaintiffs; Nancy D. Allen, a defendant, and Lucy V. Fort, Geneva Fort, Sally Fort, and Mary A. Davis.

2. That on 21 November, 1877, the said Mary A. Davis and her husband, J. B. Davis, conveyed by deed duly executed, etc., her one-sixth interest in remainder in said land to D. F. Fort, making his interest in said remainder *one-third.*

3. That by deed dated 22 November, 1880, which was acknowledged before the clerk and filed for registration 10 December, 1885, D. F. Fort conveyed his interest in said land to his wife, Roberta Fort.

4. That said Roberta Fort died intestate 3 February, 1886, and her interest in said land—one-third, subject to the life-estate of Nancy Fort—descended to her infant children, the plaintiffs, other than D. F. Fort, as her heirs at law.

5. That on 4 February, 1889, Nancy Fort, the life tenant, and Lucy B. Fort, Geneva Fort, and Sallie Fort, conveyed their respective interests by deed duly registered, to the plaintiffs, Moses, Hoy, David, Troy, John, and Roberta Fort.

6. That in 1874 or 1875 the defendants took exclusive possession of 44 acres from the west side of the David Fort land (the 273⅝ acres), by consent of Nancy Fort, and with an oral understanding with her and the other owners of the remainder that they would take (186) that part as the share of the *feme* defendant in the tract, and they were not accountable to said Nancy Fort for rent during her life time.

7. That by deed 15 November, 1888, and registered, the said Nancy Fort, Lucy V. Fort, Geneva Fort, and Sallie Fort conveyed their respective interests in said 44 acres to the defendants, the same being stated in said deed to be that portion of the David Fort land allotted to N. D. Allen.

8. That said 44 acres, without accountability for rent to the life tenant, was fully equal in value to one-sixth of the remainder interest in the whole tract.

9. That about 29 June, 1884, the defendant W. G. L. Allen agreed to purchase from D. F. Fort and wife 83 acres from the east side of said David Fort land, at the price of $8 per acre, and soon thereafter went into possession thereof, and erected houses and made other improvements thereon, and also cut valuable timber therefrom. Said agreement was by parol, and never reduced to writing.

10. That the said D. F. Fort and wife never tendered a sufficient deed to said W. G. L. Allen for the said 83 acres of land.

11. That defendant W. G. L. Allen has not paid, nor offered to pay anything for said 83 acres, or any part thereof, nor has he paid any rent for said land.

12. That in October or November, 1888, the plaintiff D. F. Fort and defendant W. G. L. Allen agreed by parol to leave their differences about said 83 acres of land to arbitrators, who made an award to the effect that 78 acres of the land was, by consent, D. F. Fort's; that the other

five acres belong to Mrs. Nancy Fort, and that the improvements on said land were put there by W. G. L. Allen, and the buildings (187) belonged to him.

13. That the rental value of said 83 acres of land from the time the defendants went into possession to the last of 1888, when defendant W. G. L. Allen agreed to surrender 78 acres, and the damages to the land by cutting timber, etc., are equal in value to or greater than the sum whereby said land is enhanced in value by said improvements.

14. That the plaintiffs, other than D. F. Fort, are infants under 21 years of age, without regular guardian, and D. F. Fort is their father and next friend.

15. That the rental value of the 5 acres claimed by the defendants for the year 1889 was $20.

CONCLUSIONS OF LAW

1. That the plaintiff D. F. Fort has no interest in the land in controversy, and is entitled to recover nothing in this action.

2. That the arbitration and award of October or November, 1888, was without legal effect as to the parties actually interested in the 83 acres of land in controversy.

3. That the defendants are in equity estopped from claiming any interest in the David Fort land, other than the 44 acres of which they took possession and which was conveyed to them, as set forth in findings of fact 6 and 7.

4. That by this action the plaintiffs have renounced any interest in said 44 acres.

5. That the plaintiffs, other than D. F. Fort, are the owners and entitled to the possession of the land in controversy, and every part thereof.

6. That said infant plaintiffs are entitled to $20 for rent for the year 1889.

7. That the said infant plaintiffs are entitled to judgment for the possession of the land in controversy, for $20 damages, and (188) for costs.

EXCEPTIONS

1. For that the referee finds in paragraph 1 that D. F. Fort has no interest in the land in controversy, without specifying what land in controversy.

2. For that he finds in paragraph 2 that the said arbitration and award mentioned therein was without legal effect as to the parties actually interested in the 83 acres of land, when he finds as a fact in paragraph 3 of "facts found" that said D. F. Fort conveyed by deed his

interest in said 83 acres to his wife, Roberta Ford, and children, without also finding that the same was necessary for their support and maintenance.

3. And for that he finds in paragraph 3 that the defendants are estopped in equity from claiming any interest, etc., when he also finds in paragraph 6 of "facts found" that the defendants took possession of said 44 acres under an oral agreement that they would take the same as the share of the *feme* defendant, etc., as appears in said paragraph 6, whereas a verbal agreement made by any one, and especially by a *feme covert,* about land is binding neither in law nor equity, as this agreement is found to have been made.

4. For that the referee finds in paragraph 5 that the plaintiffs other than D. F. Fort are the owners and entitled to the possession of the land in controversy; whereas, as a matter of law, they are entitled to the possession of the 5 acres in controversy, if at all, only for the life time of the said Nancy Fort, the widow of the late David Fort, and only so upon the payment by them of the value of the improvements erected since the possession by the defendants.

5. And for that he finds in paragraph 6 that said infant plaintiffs are entitled to $20 rent for the year 1889; whereas, as a matter of law, they are entitled to recover nothing until they pay for the increased value of the land (the 5 acres) by reason of the improvements.

The court overruled all of the exceptions and adjudged that (189) the plaintiffs had no interest in the 44 acres allowed to the *feme* defendant; that the plaintiffs are the owners of and entitled to the possession of the said 83 acres; that they receive the same, and $20 rent and damages, and that a writ of possession issue, etc.

The defendants appealed.

J. N. Holding and W. H. Pace for plaintiff.
S. G. Ryan for defendant.

SHEPHERD, J. We are unable to perceive any merit in the first two exceptions. It has been decided that a husband may convey directly to his wife (*Walker v. Long,* 109 N. C., 510), and it is clearly unnecessary to the validity of the conveyance that it should be made in consideration of her support and maintenance. This being so, it must follow that D. F. Fort, having conveyed his interest in the land in controversy, had no authority to bind his grantee by a submission to arbitration; and even had he possessed such authority, an oral agreement to arbitrate could not be enforced as to real property.

The third exception presents the main point to be determined, and this is whether the share of N. D. Allen, the *feme* defendant, as tenant in common in the said land, has been allotted to her. If she is estopped

from claiming more than 44 acres of which she has been in the exclusive possession since 1875, then the plaintiffs, having acquired the interest of the other tenants in common and the life estate of the widow, are the owners of the remaining part of the land, and as the 83 acres—the subject of this action—is a part thereof, it must also follow that they are the owners of the same. There was no partition by judical proceedings, but it is found by the referee that, in 1874 or 1875, the said defendant and her husband took exclusive possession of the
(190) said 44 acres under an oral agreement that it should be the full share of the *feme* defendant.

It is also found by the referee that the "said 44 acres, without accountability for rent to the life tenant, Nancy, was fully equal in value to one-sixth of the remainder interest in the whole tract."

It is well settled that a parol partition of lands is a contract within the purview of the statute of frauds, and is not binding. *Medlin v. Steele,* 75 N. C., 154. If, then, nothing further appeared than the oral agreement, and the possession under the same, it would be clear that the *feme* defendant would not be estopped, and that she could still assert her claim as tenant in common with the plaintiffs.

It is found, however, that afterwards, in 1888, the said defendant accepted a deed for the 44 acres from all of the parties in interest, except the plaintiffs, who are infants; and it is further found that the deed declared that the said 44 acres was "that portion of the David Fort and alloted to N. D. Allen," the *feme* defendant. The use of the word "allotted" in itself implies a full partition of the land. To allot means "to set apart a thing to a person as his share, as to allot a fund or land." Anderson Law Dict., 51.

So, apart from the express agreement found by the referee and the fact that the land is fully equal to her share, we have the *feme* defendant occupying the land under a deed which, in effect, declares that the land conveyed therein is her share of the whole tract. The plaintiffs by this suit affirm the said conveyance, and the said defendant, being still in the exclusive possession of the 44 acres, intends, for aught that appears, to hold the same under the above mentioned deed, and at the same time insist that she is entitled to five specific additional acres out of the remaining part. If she could claim against the implied terms of the deed, we are unable to understand how she would be entitled to any specific part of the land, as she would then be a tenant in common in the entire tract. As we have seen, the oral
(191) agreement would not work an estoppel, and especially as against a *feme covert;* but a *feme covert* has no more right than any other person to claim the exclusive possession of land under a conveyance, and at the same time repudiate the recited terms upon

which it is made. It is well established that a grantee who accepts a deed poll is bound by its terms or qualifications. *Maynard v. Moore,* 76 N. C., 158; *Long v. Swindell,* 77 N. C., 176. The principle is well stated in *Hutchinson v. R. R.,* 37 Wis., 602, in which it is said that "It would be strange if the defendant could accept the grant freed from the provisions qualifying the grant; take the entire estate without the limitations of the estate; claim under the contract without being bound by its terms."

Now, it is true that it is not every recital that binds; but without entering into a discussion of the doctrine of recitals, abounding as it does in many refinements and nice distinctions, it is sufficient to say, for our present purpose, that where it is the intent of the parties to place the existence of a fact beyond question or to make it the basis of the contract, the recital will be effectual, and neither party will be permitted to deny it. 2 Herman on Estoppel, sec. 636. This view is sustained by *Henderson, C. J.,* (*Brinegar v. Chaffin,* 14 N. C., 108) who says that "Recitals in a deed are estoppels when they are the essence of the contract; that is where unless the facts recited exist, the contract, it is presumed, would not have been made." It is manifest that when the deed to the *feme* defendant was executed, the parties intended that it should be an allotment to the grantee of her share in the lands of D. F. Fort, their ancestor. It was the basis of the contract, and without such an undertaking it is fair to assume that the conveyance would not have been made. Such, we think, is the necessary inference to be drawn from the recital in the said deed. If this be true, it would form a material part of the contract, and (192) while the grantee, being a *feme covert,* would not be bound by the deed and could repudiate the entire transaction, yet it would offend every principle of equity and good morals to permit her to enjoy its benefits and at the same time deny its terms or qualifications.

The effect of the partition of covenants by deed is to work an estoppel as to the extent of the lands thus set apart and allotted in severalty (*Harrison v. Ray,* 108 N. C., 215), and it must be attended with the same result in the present case. It was the right and privilege of the *feme* defendant to relieve herself of the estoppel by disclaiming to hold the land in severalty under the said conveyance and offering to throw the same into the "hotchpot" in order that there might be another partition. She had ample opportunity to do so in this action, but no such disposition is manifested on her part, and we are therefore of the opinion that as she was elected to hold under the deed, she must be bound by the estoppel growing out of its recitals.

We place our decision upon the principle of *Burns v. McGregor,* 90 N. C., 222; *Walker v. Brooks,* 99 N. C., 207; *Hinton v. Ferebee,* 107

N. C., 154, and other similar decisions. See Womack's Digest, 1296. The cases of *Towles v. Fisher,* 77 N. C., 437; *Weir v. Page,* 109 N. C., 220, and *Farthing v. Shields,* 106 N. C., 289, cited by counsel, are, under the views we have taken, inapplicable to the facts before us.

We regret that, by reason of the neglect of the defendants to present the testimony in a proper manner, the court is precluded from passing upon the exceptions addressed to the findings of fact. We have, therefore, been confined to the report of the referee, and upon his findings we must conclude that the *feme* defendant is estopped from claiming any other part of the land than that which she holds under the conveyance above mentioned. It must, therefore, follow that the plaintiffs are the owners of the remaining land of which the 83 acres,
(193) the subject of this action, is a part. This is also true as to the 5 acres claimed by the defendants, it being included in the said 83 acres.

As to the improvements, the referee finds that the rental value of the land and the damage by the cutting of timber, etc., during the possession of the defendants, are equal or exceed in amount "the sum whereby said land is enhanced in value by said improvements." Upon this finding it is clear that his refusal to allow anything for the improvements should be sustained.

Upon a careful consideration of the case, as presented for review, we are of the opinion that the exceptions of the defendants must be overruled, and the judgment should be

Affirmed.

Cited: Raby v. Reaves, 112 N. C., 691; *Chard v. Warren,* 122 N. C., 86; *McLamb v. McPhail,* 126 N. C., 221; *Drake v. Howell,* 133 N. C., 166; *Carter v. White,* 134 N. C., 480; *Pinchback v. Mining Co.,* 137 N. C., 180; *Lumber Co. v. Hudson,* 153 N. C., 100; *Leach v. Lumber Co.,* 159 N. C., 535; *Herring v. Lumber Co.,* 163 N. C., 485; *Cutler v. Cutler,* 169 N. C., 484; *Hill v. Hill,* 176 N. C., 197.

ALPHONSO DIBBRELL ET AL. V. THE GEORGIA HOME INSURANCE COMPANY.

Insurance—Forfeiture—Waiver—Contract—Statute of Limitations—Agency—Estoppel.

1. A stipulation in an insurance policy that a failure to bring suit within a time therein prescribed after loss should constitute a forfeiture, is *a contract,* and not a statute of limitations, and may be waived, or the

party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement.

2. The stipulation usually inserted in policies of insurance that no agent of the insurer is authorized to change the terms of the contract, and that such terms shall not be waived except in writing endorsed on the policy, does not extend to conditions to be performed after a loss is incurred.

3. The authority conferred by an insurance company upon its agent in adjusting a loss to require or dispense with the production of papers, under a stipulation to that effect in the policy, necessarily involves the authority to waive compliance with another stipulation requiring suits to be brought within a specified time.

4. And where such agent did, from time to time, make successive demands for books and papers, the production of which necessarily consumed the time within which suit was required to be brought by a stipulation in its policy, the said stipulation was waived, and the insurer was estopped from insisting on its enforcement.

MERRIMON, C. J., dissenting.

APPEAL at May Term, 1891, of VANCE, from *Whitaker, J.*

The defendant rested its defense solely upon the stipulation contained in the policy that no suit brought for the recovery of any loss and founded upon the policy should be sustainable in any court unless instituted "within twelve calendar months next after the loss shall have accrued."

The policy contained, also, another stipulation, which is as follows: "If required, the assured shall produce books of account, and other papers and vouchers, and exhibit the same for examination either at the office of the company or such other place as may be named by its agent, and permit extracts and copies thereof to be made, and shall also furnish the original or properly certified duplicate invoices of all property hereby insured, whether damaged or not damaged."

It is admitted that the plaintiffs paid all the premiums that were due up to the time when the building, together with "the stock of leaf tobacco (their own or on commission, or held in trust for others), contained in the four-story brick building" insured by the policy, were destroyed by fire on 31 July, 1888. It is also now agreed that the plaintiffs are entitled to recover, as the value of the tobacco burned, $1,000, if their right of recovery has not been forfeited under the conditions of the policy. (195)

ISSUES

1. Did the plaintiffs make proper proof of the loss in accordance with the terms of the policy? Ans.: Yes.

2. Was plaintiffs' action commenced within the time limited in the policy? Ans.: No.

3. Has the defendant duly waived the limitation clause of the policy? Ans.: Yes.

4. Is plaintiffs' action barred by their failure to commence their action within the period specified in the insurance policy? Ans.: No.

5. Was the failure to commence action by plaintiffs against defendant within the time specified caused by the inducements, actions, or promises of defendant? Ans.: Yes.

Thereupon, judgment was entered for plaintiffs, and defendant appealed.

A. C. Zollicoffer for plaintiffs.

J. W. Hinsdale for defendants.

(202) AVERY, J., after stating the case: In his first interview with the plaintiffs, soon after the fire, which occurred 31 July, 1888, the adjuster of the defendant told them that their "books were not straight, but he would give them time to straighten them, and would (then) adjust the loss." Inside of the sixty days limit fixed in the policy the plaintiffs forwarded proofs of loss, which seem now to have been sufficient, as no further objection is urged to them. After waiting for an acknowledgment of the receipt of proof of loss, or for some further statement of the objection to their books, until May, 1889, the plaintiffs seem to have determined upon aggressive action for the recovery of their demand against defendant. Meantime Spencer, the adjuster, says that he made no objection to the proof of loss because it was not incumbent on him to do so.

So soon as the plaintiffs began to move, first, by insisting upon knowing the adjuster's objection to a settlement, and then, on 10 May, 1889, by demanding, through their attorneys, of the president of the company the immediate payment of $1,000, with interest from 1 October, 1888, the adjuster seemed to feel it incumbent on him to meet them with counter demands for duplicate bills of all of the tobacco received at the warehouse in January, 1887. When the plaintiffs had sent for these bills and met Spencer again, they were informed that he insisted, according to the stipulations in the policy, that he should have for examination duplicate bills of all tobacco received at the warehouse from 1 January, 1887, till 31 July, 1888. As the policy covered tobacco in the warehouse that was owned absolutely by plaintiffs, as well as that consigned to them to sell on commission, he contended that he had the right to compare the books and the duplicate bills. When told by the plaintiffs on 1 June, 1889 (eleven months after the loss was

sustained), that it would then take them six months to comply with his new demand for duplicate bills for eighteen months instead of for the months of January, 1887, only Spencer replied that plaintiffs must do the best they could and inform him when they (203) should get the bills, and he would adjust the loss. The plaintiffs, taking him at his word, began to get up duplicate bills; but, according to the uncontradicted testimony of R. L. Dibbrell, found it impossible to finish the work before 1 January, 1890. When they *did inform* the adjuster of their readiness to comply with his demands, they could not induce him to answer even a registered letter communicating the fact. He then claimed that while the plaintiffs were engaged in the vain effort to comply with a demand performed in accordance with one stipulation of the policy, they had forfeited their right of action under another stipulation, which restricted them in its exercise to twelve calendar months after the loss occurred. The adjuster had felt it incumbent on himself to warn them of the Scylla of defective proofs, but had carefully refrained from suggesting that, in avoiding that, they would be stranded on the Charybdis of delay in initiating suit. If they had brought their action when their counsel proposed to issue summons on 12 May, 1889, the defendant would have resisted their recovery, upon the ground that they had failed when "required" to "furnish original or properly certified invoices of all property insured." The original bills of tobacco bought by them or sent by customers for sale were destroyed, and duplicates could not be gotten in less than six months.

The enforcement of both conditions of the policy at the same time was not possible, and the question, therefore, naturally arises whether, by demanding compliance with the one stipulation, the agent of the company did not waive the right to insist upon the performance of any other, the enforcement of which was inconsistent with his own demand. It seems to us that if the adjuster had a right to insist upon the production of the vouchers, or to waive such proof as he deemed best for the company, such power necessarily involved the authority also to waive the requirement that the action should be brought before such papers could be obtained. Wherever a company empowers (204) an agent specially to do, or the scope of his agency permits him to do, any act inconsistent with the idea that the company will insist upon a forfeiture under a given condition in the policy, then such act when done by him must be construed as a waiver of the right to demand its enforcement. 2 May Ins., secs. 505 and 497. This principle has been distinctly recognized by this and other courts of the country so often that it ought not to be deemed necessary to cite authority in support of it. In *Grubbs v. Insurance Co.,* 108 N. C., 477, this Court

held that where an adjuster required the insured to furnish invoices of goods destroyed, proofs of loss, or plans and specifications of buildings burned, or to appear for examination, such act amounted to a waiver of the right to insist upon a forfeiture for failure to comply with a condition of the policy relieving the company from the contract in case of subsequent insurance of the same property without the written consent of the company endorsed on the policy. This view is sustained by the decisions of other courts, some of which have emanated from the most eminent jurists of the country. *Insurance Co. v. Kittle,* 39 Mich., 52; *Titus v. Insurance Co.,* 81 N. Y., 410; *Connor v. Insurance Co.,* 53 Wis., 585; *Webster v. Insurance Co.,* 26 Wis., 57. In *Grubbs' case* the adjuster made the demand, as in this case, for duplicate invoices in place of those destroyed by the fire, and the ruling of the court rested on the very substantial reason that if the adjuster, acting in the scope of his authority, insisted that the insured should incur the expense of collecting these invoices, such a demand was inconsistent with the idea that the policy was forfeited. A persistent demand for proofs, with full notice that they could not be gotten till six months after the expiration of the limit of twelve calendar months (and then by incurring expense and performing much labor), was an act in the scope of the adjuster's authority, but utterly incon-
(205) sistent with the present contention of the company that the right of action was forfeited by failure to issue a summons before 31 July, 1889. Speaking through its adjuster, the corporation said, in effect, at the end of eleven months after the fire, "If you sue now, the company will resist recovery on the ground that you have failed to furnish duplicate invoices on the demand of its authorized agent, in accordance with the conditions of the policy." *Ind. Insurance Co. v. Capehart,* 108 Ind., 270. When by this shrewd device the insured, who has paid the premiums and complied with his contract, is induced to engage in the laborious and expensive work of collecting duplicate invoices of tobacco received for eighteen months before the fire, and to allow twelve calendar months to elapse while so occupied, without instituting suit, the adjuster having played his part, is relegated to the background, and the company, by its counsel, comes into court and says: "It is true, the adjuster had the right to insist upon further proofs of loss under the condition of the policy, but, in fact, sufficient proof had already been furnished him by the insured, though it was not incumbent on him to admit it, and he had a right to insist, as he did, upon the insufficiency of the proof sent on 25 September, 1888; but the adjuster was only a special agent as to the stipulation limiting the time bringing the action." By the terms of the policy the insured was bound to furnish proofs of loss within sixty days after the fire

occurred, and it was not on argument, and we suppose will not now be, denied that the adjuster or other agent of a company entrusted with the duty of receiving and passing upon the statement of the loss, has, by implication arising out of the authority given him, the power to extend the time for furnishing the proofs. *Insurance Co. v. Schollenburger,* 44 Penn. St., 259.

So it is well settled that if, instead of extending the time for filing proofs of loss, the adjuster, who is charged with the duty of examining them, informs the assured before the expiration of the sixty days that he denies the justice of his claim and will not pay it, (206) such conduct, by implication, renders it unnecessary to make out a statement of loss, and is held to be a waiver of the requirement to furnish it, as well as of the condition that suit shall not be brought within that time. *Insurance Co. v. Jacobs,* 66 Texas, 366; 2 May, sec. 504. As a general rule, if the insurer, through the conduct of any agent acting within the scope of his authority, lead the insured into an infraction of one of the conditions of a policy by insisting upon the performance of a duty enjoined by another clause of the policy, and inconsistent with the observance of such condition, the insurer will be estopped from insisting upon a forfeiture. 2 May, p. 1144 and notes 2 and 3, secs. 497, 499. And it has been expressly held that "Statements by a local insurance agent that the plaintiff's loss was all right," and that the company would pay the amount, constitutes a waiver by the company of the clause in the policy requiring formal proof of loss, and also "the one barring suits not brought within one year." *Ide v. Insurance Co.,* 2 Burr., 235; 2 May, sec. 504. The authorities cited, and many others, recognize the power of even a local agent, while acting within the scope of his authority, to waive the forfeiture prescribed for the infraction of a given condition in a policy by leading him into the reasonable belief that it will not be insisted on, and they also lay down the principle that the company is estopped in such cases from taking advantage of the breach of the condition, because it would be fraudulent to do so. In *Muse v. Assurance Co.,* 108 N. C., 242, it is declared that such stipulations, operating as forfeitures, are construed strictly, and comparatively slight evidences of waiver have been held sufficient to prevent their enforcement. *Ripey v. Insurance Co.,* 29 Barb., 552; *Ames v. Insurance Co.,* 14 N. Y., 253.

Counsel for defendant seem to have overlooked the fact that (207) the plaintiffs are not insisting that the defendant company, by the conduct or the words not reduced to writing of its authorized agents, could extend the operation of a statute of limitations, but that it could by language uttered and acts done by such agents, while in the line of duty, waive the exaction of a forfeiture, which is not favored by the

court. Says *Judge Christiancy,* in *Insurance Co. v. Hall,* 8 Cooley (Mich.), 211, in referring to a stipulation similar to that under consideration: "If valid at all, it was valid as a contract, not as a statute. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay, beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principle governing contracts, be *more flexible in its nature,* and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period." In that case it was held that the condition was waived by furnishing no opportunity to plaintiff to serve process just before the expiration of the twelve months. A case directly in point is *Ames v. Insurance Co., supra,* wherein, discussing the waiver of a similar condition that suit must be brought within six months, the court said: "The defendants had it in their power, by objecting to the proofs of loss and neglecting or refusing to file them, to extend the time in which they were required to pay beyond the period of six months after the occurrence of the loss, and in such case clearly it could not be pretended that the insured had stipulated away his right of action, but the defendants would be deemed to have waived the twelfth condition. In this case the proofs of loss were delivered to the defendant some nine days after the fire. They were retained without objection *eighty-five days,* or within five days of the time when the loss was due and payable by the ninth condition. It was then first suggested by the secre-
(208) tary that the proofs were incomplete in not setting forth, as required, whether or not the insured property was encumbered. Seven days thereafter, and on 14 October, the plaintiff transmitted an affidavit to the company supplying the alleged defect. No further objection was heard from the defendants, but they had secured all that was probably desired—an extension of time for ninety days from 14 October, and put it out of the power of the plaintiff to successfully maintain an action commenced within six months after the loss occurred. He was told, in effect, that the defendant would insist on the terms of the ninth condition (which provided that suit could not be brought for ninety days after filing proof of loss) as to the time when the loss was due and payable, and that, if he commenced an action to avoid the bar prescribed by the twelfth condition, they should interpose the defense that by the contract the insurance money was not yet due and payable. It cannot be doubted that the defendants intended to and did waive the limitation stipulated by the twelfth condition." This opinion is cited with approval by leading text-writers and many of the courts. Says May (vol. 2, sec. 505), "Thus the insured is estopped to object to a failure to bring suit within the time limited by an offer

to pay the loss afterwards or when such failure is induced by the conduct of the insurer"—citing *Ames'* case to sustain the position.

In *Muse v. Assurance Co., supra,* this Court, following the current of authority, held that the stipulation that there should be a forfeiture unless suit should be brought within twelve months after the loss operated as a contract which might be waived, and not as a statute of limitations. Indeed, in that case it was declared that plaintiff might have submitted to judgment of nonsuit and brought a new action within a year after such judgment, though after the expiration of twelve months from the fire, if the limit had been imposed by a statute instead of by contract. When the rights of Muse were declared lost because the principles applicable to the statute of limitations did (209) not apply to a contract, we are at a loss to understand how counsel can contend that in the case under consideration the plaintiffs have lost their right of action, because the bar of the statute of limitations cannot be extended except by an agreement in writing and upon consideration, or at any rate a direct promise not to plead it. Neither *Joyner v. Massey,* 97 N. C., 148, nor any of the class of cases to which it belongs apply to that at bar. We might concede the law in its application to statutes of limitation to be just what counsel insisted that it was, and still the plaintiffs would be protected by the well-established principle that contracts providing for forfeitures are more "flexible" than statutes of limitation, and may be waived by very slight circumstances. *Muse v. Assurance Co., supra; Insurance Co. v. Hall, supra; Ames' case, supra;* 2 May, sec. 505. The usual stipulation in a policy that no agent of the company is authorized to change its terms or conditions, and that they shall not be waived except in writing endorsed on the policy, does not apply to conditions to be performed after the loss is incurred, nor invariably even to the warranties of the contract if any fraud be practiced. *Carson v. Insurance Co.,* 43 N. J., 300; *Whitted v. Insurance Co.,* 76 N. Y., 421; *Insurance Co. v. Capehart,* 108 Ind., 270; *Fishbeck v. Insurance Co.,* 54 Cal., 422; *Day v. Insurance Co.,* 81 Me., 244; *Insurance Co. v. Weiss,* 106 Pa. St., 20; *Hornthal v. Insurance Co.,* 88 N. C., 71; *Depree v. Insurance Co.,* 92 N. C., 422; *ibid.,* 93 N. C., 240; *Grubbs v. Insurance Co., supra; Follette v. Insurance Co.,* 107 N. C., 240; *Lamberton v. Insurance Co.,* 39 N. W., 76. Where, as in our case, the insured is led by the conduct of an agent of the company, acting within the scope of his authority, to believe that the stipulation will not be insisted on, or such agent insists upon another stipulation inconsistent with its enforcement, the condition is deemed waived without the endorsement on the policy. (210)

The plaintiffs' counsel, on 10 May, 1889, demanded a settlement of the president, and the secretary replied, referring them to the adjuster, who had "the matter in hand" and would treat with them, thus waiving directly their right to arrange the matters in controversy, if such authority would otherwise have been exclusively in them, and holding the adjuster out to the plaintiffs as armed with full power to represent the company and treat with the plaintiffs or their attorneys in their stead (see letter of the secretary) as fully as they or either of them could do. The facts in our case, therefore, present a peculiar aspect, in that the adjuster is expressly clothed with plenary power in the conduct of the settlement, as far as the president and the secretary of the company could confer such authority. Considering Spencer then, as the representative of the president, and so held out by his letter, he had authority, either directly or by implication, as a general agent of the company, in the language of *Chief Justice Smith,* in *Hornthal v. Insurance Co., supra,* "to waive a forfeiture and dispense with what would otherwise cause it."

We are aware that it is possible to find authority in support of a different view of this case from that taken by us, but we prefer, as between conflicting opinions, to follow that line of authorities that does not leave an ignorant individual who has made an honest effort to perform his contract at the mercy of shrewd agents of corporations because of stipulations with which he has been bound hand and foot. We have no sympathy with any construction of contracts which would leave the courts powerless in the presence of an acknowledged fraud, though it be perpetrated by hedging one about with restrictive conditions and forfeitures, so that, pursue what course he will, he runs counter to a stipulation which, if strictly enforced, is fatal to his recovery of the money justly due to him in consideration of the fact that he has paid his premiums and comes before the court with clean hands. Under such circumstances technical defenses should be disregarded upon
(211) slight evidence of a waiver of rights under them, in order to do substantial justice.

We think, for the reasons given, that there was no error in the charge of the court below of which the defendant had just cause of complaint. His Honor put upon the plaintiffs the burden of showing that the adjuster made the promise to pay for the purpose of inducing delay, and then taking advantage of it under the limitation stipulation, though we consider the demand of the adjuster for the performance of any condition that he had a right to insist on and which was inconsistent with the bringing of the action within the limited time a waiver of that stipulation. *Ames v. Insurance Co., supra.* It seems to us, also, that the judge might have told the jury that if the stipulation was

waived by the conduct and language of the adjuster, then the plaintiffs were left free from any restriction as to the time of bringing suit except such as was imposed by the statute of limitations. The waiver, which the jury found was made by the adjuster, grew out of his insisting upon proofs which it required an indefinite time to procure and furnish, and it must be construed to have been absolute and unconditional, not an extension of its operation while the proofs were being produced. If the right to demand the forfeiture was waived at all, it was by such conduct on the part of the adjuster as made it inequitable for the company to insist upon the stipulation, or, in other words, it was because the defendant was estopped by its conduct from enforcing that clause of the contract then or afterwards. 2 May, sec. 505, and other authorities cited *supra*. If the defendant was estopped from enforcing the forfeiture by matter *in pais*, such as the conduct of its agent, inconsistent with the right to demand a compliance with it, it is difficult to understand how the estoppel could operate to defer the enforcement instead of destroying the right to insist upon it entirely.

MERRIMON, C. J., dissenting: The policy sued upon in this (212) action contains this clause of agreement: "It is expressly covenanted by the parties hereto that no suit or action against this company for recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." The court has held that such agreement is valid and binding on the parties to it. *Muse v. Assurance Co.*, 108 N. C., 240; *Manufacturing Co. v. Assurance Co.*, 106 N. C., 28. The alleged loss of the plaintiff occurred on 31 July, 1888, and more than twelve months next thereafter, to wit, on 4 June, 1890, this action began. Hence, by the express agreement above set forth of the parties, the alleged cause of action is without any force or validity, and not actionable.

The plaintiffs allege, however, that their delay in bringing their action was induced by the defendant. "And they further say that defendant ought not to be allowed to set up said limitation or forfeiture as a defense to this action, since the delay in bringing this action was caused by the actions and promises of the defendant, which induced plaintiffs to believe that the said limitation would not be pleaded or relied on."

But the policy contains this further clause of agreement: "And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy unless such waiver shall be endorsed hereon in writing." This agreement does not contravene any principle or policy of the law. It is reasonable, and there is no legal reason why it is not valid. The parties might make it, as they did, a material part of the contract of insurance. It is not
(213) pretended that the defendant or its agent *waived* the agreement that the plaintiff in case of loss should bring his action within twleve months next after it accrued by writing or endorsement on the policy, or in writing at all. The plaintiffs knew of this agreement; it is presumed, and must be taken, that they had knowledge of it; it is not contended that they did not. It was, therefore, their laches if they allowed more than twelve months to elapse after their loss before they brought their action without having a waiver as to the lapse of time endorsed on the policy. In the face of the express stipulation above recited, and the absence of an endorsement of such waiver on the policy, and in the absence of all agreement of such waiver, I cannot see any just or valid reason, legal or other, why the agreement of the parties shall not be enforced according to its plain terms and purpose.

It is not alleged that the defendant or its agent fraudulently induced the plaintiffs to delay the bringing of their action, but simply that they were induced to do so by the defendant's "actions and promises." It appears that the plaintiffs furnished their proof of loss. The defendant's agent (the adjuster) insisted that they should furnish certain other evidence of the extent of their loss. But the plaintiffs did not ask the agent of the defendant to waive the lapse of time in writing on the policy or otherwise, as they might have done; they said nothing on that subject, nor did the defendant or its agent intimate that he had any authority to do so, nor did he promise to do so. There was no evidence sufficient to go to the jury to prove such a waiver by act or promise in writing or otherwise. The evidence relied upon, fairly interpreted, gives rise to no more than conjecture of the merest inference, that ought not to be allowed to prevail to destroy a plain and express stipulation. If evidence of the waiver, other than a waiver in writing endorsed on the policy, could be competent at all, it should have been clear and distinct, not such as gave rise to mere
(214) inference or possible implication. Moreover, it was in evidence, without contradiction, that the adjuster had "no authority to waive any stipulation of the policy."

This case is very different from *Joyner v. Massey,* 97 N. C., 148, and other like cases cited for the plaintiffs. In these cases the defend-

ants expressly asked and induced the plaintiffs not to sue, and promised directly that they would not plead the statute of limitations. The court properly held that it would be unconscionable and a fraud upon the plaintiffs to allow the defendants to avail themselves of that plea. But here the defendant did not request the plaintiffs not to sue, nor did it promise not to avail itself of the express agreement under consideration. In view of this agreement the waiver should have been clear and distinct, not left to mere inference.

The court instructed the jury that if the defendant's agent on 1 June, 1889, required the plaintiffs to produce certain duplicate warehouse bills, the plaintiffs would be entitled to a *reasonable time* within which to procure and produce the same, and left it to them to determine what was such reasonable time. The view I have taken above renders it unnecessary for me to point out the error in this instruction. I deem it worth while, however, to say that what is reasonable time is not a question of fact for the jury to determine, but is a question of law to be determined by the court when the facts are found or admitted; and when the facts do not appear the court should submit the evidence to the jury, instructing them that there would or would not be reasonable time accordingly as they might find the facts in view of varying aspects of the evidence. See *Emry v. R. R.*, 109 N. C., 589, and cases there cited. In my judgment, there is error, and there ought to be a new trial.

Per Curiam. No error.

Cited: Bergeron v. Ins. Co., 111 N. C., 52; *Horton v. Ins. Co.*, 122 N. C., 504; *Pretzfelder v. Ins. Co.*, 123 N. C., 166; *Strause v. Ins. Co.*, 128 N. C., 66; *Gerringer v. Ins. Co.*, 133 N. C., 414, 417; *Parker v. Ins. Co.*, 143 N. C., 344; *Modlin v. Ins. Co.*, 151 N. C., 45; *Trull v. R. R., ib.*, 550; *Higson v. Ins. Co.*, 152 N. C., 210; *Heilig v. Ins. Co., ib.*, 360; *Millinery Co. v. Ins. Co.*, 160 N. C., 137; *Lumber Co. v. Johnson*, 177 N. C., 51; *Hardy v. Ins. Co.*, 180 N. C., 184.

(215)

W. H. HARRELL v. THE ALBEMARLE AND RALEIGH RAILROAD COMPANY.

Railroads—Negligence—Evidence.

1. Where a railroad company permitted one of its cars to remain for several days on a side-track, in a public street, in such a position that it projected two feet on a bridge at a public crossing, and was calculated to and did frighten plaintiff's horse, whereby plaintiff received injuries,

the company was guilty of negligence, although its other side-tracks may have been occupied fully with other cars necessary for the prosecution of its business.

2. Evidence that another horse had become frightened at the same car, on a previous occasion, was competent to show that it was calculated to frighten horses, and negligence in permitting it to remain at that place.

ACTION for damages, tried at March Term, 1891, of MARTIN; *Whitaker, J.*

The plaintiff alleged that he was "a practicing physician, and while going from the town of Williamston into the country to attend to his patients, with his horse and buggy, he found it necessary to cross the track of said railroad on a bridge, at a point on the public street in the town of Williamston, which had heretofore been constructed by the defendant company, at a regular and usual crossing for persons going into the country in the direction the plaintiff was going on a bridge.

"That near or upon said bridge, in the public street of said town, upon the said day and several days theretofore, the said defendant had by their gross negligence, through its employees and agents, placed one or more of its cars partly over said bridge or near thereto in said public street of said town, partly obstructing said crossing and street, which was calculated to frighten horses passing; and that the plaintiff, while attempting with the utmost care to drive over said bridge, a bridge which the plaintiff had crossed many times before, his horse (216) became frightened at said car or cars and became unmanageable and ran away, throwing the plaintiff from his buggy, inflicting serious and permanent injury, breaking his buggy, medicine box, and injuring his horse, to the plaintiff's damage," etc.

The defendant answering, among other things specifically denied that it was necessary for the plaintiff to cross the defendant's roadbed at the point mentioned, as there were other roads leading from the town and in the direction the plaintiff was going, and further alleged "that the use it was making of its track, by the placing of a car thereupon, in or near the public highway, at the time of the plaintiff's mishap, was a reasonable one."

Further, that it is not guilty of carelessness, negligence, or improper conduct, as in the complaint alleged; and says that the injury therein described, if any was, was caused by the fault and negligence of the plaintiff himself. Wherefore, defendant asks that it go without day and recover costs.

On the issues submitted by consent, the jury found the following state of facts: "That the defendant negligently caused and allowed its car to be placed and remain on the bridge at the point where the public street of the town crossed the railroad; that the car was on the bridge

two feet; that it was calculated to frighten plaintiff's horse, and did frighten him, so that the plaintiff received damage thereby to the amount of $400; that the defendant in placing the car there and permitting it to remain was not making a reasonable use of its track, but was guilty of negligence, and that the plaintiff was not guilty of contributory negligence."

The defendant asked the following instructions:

1. That the placing of the car partially in the street, even if it extended to some extent over the bridge, was not negligence.

2. A car in a highway, with which a traveler does not come in contact or collision, and which does not obstruct the way of travel, is not to be deemed a defect, though a horse may take fright thereat and cause damage. (217)

3. That the defendant company had the right to the use of the track on which its car was placed, and had the right to place its car there, and if its car left sufficient space for the passage of vehicles, and did not actually obstruct the cartway, it is not liable.

4. That the ordinary rule, that persons placing objects in or near a highway, and which are calculated to frighten horses of ordinary gentleness, are liable for the injuries resulting therefrom, does not apply to this case.

5. That upon the testimony in the case, the defendant company is not liable.

6. That if they believe the cars were placed on the side-track, as testified by witnesses Ellison and Hill, theirs being the only evidence as to the necessity of so placing the cars, they should find that the defendant was not negligent, and that the use of said track was reasonable, and defendants are not liable.

7. That if the jury believe that at the time the cars were placed upon the side-track the other side-tracks were filled with cars, and that it was necessary to put them on said side-track, then they should find that the defendant was negligent, and that the use made of the side-track in placing the cars upon it was reasonable, and the defendants are not liable, and that upon this point of the necessity and reason of so placing the cars the only evidence is that of the witnesses Ellison and Hill.

8. That if there was sufficient room left on the bridge for persons to pass with buggies, wagons, etc., and they could do so without striking against the car, with ordinary care, then the defendants are not guilty of negligence; and this would be so even if they had to turn from the usual track of wheels on the bridge. (218)

The court declined these prayers for instructions and, among other things, not excepted to, charged instead thereof:

"If you should find that at the time of the accident the side-tracks, other than the one upon which was the car of which the plaintiff complains, were filled with cars, and that it was necessary to the industry of the defendant to have this car at the place at which it was, then it would be your duty to say that the defendant was not negligent, and that the use defendant was making of its track was a reasonable one."

For the refusal to give these instructions (except the fourth, as to the refusal of which there is no exception), and to instruction just quoted, the defendant excepted, and appealed from the judgment against it.

Donnell Gilliam for plaintiff.
J. E. Moore for defendant.

CLARK, J., after stating the case: This charge was certainly as favorable to the defendant as it had a right to ask; indeed, we think more so, because, notwithstanding the defendant might have failed to provide itself with side-tracks sufficient for its business, it did not follow that it had the right to obstruct the public street and crossing by allowing a shanty-car to remain for several days "ten feet in the street and two feet on the bridge at the crossing," especially when the jury find from the evidence that such shanty-car so situated was calculated to frighten the plaintiff's horse.

If the defendant "in the exercise of its industry" was moving the car along its track and crossing the street, and the plaintiff's horse was frightened thereby, or if the car was on the side-track at a place where it had a right to be, and the horse took fright, ordinarily the plaintiff could not recover. *Morgan v. R. R.*, 98 N. C., 247. The railroads are chartered with a view to the exercise of the rights
(219) necessary and proper for the performance of the great industry committed so largely to them. But when the car was placed in the street, occupying a part of the bridge, permitted to remain there for several days, and so situated was calculated to frighten plaintiff's horse, and did frighten him, and the court told the jury, notwithstanding, that if the putting the car at such place was necessary to the defendant's industry because the other side-tracks were filled with cars, that the plaintiff could not recover, the defendant certainly has no cause to complain. *Myers v. R. R.*, 87 N. C., 345. This covers substantially the objections raised by the prayers for instruction, their refusal, and to the instruction given in lieu thereof.

The only exception to evidence is that a witness was allowed to testify that he saw another horse frightened by this car at that place

the day before. This evidence was competent, both on the issue submitted, by consent, whether the car was calculated to frighten horses, and whether it was negligence to permit it to remain at that point.

No error.

Cited: Alexander v. R. R., 112 N. C., 733; *Norton v. R. R.*, 122 N. C., 934; *Dunn v. R. R.*, 124 N. C., 256; *Thomason v. R. R.*, 142 N. C., 329; *Duffy v. R. R.*, 144 N. C., 28; *Deligny v. Furniture Co.*, 170 N. C., 204.

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(220)

JOHN L. HALL v. LEANDER TILLMAN ET AL.

Claim and Delivery—Form of Judgment—Liability of Sureties Upon Defendant's Undertaking—Costs—Injuries to Property in Seizure.

1. In claim and delivery, when for any cause judgment cannot be given for the recovery of the property in specie, as where *pendente lite* the property was sold under order of court, judgment should be rendered for the recovery of the value of the property at the time of the tortious taking, with interest thereon, in lieu of damages for deterioration and detention, and for the costs.

2. Where, in claim and delivery, the defendant pleads that he became possessed of the property under a contract of sale, upon the facts being so found by the jury (the property having been sold under an order of court *pendente lite*) judgment should be rendered against the sureties to the defendant's undertaking for the penalty of the bond, to be discharged upon the payment of the contract price, with interest and costs, less the payments by the defendant.

3. The sureties on a defendant's undertaking in claim and delivery are liable for the costs of the action upon the plaintiff's recovery, notwithstanding the amendment by Laws of 1885, ch. 50, to The Code, sec. 324.

4. A plaintiff who is adjudged to be the owner of machinery is not liable to the defendant for injuries to a shelter covering it, done in removing it under an order in claim and delivery proceedings, unless wantonly done.

CLAIM AND DELIVERY for the purpose of acquiring possession of a portable engine and sawmill, tried at September Term, 1891, of CHATHAM, before *McIver, J.*

At Fall Term, 1886, the jury responded in the affirmative to two issues involving the plaintiff's title and right to possession, but did not answer the other issues. Thereupon the court ordered the engine and sawmill to be sold, which was done by the commissioners appointed, and the proceeds of sale were paid and sale confirmed. (221)

The appeal from that judgment was not perfected.

Subsequently a judgment was rendered for what purported to be, but had never been ascertained by a jury to be, the balance of a debt due the plaintiff from the defendants, against the defendants and the sureties on the replevy bond. That judgment was reviewed on appeal (see case, 103 N. C., 281), and a new trial was granted as to untried issues, leaving the verdict already returned undisturbed.

First Exception.—At May Term, 1891, when the case was called, the plaintiffs submitted the following issues:

1. What damage has the plaintiff sustained by reason of the detention of the property in controversy by the defendants from 28 November, 1884, to 12 February, 1887?

2. What damage has the plaintiff sustained by reason of the deterioration of the property in controversy from 28 November, 1884, to 12 February, 1887?

The defendants excepted to the issues tendered by the plaintiff, and contended that no issue should be submitted for the plaintiff, he having elected to stand by the judgments of Fall Term, 1886, and February Term, 1887, and reap the fruits of the same. Also, upon the grounds that if any issues were submitted, they should be those submitted at Fall Term, 1886, and not passed upon by the jury, with the following additional issue tendered by the defendants and accepted by the plaintiff: "What damage has the defendant sustained by reason of the tearing down of the house and removing the machinery of the plaintiff?"

The defendants further objected to the issues as tendered by the plaintiff, upon the ground that the time during which damages should be assessed against defendants should be from 28 November, 1884, to October Term, 1886. The issues tendered by the plaintiff and the one tendered by the defendants were submitted by the court, and the (222) defendants excepted.

After the close of the evidence, and during the argument of counsel, his Honor, of his own motion, changed the issues and submitted to the jury those set out in the record, and the defendant did not except.

Second Exception.—The plaintiff was examined as a witness in his own behalf, and testified that the mill and engine had deteriorated in value from 28 November, 1884, to 12 February, 1887, a certain sum, and that the mill during that period would have been fairly worth to him the sum of $50 to $60 per month.

The defendants excepted to the evidence as to the monthly value, upon the ground that the witness should testify as to the value of the mill during the period as a whole, and that the interest upon the value at the time of seizure was the true measure of damages.

There was evidence on the part of the defendants tending to show that at the time of the seizure the property was under repair and had no rental value; that repairs were put upon it by the defendants to an amount of $125.

Third Exception.—On the cross-examination of the plaintiff he testified, the defendants objecting, that while the property was in possession of the defendants and before this action was instituted, he had been paid by the defendants the sum of $200 on an alleged contract of sale of the property. During the progress of the trial his Honor withdrew this evidence from the jury, and the defendants excepted.

Fourth Exception.—His Honor charged the jury that the interest on the value of the property at the time of the seizure was not the measure of damages for the detention, but that the true measure of damages was the fair rental value during the period, at the place of location, and that the jury might estimate it by the month, as all the evidence introduced tending to show a value tended to show it (223) by the month. The defendant excepted.

Fifth Exception.—The court further charged the jury that in estimating the deterioration of the property the jury might consider the price at which the property sold at the commissioner's sale, together with the other evidence in the case, to which charge the defendants excepted. There was a verdict as set out in the record. The defendants moved for a new trial, for the errors assigned. The motion was refused and judgment rendered as set out in the record.

Sixth Exception.—From which judgment the defendants appealed to the Supreme Court, for the errors assigned, and for the further reason that no judgment should be rendered against defendants' sureties for costs.

Thomas B. Womack for plaintiff.
James H. Headen and A. P. Gilbert for defendants.

AVERY, J., after stating the facts: Under the provisions of the original section (326 of The Code) the bond filed by the defendants in the ancillary proceeding would have been conditioned for the delivery to the plaintiff of the property described in his affidavit, "if such delivery should be adjudged, and for the payment of *such sum as may for any cause be recovered against the defendant.*" But it was provided by the act amendatory of that section (ch. 50, sec. 2, Laws 1885) that such bond should thereafter be conditioned "for the delivery thereof *with damages for its deterioration and its detention, if delivery can be had; and if such delivery cannot, for any cause, be had, for the payment to him of such sum as may be recovered against the defendant for the*

value of the property at the time of the unlawful taking or detention, with interest thereon, as damages for such taking and detention."

In *Taylor v. Hodges,* 105 N. C., 349, it is said that "section 324 of The Code, as amended by chapter 50, Laws 1885, prescribes a (224) form of replevin bond peculiarly adapted to those cases where the title to specific personal property (such as horses) is the only question at issue, *and the full value of the property is the just alternate allowance as damages when the property is not delivered."* Section 326, as amended by section 2 of the same act, requires that the bond of the defendant, when he retains possession of the property, shall, in case of a judgment adverse to defendant's claim, secure to the plaintiff the delivery or the value of the property at the time of the wrongful taking or detention, instead of the value "at the time of seizure" under the warrant as is provided in the bond prescribed for the plaintiff. It is manifest that the Legislature did not intend to give to either plaintiff or defendant, who might prevail in the action, double damage, interest on the amount of money invested in the property wrongfully detained, and at the same time additional compensation for deterioration and detention. But where the property is unjustly withheld by either, and subsequently returned under the decree of the court, compensation is allowed, not only for detention, but for deterioration, because the full measure of justice could not be meted out in any other way. Before the passage of the amendatory act the value was assessed, as in the old action of replevin, at the time of the trial instead of that of seizure by the officer or the wrongful taking or detention; but in both *Holmes v. Godwin,* 69 N. C., 467, and *Miller v. Hahn,* 84 N. C., 226, the Court declared that "Where the property had been destroyed so that it could not be returned in specie, the jury would be justified in so finding and giving the value of the property at the time of the taking and interest thereon as the damages for taking and detention. Now where a return of the specific article to the plaintiff cannot be enforced, the value is assessed as of the time of the tortious taking or the wrongful detention by the defendant, and he is required to pay interest by the terms of the act "as damages," both for taking and detention, from that (225) time, as would have been the rule if the plaintiff had brought trover under the old, or had declared in his complaint simply for the wrongful conversion under the new practice. The property in this case having been sold under a judgment of the court in the cause and placed beyond the reach of the law, the question of damages resulting from deterioration and detention was no longer a living issue. That judgment, rendered in 1886, is now *res judicata.* A new trial was granted on appeal from a subsequent judgment in order to have "a finding upon at least one of the remaining issues" suggested on the

former trial. *Hall v. Tillman,* 103 N. C., 281. The one remaining issue upon which it was essential for the plaintiff's interest to have a finding before the case could be disposed of, was that involving the value at the time of the wrongful detention. As the specific machinery cannot be now returned, and the money realized from a sale of it has been paid into court, the question of just compensation to the owner for being compelled to take back his property, deteriorated in value since he parted with it, does not arise.

In providing that the plaintiff shall have interest from the time of the taking or detention, in lieu of damage, the statute but reaffirms a principle upon which the court might have acted under similar circumstances before its passage. *Holmes v. Godwin* and *Miller v. Hahn, supra.* Where the property could not be returned, and the court was bound to take cognizance of the fact, as in the case at bar, it was error to instruct the jury that a fair rental value of the property was the true measure of damage instead of the interest from the time of wrongful detention, as it was to submit the issue offered by the plaintiff involving the question of damage by deterioration and detention. The court could have proceeded to judgment as to the amount due plaintiff for the detention upon a finding of the value of property when the defendants wrongfully detained it, because the law prescribes that interest on said sum from that time shall be the damage. (226) But in a case like that at bar, where a purchaser makes default in paying the purchase money for personal property, the title to which is still in the original owner, either by reconveyance or reservation at the time of the sale, the jury should ascertain the value when the purchaser acquired possession, because his refusal to meet the payments and perform the conditions attaching to the purchase place him, in contemplation of law, in the same position as if the original taking had been wrongful instead of permissive. If the court had directed the jury to find the value of the mill and engine when delivered to the defendants, the court could have proceeded to judgment upon that finding by allowing interest on that sum, as damage, unless it appeared also that there was a stipulated price agreed upon between the parties for the property, a part of which had been actually paid. Claiming the right to show such contract and payment, the defendants excepted to the ruling of the court in withdrawing from the jury evidence that had been admitted and which tended to show that the defendants had previously paid to the plaintiff $200, a part of the purchase price of the machinery seized, while it was still in the hands of the defendants as purchasers, and before the seizure and subsequent replevying by defendants.

The defendants set up the defense in their answer that they had bought the portable sawmill and engine from the plaintiff, had agreed to pay him $800, and had actually paid, after the original contract of sale, and before the seizure, $200. It seems that the defendants on the former appeal insisted that the court could not proceed to judgment upon the simple finding that the plaintiff was the owner and entitled to the possession of the mill and engine in controversy, when it appeared of record that they had been converted into money by virtue of an order in the cause. When *Justice Davis* said for the Court that there was "at least one" issue remaining to be tried, he evidently adverted (227) to the possibility that the defendants might insist, on the new trial awarded, upon their claim to a credit upon the value of the machinery for the payment of $200. Where in selling property the owner reserves title in himself till the purchase money is paid, or takes a reconveyance by mortgage deed to himself from the purchaser to secure his debt, though he has a right to demand possession on default in the payment of the price or on breach of the conditions of the mortgage, the defendant and his sureties upon a final adjustment of their liabilities may justly demand that the jury shall find what was the price agreed upon between the parties for the property, and what sum had been actually paid. *Taylor v. Hodges, supra.* "There are torts and contracts, just as there used to be; but there are not several forms of action. . . . It is the transaction that is investigated, without regard to its form or name." *Walsh v. Hall,* 66 N. C., 233; *Wilson v. Hughes,* 94 N. C., 182. If there was no testimony upon which the actual amount of purchase money due after deducting the payments could be ascertained, then the judgment would depend upon the value at the time of the wrongful taking or detention, which, in a case where there is default in paying the purchase money, would relate to the taking under the contract not performed, and the plaintiff would recover the penalty of the bond, to be discharged upon the payment of the value of the property so ascertained, and interest from the date of wrongful taking and costs. But if, in addition to the value at the date of wrongful detention or conversion, the jury had found that the original purchase money was $800, with interest from a specified date, and that at a period subsequent to the sale, and before the action was brought, the defendants had paid $200, then the true amount of the debt due could be ascertained by allowing such credit. In that event the judgment should have been for the recovery of the penalty of the bond, to be discharged on the payment of the balance actually (228) due on the debt, with interest from the first of the term, and costs of action. *Taylor v. Hodges, supra.* To that, if the jury had been allowed to ascertain the value at the time of the original

taking, the plaintiff would, if no payment had been made on the stipulated price, have been entitled to recover on the bond, to be discharged on payment of the value, with interest from that time; but if, in addition, they had found that $200 had been paid on the original contract, then the plaintiff should have had judgment for the penalty, to be discharged on payment of the balance actually still due. So that, by this interpretation of the statutes and constructions placed upon them, a fair and equitable adjustment between the parties can be effected. Where the purchaser uses the property and makes no payment at all, the taking is treated as if it had been tortious from the beginning. Where he pays a part of the purchase money, but fails to discharge the whole of the debt, it is treated as a contract, and full credit is allowed for what he has paid, while the original owner looks to the bond to secure the residue, with interest.

Under the old practice the plaintiff might have brought an action of detinue or trover and conversion, or he might have sued out a writ of replevin and seized the machinery, but in either action he would have recovered costs, and in the action of replevin the sureties on the defendants' replevin bond would have been liable for costs as incident to the judgment for the property. Under the new practice it was held, up to the passage of the act of 1885, that if the plaintiff, instead of declaring in his complaint for a tortious taking or a wrongful conversion, simply resorted to the ancillary proceeding of claim and delivery, the action would be assimilated to that of replevin, in so far that the value should be estimated as of the time of trial. *Holmes v. Godwin, supra.* But we see no reason why the analogy does not hold out so far as to entitle the plaintiff to costs as incident to recovery of the property withheld. But our attention is called to the form of the amended statute as bearing directly on this question. It is true that the language of section 326 of The Code is unmistakable (229) in requiring the bond to be conditioned "for the payment of such sum as may for any cause be recovered against the defendant." We do not think that it was the intention of the Legislature to alter the law in this respect. Besides, this is not like an affidavit for injunction, only an incidental, though an ancillary proceeding, because the matter in controversy is the same as that covered by the condition of the bond, viz., Which of the parties has the right to the specific property? The plaintiff will be entitled to receive, before the bond can be discharged, if he should prevail in the action, not only the value of the property or the balance of the purchase money, as the case may be, with interest, but the costs as incident to his recovery. *Slaughter v. Winfrey,* 85 N. C., 160; *Long v. Walker,* 105 N. C., 96. The language of the statute is not so explicit as that of the original section of The

Code, but we think that it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. The defendants have not made it appear, so far as we can see, that they are entitled to damages for pulling down a house or removing the machinery. The plaintiff was entitled to the custody of the property, as the jury have found. He had the right, therefore, under the order of seizure, to take and remove it. If it could not be removed without injury to the shelter placed over it, the plaintiff would not be liable for such injury as was not wanton, but merely incidental to such removal.

Error.

Cited: *Taylor v. Taylor,* 112 N. C., 34; *Hall v. Tillman,* 115 N. C., 502; *Hendley v. McIntyre,* 132 N. C., 278; *Mahoney v. Tyler,* 136 N. C., 43.

(230)

R. M. NIMOCKS ET AL. V. THE CAPE FEAR SHINGLE COMPANY.

Injunction—Receiver.

When the facts upon which an injunction was granted until the hearing and a receiver was appointed by the judge below are controverted and doubtful, the Supreme Court will not interfere with the orders, especially when it appears that no serious injury to any of the parties can arise therefrom.

MOTION for injunction and receiver, heard before *Whitaker, J.,* at August Term, 1891, of HARNETT.

The plaintiffs allege, in substance and effect, that the defendant corporation is indebted to them respectively in large sums of money; that it is largely insolvent; that being so insolvent, it has confessed divers judgments, without action, in favor of its officers and stockholders, founded upon fictitious debts, the purpose being to defraud the plaintiffs and others, its creditors, and defeat the payment of their debts; that to that end they seek to sell the property of the defendant corporation under executions issued upon such fraudulent judgments and put the same beyond their reach, etc. The defendants admit the insolvency of the defendant corporation; that the latter has confessed judgments in favor of some of its officers and stockholders who are defendants, and that they are proceeding to sell the said corporation's property to pay these judgments; they deny the alleged fraud, and allege their good faith, etc.

The court heard the motion of the plaintiffs for an injunction and a receiver pending the action, upon divers affidavits produced by the plaintiffs and defendants, and, finding the facts, allowed the motion. The defendants excepted, and appealed.

F. H. Busbee for plaintiffs. (231)
J. W. Hinsdale and W. E. Murchison for defendant.

MERRIMON, C. J., after stating the case: There was clearly evidence to warrant the findings of fact by the court below, and, upon an examination of the evidence, we see no reason to disturb such findings or to reverse or modify the order based upon them granting an injunction and appointing a receiver pending the action. It is admitted that the defendant corporation is hopelessly insolvent, and that shortly before this action began it confessed divers judgments, without action, in favor of some of its officers and stockholders, and that the latter were proceeding to enforce the same by sale under execution. The plaintiffs allege that their judgments were founded upon fictitious debts; that they are void, and the purpose of them was to defeat the plaintiffs' rights as creditors by sacrificing the property of the corporation at a forced sale. The defendants deny the fraud, and allege the justice of their demands. The evidence leaves material questions at issue not at all free from doubt. In such case this Court will not interfere with the order granting an injunction and appointing a receiver, especially when it appears, as it does in this case, that the parties interested can suffer no serious injury arising therefrom. *Machine Co. v. Lumber Co.*, 109 N. C., 576.

Affirmed.

Cited: Bank v. Cotton Mills, 115 N. C., 525; *Stokes v. Cogdell,* 153 N. C., 182.

STATE EX REL. TRAVIS N. HARRIS v. GEORGE N. SCARBOROUGH.

Election—Registration—Constitution—Voters.

1. While the General Assembly cannot add to the qualifications prescribed by the Constitution for voters, it has the power, and it is its duty, to enact such registration laws as will protect the rights of duly qualified voters; and no person is entitled to vote until he has complied with the requirements of those laws.

2. Where there has been no registration at all, the votes cast cannot be counted by proving that none but duly qualified electors voted. Possibly

this principle might be relaxed where a fraudulent conspiracy to deprive the voters of the right of suffrage is shown; and it dos not apply where the Legislature has failed to provide means for registration.

3. Where a voter offers to comply with the laws in reference to registration, but is prevented by the wrongful conduct of the registrar, his vote should be received and counted; but a vote cast upon an invalid registration should be rejected.

4. The provision in the statute (ch. 287, sec. 3, Laws 1889) that no registration shall be valid unless it specifies, as near as may be, the age, occupation, residence, etc., of the elector, is in conformity with the Constitution and is mandatory in its terms, and he who seeks to vote without complying therewith must show that he offered to do all that was required of him and was prevented by the fault of the registration officers.

5. A response to the inquiry as to the place of birth and residence of the voter, giving the name of the *county*, is sufficient compliance with the statute in that respect; but a response giving only the name of the State is too indefinite, and a registration thereon is invalid.

6. Where it appeared that the registrar read to each person applying to register the inquiry printed at the head of the columns of the registration books furnished him, he discharged his duty in that respect, and it was the duty of the elector to make his response sufficiently specific to meet the purposes of the law.

(233) QUO WARRANTO to try the title to the office of register of deeds, tried before *Graves, J.*, at June, 1891 (Special Term), of MONTGOMERY.

The registration for Bean's Mill Precinct in Ophir Township, and Little River Precinct in Little River Township, was assailed by defendant, and the registration books were introduced for that purpose. The registration book for Bean's Mill Precinct, in the column under the head "Place of birth," and on the line opposite the name of the voter registered, had simply as the place of birth of the voter "North Carolina," and in the column under the head of "Place of residence," "Montgomery County," and in the column under the head of "Name of township or county from whence removed," as the place from which the voter had removed, simply "Ophir," and there was evidence tending to show (and the evidence was uncontradicted) that the registrar, at the time the voter appeared for registration and registered, read to the person so registered the said headings of the columns in the form of interrogatory, and the voter gave answer corresponding to said entries exactly as the entries were made. To all of which evidence plaintiff objected; objection overruled, and exception by plaintiff.

The registration book for Little River Precinct and Little River Township, in the column in said book under the head of "Place of

birth" had, opposite the name of the voter as his place of birth, simply the name of the county in which he was born, and in the column for "Place of residence" simply Montgomery County, and there was uncontradicted evidence that the registrar read the headings of said columns in the form of interrogatory to the applicant for registration, and the voter answered precisely as the entries aforesaid were made in the said columns. Plaintiff objected to said evidence; objection overruled, and there was exception.

A number of votes in Troy Township was assailed, and for that purpose the registration book was introduced by defendant. Said registration book showed in the columns under the heading in said registration book, "Name of township or county from whence removed," a blank—no entry at all. And the registrar was introduced, (234) and testified that he read the said heading to the person registering in the form of interrogatory, and the person so registering made no answer to the question so asked, and that the said persons had, since the preceding election, moved to Troy Township for residence. Plaintiff objected to this evidence; objection overruled, and exception.

It is admitted by the pleading in the cause that there was "an entirely new registration" had in pursuance of law in the entire county for the election here in controversy. At the close of the evidence the court stated that he should charge the jury that the registrations aforesaid were not sufficiently specific to meet the requirements of the registration law, section 2676 of The Code, as amended in 1889, and that such registration was invalid, and the votes of the voters so registered should not be counted in determining the result of the election in controversy unless such omissions and want of specific statements in respect to place of birth, place of residence and place from whence removed were not the fault of the voter, but were the fault of the registrar. That is, if the voter himself gave answers to the inquiries of the registrar as aforesaid corresponding to entries aforesaid, and said nothing to cause said entries to be made specific, then, it not being the fault of the registrar, but his own, the registration would be invalid, and the votes should not be counted.

To this ruling of his Honor the plaintiff excepted, and in deference to the intimation aforesaid by his Honor, the plaintiff, after excepting, submitted to judgment of nonsuit and appealed. It is admitted that if the said assailed registration is omitted from the count of votes, the plaintiff cannot recover.

In respect to said registration the plaintiff contended that the (235) following clause in the election law (sec. 2676), to wit: "No registration shall be valid unless it specifies, as near as may be, the age, occupation, place of birth, place of residence of the elector, as well as

the township or county from whence the elector has removed, in the event of removal, and the full name by which the voter is known," has been substantially complied with in regard to the matter assailed; and that the provisions of said statute should be treated as directory, it not appearing that the voters assailed were not otherwise disqualified; and he further contended that if the Legislature intended such law to be mandatory, the same is unconstitutional, for that, in effect, it imposes qualifications for an elector in addition to those imposed by the Constitution, and such law is not authorized by the section of the Constitution empowering the Legislature "to provide for the registration of all electors."

J. A. Lockhart for plaintiff.
W. C. Douglass and T. J. Shaw for defendant.

AVERY, J. After declaring who should be qualified electors, Art. VI of our State Constitution makes it obligatory upon the Legislature to guard against the fraudulent usurpation of the elective franchise, in the following explicit language: "It shall be the *duty* of the General Assembly to provide, from time to time, for the registration of all electors, and *no person shall be allowed to vote without registration,*" etc. Const., Art. VI, secs. 1 and 2.

In obedience to this injunction of the organic law, and in the exercise of the legal discretion incident to the power given them, the Legislature provided (Laws 1889, ch. 287, sec. 3) as follows: *"No registration shall be valid unless it specifies, as near as may be, the age, occupation, place of birth, place of residence* of the elector, as well as the township or county from whence the elector has removed, in event of removal, and the full name by which the voter is known."

(236) It is now well settled that legislatures acting under such grants of power may enact registration laws for the purpose both of preventing those not entitled to vote from enjoying the privilege and of securing the right of suffrage to the qualified electors; though they have no power to add to their constitutional qualifications. Cooley's Const. Lim. (6 ed.), 756; *Kiveen v. Wells,* 144 Mass., 497; *McMahon v. Mayor,* 66 Ga., 217.

If a statute appears upon its face to have been framed with the intent to prevent fraudulent registration, or, in case of failure to accomplish that object, at all events to detect and punish the crime of illegal voting, it is within the purview of the law-making power to pass it. Every presumption is in favor of its validity and of the good faith of the body that enacted it. *S. v. Moore,* 104 N. C., 717; *Powell v. Commissioners,* 114 Penn. St., 265; *S. v. Eaves,* 106 N. C.,

752; *Brown v. Brown,* 103 N. C., 213; *Randall v. R. R.,* 107 N. C., 752.

Judge Cooley says: "All such reasonable regulations of the constitutional right which seem to the Legislature important to the preservation of order in elections *to guard against fraud,* undue influence and oppression, and to *preserve the purity* of the ballot box, are not only within the constitutional power of the Legislature, but are commendable, and at least some of them absolutely essential." Const. Lim., 757 and 758.

The Constitution of 1868 was amended in 1877 so as to require a residence of ninety instead of thirty days in the county as qualification. This amendment was aimed at the fraudulent practice of buying purchasable electors and colonizing them in a county thirty days before the time of voting, in order to control the election of its representatives or other local officers. The new requirement increases the expense attendant upon what is known as colonization of voters, and (237) furnishes additional time for detecting the fraud. Where such migratory characters are compelled to state on oath their ages, occupations, place of birth, place of residence, the township from which they may have removed and the full name by which they are known, they give data which, if upon inquiry it prove to be false, invites further investigation to ascertain the fraudulent purpose that induced the perjury, and if it be a true history of the movements of the voter, affords the means of verifying or contradicting his statements as to age or disqualification for crime. We must assume that the purpose of the Legislature was to attain such results as obviously and naturally might follow the strict enforcement of the statute. Where a statute, enacted in obedience to such a mandatory constitutional provision as that contained in Article VI, sec. 2 (if not where it is passed in the exercise of the bare authority to require registration), declares that no votes shall be received but those of registered electors, it seems to be settled that votes cast in a township where there has been no registration at all cannot be made lawful and counted by proving that none but duly qualified electors voted. Cooley's Const. Lim. (6 ed.), p. 758; McCrary Elec., sec. 100; Brightly El., p. 51.

It may be that the rule would be different where a fraudulent conspiracy to deprive the voters of a particular precinct of the right of suffrage is shown. "It is no answer" (says Judge Cooley) "that such a rule may enable the registry officers, by neglecting their duty, to disfranchise the electors altogether; the remedy of the electors is by proceeding to compel the performance of the duty, and the statute being imperative and mandatory, cannot be disregarded." Under our statute, registrars who willfully fail to discharge their official duties are also subject to indictment. This principle does not apply

(238) where an act of the Legislature fails to provide any means of registering the electors of a ward, section, or township (*Vann Bokkelen v. Canaday,* 73 N. C., 198), and was declared equally inapplicable where the law under which a municipal election was held was disregarded by a failure of the proper authorities to order a registration at all, thus vitiating the whole vote cast. McCrary, sec. 101; 6 Am. & Eng. Enc., 2905.

Where an individual voter offers to comply with a reasonable regulation in reference to registration, and is prevented from compliance by the wrongful act of the registrar, his vote should unquestionably be counted, and the judge below very properly so held. McCrary, sec. 102.

In *Hampton v. Waldrop,* 104 N. C., 453, a question widely different from that under consideration was presented. There the registrar merely entered in a new book the names of electors which had been properly and lawfully recorded on a former registration book that had been lost, and then registered in the manner prescribed by law the names of other persons who were entitled to vote at that place. The new applicants had a right to be registered in a new book if the old could not be found when they complied with the law. Those whose names appeared in the old registry had already complied with the requirements of the statute.

If the Legislature sees fit to enact a reasonable regulation as to the manner of recording the names of voters, and the information which the voter must impart (in order that persons so inclined may inquire into the truth of his statements), and to pronounce the registration of each particular name invalid unless the elector shall comply with its requirements, it is manifest that the same reasons exist for rejecting the ballot to each voter whose registration is not valid as for refusing to count a whole township not registered at all. An invalid registration is no registration at all, and the principle must be ap-
(239) plied to an individual as well as to a class.

In the case at bar, then, we have a reasonable statutory requirement that the elector shall place upon the registration books certain facts connected with his own history, in order that opportunity may be given to look into the grounds for challenge and thereby prevent illegal voting, or that the courts may detect and punish the crime if it becomes a fact accomplished. The law in unmistakable and imperative terms declares that the registration in each particular case shall be invalid and void for failure to comply with the specific requirements. If, in the face of the first clause of the section ("No registration shall be valid"), the courts should declare its provisions merely directory, and thus thwart the manifest purpose of an independent

coördinate branch of the Government when acting within the limit of its power, they would establish a precedent far more dangerous to liberty and constitutional government than all of the real or imaginary evils or inconveniences that might arise from the enforcement of the statute. Cooley's Const. Lim., pp. 197, 200, and 201.

"The judiciary cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Cooley (4 ed.), star p. 168; *S. v. Patterson,* 98 N. C., 660.

While most of the regulations of the law respecting the manner of opening and holding elections are held by the courts to be merely directory, provided the language of the statute does not plainly make them mandatory, no American court has ever claimed the right to disregard an imperative requirement of a statute if the Legislature had the power to pass it and to make it unmistakably mandatory. If the elector purposely refrains from qualifying himself by registration for the enjoyment of the privilege of voting, it is his own fault; and if he is prevented by physical disability from having his name entered on the registration books before the time prescribed by law, it is his misfortune. *Capen v. Foster,* 23 Am. Dec., 632; *People v. Hoffman,* 116 Ill., 587; McCrary, secs. 96 and 97. (240)

The law being constitutional, *"it must appear that the voter did, or offered to do, all that the law required at his hands, and that his failure to be registered was the fault of the officer of registration."* McCrary, sec. 102, p. 67; *S. v. Commissioners,* 20 Fla., 859. In absence of proof to the contrary, it is always presumed that the officer has done his duty. Every citizen is presumed to know the law governing his relations with others, as well as the mandatory rules which prescribe how he may secure the enjoyment of his rights. In the absence of any definite information on the subject, the failure to enter upon the registration book such facts connected with the history of an elector as the statute imperatively requires as a prerequisite to the exercise of the elective franchise must be considered due to the carelessness or inexcusable ignorance of such elector. That presumption can be rebutted only by showing that he offered to comply with the requirements of the statute, and was prevented by the neglect or willful act of the registrar. McCrary, sec. 101.

We concur with the court below that it was the duty of the elector to make the answers as specific as the statute requires them, and that the registrar, if he read the headings calculated to elicit the requisite answers, certainly did all that the law required of him.

Reason, as well as authority, commend the view taken in the court below, that the burden of showing a strict compliance with the law was on the relator, instead of requiring the registrar to charge his

memory with all that occurred, so as to be able to state whether the elector refused, when asked, or simply neglected to state definitely his places of birth and residence.

It only remains to determine whether the names of either or all of the two classes of electors mentioned as recorded by the two regis-
(241) trars were lawfully registered so as to entitle them to vote.

Where the words of a statute have no technical meaning, they must be interpreted according to their ordinary import. In response to either the question, "What is your place of birth?" or "What is your place of residence?" the answer "Montgomery County" would generally be deemed sufficiently definite, and is the reply that would be universally given by natives or residents of the county, except that some persons would make the response more specific by giving the name of an incorporated town located in that county if they lived within its bounds; as, for instance, "Troy." But where the reply to either of those questions was "North Carolina," it was not sufficiently specific, according to the ordinary import of words; and if it were treated as sufficient in law, the manifest purpose of the Legislature would be defeated. Usually it does not prove difficult to test the truth of the statement that a man was born or resides in a particular county, by reference to the tax lists, poll-books, church records, or by resorting to other means of acquiring information; nor, when the statement is verified, to determine whether he is disqualified by any record existing in such county or in the next one to which he migrated from that; but with no more definite clue to the previous history of a person than the fact that he was born in North Carolina, the most diligent efforts to trace his past movements must almost inevitably prove vain.

The electors of Little River Precinct in Little River Township who caused the name of the county of their birth to be recorded opposite their names, and "Montgomery County" to be entered as their place of residence, we think complied with the requirements of the statute. But the registration at Bean's Mill Precinct was fatally defective in stating the electors' places of birth to be "North Carolina."

As we understand the facts, the case comes before us now upon an intimation based upon an admitted state of facts as to the registration in certain precincts only, which induced the relator to submit
(242) to judgment of nonsuit and appeal. All other grounds upon which plaintiff relies are reserved, as are all other grounds of defense, to await the decision as to the legality of the registration at Bean's Mill and Little River precincts.

For the error in holding that the registration in Little River Precinct was not valid, if the testimony of the registrar was believed, the relator is entitled to a new trial. The courts have no more right to look

to possible consequences of enforcing a law than they have to conjecture as to the motives of the Legislature in enacting it, provided the law passed is within the limit of its powers. Whatever defects there may be in the registration books, as they appear today, it will not be difficult for electors to have them cured before the next general election, as there will be abundant time to give notice. Where an elector may be again sworn, we see no reason why blanks may not be filled or improper entries erased and proper ones substituted opposite to his name as already recorded in the book.

CLARK, J., concurring in result, but dissenting in part from the reasoning:

It is within the power of the Legislature to adopt reasonable regulations in regard to the registration of voters. The act in question is not obnoxious to any charge of interference with the constitutional right of voting. The requirement that the party offering himself for registration shall give his place of birth, his place of residence, and the township from which he has removed, is reasonable, as it aids the purpose of tracing out and preventing attempted frauds on the elective franchise.

When the voters in Little River Township and precinct, to the interrogatories of the registrar, gave simply "Montgomery County" as their place of birth and residence, such answer, if truthful, and in the absence of a requirement in the statute that the voter should particularize further by giving the name of the town or town- (243) ship of birth and residence, was sufficient, and it was error to hold that the votes of persons so registered should be thrown out. Most especially is this so when the officer of the law received such responses without objection or demand for further particularity or identification on the part of the voter.

As to the voters at Bean's Mill Precinct, Ophir Township, the response of "Montgomery County" as place of residence was, as we have said, sufficient, especially when no further information was sought by the registrar. The response of "Ophir" to the question as to the township whence the voter had removed was sufficiently definite, and could only be understood as meaning that the voter was still, as he had been at the previous election, a resident of that township. The response giving "North Carolina" as the place of birth is indefinite. But it was error in the court to hold, as a matter of law, that *per se* this was the fault of the voter, and invalidated the vote given by him. Whether it was so or not depended upon the facts of the case. If the registrar, when such response was given, had asked for a fuller and more definite response, and this had been refused or not given, then

there would have been conduct on the part of the person offering to register which might be justly held as sufficient to deprive him of the right to vote. But the registrar is the officer of the law. He is appointed to make inquiries and set down the replies. When, in response to the inquiry as to the place of birth, the elector in good faith, and thinking he had complied with all that was required of him, responded "North Carolina," he was guilty of no disobedience of law or other act which deprived him of his right to vote. If the response was not sufficiently definite, the representative of the law, the registrar duly appointed, sworn and paid to perform the duty of taking the registration, should have asked the elector to respond more particularly; and (244) if the registrar failed to do so, the neglect of duty was on the part of the registrar. The elector might well be justified in taking the acquiescence of the officer as a representation that the answer was a full compliance with the requirements of the law. Any other view, it would seem, would make the registration of voters not an impartial observance of regulations to protect the electoral franchise and to prevent frauds upon it, but would furnish opportunities whereby the trusting, the unwary, the unskilled or the ignorant would be deprived of their constitutional right of exercising the right of voting. This presupposes that the answers of the party offering to register were made in good faith, and this is a presumption of law, as the burden of invalidating such vote is upon the plaintiff, who is seeking to reverse the result of the vote as cast. Of course, if the voter is shown to have answered evasively and indefinitely on purpose, in bad faith, or if asked for further information, refuses it, or if informed that his reply is insufficient, he failed to make it more definite, the fault would be his, and his intentional noncompliance with the reasonable requirements of the statute would invalidate his vote.

As to voters from Troy Township, in regard to whom it appeared that the inquiry required by law was addressed, which they failed or refused to answer, such votes were properly held invalid.

DAVIS, J., concurred in the opinion of CLARK, J.

Per Curiam. Error.

Cited: Reid, ex parte, 119 N. C., 646; *Quinn v. Lattimore,* 120 N. C., 434.

(245)

W. J. WYATT v. THE LYNCHBURG AND DURHAM RAILROAD COMPANY.

Arbitration and Award—Evidence.

Upon the filing of an award directing payment to the plaintiff of a certain sum in dollars and cents, the defendant moved, upon affidavits setting forth the contracts upon which the award was based, that the judgment to be rendered thereon should be so framed that defendant might discharge the same with certain bonds, as stipulated in the said contract: *Held*, that evidence *altunde* of principle upon which the award was based was not competent; and it being regular on its face, and no objection on account of fraud, mistake, or irregularity being made, it should be affirmed.

MOTION to enter award, before *Boykin, J.*, at March Term, 1891, of DURHAM.

The action was brought to recover a balance alleged to be due for work done and material furnished on the construction of defendant Lynchburg and Durham road.

At the return term, and before any pleadings were filed, the cause was referred to arbitrators with directions to make an award and report it to the court. This was done, and a sum in dollars and cents was awarded to be due the plaintiff. Upon motion to enter judgment according to the award, the defendants, The Penn Construction Company and Codwise & Allen, moved that the judgment should be so framed that they might discharge it with certain bonds issued in aid of the Lynchburg and Durham Railroad by certain townships of Person County, and supported this motion by affidavit that the contract under which the work was done contained a provision to that effect; that the contract was before the arbitrators on their hearing, and their attention was particularly called thereto. The contract was also offered in evidence on this motion. (246)

The motion of defendants was overruled, and judgment entered in pursuance of the award, from which defendants Penn Construction Company and Codwise & Allen appealed.

J. W. Graham, J. S. Manning, W. W. Fuller, and J. Parker for plaintiff.

W. A. Guthrie for defendant.

SHEPHERD, J. Upon the coming in of the award the defendants introduced before his Honor an affidavit from which it appeared that in the contract on which this action is brought it was provided that the

defendants should have the privilege of paying for work done in Person County "in the valid county or township bonds of the said county," the same to be received "in payment for said work at par and interest." It also appeared by said affidavit that the contract was introduced before the arbitrators and their attention directed to the provision above mentioned. The defendants then moved that the judgment should be so framed as to permit them to discharge the amount found to be due by the award by the payment into court of an equal amount in the said bonds.

The award does not set forth the terms of the contract, nor does it identify it as the same as that mentioned in the affidavit. Neither does it undertake to construe its provisions, nor in any other respect to decide according to law. It simply speaks of a contract between the parties, and declares that so many dollars and cents are due the plaintiff by the defendants.

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 the arbitrators "and unaffected by fraud, mistake, or
(247) irregularity, the judge has no power over it, except to make it a rule of the 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 they intended to decide according to law (*Jones v. Frazier,* 8 N. C., 379; *Hurdle v. Stallings,* 109 N. C., 6), "for they are a law unto themselves, and may decide according to their notions of justice, without giving any reasons." *Leak v. Harris,* 69 N. C., 532. Unless the award discloses an intention to decide according to the law, such intention can be shown in no other way. *Ryan v. Blount,* 16 N. C., 382. In the case just cited it appeared that the arbitrators improperly charged a guardian with compound interest, and testimony was heard which showed that they undertook to decide that question according to law. The judge set aside the award, and this Court, in reversing the judgment, said that "The court must have come to that conclusion (that is, that they intended to decide according to law) by conjecture, or by evidence *aliunde;* neither of which sources will do. It must plainly appear upon the face of the award; otherwise, it is taken that the arbitrators intended to be governed by their own rules or notions of right. Both the law and the facts are referred to them, and where there is no fraud or mistake, the latter to be ascertained as before stated, the award is conclusive. It is in their judgment, as to both, that the parties confide." Tested by the foregoing principles, we are unable to see any error on the part of his Honor in refusing the motion of the defendants. As we have stated, there is nothing in the award which

shows that the arbitrators intended to decide according to law. Had the contract mentioned in the affidavit been admitted in the pleadings, there might have been some ground upon which to base the motion; but even in that case the power of the court to interfere would be doubtful, as the submission to arbitration was not restricted to the ascertainment of how much was due upon the contract, (248) but it comprehended "all matters in controversy," thus leaving the existence of the contract, as well as its terms and legal construction, to be determined entirely by the arbitrators. The affidavit shows that they had the contract mentioned by the defendants before them, and if they found that such was the contract and erred in its legal construction, it is clear that their judgment cannot be reviewed unless, as we have said, it appears that they intended to decide according to law. It may be that they found that such was not the contract, or that it had been modified, or that the defendants had waived the right to avail themselves of the privileges claimed, or that, in estimating the amount due in money, they considered the actual value of the bonds. Whatever may have been the reasons upon which the arbitrators acted, we are very sure that, under the principle so often declared by this Court, his Honor committed no error in refusing the motion of the defendants.

Affirmed.

Cited: Herndon v. Ins. Co., post, 287.

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(249)

HARPER WILLIAMS v. S. ALBERTSON, ADMR.

An opinion will not be filed when it can serve no useful purpose.

MOTION by defendants, heirs at law and the administrator of Stephen M. Houston, to set aside an award, the judgment confirming the same, the sale and report thereof in accordance with said judgment, all of which proceedings were had in this action, heard at February Term, 1891, of DUPLIN. *McIver, J.,* presiding.

The facts were found by the court, and thereupon it refused to grant the motion, and defendants appealed.

W. R. Allen for plaintiff.
H. L. Stevens for defendants.

PER CURIAM: We have examined with much care the record in this case, and the points presented and argued by counsel have been fully

considered. As the principles involved have been often decided by this Court, and no useful purpose can be served by an opinion applying them to the particular facts of this case, it is sufficient to say that we think there was no error in the ruling of the court below, and that the judgment should be

Affirmed.

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(250)

J. C. HUDSON v. D. B. JORDAN.

A case will not be reversed on rehearing unless some point or authority was overlooked.

PETITION of the defendant to rehear and reverse the judgment of this Court rendered in this action at February Term, 1891 (reported 108 N. C., 10).

G. V. Strong and C. B. Aycock for plaintiff.
H. L. Stevens and W. R. Allen for defendant.

DAVIS, J. It is of public interest that there shall be an end to litigation. It was said by the Chief Justice in *Emry v. R. R.*, 105 N. C., 45: "It is but a reiteration of what has been said in a multitude of decided cases of this Court, to say that it will rehear a case only for very weighty considerations and when the alleged error clearly appears." And upon a rehearing no case should be reversed unless it appears to have been decided hastily, or some material point overlooked, or some authority was not called to the attention of the court, or when it appears that in the former decision some material fact was overlooked. See cases cited in Clark's Code under Rule of Supreme Court, 53." From a careful review of the former decision in the present case, we fail to observe any omission on the part of the court to consider carefully and fully every point presented in the pleadings. It fully appears from the opinion of a majority of the Court, delivered by CLARK, J., and the able dissenting opinion delivered by the Chief Justice, that the decision sought now to be reversed was rendered upon a full and careful discussion of the questions presented, and we affirm the decision then made.

Petition denied.

Cited: Tucker v. Tucker, post, 334; *Moore v. Beaman,* 112 N. C., 561; *Mullen v. Canal Co.,* 115 N. C., 16; *Weisel v. Cobb,* 122 N. C., 70; *Hodgin v. Bank,* 125 N. C., 503, 511.

(251)

SIMEON WOOTEN v. JOHN D. WALTERS ET AL.

Contract, When Divisible—Courts—Sale.

Plaintiff and defendant entered into a parol agreement by which the former engaged to transfer to the latter a stock of merchandise and certain real property in exchange for the latter's interest or shares, in a corporation. Possession was mutually delivered, but shortly thereafter the plaintiff notified defendant that he repudiated the contract, and brought suit to have it canceled and for repossession of the property so transferred by him: *Held*—

1. The contract was divisible; and while the plaintiff was entitled to recover the possession of the real property—the contract for the sale thereof being void under the statute of frauds—the title to the merchandise passed to defendant, who was entitled to recover the difference in the value thereof and the shares in the corporation which he had delivered to plaintiff.

2. The defendants were properly adjudged to pay the costs of the action.

APPEAL at November Term, 1891, from LENOIR; *Boykin, J.*

PLAINTIFF'S APPEAL

The plaintiff brought this action to avoid the contract and recover the real and personal property hereinafter specified. The case was, by consent of the parties, referred.

The material facts found by the referee are as follows:

1. That in 1889 the plaintiff and defendants formed themselves into a company and were incorporated under the name of the Kinston Oil Mill Company, for the purpose of manufacturing cotton-seed oil.

3. That no certificates or other evidence of stock were ever issued by said company.

4. In November, 1889, the plaintiff agreed with the defendant J. D. Walters to sell to him his stock of merchandise and two stores and lots, all being in LaGrange, and was to take in payment therefor the interests of the said J. D. Walters and the defendant Alex. Sutton in the said oil mill, the difference to be paid as it should (252) appear on estimation.

5. The contract above mentioned was entered into under the following circumstances: Walters was at the store of Wooten, and a proposition to trade was made, by which party is uncertain, and whether the stores were then named or not is uncertain. They agreed to meet again that night. At night Walters went to Wooten's store, and after a while they agreed that the goods were worth 20 per cent less than their original cost. They then immediately began to talk about the

price of the stores, but did not agree as to their price; they then began to talk about the price of the oil mill property. Walters said it was worth dollar for dollar for what had been put into the mill; Wooten thought he ought to make some reduction; Walters refused to do so. Then they began to talk again about the stores, but did not agree as to the price. At this point Walters said to Wooten, "Do we understand each other?" Wooten said he thought so. Walters said, "You are to take the oil mill property at what it cost us, and I am to take the goods at 20 per cent off first cost." Wooten made no reply, but walked off to attend to some matter, came back, and they walked out of the store. Walters again named about the stores; Wooten asked $3,000; Walters offered $2,500. Before they separated they agreed on the price of the stores at $2,750, and Wooten then asked Walters when he wanted to take an inventory of the goods.

6. The contract was not reduced to writing, nor any note or memorandum thereof.

8. After the inventory was completed, Wooten delivered the stores and goods into the possession of Walters.

9. Wooten took possesion of the oil mill property, completed the erection of machinery, etc., and operated the mill about two weeks, and then stopped running the mill, and about a week after in-
(253) formed Walters he should not carry out and complete the contract, and offered to return to him the mill property, and demanded of Walters the return of the stores and goods.

10. Walters has always been willing and able to perform his part of the contract, and several times so informed Wooten.

Conclusions of law from the foregoing facts:

1. That the contract for the sale of the stores and the goods is an entire contract, and cannot be divided or apportioned.

2. That the plaintiff Wooten is entitled to recover the possession of the two stores and lots mentioned in the pleadings.

3. That the plaintiff Wooten is not entitled to recover the goods, or the value of them, from the defendants.

4. That the defendants are not entitled to have the contract enforced, as to the stores and lots.

5. That the defendants are entitled to recover of the plaintiff $971.32, it being the amount paid plaintiff over the value of goods received from plaintiff.

The court sustained the defendants' exception to the first conclusion of law and "adjudged that the said contract is divisible."

The plaintiff filed exceptions as follows:

"1. Plaintiff excepts to conclusion of law No. 3, that the plaintiff is not entitled to recover the goods or the value of them from the

defendants; whereas he ought to have found that the plaintiff was entitled to recover the value of the goods, as he has found that the goods had been sold by the defendant J. D. Walters.

"2. Plaintiff excepts to conclusion of law No. 5, wherein he finds that the defendants are entitled to recover $971.32 from plaintiff: whereas he ought to have found that the plaintiff was entitled to recover of the defendant John D. Walters the value of the goods, to wit, $7,134.78, and interest thereon."

The court overruled these exceptions and gave judgment as (254) follows:

"It is adjudged that the plaintiff recover of the defendants the two stores and lots mentioned in the pleadings; that the defendants retain possession of the stock of goods and general merchandise, and that the defendants recover of the plaintiff the sum of $971.32, the amount found due by the referee, with interest on the said amount from 1 December, 1889, till paid; and further, that the plaintiff recover of the defendants his costs of this action, to be taxed by the clerk."

The plaintiff assigned as error that the court sustained the defendant's exception above mentioned, and overruled his exceptions above set forth, and appealed.

George Rountree for plaintiff.
G. V. Strong, W. R. Allen, and C. B. Aycock for defendants.

MERRIMON, C. J., after stating the case: A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety, and the purchaser will be liable for the entire sum agreed to be paid. And so, also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence, it has been held that where a cow and four hundred pounds of hay were sold for $17, the contract was entire. *Mr. Justice Story* says (255) that "The principle upon which this rule is founded seems to be that as the contract is founded upon a consideration dependent upon the entire performance thereof, if for any cause it be not wholly per-

formed the *casus foederis* does not arise, and the law will not make provision for exigencies against which the parties have negelected to fortify themselves." Such contracts are enforcible only as a whole.

On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains in tact. In such a contract the consideration is not single and entire as to all its several provisions as a whole; until it is performed it is capable of division and apportionment. Thus, though a number of things be brought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or when the things being of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance or by one contract. Thus where a party purchased two parcels of real estate, the one for a specified price and the other for a fixed price, and took one conveyance of both, and he was afterwards ejected from one of them by reason of defect of title, it was held that he was entitled to recover therefor from the vendor. *Johnson v. Johnson,* 3 Bos. & Pul., 162; *Miner v. Bradley,* 22 Pick., 459.

So, also, it was held, where a certain farm and dead stock (256) and growing wheat were all sold together, but a separate price was affixed to each of these things, it was held that the contract was entire to each item and was severable into three contracts, and hence a failure to comply with the contract as to one item did not invalidate the sale and give the vendor a right to reject the whole contract. In such case the contract may be entire or several, according to the circumstances of each particular case, and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, "but on the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the

nature of the subject-matter or by the act of the parties." This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case. *Brewer v. Tysor,* 48 N. C., 180; *Niblett v. Herring,* 49 N. C., 262; *Brewer v. Tysor,* 50 N. C., 173; *Dula v. Cowles,* 52 N. C., 290; *Jarrett v. Self,* 90 N. C., 478; *Chamblee v. Baker,* 95 N. C., 98; *Lawing v. Rintles,* 97 N. C., 350; *Manufacturing Co. v. Assurance Co., ante,* 176; Story on Cont., secs. 21, 25; 3 Par. Cont., 187; Whar. Contracts, secs. 338, 511, 748.

Applying the rules of law thus stated to the case before us, we are of the opinion that the contract to be interpreted, treated as executory, is severable and the sale of the goods therein mentioned was not necessarily an inseparable part of the land embraced by this contract. Although it is single, it embraces the sale of two distinct things, (257) each having a certain price affixed to it, and the price paid for the whole being susceptible of apportionment. Neither by the terms of the contract settled by the findings of fact nor by its nature and purpose does it appear that the storehouse lot of land and stock of goods, distinct things, were *not* necessary parts of an entire contract. These things were not necessary parts of each other; they were entirely capable of being sold separately. Nor does it appear that they were sold as a single whole. On the contrary, they were spoken of and treated as different subjects of sale; a specified price was affixed to the land, and a distinct definite price affixed to the goods. Wherefore this distinction? Why was the price fixed as to the separate and distinct subjects of sale? As we have seen, the two things were not necessary to each other, and nothing was said or done by the parties, nor does anything appear to show that the party would not have made the contract unless it embraced both the sale of the land and the stock of goods. The sale of the stock of goods was not part or parcel of the sale of the land, nor dependent upon it; although the sale of both were made at the same time and embraced by the same contract, severable in its nature and purpose, they were treated as distinct subjects of sale, the price of each being definitely fixed. The mere fact that the plaintiff was about to change the character of his business did not imply that the storehouses and the land on which they were situate must be sold with the goods, else the goods would not be sold. Such things are valuable to let for rent. There is an absence of anything that shows a purpose to sell the two things as an inseparable whole. When, therefore, the plaintiff avoided the contract, not reduced to writing as to the land, as he might do under the statute pertinent, he did not avoid the contract as to the stock of goods; the contract was severable, and as to

the goods was valid and remained of force and continued to have effect.

It seems that really the contract was executed as to the goods,
(258) and the sale might on that ground be upheld without reference to the ineffectual sale of the land, but no question in that aspect of the case was raised.

Affirmed.

DEFENDANT'S APPEAL

MERRIMON, C. J.: This action is somewhat peculiar. Its purpose is to avoid a contract not reduced to writing in respect to real and personal property. The plaintiff recovered the real property, but not the personal property. As to the latter, the court by its judgment settled the rights of the parties favorably to the defendants. The court gave judgment against them for costs, and this they assigned as error. The statute (The Code, sec. 525) prescribes that costs shall be allowed of course in favor of the plaintiff upon a recovery in an action for the recovery of real property, or when a claim to real property arises on the pleadings, or in an action to recover the possession of personal property. But the defendant shall be allowed costs in such actions unless the plaintiff be entitled to costs therein. There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery in such action. The language of the statute as to them is comprehensive and without exceptive provision. In *Wall v. Covington,* 76 N. C., 150, it was held that no part of the costs in such action can be taxed against the party recovering. And in *Horton v. Horne,* 99 N. C., 219, it was decided, in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to cost. Parties to recover costs

only in the cases and as allowed by statute. We think the court
(259) properly allowed the plaintiff his costs. *R. R v. Phillips,* 78 N. C., 49.

If it be granted that this is not strictly an action for the recovery of real or personal property, then it would be embraced by the statute (The Code, sec. 527) in respect to costs, and costs would be allowed in the discretion of the court; and nothing to the contrary appearing, it would be taken that the court gave judgment in the exercise of its discretion in favor of the plaintiff. *Gulley v. Macy,* 89 N. C., 343.

Affirmed.

Cited: Field v. Wheeler, 120 N. C., 270; *Williams v. Hughes,* 139 N. C., 20; *Grocery Co. v. Bag Co.,* 142 N. C., 186; *Phillips v. Little,* 147 N. C., 283; *Willis v. Construction Co.,* 152 N. C., 106; *Cotton Mills v. Hosiery Mills,* 154 N. C., 467; *Harvester Co. v. Parham,* 172 N. C., 392; *Swain v. Clemmons,* 175 N. C., 242.

ALLEN CROOM v. SAMUEL SUGG ET AL.

Evidence—Handwriting—Forgery—Estoppel.

1. A plaintiff who brings an action against the executors of a person whose estate is charged with a liability is estopped to deny the execution of the will under which they were appointed and qualified; and the original will taken from the records of the court is competent, without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of testator to the instrument in controversy.
2. Upon the trial of an issue as to the genuineness of a paper alleged to have been forged by plaintiff, evidence that plaintiff was skillful in imitating the handwriting of others, and that he himself proclaimed that fact, is competent.

APPEAL from *Boykin, J.*, at February Term, 1892, of GREENE.

The action was brought to recover on what purported to be a bond executed by Fannie Sugg, defendant's testatrix, to the plaintiff.

After a number of other witnesses had testified for defendants (260) that the signature to the bond sued on was not genuine, G. W. Sugg, having qualified as an expert, was asked to compare testatrix's signature to her will and codicil under which defendants were acting as executors, and which was a record of the court, with that to the bond which purported to have been executed by her. The first assignment of error was the ruling of the court admitting this testimony.

Defendants asked a witness "if he heard the plaintiff, Allen Croom, tell Thomas Sugg that he (plaintiff) could imitate anybody's handwriting and it would never be detected," the plaintiff having previously, on his cross-examination, been asked if he had not made such statement to said Thomas Sugg, and having answered that he had not. Plaintiff objected to the question and answer; objection overruled; exception by plaintiff. Witness then answered that he "heard plaintiff tell Thomas Sugg about fifteen years ago that he (plaintiff) could imitate anybody's handwriting and it could not be detected."

Plaintiff appealed.

George Rountree for plaintiff.
Swift Galloway for defendant.

AVERY, J. The burden would have been upon the plaintiff to prove, if the fact had been denied, the allegations of his complaint that Fannie Sugg had made a will; that it had been duly proven, and that defendants had qualified as executors appointed by its terms. He could have shown that the defendants were her personal representatives, as alleged

in this action, pending as it was in the Superior Court of Greene County, by the introduction of the original will on file as a record of the court, or by a properly certified copy of it. The Code, secs. 2173 to 2176; *S. v. Voight,* 90 N. C., 741; *Darden v. Steamboat Co.,* 107 N. C., 437; *Davenport v. McKee,* 98 N. C., 500. The paper offered constitutes a part of the testimony which it would have been
(261) essential that the plaintiff should introduce to meet a general denial of his own declarations. It would be equivalent, therefore, to allowing him to question his own right to sue the defendants and to raise a doubt as to his own status in court, were he permitted to say that the signature to the will is not genuine. For the purposes of this action we think that the plaintiff is estopped to deny the execution of the will which authorizes the defendants to represent the estate of testratrix, and that the witness was properly allowed to compare the signatures to the will and codicil with that to the bond sued on, as he is precluded denying the truth of his own allegations in the pleadings. *Tunstall v. Cobb,* 109 N. C., 316; 7 Am. & Eng. Enc., 2b, and note.

It would unquestionably have been competent to prove, in connection with the testimony tending to show the signature to the bond to be a forgery, that the plaintiff, who had set it up as genuine, was unusually clever in imitating the handwriting of others. The testimony being competent, his own declarations against his own interest were, as in all other cases, as clearly admissible as any other evidence to establish the truth of the alleged fact. *May v. Gentry,* 20 N. C., 249; *Braswell v. Gay,* 75 N. C., 515.

The introduction of testimony for the purpose of showing that the signature to the bond was not genuine involved a suggestion of turpitude on the part of the payee and holder, and it was not irrelevant to go a step further and show that the plaintiff had the skill to qualify as well as the motive to stimulate him to commit the forgery.

No error.

Cited: *S. v. Noe,* 119 N. C., 851.

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(262)

W. B. RACKLEY v. J. T. CHESTNUTT.

Deed—Correction—Evidence.

A deed conveying land to C., "and the children of the natural issue of her body, . . . to have and to hold unto the said C. and the issue of her body forever and clear from all manner of encumbrances," with war-

ranty to C. forever, contains evidence upon its face of a purpose to convey the fee sufficient to warrant a decree for correction by inserting the necessary words of inheritance.

APPEAL at December Term, 1891, of SAMPSON, from *Boykin, J.*

The action was brought for the recovery of the possession of the land described in the complaint, and for the correction of a certain deed from one Jacob Chestnutt to one Eliza J. Chestnutt, his grandchild, and who afterwards intermarried with the plaintiff, and died, leaving one child, an infant of a few weeks, who also died, leaving the plaintiff surviving. A copy of the said deed is hereto attached, marked exhibit "A," and made part of this case.

The only issue submitted to the jury was:

"Did Jacob Chestnutt stand in the relation of a parent to Eliza J. Chestnutt at the time of the execution of the deed, on 13 February, 1872?" Ans.: "Yes."

The only evidence offered by the plaintiff upon this issue was the deed itself.

The defendant objected to the deed as evidence upon this issue, upon the ground that the fact of the execution of the deed and the contents and recitals therein are not evidence of the relation assumed by the grantor, and that proof of the relation must be made *aliunde* the deed. This objection was overruled, and the defendant excepted.

The defendant offered no evidence.

Upon the rendering of the verdict, the defendant moved—

1. For a new trial, for that his Honor erred in admitting the (263) deed as evidence upon the issue submitted to the jury.

2. For judgment, notwithstanding the verdict, upon the ground that there could be no judgment for the plaintiff reforming and correcting the deed until a jury had found affirmatively, upon an issue submitted, that the words "their heirs" had been omitted by mistake and inadvertence.

Both motions were overruled.

Judgment was rendered for the plaintiff, correcting the deed by inserting after the words, "Eliza J. Chestnutt and the issue of her body," as they appear in the premises and the *habendum* of the deed, the words, "and their heirs," and declaring the plaintiff the owner in fee simple of the land described in the deed. From this judgment the defendant appealed.

The portions of the deed material to the question were:

"Witnesseth, that I, the said Jacob Chestnutt, for and in consideration of the natural love and affection I do have and bear towards my granddaughter, Eliza J. Chestnutt, and a further consideration of the

sum of $5, to me in hand paid by J. R. Beaman (whom I will, in this deed of gift, appoint as her guardian), the receipt of which I do hereby acknowledge, do give, grant, bargain and sell, and alien, enfeoffed, conveyed, and confirm and set over for himself, his heirs, executors, administrators and assigns, and do fully, freely and absolutely give, grant, bargain, sell, alien, enfeoffed, convey and confirm, and set over unto the said Eliza J. Chestnutt and the children the natural issue of her body; and if she, the said Eliza J. Chestnutt, should die without leaving a child or children, then the lands as herein described and given to her shall descend back to my lawful heirs. All that piece or parcel of land, etc., saving and reserving the free use of the above described lands to myself during my natural life. To have and to hold the above bargained premises, thereunto belonging in any way to (264) the said Eliza J. Chestnutt and the issue of her body, as heretofore described, forever free and clear from all manner of encumbrances whatever, except the use of the above described lands during my natural life, as before mentioned; and I, the said Jacob Chestnutt, do warrant and defend the right and title of the aforementioned lands to the said Eliza J. Chestnutt forever; and I hereby appoint my trusty friend, John R. Beaman, guardian of the said Eliza J. Chestnutt, at my death, if he should be the longest liver."

W. R. Allen for plaintiff.
D. B. Nicholson (by brief) for defendant.

SHEPHERD, J. This case is governed by the principles declared in *Vickers v. Leigh,* 104 N. C., 248; *Moore v. Quince,* 109 N. C., 85, and *Saunders v. Saunders,* 108 N. C., 327. The judgment is, therefore,
Affirmed.

Cited: Whichard v. Whitehurst, 181 N. C., 81, 84.

M. W. BUFFKINS v. D. EASON.

Counterclaim—Trial—Judge's Charge.

1. An allegation in answer that the property for the recovery of which the suit is brought belonged to plaintiff and defendant as partners, does not constitute a counterclaim.

2. When the evidence upon an issue is conflicting, it is error in the court to direct the jury to return a verdict for one of the parties—the jury alone being the judge of the weight of the evidence.

APPEAL at Fall Term, 1891, of PASQUOTANK, from *Brown, J.*

The complaint alleges that the plaintiff is the owner and entitled to have possession of a quantity of corn specified therein, and that the defendant wrongfully detains the same, etc.

The answer denies all the material allegations of the com- (265) plaint. It also alleges, as matter of defense, that the plaintiff and defendant are partners in trade, and that the corn in controversy belongs to them as such partners. No cause of action or counterclaim in that respect is otherwise alleged.

The plaintiff did not make reply to the answer, and the defendant moved for judgment upon the complaint and answer upon the ground that no reply was filed. The court denied this motion, and the defendant excepted.

On the trial the court submitted to the jury issues as follows:

1. Did the defendant sell and deliver the corn described in the complaint to the plaintiff after the execution of the paper-writing dated 28 August, 1890?

2. Is the plaintiff entitled to the possession of the corn described in the complaint by virtue of the paper-writing, dated 28 August, 1890?

3. Does defendant wrongfully detain same?"

To the first of these the jury responded in the negative.

The court charged the jury, upon all the evidence in the case, to answer the second and third issues in the affirmative, which they accordingly did, and the defendant excepted.

The plaintiff was examined as a witness in his own behalf, and put in evidence a paper-writing under seal, which was in effect an unregistered chattel mortgage to him executed by the defendant, embracing the corn in question. The subscribing witness thereto testified that he witnessed the same and saw it executed.

The defendant was also examined as witness in his own behalf, and his testimony and that of the plaintiff were much in conflict. He denied the plaintiff's demand, and did not admit the execution of the paper-writing mentioned above. The court gave judgment for the plaintiffs, and the defendant appealed. (266)

No counsel for plaintiff.

Grandy and Aydlett (by brief) for defendant.

MERRIMON, C. J. The answer does not purport to allege a counterclaim, nor does it allege facts informally sufficient to constitute one. It simply alleges that the plaintiff and defendant were partners in trade and as such owners of the corn, the subject of controversy, as matter of defense. Such allegation "is to be deemed controverted by the adverse

party as upon a direct denial or avoidance," unless the court shall require a reply to such new matter. The statute (The Code, secs. 248 and 268) so provides. *Price v. Eccles,* 73 N. C., 162; *Fitzgerald v. Shelton,* 95 N. C., 519; *Stanton v. Hughes,* 97 N. C., 318. The court, therefore, properly denied the motion of the defendant for judgment upon the complaint and answer.

We are, however, of opinion that the court erred in directing the jury, upon all the evidence, to respond in the affirmative to the second and third issues. The defendant did not admit that he executed the paper-writing under which the plaintiff claims the corn; indeed, he testified to a state of facts wholly inconsistent with it, and its several provisions. His testimony was, in all material respects, in conflict with that of the plaintiff. He testified that he never delivered the corn to him and that the latter never made demand upon him for the same. The plaintiff testified directly the reverse.

The unregistered mortgage, as between the plaintiff and defendant, had the effect, so far as appears, to put the title to the corn in question, embraced by it, in the plaintiff. The court might have told the jury that if they believed the evidence of the subscribing witness, the defendant executed the paper-writing mentioned, and in that
(267) case they should respond to the second and third issues in the affirmative. It was the province of the jury to pass upon the weight of the evidence, as the learned judge very well knew. No doubt, he omitted to instruct them in substance as above indicated, by inadvertence; he may have done so, and omitted to so state in the case settled on appeal. It does not, however, appear that he gave that instruction, and hence it must be taken that he did not.

The judgment must be set aside, and a new trial awarded.

Error.

Cited: *S. c.,* 112 N. C., 163; *White v. Carroll,* 146 N. C., 234.

THE COMMERCIAL BANK OF DANVILLE v. W. H. S. BURGWYN ET AL.

Agency—Corporation—Notice—Fraud—Evidence—Negotiable Instrument—Burden of Proof.

1. A corporation is not bound by the acts or chargeable with the knowledge of one of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in any official or representative capacity.

2. When the maker of a note alleges fraud on the part of the payee in obtaining its execution, and offers proof tending to support that fact, the *prima facie* case of an endorsee before maturity that he took without notice is so far rebutted as to shift the burden on him to show that he purchased for value and in good faith; but when he has complied with this obligation, his *prima facie* case is restored, unless the circumstances under which he took the paper are such as to amount to constructive notice, when the burden is again transferred to the defendant to establish knowledge of the plaintiff of the vitiating facts.

3. Where it was shown that a director of a bank, and also one of its discount committee, conferred with the president of the bank in relation to discounting paper which such director held as president of another corporation, and that, after consideration with other officers—the applying director taking no part in the matter—the paper was discounted in the usual course of business: *Held*, not to constitute evidence sufficient to go to the jury of notice of an alleged fraudulent element in the paper discounted.

APPEAL at Spring Term, 1891, of VANCE, from *Whitaker, J.*

On 14 June, 1888, the defendants executed the several negotiable notes sued on, due one year after date, to Ruffin, Hairston, and Ballou, who, in July following, endorsed them to the Southern Electric Light, Power and Construction Company, a Virginia corporation, of which one John F. Rison was president, and he was also at the same time one of the directors and discount committee of the plaintiff bank.

In September, 1888, the Southern Electric Light, Power and Construction Company borrowed from plaintiff $1,207.08 for sixty days, giving its note therefor, and also depositing the notes now in controversy as collateral; the loan was renewed at maturity, and when it became payable the second time—in January, 1889—the plaintiff discounted the notes deposited as collateral, and from the proceeds the note of the electric company was satisfied and the surplus paid to it. The notes so discounted were endorsed by said Rison as president of the electric company on 25 July, 1888, when they were first negotiated as collateral.

When the notes became due, payment was demanded and refused, and several actions thereon were begun, which were consolidated with this one.

The defendants alleged that the execution of the notes was procured by the false and fraudulent representations of Ruffin, Hairston, and Ballou, the payees, by which they (defendants) were cheated and defrauded, and which avoided the contract, and (269) that the successive endorsements and transfers made to the electric company and to the plaintiff were devices to deprive defendants of opportunity to avail themselves of these facts; and that, at any rate, Rison had notice of the vitiating circumstances as early as

December, 1888, and that he being one of the directors and discount committee of plaintiff, that fact fixed plaintiff with notice of all the circumstances of which he had knowledge.

The evidence as to whether Rison had notice of the alleged fraud was conflicting; but the plaintiff offered much uncontradicted testimony tending to show that Rison did not act in his capacity as a director or member of the discount committee of plaintiff when he negotiated and endorsed the notes; that there was a by-law of the plaintiff which forbade an officer of the bank to act on any paper in which he was personally interested; that the bank had no notice of the alleged fraudulent practice, but took the paper in good faith, in the regular course of business, before maturity, and paid full value therefor.

The following issue was submitted:

"Is the plaintiff the *bona fide* owner of the notes sued on, having obtained the same for value without notice and before maturity?" To which the jury responded, "No."

Among other things, the plaintiff requested his Honor to instruct the jury as follows:

3. That if the notes passed to the plaintiff for value and without any bad faith on its part, plaintiff must have a verdict.

4. That there is no evidence of bad faith on the part of plaintiff in acquiring said notes.

6. That the defendants must show in this case to the satisfaction of the jury that J. F. Rison when in Henderson in December, 1888, was acting as the authorized agent of the plaintiff, under its constitution and by-laws, and as such that he was notified by the defendants that they would not pay their notes, or that they had offsets against
(270) the same, or else any knowledge which said Rison then acquired would not be notice to the plaintiff, and it must recover.

7. There is no evidence that said Rison was the authorized agent of said bank at said time, and hence said bank had no such notice as the law merchant contemplates to defeat a recovery in this action.

8. But even if the Bank of Danville had any notice of any equity existing between the payers and payees of said notes when it bought the same, still if the Southern Electric Light Company had, previous to said time, owned said notes *bona fide,* and without such notice, and assigned same to the plaintiff, plaintiff will be and is such an innocent holder of said notes as will entitle him to a verdict in this case.

9. That if J. F. Rison, president, representing the Southern Electric Light Company, was at any time an innocent holder for value of the said notes, and assigned them to the plaintiff for value, the plaintiff cannot be deprived of its right to recover.

10. That under all the circumstances of the case the court should instruct the jury that there is a presumption of law that said Rison was such holder.

11. There is no evidence that the Southern Electric Light Company had any notice of any equity existing between the original parties to these notes.

13. That though there might have been fraud on the part of Ruffin, Hairston, and Ballou in procuring the execution of the notes sued on, still there is not sufficient evidence in this case to go to the jury that the plaintiff is not the owner, and did not acquire said notes before maturity, without notice, and for a valuable consideration.

14. If the jury believe, from the evidence, that at the time the plaintiff discounted the notes sued on, the same were presented to said bank by J. F. Rison for discount as president of the Southern Electric Light Company, then, unless it is shown affirmatively (271) that actual notice was given to said bank at that time, or prior thereto, of the defenses of the makers against the payees, the plaintiff could still be an innocent holder of said notes without notice.

15. That if the director and vice-president of a bank, being also a member of the discount committee of said bank, procure the discount of a note which he holds as president of another company, and knows at the time of equities in favor of the makers against the payees, nothing else appearing, the law will presume that such person was not the agent of the bank, and that he did not make known his knowledge to said bank, and the bank will be held an innocent holder.

Of the above instructions his Honor gave the 8th and 9th and all of the 15th, except the last line, and refused to submit the others, and the plaintiff excepted to the refusal to charge as requested.

Defendant asked his Honor to instruct the jury that if at the time said notes were discounted J. F. Rison acted upon the discount committee of the same with the president, and said Rison had notice that defendant claimed that said notes were executed by undue fraudulent representations of Ruffin, Hairston, and Ballou, then plaintiff would be bound by said notice. His Honor gave the instruction, and plaintiff excepted.

His Honor then charged the jury as follows:

"The notes sued on are negotiable, and there is a presumption of law in favor of the plaintiff that it is the owner of the notes, and that it took them for value and before dishonor. But fraud in the inception of the instrument is pleaded by the defendants, and they have introduced evidence tending to establish such plea. This having been done by the defendants, the *prima facie* case made by the plaintiff is so far rebutted as to shift the burden of proof and to make it necessary for

the plaintiff to show that it is a *bona fide* purchaser for value before maturity, and without notice of the rights of the defendants as against the payees, Ruffin, Hairston and Ballou. If the plaintiff has
(272) satisfied you by the preponderance of testimony that it became the *bona fide* purchaser for value of these notes before maturity and without notice of the equity or set-off of the defendants, then you will answer the issue submitted to you, 'Yes,'; otherwise, you will say 'No.'

"If you shall find that J. F. Rison was a member of the plaintiff's discount committee, and as such acted in the purchase by plaintiff of these notes, then whatever knowledge Rison may have had of the defendants' rights is the knowledge of the plaintiff, and the plaintiff cannot recover."

Plaintiff excepted to the charge of his Honor as given, especially that he charged, if the jury should find that J. F. Rison was a member of the plaintiff's discount committee, and as such acted in the purchase by plaintiff of these notes sued on, then whatever knowledge Rison may have had of the defendant's equities is the knowledge of the plaintiff, and the plaintiff cannot recover.

Judgment for defendants, and plaintiff appealed.

J. W. Graham, John Devereux, and A. W. Graham for plaintiff.
S. F. Mordecai for defendants.

SHEPHERD, J. The defendants having pleaded that the notes sued on were obtained by the fraudulent representations of the payees, and testimony having been introduced in support of such plea, his Honor was correct in holding that the *prima facie* case of the plaintiff endorsee was so far rebutted as to shift the burden of proof and to make it necessary for it to show that it was a *bona fide* purchaser for value and without notice. *Bank v. Burgwyn,* 108 N. C., 62; *Pugh v. Grant,* 86 N. C., 39. When, however, the plaintiff responded by showing that it acquired the notes *bona fide* for value, in the usual course of business and while they were still current, the *prima facie* case of the
(273) plaintiff was restored, and unless the circumstances under which the purchase was made were of such character as to amount to constructive notice, the jury should have been instructed that the burden of proof was upon the defendants to establish knowledge on the part of the plaintiff, at the time of its purchase, of the impeaching facts alleged in the answer. Daniel Neg. Instruments, sec. 819.

We are of the opinion that there is nothing in the testimony that amounted to such constructive notice. According to the testimony of J. F. Rison, all of the notes were endorsed in July, 1888, to the

Southern Electric Light, Power and Construction Company, and that the said company, through its president, the said J. F. Rison, endorsed them for value to the plaintiff some months before they were due. It is contended that the plaintiff was affected with any notice that could be imputed to the said Rison, because the latter was, at the time of the transaction, the vice-president and a director of the plaintiff and a member of its discount committee. It does not appear that Rison had any notice of the claim of the defendants until after the Burgwyn note had been discounted by the plaintiff; but conceding, for the purpose of the argument, that he had such notice at the time of the discounting of all of the notes, it is well established that the plaintiff cannot be affected therewith, unless Rison was acting in his official capacity for the plaintiff in the said discounting transactions.

"The foundation principle upon which rests the doctrine that a party, whether an individual or a corporation, is chargeable with notice imparted to his agents in the line of their duty, is that agents are presumed to communicate all such information to their principals because it is their duty so to do. The principal is conclusively presumed to know whatever his agent knows, if the latter knows it as agent. Of course, no such presumption can exist where the agent is dealing with the corporation in the particular transaction in his own (274) behalf." So. Law Review, 816. In such transaction the attitude of the agent is one of hostility to the principal. He is dealing at arm's length, and it would be absurd to suppose that he would communicate to the principal any facts within his private knowledge affecting the subject of his dealing, unless it would be his duty to do so, if he were wholly unconnected with the principal. As was said by the court in *Wickersham v. Chicago Zinc Co.,* 18 Kan., 481, "Neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself and deals with the corporation as if he had no official relations with it"; or, as was said in *Barnes v. Trenton Gas Light Co.,* 27 N. J. Eq., 33, "His interest is opposed to that of the corporation, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it."

This doctrine has been applied to the case of a director procuring the discount of a note for his own benefit, having knowledge that it is founded upon an illegal consideration (*Bank v. Christopher,* 40 N. J. L., 435); or that it was made for his accommodation (*Bank v. Cunningham,* 24 Pick., 270); or that it was obtained upon a false pretense of having it discounted for the maker (*Washington v. Lewis,* 22 Pick., 24); or that it was affected in his hands with certain conditions (*Bank v. Leuceal,* 13 La., 525); or with a claim of recoupment of which the

bank had no notice (*Loomis v. Bank,* 1 Dismey, 285); or with other equities (*Savings Bank v. Boston,* 124 Mass., 506). To the same effect are *Corcoran v. Snow Cattle Co.,* 151 Mass., 74; *Innerarity v. Bank,* 139 Mass., 332; *Stevenson v. Ray,* 26 Mich., 44; *Frost v. Belmont,* 6 Allen, 163, and other cases. In the foregoing decisions the director was not acting in his official character in the particular transaction; but had he been so acting, the bank, by a great preponderance of authority, would have been affected with his knowledge. 1 Morse (275) Banks, 137, and authorities cited. The question, therefore, is, Did Rison act as a member of the discount committee of the plaintiff, or in any other official capacity in respect to the discounting of these notes? He testifies that he told the president and cashier of the plaintiff that the Southern Electric Light, Power and Construction Company, of which he was president, desired to have certain notes discounted; that he was informed that the plaintiff would let him know at 1 o'clock of that day; that he called at that hour and was told that the plaintiff would discount the paper. He also testified as follows: "The transaction, as before stated, between the bank on one side and myself as president and representing the Southern Electric Light, Power and Construction Company on the other, was transacted as any other business matter of like nature is done with the bank. I did not sit in the board during the consideration of the paper discounted. The bank paid value for said note without any notice to it of any set-off or counterclaim by said Burgwyn, and is today the absolute owner and controller of said note. I have not at any time represented the bank in the foregoing transaction, at the time named or since." He further testified that no director, interested in any way in any paper offered for discount, could, under the by-laws of the bank or the laws of Virginia, participate in the deliberations of the discount committee in passing upon such paper.

The cashier of the plaintiff testified that "The transaction was in nowise different from any others carried on between the bank and its customers"; that it was in good faith, and that Rison was not present when the note was discounted.

The president testified that Rison "conferred" with him about the discount of the note, and submitted it to him for discount; that witness said that he would inform him during the day, and that he told the cashier to discount it after he had made up his mind to do (276) so. He also stated that Rison was not present when the note was discounted, and that witness had no notice of the matters now pleaded by the defendants. This, the only testimony upon the subject, very clearly shows that Rison was not acting for the plaintiff as its director or agent in any capacity in the discounting of the said

paper, and this being so, it must follow that there was no constructive notice arising from the circumstances attending the transaction. His Honor, therefore, should have instructed the jury, after the plaintiff had by its testimony restored its *prima facie* case, that the burden was on the defendants to show actual notice. The failure to do this was an error of which the plaintiff may justly complain.

We are also of the opinion that there was no sufficient evidence of actual notice. If there had been, the astute counsel for the defendants would undoubtedly have called it to our attention. He could only refer us to the expression of the president to the effect that Rison "conferred with him" about the discount of the note. Surely this was not sufficient to warrant the jury in finding actual notice of the matters of defense set up by the defendants. Both the president and Rison explain what took place on the occasion. The note was submitted for discount, and Rison was to be informed later in the day of the action which the plaintiff had taken. Both of them deny that the president had any notice; and it is very plain to us that testimony like this, which but barely raises even a conjecture in support of the view sought to be established, should not be submitted to the jury. *March v. Verble,* 79 N. C., 19; *Wittkowsky v. Wasson,* 71 N. C., 451; *Brown v. Kinsey,* 81 N. C., 244; *S. v. Waller,* 80 N. C., 401. If such testimony is permitted to have the effect of rebutting the *prima facie* case of the holder of negotiable paper, the peculiar immunities incident to such obligations will be practically destroyed, and incalculable damage inflicted upon the commercial world.

If, as we have seen, the *prima facie* case of the plaintiff was (277) restored, the burden was on the defendant to prove notice in the plaintiff; yet the whole case was tried upon the theory that the burden was on the plaintiff to negative the existence of such notice. It must be apparent, therefore, that there was error in refusing at least some of the instructions prayed for. This is entirely manifest from the view we have taken that there was no sufficient testimony of actual notice.

Error.

Cited: LeDuc v. Moore, 111 N. C., 517; *Campbell v. Patton,* 113 N. C., 484; *Bank v. Burgwyn,* 116 N. C., 123; *Bank v. School Committee,* 118 N. C., 386; *Shields v. Durham, ib.,* 455; *Bank v. Fountain,* 148 N. C., 595; *Brite v. Penny,* 157 N. C., 114; *Roper v. Ins. Co.,* 161 N. C., 157; *Gardner v. Ins. Co.,* 163 N. C., 379; *Corporation Commission v. Bank,* 164 N. C., 358; *Trust Co. v. Bank,* 167 N. C., 261; *Smathers v. Hotel Co.,* 168 N. C., 74; *Anthony v. Jeffress,* 172 N. C., 381, 385.

J. P. CAMERON v. J. W. BENNETT.

Appeal—Practice.

An appeal from a refusal to render judgment upon the pleadings, taken before the trial, will not be considered. The proper practice is to enter the motion, and, if it is refused, note an exception and proceed with the trial.

MOTION by plaintiff for judgment upon the pleadings, heard at February Term, 1892, of RICHMOND; *Boykin, J.*

The motion was refused, and the plaintiff appealed.

Burwell and Walker (by brief) for plaintiff.
J. D. Shaw for defendant.

CLARK, J. Complaint and answer having been filed, the record states, "Motion for judgment refused; motion denied; appeal by plaintiff." No judgment having been rendered, no appeal lies. *Taylor v. Bostic,* 93 N. C., 415; *Baum v. Shooting Club,* 94 N. C., 217; *S. v. Ha-*
(278) *zell,* 95 N. C., 623; *S. v. Divine,* 98 N. C., 778.

Besides, a counterclaim is in the nature of a cross-action, and the motion for judgment upon the pleadings was in the nature of a motion to dismiss the cross-action. It is settled that an appeal does not lie from the refusal of a motion to dismiss an action. *Mitchell v. Kilburn,* 74 N. C., 483; *McBryde v. Patterson,* 78 N. C., 412; *R. R. v. Richardson,* 82 N. C., 343; *Plemmons v. Improvement Co.,* 108 N. C., 614. There are numerous other cases to the same effect. For the same reason, an appeal will not lie for a refusal to dismiss the cross-action, in which the defendant is virtually plaintiff. Indeed, the proper course of procedure is pointed out in *Walker v. Scott,* 106 N. C., 56, in which it is said, "If an answer is insufficient, the plaintiff can move for judgment, and, if it is refused, have an exception noted." The plaintiff should have had his exception noted and have proceeded with the trial. If the result of such trial had been in his favor, he would have desired no appeal; if it had been against him, his exception would have come up for review. The Court will not take "two bites at a cherry."

Dismissed.

Cited: Milling Co. v. Finley, post, 412; *Duffy v. Meadows,* 131 N. C., 33; *Barbee v. Penny,* 174 N. C., 573; *Williams v. Bailey,* 177 N. C., 40; *Thomas v. Carteret,* 180 N. C., 111; *Duffy v. Hartsfield, ib.,* 152.

(279)

C. M. HERNDON v. THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON.

Arbitration and Award—Insurance.

1. If an award, upon its face, appears to be complete and final, and contains no erroneous view of the law upon which it is based, every reasonable presumption will be made in favor of its validity; but it may be attacked by evidence *aliunde* that it was procured by fraud, and that the arbitrators refused to hear competent testimony.

2. Two arbitrators chosen, under a stipulation in an insurance policy, agreed upon an award and prepared a paper containing it, but being uncertain under the reference whether they had passed upon all the questions submitted, took it to the adjusters representing the insurance company, and said the award was not complete if it was proper for them to consider other items; otherwise, it was; and being assured that it was not necessary to pass upon any other question, signed it, when, in fact, the reference did embrace the other matters: *Held*, it was not error to submit to the jury the fact whether there was a final agreement upon and delivery of the award.

MERRIMON, C. J., and SHEPHERD, J., dissenting.

ACTION on an insurance policy to recover for loss by fire, tried at June Term, 1891, of DURHAM, before *Boykin, J.*

The issues and findings were as follows:

1. Has there been an arbitrament and award as to the amount of damages which plaintiffs could recover under this policy? Ans.: No award.

2. Did plaintiff file with defendant notice and proof of loss, as required by the policy? Ans.: No.

3. Did defendant waive notice and proof of loss? Ans.: Yes.

4. What was the damage done by the fire to the property included in the policy? Ans.: Nine thousand two hundred dollars, with interest.

The other material facts are stated in the opinion.

J. W. Graham and W. W. Fuller for plaintiff. (280)
J. W. Hinsdale and J. S. Manning for defendant.

AVERY, J. The plaintiff and defendant selected each an appraiser, under a condition of the policy which provided that where they could not agree as to the amount of loss or damage two appraisers might be so chosen, and a third added at the demand of either insurer or insured, to determine "the sound value and loss or damage to the property *partially or totally destroyed.*" Another stipulation reserved to the company "the right to take the whole or any part of the property

so damaged at the appraised value, or *to repair, rebuild, or* replace *the property lost* or damaged with other of like kind and value," etc.

The single question really presented by the appeal is whether the paper signed by the arbitrators was completed and delivered as their award. In the charge of the court to which exception was taken, the jury were told that "If Dewey and Heartt (the appraisers) jointly agreed and jointly reported, and *any time elapsed before Heartt expressed his dissent, the award was good. If they ever agreed, the arbitrament was final, and the plaintiff cannot recover.*" The alleged award was in evidence, and the court told the jury if it was agreed to by the appraisers it was final, and would bar recovery by plaintiff. The unavoidable implication arising out of the language used was that there was no question as to the fact that the paper was, upon its face, in the absence of extrinsic proof, a sufficiently full and a final award as to all matters involved in the controversy. The attention of the jury was confined to the single question of fact whether both parties agreed to the report and signed and delivered it as their award, intending it to be unconditionally a final determination of all issues raised by the pleading. When the judge told the jury in language so explicit
(281) that the controversy was narrowed down to the single inquiry whether both agreed to sign and did deliver the paper as their joint award, there was no more necessity for the negative averment in his charge that the paper could not be attacked for any defect apparent upon its face, or that the appraisers had not undertaken to decide a question of law and missed it, than there was for any other abstract statement of the general doctrine of arbitration and award, embodying a proposition of law correct theoretically, but in fact inapplicable to the testimony to which the attention of the jury was directed, or unnecessary in view of instruction already given. When the court told the jury that the award in its present form was final if "the appraisers jointly agreed and jointly reported it," how would it have helped the jury to a conclusion to have added "that the award upon its face covered all matters in dispute," or "that it did not appear from the face of the award that the arbitrators undertook to decide according to law and failed"? The judge went behind those questions and dispensed with all necessity for mentioning them, when he said that the award, in the shape in which it was before the jury, was a final adjustment of the controversy if it was executed and delivered by the appraisers.

The two appraisers, Dewey and Heartt, went from their room at the hotel to that occupied by the adjusters of the defendant company and several other companies which had issued policies on the property damaged and destroyed by the fire, Dewey having in his hand at the

time a paper. In response to the inquiry from one of the adjusters whether they had finished their award, Dewey said, "We don't know whether it is law for us to consider the value of the articles covered by the policy which were wholly destroyed and are not visible to the eye on the premises, or only such things as we saw partially destroyed; nor whether it is law for us to consider the labor and expense of erecting, testing, and regulating the machinery and getting it in working condition to make ice, and the freight on machinery (282) from its place of manufacture, or not. If it is law to consider any of those things, then our award is not complete; if it is not law to consider any of them, then we are through." One of the adjusters replied, in the presence of the others, "You have considered all that is right. If there is anything left out, you can go back this afternoon and add it." Heartt and Dewey then retired and shortly returned, when Heartt said, 'Well, with the understanding that if any of the items that I have mentioned as not having been considered ought to have been considered, this is not to be our award, because it is not final and complete, I will sign it." Heartt signed the paper and stepped out. Kenney, the defendant's adjuster, immediately took up the paper and offered to pay Herndon the amount of the appraisement, it being now admitted that the appraisers were in error in failing to determine the matters mentioned by Heartt, and which he was uncertain as to the necessity for incorporating into the award. The plaintiff declined the offer and insisted upon having the award completed.

Heartt was recalled, and repeated what he had said; but Kenney and the other adjusters insisted that the duty of the appraisers was at an end, and refused, in any event, to pay more than the sum named in the paper as the value of the damage assessed as far as the arbitrators had gone in estimating losses.

It was expressly stipulated in the agreement to submit to arbitration, that the appraisers should "estimate the loss upon *property damaged and destroyed,*" and also that they were "to make an estimate of the actual cash cost of replacing and repairing the same or actual cash value thereof," etc. It is not denied that the award is not so full and complete a report of loss as it was contemplated by the parties to this agreement that it should be, and that it is defective in failing to determine the matters referred to by Heartt in his conversation (283) with the adjusters.

It does not appear from the face of the report that the appraisers rested their decision upon any erroneous view of the law, and, therefore, if both of them signed it unconditionally and delivered it as their award, it would not be subject to attack for omission through ignorance of the law as distinguished from arbitrary refusal to hear or consider

pertinent testimony as to material questions arising out of the controversy. *Smith v. Kron,* 109 N. C., 103; *Hurdle v. Stallings,* 109 N. C., 6; *Allison v. Bryson,* 65 N. C., 44; *Farmer v. Pickens,* 83 N. C., 549; *Robbins v. Killebrew,* 95 N. C., 19.

Where the award upon its face appears to be complete and final, and sets forth no erroneous view of the law as a reason for the conclusions stated, it will be presumed also that the arbitrators considered and determined all matters in dispute and passed upon all pertinent evidence. *Robbins v. Kittlebrew, supra; Williams v. Clouse,* 91 N. C., 322; *Jones v. Coffey,* 97 N. C., 347; *Gay v. Stancell,* 76 N. C., 369.

But though the award may be couched in such terms as to afford no intrinsic ground for impeachment, it has been expressly held by this Court that it may be attacked by evidence *aliunde* tending to show that there was fraud in procuring it, or that the arbitrators refused to consider pertinent testimony when offered. *Hurdle v. Stallings, supra.*

A deed that contains all the formal parts necessary to pass the land described in it, and which had been duly proven and registered, is open to an attack, even in a court of law, on the ground that there was a want of capacity in the maker or fraud in the *factum,* or that it had not been delivered at all, or only as an escrow. *Jones v. Cohen,* 82 N. C., 75; *Clayton v. Rose,* 87 N. C., 106; *Mobley v. Griffin,* 104 N. C., 116; *Helms v. Green,* 105 N. C., 259; *Gilchrist v. Middleton,* 107 N. C., 679. And the registration of a deed is but *prima facie* evidence of its actual delivery, which may be rebutted by testimony satisfactory to a jury. *Devereux v. McMahon,* 108 N. C., 146; *Whitman v.* (284) *Shingleton, ibid.,* 193; *Williams v. Springs,* 29 N. C., 384; *Whitsell v. Mebane,* 64 N. C., 345.

The Supreme Court of Massachusetts and the Court of Errors of New York concurred in holding at a very early period, as did this Court in *Hurdle v. Stallings, supra,* that though every reasonable presumption would be made in favor of an award, evidence would be heard to impeach it for refusal of the arbitrators to hear material evidence. *Van Cortland v. Underhill,* 17 John., 405; *Edwards v. Stevens,* 1 Allen, 315.

When Heartt announced that he was ready to sign the award as written, with the proviso mentioned, and was assured by one of the adjusters, in the presence of the others who were acting in concert with him, that they had considered everything that was necessary, but, if not, that Heartt might return in the afternoon and correct it, and Heartt signed it on that assurance, the award was not, in contemplation of law, delivered and published, because Kenney, the defendant's adjuster, then picked it up and refused to agree to any amendment in the afternoon, as originally proposed. The fact that another of the

adjusters may have given the assurance while Kenney assented to it by his silence only, does not make it enforcible at the instance of the defendant, and not in favor of the company whose adjuster acted as spokesman for the party. While the law favors this mode of settling suits when the hearing is conducted fairly, the courts will not sanction such methods as were resorted to in this instance, if Heartt is to be believed, in order to induce an arbitrator to sign an award. If the award was signed when it was incomplete, because of the false assurance given by one of the adjusters, the others who were present acting in concert with him, will not be allowed to claim for their companies that they shall be permitted to reap the benefit of the falsehood. Where two arbitrators act, the award must be the expression of their concurrent conclusions. The jury evidently believed, if we judge from their findings under the instruction of the court, (285) that Heartt at least did not assent unconditionally to the award in its present shape, and that the adjusters refused to redeem their promise by permitting him to take it back in the afternoon for the purpose of amending it, if he could get the concurrence of his associate, Dewey. The very question that Heartt could not decide might, by agreement of the appraisers, have been inserted in the award, and its validity made to depend upon the decision of the court as to the right of the plaintiff to have the evidence mentioned considered and passed upon (1 A. & E. Enc., 680, and note 2) just as arbitrators may waive their right and set forth their conclusions of fact and law, if they so elect, to be reviewed by the court. *Smith v. Kron, supra.*

In *Caldwell v. Dickinson,* 15 Gray (Mass.), 371, the facts were that the arbitrators met and signed an award which, upon its face, was a complete settlement of the controversy; but when they met the parties, the chairman of the three stated verbally, as did Mr. Heartt, that he was "uncertain whether the paper expressed correctly what they had decided," and that they might wish to amend the award on certain conditions. He gave copies to the parties and retained one for himself, which he afterwards amended when his associates were not present. The two other copies were not altered so as to correspond with that in the possession of the chairman. When the plaintiff proceeded to have the award in his possession enforced, the Supreme Court said, in passing upon the foregoing facts, "It is clearly established *that that writing did not contain the real decision of the arbitrators, but was made under a mistake, and was only published with a proviso that it should not be considered as their award,* but should be corrected if the mistake which was then suspected should be afterwards ascertained." The error into which Heartt feared they might have fallen, when he was in the room with the adjusters, he was afterwards convinced had been

(286) made; but the adjusters refused to return the paper so that it might be amended in accordance with the wish of the appraisers, as expressed for both by Heartt in the presence of Dewey. The papers that they took possession of do not contain the award of the two appraisers, according to the testimony of Heartt, and there was no error in submitting to the jury, as concisely as the judge did, the question of fact whether the appraisers completed their award and concurred in it as their joint report in the form in which defendant seeks to enforce it. The jury found, in effect, upon a fair submission of the question, that the paper did not contain all of their award, and we think that the judgment of the court that the plaintiff recover the amount of damage assessed, with costs, was in accordance with law. The usual course is to order such an award upon such facts as were found to be set aside (*Hurdle v. Stallings, supra*), but the judgment was founded upon the idea that it was invalid, and no suggestion was made that it should be amended in this respect, if it is really material to do so.

We do not think that the defendant—after failing to enforce the award and refusing to submit to amendment, should be allowed at this late day, when defeated in its main purpose, to send the plaintiffs out of court by a tardy acquiescence in the rejected proposition to amend. After getting control of the paper "the adjusters refused to pay more than the award named in the paper, and insisted that it was final, and that the appraisers' duties were at an end." Hence this suit, in which the plaintiffs have proceeded upon the idea that the arbitrators were indeed *functi officio.*

We do not deem it necessary to take up in detail the thirty-six requests for special instructions, or pass upon some other questions suggested by the argument, but to which we attach no importance.

(287) SHEPHERD, J., dissenting: I very much regret my inability to agree with the court in the disposition which it had made of this appeal. Under the provisions of the policy the parties agreed to submit their differences as to the amount of the "loss and damage" to arbitration, and the validity of the award made in pursuance of said agreement is the chief question presented for our consideration.

It appears that the arbitrators had some difficulty in determining whether, as a matter of law, a certain expense account should be allowed the plaintiff, but it is admitted that there is nothing upon the face of the award to indicate that they undertook to decide that question according to legal principles. It is conclusively settled, as said by AVERY, J., in *Smith v. Kron,* 109 N. C., 104, that arbitrators "are a law to themselves, are not bound to decide correctly, and unless they gratui-

tously incorporate in their award erroneous 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." To the same effect is the opinion of the Court in this case. It is also well settled in this State that evidence *aliunde* will not be heard for the purpose of showing that the arbitrators intended to decide according to law. *Ryan v. Blount,* 16 N. C., 382; *Wyatt v. R. R., ante,* 245. These principles being established, and, indeed, conceded by the court, I am clearly of opinion that his Honor erred in refusing to give the fifth instruction prayed for by the defendant, viz.: "That it does not appear upon the face of the award that the arbitrators undertook to decide according to law, and that the award cannot be set aside on account of a mistake of law," etc. Not only did the court fail to give this instruction, but the jury were told that "If the award was made to hinge upon supposed principles of law, and they were *erroneously decided,* the award was not final and complete." So there was not only a failure to give an admittedly proper construction, but there was a charge directly in the teeth of it. It may (288) be urged, however, that the error is cured by the following language of the judge: "If they (the arbitrators) once agreed, the arbitrament is final, and the plaintiffs cannot recover"; but this language does not occur in immediate connection with the other part of the charge, but after the court had remarked upon the manner of making the report and the dissent of Heartt. But conceding that the two instructions may be reconciled (which I apprehend it is not easy to do) the same error is repeated later by the instruction that "If they (the arbitrators) came to the conclusion that they have no right as a matter of law to include the expense account, the plaintiff is entitled to a verdict upon the first issue." It will be observed that the award was also attacked on the ground that there was no delivery or publication, and in the opinion of the Court upon that question I entirely concur. Both of these questions, however, were comprehended under one issue (that is, whether there had been an "arbitrament and award"), and how is it possible to tell which view was adopted by the jury? If we could know that they found that the award was never legally delivered or published, the error would of course be harmless; but this does not appear, and we have no right to indulge in conjectures upon so serious a question. The charge, as set out in the case on appeal, is so brief that I very much question whether it fairly presents the instructions as actually given by the judge. It may be but a summary of the charge, which if given in full might reconcile the conflicting language to which I have adverted. As it appears in the record, I do not think it can be made to harmonize with the defendant's

prayer for instructions and the unquestionably correct principles of law embodied therein. To say the least, it did not clearly present the view insisted upon by the defendant, and was calculated to (289) confuse the jury.

I am, therefore, most decidedly of the opinion that there should be a new trial.

MERRIMON, C. J.: I concur in the above dissenting opinion.

PER CURIAM. Affirmed.

W. G. LEDUC, RECEIVER, v. GEORGE BRANDT ET AL.

Pleading—Parties—Causes of Action—Joinder of.

A plaintiff in a creditor's bill may join causes of action for the recovery of an indebtedness not theretofore reduced to judgment; for the removal of an insolvent trustee; for the appointment of a receiver; to declare a conveyance to the creditor of the principal defendant void, and that a prior mortgage shall be foreclosed and the surplus money applied to the debts of other creditors; and persons having an interest in these several causes of action should be made parties defendant.

ACTION, heard upon complaint and demurrer at January Term, 1892, of CUMBERLAND, *Boykin, J.*, presiding.

The case is stated in the opinion.

R. P. Buxton for plaintiff.
G. M. Rose for defendants.

SHEPHERD, J.: The plaintiff (who is the receiver of The People's National Bank of Fayetteville) alleges that the defendant Brandt is indebted to the said bank in a large sum of money, which indebtedness is evidenced by the several promissory notes described in the complaint.

He further alleges that the said Brandt has executed a deed of (290) trust to the defendant J. B. Smith, and that said deed conveys all of the real and personal property of the said debtor, including a large stock of goods and merchandise; that the said deed was made for the purpose of defrauding the plaintiff and certain other creditors; and that the trustee is insolvent and an improper custodian of the property. It is further alleged that, prior to the execution of the deed of trust, the said Brandt executed a mortgage upon certain of the real estate contained in said trust to the defendant Ellen Smith, purporting

to secure a debt due to the said Ellen, and also a debt due to one Ida Rankin; and it is also alleged, in effect, that the said mortgage is fraudulent and void as to creditors. It further appears that, prior to the said Smith mortgage, the defendant Brandt had executed a mortgage upon a part of the property contained in the same to the defendant, The Bank of Fayetteville. The *bona fides* of this deed is not questioned, but it is alleged that the value of the property contained therein is much in excess of $6,000, the amount secured to said bank. The plaintiff prays for judgment against the defendant Brandt upon the alleged indebtedness, that the trustee be removed; that a receiver be appointed; that the deed of trust and mortgage to Ellen Smith be set aside; that the mortgage to The Bank of Fayetteville be foreclosed and the surplus be applied to the payment of the plaintiff's judgment, and for other and further relief. The defendants demurred for misjoinder of causes of action and parties, and the demurrer being sustained, the plaintiff appealed.

It is very clear, from the above summary of the complaint, that this is an action in the nature of a judgment creditor's bill, and it has been well settled that such an action may, under our present practice, be commenced before the plaintiff's indebtedness has been reduced to judgment, and that in the same action the court may subject to the payment of the indebtedness the equitable or other interests of the debtor which are not subject to sale under execution, and also any property which may have been conveyed for the purpose (291) of defrauding creditors. *Hancock v. Wooten,* 107 N. C., 9; *Monroe v. Lewald,* 107 N. C., 655; *Smith v. Summerfield,* 108 N. C., 284.

If, then, the alleged fraudulent conveyances can be set aside in this action, it must follow that the defendant J. B. Smith, the trustee in the deed of trust which conveys all of the property of the debtor, and Ellen Smith, the mortgagee of a part of the same property, together with Ida Rankin, whose debt is secured in the same mortgage, are not only proper but necessary parties to this action, and the demurrer, in respect to their joinder, must therefore be overruled. *Bank v. Harris,* 84 N. C., 206; *Mebane v. Layton,* 86 N. C., 571; The Code, sec. 184; Wait on Fraudulent Conveyances, 131, 132.

As to The Bank of Fayetteville: It is true that the validity of the mortgage to this defendant is not questioned, but it is alleged that the mortgage debt is much less in amount than the value of the property conveyed to secure it. If this be so, then if the mortgage to Ellen Smith and the deed of trust are set aside, the plaintiff would be entitled to subject to the payment of his indebtedness any surplus that might remain in the hands of The Bank of Fayetteville, should it

foreclose its mortgage, and as the court has by this action acquired jurisdiction over the said property, and as it may, in certain contingencies, decree that it be sold, it is proper, in analogy to the rule laid down in *Hinson v. Adrian,* 86 N. C., 61, that all prior encumbrances should be joined as parties. The demurrer, therefore, as to the joinder of this defendant must also be overruled; but it must be noted that the foreclosure of its mortgage should not be delayed by this action, and all that can be required of it is that the sale shall be fairly conducted, and the surplus, if any, be paid into court or into the hands of
(292) a receiver to await the final determination of this controversy.

Upon an examination of all the causes assigned in the demurrer, we are of the opinion that none of them can be sustained, and that the judgment below should be

Reversed.

Cited: Cook v. Smith, 119 N. C., 355; *Gammon v. Johnson,* 126 N. C., 65.

W. L. HALL, ADMINISTRATOR, v. EMMA TURNER, ADMINISTRATRIX.

Easement—Estate, Base or Qualified, and Upon Condition—Mills and Dams—Contract, Construction of—Evidence.

In 1873, H. and T. entered into an agreement under seal by which H. "consents for said T. to back water, if necessary, up in to his field, on condition that said T. will allow H. as much woodland along the line fence on south side of the river; T. is allowed to raise dam 8 or 9 feet high; this agreement to remain good so long as T. keeps up a mill; . . . afterwards to be null and void." T. erected a mill and dam, in consequence of which about 12 acres of H.'s land were eventually flooded, and H. went into possession of about 4 or 5 acres of the woodland, that being about the quantity covered originally by the water of the pond: *Held*—

1. The agreement vested in T. an equitable base or qualified fee in an easement to back the water upon H.'s land so long as he, or those claiming under him, maintained the mill, and that upon T.'s death this estate descended to his heirs. (Base or qualified fees defined, and *Hill v. Kesler,* 67 N. C., 443, commented upon.)

2. The agreement that H. should have as much land on the south side of the river was a condition subsequent to the easement so created, and upon the failure of T., or those claiming under him, to perform that condition, the easement terminates.

3. That H.'s right to occupy the land under the condition subsequent was not restricted to the amount which he entered upon at the beginning of the operation of the agreement, but expanded and was coextensive with the quantity of land which subsequently became servient to the overflow of his land from the erection of the dam.

4. That H. was entitled, under the agreement, to the use of so much of T.'s land as T. by the erection of the dam not only actually overflowed, but "sobbed" and made unfit for cultivation of his (H.'s) land.

5. The evidence as to the height of the dam being conflicting, the court properly charged the jury that by a dam 9 feet high is meant such a dam as, under given circumstances, will pond the same quantity of water that a dam exactly and uniformly 9 feet high under the same circumstances would pond.

APPEAL from *Winston, J.*, at August Term, 1891, of ORANGE.

The plaintiffs, the administrator, widow, and heirs at law of Lambert Hall, allege that the said Lambert Hall and Evans Turner on 13 March, 1873, entered into the following agreement, to wit:

"Articles of agreement made and entered into this 13 March, 1873, between L. W. Hall of the county of Orange and State of North Carolina, of the one part, and Evans Turner of the county and State aforesaid, of the other part, witnesseth: that the said L. W. Hall agrees and consents for the said Evans Turner to back water, if necessary, up into his field, on condition that said Evans Turner will allow the said L. W. Hall as much woodland along the line fence on the south of the river. Said Turner is allowed to raise a dam 8 or 9 feet high. This agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place; afterwards to be null and void. Witness our hands and seals the day and date above written. L. W. HALL (Seal). EVANS TURNER (Seal). Witness, N. Y. HARRIS."

The complaint further alleges that, at the time of the execution of said agreement, about 4 or 5 acres of woodland of said Turner were taken possession of by said Hall, and that he used the same until his death in 1888; that said Turner, after the adoption of the stock law in 1885, hauled off all the fences on said 4 or 5 acres, and that the same were mortgaged in 1882 to one Gray; that the dam raised by Turner is, from the bottom of the mudsill to the top of the (294) sheeting, 10 feet 3 inches, and from the mudsill to the top of the the river about 2 feet, and the land of the plaintiff, which is flooded and damaged by said mill-pond is about 12 acres, on most of which dower has been assigned to the plaintiff Fannie J. Hall; that the same would be very productive if not damaged by the said flooding; that plaintiffs have not continued in the possession of the 4 or 5 acres south of the river since the death of Evans Turner.

They demand judgment—

1. That "the license granted in said agreement" terminated at the death of said Turner in 1889, and is void for uncertainty and indefiniteness, and is no longer operative and binding on the plaintiffs.

2. That if it be considered as running with the land, that the quantity of land damaged be ascertained and the same quantity set apart to the plaintiffs south of the river, if said dam shall not exceed the height allowed in said agreement.

3. That if said dam be found to be more than 9 feet high, then they ask that the damages be inquired into and for judgment for the same.

4. That if plaintiffs are compelled to take the land south of the river in lieu of that flooded and damaged, that the defendants be required to free the same from all mortgages and encumbrances existing thereon.

5. That the lands of plaintiffs be freed from said agreement, and the defendants keep the land on the south side of the river.

6. That the dam be pulled down and the plaintiffs be paid all damages done them during the life of said Turner by reason of his violation of said agreement, and since that time by reason of said dam.

7. That all damages up to the time of the trial be assessed.

8. For further and other relief, and for costs.

The defendants, in their answer, admit the execution of said (295) agreement, and that the land on the south of the river, mentioned in the complaint, was taken possession of by Hall; but they allege that the quantity is underestimated, and that the same is equal to that covered by water in consequence of said dam. They deny the removal of the fences. They admit the execution of the mortgage. They deny the raising of the dam to the height alleged by plaintiffs. They deny any damage as alleged, and aver that if there be any it existed and was provided for at the time of the execution of the said agreement by the taking possession of the 4 acres. They deny that the plaintiff has discontinued the use of said land since the death of Evans Turner. They deny any violation of said agreement by said Turner or themselves, and they claim that said agreement operates as a covenant running with the land.

The following issues were, without objection, submitted to the jury:

1. Has the dam been raised above 9 feet? No.

2. If so, what yearly damage have the plaintiffs sustained on account of same?

3. What quantity of land is covered by water ponded back by the dam and damaged thereby?

4. What quantity of land is embraced in the tract agreed to be conveyed by Evans Turner to plaintiffs' intestate? Ans.: Four acres (by consent.)

R. N. Hall, Jr., testified that he had accurately measured the height of the dam in the summer of 1890, assisted by S. H. Jordan, since dead, and that it averages 10 feet high all the way through; a little lower for

a small distance on the south than the rest of the way, and was highest in the center of the current in the stream; that the mudsill was raised a foot above the bed of the river, making the actual height of dam from bed of river 11 feet. That the length of the dam is 133 feet 8 inches. That the damage to the land of plaintiff yearly from the raising of the dam above 9 feet would be $30. That 12 acres were under water, or sobbed from the ponding back. (296)

N. Y. Harris also testified to same amount of damage from the dam being above 9 feet; that a dam at 9 feet would do little damage and not cover more than 4 or 5 acres.

C. R. Miller testified that he and R. N. Hall, Jr., had recently measured the height of the dam, and it was about 10 feet high, and that the mudsill was 1 foot above the bed of the river, making the actual height of the dam 11 feet, and that the yearly damage from the erection of a dam above 9 feet to land of plaintiff was $30.

Defendant introduced one A. M. Leathers, who testified that the dam was 8 feet high, measured by him and others in 1890, in July.

Other witnesses testified as to the benefit of the dam to the land of plaintiff, and that the lands were not damaged by being covered with water in times of freshet, and as to the value of the land, about 4 acres, which intestate had formerly used belonging to defendant's intestate, and that in the trade the deceased Hall got the better of the deceased Turner. One witness also stated that the land covered by water was not as much as 10 acres. Defendant Emma Turner stated she had the dam repaired since the death of Evans Turner, but it had not been raised above what it was before.

Other witnesses stated that they were present when Leathers measured the dam, and saw him measure it in July, 1890. William F. Gray, witness, testified that he assisted A. M. Leathers by putting down the tape line on dam every 10 feet, and on paper the figures which he called out, and also stated that the portion of the dam which A. M. Leathers made 9 feet 5 inches high extended for 20 feet in the center of the stream, but the dam was lower on each side of this. That the dam did not average more than 7 or 8 feet in height. A. M. Leathers also stated the same. There was also testimony that Evans (297) Turner, in 1885, hauled off the fence around the land.

Counsel for plaintiff, in his argument, contended that the evidence in the case, both for plaintiffs and defendants, showed that a dam had been erected above 9 feet, and the admission of the defendants' witnesses that the dam was over 9 feet at two different points, one of them extending a distance of 20 feet in the center of the current, was of itself sufficient to decide the first issue in the affirmative.

His Honor in his charge to the jury stated to them that he did not agree with the argument of the plaintiffs' or defendants' counsel respecting the rule, and charged the jury as follows:

"In this case four issues are submitted to you for your consideration. It is agreed by counsel for both plaintiffs and defendants that under the agreement dated 13 March, 1873, between L. W. Hall and Evans Turner, said Evans Turner could erect a milldam not exceeding 9 feet in height. So the court presents to you the first issue, Is the present dam higher than 9 feet? In considering this issue, which is one of fact for you, you will recall all the evidence bearing on the same.

"There is no evidence that the milldam at present existing is not of uniform height, and hence the court gives you the following rule to guide you in determining whether the said dam is over or under 9 feet high, to wit: By a dam 9 feet high is meant such a dam as, under given circumstances, will pond the same quantity of water that a dam exactly and uniformly 9 feet high, under the same circumstances, would pond." Exception by plaintiff.

"Therefore, you will ascertain from the evidence whether the dam that now stands ponds back, on account of its increased but broken height (if you shall find that it has been increased in height), but not
(298) on account of any filling up of the bed of the pond and tightening or improving the dam, except by raising more water, that is a greater volume of water, than a dam of uniform height of 9 feet would do. If so, you will answer the first issue, Yes; otherwise, No.

"If you answer the first issue No, you need not answer the other issues at all. If you answer it Yes, you will next consider what amount of damage the plaintiffs have sustained on account of same.

"If the dam has been increased in height, and such increase has caused damage, the element of damage will be the overflow of the new land and the sobbing of same, and injuring and destroying its value although not overflowed, and you will simply calculate what the annual injury on all of such damage is, and answer the second issue as you shall find. The third and fourth issues are issues of fact unmixed with law, and the court cannot aid you in determining the same."

His Honor answered the fourth issue "Yes," by consent, and told the jury that if the first issue was answered in the negative they would not proceed to the consideration of the other issues.

The jury returned the response "No" to the first issue, and no answer to the second and third issues. The fourth had been answered by his Honor "Yes," as above stated, before the jury retired.

Plaintiff, after a motion for a new trial on the ground that the verdict was against the weight of testimony, which was refused, moved to

set aside the verdict because there was no response to the third issue, and which was material and closely connected with first issue, in view of the testimony that a dam at 9 feet would only cover 4 or 5 acres, while there was testimony that 12 acres were covered and sobbed. His Honor declined the motion, and plaintiff excepted.

Plaintiffs' counsel then insisted that even if the dam was only (299) 9 feet high, under the contract of 13 March, 1873, the plaintiffs were entitled to "as much woodland along the line fence on the south side of the river" as was covered by back water, and the failure of the jury to find this amount rendered a new trial necessary. His Honor refused a new trial on this ground, and plaintiffs excepted.

Upon the questions reserved, the plaintiffs then moved for judgment—

1. That as there is no sufficient description by which any quantity of land can be allotted to plaintiffs as compensation for the ponding of water on their land, the said contract of 13 March, 1873, is void for vagueness and uncertainty; and as the consideration to be paid to plaintiffs cannot be ascertained, the said contract should be annulled *non obstante veredicto.*

2. That said contract is but a license to the said Evans Turner, which expired with his death, being personal to him, and not a covenant running with the land. And as there is no provision for a conveyance of any land to L. W. Hall in fee, but only a permissive use to continue as long as "said Turner" keeps up a mill, the said contract had therefore been fulfilled and ended, and the plaintiffs were no longer restrained thereby, but had a right to abrogate the same and have the dam removed.

3. That the said contract was but a license to keep up a mill at the Wagoner place to said Turner, and that if it did not expire with the death of said Turner, the mill must go down by *natural decay,* and could not be repaired by his administrator or heirs at law, and defendants were liable for any flooding caused by such repairs and must remove the dam or pay for the trespass.

4. That said contract should be declared void and impossible of enforcement and entirely annulled, as there is no definite description to identify the land intended to be conveyed on either side, or fit it to the description in the paper-writing. And the acts of ownership still exercised by Evans Turner over the 4 acres in the possession of (300) Lambert Hall, by taking the rails therefrom and including it in the mortgage to Gray, showed that it had not been conveyed, or intended to be conveyed, to Lambert Hall, and was still the property of Evans Turner.

5. That as no consideration has been received other than the permissive use of the 4 acres, which continually decreased in value while the damage to the land covered and sobbed by water from the ponding continually increased in amount, the said agreement is against equity and good conscience, and a growing hardship, from which the plaintiffs ought to be relieved and restored to the right to recover proper compensation for the injury done their land.

6. That the said agreement was a personal license given by L. W. Hall and expired with his death, and the rights of his widow and heirs at law as owners of the land are not concluded by anything contained in said agreement from insisting that the dam be pulled down or the proper compensation made to them.

7. That no title has been passed to the plaintiffs or their ancestors for any land, and there is a fatal vagueness of description which cannot be corrected or made definite, and that the parties should be restored to their original positions, and the paper-writing delivered up and canceled and declared null and void.

The following judgment was rendered:

"This cause having been heard, and the jury for its verdict having said that the dam has not been raised above 9 feet, and the court being of the opinion that the other issues submitted are not material whether the agreement between the intestates of the plaintiffs and defendants respecting the erection of the dam is a license revocable at the death of Turner or is void for uncertainty, and the court being further of the

(301) opinion that if said agreement is a covenant perpetual running with and binding the land, then the equitable aid of the court cannot be invoked to ascertain and set apart to the plaintiffs the same quantity of land as is covered by water, for that there is neither allegation in the complaint nor proof that the defendants have ever declined or refused, or do now decline, to permit the plaintiffs to have, use, occupy, and enjoy the said quantity of land in as full and ample a manner as the said covenant or agreement authorizes. The court doth therefore adjudge that the plaintiffs take nothing by their writ, and that defendants go hence without day and recover their costs."

From this judgment the plaintiffs appealed.

J. W. Graham for plaintiffs.

J. S. Manning for defendants.

SHEPHERD, J., after stating the case: After a careful consideration of the charge of his Honor in reference to the height of the dam, we are of the opinion that, in view of the testimony, there was no error, and that the exception of the plaintiff in this particular must be overruled.

The other points presented in the record are not so clear, and we approach their consideration with no little doubt and solicitude. The plaintiffs insist that the right of the defendants to maintain the dam and overflow the plaintiffs' land, determined at the death of the defendants' ancestor, Evans Turner; but if they are mistaken in this, they pray that the defendants, the heirs of said Turner, be required to "allow" the plaintiffs the use of so much land on the south of the river as will equal in acreage the quantity now overflowed and damaged by reason of the maintenance of the said dam. The agreement between the said Hall and Turner is of a very peculiar character, and so vague and uncertain in part that but for the fact of its having been executed by one of the parties who has erected the permanent improvements we would be somewhat inclined to place it under that (302) class of contracts mentioned by *Lord Brougham* in *Keppel v. Bailey,* 2 Mylne & Keene, 577, as being "so clearly inconvenient to the science of the law" as to receive no encouragement at the hand of the courts. Although the agreement contains no words of covenant, we think that, in consideration of the circumstances, an equitable construction warrants us in holding that it was the intention of Hall to confer upon Turner an easement "to back water, if necessary, up into his field." Such an easement is "an incorporeal hereditament, a right not indeed to the land itself, but to a privilege on and upon the land. . . . It is a freehold interest," and within the statute of frauds. *Bridges v. Percell,* 18 N. C., 492.

It is true that in *McCracken v. McCracken,* 88 N. C., 272, it is said that such an interest must not only be evidenced by writing, but that it can "only be made effectual by deed"; but by the use of this language the learned justice who delivered the opinion was evidently referring to the subject in its legal aspects, as it is well settled that an agreement upon a valuable consideration to confer an easement will be effectuated in equity, provided it be in writing, and this without reference to the presence of a seal. *R. R. v. Battle,* 66 N. C., 546; *R. R. v. R. R.,* 104 N. C., 658. So, too, a covenant, though not technically "running with the land," may nevertheless be sometimes binding in equity to the extent of fastening a servitude upon real property. Pom. Eq., 689; *Bedford v. Trustees,* 2 M. & K., 517.

Such is the character of the agreement before us; but the important question presented is, How long is this easement or servitude to continue? An interest like this, being within the statute of frauds, is created in the same manner as an interest in the land itself, and hence it would seem that if there be a grant of an easement, there must be words of inheritance if it is intended that the estate shall endure beyond the life of the grantee. So, on the other hand, if there

(303) be a contract to confer an easement, it will ordinarily be governed by the same principles as are usually applied to contracts for the sale of real estate. Thus, if one contract to sell land to another, and there be no words of restriction, it is implied that an estate in fee is intended, and specific performance will accordingly be decreed. Likewise, if one agree to confer an easement, and from the nature of the contract and its subject-matter there is nothing to show that it is to be restricted to the life of either party, there is an implication that the grant is to be coextensive with the uses apparently contemplated by the parties. In our case it is contended that there are words of restriction, to wit: "This agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place." In opposition to this view the defendants rely upon *Merriman v. Russell,* 55 N. C., 470. In that case the "articles of agreement" contained no words of inheritance, but simply the following language, viz., "bargained and sold so much of my land lying on Hooper's Creek, in the county and State aforesaid, as will conveniently carry the water to a sawmill so as to be to his (W. R. Gash's) profit and advantage." The Court speaks of this writing as a grant, and *Pearson, J.,* in delivering the opinion, said: "There are no words of limitation, and by the rule of the common law in reference to a grant of land, only an estate for the life of the grantee would pass. Here the rule of construction comes in again. As the professed purpose is to convey water to a mill, of course it was the intention that the supply of water should be kept up as long as the party wished to operate the mill. Few would be at the expense of erecting a mill if the supply of water depended upon the uncertainty of life. We think there was a base or qualified fee granted in this easement, and that Gash, his heirs and assigns, are entitled to it so long as they continue to operate the mill."

(304) However just may be the criticism upon the resort to construction in the above case, and thereby supplying words of inheritance (if, indeed, the instrument was considered simply in its legal character as a grant), it is very clear that the objection cannot be urged in the present instance, where the agreement is entirely executory in its nature. At all events, the case of *Merriman* (*supra*) lends us valuable aid in solving the question now before us. In that case the easement was in so much of the land "as will conveniently carry the water to a sawmill, so as to be to *his* (W. R. Gash's) *profit and advantage.*" Why should not these words be considered as equally restrictive as those used in the present contract, viz., "This agreement to remain good so long as the said Turner keeps up a mill at the Wagoner place"? In one case the easement is to be to "his (the grantee's) advantage"; in the other, so long as "Turner keeps up a

mill," etc. It would seem that the privilege granted was as personal in one case as in the other; but admitting that there is a shade of difference between them, yet this must surely disappear when the contract is viewed in the light of the reasoning of the opinion in the case above mentioned. "Few (says the Court) would be at the expense of erecting a mill if the supply depended upon the uncertainty of life"; and so, too, we may remark in this case, that few would erect a milldam and other improvements if its enjoyment was to be contingent upon the duration of the life of one of the parties.

In consideration of the foregoing reasons, and in the absence of plain restrictive language, we conclude that it was not the intention of the parties that Turner was to have a mere personal right to flood the land of Hall, but that the easement or servitude descended with the land to the heirs of Turner, who have, *in equity,* a base, qualified, or determinable fee therein.

But here we are confronted with the case of *Commissioners v. Kesler,* 67 N. C., 443, in which *Pearson, C. J.,* speaks of a base or qualified fee as an "obsolete estate, which has never been in force or in use in this State." It is impossible to reconcile the conflicting (305) utterances of that distinguished jurist upon this subject. Whenever a fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified, or determinable. Tiedeman R. P., 44. This definition, in a general sense, comprehends a fee upon condition, a fee upon limitation, and a fee conditional at common law. Some authors apply the term *base fee* solely to limitations of the last named class (Tiedeman Real Property, *supra*); and these having been converted into estates tail by the statute *de bonis,* and these latter by our statute into fees simple, it would of course follow that if the term "base fee" is exclusively applicable to a fee conditional, as it was technically known at common law, it no longer exists in this State. Blackstone's classification is different (2 vol., 110), and there is some confusion in the ancient authorities upon the subject. Practically, however, in modern times, the terms base, qualified, or determinable fees, are applied to either of the estates above mentioned. Mr. Washburn (1 vol., 77) thinks that the term *determinable fee* is "more generic in its meaning, embracing all fees which are liable to be determined by some act or event expressed on their limitation to circumscribe their continuance or inferred by law as bounding their extent." See, also, 1 Preston Est., 466; *Seymour's case,* 10 Rep., 97. The term *qualified fee* is thought to be preferable by Mr. Minor, 2 Inst., 86. By whatever name it may be called, it is plain that except in the case of technical fees conditional at common law, the limitations

we have mentioned may still be made when not opposed to public policy. It will be observed that in *Kesler's case* the decision was made to turn chiefly on the ground of public policy, and because apt (306) words of limitation were not employed. In that very decision the existence of a base or qualified fee is recognized in the case of the Cherokee tribe of Indians. But, however broad may be the language quoted, we have no idea that it was the purpose of the Chief Justice to say that the limitation expressly defined by him as a base or qualified fee in *Merriman's case* could not be made in North Carolina. Such limitations are not infrequent in this and other states (2 Wash. R. P., 4), and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property. We are, therefore, of the opinion that Turner and his heirs took, in equity, an easement to overflow the land of Hall, determinable when they ceased to keep up the said mill. In this respect it is a limitation. But it is to be observed that this base, qualified, or determinable fee (we prefer the term qualified) is liable to be defeated by the failure of Turner "to allow the said L. W. Hall as much woodland along the line fence on the south side of the river." In this particular, the estate in the easement is an estate upon condition, and the condition is, in effect, that Hall is to be allowed to use as much land on the south side of the river as is equal to the land which is flooded by the maintenance of the dam at the height of 9 feet. This includes not only the land actually flooded, but all that is damaged and rendered unfit for cultivation by sobbing. *Cagle v. Parker,* 97 N. C., 271. It seems that soon after the execution of the agreement Hall was put in possession of about 4 acres, and continued to occupy it until the death of Turner. It is insisted that the plaintiffs are restricted to this particular number of acres. This may be so in some cases, as, for instance, where a right of way is granted, if it be once located, it cannot be changed. It may also be true of contracts generally of this character, but we do not think that this particular contract is susceptible of such a construction. No provision is made for the ascertainment of the land, nor is there anything to show that the parties intended to fix upon any certain quantity (307) as a final consideration of the easement. Had they so intended, they would doubtless have provided for it in the agreement. The words are strict words of condition, and as applied to this case they constitute a condition subsequent. It was evidently the purpose of the parties that Hall should use as much of Turner's land as would equal the quantity flooded by the dam, and that this agreement was to be carried out in good faith and in view of the exigencies of the future. If the 4 acres taken possession of by Hall was to be in full satisfaction for the easement, the contract should have so stipulated. The agree-

ment means that so long as Turner, his heirs or assigns, keep up the mill they are entitled to the easement, provided they permit Hall and his heirs or assigns to enjoy an equal quantity of land on the south side of the river. If they refuse to perform this condition, the plaintiffs are entitled to a decree declaring that the easement is at an end. As we have indicated, we think that Hall was not restricted to the 4 acres, and in this view the third issue (involving an inquiry as to the quantity of land flooded) should have been submitted to the jury. If it should be found that more than the 4 acres is flooded and sobbed, and thus rendered unfit for cultivation by the maintenance of the dam at the height of 9 feet, the defendants must "allow" the plaintiffs the use of an equal quantity of land. It was this uncertain and variable feature of the agreement that seemed at the outset so novel to us, and it is because of this that the plaintiffs pray that the agreement be declared void. As, however, the contract has been executed by the defendants by the erection of permanent improvements, and as it does not contemplate a conveyance of any land, but simply a right to occupy it, we think that it would be inequitable to make such a decree until it is apparent that the defendants are either unwilling or by their conduct have put it out of their power to perform the condition. The fact that the land of Turner has been mortgaged does not of itself work a forfeiture, for this does not happen until there has (308) been an actual disturbance of the possession of the plaintiffs. As to the 4 acres, the mortgagee is affected with constructive notice of the claim of the plaintiffs, and take subject to their right to use the same. If the plaintiffs should be allowed the use of an additional quantity of land, and the mortgagee has had no actual notice, then he would take such additional land free from any claim of the plaintiffs, and if, by reason of such mortgage, the plaintiffs are ousted, there would then be clearly a breach of the condition, and the easement of the defendants, at the election of the plaintiffs, would be forfeited.

If, upon another trial, it be found that more than 4 acres are flooded and sobbed, then the defendants should submit to the appointment of commissioners to lay off and set apart sufficient land of the defendants for the use of the plaintiffs as will meet the requirements of the contract as interpreted by us.

It is said that there is no allegation that the defendants have declined to allow the plaintiffs the relief we have indicated. This is a mistake, as the plaintiffs expressly allege that more than 4 acres have been flooded, and they pray that if the agreement is not declared void, "the quantity of land damaged be ascertained and the same quantity set apart to the plaintiffs south of the river, if said dam shall not exceed the height allowed in the agreement."

The answer, in effect, denies that the plaintiffs are entitled to any larger quantity than the said 4 acres.

In view of the peculiarity of the case, we are not surprised at the ruling of his Honor, but after much consideration we are of the opinion that, for the reasons given, there should be a new trial.

Error.

Cited: *S. c.*, 111 N. C., 181; *Keith v. Scales,* 124 N. C., 514; *Church v. Bragaw,* 144 N. C., 134; *Ruffin v. R. R.,* 151 N. C., 335; *Guilford v. Porter,* 167 N. C., 368.

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(309)

W. A. COX, ADMINISTRATOR, v. NANCY A. JONES ET AL.

Appeal—Transcript of Record—Judgment, Vacating.

The Supreme Court will not consider an appeal from a motion to set aside the orders, decrees, etc., in an action or special proceeding, for irregularities, unless the transcript contains a record of such action or proceeding; and where it appears that the original record has been lost or destroyed, the cause will be remanded, to the end that the record may be properly supplied.

APPEAL at Spring Term, 1891, of JONES, from *McIver, J.*

John Devereux, Jr., for plaintiff.
H. R. Kornegay for defendant.

MERRIMON, C. J. This is a motion made in September, 1888, to set aside, for alleged gross irregularities, the orders and judgments made in 1871 in a special proceeding brought by the plaintiff administrator to obtain license to sell land to make assets to pay debts of his intestate. The transcript of the record is very voluminous and confused. The evidence on which the findings of fact are based is improperly sent up, as there is no exception on the ground there was no evidence to support some finding of fact. In a case like this, this Court cannot review such findings. The evidence sent up is mere redundant matter, serving no purpose here.

It was not brought to our attention on the argument, as it should have been, that the transcript did not contain the record of the special proceeding; it only embraced the record of the motion and proceedings subsequent thereto. It is essential that we have the record before us,

in order that we may see and determine what the irregularities are, if there be such. Hence, we directed that a writ of *certiorari* issue to the clerk of the Superior Court, commanding him to certify (310) the record to us. He has made return of the writ, sending only fragmentary parts of the record, and stating that these were all he could by diligent search find in his office. He failed to send a transcript of the summons, the petition, and the report of sale. Moreover, he did not send up, as he should have done, a copy of the deeds made by the administrator to the purchaser of the land.

We cannot properly decide the case until the record of the special proceeding is before us. To the end that so much of it as is lost or destroyed may be properly supplied, we remand the case. The court below will have authority to supply the necessary record according to law, and to make all appropriate amendments and orders necessary to perfect the appeal. *Bethea v. Byrd,* 93 N. C., 141. Let the case be Remanded.

Cited: *S. c.,* 113 N. C., 277; *Drewry v. Bank,* 173 N. C., 666.

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(311)

A. C. SCOTT v. E. L. FISHER.

Contract—Interest—Surety, when Discharged—Consideration.

1. If a contract to pay money contains a stipulation to pay interest at specified times, the sums so agreed to be paid as interest become due at the periods prescribed, and will thereafter bear interest at the same rate, and an independent action can be maintained; upon which agreement that the interest shall be so paid may be made either before or after the maturity of the principal sum.

2. An agreement between the payee and the principal obligor in an obligation bearing interest payable annually, made without the assent of surety that the time for the payment of the debt would be extended upon the payment of the interest thereafter semiannually, is such a material change of the contract as to amount to a forbearance, upon a sufficient consideration, for at least six months, and will discharge the surety.

APPEAL at January Term, 1891, of CABARRUS, from *Graves, J.*

The plaintiff sued to recover the amount due upon a sealed promissory note, executed by the defendant as surety for J. S. Fisher for $1,000, due at one day after date, "with interest at 8 per cent per annum."

The defense was that the plaintiff had, without the assent of defendant, entered into an agreement, upon a sufficient consideration, to forbear the collection of the debt, whereby he was discharged from all liability.

The defendant testified "that in January, 1889, he had a conversation with the plaintiff in which the plaintiff stated to him that the principal debtor, J. S. Fisher, came to him (Scott) in January, 1887, about two weeks before he (J. S. Fisher) broke, and that the said J. S. Fisher then pulled out the money and offered to pay him (Scott) this note, and that he (Scott) said to said J. S. Fisher that he (Scott) did not need the money, and if he (J. S. Fisher) would pay him the interest at 8 per cent semiannually, that he (J. S. Fisher) might (312) keep the money, and that said Fisher replied 'All right,' and kept the money."

The witness further testified that this arrangement or agreement between Scott and J. S. Fisher was without his knowledge, consent, or privity, and that the first he heard of it was from the conversation of the plaintiff Scott, above stated.

The defendant introduced another witness, who testified in substance the same.

There was evidence that J. S. Fisher became insolvent in January, 1887. The only testimony offered by the plaintiff as to the issue under consideration was given by himself, in which he denied ever having had either the conversation with the defendant E. L. Fisher, or the one alleged with J. S. Fisher, saying upon the stand no such conversation or conversations had ever taken place.

His Honor then instructed the jury that "There must be a valuable consideration for a contract to forbear, before the surety is released, and if the principal debtor say to the creditor, 'I have the money to pay you,' and the creditor say, 'I do not need it, and you can keep it, if you will pay the interest semiannually,' and the principal debtor says, 'All right,' and keeps the money, such an agreement is not such an agreement to forbear as will discharge the surety, although he did not know of it or assent to it. Therefore, on the evidence of defendant you ought to answer the issue No."

The issue upon which the judgment was based was, "Did the plaintiff make the contract with J. S. Fisher to forbear the collection of the debt for which the note was given, without the knowledge and consent of defendant?"

There was judgment for plaintiff, and defendant appealed.

H. S. Puryear for plaintiff.

W. J. Montgomery for defendant.

SHEPHERD, J. "It is well settled that if a creditor enter into (313) any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. A familiar instance of this is where a creditor binds himself not to sue or collect the debt for a given time, and thereby puts it out of the power of the surety to pay the debt and sue the principal debtor." *Deal v. Cochran*, 66 N. C., 269; *Forbes v. Sheppard*, 98 N. C., 111; *Hollingsworth v. Tomlinson*, 108 N. C., 245.

His Honor held that there was no valid contract of forbearance so as to bring the present case within the principles above stated, and the ruling is based upon the idea that the promise on the part of the principal debtor to pay the interest semiannually did not amount to a sufficient consideration to support the agreement. A valuable consideration is "any benefit to the person making the promise, or any loss, trouble, or any inconvenience to or charge upon the person to whom it is made, . . . and provided there be some benefit, etc., . . . the courts are not willing (in the absence of fraud) to enter into the question whether the consideration be adequate in value to the thing which is promised in exchange for it." Smith on Contracts, 166, 168.

Tested by this rule, we are of the opinion that the alleged promise conferred a *benefit* upon the plaintiff, in that it worked a material change in the contract in respect to the payment of interest. The note stipulates for the payment of interest at the rate of 8 per cent per annum, and although it may not be paid until several years after it falls due, the payee is not entitled to interest upon the interest which has accrued at the date of maturity. The reason is that the parties having, by *acquiescence*, extended the credit, the interest, which is an incident of the debt, goes with it and is not due at the maturity of the debt so that an independent action for its recovery can be maintained. It is otherwise when the note contains an express promise to pay interest at specified times. At each time there is a certain sum of money due for which an action lies. "When there is an (314) agreement set out in the note for the payment of interest annually or semiannually, the maker is chargeable with interest at a like rate upon each deferred payment of interest, in like manner as if he had given a promissory note for the same amount. . . . By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest." *Bledsoe v. Nixon*, 69 N. C., 89; *Knight v. Braswell*, 70 N. C., 709; *King v. Phillips*, 95 N. C., 245; *Cox v. Brookshire*, 76 N. C., 314.

Such an agreement may be made either before or after the maturity of the debt, and when the principal debtor in this case agreed to pay the

interest semiannually, it so changed the original contract as to charge him with interest upon the interest accruing every six months thereafter; and this surely was such a *benefit* to the plaintiff, the payee, as would support his promise to forbear.

It is insisted in this Court, though not distinctly passed upon below, that granting the consideration to be sufficient, the contract is nevertheless void because of its indefiniteness. It is true, as argued by counsel, that there must be a definite time fixed for the extension of credit; that is to say, there must be a time fixed before which the creditor cannot proceed against the principal debtor; but we think this is fully complied with by the agreement to pay the interest semiannually. However indefinite it may be after the first six months, it certainly amounts to an agreement to forbear for that period at least, and this is all that is necessary under our decisions to discharge the surety. In this we are sustained by the following authorities: "An agreement to extend the time for twenty or thirty days is definite as to twenty days, and, therefore, discharges a surety." 2 Daniel Neg. Inst., sec. 1319. And so in *Pipkin v. Bond,* 40 N. C., 91, the surety was discharged, although the precise time fixed by the agreement (315) could not be ascertained, the Court remarking that "As men of common sense, with even a very slight acquaintance with the common course of dealing, we are obliged to perceive that the parties understood that no suit should, at all events, be brought before the next term of court."

In consideration of the foregoing reasons, we are of the opinion that the court erred in instructing the jury that the testimony did not warrant an affirmative finding on the third issue.

As this disposes of the appeal, it is unnecessary to pass upon the question raised on the argument as to the effect of the alleged tender by the principal debtor. It is sufficient to say that the point is not raised, either by the answer or the issues.

Error.

Cited: Hinton v. Greenleaf, 113 N. C., 8; *Smith v. Parker,* 131 N. C., 471; *Revell v. Thrash,* 132 N. C., 808; *Fitts v. Grocery Co.,* 144 N. C., 468; *Parker v. Horton,* 176 N. C., 145.

G. W. BOWLEY v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Removal of Causes to United States Courts—Practice in.

1. A complaint against two railway companies, one of which is a resident but the other is a nonresident corporation, to recover damages for injuries resulting from their joint negligence as common carriers, does not state such a severable controversy as will authorize the removal thereof to the United States courts upon the application of the nonresident corporation.

2. It is not sufficient to allege in the pleading that the resident corporation was joined as defendant to prevent the nonresident corporation from removing the cause from a State to the United States courts. That fact, if it can be made available at all, must be affirmatively established by competent evidence.

APPLICATION to remove cause to United States Circuit Court, (316) heard before *Boykin, J.*, at November Term, 1891, of IREDELL.

It appears that the plaintiff is a citizen of the State of Georgia, and was such at the time he brought this action in the Superior Court of Iredell County against the defendants to recover damages to the amount of $10,000, occasioned by their alleged negligence. The defendant the Western North Carolina Railroad Company is a corporation of this State with its principal place of business in the Western District of North Carolina, and the defendant the Richmond and Danville Railroad Company is a corporation and citizen of the State of Virginia, and was such at the time this action was brought. The latter company filed its petition at the appearance term of the court, alleging, among other things, that the amount involved in the action exceeds the sum of $2,000; that the controversy "is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between the said petitioners, the Richmond and Danville Railroad Company and the said George W. Bowley." The prayer of the petition is that the court take no further steps in the action than to make a proper order of removal of the same into the Circuit Court of the United States in and for the Western District of North Carolina, there to be disposed of according to law. The court denied the application, and the Richmond and Danville Railroad Company excepted and appealed.

Armfield & Turner (by brief) for plaintiff.
F. H. Busbee for defendant.

MERRIMON, C. J., after stating the facts: The complaint alleges "that the said Western North Carolina Railroad Company and the Richmond and Danville Railroad Company, on 27 August, 1891, and (317) for a long time previous thereto, as the plaintiff is informed and believes, were, and up to the present time are, engaged as common carriers of passengers, baggage and freight for hire along a line of railroad belonging to the Western North Carolina Railroad Company, from Salisbury to Paint Rock in the State of North Carolina."

It further alleges that the injury complained of was occasioned by the negligence of the defendants as such common carriers while the plaintiff was a passenger on one of their passenger trains. It plainly alleges a joint tortious injury done by the defendants, which in no view of it is separable. The action must hence be tried as a whole. The cause of action alleged cannot be divided and tried as to one of the defendants in the State court and as to the other in the Circuit Court of the United States. *Gudger v. R. R.*, 87 N. C., 325; *O'Kelly v. R. R.*, 89 N. C., 58; *Douglas v. R. R.*, 106 N. C., 65; *Hyde v. Reeble*, 104 U. S., 407; *R. R. v. Waugelin*, 132 U. S., 599, and cases there cited.

It was suggested on the argument that the defendant the Western North Carolina Railroad Company is no more than a nominal party; that it is not liable to the plaintiff, and is made a party on purpose to prevent the removal of the action as to the appellant to the Circuit Court. But this does not appear from the record, nor is it alleged in the petition for removal of the action, much less is it proved. In the appellant's answer to the complaint it denies that "its codefendant was a common carrier of passengers at that time (27 August, 1891) or for some time previous thereto, the said Western North Carolina Railroad Company having leased its rights as such to this defendant." This is all that appears in the record implying the slightest objection to the codefendant of the appellant as a party; so far as appears, the former may be a proper party. It may be that if the appellant had made appropriate allegations in its petition for removal, the court below might have inquired into the purpose to make a nominal color- (318) able party with a view to prejudice its right. In *Oakley v. Goodman*, 118 U. S., the Court said: "While, therefore, the courts of the United States have, under the act of 1875, the power to dismiss or remand a case, if it appears that a colorable assignment has been made for the purpose of imposing on their jurisdiction, no authority has as yet been given them to take jurisdiction of a case by removal from a State court, when a colorable assignment has been made to prevent such removal. Under the law as it now stands the resort can only be had to the State courts for protection against the consequences of such an encroachment on the rights of the defendant." But we abstain

from expressing any opinion in this respect, as the case does not make it necessary for us to do so. It would not be sufficient to simply allege the purpose of the plaintiff to make a colorable party defendant to prevent the removal of the action; it must be proved in some appropriate connection and way. *Bank v. Cooper,* 120 U. S., 778; *Provident Savings Society v. Ford,* 114 U. S., 635; *Mining Co. v. Canal Co.,* 118 U. S., 270; *R. R. v. Waugelin, supra;* Foster's Federal Prac., sec. 384.

It appears that the plaintiff and the appellant were nonresidents of this State and the Western District of North Carolina, and that they respectively were citizens and residents of different states. The plaintiff could not, therefore, have brought his action in the Circuit Court of that district. The statute provides that the action "shall be brought only in the district of either the plaintiff or the defendant." The plaintiff hence insists that the action could be removed only into the United States Circuit Court where he might have brought his action, and as he could not have brought it in the Western District of North Carolina, this action cannot be removed to the Circuit Court of that district, nor can it be removed to a Circuit Court of the district where he resides, nor to that where the appellant resides. It is not necessary to dispose of the case upon that ground. It seems that there is (319) authority sustaining that view. *Gudger v. R. R., supra; Pipe Co. v. Howland,* 99 N. C., 202; Speer Removal of Causes, sec. 23 *et seq.*

Affirmed.

NOTE.—*Lawson* against same defendants; *Coone* against same defendants, and *Armfield* against same defendants, from IREDELL, are, in material respects, substantially like this case, and must be governed by it.

JOHN C. MILLER ET AL. v. R. A. SHOAF ET AL.

Limitations, When Statute Begins to Run—Administration—Assets, Real, When Subject to Sale.

1. The statute of limitations—The Code, sec. 153 (2)—requiring creditors of deceased persons to commence actions within seven years after the qualification of the personal representative, contemplates those claims upon which the right of action had accrued at the time of such qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. *Syme v.* Badger, 96 N. C., 197, and *Andres v. Powell,* 97 N. C., 155, distinguished.

2. The statute—The Code, sec. 1489—authorizing the retention by an administrator or executor of funds to meet unliquidated demands embraces only the demands which are existing and capable of being ascertained.

3. The fact that some of the heirs of a deceased debtor have disposed of lands descended from their ancestor, will not deprive a creditor of his remedy to subject those in possession of others.

(320) SPECIAL PROCEEDING in the nature of a creditor's bill, heard before *McIver, J.*, at February Term, 1892, of ROWAN, upon an appeal from the clerk upon a question of law, whether the plaintiff's cause of action was barred by the statute of limitations.

His Honor affirmed and approved the judgment and decision of the clerk, from which the defendant appealed.

The facts appear in the complaint and answer, and are admitted to be true.

The plaintiff alleged, in substance: That Daniel Hoffman died intestate in 1874, and the defendants John Eagle and R. A. Shoaf were duly appointed his administrators; that in 1891 Roseman, administrator of Elizabeth Propst, obtained judgment against the plaintiff and R. A. Shoaf and John Eagle, administrators of Daniel Hoffman, for $800, to be discharged upon the payment of $300; that the said John C. Miller and the defendants' intestate, Daniel Hoffman, were cosureties on the administration bond of one Eli Propst, and said judgment was obtained against the plaintiff and the administrators of the said Daniel Hoffman on account of said suretyship; that the plaintiff in said judgment issued execution on the said judgment and compelled the plaintiff herein to pay the whole of said judgment; that the plaintiff demanded of the defendants contribution for which they were liable, but they have refused to pay the same, or any part thereof; that at the time of his death the said Daniel Hoffman was seized of a tract of land containing about 300 acres, which descended to his said heirs, and that the personal estate of the said Hoffman has been exhausted in the payment of debts, and the plaintiff has applied to the said administrators to have the land, or a part thereof, sold to pay his debt, but they have refused to comply with his reasonable request.

Wherefore, he demanded judgment against the said administra-
(321) tors for $150 and interest, and the further sum of one-half the costs of the suit of Propst's administrator against John C. Miller and the said administrators, and that the said land be sold to pay said debt.

The defendants answered, admitting the material allegations of the complaint, but for a further defense averred "that the defendants John Eagle and R. A. Shoaf, as administrators of Daniel Hoffman, have fully administered and settled the estate of their intestate and have no assets, and, according to law, duly advertised for all persons having claims against said estate to present them for payment; that on 3 March,

1874, letters of administration were granted to the defendants John Eagle and R. A. Shoaf, and they have filed in the office of the probate judge of said county a final settlement of said estate on 8 September, 1877; that the plaintiff's cause of action therein stated did not accrue within six years next before the commencement of this action; that the plaintiff's cause of action stated therein did not accrue within three years next before the commencement of this action; that the plaintiff's cause of action did not accrue within ten years next before the commencement of this action; that the plaintiff's cause of action did not accrue within seven years next before the commencement of this action; that the plaintiff's cause of action did not accrue within one year next before the bringing of this action; that the real estate has been divided and partitioned among the heirs at law of the said Daniel Hoffman, and nearly all of the land so partitioned has been sold to third parties, and only a few of the heirs now own the land so allotted to them, and there are no assets, and only a small portion of said heirs have retained their land, and others of said heirs are insolvent."

Kerr Craige for plaintiff. (322)
Lee S. Overman for defendant.

SHEPHERD, J. The plaintiff, John C. Miller, and Daniel Hoffman, deceased, were sureties on the administration bond of one Eli Propst, and in May, 1891, a judgment was obtained against the plaintiff and the personal representatives of said Hoffman. Execution having issued, the plaintiff was compelled to pay the whole of said judgment, and this action is brought against the administrators and heirs at law of Hoffman, the said cosurety, for contribution.

It thus appears that the plaintiff's case of action accrued in 1891 (The Code, sec. 2094; *Leak v. Covington,* 99 N. C., 559), but it is contended that he is barred, both as against the personal and real representatives, because the former rendered their final account and settled the estate in 1877, having duly advertised for the presentation of claims when they qualified in 1874. There are no assets, therefore, in the hands of the administrators; nor does it appear that they did not fully and properly administer the estate, but the heirs at law have pleaded all the statutes of limitations, and especially do they rely upon the seven years statute (The Code, sec. 153, subdiv. 2) and *Syme v. Badger,* 96 N. C., 197; *Andres v. Powell,* 97 N. C., 155, and the authorities therein cited. In other words, the heirs claim that they are entitled to hold the land against a creditor of their ancestor whose right of action has just accrued, although the personal assets have been exhausted in a due course of administration. What natural justice there is in such

a contention we are unable to discover, and we think it would be perplexing to the most profound casuist to defend so inequitable a discrimination on the ground of a public policy which requires that "repose should be given to estates." If it has ever been intimated or decided by this Court that a cause of action can be barred by the statute of limitations before it has accrued, it is time that such a doctrine should be thoroughly repudiated. A statute to this effect passed after (323) a liability has been incurred would be clearly unconstitutional (Cooley Const. Lim., 367), and while such an act of the Legislature, if prospective in its terms, might be sustained on the ground that parties must be deemed to have contracted with reference to existing laws, the courts would, in the absence of explicit language, be very slow to interpret the legislative will so as to impute to it a purpose to work such an anomaly in our jurisprudence. The act of 1715 (Rev. Code, 205) was very similar to the law now under consideration, and HALL, J., in delivering the opinion in *Godley v. Taylor,* 14 N. C., 180, said that "When the Legislature say that creditors shall make their claim within seven years after the death of the testator (in the present act after the date of the qualification of the administrator and making due advertisement), they must have in contemplation such a creditor as had a *claim* to make; such a claim that might be enforced *in presenti.* They did not mean a claim that might arise *in futuro,* which could not be enforced until it did arise or accrue. By an equitable construction of the act, he must make his claim within seven years after it accrues. To require him to make it before would be to require of him an impossibility. The statutes of limitations generally begin to run after the cause of action has accrued." After quoting *Chief Justice Abbott* in *Murray v. E. I. Co.,* 7 E. C. L., 66, that "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing," the Court further remarked: "Would not his lordship have been equally orthodox if he had also said, although there is a creditor in existence, yet if there is no *claim* or cause of action, the statute of limitations will not run?" This latter proposition is not only sustained in the foregoing cases, but is an admittedly well settled principle of law. We are hardly driven in the present case to an equitable construction of the statute, for if we turn to sec. 138 of The Code we will find this very principle recognized as governing all of the pro- (324) visions respecting the limitations of actions, and it cannot be said that The Code, sec. 153, contains anything which really conflicts with it. As is said in *Godley v. Taylor, supra,* such provisions "being all in *pari materia,* ought to receive a uniform construction, notwithstanding slight variations in phraseology." Since the decision in *Godley's case, supra,* we can find nothing in our reports in the way of

adjudication which recognizes the doctrine now insisted upon by the defendants. In *Syme v. Badger, supra,* the question presented was, When did the cause of action accrue?—the plaintiffs insisting that it did not accrue until all of the remedies against the personal representative had been exhausted. The Court held otherwise, on the ground, it seems, that both the administrator and the heirs could have been sued together within seven years in an action in the nature of a creditor's bill.

In *Andres v. Powell, supra,* it is stated in the opinion that the statutory period had elapsed after the cause of action had accrued, and this seems to be the *ratio decidendi* of that case.

We do not understand that either of the above decisions rested upon the principle asserted by the defendants in the present case, and if there be anything in the opinions which countenances such a doctrine in the slightest degree, it was unnecessary, and certainly does not meet with our approval.

Our attention has been called to The Code, sec. 1489, which provides that "If upon a final accounting by a personal representative it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim," etc. What effect this might have in exonerating the real representatives and imposing a liability upon the administratrix for their neglect to comply with this provision, if it applied to this case, it is unnecessary to determine, as very clearly the claim of the plaintiff is not such a debt as is contemplated by the statute. It means some existing claim capable of being ascertained, and not the (325) mere liability of a surety or a cosurety on an administration bond which may never ripen into a cause of action. To hold otherwise would indefinitely postpone the settlement of estates if the intestate happened to be a surety upon bonds of such a character; although there might be but little or no probability of any default on the part of the principal obligor.

Neither is there anything in the fact that some of the heirs have sold their lands. "Payment may be enforced against any tract for the satisfaction of the indebtedness, leaving those whose property may be taken to obtain contribution according to the respective values of the other lands held by devisees or heirs." *Lilly v. Wooley,* 94 N. C., 412.

We are of the opinion that there is no error in the rulings of his Honor, and that the judgment should be

Affirmed.

Cited: Lee v. McKay, 118 N. C., 524.

W. T. ADAMS v. THE DURHAM AND NORTHERN RAILROAD COMPANY.

Damages—Easement—Eminent Domain—Railroads, Liability for Injuries by Constructing Road.

1. It is a general rule that damages to land caused by the erection of a waterway by a railroad company—if skillfully constructed—are included in the compensation for and pass by the grant of the easement of the right of way; but this general rule is subject to another rule, that the grantee of the easement shall not use its privilege in such manner as to inflict unnecessary injury upon the servient owner.

2. Where the evidence tended to show that a railroad company diverted one stream into another, so that the waters from both might be conducted through one waterway; and that such diversion was not necessary to insure the safety of the road, but merely for the purpose of lessening the cost of construction, the owner of the land so damaged was entitled to recover for injuries, notwithstanding he may have granted this right of way.

3. When the injuries are the result of causes which may be removed, or a nuisance which may be abated, the measure of damages is not the difference in the value of the land before and after the injury, but its comparative productiveness.

ACTION to recover damages for overflow alleged to have been caused by turning a running stream into the channel of another while constructing the road, so as to make both pass through a single waterway, tried at April Term, 1892, of GRANVILLE, before *Boykin, J.*

The plaintiff and his wife had joined in a conveyance of the right of way for the Durham and Northern Railroad on either side of the center of the railroad track.

The plaintiff introduced evidence that by reason of the turning of two streams of water, one called Adams' Branch and the other Fleming's Branch, into one, his land on both sides of the road was flooded and damaged. The plaintiff further showed that in clearing off the right of way certain logs and bushes were thrown by the defendant in Adams' Branch, and the cost of clearing them out amounted to $40. The plaintiff did not introduce any evidence that the said railroad was negligently constructed, or that, in prudent and careful railroad construction, it was not proper to cause the two branches to flow together, or that the trestle was not large enough to carry off the water.

It was admitted that all the land of the plaintiff alleged to have been damaged was, before the railroad was built, in one tract. In estimating the damage, all of the plaintiff's evidence was as to the damage done to the entire tract, and there was no evidence introduced as to the damage done each separate tract, except the cost of cleaning the (327) logs, etc., from Adams' Branch.

The defendant introduced the deed for the right of way over this land.

William Moncure, a witness for the defendant, among other things, testified that he is by profession a civil engineer, and was superintendent of the defendant's road, and had been engaged in constructing and working on railroads for eleven years; that the road of the defendant over the land of the plaintiff is well and skillfully constructed, and the trestle is amply sufficient to carry off the water; that this trestle is 75 feet long; that waterways under the track of railroads are always points of danger, as washouts are more likely to occur at these places than elsewhere; that in the construction of railroads it is always the custom of prudent engineers to make one waterway instead of two when it is practicable to do so; that in trestles there is always more or less danger of the abutments washing out, and these abutments have to be constantly and carefully watched; that it was possible at this place to have made two trestles, but the road would not have been as cheaply and safely constructed with two trestles as in the manner in which it was constructed. The defendant also introduced evidence that the land alleged to be injured was, before the road was built, and is now, a low, wet, swampy place, and was uncleaned and unfit for cultivation, and that Adams' Branch in this swamp was always partially obstructed with logs, brush, etc.

The defendant asked the court to charge the jury as follows:

1. That, upon the whole evidence, there was no evidence of negligence in the construction of the road, and that the plaintiff was only entitled to recover the cost of cleaning out Adams' Branch. This was refused, and defendant excepted.

2. That if the jury should believe, from the evidence, that (328) the defendant had purchased and paid for the right of way over this land, and that turning these two branches together was the proper and prudent manner of constructing said road, then that any damages which accrued from the proper and prudent construction of the road in the usual manner were included in the price paid for the right of way, and the plaintiff in this action could only recover the cost of cleaning out Adams' Branch. This was refused, and the defendant excepted.

3. That as the defendant had the right under its charter to construct the road, the plaintiff cannot recover unless he shows that the work was negligently done, or that he was damaged by some act of the road not necessary for its safe and prudent construction, and in this case there is no evidence of any negligence or useless damage, except in allowing

Adams' Branch to be filled with logs. This was refused, and the defendant excepted.

4. That the measure of damage for the injury done to the land above the road by reason of the obstructions allowed to accumulate in Adams' Branch is the cost of clearing out such obstruction placed there by the defendant. This was refused, and the defendant excepted.

His Honor charged the jury that there was no negligence in the construction of the road as regards the land lying below the roadbed, and in arriving at their verdict they would not allow any damages for injury done this land; that if the jury believed that there was negligence in the construction of the trestle, and that it was not sufficient to carry off the water, and that by reason of such negligence the land above the roadbed was injured, they could allow such damages as they thought the plaintiff had suffered by reason of such flooding.

To this charge the defendant excepted, and assigned as error that there was no evidence that there was any negligence in the construction of the trestle, or that the trestle was not sufficient to carry
(329) off the water, and because it was not responsive to the plaintiff's prayer for instructions in regard to the measure of damages, and because, in arriving at the plaintiff's damage, no witness had separated the damage done to the various tracts, but in estimating the amount of damage had done so for the whole tract, both that above and that below the roadbed.

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

A. W. Graham for plaintiff.

J. B. Batchelor and John Devereux, Jr., for defendant.

AVERY, J., after stating the case: It is contended for the defendant that, though Fleming's Branch was turned from its natural channel above the track and made to pass under a trestle with the waters of Adams' Branch, the undisputed fact that the work of constructing the trestle was skillfully done and that it afforded ample room for the passage of both streams, relieves the company from liability to the owner of the tract of land on which the waterway is situated for damages caused by overflow, either above or below the trestle, because compensation for such injury to that land as was incident to a proper construction of the road across it, was allowed to the owner in estimating the value of the right of way.

It is conceded that one of the propositions upon which this contention is founded is, in the abstract, correct, and is supported by abundant authority. Such damage as is due to the erection of a waterway

over a running stream at the point of its intersection with the line of a railway is considered, where the work is skillfully done, as included in the cost of the easement or to have passed as an incident to a grant of it; and the fact that it was so constructed as to pass the water, even in time of ordinary freshet, being admitted, neither the owner of the servient tenement nor the proprietor of a tract above can (330) maintain an action for damage due to placing the structure across the stream. *Emry v. R. R.*, 102 N. C., 209; 6 A. & E., 552; *Proprietors v. R. R.*, 10 Cush. (Mass.), 385; *Meares v. Wilmington*, 31 N. C., 73; *Wright v. Wilmington*, 92 N. C., 156; *R. R. v. Wicker*, 74 N. C., 220.

The damage directly due to the diversion of a water-course from its natural channel is not considered to have been included in the estimated cost of the right of way merely because the corporation, acting through its agents, may have found it less expensive to turn one branch into the channel of another, or to divert one from its natural bed rather than construct two trestles or locate one at the original intersection of the stream with the railway. Whether an easement passed by private sale or condemnation, the estimate of its value is presumed to be made in contemplation of the observance on the part of the corporation of the golden maxim of the law, by so exercising its privilege as to inflict no unnecessary injury on the servient owner. Lewis on Eminent Domain, sec. 571; Angell on Water-courses, sec. 97; *ibid.*, secs. 95, 95a; *Lillotran v. Smith*, 32 N. H., 94; *Embry v. Owen*, 6 Exc., 369; *Pugh v. Wheeler*, 19 N. C., 50; *Walton v. Mills*, 86 N. C., 280; *Wilhelm v. Burleyson*, 106 N. C., 389; Gould on Waters, secs. 209, 214, 401, 405; *Hasher v. R. R.*, 60 Mo., 329; *Curtis v. R. R.*, 98 Mass., 428; *Lawrence v. R. R.*, 71 C. L., 643; Mills Em. Domain, sec. 81 (p. 220); *Munken v. R. R.*, 72 Mo., 514; *R. R. v. Wicker, supra.*

It would seem to be the established rule in America that for any infringement of the plaintiff's right, as of that to have the two branches to flow in their accustomed channel, he would, as against a coterminous landowner above him, have the right to recover at least nominal damages if no actual injury were shown (2 Shearman & Red. Neg., 733; Gould, *supra*, secs. 401 and 405; Bishop's C. L., sec. 892); and where the flow of the stream is changed, or two running streams (331) are united by a corporation holding an easement merely for the purpose of diminishing the cost of construction, and not because such changes are necessary to insure the safety and permanency of the structure built by it, the company must answer for such damages as are caused by the divisions made, not to protect the lives and property of its prospective patrons, but to diminish the draught upon its treasury. Lewis Em. Dom., secs. 61, 62 and 571; Mills Em. Dom., sec. 81.

If Fleming's Branch was turned away from its original channel and into Adams' Branch merely to save money, and not lives and property, the roadbed might have been completed, possibly at greater cost to the company, but without inflicting the injury from overflow above and below the track which is complained of. It being admitted, as a general rule, that such injuries to the servient tenement as are necessarily incident to a skillful construction of the road are considered as included in the compensation for the easement, it is clear that the skill is not to be measured by the cost of the structure alone, but by its completion upon such a location and in such a manner as to provide for the public safety and convenience without unnecessary injury to the land subject to the servitude. When the attempt is made to draw and define the line of legal right between two such conflicting claimants, it is essential always to recur to the rule, *Sic utere tuo, ut alienum non loedas,* as the touchstone by which the culpability of conduct is to be determined. The persons who fixed the cost of the easement contemplated the building of the structure with an eye to the safety and convenience of the public, and subject to this controlling purpose, with a proper regard for the rights of the servient as well as dominant owner.

The court erred in submitting the question whether in their opinion there was negligence in the construction (not the location) of the trestle by failure to provide a sufficient room for the passage of
(332) the water, and whether, by reason of such negligence, the land above the roadbed was injured, and in making the right of recovery depend solely upon their finding in this respect, as all of the evidence tended to show that the trestle afforded ample room for the passage of the water even in time of ordinary freshets. *Morgan v. R. R.,* 98 N. C., 247. The instruction was calculated to mislead them. The judge should have told the jury that by diverting Fleming's Branch from its channel above the railroad, unless it was necessary to do so in order to make the best provision for the safety of passengers and property to be transported over the road, the defendant company incurred liability for at least nominal damages, and for such actual damage from overflow as was caused to the plaintiff's land above the railroad or below it, by diverting the branch from its natural course as well as by throwing logs into Adams' Branch, or allowing obstructions to be placed in that portion of the stream covered by the easement.

If the true test should be hereafter applied by a jury, they might find a greater or less sum to be due than that fixed by their verdict for the land above the track; but since the charge was evidently calculated to mislead, the defendant has the right to demand a new trial as to that question. As we understand the facts from a statement that is not very

full or clear, and as we gathered them from mutual admissions of counsel on the argument, the court below also erred in giving the instruction that the jury must not allow any damage for injury done to the plaintiff's land lying below the railway. This was not an error of which the defendant complained, but, as the case is to be tried again, it is not improper to anticipate a question that must inevitably arise in the court below on the next trial, and would probably have arisen now if plaintiff's appeal had been perfected. If there was testimony tending to show (as seems to be conceded, and as the map indicated) that the plaintiff's land below the railroad, and above the point (333) at which Fleming's Branch originally entered into Adams' Branch, was injured by overflow, and that such overflow was caused by turning the water of both into one channel, then the defendant was answerable also for such damage above the point of original intersection of the two streams, and it should have been estimated by the jury.

In cases of this kind, when the damage is due to a cause that may be removed, or a nuisance that may be abated, the measure of damage is not the difference in the market value of the land before and after the injury, but is estimated by comparing its productiveness before and after the flooding. *Spilman v. Navigation Co.*, 74 N. C., 675; 16 A. & E., 984.

For the reasons given, we think there was

Error.

Cited: Waters v. Lumber Co., 115 N. C., 654; *Fleming v. R. R., ib.*, 693, 697; *Ridley v. R. R.*, 118 N. C., 998, 1004; *Parker v. R. R.*, 119 N. C., 685; *Craft v. Timber Co.*, 132 N. C., 155; *Jones v. Kramer*, 133 N. C., 448; *Thomason v. R. R.*, 142 N. C., 328; *Parks v. R. R.*, 143 N. C., 295; *Davenport v. R. R.*, 148 N. C., 291; *Webb. v. Chemical Co.*, 170 N. C., 664; *Morrow v. Mills*, 181 N. C., 425.

HENRY TUCKER v. FLORA TUCKER.

Sale of Land for Taxes—Pleading—Presumption.

1. The plaintiff, claiming under a tax sale, in his complaint alleged that the land (describing it by metes and bounds) had been allotted to defendant as a homestead; that the said land had been duly listed for taxation, and, upon failure of the owner, the "said land" was sold for taxes: *Held*, there was an irresistible inference that the *entire* tract was sold, and no one but the county (under the Revenue Act of 1885) being entitled to purchase the whole tract, a sale to an individual was void.

2. This inference is not rebutted by an agreed statement of facts that the land was duly listed, the tax lists placed in the hands of the collector, and that advertisements and sales were made, there being no statement as to the *manner* in which the sale was made.

3. The presumption that one who makes a sale of land for taxes has complied with the requirements of the law regulating such sales does not arise until after the deed to be made thereupon has been executed.

PETITION by defendant to rehear this case, reported in 108 N. C., 235.

T. W. Strange for petitioner.
No counsel contra.

SHEPHERD, J. It is a well settled rule that "No case ought to be reversed upon petition to rehear unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the Court." *Watson v. Dodd,* 72 N. C., 240; *Gay v. Grant,* 105 N. C., 478; *Hudson v. Jordan, ante,* 250.

The converse of the proposition is of course true, and is applicable to the present case.

On the former hearing the argument of counsel was chiefly addressed to the following questions: (1) Whether the defendant, to whom a homestead had been allotted in lieu of dower, could forfeit her right thereto by a sale of the same for nonpayment of taxes and failure to redeem within the statutory time. The Constitution, Art. X, sec. 2, expressly makes the homestead liable to sale for taxes. (2) Whether the plaintiff was the "next in title" who was entitled to redeem on the failure of the life tenant to do so. Under the canon of descents, The Code, sec. 1281, Rules 9 and 10, he clearly was. We held, therefore, both questions in the affirmative, and adversely to the defendant. We are satisfied of the correctness of the decision on these questions; but we were inadvertent to the point now called to our attention, and we think, as a (335) plain matter of justice, it should be passed upon by us. Upon referring to one of our note-books, we find that the point was made by counsel, but as the greater part of his argument was directed, as we have said, to the other questions, it was overlooked by the Court in arriving at its conclusion. Such being the case, we have very cheerfully awarded to the defendant a rehearing.

The facts are fully stated in 108 N. C., 235. These need not be repeated here, as it is sufficient to say, for our present purpose, that the only question to be determined is whether, upon the pleadings and the facts agreed, there was a valid sale of the land for taxes. If there was no such valid sale, there was no forfeiture to the plaintiff as the next in title (Laws 1885, ch. 177, sec. 59), and our former judgment should be

reversed. The alleged sale was made under sections 39 and 40, ch. 177, of the above mentioned act of the Legislature, and this, among other things, provides that "The whole tract or contiguous body of land belonging to a delinquent person or company shall be set up for sale at the same time, and the bid shall be struck off to him who will pay the amount of taxes with all the expenses for *the smallest part of the land.* If no one will or shall offer to pay the amount of taxes for a less number of acres than the whole number of acres in said tract, then the sheriff shall bid off the property for the county," etc. From this it appears that, under the law as then existing, no one but the county could become the purchaser of an entire tract of land sold for taxes, and the sale in this case being distinctly denied in the answer, the only point to be considered is whether the *whole* tract was exposed to sale and bid off by Maria Fuller. That the whole of the tract was exposed to sale and bid off by the said Maria is, in our opinion, plainly manifest from the pleadings and the facts agreed. The plaintiff sues for a certain lot of land, and with much particularity describes it in his complaint by metes and bounds. He alleges that "The (336) defendant was the owner of a life estate in *said* land, the same having been allotted to her in due form of law as her homestead; . . . that *said* land and premises were in due form of law listed by the defendant for taxation; . . . that defendant willfully failed and refused to pay the said taxes and allowed the *same* to be sold." From the statement of facts agreed, it appears that the defendant had the "*locus* allotted to her in due form of law as her *homestead;* . . . that the taxes were assessed against her and *the land in controversy;* . . . that *said* land was exposed for sale, . . . and the *same* was bid off . . . by Maria Fuller."

The irresistible inference to be drawn from the foregoing extracts is that the *whole* of the land as described in the complaint was attempted to be sold by the sheriff, and we seek in vain to find in any part of the record the slightest intimation that only a part of it was so disposed of. If only a part of the tract specifically described in the complaint was sold, and the plaintiff claims it by reason of a forfeiture occasioned by the delinquency of the defendant and the consequent sale, how does it happen that he is suing for the *whole* tract, claiming the same solely by virtue of the alleged sale?

It is insisted, however, that in the face of all this, we are authorized to say that only a part of the tract was sold, and this because of certain recitals in the statement of the facts agreed. Let us examine and see the nature of these statements. They are as follows, to wit: "That defendant duly listed, according to law, said land and premises; . . . that in the time prescribed by law the tax lists . . . were placed

in the hands of the sheriff . . . in the manner prescribed by law; . . . that after the advertisement required by law, the said land was exposed to sale; . . . that the same was bid off by
(337) Maria Fuller, and the certificate of sale was duly registered according to law." It is said that the frequent recurrence of the expressions "according to law," "prescribed by law," and the like, raises a presumption that the sale was regular in all respects. These expressions (though not presumptions of law, but simply statements of fact to be construed as any other fact agreed upon) do certainly import the regularity of the performance of the particular acts to which they refer, such as the listing for taxes, placing the tax lists in the hands of the sheriff, advertising, the registration of the certificate, and the like; but they extend no further; and it is to be noted that there is no statement that the *sale* was made according to or as prescribed by law. Even if such statements could be considered as presumptions of law, it is plain that they have no reference to the quantity of the land sold. And so, if there had been a statement that the sale was made "according to law," it would be a mere matter of construction as to the meaning of the facts agreed, and these, as we have seen, unmistakably show that the whole and not a part of the land was sold. It is further insisted that by the act above mentioned (section 42) it is to be presumed that the sheriff has complied with "all the requirements of the law"; but very plainly this has nothing to do with our case, as *no deed* has ever been executed by the sheriff, and the presumption does not arise until this has been done. Had there been a deed, we are entirely clear that the *prima facie* case under the statute would have been rebutted by the pleadings and the facts as agreed upon by the parties.

If we had any doubt upon the question, it would vanish before the familiar principle, so often laid down by this Court, that one whose claim is based upon a sale for taxes must show "that the taxes were due, and that *every other material requirement has been complied with.*" *Fox v. Safford,* 90 N. C., 296. There being no deed, the presumption of law, therefore, is against the plaintiff; and instead of showing that all the material requirements have been complied with, his com-
(338) plaint, as we have seen, as well as the facts found, show directly contrary.

We must, therefore, conclude that the point overlooked by us on the former hearing is well taken by the defendant, and, while adhering to our previous decision upon the questions discussed in the opinion, we think that the judgment should, for the reasons we have given, be

Reversed.

Cited: *Hodgin v. Bank,* 125 N. C., 503, 511.

*L. M. WATERS v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Common Carriers—Contract, Illegal—Negligence.

1. A common carrier is not exempt from liability for negligence in transporting passengers or freight, even though the purpose of the shipper or passenger is unlawful and was so known to all the parties, unless the unlawful purpose entered into the consideration of the contract.

2. In an action for damages alleged to have been caused by the failure of a railroad company to ship freight at a time stipulated, it was error to submit to the jury the question of damages caused by the detention *en route* of the freight shipped under a subsequent contract, especially as the complaint did not contain any allegation of a breach in that respect.

APPEAL at Fall Term, 1891, of ASHE, from *Bynum, J.*

A former appeal in this action was decided at February Term, 1891 (108 N. C., 349), when a new trial was granted, after which plaintiff filed an amended complaint, in which it is alleged in substance that the defendant is a corporation duly created by law, owning and operating a line of railroad between the town of Taylorsville, in (339) North Carolina, and the city of Charleston, South Carolina. That on or about 10 May, 1888, he was the owner of a lot of cattle which he desired to ship from Taylorsville to the city of Charleston, and in order to reach said city on the Saturday morning following, he contracted with the defendant, for and in consideration of $58.50, to furnish on Wednesday night one safe and substantial Richmond and Danville stock-car capable of holding and transporting the said cattle, thirty-two in number, and that the said car should be transported with diligence and dispatch from Taylorsville to Charleston, and reach the latter place on Saturday morning. That the defendant, at the time of making the said contract, was distinctly and plainly informed that the plaintiff desired to reach Charleston on Saturday to be ready for the Monday market. That the defendant neglected and failed to perform and comply with said contract, and by reason of said neglect and failure the plaintiff sustained $350 damage, and he demands judgment for the same, and for costs, etc.

The defendant answered, admitting that it was a corporation as alleged, but denying all the other allegations *seriatim,* and for a further defense alleged:

"1. That, as it is informed and believes, a cattle car of a kind in constant use on its road was tendered to the plaintiff on his arrival at the town of Taylorsville, and refused by him.

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

"2. That, as it is informed and believes, it was Sunday market in Charleston which plaintiff desired to reach, and this information is obtained partly from the sworn statement of plaintiff in his original complaint, and, as it is advised and believes, the law of South Carolina prohibits the sale or offering for sale of any property in said State on Sunday.

"3. That plaintiff's cattle were shipped by defendant from Taylorsville within a reasonable time from their delivery at its depot."

(340) This answer was duly sworn to.

Upon the trial the plaintiff offered in evidence the verified answer of the defendant in the original action, and afterwards the defendant put in evidence the original verified complaint of the plaintiff, which are set out in full in the record. Much other evidence was offered, to which there were many exceptions.

At the close of the evidence the defendant asked in writing twenty-one special instructions, eight of which were refused, and exceptions entered by defendant; but only two (the second and twenty-first) seemed to be insisted upon by counsel in his brief for defendant. The second prayer for instructions was as follows:

"If the jury believe the evidence of the plaintiff himself, he had in his mind at the time of making the contract the purpose to expose his cattle to sale on Sunday, and communicated this purpose to the defendant, and the contract, if made, was void, and the plaintiff is not entitled to recover."

Instruction refused, and defendant excepted.

G. V. Strong and G. W. Bower for plaintiff.

G. F. Bason for defendant.

DAVIS, J., after stating the case: When this case was before us on the former appeal (108 N. C., 349), the Court said that the judge below very properly declined to give the instruction that the "contract was based upon an illegal consideration and was void, . . . as there is not the slightest illegality, either in the consideration or promise. The consideration was $58.50, and the promise was to transport the cattle so as to reach the city of Charleston on Saturday. We presume that the defendant intended to present the question as to the effect of the alleged illegal purpose of the plaintiff, but as the point is not

(341) presented in the prayer for instruction, we do not feel at liberty to pass upon it in this appeal." The question which the Court declined to pass upon, because not presented by the prayer for instruc-

tion, is now directly presented by the prayer, but there is no issue to which the prayer for instructions is applicable. There was no objection to the issues framed, and none was tendered as to the purpose of the plaintiff with regard to the sale of cattle on Sunday, or of the knowledge of the defendant of his purpose, but there was evidence tending to show the plaintiff's illegal purpose to sell on Sunday, and that that purpose was communicated to the defendant. The jury were instructed, at the request of the defendant, that "If the plaintiff had in his mind, at the time of making the alleged contract, the purpose to sell his cattle or expose them for sale in Charleston on Sunday, and communicated his purpose to the defendant, and the contract was made with this understanding, then it is void, and the plaintiff is not entitled to recover"; and we think this instruction was fully as liberal as the defendant was entitled to bearing upon the illegality of the contract; and though the question was not presented by any issue, we deem it proper to say that railroad companies are public carriers of passengers and freight, and they cannot exempt themselves from liability for damages by reason of the fact that freight is to be used for some illegal purpose at the point of destination, or that the object of the passenger is to do some illegal act at the point of destination, even if the railroad company had knowledge of the illegal purpose, unless that illegal purpose was the consideration and inducement of the contract. The railroad company has no right to say to the passenger or to the shipper, "I will not transport you or your freight, for it is your purpose to do some unlawful act"; but if it makes some special contract, not in the regular order of transportation, as, for instance, to furnish a special train to passengers to go to a particular point to engage in a prize fight, the contract will be illegal and void, and no (342) action could grow out of it. An illegal contract furnishes no ground, in law, of action; but the railroad is not exempt from liability for negligence, even though the purpose of the shipper or passenger be illegal, unless the illegal purpose enter into the consideration of the contract of transportation.

The twenty-first prayer for instruction which the court refused to give was: "Plaintiff can recover nothing for the drift at Columbia nor for his expenses there, and nothing for the drift at Taylorsville, except for such as would have occurred notwithstanding good care and attention." It is in evidence that the cattle were shipped, but not under the contract for the breach of which this action is brought. The plaintiff himself testified, "I shipped my cattle on a written contract different from the one first made." There is no allegation in the complaint of any breach of the written contract under which the plaintiff shipped his

cattle, nor of any damage by reason of detention in Columbia. The written contract under which the cattle were shipped was made, according to the evidence, after the plaintiff reached Taylorsville, and after the breach of the parol contract, for the breach of which this action is brought, and his Honor erred in refusing the last instruction.

Error.

Cited: *McNeill v. R. R.,* 135 N. C., 724.

(343)

MARCUS TILLEY, ADMINISTRATOR, v. MARY M. BIVENS ET AL.

Appeal—Reference—Exceptions—Motion to Recommit.

1. An exception should point out the error complained of. A mere "objection" is not a compliance with the statute or the rules of court in that respect.
2. The fact that a referee failed to find certain facts is not ground for an exception, but is ground for a motion to recommit with instructions.

MOTION to confirm report of referee at January Term, 1891, of DURHAM; *Boykin, J.*

This is a special proceeding, brought by the plaintiff administrator with the will annexed, to obtain a license to sell the real estate of his testatrix to make assets to pay debts, etc. The defendant denied that the estate was chargeable with debts as alleged, and denied that there was necessity for sale of the land, etc. By consent of parties there was an order of reference to take and state an account, etc. The referee took evidence at great length, found the facts and made report, to which the defendants filed divers exceptions.

The court adopted the findings of fact, overruled all the exceptions, both to the findings of fact and law, and granted the license to sell the land, etc., and the defendants appealed.

W. W. Fuller for plaintiff.

J. Parker and J. S. Manning for defendants.

MERRIMON, C. J. It appears that there were one hundred and seventy-five "objections" to evidence before the referee, most of which seem to have been merely captious. There is no assignment of error, nor does the "objection" suggest the ground of it. Mere objection does not serve the purpose of an exception, and the latter, when made, must

(344) specify in terms or by intelligent implication what the ground of it is; otherwise, it must go for naught. This is required by the

statute as well as the settled practice of this Court. The Code, sec. 412, par. 2; *Suit v. Suit,* 78 N. C., 272; *Cooper v. Middleton,* 94 N. C., 86; *Battle v. Mayo,* 102 N. C., 413; *Joyner v. Stancill,* 108 N. C., 153.

There are divers exceptions to the report of the referee. Most of these relate to findings of fact. The court approved and adopted these findings as its own, and as there was evidence from which they might be made, we cannot review them. This is settled by many decisions.

There were exceptions based upon the ground that the referee had failed to find certain facts. This was not ground of exception; it might have been ground of a motion to recommit the report, with instruction to find them if it appeared that they were material. *Blalock v. Manufacturing Co., ante,* 99.

The exceptions to conclusions of law present no questions of importance, and it can serve no useful purpose to refer to them in detail. It is sufficient to say that most of them are fully warranted by the findings of fact. Nothing appears to show that the plaintiff ought to be taxed with any part of the costs, or that costs were improperly allowed. The exceptions in these respects should state facts sufficiently to show the ground of objection; otherwise, the presumption is that the allowance was properly made and the judgment was correct.

Affirmed.

Cited: *S. c.,* 112 N. C., 349.

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(345)

THE MOREHEAD BANKING COMPANY ET AL. v. E. A. WHITAKER ET AL.

Evidence—Fraud.

1. A reservation in a deed of trust for benefit of creditors, of the homestead and personal property exemption provided in the Constitution, or $500 in money in lieu of such personal property exemption, is no evidence of a fraudulent purpose.

2. The mere fact that one of the preferred creditors in an assignment is the son of the debtor will not raise a presumption that the indebtedness is fraudulent.

APPEAL at October Term, 1891, of DURHAM, from *Winston, J.*

This is a creditors' action brought against the defendant Whitaker, their debtor, and V. Ballard, the trustee of a deed of trust executed on 12 January, 1891, whereby the said Whitaker conveyed to him all his real and personal property, consisting of land, goods in store, rights, credits, etc., to be sold, collected, and applied to the payment of the

debts of his creditors against him, preferring certain of them before others by classes. In this deed the said Whitaker reserves his right of homestead and personal property exemption in these words: "The said parties of the first part (Whitaker and wife) reserve and except from the operation of this deed the homestead secured to them by the Constitutition and laws of said State in the lot of land above described, and do hereby direct and require said party of the second part (the trustee) to have the same laid off and allotted to them, or such one of them as may be entitled to it according to law; and said party of the second part shall have allotted and set apart to said E. A. Whitaker, according to law, and after selection of the articles by said Whitaker, the personal property exemption allowed to him by the Constitution and laws of the State, unless said Whitaker shall elect to take the same in (346) money or partly in money, in which event the sum of money so preferred by him, not exceeding $500, shall be paid to him by said party of the second part out of the proceeds of sales and collections hereinafter provided for in lieu of his said exemption in specific articles of property in whole or in part, as the case may be; and subject to the two foregoing reservations of real and personal exemptions, said party of the second part shall proceed to collect as rapidly as possible all notes, accounts, and debts of every kind owing to said E. A. Whitaker, and he shall sell all said land in excess of the constitutional homestead, and all said personal property in said excess of said personal property exemption at private or public sale for cash only, as seems to him best for the creditors of the said E. A. Whitaker, and in the manner most likely to yield enough to pay the debts, and he shall apply all proceeds of collections and sales as fast as realized," etc.

The purpose of the action is to have said deed declared void for fraud, the property sold, the debts collected, and the proceeds thereof applied to the satisfaction of the plaintiffs' debts according to their respective rights, etc. The plaintiffs contend, among other things, that the above recited provision of said deed of trust renders it presumptively fraudulent upon its face, upon the ground that it provides for the case, convenience, and advantage of the said Whitaker to the prejudice of his creditors, and is intended to hinder and delay them, etc., and they asked the court to so instruct the jury, which it declined to do, and the plaintiffs excepted.

The court submitted to the jury these issues, to which they responded as indicated at the end of each:

1. "Was the deed of assignment of E. A. Whitaker and wife to V. Ballard, as set out in the complaint, made by E. A. Whitaker with intent to hinder, delay, and defraud his creditors?" Answer: "No."

2. "Is the debt of E. A. Whitaker, Jr., preferred in said deed (347) of trust, just and true?" Answer: "Yes."

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

W. A. Guthrie, J. Parker, and J. S. Manning for plaintiffs.
W. W. Fuller for defendants.

MERRIMON, C. J., after stating the facts: The deed of trust in question upon its face purports by its terms and effect to convey all the property of the defendant debtor to his codefendant trustee, reserving to the former his right of homestead and personal property exemption from execution for the benefit of his creditors as therein classified. The trustee is required to take possession of the property, sell it, collect the rights and credits as rapidly as practicable, having in view the best advantage of the creditors, and to pay their debts as fast as he shall realize money for the purpose. The debtor had the right to so classify and prefer his creditors by paying one or more of them before others. He did not reserve to himself any advantage or provide for any delay or hindrance to his creditors, except that he reserved his rights of property exemptions as allowed by the Constitution and laws. Such reservation does not imply fraud or fraudulent purpose; it withholds nothing from his creditors that they are entitled to have—nothing that they could sell under execution, if the deed had not been made. The deed in no way helped the debtor to claim and have his exemptions; these the law secured to him in any case; they afforded no motive, fraudulent or otherwise, to make the deed. The mere fact that the debtor provided in the deed that he might take money in lieu of articles of property did not prejudice the creditor; this provision did not help him to any advantage to the prejudice of the plaintiffs. In any case he could only get $500, and the leading and declared purpose is to get only the exemption allowed by law. The reservation, therefore, (348) did not render the deed presumptively fraudulent upon its face, nor was it evidence of fraud or fraudulent purpose. *Eigenbrun v. Smith,* 98 N. C., 207.

It appeared on the trial that E. A. Whitaker, Jr., a creditor of the third class provided for, is a son of the defendant debtor, and the plaintiffs requested the court specially to instruct the jury that on account of such relationship the law presumed his debt to be fraudulent, subject to the right of the defendants to rebut such presumption. The court declined to do so, and the plaintiffs excepted. The mere fact of such relationship and the indebtedness of the father to the son did not raise the presumption that such indebtedness was fraudulent, and hence the

plaintiffs were not entitled to the instruction asked for. Father and son may deal with each other in good faith just as others not so related may do. Where interested parties bring their mutual dealings into question, the mere relationship gives rise to suspicion, and it becomes evidence of fraud. Other like attending evidence may raise the presumption of fraud, subject to be rebutted. Thus, if the father be insolvent and sell his property to his son for less than its reasonable value, the presumption of fraud would arise where explanation is withheld; but such presumption might be rebutted. When such presumption arises, the jury, under proper instructions from the court, must find the fraudulent intent, unless it shall be rebutted by proof satisfactory to them. *Winchester v. Reid,* 53 N. C., 377; *McCanless v. Flinchum,* 89 N. C., 373; *Helms v. Green,* 105 N. C., 251.

The court, having reference to the instruction prayed for above mentioned, told the jury that "It is a rule of law, says an eminent judge, that when a debtor much embarrassed conveys property of much value to a near relation, and the transaction is secret, and no one present to witness the transaction but mere relations, it is to be regarded as (349) fraudulent; but when the relations are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence may satisfy them." In view of the evidence, this instruction was all the plaintiffs were entitled to have. Although it was not directly appropriate, it gave the jury to understand that if the defendant father was insolvent, and he became largely indebted to his son, a preferred creditor, such indebtedness would "be regarded as fraudulent," unless it should appear to them otherwise from evidence referred to before them. The instructions of the court to the jury were intelligent and very fair, rather favorable to the plaintiffs, and they have no substantial grounds of complaint. The jury rendered their verdict adverse to them, and there was evidence upon which they might do so.

There are other unimportant exceptions, but we need not refer to them further than to say that they are without merit and cannot be sustained.

No error.

Cited: Clement v. Cozart, 112 N. C., 423; *Bank v. Bridgers,* 114 N. C., 386; *Bank v. Gilmer,* 116 N. C., 702; *Thomas v. Fulford,* 117 N. C., 689; *Goldberg v. Cohen,* 119 N. C., 65; *Joyner v. Sugg,* 132 N. C., 588.

(350)

THE WILSON DRUG COMPANY v. THE PHŒNIX ASSURANCE COMPANY.

Contract—Insurance.

Plaintiffs were wholesale and retail dealers in drugs, paints, and other goods usually kept in drug stores; the business was carried on in one building, the wholesale and retail departments being separated by a partition; an insurance policy insured "their wholesale stock of drugs, paints, oils, dye-stuffs, *and other goods* on hand, . . . contained in the three-story brick and basement metal-roof building, situate," etc.: *Held*, that the contract of insurance embraced both the goods in wholesale and retail departments in the described building.

APPEAL from *Bynum, J.*, at Spring Term, 1892, of MECKLENBURG.

This action is brought to recover the sum of money specified in a policy of insurance of the defendant, whereby it "insured the plaintiff against loss or damage by fire to the amount of $1,500 on plaintiff's stock of surgical instruments, including amputating and operating cases, pocket-cases, gynæcological, ear, eye, throat, and all other instruments usually kept in surgical instrument depots, all contained in the three-story and basement brick metal-roof building situate No. 20 (Sanborn map, 1890) East Trade Street, Charlotte, N. C."

This policy contained, among other things, this provision:

"7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the dates of the different policies, or their invaliditiy from want of notice of this or other insurance, or from the violation of any of their conditions, or the insolvency of any or all the insurance companies; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average or coinsurance, this policy shall be subject to (351) average or coinsurance in like manner."

It appeared that the plaintiff had policies of insurance of divers other insurance companies containing the like provision as that last recited, which insured the plaintiff's property as follows: "On their stock of drugs, medicines, paints, oils, turpentine, dye-stuffs, glass, fancy goods, cigars, liquors, and other merchandise usually kept in drug stores, contained in the three-story and basement brick metal-roof building situate at No. 20 Trade Street, Charlotte, N. C. Other insurance allowed."

The plaintiff also had another policy issued to it by the Orient Fire Insurance Company, which contained the like provision as that above recited, which insured its property as follows:

"On their wholesale stock of drugs, paints, oils, dye-stuffs, *and other goods on hand for sale* not more hazardous, while contained in the three-story brick and basement metal-roof building situate on the south side of Trade Street, between Tryon and College streets, Charlotte, N. C. Other insurance allowed."

It was admitted that the plaintiff's property was lost by fire on 31 January, 1891, without any fault on its part.

The plaintiff's loss of the property insured by the defendant was greater than $1,500, and it insisted that the defendant was bound to pay the full amount specified in its policy. The defendant, however, insisted that it was only bound to pay so much of the loss as the said Orient Fire Insurance Company was not bound to pay, under the contributory provision recited above. It was contended by the plaintiff that the policy of the last-named company did not embrace the property insured by the policy of the defendant sued upon; that the latter
(352) alone embraced such property, and therefore the plaintiff was entitled to judgment for the full amount.

It appeared that the plaintiff was a wholesale and also a retail dealer in drugs, medicines, paints, oils, dye-stuffs, turpentine, fancy goods, liquors, and other goods usually kept in drug stores. These businesses were carried on in the same house, a partition only separating the wholesale from the retail business.

The court was of opinion that the policy of the said Orient Fire Insurance Company covered and embraced the property insured by the policy of the defendant, and that the latter was only bound to pay its *pro rata* part of the loss in question, and gave judgment accordingly, and the plaintiff appealed.

Burwell & Walker (by brief) for plaintiff.
Jones & Tillett (by brief) for defendant.

MERRIMON, C. J., after stating the case: It is to be noticed that the defendant's policy referred to and embraced particular goods of particular kinds or classes. It was not intended by it to insure the plaintiff's whole stock of goods, but to insure those particularly described and specified. The policy of the Orient Fire Insurance Company was plainly intended to be comprehensive; it specifies the plaintiff's "wholesale stock of drugs, paints, oils, dye-stuffs, and *other goods.*" These last are comprehensive words—not limited to *other wholesale goods* "on hand for sale not more hazardous," simply in the wholesale part of

the house, but "contained in three-story brick and basement metal-roof building." There is no word of limitation except the word "wholesale," and it is supplemented and the meaning and purpose enlarged and extended to "other goods on hand for sale," not simply of the wholesale stock, but other goods—goods other than those specified by name "contained in the three-story brick and basement metal-roof building." Moreover, in the nature of the matter, why, in the (353) face of such comprehensive terms, should the meaning of the purpose to insure be limited to the wholesale stock of goods? Why should the plaintiff in the absence of the limited purpose specified, be deemed to have intended to insure one part of its goods and not another? Besides, the care and caution of insurers, always observed by them, to limit their liability in plain and express terms forbid the interpretation contended for by the plaintiff. In addition, in case of doubtful meaning, their policies are to be taken most strongly against them. They execute them, and are presumed to be on their guard and observe due caution in expressing and defining their liability.

Affirmed.

THE ROAN MOUNTAIN STEEL AND IRON COMPANY v. O. B. D. EDWARDS.

Action to Recover Land—Deed, Exceptions, and Reservations in—Evidence—Burden of Proof.

When, in an action to recover land, the defendant sets up title under an exception in the deed under which plaintiff claims, the burden is upon him to bring himself within the exception by proper proofs.

ACTION for the recovery of land, tried by *Bynum, J.*, at Fall Term, 1891, of MITCHELL, upon the following case agreed, to wit:

(Only so much of the case as is necessary to an understanding of the decision is set out.)

1. That on 13 March, 1875, John E. Brown and John J. Donaldson, by their attorney William J. Brown, conveyed to John T. Wilder, by deed of general warranty, a tract of land in Mitchell County, N. C., containing 45,000 acres, more or less, fully described in (354) said deed.

2. That on 1 October, 1877, the said John T. Wilder *et al.*, by deed of general warranty, conveyed said tract of land, above mentioned, to the Roan Mountain Steel and Iron Company, plaintiff in this action, and said company has been in possession of said land since said con-

veyance by Wilder and others to said company, subject to the exception in the deed to Wilder from Brown and Donaldson.

3. That the deed to Wilder from Donaldson and Brown conveyed "all lands (within the described boundaries) not heretofore conveyed or contracted to be conveyed by the said parties of the first part," and that among the exceptions covered by said deed was a paper executed by Brown, agent for one James T. Hunter, called in the pleading a title bond for certain lands, the descriptive words of which are as follows: "Lying on Cooper's Branch, adjoining the lands of John Street, David Lipton, and others, to be so run as to take all the unsold lands between 'lines.'" The price to be paid for any lands conveyed thereunder being fixed at $1 per acre.

4. That the said deed from Wilder *et al.* to the Roan Mountain Steel and Iron Company, and from Brown and Donaldson to Wilder as aforesaid, embraced by "calls" the lands mentioned in the Hunter bond, and that Willian J. Brown, agent, etc., after the deed to Wilder, executed a deed to one David Bailey, who was the assignee and holder of the Hunter bond above described, for a boundary of land mentioned as 50 acres, more or less, and that thereupon said bond was surrendered to W. J. Brown by said Bailey in presence of said defendants, and afterwards passed into the hands of defendant with the endorsement of W. J. Brown thereon to said defendants, which bond, with the endorsement, is hereby referred to.

5. It is further agreed that the plaintiff corporation is owner in fee simple of all lands described in the deed from Wilder *et al.* to said company, except that portion of the same which may be included (355) in what is known as the Hunter bond, referred to in paragraph "three" above; said bond being subject, nevertheless, to legal constructions and all rules as to the quantity of land, if any, covered thereby. It is also admitted that William J. Brown, agent aforesaid, or professing to act as such agent, at the instance of the defendant conveyed to Levi Edwards, son of the defendant, a portion of said land claimed to be covered by said Hunter bond, which deed was executed 17 July, 1882, and is hereby referred to; and further, that the land thus conveyed by said deed to Levi Edwards has since been conveyed to the defendant by said Levi Edwards.

The court being of opinion that the plaintiffs are not entitled to recover, adjudged and decreed that the plaintiff is not the owner of the land claimed by the defendant and covered by the deed executed by W. J. Brown, agent of John J. Donaldson, to Levi Edwards on 17 July, 1872, but that the defendant O. B. D. Edwards is the owner of the same.

From this judgment the plaintiff appealed.

W. H. Malone and J. F. Pogue for plaintiff.
W. B. Councill (by brief) for defendant.

PER CURIAM: It being admitted that the *locus in quo* is within the boundaries of the plaintiff's deed, and the defendant claiming under an exception made in said conveyance, it is clear that it was incumbent upon him to bring himself within the terms of the exception by proper proofs (*Gudger v. Hensley,* 82 N. C., 481), and this the defendant has failed to do, as there is nothing in the case to show that any land has been identified as that mentioned in the bond for title. Conceding, therefore, what is by no means clear, that the said bond is not void for indefiniteness of description, there is a total absence of any testimony or finding locating the same, and it must follow that the plaintiff is entitled to a (356)

New trial.

Cited: *S. c.,* 111 N. C., 500; *Bernhardt v. Brown,* 122 N. C., 590; *Wyman v. Taylor,* 124 N. C., 430; *Batts v. Batts,* 128 N. C., 22.

M. G. MARKHAM v. JOHN W. MARKHAM.

Action, Form of—Contract—Evidence.

Plaintiff contracted with defendant to serve him as clerk from 1 January, 1891, to 1 January, 1892, at the rate of $45 per month, payable monthly; the plaintiff was paid up to 1 June, but on the following day defendant asked him to surrender the keys of the store, which was done, and plaintiff left; on 6 July following he brought suit before a magistrate for the amount of stipulated wages for the month of June: *Held*—

1. The plaintiff was entitled to recover irrespective of whether the form of action was upon contract or for damages for wrongful dismissal.

2. That plaintiff might have postponed his action till the end of the year and recovered the aggregate sum of annual wages, to be lessened by any amounts paid thereon and all amounts he might have received from other employment he should have obtained in the meantime.

3. That it was not error to submit to the jury the question whether the conduct of defendant in demanding the surrender of the keys was a dismissal.

APPEAL from a justice of the peace, tried before *Winston, J.,* at October Term, 1891, of DURHAM.

The plaintiff testified: "I was in the employ of the defendant from 1 January, 1891, to 2 June, 1891. The contract between us was that

I was to work for him from 1 January, 1891, to 1 January, 1892, at the rate of $45 per month, or as I needed the money. Nothing
(357) was said about how I was to be paid. I was working by the year. I began work on 1 January, 1891; had been working for defendant as clerk for several years, and had been carrying the key. I quit on the night of 2 June; did not return to work on the morning of 3 June. On the night of 2 June, at the time for closing the store, defendant called me and said he would have to ask me to give up the key. I handed him the key, and said I did not care to work for a man who let his wife rule him. I said this after defendant demanded the key. The defendant made no reply; this was all the conversation. I had been paid up to 1 June. The defendant tendered me the money for two days work in June, at the rate of $45 per month. During the month of June I sought employment and could not get any. I made $6 in that month." The defendant said he was sorry for the disturbance between plaintiff's wife and defendant's wife. This was all the evidence.

Defendant demurred to the evidence upon the ground that the evidence was insufficient to prove a discharge of plaintiff by defendant, because, as the contract of hiring was by the year, with no agreement as to how the plaintiff should be paid, and the year not having expired, the plaintiff could not recover, his action being premature.

His Honor overruled the demurrer. Defendant excepted.

The defendant then asked his Honor to charge the jury that plaintiff could not recover upon his own evidence, for the reason stated above. His Honor declined to give the instruction. Defendant excepted.

His Honor charged the jury: "If the hiring was by the year, to be paid $45 a month, and the defendant dismissed plaintiff without legal excuse, the plaintiff will recover for June, 1891, less what he could and did make, $6." Defendant excepted.

His Honor charged the jury, if the hiring was by the year, to be paid monthly, and the plaintiff left of his own accord, he could not
(358) recover anything.

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

W. W. Fuller for plaintiff.
J. S. Manning for defendant.

AVERY, J.: If the agreement was that the plaintiff should sell goods as a clerk for a year, with a fixed compensation of $45 per month, the defendant could not discharge him during the year for insufficient reasons and refuse to let him perform further service, without incurring liability for the loss sustained by the plaintiff by reason of such wrongful act. *Chamblee v. Baker,* 95 N. C., 102.

It seems that this liability would be incurred where there is legal cause on the part of the employee for quitting the service and abandoning the performance of the contract, whether the parties had agreed to pay a gross sum at the end of the year or in installments at the end of every month. *Booth v. Ratcliffe,* 107 N. C., 6; *Chamblee v. Baker, supra.*

In the absence of such an agreement between the parties as definitely determines the price fixed by them upon the services rendered, the employee may sue immediately upon his wrongful discharge and recover for the portion of the work actually performed before that time, as upon a *quantum meruit.* Bishop on Contracts, sec. 838; 2 Parsons on Contracts, pp. 522, 523, 658, 659, and note (*i*); *Booth v. Ratcliffe, supra; Kendall v. Commissioners,* 79 Va., 563; *Asylum v. Flannagan,* 80 Va., 116.

But in our case the plaintiff was paid up to the first day of June, and claims that he was discharged from defendant's service without legal cause on the night of 2 June. He sued before the end of the year to recover his wages at the contract price of $45 per month. (359) He might have waited till the end of the year and brought his action then for his wages at the same rate for seven months; but the defendant could have shown, in diminution of damages, that the plaintiff on 1 July, and thereafter to the end of the year, engaged in other lucrative employment, for which he was paid as much compensation as he would have been entitled to receive under the contract sued on, and this would have prevented recovery for any portion of the year except the month of June, because payment for that month would have placed him in the same condition as if the defendant had accepted and paid for his services for the entire year at the stipulated price. *Hendrickson v. Anderson,* 50 N. C., 246. But if the defendant wrongfully violated "his part of the contract," there can be no question about the right of the plaintiff to have brought the action immediately upon the breach, on the third day of June, for the work he had actually performed, subject to be diminished by the amount already received, though he had been paid up to two days before. *Brinkley v. Swicegood,* 65 N. C., 626. The plaintiff did not proceed or rely upon either of the theories mentioned. We assume, as it is legitimate for us to do, that he was employed in some other business about the first of July that promised to yield as much remuneration as the defendant had contracted to pay for the residue of the year. If such was the case, the plaintiff would have been put "in the same condition" as if the defendant had complied with the contract between them on receiving from the latter $45 less $6, the amount actually earned after his discharge during the month of June. "The injured party, according to the dictates of

reason," said the Court in *Hendrickson v. Anderson, supra,* "ought to be put into the same condition as if the contract had been fully performed on both sides." This equitable principle is the test to be applied. The plaintiff claimed exactly what the law declared
(360) him entitled to receive—wages at the stipulated rate for the time when he failed to receive either from the defendant or any other person as much as $45 per month. The court told the jury that if wrongfully discharged, he was entitled to recover the stipulated monthly price, less the sum shown to have been actually earned by him, viz., $6. The suit was brought before a justice of the peace on 6 July. The plaintiff might have brought it at the same date in the Superior Court, claiming a much larger sum and suffering it to be diminished by proof of the amount already paid, or he might have waited till after 31 December and brought the action for wages for the whole year, and had his claim for damages diminished by deducting both the payments by defendant and the amount of wages received from other sources to the net sum of $39. 14 A. & E., 793, 794. The value of his services was fixed by agreement of the parties, not at a gross sum per year, but at $45 per month. Actions were brought under the former practice upon a *quantum meruit,* in the absence of an express agreement, because the law implied a promise on the part of the person benefited to pay for services rendered at his request or instance. Our case is not like those where parties agree upon a gross sum to be paid for building a house, or for labor for a year where there is no agreement as to the apportionment if it is only partly performed. In such a case work or services might for some reason be more valuable one month than another; but under the contract in this case the amount which the plaintiff might have claimed at the end of the year could have been ascertained only by multiplying the rate determined by the parties to be the value of the service for a month by the number of months. The plaintiff in the summons (no formal complaint or answer being filed) complained for the "nonpayment of the sum of $45, with interest on $45 from 1 July, 1891, until paid, *due by contract.*" He chose to ask judgment for
(361) the net sum, ascertained by deducting both the payments already made by the defendant and his subsequent earnings derived from other sources from the gross amount of wages for twelve months at $45 per month. The forms of actions are abolished, and all suits brought for the redress of private wrongs are now comprehended under the generic term, civil action. Constitution, Art. IV, sec. 1. The claim is for $45, due by contract. When, upon every legal view of the case, the sum actually due him, if he was wrongfully discharged, is the amount claimed, less what he earned during the month of July, to send him out of court because he did not, in strict conformity to an absolute rule of pleading,

adopt the "form of action" known as *assumpsit,* and sue as on a *quantum meruit,* instead of using another form to enforce a promise which the law implied, would be to tack the new cloth to the old garment. Instead of all this stickling for forms, the plaintiff says, in effect: "The defendant owes me $45, due by contract." He does not deem it necessary to say whether it arose out of an express or an implied contract; but the defense set up orally by the defendant would seem to concede that there had been a contract which fixed the former's wages definitely, as he "denied the allegations of the complaint, but said that upon a settlement of the account between plaintiff and defendant he owed plaintiff $1.44." The jury found that the balance due was the sum demanded, less the earnings of plaintiff for the month of June. If the plaintiff brought his action for damages and laid his damages at $45, the theory of the law would still be that he would recover on an implied contract, and the damage would be "due by contract," as alleged. The measure of damages must of necessity depend upon the value of the services which had been agreed upon.

In the face of the manifest purpose of the framers of the Con- (362) stitution that meritorious actions should not be defeated or delayed by mere technical objections to form not founded on substantial reason, we cannot hold that the plaintiff's declaration should have been made in a particular way, or possibly in such a form as would have necessitated his seeking another jurisdiction to institute his action. If the suit is treated as one brought to recover such damage, as it may be, caused by the wrongful dismissal, the plaintiff has a right to recover, as a part of the damages, his salary *pro tanto* (2 Wharton on Contract, sec. 716), and this is all that he claims, and all that the court declared him entitled to receive. The rate agreed upon by the parties as the value of a month's services must, of necessity, guide the jury in assessing the damage, whether for a month of labor performed under the contract for his employer or for a month when he was out of employment on account of the wrongful dismissal, and earned nothing. The plaintiff had a right, too, to treat the contract as existing, and sue at the end of the month. 14 A. & E., 798 (3). The defendant did not ask for more specific information, nor did he demur, but contented himself with a general denial and a special averment that after full settlement the balance was $1.44, instead of $45. We think that the instruction with regard to damage was correct, for the reasons given. But the court charged the jury further, as follows: "What did the defendant mean by asking plaintiff to give up the keys? Did he mean to dismiss the plaintiff? If the plaintiff said, 'I will not live with a man ruled by his wife,' and this was after he had been told by defendant to give up the keys, and by this the jury find that the defendant had discharged the

plaintiff already, it will not affect the claim of the plaintiff; but if it was said first, and plaintiff thereby meant that he would leave, and did leave, he cannot recover."

Defendant excepted, and assigned such instruction as error. It is insisted that the judge erred in leaving this matter to the jury
(363) as he did, because the question whether plaintiff was discharged was not one for them generally, and especially that the language of the plaintiff showed that he left of his own volition, and not because he was discharged by the defendant.

Where the owner of a store where merchandise is kept asks the clerk for the key, the request may mean that the former wishes to take it temporarily, or that he intends no longer to trust the latter with its custody. The defendant called the plaintiff, at the time for closing the store, and said "that he would have to ask him to give up the key." The reply of the plaintiff evidently indicated that he understood his employer to mean that he was driven to make this request by reason of the unpleasant relations of the two families, and if he had to make the request or was impelled to it by an influence of any kind, he meant to discharge the clerk, and the plaintiff, smarting under the demand and understanding what influence was operating, said he did not care to work for a man who was ruled by his wife. The plaintiff stated expressly that he had repeated the substance of all the conversation between them. When the plaintiff interpreted the request to mean a discharge, the defendant did not deny it, nor did he deny that he had taken the step on account of disagreement between the families. It was not improper to leave the jury to draw the inferences from what was said as well as from the failure of the defendant to say more. If the jury found that the parties mutually understood that the defendant meant, as the plaintiff interpreted his equivocal language, "I am compelled, on account of trouble between our families, to take my business out of your hands, and ask you with that view to surrender the key," the fact that the latter said in effect, "I do not regret that you have discharged me, because I do not care to work for a man who lets his wife rule him," would not make the language and previous conduct of defendant amount to less
(364) nor more than a dismissal. No set form of words was necessary to express the desire to discharge him. 14 A. & E., 792, 5, and note 4. The law did not compel him to explain to his employer that but for the unfortunate relations he would have been able and willing to serve him. 14 A. & E., 792. The defendant did not demur, nor did he suggest by way of defense that the plaintiff had not averred his readiness to perform the service according to his original contract. The plaintiff is, therefore, deemed to have alleged *ore tenus* all that was essential. The jury might well have inferred from the testimony, if

that point had been raised, that plaintiff was able to perform his contract. This specific objection does not seem to have been made either in a bill of exceptions or on a motion for a new trial; and, if it were tenable, has not therefore been assigned as error. *McKinnon v. Morrison,* 104 N. C., 34.

No error.

Cited: Hassard-Short v. Hardison, 114 N. C., 487; *Smith v. Lumber Co.,* 142 N. C., 33, 37.

J. C. WILSON v. E. L. CLARK ET AL.

Negligence—Proportions—Contractors—Religious Associations—Master and Servant.

In an action to recover damages for injuries alleged to have been received by the plaintiff while assisting as an employee in the erection of a church, it appeared that defendants were members of a committee appointed by the church organization for which the building was being erected, to supervise its construction, but they had no other interest, except as members of the church, in the structure: *Held*—

1. That the evidence did not establish the relation of master and servant between the plaintiff and defendants.

2. That the defendants were not proprietors or contractors, and in no aspect liable to plaintiff for his alleged injuries.

APPEAL at August Term, 1890, of BUNCOMBE, from *Phillips, J.* (365)

The plaintiff, in several causes of action, presenting different aspects of defendants' liability, alleged that defendants were the proprietors or contractors of a certain building upon which he was employed by them, and that while so employed, by their negligent conduct and the negligent conduct of their agents and servants, he was seriously injured without any fault on his part. The answer denied the material averments of the complaint.

It was in evidence that a religious association known as "Hominy Baptist Church," desiring to build a house of worship, appointed the defendants, who were members of that organization, a committee to represent it in the execution of the purpose. The defendants accordingly procured suitable designs and specifications from an architect, solicited and collected subscriptions of money and labor, employed a superintendent, and in other ways gave their services in the prosecution of the work. The members of the committee also worked upon the

building as laborers, and sometimes employed laborers, not on their own account, but as representing the church. There was some conflict of evidence as to whether the plaintiff was ever employed by any one. While the roof was being put on, the plaintiff, who was a carpenter, was called from a point at which he had been working on the ground to assist in placing a rafter, and while so doing, the upper part of the structure gave way and he was precipitated to the ground, and received serious injuries.

There was much testimony as to the manner in which the accident occurred, but at the close of the evidence his Honor intimated an opinion that, upon all the evidence, the plaintiff was not entitled to recover, whereupon the plaintiff submited to a nonsuit and appealed.

(366) *W. H. Malone for plaintiff.*
T. F. Davidson for defendants.

MERRIMON, C. J.: Accepting the whole of the voluminous evidence produced on the trial as true, we concur fully in the opinion of the court, that in no aspect of it was the plaintiff entitled to recover in this action. It did not at all tend to prove that the defendants, or any of them, were "the proprietors" of the building known as "Hominy Baptist Church," or that they had any interest in it, except that some of them were commissioners and members of that church, and others of them were laborers engaged in constructing the church building. The building in process of construction was not that of the defendants, nor did the evidence show that they were contractors to build it. The commissioners and the superintendent of the work employed some of the laborers, not for themselves or on their own account, but for the church as an organization. It is doubtful whether the plaintiff was employed by the commissioners—the evidence tended strongly to prove that he asked to be and was allowed to labor on the building for the purpose of paying part of the sum of money a contributor to the fund to build the church had promised to pay (he was indebted to that contributor); but in the strongest view of the evidence for him, he was no more than a laborer employed to do work for the church, and not for the defendants. The latter were not his employers, nor were they liable to him for the injury he sustained in any aspect of the several causes of action—all substantially the same—alleged in the complaint.

Affirmed.

(367)

STATE EX REL. J. E. MERRELL v. W. P. WHITMIRE.

Elections—Evidence—Appeal—Assignment of Error—Trial—Special Instructions.

1. Upon the trial of an action involving the regularity of an election, there was evidence tending to show that the returns from one voting place had been altered surreptiously by a friend and partisan of the defendant: *Held*, that the declaration of such partisan, not made in the presence of defendant, was not competent—he not having been examined as a witness.

2. The Supreme Court will not assume that the facts stated in an assignment of error are true, when the case on appeal, settled by the trial judge, contains no statement of such facts.

3. Requests for special instructions should be in writing and presented to the court before the close of evidence.

ACTION to try the title to the office of register of deeds of Transylvania, tried before *Merrimon, J.*, at Fall Term, 1891, of HAYWOOD, to which the action had been removed.

The relator insisted that the returns from Dunn's Rock Township were changed after they were signed by the judges of election, and before they reached the board of canvassers, by changing the number of votes received by W. P. Whitmire from 61 to 64.

There was evidence offered by the relator tending to prove that Whitmire received only 61 votes in Dunn's Rock Township. All the judges of election testified to facts and circumstances tending to show this. The defendant offered evidence tending to show that he had received 63 votes. One of the judges of election was chosen to carry up the returns to the board of canvassers, and they were delivered to him for that purpose, and he left them overnight at the house of one Bryson, who lived four miles from the courthouse of the county. (368)

Bryson, at whose house the returns were left, testified that he went to bed about 9 o'clock, and that some time in the night T. T. Loftis and Back Summey came to his house and asked to see the returns, to settle a dispute about the votes for clerk, as they claimed; that they got the returns and examined them by the light from the fireplace, but he did not know whether they meddled with the returns or not.

The relator then offered to show by one Lance that he heard Loftis say that he had altered the returns of the vote of Whitmire from Dunn's Rock Township, and in this connection, and as a ground for the admission of said Loftis' declaration, to show that Loftis was a partisan of the defendant. The defendant objected to this evidence. The court sustained the objection, and the relator excepted.

The relator attacked the vote of Hogback Township for that the registrar of voters for that township was not qualified to act as such; that no boxes were used at said voting precinct; that hats were used instead of boxes; that the registration laws were not observed, in that the voters were not required to give their age, place of residence, place of birth, nor occupation, and M. Revis and William Britton were allowed to vote for defendant, not being residents of the State nor qualified electors.

The relator then handed to the witness a number of books, among which he identified the registration book of Hogback, but it was not otherwise put in evidence any time during the trial. It was not read to the jury, nor did the relator offer to read it to them. The relator offered no evidence to show that the registrar of voters for Hogback Township was not qualified to act as such. The only evidence that the registration laws were not observed in said township was the identification of the registration book by the defendant, as above stated.

After the argument of the case was opened, counsel for the
(369) relator handed to the court a written request for special instructions, which were refused.

There was judgment for defendant, and plaintiff appealed.

V. S. Lusk for plaintiff.
No counsel contra.

CLARK, J.: The offer of the plaintiff to show by a witness that he had heard T. T. Loftis say that he had altered the returns of Dunn's Rock Township was properly denied. If Loftis had been a party to the action, his admissions against his interest would have been competent, as would have been his declarations as to his qualifications to vote when made at the time of voting, or prior thereto, if his vote were in controversy. *Boyer v. Teague,* 106 N. C., 576. If he had made the alleged statements in presence of the defendant without his denying the charge, the evidence might have been received on the ground of the implied admission by the defendant's silence, if the circumstances were such as to call for notice of the remark by him; or if Loftis had been a witness in the case, his previous statements in regard to the matters testified to by him should have been received to corroborate or contradict him. But the "hearsay" evidence here does not come within any of the exceptions. That Loftis was a friend or partisan of the defendant could not make his *ex parte* unsworn statements competent evidence against the defendant, any more than similar statements by anyone friendly to any other litigant could be received as evidence against him.

The exception that the court did not "submit to the jury the evidence as to the voting in Hogback Township" cannot be sustained. It

does not appear that the court excluded such evidence, nor is there any suggestion to that effect beyond the bare assignment of it as error. We cannot assume that the assignment of error is a correct statement of the facts therein recited, when such facts do not appear in the (370) case stated by the court. *Walker v. Scott,* 106 N. C., 56. The registration books and the poll books of Hogback and other townships were identified by a witness, but the case states that the books themselves "were not put in evidence, nor were read to the jury, nor did the plaintiff offer to read them, and the only evidence that the registration laws were not observed in said township was the identification of the registration books." If, indeed, however, there was an omission to charge in a particular aspect of the case, it was not error, unless the judge was asked to do so. *Terry v. R. R.,* 91 N. C., 236; *S. v. Bailey,* 100 N. C., 528; *Bethea v. R. R.,* 106 N. C., 279.

The requests to charge, handed up after the argument begun, were too late. They should have been asked at or before the close of the evidence. The Code, secs. 414, 415. It is but fair to the opposite side, and in the interest of the regular and impartial administration of justice, that requests to charge should be asked in writing and within the time prescribed by the statute, so that there may be time for the judge to consider the requests during the argument of counsel to the jury. Some time must be fixed after which it is too late for the party asking the prayers to insist upon their being granted. The requirements of the law in this regard are well known, and it is the plaintiff's own fault that he did not observe them, and hand up his requests to charge in proper time. This rule of practice has been recently reaffirmed in *Posey v. Patton,* 109 N. C., 455, in which case the authorities are cited and the reason for the law noticed.

The defendant contested the vote of one Tompkins, and the court instructed the jury that "If Tompkins, who was a married man, came to the county of Transylvania not intending to become a resident of the county, but to take charge of and conduct a newspaper until after the election, and then go away, and left his family in the county of Jackson, and his family resided in the county of Jackson, and remained there until 14 September, before coming to Transylvania (371) County, he was not entitled to register and vote in Transylvania County, unless it was ninety days from the time his family came into the county to the day of election." It was admitted that if Tompkins was not a resident of the county until his family came there to reside, he had not been a resident of the county ninety days before the election. The plaintiff excepted to this instruction. If erroneous, it is so only on the ground that the jury might understand it to mean that though Tompkins had come into the county temporarily, intending to remain

only to conduct a paper during the canvass and leave after the election, yet he would be a competent voter if he came ninety days before the election and brought his family with him. The Code, sec. 2680. This would not be an error of which the plaintiff could complain.

No error.

Cited: *Ward v. R. R.*, 112 N. C., 178; *Luttrell v. Martin, ib.*, 607; *Patterson v. Mills*, 121 N. C., 269; *S. v. Wilson, ib.*, 658; *Webb v. Atkinson*, 124 N. C., 454; *S. v. Dixon*, 131 N. C., 813; *Moore v. Palmer*, 132 N. C., 976; *Hart v. Cannon*, 133 N. C., 13; *Pegram v. R. R.*, 139 N. C., 305; *Craddock v. Barnes*, 142 N. C., 99; *S. v. McKenzie*, 166 N. C., 296; *S. v. Freeze*, 170 N. C., 711.

EDWARD VICKERS v. JAMES HENRY ET AL.

Deed, Description in—Title in Action to Recover Land—Married Women—Possession.

1. Plaintiff, having shown title to the land in controversy out of the State, and color of title to himself, under which he had been in actual possession for more than seven years, when the defendants—husband and wife—entered under a claim of the wife, established a right to recover, notwithstanding the *feme* defendant was under coverture during the time of plaintiff's possession.

2. A description of land in a contract to convey, as "100 acres, to include the William Estice improvement, and to lap on a survey to J. A.," the deed to be made as soon as the purchase money was paid, is clearly void for uncertainty.

(372) APPEAL at Fall Term, 1891, of JACKSON, from *Merrimon, J.*

The action was commenced 22 April, 1882. The defendants were married in 1866 or 1867, and in 1881 entered upon the land, claiming under an alleged assignment of dower to the *feme* defendant as widow of a former husband. The other facts material to an understanding of the questions discussed by the Court are stated in the opinion.

T. F. Davidson for plaintiff.
J. F. Ray (by brief) for defendant.

MERRIMON, C. J.: It appears from the case stated on appeal that the plaintiff on the trial showed title out of the State, color of title of his ancestor and himself, and continued in actual possession, with claim of

the land specified in the complaint, for more than seven years next after 26 May, 1870; that the defendants—husband and wife—took possession of part of this land about 1880, and had such possession at and ever since the time this action began. Thus plainly the plaintiff showed title in himself.

The defendant put in evidence what purported to be a bond for title for the same land made to a former deceased husband of the *feme* defendant, which describes the land to which it has reference in these words: "One hundred acres of land, to include the William Estice improvement and to lap on a survey made Joseph Arrington, the said Estice having lost or misplaced said bond, and consents to this trade, and agrees for his contract and bond to be revoked and the deed to be made as soon as the above named Arrington shall well and truly pay, or cause to be paid, the full and interest sum of $89.60," etc. It did not appear that any part of the purchase money thus agreed to be paid ever was paid, but the *feme* defendant contended that she was entitled to dower as widow of her former husband in said land, and that the same was duly assigned to her. It did not sufficiently appear (373) that dower was allotted to the *feme* defendent; but if this were otherwise, neither the plaintiff nor those under whom he claims had notice of, nor were they parties to, the dower proceeding, and are not affected by the orders and decrees that may have been made therein. Moreover, the bond for title under which the defendants claim was clearly void for uncertainty in the description of the land which it purports to embrace. It designates no particular land, nor does it refer to data from which the 100 acres mentioned could be located or ascertained. It is impossible to learn from the description what land purported to be sold. See *Perry v. Scott,* 109 N. C., 374, and the pertinent cases there cited.

We may add that it did not at all appear that the former husband of the *feme* defendant had any equitable interest in the land that entitled her to dower therein, if the bond had been sufficient; nor did it appear that the plaintiff had any notice of the bond at the time of the execution of the deed under which he claims. So far as appears, the plaintiff's title was in no way affected by the bond for title under which the defendants claim. The defendants showed no title, equitable or legal.

No error.

(374)

R. D. FLEMING v. JOHN GRAHAM.

Homestead—Judgment—Mortgage—Priority—Lien.

1. A valid conveyance of land before the allotment of a homestead is a waiver of the right of homestead as to the land thereby conveyed, and the vendee takes it subject to the lien of any judgment docketed prior thereto; but the vendor may subsequently have a homestead allotted to him in other lands.

2. A., being financially embarrassed and without having a homestead allotted, executed a mortgage upon his only tract of land, of less value than $1,000, his wife not joining in the conveyance; the mortgage was filed for registration during a term of the Superior Court, at a subsequent day of which a judgment was rendered against him and duly docketed: *Held*, (1) the lien of the judgment was prior to that of the mortgage; (2) the conveyance was void, the wife not having joined in its execution.

ACTION to foreclose a mortgage, tried at Fall Term, 1891, of WARREN, *Bryan, J.*

The facts are stated in the opinion. There was judgment for defendant, and plaintiff appealed.

W. A. Montgomery for plaintiff.
R. H. Battle and S. F. Mordecai for defendant.

CLARK, J.: In *Mayho v. Cotton,* 69 N. C., 289, it is said: "Section 8, Art. X of the Constitution, applies only to a conveyance of the homestead after it is laid off." This is cited and approved in *Hughes v. Hodges,* 102 N. C., 236 (247), with some reservations, in which it is said that, though no homestead has been allotted, such conveyance cannot be made by the husband without the assent of the wife, if there are judgments against him which constitute a lien upon the land, and upon which executions might issue and make it necessary to have his homestead allotted.

(375) In the present case the defendant, at the time of the execution of the mortgage, to foreclose which this action is brought, had no realty except that embraced in this mortgage, which is found by the jury to have been worth $830; there was a prior mortgage upon it for several hundred dollars, and the defendant was financially embarrassed and in debt to divers other persons. The mortgage now held by plaintiff was executed by the defendant without his wife joining therein. It was filed for registration in the office of the register of deeds for Warren County on 5 March, 1884, and was registered on 10 March. The term of Warren Superior Court began 3 March, 1884, and on 6 March, 1884, a judgment in favor of another party was recovered against the

defendant for $362. The Code, sec. 1254, provides that no mortgage shall be valid against creditors of or purchasers from the mortgagor except from the registration. The registration of the mortgage was on 10 March, subsequent to the rendition of the above judgment. It is true that The Code, sec. 3654, requires the register to forthwith register a mortgage after its delivery to him. It is unnecessary to consider whether this provision could have the constructive effect to date back the registration to the filing, for The Code, sec. 433, provides that all judgments rendered at any Superior Court and docketed during a term thereof, and within ten days thereafter, shall be deemed to have been rendered and docketed on the first day of the term. The judgment was actually rendered on 6 March, prior to the registration of the mortgage on 10 March, and, by the statute, the judgment was constructively rendered and docketed on 3 March, prior to the filing of the mortgage, if the registration of the mortgage shall be constructively dated back to the filing. So, in any aspect of the case, there was a judgment lien having priority to plaintiff's mortgage, upon which execution "might issue and make it necessary to have the homestead allotted." The mortgage, therefore, was invalid to convey the debtor's interest in such homestead, without the wife having joined in the con- (376) veyance. *Hughes v. Hodges, supra.*

The homestead is a feature introduced into the law of recent years. The decisions in different states are conflicting. In our own State they have not been entirely harmonious. It would seem, however, to be settled that the homestead right is not an estate, but an exemption for a limited period of the property embraced in it from sale under execution. If set apart and allotted, the homesteader cannot convey it without the joinder of his wife in the deed. If not allotted, the owner of land preserves his *jus disponendi,* and can convey it (subject only to the wife's contingent right of dower) without her joining in the deed, except in the specified cases mentioned in *Hughes v. Hodges.* If a valid conveyance of land is made by the husband alone when the homestead has not been allotted (in those cases when he can make such), or by the husband and wife, whether it has or has not been allotted, the "exemption from sale," *i. e.,* the homestead right as to such land, is thereby waived, and the grantor can have his homestead set apart subsequently in any other land. For the same reason, the grantee in such deed takes the land subject to the lien of any judgment docketed prior thereto. If this were not so, and the exemption continued in force to protect the land in the hands of the grantee, either the homesteader would be debarred from at any time changing his homestead, and would be without the protection of one after conveying land in which it had been or might have been allotted, or else he could take homestead after home-

stead, as he might acquire land, give to them protection from execution during his life, and till his youngest child became of age, and convey such homestead successively free from the lien of judgments against him, and thus obtain the benefit of several homesteads instead of the one guaranteed him. If this were law, upon the termination of
(377) the homestead right by the death of such debtor, and the arrival of his youngest child of age, numerous $1,000 tracts of land would be for sale, which he had kept till then exempt from his creditors.

New trial.

Cited: *VanStory v. Thornton,* 112 N. C., 207; *S. c.,* 114 N. C., 378; *Gardner v. Batts, ib.,* 501, 504; *Stern v. Lee,* 115 N. C., 431, 436; *Thomas v. Fulford,* 117 N. C., 673, 679, 685; *Bevan v. Ellis,* 121 N. C., 235; *Joyner v. Sugg,* 132 N. C., 588; *Rodman v. Robinson,* 134 N. C., 505; *Sash Co. v. Parker,* 153 N. C., 134; *Dalrymple v. Cole,* 156 N. C., 359; *Dalrymple v. Cole,* 170 N. C., 105; *Kirkwood v. Peden,* 173 N. C., 462.

NOTE.—The purport of this decision is now C. S., 729.

A. L. FOLLETTE v. THE MUTUAL ACCIDENT ASSOCIATION.

Agency—Insurance.

Where the local agent of an insurance company has actual knowledge of the falsity of a statement made by the insured in his application, and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract.

ACTION, tried at October Term, 1891, of DURHAM, before *Winston, J.*

The facts necessary to an understanding of the point decided are stated in the opinion.

The defendant appealed from the judgment rendered.

W. W. Fuller and J. Parker for plaintiff.

J. S. Manning for defendant.

AVERY, J.: Though, in some of its features, there are slight differences between the case presented by this appeal and that considered when a new trial was awarded to the plaintiff at September Term, 1890 (107 N. C., 240), the main question involved is the same. Under the guise of a second appeal, the defendant company insists that this Court shall review and overrule its former decision, as if it were a rehearing.

There is no branch of the law as to which, in all of its ramifications, there is so much conflict in the rulings of the various (378) courts of appeal, and so great a diversity of opinion amongst respectable text-writers, as that governing the rights and liabilities of insurers.

When the universal custom was that the underwriter sat in his city office and issued policies of insurance, relying solely upon the representations of the applicant for information, whether as to his own physical state or as to the value, condition, and surroundings of his buildings, the insurer would have dealt at a great disadvantage with the unreliable class of his customers if a contract procured by false representations had not been declared fraudulent and void, or if the disregard of stipulations intended to insure the observance of ordinary care in the habits of a person, or the use of a building, had not been held sufficient to defeat a recovery upon the death of the person or the destruction of the property insured. But when, in the new order of things, the active competition between companies brought to every man's door a soliciting agent, furnished with instruction and advised as to his duty by the best trained business men and ablest lawyers in the country, the shrewdest and most unscrupulous of applicants could hope to get no advantage, and the untrained or uneducated among the number labored under a decided disadvantage in answering questions, not always comprehended in all of their bearings, and in receiving subsequently from its chief office, in a distant city, the contract of the company, limiting its own liability and imposing new duties upon the insured by means of conditions never heard of before the issuing of the policy, and often never read, or imperfectly understood afterwards. *Ubi eadem ratio, ibi idem jus.* When custom reverses the position of the parties, it would be strange if the laws should undergo no modification.

The local agent of the defendant company testifies that, with a knowledge of the deafness of the plaintiff, he filled out his application for an accident policy, signed his own name on the back of it, and forwarded it to the principal office in New York. The policy came in due course of time and was delivered to the plaintiff, who paid (379) all of the premiums assessed against him until he was so seriously wounded in his arm by the accidental discharge of a gun, in the hands of a friend, as to make amputation necessary. The company took a receipt by way of compromise, which, under the findings of the jury, is not evidence of payment, and, as there was no exception to the rulings or charge involving the question of payment or satisfaction, we are brought to the consideration of the leading point.

In the application for membership is the following paragraph:

"I have never had, nor am I subject to, fits, disorders of the brain, . . . or any bodily or mental infirmity, except had an attack of rheumatism six years ago."

The defendant now contends that the representation by the plaintiff that he was free from bodily infirmity was false and fraudulent, and constituted a material inducement to the defendant to issue the policy. Ordinarily, the defendant could avoid the performance of the contract by showing the falsity of a material statement in the application. But the plaintiff, where representations contained in the application are admitted to be untrue, may rebut the presumption of fraudulent intent arising from such admission by showing that the local agent of the company, with full knowledge of the falsity of the statement, entered the answers of the insured and forwarded the application, approved by his own endorsement. We cannot give the sanction of this Court to the doctrine that a local agent may scream into the ear of a deaf person solicitations to apply for an accident policy, write for him an answer, which he knows at the time to be untrue, to a question in the application, procure the policy, receive the premiums as they fall due, and when the insured becomes prostrate from a wound, stand aside at the bidding of the principal and allow it, with the premiums in its
(380) coffers, to avoid the contract on account of a statement known by the agent to be false when he prepared it for the applicant's signature. The reason which induced the courts to guard the underwriter against misrepresentations as to facts within the peculiar or exclusive knowledge of applicants no longer exists when the agent of the insurer, on the ground, has as full knowledge of the truth or falsity of an application prepared by him as has the insured. *Cessante ratione, cessat et ipsa lex.* Where the local agent of a company has actual knowledge of the falsity of an answer to a question in the application which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the contract on the ground of false warranty. 1 A. & E. 333; 1 May on Ins., secs. 140-143; 2 *ibid.*, secs. 497-501; *Dupree v. Ins. Co.*, 92 N. C., 417; *ibid.*, 93 N. C., 240; *Hornthal v. Ins. Co.*, 88 N. C., 73; *Fishbeck v. Ins. Co.*, 54 Cal., 422; *Eggleston v. Ins. Co.*, 65 Iowa, 308; *Ins. Co. v. Fish*, 71 Ill., 620; *Mullen v. Ins. Co.*, 58 Vt., 113; *Shaffer v. Ins. Co.*, 53 Wis., 361; *Ins. Co. v. McCrea*, 8 Lea (Tenn.), 513.

It is not material whether we say that the conduct of the local agent amounts to a waiver or works an estoppel on the insurer, as the authorities are in conflict upon the point. 1 May, *supra*, sec. 143; 2 *ibid.*, sec. 498. Certain it is that in such cases the knowledge of the agent is imputed to the principal, and "to deliver a policy with a full knowledge of

facts upon which its validity may be disputed, and then insist upon those facts as a ground of avoidance, is to attempt a fraud." 2 May, *supra,* sec. 497. The agent necessarily discovered, while negotiating with the plaintiff, that the latter was deaf; and it would be as unreasonable to presume that both the agent and the applicant intended to affirm that to be true which they knew to be false as that such a patent defect as the loss of an eye in a horse did not exist. *Leslie v. Ins. Co.,* 5 T. & C. (N. Y.), 193; *Ins. Co. v. Mahone,* 21 Wallace, 152; *Brown v. Gray,* 51 N. C., 103; *Fields v. Rouse,* 48 N. C., 72. (381)

We do not propose to go behind the verdict and the instruction upon which it was founded, and avoid the reaffirmation of the principles announced on the former hearing of this case by determining what is a bodily infirmity, since conceding deafness to come under such designation, we think that there was no error in the rulings of the court below. As already intimated, it is immaterial whether we declare that the agent by his conduct waived objection to the inaccurate statement, or that by writing it down, or having full knowledge of the real truth of the matter, his conduct operated to estop the company, since, in view of what occurred when the application was made out and before, the avoidance of liability under the contract, because of the infirmity known by the agent to exist, would be fraudulent and unjust. There is no error.

Affirmed.

Cited: Bergeron v. Ins. Co., 111 N. C., 47; *Fagg v. Loan Assn.,* 113 N. C., 368; *Sydnor v. Boyd,* 119 N. C., 489; *Horton v. Ins. Co.,* 122 N. C., 504; *Sprinkle v. Indemnity Co.,* 124 N. C., 409; *Fishblate v. Fidelity Co.,* 140 N. C., 595; *Robinson v. Brotherhood,* 170 N. C., 548; *Collins v. Casualty Co.,* 172 N. C., 548.

THE CATAWBA TOLLBRIDGE COMPANY v. CYRUS FLOWERS ET AL.

Highways—Bridges—Ferries.

1. No one, in the absence of special authority from the Legislature or the board of county commissioners, has the right to erect and maintain a bridge or ferry within such a distance of a duly authorized tollbridge as will divert from the latter the custom which, in the ordinary course of travel, would pass over it, whether that distance be greater or less than five miles.

2. The distance of five miles prescribed in the statute (The Code, sec. 2099) in reference to ferries is five miles in a direct straight line from the ferry first established.

(382) ACTION for damages, tried at Spring Term, 1892, of CATAWBA, *Bynum, J.*

The plaintiff is incorporated by chapter 130, Laws 1848-9, amended by statute ratified 22 December, 1873, and is authorized to construct a tollbridge over the Catawba River as prescribed, to demand and receive not exceeding certain tolls specified from persons crossing the same on foot, on horseback, in vehicles, in wagons, carriages, etc., taken across the same. The charter of the company does not forbid the erection and use of like or other tollbridges or public ferries over the said river, as allowed by the general statute on the subject of roads and ferries. The plaintiff is also authorized to construct a public highway to, across, and from its bridge. It constructed and used its bridge as allowed by its charter, and contends that it has the right to carry persons, etc., across the said river by its bridge, to the exclusion of every other person to do the like by bridge or ferry for the distance of five miles above and below its bridge.

The plaintiff alleges that the defendants without authority, and unlawfully, have established and use a ferry across the said river within five miles of its bridge, whereby they have diverted and drawn from the latter a large part of its patronage, to its great damage, etc., and it demands judgment for the same. The defendants allege that their ferry has been in operation for more than sixty years, and for forty years before the plaintiff's bridge was built, and their right to have and maintain the same is paramount to that of the plaintiff. They also plead the statutes of limitation.

The court submitted to the jury the following issues, to which they responded as follows:

1. Is the plaintiff the owner of the bridge, as alleged in the complaint? Ans.: Yes.

2. As such owner, is plaintiff entitled to the exclusive privilege or franchise of carrying persons, horses, wagons, cattle, buggies, car-
(383) riages, and the like, across the Catawba River within five miles of said bridge, as alleged? Ans.: No.

3. Have the defendants unlawfully established a ferry over the said Catawba River within five miles of said bridge, and do they carry persons, horses, wagons, cattle, buggies, carriages, and the like, across the said river for toll? Ans.: No.

4. Has the action of defendants in establishing and operating said ferry damaged the plaintiff; if so, in what sum? Ans.: Nothing.

5. Have the defendants, and those under whom they claim, operated said ferry for twenty years next before the bringing of this action? Ans.: No.

Among other things, the court instructed the jury as follows:

Upon the second issue he instructed them that while the charter authorized the plaintiff to construct and operate said bridge, it did not give them the exclusive privilege of transporting persons, etc., across the river by means of said bridge within five miles of said bridge, and that they would answer it "No."

Upon the third issue, he instructed them that if Paine, Fisher, Flowers & Lyerly had operated a ferry there for more than twenty years continuously, for the purpose of carrying persons, horses, vehicles, etc., over said river, receiving pay therefor, the law presumed the grant of a franchise; and if that was the ferry that Icard was operating, then the ferry would not be unlawfully established. If there had been a break in said time of twenty years, for as long a time as two years, that the time would have to be computed from the break, and that unless the defendant showed by a preponderance of the testimony that it had been operated continuously for twenty years before the bringing of this suit, he had failed to show the franchise, and it would be unlawfully established. That if he had failed to show the franchise by the twenty years use, then the order of the commissioners of Caldwell County did not authorize the establishment of the (384) ferry, but it required the same order from the commissioners from Catawba County, and the defendant, not having shown that he had failed in this branch of his defense, the establishment of the ferry would be unlawful.

Upon the second question involved in the issue, the court instructed the jury that the distance of the ferry from the bridge was to be ascertained by them by following the course of the stream, not an air-line, and not the distance by the road on either side of the stream, and if it was within five miles by the course of the stream, on this they would say "Yes"; if more than five miles, they would say "No."

The plaintiff assigned error as to these instructions. The court gave judgment for the defendants, and the plaintiff appealed.

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

MERRIMON, C. J.: The power to provide for and regulate the establishment and use of highways, public bridges and ferries is vested in the Legislature. The latter, in the exercise of that power, has enacted the general statute (The Code, ch. 50) in respect to "roads, ferries, and bridges," and many other particular statutes, public and private, in some instances incorporating tollbridge, turnpike, ferry, and other like companies with a view to the greater advantage of the public. The

plaintiff is such a company, and had the right by virtue of its franchise to construct, use, and derive advantage from its bridge, as allowed by its charter and principles of law applicable. In consideration of such rights and privileges granted by the Legislature, it was bound to make its bridge such as the nature of the stream over which it was constructed required; to make it substantial, safe, and convenient, and to (385) keep it always in reasonable repair for the use of the public. If it failed in these respects in a substantial degree, it was indictable, and amenable, civilly to any person who suffered injury and damage caused by such default. In consideration of these public advantages, the plaintiff had the exclusive right as against private individuals to carry persons, their carriages, wagons, live stock, and the like, going, passing and repassing ordinarily by that way, over its bridge. The defendants or other private persons had no right officiously to erect another private bridge or ferry across the river named, and thereby take from and divert the patronage that would in the ordinary course of travel, and passing to and fro, go that way, from the plaintiff's bridge; and this is so whether they took compensation or not for the use of their bridge or ferry. The plaintiff, in consideration of the erection of its bridge, its duties and obligation to the public, by its charter is entitled to the benefit of such patronage. Nor is this unjust or unreasonable. The private person may have an indifferent bridge or ferry; he may keep it for a month or two or a year, and abandon it, or allow it to become ruinous and dangerous; the plaintiff is bound by its obligation to the public to keep its bridge continuously safe and in good repair; it owes the public important duties and fails to perform them at its peril. Hence, if a private person shall so interfere with the plaintiff's rights, to its injury, it at once has a cause of action against him, and it may sue and recover such damage as it has sustained. *Long v. Beard,* 7 N. C., 57; *Pipkin v. Wynns,* 13 N. C., 402; *Smith v. Harkins,* 38 N. C., 613; *Taylor v. R. R.,* 49 N. C., 277; *Carrow v. Bridge Co.,* 61 N. C., 118; *Barrington v. Ferry Co.,* 69 N. C., 165; *Broadnax v. Baker,* 94 N. C., 675.

The plaintiff's charter does not in terms grant it exclusive privileges, nor such exclusive privileges as are above pointed out for any particular specified distance above or below its bridge on the river; nor has (386) it exclusive privileges that at all exclude the exercise of the power of the Legislature or the county commissioners in respect to the establishment of roads, ferries, and bridges. The Legislature might by proper enactment authorize the construction of a bridge or ferry near to the plaintiff's bridge, and so might the county commissioners, in the exercise of authority conferred upon them by the general statute (The Code, ch. 50). It may be that the county commissioners ought not, in

fairness and in good faith, to exercise such power; still it exists, and the plaintiff has notice of the same. *Smith v. Harkins, supra,* and *Barrington v. Ferry Co., supra; Bridge Co. v. Commissioners,* 81 N. C., 491. Such power ought not to be exercised except for substantial considerations.

The instruction of the court to the jury complained of in respect to the second issue is erroneous. The court should have told the jury that the plaintiff's rights were exclusive as against the defendants, unless it should appear that their ferry was in some way established or authorized by law. It appears that it was not authorized by statute or the order of the proper county commissioners, and the jury found by their verdict that the defendants had not operated it for twenty years. They had no lawful ferry, and hence have no right by their private ferry to interfere with and divert the plaintiff's customers from its bridge to its injury.

In the absence of any public bridge or ferry other than the plaintiff's bridge, its exclusive right to patronage as against the defendants was not necessarily confined to five miles above and below its bridge on the river; it was entitled to have the custom that in the ordinary course of travel and transportation would go over its bridge. The defendants would be liable to the extent they diverted the same, whether within or without five miles.

It seems that the plaintiff and the court supposed its exclusive (387) right as to distance was governed by the statutory regulation. The Code, sec. 2049. If this were so, we are of the opinion that the words "within five miles of any ferry on the same river or water, which theretofore may have been appointed," imply five miles in a direct straight line from the ferry first appointed. The purpose is to locate ferries at least five miles apart. Streams in many cases are tortuous, very crooked, and the distance of five miles from one ferry by the course of the river might turn out to be a mile or two miles from it by a direct line. The language employed and the nature of the matter leave no doubt in our minds that our interpretation of the provision is a correct one.

There is error, and the plaintiff is entitled to a new trial.

Error.

Cited: *In re Spease Ferry,* 138 N. C., 223.

DOE EX DEM. JOHN R. TAYLOR v. JOSEPH H. GOOCH.

Pleading—Practice—Judgment, Irregular, When and By Whom Vacated—Parties—Negligence.

1. While a plaintiff cannot recover upon a title accruing after the commencement of an action to recover land, a defendant will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began.
2. A judgment against a party then dead is irregular and may be set aside, within any reasonable time, upon the motion of a person who has acquired the interest of such deceased party since the action commenced, although such person was not a party to the suit.
3. In 1871 a judgment in ejectment was rendered against a defendant then dead; writ of possession issued in 1882, whereupon a party, who had acquired the interest of the deceased defendant, brought an action to set it aside, which was decided adversely to him upon the ground that his remedy was by motion in the cause; at the next term (in 1888) he made the motion: *Held*, that he had not been guilty of laches, and the motion was in apt time.

(388) EJECTMENT, tried at Spring Term, 1891, of WARREN, *Connor, J.*

The original declaration was filed in 1852 in the Superior Court of GRANVILLE, and, issue being joined, was removed to WARREN, where several ineffectual trials were had. In 1878 there was a verdict and judgment for plaintiff, but it was subsequently ascertained that the defendant at that time was dead.

The plaintiff sued out a writ of possession in 1882, and immediately the heirs at law and the others claiming under the defendant brought an action to restrain the execution of the writ and to set aside the judgment. This action was decided against the plaintiff therein (*Knott v. Taylor,* 99 N. C., 511); whereupon, at the next term of the Superior Court, they made a motion in the original cause to vacate the judgment rendered in 1878, which was granted. The heirs at law of the defendant Gooch were then made parties, who adopted the plea of their ancestor, and with the leave of the court put in an answer, in the nature of a plea since last continuance, wherein they alleged that in 1802 one John Walker, being then seized of the lands in controversy, duly contracted in writing to convey it, upon the payment of purchase money therein stipulated, to William Pannill, who immediately entered into possession, and paid the purchase money when it became due; that John Walker having died without executing a conveyance, Pannill instituted a proceeding in the Circuit Court for the Hillsboro Circuit,

said court having jurisdiction in the premises, against the administrator and heirs at law of the said John Walker, all of said heirs being infants, for the specific performance of said contract; that upon the hearing of said proceeding, a decree was rendered by said court declaring that the purchase money due under said contract had been paid by said Pannill, and that the infants defendant heirs at law of the said John Walker make title to the said William Pannill for said land when they should arrive at the age of twenty-one years; that during 1806 one John Washington having obtained a judgment, said (389) William Pannill caused execution to issue thereon, and that pursuant thereto the interest of the said William Pannill in said land was sold by the sheriff of Granville County and purchased by the said John Washington, who took the sheriff's deed therefor; the said John Washington died during 1826, devising by his last will and testament his interest in the said land to Delphine Washington, who conveyed the same by deed during 1848 to Joseph H. Gooch, the original defendant in this action, and the immediate ancestor of the present defendants.

It is admitted that the said John Washington went into the possession of the *locus in quo* immediately after the alleged sale by the said sheriff of Granville County and alleged purchase by him in 1826, and that his widow and devisee took possession upon the death of her husband and so remained until she conveyed to defendant Gooch in 1848, who remained in such possession until the service of the declaration in this action.

The defendants, for the purpose of sustaining their plea since the last continuance, showed, in evidence, against plaintiff's objection—

1. The transcript of the record of the court of equity, as set up in their answer.

2. Deed from Stephen S. Parrott, administrator *de bonis non* of John Walker, to William Pannill, Jr., Nancy Pannill, and Elizabeth Otey, heirs at law of William Pannill, deceased, bearing date 21 April, 1857; and *mesne* conveyance from them to defendants.

The court instructed the jury that the plaintiff was not entitled to recover. To this instruction the plaintiff excepted.

The verdict was returned for the defendants, and judgment was (390) rendered thereon by the court; from which plaintiff appealed.

J. B. Batchelor for plaintiff.
J. W. Hays for defendants.

CLARK, J.: The purchase money having been paid in full by William Pannill, the heirs at law of the vendor were naked trustees of the legal title for his benefit. In a court of competent jurisdiction, in a proceeding to which the heirs at law of the vendor and the vendee

were parties, it was adjudged in 1803 that the former execute title to the said vendee. With that decree in force and unimpeached, it is clear that the heirs at law cannot take advantage of their own wrong in not having executed the decree to recover from the beneficial owner the land for which it is adjudged that he had already paid in full, and which their ancestor had covenanted to convey to him whenever such payment had been made.

By virtue of ch. 478, Laws 1797, Rev. Code, ch. 46, sec. 37 (and substantially reënacted in The Code, sec. 1492), the administrator *de bonis non* of the vendor subsequently in 1855 registered the bond to make title in the proper county, and conveyed the legal title to Pannill's heirs at law, who, in turn, in 1857 conveyed to Gooch, then the defendant in this action. This, by virtue of the statute, passed, as against the plaintiff, the naked legal title, which alone she could claim as an heir at law of the vendor. This was set up as a plea since last continuance, and was properly allowed by the court, since it could not have been pleaded when the answer was filed, and the defendant was entitled to the benefit of it. In *Johnson v. Swain,* 44 N. C., 335, such plea was allowed where plaintiff acquired possession after suit brought, and of course is allowable here, where the title passed out of the plaintiff by virtue
(391) of the statute. It is immaterial to consider whether it was strictly an amendment to the answer or a plea since last continuance. A plaintiff cannot recover on a title accrued since action begun. If he sues too soon, he can take a nonsuit and begin over again. Not so with the defendant. If the court cannot permit him to set up a defect in plaintiff's title, or a matter validating his own, which accrues since action brought, the defendant would be without remedy, since the judgment obtained against him for want of such plea would be an estoppel. The statute then in force gave the court the fullest power to permit this amendment to the answer. It provides that the court may "amend any process, pleading or proceeding, either in form or substance." R. C., ch. 3, sec. 1.

It is immaterial to consider what interest passed to Washington under the execution sale against Pannill in 1806, subsequent to the decree of 1803, but prior to the act of 1812, authorizing the sale of trust estates—which point was somewhat considered when this case was here the second time (in 1857), 49 N. C., 436—because after that time the above conveyances placed the legal title and the right of Pannill's heirs also in Gooch, who held already whatever rights, if any, had passed under the execution sale.

The judgment taken against Gooch in 1878, after his death, was irregular and voidable, and was properly set aside by a motion in the cause. It is objected that the motion could not be made by the mover,

who was not a party to the original action, but who had acquired his interest in the subject-matter of the suit under Gooch since action begun. But it has been held in a proceeding between these same parties, *Knott v. Taylor,* 99 N. C., 511, that he can make such motion. It would be very strange if he could not, since it is held in that case that he could not set up his rights and enjoin the execution of plaintiff's writ of possession in an independent action.

An irregular judgment can be set aside upon motion within (392) any reasonable time. *Harrell v. Peebles,* 79 N. C., 26; *Austin v. Rodman,* 8 N. C., 71; *Wade v. Odeneal,* 14 N. C., 423; *Bender v. Askew, ib.,* 149; *Keaton v. Banks,* 32 N. C., 381; *Blue v. Blue,* 79 N. C., 69.

The judgment was taken against Gooch in September, 1878, after his death. A writ of possession was sued out thereon in 1882, and immediately the present mover in this cause instituted proceedings to restrain the plaintiff. At Spring Term, 1888, of this Court, it was decided that the mover had mistaken his remedy, which should be by a motion in the cause. *Knott v. Taylor, supra.* At the first term thereafter of the court below, in September, 1888, this motion in the cause to set aside the judgment was made. It was in apt time. There has been no acquiescence or sleeping on his rights by the party aggrieved. It is not shown that he had any knowledge of the judgment till plaintiff sued out his writ of possession in 1882, and it is not probable that he had.

This is the fifth time this matter, which has been in litigation more than forty years, has been in this Court. The defendants, and those under whom they claim, have been in continuous and unbroken possession of the premises for ninety years. Eighty-nine years ago a decree was made in a cause pending between the parties under whom the plaintiff and defendants, respectively, claim, adjudging that those whose title and possession the defendants hold had paid in full for the premises, and adjudging that the plaintiff's ancestor execute title to the same.

This action, having begun long before the adoption of the present reformed procedure, our old friends, John Doe and Richard Roe, figure as parties to the action. It is probably their last appearance upon the legal stage in this State. Originally introduced as a means of evading the excessive technicalities of the old real (393) action, the disappearance of the fiction marks a still more notable advance in the progress and simplification of the methods of legal procedure.

No error.

Cited: Batts v. Pridgen, 147 N. C., 135; *Jordan v. Simmons,* 175 N. C., 539.

FRANCES E. WILLIAMS ET AL. v. JOHN R. WHITAKER ET AL.

Homestead—Proceeding in Rem—Notice—Estoppel—Jurisdiction—Widows.

1. The allotment of a homestead does not confer or divest any title, and is not strictly but a *quasi* proceeding *in rem;* and only those persons having actual or constructive notice are bound thereby.
2. The allotment of a homestead to one having no right thereto is void, and may be attacked collaterally.
3. The allotment of a homestead to a widow upon the lands of her deceased husband—there being children of the marriage—is without jurisdiction, and is void; and the heirs are not estopped thereby.

SPECIAL PROCEEDING for partition, tried upon issues joined before the clerk at May Term, 1891, of HALIFAX, *Connor, J.*

There was judgment for plaintiffs, from which defendants appealed. The facts are stated in the opinion.

J. M. Mullen for plaintiffs.
R. O. Burton for defendants.

SHEPHERD, J.: The plaintiffs claim as purchasers from two of the heirs at law of Jesse Heptinstall, and the title of the defendants is derived from another of the said heirs and the widow of the said Jesse.

The plaintiffs, therefore, are the owners as tenants in common of (394) an undivided two-thirds interest in the land mentioned in the petition, and they are entitled to a decree directing that the same be sold for partition, unless the right of partition is to be postponed until the expiration of the homestead (which includes the whole tract) by the death of Ophelia, the widow. Plaintiffs contend that the allotment of the homestead is void as to them; and inasmuch as such allotment does not constitute color of title (*Keener v. Goodson,* 89 N. C., 273), and the possession, even if conceded to be adverse, has been continued for a period shorter than twenty years, it must follow that the only question presented for our consideration is whether the allotment is void as to the plaintiffs, and for that reason subject to collateral attack. There being children, it is conceded that the widow was not entitled to a homestead (*Wharton v. Leggett,* 80 N. C., 169; *Gregory v. Ellis,* 86 N. C., 579); but it is insisted that the proceeding under which the allotment was made is a proceeding *in rem* and, therefore, conclusive against all persons and cannot be impeached. Such is the effect of a proceeding of that character in its strictest sense, but it is very clear that the allotment of a homestead is not such a proceeding,

as it does not condemn or operate upon the title of property, but simply sets apart a portion of it as exempt from execution for a limited period. "The object and purpose of a proceeding purely *in rem* is to ascertain the rights of every possible claimant; and it is instituted on an allegation that the title of the former owner, whoever he may be, has become *divested;* and notice of the proceeding is given to the whole world to appear and make claim to it." *Woodruff v. Taylor,* 20 Vt., 65; *Duchess of Kingston's case,* 2 Smith's L. C., 694; Waple's Proc. In Rem., ch. 1.

The decree in such a proceeding is binding upon the whole world, and it cannot be seriously contended that the mere allotment of a homestead to one who has no title can estop the true owner, who has had no notice, from asserting his rights of property. Again, construc- (395) tive notice, as we have seen, must be given to the whole world, and under proceedings for the allotment of a homestead the creditors are the only persons who are required to be notified by the "advertisement" provided in The Code, sec. 515.

These considerations are sufficient to show that the proceeding is not strictly, but at the most, only *quasi in rem;* in which case it is well settled that, so far as the rights of specific property are concerned, no one but parties having actual or constructive notice are bound. Waples Proc. In Rem., ch. 56; *Duchess of Kingston's case,* notes, *supra; Hornthal v. Burwell,* 109 N. C., 10.

The children were not parties, nor was there any actual or constructive notice given, or required to be given, to them, since their mere existence precluded the widow from having a homestead in the said land. The only persons who could be affected were the creditors, and these only as to the manner and extent of the allotment, the duty and authority of the appraisers extending no further than to make the same. *Aiken v. Gardner,* 107 N. C., 236. As we have said, the simple allotment of the homestead does not confer or divest any title, and we think it quite clear that if the widow were suing the children or their grantees under this allotment, she could not recover.

Conceding however, that the allotment proceeding was a proceeding *in rem* in its strictest sense, it would nevertheless be entirely void unless the justice of the peace had jurisdiction to act in the premises. Jurisdiction is, of course, as essential in this as in all other cases (Waples, *supra*), and if it is to be determined by the *right* to have a homestead set apart as against the children, it must follow that the justice of the peace had no authority, and the allotment was void. That such is the principle by which jurisdiction is to be determined in this particular proceeding is apparent from *Gheen v. Summey,* 80 N. C., 187. In that case a homestead had been allotted to a judgment debtor in 1870, against a debt contracted prior to 1868, and, on the (396)

appeal of the judgment creditor to the township board of trustees, the homestead was again allotted to the judgment debtor; it was held that the judgment creditor was not thereby estopped from proceeding to collect his debt by a levy and sale of the homestead. The principle of the decision is that the Supreme Court of the United States having decided (*Edwards v. Kearsey,* 96 U. S., 595) that our constitutional provision relating to the homestead was in violation of the Federal Constitution as to preëxisting debts, the machinery for setting apart the homestead as to such debts was void, and therefore the appraisers had no jurisdiction, and their acts were also "absolutely void." The Court said that "They had no more authority to decide the matter than any other body of citizens who might choose to exercise the power. In order to be conclusive, the judgment relied on as *res adjudicata* must have been one of a legally constituted court . . . of competent jurisdiction. Then, neither the appraisers nor the township trustees having authority to lay off and allot to the defendant his homestead against the debt of the plaintiffs, there is no estoppel of record against them, nor is there any estoppel *in pais.*" It will be observed that the authority of the appraisers is made to depend entirely upon the right of homestead as against the preëxisting indebtedness mentioned. If this is the true principle, its application to the present case is very plain. The widow had no right under our Constitution to a homestead in this intance, and accordingly the machinery provided by the Legislature for setting it apart was either inapplicable or void as to her. See, also, *Grant v. Edwards,* 86 N. C., 513.

It is insisted upon the authority of *Neville v. Pope,* 95 N. C., 346, that upon the face of the record it must be taken that the justice of the peace had jurisdiction. In that case a *feme covert* was sued before a justice of the peace, and failing to plead her coverture, a judg-
(397) ment was rendered against her. This Court refused to declare the judgment void for want of jurisdiction, on the ground that a married woman could under some circumstances become liable for a contract or tort which was cognizable by a justice of the peace, and that until the judgment was set aside for irregularity it would conclusively assume that "The cause of action was such a one as warranted the judgment." We do not see how this decision applies to the case before us, as we have seen that under no circumstances has a justice of the peace authority to set apart a homestead, where the homestead right does not exist. In *Gheen v. Summey, supra,* the creditor who actually appeared as a party, and against whom a final judgment was rendered, was held not to be estopped, and this because the appraisers were acting without

authority; a *fortiori* should this be so as to the children, who were neither actual nor constructive parties to the proceeding under consideration.

We are of the opinon that the ruling of his Honor was correct, and that the judgment should be affirmed.

Affirmed.

Cited: *Formeyduval v. Rockwell,* 117 N. C., 325.

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(398)

J. E. BLACK v. W. H. BLACK.

Deceit—Issues—Exception—Charge—Prayer for Instruction.

1. Issues substantially presenting the questions of fact in controversy, though unnecessarily multiplied, are not the proper subject of exception.
2. The test is, Did the issues presented afford the parties opportunity to introduce all pertinent evidence and apply it fairly?
3. A charge reasonably responsive to prayers for instruction is all that can be required, if it states the law correctly.
4. In action for deceit in the sale of a mule, a charge that to maintain his action the plaintiff must establish that the mule was unsound, that defendant falsely and fraudulently asserted it to be sound, that these false representations induced the trade, and that if the plaintiff was not in fact misled, but acted on his own judgment, the jury should find that he was not induced to part with his property, was fairly explanatory of the action.

APPEAL at August Term, 1891, of MECKLENBURG, from *Hoke, J.*

The action was brought to recover damages, which plaintiff alleges he sustained by reason of the *deceit* of the defendant in respect to a mule which the plaintiff took from him in exchange for a horse. The pleadings raised issues of fact. The verdict of the jury was favorable to the plaintiff, and the court gave judgment in his favor. The defendant, having assigned error, appealed.

Clarkson & Duls (by brief) for plaintiff.
Burwell & Walker (by brief) for defendant.

MERRIMON, C. J.: The issues tendered by the defendant were appropriate, but the substance of them was sufficiently embodied in those submitted to the jury. The latter, though unnecessarily multiplied, served

to ascertain and settle the material facts in controversy; they were simple, did not necessarily confuse the jury, nor can we see that (399) the defendant suffered prejudice from them. The issues raised by the pleadings were, in substance, submitted, though not in the most direct form. They afforded the parties, respectively, opportunity to introduce all pertinent evidence and apply it fairly and intelligently. This is sufficient, unless the complaining party shows that he suffered prejudice from the number and character of the issues. The first exception is, therefore, unfounded.

The defendant requested the court to give the jury twelve special instructions. It gave several of them, properly declined to give others, and gave so much of the remaining ones as he was entitled to have given. He complains particularly that the court declined to tell the jury in terms that "If plaintiff was told the mule was lame, and took him at his own risk, the defendant was relieved from disclosing any defects, if they existed, and is not guilty of a false and fraudulent representation, or a fraudulent concealment in not making the particular defect known to plaintiff."

If it be granted that he was entitled to have the substance of this instruction given, we think the court gave it with sufficient directness and fullness. It said, among other pertinent things, to the jury, "that in order to maintain his action, it was necessary for plaintiff to establish that the mule was unsound; that defendant falsely and fraudulently asserted it to be sound, and that these false representations induced plaintiff to make the trade. If plaintiff was not, in fact, misled by defendant, but acted on his own judgment in making the trade, they should find that he was not thereby induced to part with his property." This plainly implied that the plaintiff could not recover if he took the mule at his own risk, relied and acted upon his own judgment. The evidence was conflicting, presenting two distinct aspects of it—one favorable to the plaintiff, the other to the defendant. The court (400) referred to it in detail, pointing out its bearing upon the several issues. The charge was intelligent, very fair, sufficiently specific and full, and we are unable to discover any error that entitles the defendant to a new trial.

Affirmed.

Cited: S. c., 111 N. C., 300; *Patton v. Garrett,* 116 N. C., 856; *Tuttle v. Tuttle,* 146 N. C., 487; *Dortch v. R. R.,* 148 N. C., 576; *Whitmire v. Heath,* 155 N. C., 307; *Robertson v. Halton,* 156 N. C., 221; *Fields v. Brown,* 160 N. C., 299; *Lumber Co. v. Mfg. Co.,* 162 N. C., 397; *Bank v. Roberts,* 168 N. C., 475; *Millikin v. Sessoms,* 173 N. C., 724.

J. H. SMITH v. J. W. L. ARTHUR ET AL.

Purchase Money—Deed—Contract—Recital—Counterclaim—Issue—Judgment.

1. In action for the recovery of purchase money the plaintiff set up the amount of the balance unpaid and how it was due: *Held*, sufficient.
2. The plaintiff affirms a deed which was delivered without his consent by suing for the balance due of the consideration.
3. Recital of receipt of the consideration in a deed is not contractual in its character so as to preclude recovery of the purchase money due.

APPEAL from *Merrimon, J.*, at Fall Term, 1891, of SWAIN.

The plaintiff complained for a balance of purchase money unpaid for a tract of land recited in the deed as paid, and that the defendants obtained possession of the deed by fraud on their part and mistake on part of plaintiff. This defendants deny, and set up that plaintiff was their agent in his original purchase of said land, had not paid the amount of purchase money recited in deed to him, conspired to cheat defendants by misrepresentation as to value, and executed a deed to defendants reciting as consideration the amount sued for; defendants plead as set-off and counterclaim damages on account of failure of title, (401) the deed having been made with full covenants.

The defendants moved for judgment upon the pleadings, for the reason that the complaint did not state a cause of action, in that it did not allege that the contract sued upon was in writing, and because said complaint did not set out a copy of any written instrument evidencing the contract sued upon, or account for the loss thereof, which motion was denied by his Honor, and the defendants excepted. The following issues were settled by his Honor and submitted to the jury, to wit: (1) Was the plaintiff, J. H. Smith, the agent of the defendants, Arthur, Coffin & Co., to purchase for them the Walker lands? (2) Did defendants agree to purchase from plaintiff the lands described in the complaint? (3) What sum is due the plaintiff from the defendants?

The jury found for the plaintiff. Defendants appealed.

T. F. Davidson for plaintiff.
J. B. Batchelor for defendants.

SHEPHERD, J.: The motion for judgment upon the pleadings was properly overruled. This is not an action for the specific performance of a contract for the sale of land, but for the recovery of an alleged balance of purchase money for land which has been sold and conveyed

to the defendants by the plaintiff. It is true that the plaintiff alleges that the deed was only signed by him, and that its possession by the defendants was procured by fraudulent means; but as the defendants admit its execution, and claim under it, and the plaintiff affirms it by suing for the purchase money, it must be treated for the purpose of this action as having been duly executed. This being so, it was unnecessary for the plaintiff to have shown a written contract of sale, and he was entitled to recover any balance due him as purchase money for the said land. Executed contracts of this character are not within the (402) statute of frauds. *Choat v. Wright,* 13 N. C., 289; *Rice v. Carter,* 33 N. C., 298. The terms, however, of the contract seem to have been stated in a lost letter, and secondary evidence of its contents was admitted by the court. This testimony was consistent with the recital in the deed as to the amount of the consideration, and it, as well as the deed, was admissible for the purpose of showing the said consideration. The objection that the recital of the receipt of the consideration money is conclusive, and that the plaintiff is estopped to show that any balance is due, is met by *Barbee v. Barbee,* 108 N. C., 582. In that case the effect of such a recital is fully discussed, and it was held that it "is not contractual in its character, and is only *prima facie* evidence of the payment of the purchase money, which may be rebutted by parol testimony." As to the refusal of the court to submit an issue upon the counterclaim, we will remark that such a practice is not to be commended. Under the circumstances of this case, however, we do not see how the defendants were prejudiced, as his Honor afterwards gave them a judgment as upon default and inquiry, and stayed execution until the inquiry could be instituted.

Affirmed.

Cited: Boutten v. R. R., 128 N. C., 341; *Drake v. Howell,* 133 N. C., 167; *Brown v. Hobbs,* 154 N. C., 547, 551, 552.

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(403)

JOHN R. ROSS v. NANCY HENDRIX ET AL.

Equity—Equitable Defense—Possession—Constructive Notice—Action to Recover Land—Dower—Limitations.

1. Where it appeared that the proceeds of the wife's separate land, sold since 1868, was used by the husband to purchase another tract, it was held, in the absence of any agreement to the contrary, to be sufficient to constitute a resulting trust, which, coupled with open possession, could be set up to defeat the naked legal title in an action of ejectment.

2. Open, notorious, and exclusive possession for twelve years, accompanied by a claim of ownership, is constructive notice of an equity, even though it be the possession of one entitled to dower which had not been allotted.

3. It would have been otherwise if the dower had been allotted as to the part embraced in the allotment.

4. Where such equitable ownership is set up as a defense in an action to recover land, the statute of limitations does not bar.

SPECIAL PROCEEDING, begun before the clerk and transferred to the Superior Court at term for trial upon the issues raised in the pleadings, and tried before *Graves, J.*, at December Term, 1889, of GUILFORD.

Both parties claimed the land under the same person (George K. Hendrix, deceased), who was the husband of one of the plaintiffs and the father of the other. The plaintiffs relied on three deeds, executed in 1887 and 1888; and the defendants set up an equity with notice, and introduced testimony tending to show that the widow of said Hendrix, defendant, had lived on the land sixteen years, *i. e.*, since her marriage, and she had been in possession since her husband's death, twelve years; that the land was bought by him with her money, showing the amount which went in it. The deceased was heard to acknowledge that his wife's money bought the land. It appeared also that the defendant, his widow, laid claim to the land, and so informed plaintiff. (404)

The plaintiff's counsel insisted that the defendant Nancy Hendrix had failed to establish by proof the equity claimed by her, and asked the court to charge the jury that there is no evidence to go to them upon the second issue, as to the alleged agreement between the said George K. Hendrix and the defendant Nancy, his wife, that her money was used in paying for the land at the assignee's sale, or, if it was so used, that it was upon any agreement made at the time, or before that time, between her husband and herself that the land was to be hers, or that she was to have the title or any interest in the land.

Plaintiff's counsel also asked the court to charge the jury that the possession or occupancy of the land by Nancy Hendrix, under the circumstances of this case, she being entitled to dower in the land, and her possession of the same as the widow of the deceased George K. Henrix did not have the effect to fix the plaintiff with constructive notice of her claim to an equity in the land, and that they should find the fourth issue in favor of the plaintiff.

The court declined to charge as requested, and the plaintiff excepted, and appealed.

L. M. Scott for plaintiff.
J. E. Boyd for defendants.

SHEPHERD, J.: We are of opinion that there was sufficient testimony to be submitted to the jury for the purpose of establishing at least a resulting trust in the defendant Nancy Hendrix. It appears that she sold her land after her marriage, which occurred some sixteen years before the trial of this action. The sale then having been made since 1868, the proceeds arising therefrom was her separate property, and these proceeds having been invested in the land in contro-
(405) versy by her husband, it must follow, in the absence of any agreement to the contrary, that a trust resulted to her. *Kirkpatrick. v. Holmes,* 108 N. C., 206.

We are also of opinion that the possession of the entire tract of land for twelve years by the said Nancy after the death of her husband, accompanied as it was by acts indicating a claim to its exclusive ownership, was constructive notice of her equity, and that the plaintiff is affected therewith.

It is true that if dower had been assigned in the land occupied by her, there would have been no constructive notice; but there was no assignment of dower, and she occupied the *entire* tract under the circumstances mentioned. This possession, while not adverse as between the widow and the heirs (*Page v. Branch,* 97 N. C., 97), so as to bar their entry, was sufficient to put a purchaser upon inquiry, and he must be deemed to have had notice of all that such an inquiry would have disclosed. *Bryan v. Hodges,* 107 N. C., 492; *Staton v. Davenport,* 95 N. C., 11.

The exception to the ruling upon the statute of limitations was not very seriously pressed by counsel. The possession of the defendant Nancy was consistent with her equitable ownership, and she only sets up the trust for the purpose of protecting such rightful possession. The statute of limitations does not apply to such a case. *Farmer v. Daniel,* 82 N. C., 152.

We think that, under the circumstances, it is proper to permit George Hendrix, the heir of defendant Nancy, who died pending the appeal, to come in and adopt her answer. The other exceptions are also without merit.

No error.

Cited: *Ray v. Long,* 128 N. C., 91; *S. c.,* 132 N. C., 892.

(406)

JOHN M. McCORMICK v. J. W. JERNIGAN ET AL.

Probate of Lost Wills—Lost Deeds—Equity—Limitation.

1. The probate of a lost will must be made before the clerk of the Superior Court.
2. Lost bonds and deeds must be set up in a court of equity.
3. No statute of limitations applies to the probate of a lost will.

PROCEEDING begun before the clerk of RICHMOND to probate a lost will, heard by *Boykin, J.*, at February Term, 1892.

J. D. Shaw and Frank McNeill (by brief) for plaintiff.
W. A. Guthrie and Burwell & Walker (by brief) for defendants.

CLARK, J.: The only question presented by this appeal is whether probate of a lost will can be made before the clerk of the Superior Court in the exercise of his probate jurisdiction. By sections 2148, 2149, *et seq.*, clerks of the Superior Court have exclusive jurisdiction of the probate of wills. A will which has been lost before probate remains and continues in force as a will. The Code, sec. 2176. The only difference between the probate of a will which can be produced and one which has been lost is as to the nature and quantity of the evidence required to prove it. The jurisdiction to prove the will is not changed by its loss. No equitable element is involved.

The setting up a lost deed was in the court of equity, not because from the nature of the evidence it must be proven in that court, but because a decree was requisite for a reconveyance, or to enjoin a recovery by the grantor and the like. Hence a bill for the reëxecution of a deed lost or destroyed in the hands of a grantee cannot be sustained unless there is some additional grounds for relief. (407) *Hoddy v. Hoard*, 2 Carter, 474. This is pointed out by Adams Equity, 167. He also points out that the jurisdiction to set up a lost bond is in equity only because the obligor had a right to demand profert of the bond, and when this could not be had, the remedy at law was gone and plaintiff was compelled to go into equity to recover on the bond. He says that after profert was dispensed with, equity courts held on to their acquired jurisdiction, though the reason for it had ceased. The jurisdiction as to lost negotiable instruments arose from the right to require indemnity from liability of the paper sued on and alleged to be lost, turning up in the hands of another party, but as to bills or notes not negotiable this reasoning did not apply; and hence, an action to recover upon them could be maintained at law, though lost, and proof of their loss could be made in such action. Adams Eq., 168.

The probate of a will is a simple question of proof, and no additional matter is involved which requires it to be taken into the court of equity, as is the case with lost deeds, bonds, and negotiable papers. The forms for probate of lost wills are to be found in Smith's Probate Law (3 Ed.), and are entitled "In the Probate Court." This is supported by the almost uniform practice in this country. 13 A. & E., 1077.

The statute of limitations is pleaded, but it was not pressed in this Court. The statute does not apply to the simple taking probate of a will. It must be set up, if at all, to the assertion of any rights which may be claimed under the will. In the ruling of the Superior Court that the clerk did not have jurisdiction there is

Error.

Cited: Jones v. Ballou, 139 N. C., 526, 527; *In re Hedgepeth,* 150 N. C., 249; *Ricks v. Wilson,* 154 N. C., 289; *Powell v. Watkins,* 172 N. C., 247; *Starnes v. Thompson,* 173 N. C., 472.

(408)

LUTHER SHELDON v. W. R. KIVETT.

Attachment—Affidavit—Amendment—Appeal—Practice.

1. An affidavit in attachment against a nonresident which fails to set out how the debt was due, and that defendant could not, after due diligence, be found in North Carolina, is defective.
2. Such defect may be cured by amendment in the Superior Court in the discretion of the judge, though the proceedings were commenced before a justice of the peace. The practice with regard to amendments is more liberal when proceedings were begun in such courts.
3. No appeal lies from an order allowing such amendment, but does lie from an order refusing to dismiss the attachment.
4. No appeal lies from an order refusing to dismiss an action.
5. An affidavit in attachment, if made by an agent, need not state why it is not made by the principal.

APPEAL from *Winston, J.,* at July Term, 1891, of GRANVILLE.

This action was commenced by summons issued by a justice of the peace 25 April, 1891. Upon the return of summons by the sheriff, "The within defendant not to be found in my county; resident of Texas," the plaintiff gave the undertaking set out in the record, and sued out a warrant of attachment and obtained the order of publication of the affidavit, of which the following is a copy, to wit (with the omission of the words in italics, which were subsequently added by amendment in the Superior Court):

"A. W. Graham, attorney for the plaintiff above named, being duly sworn, deposes and says:

"1. That the defendant, W. R. Kivett, is indebted to the plaintiff in the sum of $200, *due by justice's judgment.*

"2. That the said defendant is not a resident of the State of North Carolina, *and after due diligence cannot be found in North Carolina,* and has money, things of value, and property in this State, and that he has a judgment to the amount of $125 against B. H. Cozart, recovered at April Term, 1891, of Granville Superior Court.
(Signed: A. W. Graham, attorney and agent of Luther Shel- (409)
don.)"

The defendant, appearing specially before the magistrate, moved "to vacate the warrant of attachment for irregularity and insufficiency in the proof, pleadings, and affidavit upon which said warrant of attachment was granted."

This motion was denied on the ground that no irregularity or insufficiency was pointed out in the motion or by the counsel.

The cause coming on to be heard, and the plaintiff having proved his claim, and the publication of the attachment and of the summons, and the order of publication also being duly proved, and the defendant not appearing, either in person or by attorneys, upon motion of A. A. Hicks and A. W. Graham, plaintiff's attorneys, it was ordered that the plaintiff recover of the defendant the sum of $200, with interest thereon from 27 December, 1887, until paid, and former costs, $1.75, and costs of this action, amounting to $4.60. And it was further ordered that B. H. Cozart pay to plaintiff, Luther Sheldon, the sum of $125 and interest thereon, as recovered by judgment in favor of the defendant Kivett against said Cozart at April Term, 1891, of said Superior Court of Granville County, and heretofore, to wit, on 27 April, 1891, in these proceedings condemned to the payment of the judgment that might be recovered in this action. And said B. H. Cozart was ordered to pay said sum recovered by judgment aforesaid in favor of the said Kivett to the plaintiff in this action, and no other person.

From this judgment the defendant appealed.

In the Superior Court at July Term, 1891, the defendant (410) moved the court to dismiss and vacate the warrant of attachment because of irregularity in the process, pleadings, and affidavit upon which said warrant of attachment was granted and issued. Motion denied; defendant excepted.

Plaintiff then moved the court to be allowed to amend his affidavit. Motion granted, and the affidavit was amended by inserting the words above set out in italics. The defendant excepted.

From these rulings and orders, refusing to dismiss and vacate the warrant of attachment and allowing the plaintiff to amend his affidavit as aforesaid, the defendant appealed.

A. W. Graham for plaintiff.
L. C. Edwards (by brief) for defendant.

CLARK, J.: The original affidavit was defective in the particulars in which it was amended. *Faulk v. Smith,* 84 N. C., 501. But it is settled that it could be amended by leave of the court, granted in its discretion, even though the first affidavit were wholly insufficient. *Brown v. Hawkins,* 65 N. C., 645; *Pope v. Frank,* 81 N. C., 180; *Bank v. Blossom,* 92 N. C., 695; *Penniman v. Daniel,* 93 N. C., 332; *Cushing v. Styron,* 104 N. C., 338. In those cases the action began in the Superior Court. For a stronger reason the power of amendment existed here, where the action began in a magistrate's court, in which the same regularity of procedure is not to be expected, and The Code, sec. 908, provides that in such cases the court can amend "either in form or substance." *S. v. Norman, post,* 484; *Mfg. Co. v. Barrett,* 95 N. C., 36.

In an affidavit by the agent it is not required that the reasons why it was not made by the principal should be set out, as in the verification of pleadings. *Bruff v. Stern,* 81 N. C., 183. After the amendment of the affidavit in this case, it was again sworn to. *Bank v. Frankford,* 61 N. C., 199. After the warrant was issued publication
(411) for four successive weeks at the courthouse and four other public places was made, as required by The Code, sec. 350.

From the leave to amend, no appeal lay. *Lippard v. Roseman,* 72 N. C., 427; *Henry v. Cannon,* 86 N. C., 24; *Wiggins v. McCoy,* 87 N. C., 499; *Jarrett v. Gibbs,* 107 N. C., 303. But the refusal of the motion to dismiss the attachment affects a substantial right, and from it, as from the refusal of a motion to vacate an order of arrest, an appeal lies. *Roulhac v. Brown,* 87 N. C., 1. It would not lie from a refusal to dismiss an action, since there an exception should be noted and the ruling brought up for review on appeal from the final judgment, if it is against the defendant. *Plemmons v. Imp. Co.,* 108 N. C., 614; *Guilford v. Georgia Co.,* 109 N. C., 310.

No error.

Cited: Mullen v. Canal Co., 112 N. C., 110; *Luttrell v. Martin, ib.,* 605; *Cook v. Mining Co.,* 114 N. C., 618; *Judd v. Mining Co.,* 120 N. C., 399; *Finch v. Slater,* 152 N. C., 156; *Mitchell v. Lumber Co.,* 169 N. C., 398; *Hosiery Mills v. R. R.,* 174 N. C., 453; *Williams v. Bailey,* 177 N. C., 40; *Davis v. Davis,* 179 N. C., 189.

THE MERRITT MILLING COMPANY v. ROBERT T. FINLAY ET AL.

Slander—Counterclaim—Pleading—Judgment—Appeal.

1. Damages for slander cannot be set up as a counterclaim to an action for debt.
2. Where, upon such plea, on the intimation of the court an appeal was taken: *Held*, the appeal was premature.
3. An appeal lies only from a judgment.

APPEAL at December Term, 1891, of BUNCOMBE, from *Merrimon, J.*

The plaintiff sued for the amount of a debt. The defendants pleaded as defense a counterclaim for damages for slander of the business. The facts sufficiently appear in the opinion.

No counsel for plaintiff. (412)
Julius C. Martin for defendant.

CLARK, J.: It is not necessary that we consider whether there was any evidence sufficient to go to the jury to support defendants' counterclaim, for we concur with his Honor that the slander charged as the basis thereof was not a counterclaim that could be pleaded to this action.

The plaintiff complains that the defendants, being indebted to it, accepted a draft drawn on them by the plaintiff, and have failed to pay it. The defendants allege that the plaintiff slandered them as to their pecuniary standing, and injured their credit and business, and seek damages therefor by way of counterclaim. This did not arise out of contract, and therefore could not be pleaded, under subsection 2 of section 244 of The Code; nor could it be pleaded under the first subsection thereof, because it did not "arise out of the contract or transaction which was the ground of the plaintiff's claim," nor was it "connected with the subject of the action"—the contract made by the acceptance of plaintiff's draft. *Byerly v. Humphrey,* 95 N. C., 151.

The record states that, upon the intimation of the court, "the defendants submitted to a nonsuit upon their counterclaim, excepted, and appealed." The appeal was premature, and would not lie till after a final judgment upon the plaintiff's cause of action. *Walker v. Scott,* 106 N. C., 56; *Cameron v. Bennett, ante,* 277.

It also did not lie because an appeal only lies from a judgment, and no judgment of any kind appears in the record. *Taylor v. Bostic,* 93 N. C., 415; *Cameron v. Bennett, supra; S. v. Hazell,* 95 N. C., 623. This was probably an inadvertence, as the defendants admitted the acceptance was due when sued on and had not been paid, and relied solely upon the counterclaim by way of defense. We have, therefore, passed upon the point intended to be presented, as has been

(413) sometimes, though rarely, done by the Court upon sufficient cause to justify it. *McBryde v. Patterson,* 78 N. C., 412; *S. v. Lockyear,* 95 N. C., 638; *S. v. Divine,* 98 N. C., 778; *Guilford v. Georgia Co.,* 109 N. C., 310.

Appeal dismissed.

Cited: *S. v. Wylde, post,* 503; *Hinton v. Ins. Co.,* 116 N. C., 26; *Farthing v. Carrington, ib.,* 336; *Walters v. Starnes,* 118 N. C., 844; *Gammon v. Johnson,* 126 N. C., 67; *Comrs. v. Steamship Co.,* 128 N. C., 561; *Ayers v. Makely,* 131 N. C., 65; *Richardson v. Express Co.,* 151 N. C., 61; *Dowdy v. Dowdy,* 154 N. C., 558; *Shields v. Freeman,* 158 N. C., 127; *Gilbert v. Shingle Co.,* 162 N. C., 290; *Chambers v. R. R.,* 172 N. C., 556; *Barbee v. Penny,* 174 N. C., 573; *Gordon v. Gas Co.,* 178 N. C., 438; *Thomas v. Carteret,* 180 N. C., 111.

THOMAS D. TURNER v. HENRY MEBANE.

Moving House Off Mortgaged Premises.

Moving a house off mortgaged premises does not impair the lien upon it, and a decree of sale, with leave to the purchaser to remove, cannot be objected to by the mortgagor.

APPEAL at August Term, 1891, of ORANGE, from *Winston, J.*

The defendant appealed.

J. W. Graham for plaintiff.

C. D. Turner for defendant.

CLARK, J.: The defendant mortgagor moved the house from the mortgaged premises across the road to another tract, also belonging to him, but not covered by the mortgage. This certainly could not impair the mortgage lien upon the house. If it could, in these days when house-moving machinery has been so greatly perfected, there would be a serious impairment of the security of all mortgages on improved real estate. The court decreed a sale of the house in its new *situs* under the mortgage, with leave to the purchaser to remove, or roll the building off again. We can perceive no grounds, legal or equitable, upon which the defendant can object to this. The plaintiff does not ask for more,

(414) and the rights of third parties are not involved.

It does not appear that the building was attached to the freehold, and it is unnecessary to discuss the effect of such attachment in this case, if any.

No error.

Cited: *Stevens v. Smathers,* 124 N. C., 573.

D. C. FERRABOW ET AL. v. ELIZABETH GREEN ET AL.

Case on Appeal—Costs—Record.

1. Where the statement of case on appeal is defective if it had come up for the first time in this Court, yet, if the defect can be supplied by reference to the record which came up on the first appeal, the appeal will not be dismissed.

2. Where the plaintiffs prevail in a part of their action, they are entitled to costs.

APPEAL from the judgment rendered by *Boykin, J.*, at April Term, 1891, of GRANVILLE, on the ground that the former judgment was not modified in accordance with the direction of the Supreme Court. (108 N. C., 343.)

A. W. Graham and J. W. Graham for plaintiffs.
J. B. Batchelor and John Devereux, Jr., for defendants.

AVERY, J.: When this case was heard on appeal at February Term, 1891 (108 N. C., 339, 343), this Court said: "It is only necessary that the final decree shall be modified so as to provide that all of the defendants, their agents, etc., shall be restrained from committing further waste upon the lands, and to strike out so much of it as adjudges that the plaintiffs shall recover damages of the defendants H. A. (415) Stem and W. T. Stem."

At the next term, after the transcript went down, the presiding judge modified the former judgment by not only striking out so much of it as awarded damages against the two defendants named, but by allowing them to go without day and recover costs. Counsel agreed, in writing, that the judgment and agreement of counsel should constitute the case on appeal. Accordingly, the transcript shows that at said term Judge Boykin rendered the judgment set out in the record, and that the agreement was made—nothing more. Counsel for the appellee moves to dismiss for want of sufficient record to show that the court has jurisdiction, and cites *Gordon v. Sanders*, 83 N. C., 1; *Markham v. Hicks*, 90 N. C., 1; *Branch v. R. R.*, 88 N. C., 573; *Perry v. Adams*, 96 N. C., 347; and *Wyatt v. R. R.*, 109 N. C., 306, to sustain his position.

If this were an original appeal coming up for the first time, though it involved only a question of costs, depending upon the proceedings or record below for its solution, we would be bound to follow the authorities cited, and grant the motion to dismiss. This, however, is not a new or

original appeal coming up for the first time, but the very cause that was before us at Spring Term, 1891, brought back for our decision of the question whether the effect of the modification heretofore directed would be to tax the plaintiffs instead of the defendants with the costs. We think that where the same cause is brought up a second time for further direction as to the costs, which are incident to the judgment, counsel may, by consent, limit the transcript to the additional judgment appended to the record, and refer to the transcript already in this Court to supplement it.

The defendants appealed from a judgment restraining all of the defendants from committing further waste, and for the recovery of dam-

(416) ages against H. A. Stem and W. T. Stem, who were the lessees of their codefendants. While this Court reversed so much of the judgment as provided for the recovery against H. A. and W. T. Stem for damage done to the inheritance as the lessees of persons not impeachable for waste, it did not modify the decree that all should be perpetually prohibited from continuing the destruction of timber. The plaintiffs failed to maintain the demand for damages already sustained, but they did prevail against all of the defendants in the action in so far as it was brought to invoke the extraordinary power of the court to prevent further destruction of timber. Whatever might be the rule as to costs incurred in this Court, we think that there was error in the judgment that the defendants H. A. Stem and W. T. Stem go without day and recover costs below, since they were restrained with the other defendants, and one of the main purposes of the action was to get the benefit of the remedy by injunction. *Cook v. Patterson,* 103 N. C., 127; *Costin v. Baxter,* 29 N. C., 111; *Vestal v. Sloan,* 83 N. C., 555; *Horton v. Horne,* 99 N. C., 219; *Wall v. Covington,* 76 N. C., 750; The Code, secs. 525 to 528.

We think there was error. Let this opinion be certified to the end that the judgment below may be modified as directed.

Error.

Cited: Field v. Wheeler, 120 N. C., 270; *Finch v. Strickland,* 130 N. C., 45; *Williams v. Hughes,* 139 N. C., 20; *Vanderbilt v. Johnson,* 141 N. C., 373.

(417)

BOARD OF COMMISSIONERS OF HILLSBORO v. JOHN U. SMITH ET AL.

Writ of Certiorari—County Commissioners—Appeal to Superior Court—License to Sell Liquors—Good Moral Character.

1. A writ of *certiorari* is the proper proceeding to have the action of a board of county commissioners reviewed in the Superior Court.
2. The order of the court to have the proceedings of the county commissioners certified to its next term is not appealable.
3. Act of 1891, ch. 323, providing that the board of commissioners shall, upon satisfactory evidence of good moral character of the petitioner, issue the license, etc., is as mandatory as sec. 3701 of The Code.
4. The board of commissioners have a limited legal discretion in passing upon an application for license, and they have a right to take into consideration the suitableness of the place and the propriety of increased accommodations for the public.
5. As to the town of Hillsboro, the provisions of the Laws of 1854, ch. 276, respecting the manner in which the applicant shall be recommended, is still in force.

CERTIORARI, heard by consent upon petition and affidavits, by *Boykin, J.*, at chambers in DURHAM, 11 June, 1891.

The petitioners (the said town), without objection, introduced an amendment to the charter of said town, being chapter 276, Laws 1854-55.

The defendant's counsel moved to dismiss the said application upon the ground that the proceedings of the commissioners of Orange County, in regard to granting the license and orders complained of, were not subject to review, as it was an exercise of the discretion vested in said board. His Honor refused to dismiss the motion for a *certiorari*, and ordered the clerk of Orange Superior Court to issue an order to the board of county commissioners to certify their proceedings in (418) the matter of granting said order to the sheriff of Orange County to issue license to said John U. Smith & Co. to sell liquors in said town of Hillsboro by the small measure, viz., in quantities less than a quart and not more than five gallons, to the next term of the Superior Court of Orange County.

From this order defendants Smith & Co. appealed, and assigned as error the refusal of his Honor to dismiss the application for a *certiorari* upon the grounds stated.

C. D. Turner for plaintiff.

J. W. Graham for defendants.

SHEPHERD, J.: The town of Hillsboro, by its duly authorized attorney, appeared before the board of commissioners of the county of Orange and objected to the granting of a license by that body to one John U. Smith to retail intoxicating liquors in the said town. The board of commissioners ordered that a license be issued to the said Smith, and taxed the town with the costs of the proceeding. The town, having been thus treated as a party to the proceeding, very clearly had a right to have the action of the board of commissioners reviewed, and, as no appeal lies from that body in a case like the present, the writ of *certiorari* was properly granted. We are also of the opinion that the order of the judge is not appealable, and that this appeal must be dismissed. *Bank v. Burns,* 107 N. C., 465. As the case is to be further heard in the court below, it is not improper that we should pass upon the questions presented upon the face of the petition.

It is there stated that the board of commissioners considered that when the applicant (Smith) had shown a good moral character, it had no discretion whatever, but was compelled to grant him the
(419) license. The act of 1891, ch. 323, provides that "The board of commissioners shall, upon satisfactory evidence of good moral character of the applicants, issue the license," etc. Sec. 3701 of The Code is quite as mandatory in its terms, and is substantially similar to the above act, except that it uses the words "properly qualified applicants," instead of applicants having "good moral character."

In *Muller v. Commissioners,* 89 N. C., 171, a properly qualified applicant was held to mean a person having a good moral character, and the principles laid down in that case are, therefore, applicable to the one now under examination. The court says that the board of commissioners have "a limited legal discretion in passing upon an application for license, and they have a right to take into consideration the question whether the demands of the public require an increase of such accommodations, and whether the place it is proposed to establish a bar-room is a suitable one." See, also, *Commissioners v. Commissioners,* 107 N. C., 335.

The other question is whether the board of county commissioners have any power to grant a license to sell liquor in the town of Hillsboro to any person who is not recommended by the commissioners of the said town. The answer is to be found in chapter 276, Laws 1854, which provides that "The commissioners of the town of Hillsboro shall present to the said court [court of pleas and quarter sessions, the duties of which, in respect to the granting of licenses, have been devolved upon the board of county commissioners] the names of such persons, not less than two in number, as they shall recommend to be licensed to retail spirituous liquors in the said town, and it shall not be lawful for the

justices of the said court to grant a license to retail spirituous liquors within the limits of said town, except to persons who shall have been recommended as aforesaid." We have been referred to no statute repealing the foregoing act, and, if it is still in force, it is plain that a license cannot be granted except upon the recommendation therein provided. A license granted without such a recommenda- (420) tion is void, and can afford no protection against an indictment for retailing without license.

Appeal dismissed.

Cited: *S. v. Stevens,* 114 N. C., 878; *S. v. Smith,* 126 N. C., 1058; *Perry v. Comrs.,* 130 N. C., 559; *Dickson v. Perkins,* 172 N. C., 362; *Walls v. Strickland,* 174 N. C., 301.

JULIUS LEWIS ET AL. v. J. C. BLUE.

Attorney and Client—Compromise of Judgment Without Authority.

1. Authority in attorney to sue and collect a claim does not warrant him in compromising it.
2. Where an attorney, without authority from his client, assigns a judgment for less than its value: *Held*, that the plaintiff was the owner of the judgment, and that the amount for which it was transferred must be treated as a credit thereon.

PROCEEDING heard by *Boykin, J.,* at March Term, 1892, of MOORE.

The plaintiffs having a docketed judgment in the Superior Court of the county of Moore, moved for leave to issue an execution thereupon. The defendant opposed this motion, alleging that the plaintiffs were not the owners of the judgment.

The court submitted an issue to the jury. It appeared, from the case stated on appeal, that upon the trial of said cause, Julius Lewis, one of the plaintiffs, testified as follows: That the plaintiffs are the owners of said judgment, and never assigned the same to any one, and never authorized any one else to do so for them, and the same has never been paid; that prior to the taking of said judgment they placed the account, upon which said judgment was taken, in the hands of (421) J. W. Hinsdale, attorney at law, for collection, but did not authorize him to assign said claim or judgment, or compomise the same.

J. W. Hinsdale, introduced by the plaintiffs, testified as follows: That the claim upon which said judgment was taken was placed in his

hands by the plaintiffs, as attorney, for collection, and that he either handed or sent said claim to W. E. Murchison, attorney, with instructions to collect the same; that plaintiffs did not authorize him to assign or compromise said claim or judgment; that, according to his recollection, Murchison had not paid him anything on said judgment; that he did not authorize Mr. Murchison to compromise said judgment.

The defendant introduced W. E. Murchison, who testified that J. W. Hinsdale turned over said claim to him with instructions to do the best he could with it; that he reduced the claim to judgment, and had it docketed in the Superior Court; that, in his opinion, the defendant Blue was insolvent, and at the request of N. A. McKethan, who had purchased lands from Blue, upon which the judgment was a lien, and in consideration of $50 or $60 paid him by McKethan, he assigned and transferred said judgment to M. McL. McKethan, in writing, for the benefit of said N. A. McKethan, and signed plaintiffs' names to same by himself as attorney; that he had no authority from plaintiffs, excepting what was given by Col. J. W. Hinsdale, as hereinbefore testified to.

He further testified that, according to his recollection, he had paid said $50 to Colonel Hinsdale in settlement between them.

After the introduction of the foregoing evidence, his Honor declined to submit any question of facts or issue to the jury, but held, as a matter of law, that the plaintiffs were the owners of the judgment, and
(422) that the $50 paid to said Murchison was a payment on said judgment.

The plaintiffs asked his Honor to charge the jury that if Murchison accepted the $50 or $60 in compromise of the judgment without authority from the plaintiffs, that they could treat the same as a nullity, and collect the whole of this judgment from defendant. Said instruction was refused; to which refusal, and the refusal of his Honor to submit these issues to the jury, plaintiffs excepted. To his Honor's ruling that the $50 accepted by Murchison in compromise of said judgment should be applied as a payment on said judgment, the plaintiffs excepted.

The court directed that the plaintiffs' judgment be credited with $50, and that execution issue for the balance thereof, according to law. The plaintiffs having excepted, appealed.

Douglass & Shaw (by brief) for plaintiffs.
Black & Adams (by brief) for defendants.

MERRIMON, C. J.: Accepting the evidence as true, the plaintiffs' attorneys had no authority to sell, transfer, or assign their judgment; they simply had authority to collect the judgment in the way allowed by law and to take all proper legal steps for that purpose. They had not

authority to take anything in payment of the judgment other than money, or less than the face value thereof, unless they had been specially authorized by the plaintiffs to do so. *Bank v. Grim,* 109 N. C., 93. So that the sale or assignment of the judgment was void and ineffectual.

The principal counsel, at a distance from the court when the judgment was docketed, might avail himself of the services of local counsel in collecting the judgment, as he did do in this case, and such local counsel might, in good faith, collect and give a valid receipt for the money received. The nature of the duties of attorneys in collecting debts implies authority to avail themselves of local counsel to look constantly and carefully after the creditor's interests. Such (423) authority may be exercised in the orderly course of such business. *Rogers v. McKenzie,* 81 N. C., 164; *Branch v. Walker,* 92 N. C., 89; *Beck v. Bellamy,* 93 N. C., 129; *Bradford v. Williams,* 91 N. C., 7.

The assignment of the judgment was void, but the plaintiffs' counsel received $50 on account of the same. This sum should go to the discharge of that much of the judgment, certainly, in the absence of objection by the defendant or the party who paid it for him. The plaintiffs can only look to their attorneys for the money so collected.

Affirmed.

JAMES H. LOUGHRAN v. CLAYTON GILES.

Contract to Convey Land, Verbal and Written—Demurrer—Pleading—Statute of Frauds.

1. A defendant cannot take advantage of the statute of frauds respecting a verbal contract to convey land by demurrer, because such contract is not void, but only voidable when the statute is pleaded, and by demurrer the defendant elects to treat it as still subsisting.

2. The reason of the statute was to get rid of the temptation to perjury; but this cannot arise where the facts are admitted by a demurrer.

3. A verbal contract to convey land is good between the parties when its terms are agreed upon, and the statute is not pleaded.

4. When there are several defendants, and the complaint sets up a good cause of action as to any one of them, a joint demurrer will be overruled; but where several defendants are joined with the party to the verbal agreement, they cannot demur for this cause until the latter makes his election to ratify or repudiate the contract; but he cannot make an election to the prejudice of persons whose rights have intervened.

(424) ACTION for damages for the breach of a contract to convey land, heard upon complaint and demurrer by *Merrimon, J.*, at December Term, 1891, of BUNCOMBE. The demurrer was to the effect that the complaint failed to state a cause of action, and was overruled, and defendant appealed. The complaint set up the following letter and telegram:

WILMINGTON, N. C., 18 May, 1891.

MR. JAS. H. LOUGHRAN, *Asheville, N. C.*

DEAR SIR: I must beg your pardon for the delay in replying to your letter of the 8th inst. My bookkeeper has been sick, one of the clerks off on a bridal tour, and one other clerk away on his summer vacation. My hands have been full. I will make you this proposition: $7,500 for the property; payments, $2,000 cash, $1,500 in two years, $1,000 in three years, $1,500 in four years, and $1,500 in five years; interest, 8 per cent, payable semiannually. The above amount is what I think the place is worth.

I have your check for $50 in full for rent to the 15th inst. I thank you. Very truly,

CLAYTON GILES.

Cash	$2,000
2 years	1,500
3 years	1,000
4 years	1,500
5 years	1,500
	$7,500

Will you kindly reply at your earliest opportunity.

And that plaintiff received the above letter, or contract, on 21 May, 1891, and replied, accepting the offer of defendant contained in said letter, by telegram, in words and figures as follows:

(425)

21 May, 1891.

To CLAYTON GILES, *Wilmington, N. C.*

I accept your proposition. Send deed and notes to D. C. Waddell as soon as possible. JAMES H. LOUGHRAN.

The complaint further states that plaintiff was ready, willing, and able to comply with the above agreement, and defendant refused, after demand.

No counsel for plaintiff.
G. V. Strong for defendant.

AVERY, J.: The plaintiff declares in terms upon both a verbal and a written contract, as it was competent for him to do. *Harris v. Sneeden*, 104 N. C., 369; *Knight v. Houghtalling*, 85 N. C., 17; *Dail v. Freeman*, 92 N. C., 351; *Johnson v. Finch*, 93 N. C., 205. A verbal contract is not absolutely void, but voidable at the option of the party "to be charged therewith," when an action is brought to enforce it. *Foust v. Shoffer*, 62 N. C., 242; *Syme v. Smith*, 92 N. C., 338. If, in answer to the demand for its enforcement, he denies the alleged agreement, or sets up another and a different contract, or pleads specially the statute of frauds, the action cannot be maintained. *Holler v. Richards*, 102 N. C., 545; *Cox v. Ward*, 107 N. C., 507; *Browning v. Berry*, 107 N. C., 231. On the other hand, if he admits the allegation that he entered into it, and raises no question as to its validity, but is content to rest his defense upon other grounds entirely consistent with its existence and binding force, the courts cannot *ex mero motu* annul an agreement which a party has already, by his pleading, ratified, or (426) may hereafter elect to affirm. *Syme v. Smith, supra.* By filing the demurrer, the defendant has admitted that a contract was made, both verbally and in writing. The voidable contract must, from its very character, remain subject to affirmation or repudiation, till the party to be charged shall, by his language or conduct, manifest a positive purpose to pursue the one course or the other. Conceding, for the sake of argument merely, that there is not in the complaint a sufficient allegation of a written contract, still we must interpret its language as meaning that there was a verbal understanding between the parties that the land mentioned in the complaint on which plaintiff's bar-room was located should be conveyed by defendant to plaintiff upon the payment of the price mentioned. By setting up the statute in a demurrer the defendant seeks to get the benefit of it without specially pleading it, and without expressly denying that he entered verbally into the very agreement set forth in the complaint. The statute of frauds (said *Justice Ruffin* in *McCracken v. McCracken*, 88 N. C., 276) was intended to "close the door upon temptations to commit perjury, and the assertion of feigned titles to property." The evil intended to be guarded against in the enactment of the statute was the attempt to enforce pretended verbal agreements by resorting to perjury, and though it became necessary in attaining this end to put it in the power of a party to avoid, at his election, his own verbal promise to convey land, the statute was not construed as a declaration that all such contracts not in writing and signed by the party to be charged were to be treated *ipso facto* as null and void. *Wilkie v. Womble*, 90 N. C., 254; *Green v. R. R.*, 77 N. C., 95; *Davis v. Inscoe*, 84 N. C., 396.

"A verbal contract for the sale of land, tenements or hereditaments, or any interest in or concerning them (said the Court, in *Thigpen v. Staton,* 104 N. C., 400), is good between the parties to it, and will
(427) be enforced, if they agree upon its terms, and *the party to be charged does not plead the statute.*" It is settled, as is said in *Baker v. Garris,* 108 N. C., 218, that the objection that the complaint does not state facts sufficient to constitute a cause of action may be made by demurrer or *ore tenus,* and cannot be waived; but this rule is evidently intended to apply in cases where it appears upon the face of the complaint that plaintiff is not entitled to recover, no matter what defense may be set up, or whether any answer may be filed. Until the party to be charged manifests his election by pleading specially, it does not appear that he may not be willing to abide by the verbal promise. *Wilkie v. Womble, supra; Thigpen v. Staton, supra.* A demurrer cannot, from its nature, be the proper pleading by which to make and express the election to repudiate the contract. In *Conant v. Barnard,* 103 N. C., 315, it was held that where all of the defendants united in a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action, the demurrer would be overruled if the complaint set forth a good cause of action as to any one of the defendants. In a case in other respects like that at bar, but where several defendants are joined with the party to be charged by the verbal agreement, it would follow that none of the others could venture to demur, on account of the nature of the contract, until he should make his election to ratify or repudiate it. *Davis v. Inscoe, supra.* A different rule prevails, however, where the complaint sets forth facts showing a repudiation of the verbal contract by the party to be charged, and the action is one to recover possession on the strength of the title so repudiated, because when the fact that the contract relied upon to show title has been repudiated, and has become thereby void instead of voidable, is admitted by the demurrer, it is at last but an admission that there is an incurable defect in the title set up by the plaintiff. In
Young v. Young, 81 N. C., 91, cited for defendant, it appeared
(428) upon the face of the complaint that Seth Young, who had agreed, by parol, to convey the land in controversy to the father of the infant plaintiff, had subsequently, and before the action was brought, actually conveyed to one of the other defendants, Zephaniah Young, thus rendering it impossible for him, at his election, to ratify the original agreement, and thereby enable the plaintiff to make out his title and establish his right to the possession.

As it does not appear from the complaint that the defendant is not still able to perform the verbal agreement, we do not think that the

Court should treat the demurrer as an election to repudiate the contract. In the absence of an allegation that the defendant had, before suit brought, placed himself in such condition that he could not perform the agreement, there is a failure to disclose all of the facts necessary to constitute a good defense, and even in states where the demurrer has been sustained in causes of this character, it was originally so held, upon the ground that, admitting the allegations of the complaint to be true, there would be no possibility of recovery upon them in any contingency. The earliest of the Massachusetts cases that we can find, in which such a demurrer was sustained (*Walker v. Locke,* 5 Cush., 90) was one where the defendant, by conveying the premises, as in *Young v. Young, supra,* had rendered it impossible to abide by his verbal promise, and where the fact that he had so aliened the land appeared upon the face of the bill. It is true that in some subsequent cases that Court sustained a demurrer where the same reason did not exist, and the rule was generally adopted in the courts of equity in this country that a defendant might demur where it appeared affirmatively in the bill that the contract which the plaintiff was seeking to enforce was a verbal agreement to convey land. But no such doctrine was ever announced in North Carolina as obtaining in courts of equity, and we think that the rule which has been recognized here is much more just and reasonable. Until it appears affirmatively that the way is not open for the person to be charged to admit and submit to the parol agreement, there is a possibility (429) of enforcing the contract. The statute was enacted to prevent the enforcement of pretended contracts. Where there is a real agreement, there is no sufficient reason why the party against whom the court is asked to enforce it should not be forced to a discovery of the truth or to rest his defense solely upon the statute. We prefer to adhere to our own rulings. Though, generally, we have followed the courts of equity in formulating rules of pleading under the new system, there are exceptions to the general rule.

In taking the view of the subject that we have announced, we must not be understood as holding that the plaintiff has not in fact sufficiently alleged that there was a contract in writing. It might prove very interesting to discuss the question whether the telegraphic operator at Asheville was constituted the defendant's agent, as if he had been clerk at an auction sale, and whether the response in defendant's letter to that of plaintiff would make the letter admissible to show a description set forth in it. The rule has been generally adopted in other courts that where the allegation is that a defendant contracted to convey, it will be presumed that the allegation referred to a contract in writing. We

merely mention this question, however, to exclude an improper conclusion, and will forbear further discussion of it.

The judgment of the court below is

Affirmed.

Cited: *Lowe v. Harris,* 112 N. C., 501; *Williams v. Lumber Co.,* 118 N. C., 932; *Hemmings v. Doss,* 125 N. C., 402; *Morehead v. Hall,* 126 N. C., 217; *Brinkley v. Brinkley,* 128 N. C., 506; *Brewer v. Wynne,* 154 N. C., 471; *Henry v. Hilliard,* 155 N. C., 378.

(430)

CITY OF GREENSBORO v. W. D. MCADOO.

Exceptions.

An exception must point out specifically and definitely the error assigned, and not leave the court to grope through the entire record to discover error.

APPEAL from *Boykin, J.,* February Term, 1891, GUILFORD.

Dillard & King and J. E. Boyd (by brief) for plaintiff.
L. M. Scott for defendant.

CLARK, J.: The defendants except—

1. Because the judge did not hold that the action and proceedings of the plaintiff in the premises were without authority of law.

2. That the action of the jury was not in accordance with the law.

This conveys no information wherein the action and proceedings of the city were without authority of law, whether in the want of the power of local assessments or otherwise, nor wherein the action of the jury was not in accordance with the law; and in both particulars it cannot be seen definitely how or wherein the judge erred, and the whole matter is left to conjecture. In assigning error, the appellant should point out specifically and distinctly wherein it consists, and not leave the Court to grope through the entire transcript. When this is not done, the Court will affirm the judgment below. *Brumble v. Brown,* 71 N. C., 513; *Chasten v. Martin,* 84 N. C., 391; *Moore v. Hill,* 85 N. C., 218; *Strickland v. Draughan,* 88 N. C., 315; *Arrington v. Goodrich,* 95 N. C., 462. There being no errors on the face of the record proper, and no other being legally and properly assigned, the judgment must be

Affirmed.

Cited: *S. c.,* 112 N. C., 360.

(431)

JOHN KELLY ET AL. v. THE LYNCHBURG AND DURHAM RAILROAD COMPANY ET AL.

Arbitration and Award—Compensation—Pleading—Proof—Practice.

1. Though the parties to an arbitration agree that the arbitrators shall fix their own compensation, yet upon a proper suggestion that it is extortionate or excessive, it becomes the duty of the judge to hear and, if necessary, to pass upon the question thus raised.

2. When, upon the coming in of the award, the court ordered notices to issue to the arbitrators to file itemized accounts of the time engaged and expenses incurred by each, together with the value of their services, and in response to this order such accounts were filed, to which the defendants formally excepted: *Held*, (1) it is too late to object to the order; (2) the ruling of the court that it had "no power to consider the evidence in the absence of sustained proof or allegation, or some affidavit of the party setting forth fraud, collusion, conspiracy, or unfairness," was error.

3. The court has power to fix the compensation of its arbitrators when it is not agreed upon; to cut it down if it is excessive; and this in the absence of formal allegation and proof.

SHEPHERD, J., dissenting.

MOTION to revise and reduce the compensation of arbitrators, heard at October Term, 1891, of DURHAM, by *Winston, J.*

The following is the ruling and order:

"The court being of the opinion that the court has no power to consider the evidence in the absence of sustained proof or allegation, or of some affidavit of a party setting forth and specifically charging fraud, collusion, conspiracy, or unfairness, refuses said motion."

The defendant excepted. Judgment for the arbitrators.

The other facts may be gathered from the opinion of the Court.

W. W. Fuller for arbitrators. (432)
W. A. Guthrie for defendants.

AVERY, J.: If the parties had not incorporated into the agreement to submit to arbitration a provision that the arbitrators might fix their own compensation, the duty of determining what would be a just allowance for the service rendered by them, and each of them, would have devolved upon the court, and the judge might have heard evidence in case of dispute in order to arrive at a fair estimate of the value of the work done and the expense incurred in performing it. *Stevens v. Brown*, 82 N. C., 463; *Griffin v. Hadley*, 53 N. C., 82.

Where they assume the right to determine their compensation without the assent of the parties, that portion of the report will not be sustained, and, if separate from other matters disposed of, may be set aside, while the award in other respects may be enforced as a rule of court. *Stevens v. Brown, supra; Knight v. Holden,* 104 N. C., 107.

The truth of the principle embodied in the old maxim, *"Nemo debet esse judex in propria sua causa,"* is self-evident. *White v. Connelly,* 105 N. C., 70; *Freeman v. Person,* 106 N. C., 251. While it is admitted that the parties to an action may, by express agreement, clothe arbitrators with power to fix the amount of their compensation, the law attaches, by implication, the condition that the allowance shall not be unreasonable, and upon a proper suggestion that it is extortionate or excessive, it becomes the duty of the trial judge, before giving judgment to enforce the award, as a rule of court, to hear evidence, if necessary, and pass upon the question thus raised. The motion for judgment upon an award, which is by the terms of the submission to be enforced as a rule of court, may be resisted upon any ground that impeaches its validity generally, or, where it is separable, the valid-
(433) ity of a portion of the findings. *Metcalf v. Guthrie,* 94 N. C., 447; *Cowan v. McNeely,* 32 N. C., 5.

It has been the practice in our courts to attack awards for errors of law, apparent from the record, by filing exceptions. *Long v. Fitzgerald,* 97 N. C., 39; *Duncan v. Duncan,* 23 N. C., 466.

It appears, upon an inspection of the charges of two of the arbitrators (the claim of the third having been compromised pending the dispute), that they claim each about $50 per diem for every day on which they were actually sitting together, with all expenses for board and transportation; and, moreover, one account contains a charge for one day at the same rate, which was spent previous to the hearing in conference with attorneys of the plaintiff who had chosen him. The aggregate of one of the contested accounts is $1,220.50; of the other, $982.21.

Upon the coming in of the award at March Term, 1891, *Judge Boykin,* who then presided, ordered that notice issue to Lutz and Graham to file "verified itemized accounts of the time engaged and expenses incurred by each of them respectively in the trial of this cause, together with the value of their services." To this order no exception was entered, and in response to it the accounts were filed, to which the defendants have formally excepted. It is too late to object to the order made at March Term, 1891.

The judge who passed upon the exceptions to the accounts filed by the two arbitrators rested his ruling upon the ground that he had "no power to consider the evidence in the absence of sustained proof, or allegation, or of some affidavit of a party setting forth and specifically

charging fraud, collusion, conspiracy, or unfairness." The court below adopted the language used by Morse (p. 596), and quoted from an opinion of the Supreme Court of Maine. But it must be remembered that the question under discussion there was not what was the proper method of attacking an allowance of fees, made by two or three arbitrators, each for himself, according to his own estimate of (434) the value of his own services, but how the joint work of all the arbitrators, as to which there might be collusion or conspiracy, could be impeached for fraud. His Honor adopted the English rule, which has been followed by only a portion of the American courts (Morse on Arbitration, p. 620); but admitting, for the sake of argument, that the action of the arbitrators as to all issues upon which they passed as a body could in England have been impeached only by a bill in equity, and that under our Code practice we are bound to preserve the principle by requiring that the equity shall be alleged in some proper way, it does not follow that the account for services, which the parties may have consented that each arbitrator shall make out for himself, shall be attacked only in the same manner. In the absence of such agreement, the quantum of fees would have been determined at the discretion of the court, while, if the parties had not agreed upon the trial by arbitrators of the matters in controversy between them, the issues of fact raised by the pleadings would have been settled by the jury. An excessive charge of a single arbitrator might, it seems to us, have been corrected under the former practice without resorting to a court of equity, whatever might have been the rule as to collusive fraud. The permission to each arbitrator to make out his bill of charges is subject to the power of the judge to resume his functions in case the license should appear to him to have been abused. It is a substitution of the arbitrator in his place, with the condition annexed that the allowance may be set aside if unreasonable. If the award is set aside for fraud, the right of trial by jury as to the issues is reinstated. If the allowance to an arbitrator is impeached as unreasonable, the effect is to restore to the court the right to fix a reasonable compensation.

We do not concur with the court below in the view that there (435) must be *allegata* and *probata,* or proof sustained in any specified formal manner, before the court can interpose to supervise an allowance of fees by the arbitrators to themselves. The amount of fees would be determined, in the absence of any agreement, by the court, on motion, and the judge would, in case of dispute as to the character and extent of the services, hear testimony. We see no reason why the judge, upon suggestion by exception, or by motion, that the allowance is unfair, should not set aside an unjust allowance in the way prescribed by law for making a just one. This is in harmony with The Code, and the

general trend of our new practice in dispensing with useless formality where it obstructs the administration of justice. We think that the court was at liberty to hear any evidence offered as to the services performed, and upon that, and other material evidence, had the power to pass upon the question whether the charges made were unreasonable.

It would seem, however, that in America the jurisdiction of the courts of equity in setting aside awards has not been admitted to extend to all cases where there has been fraud in the arbitration; but it is needless to discuss that question, if we consider the compensation as a matter apart from the issues raised by the pleadings. We think that there was error in the ruling of the court below.

SHEPHERD, J., dissenting: I think that his Honor very properly refused to allow the award to be impeached in such a summary and informal manner. The compensation of arbitrators may be submitted to them, as well as the other matters in dispute, and their award, in this respect, is equally binding, and must be impeached in the same way.

The award in this case does not, upon its face, disclose the specific items of costs and charges as fixed by the arbitrators, and, therefore, the court could not see that they were so unreasonable as to warrant relief on the ground of fraud or oppression. In such cases the
(436) award must be impeached by an action in the nature of a bill in equity charging fraud, misconduct, or other grounds of relief; and when the award is to be made a rule of court, there should be, at least, an affidavit setting forth the grounds upon which its enforcement is resisted. The fact that the arbitrators are interested in fixing their own compensation makes no difference, as it is well settled that an award will not be disturbed where parties have knowingly submitted their differences to persons interested in the matters involved. *Pearson v. Barringer,* 109 N. C., 398, and the authorities cited. See, also, *Fox v. Hazleton,* 10 Pick., 275.

The ruling of the court below is well sustained by *Blossom v. Van-Amringe,* 63 N. C., 65, in which *Chief Justice Pearson* says: "It certainly cannot be expected that the court shall wade through all of the voluminous proceedings, accounts, time devoted to the investigation, etc., in order to determine whether the amount of compensation fixed on is too high, for the reason that the parties have agreed to leave that question to the arbitrators, and they are bound by it, except there be an allegation of unfairness so well sustained as to induce the court to interfere in order to prevent fraud and oppression by an abuse of power confided to the arbitrators." See, also, Adams Equity, 192. To set aside an award upon a motion without affidavit, or upon a mere exception, is, I think, something new in the practice. As to the fixing of

compensation, it reduces the determination of the arbitrators to but little more dignity than an ordinary bill of costs, and I cannot see how this is authorized by the Code of Civil Procedure. His Honor seems to have been of the opinion that the new *procedure* was designed simply for the purpose of enforcing existing principles of law and equity, and not to change them in any respect. Such, also, seems to have been the view of this Court from the adoption of The Code to the present time. *Parsley v. Nicholson,* 65 N. C., 207; *Oates v. Gray,* 66 N. C., 442; *Katzenstein v. R. R.,* 84 N. C., 688, and numerous other cases. The (437) impeachment of an award, like the correction of a deed, is governed by certain *principles,* and is by no means a simple matter of *practice.*

I can conceive of no greater source of confusion than the idea that the Code of Civil Procedure warrants any departure from well settled principles, and that in some vague and indefinite way it is to be made refuge for all of the "hard cases," at the sacrifice of that certainty and uniformity which constitute the beauty and strength of every enlightened system of jurisprudence.

I think that the ruling of the court below should be affirmed, and that the impeaching matter should at least be supported by affidavit.

PER CURIAM. Error.

THE WILMINGTON AND WELDON RAILROAD COMPANY
v. B. I. ALSBROOK, SHERIFF.

THE material matter involved in this appeal is set out in the former appeal between the same parties. See *ante,* 137.

CLARK, J.: This appeal comes up from the final judgment of the court below, entered in accordance with the opinion and judgment of this Court rendered at this term, on the hearing of the appeal from the interlocutory order on the motion for an injunction to the hearing. *R. R. v. Alsbrook, ante,* 137. The transcript of the record is the same, except the addition now of a final judgment below. For the reasons stated by the Court at the former hearing, the judgment must be affirmed. The opinion on the former appeal is reaffirmed, and will be entered as the opinion of the Court on this hearing.

Affirmed.

(438)
WILLIAM JENKINS v. THE WILMINGTON AND WELDON RAILROAD COMPANY.

Damages by Draining Land—Natural Channels—Viewing the Premises—Challenge—Charge—Practice—New Trial.

1. The granting or refusal of an application for the jury to view the premises which are the subject of injury or accident lies within the sound discretion of the judge.

2. Objection that a juror is on the prosecution bond of another plaintiff in another action, though against the same defendant on a similar cause of action, is properly overruled.

3. The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time.

4. Respecting the drainage or diversion of surface water, a railroad company enjoys the same (but no greater) privileges as any other landowner—that is, a right to cause it to flow in its natural channel.

5. Discussion by CLARK, J., and MERRIMON, C. J., as to the rights and duties of those draining land and flooding surface water upon the lands of others.

MERRIMON, C. J., concurring in part and dissenting from part of the opinion of the Court.

ACTION for damages alleged to have been caused the plaintiff's lands and crops by reason of the diversion of water upon his lands by the defendant company in the construction of its road from Scotland Neck to Greenville, as set out in the complaint, tried at December Term, 1891, of MARTIN.

When the case was called for trial the defendant made objection to H. T. Brown, a juror, and alleged for cause that the said juror was on the prosecution bond of one Everett in an action against the defendant for flooding said Everett's land, lying on the same stream as plaintiff's land, and damaged by the same act as that alleged by the plaintiff in this action.

Cause disallowed, and defendant excepted.

It also appeared that said juror was related to said Everett. Defendant assigned said relationship to Everett as a cause of chal-
(439) lenge.

Cause disallowed, and defendant excepted.

The defendant then challenged said juror peremptorily.

Having challenged four jurors peremptorily, the defendant offered to challenge one Griffin, a juror, peremptorily, which challenge was not permited by the court, and the defendant excepted.

After the jury was impaneled, the defendant moved the court "that the jury, after the testimony has been finished, be sent, under the direc-

tion of the court, to view the land alleged to be damaged, and the land over which the defendant is alleged to have drained water by the construction of its road, and the said watercourses, so as to damage the lands and crops as set out in the complaint."

It appeared that the land alleged to have been damaged was seventeen miles distant from the courthouse.

The testimony in the case was closed late Friday night, and the court expiring by limitation at 12 M. on Saturday night following, the judge found that it was impossible to send the jury to view the land and conclude the argument and charge the jury within that time. For these reasons the court declined to grant the motion. The argument in the cause was concluded about 3 o'clock p. m., Saturday, and the charge about 5 o'clock p. m., the court holding a continuous session.

The defendant excepted.

It was in evidence that in September, 1888, the defendant company extended its road from Scotland Neck to Greenville, and that for a portion of the way it was constructed through a low pocosin country; that in the construction of said road from the direction of north to south it was constructed through "Devil's Garden," and ditches were dug along and within its right of way to what is known as "Arden Branch"; "Devil's Garden" is a basin, low, depressed formation, covering about 250 acres; it is lower than the immediate surrounding (440) country; it is surrounded on all sides by a natural elevation or margin; it has no natural outlet, except that in seasons of heavy rainfall a small portion of the water which accumulates in it overflows its margin, the greater part of which finds its way into "Arden Branch," and thence into "Coburn Swamp"; before the building of the railroad it stood with water all the time, varying from half-leg to knee-deep; that it was covered with a thick, heavy growth, consisting of pine, maple, bay, gum, gall bushes, reeds, and such like. It is admitted that "Devil's Garden" was not a watercourse, and that the water which accumulated and stood in it was rain water or surface water. The evidence tended to show that the ditches along the defendant's right of way drained all the water of "Devil's Garden," both that along its right of way and that covering the entire basin, south into "Arden Branch"; that "Arden Branch" discharged its waters into "Coburn Swamp," which was admitted to be a natural watercourse; that the lowgrounds of this swamp where the railroad crosses it were some two or three hundred yards wide, with hills on either side eight or ten feet high; "Coburn Swamp" was canaled by the adjacent landowners up to within a short distance from where the railroad crosses it; that prior to the building of the road it was effectual as a drainage-way for said lands; that ten times as much water comes down the swamp or canal now as before the railroad was built; the

lands along the swamp are cultivated up to the canal; the lands of the plaintiff are not contiguous to the railroad, but lie two and one-half miles down "Coburn Swamp"; the ditches cut by the railroad were wholly within its right of way, and there was testimony tending to show that they were necessary in the construction of the roadbed to make the same safe for the transportation of freight and passengers, and also that the road was properly and skillfully constructed; that
(441) "Arden Branch" did not cut the rim or margin of "Devil's Garden," and only served to carry off such water as surmounted the elevation or margin which surrounds it in very wet seasons.

The evidence in regard to the damage was substantially as follows:

The canal was successful as a means of drainage before the railroad was built; since the railroad was built, about 38 acres of land has been overflowed; a crop has not been made on the land since the road was built; not much damage done to the crops in 1888, because the crops were matured before the ditches were dug. In 1889 no crop of any account was made; 1890 was over an average year, and only about half a crop was made; 1891 was an average year as to rainfall, and the land was overflowed more than ever before the road was built; the lands are overflowed when there are heavy rains; the water stands in the ditches so that when there is a heavy rain the lands overflow; formerly the ditches would carry off the waters from heavy rains; rains which overflow now, formerly did not do so.

Verdict and judgment for plaintiff. Appeal by defendant.

Donnell Gilliam for plaintiff.
James E. Moore for defendant.

CLARK, J.: The granting or refusal of the application for the jury to view the premises is a matter which rested in the discretion of the trial judge. On some occasions it may be very useful and, indeed, almost necessary. It was permitted on the trial of the *Cluverius case,* 81 Va., 787, and there are many precedents elsewhere for such practice. It was allowed in this State, without objection, on the trial (for murder) of Gooch, 94 N. C., 987, and it has been done in many other cases. On the other hand, it is most usually unnecessary, and would be
(442) productive of delay and expense and, on occasions, possibly, of irregularities. The matter is one which must be left to the sound discretion of the trial judge, by whom such motion should only be granted when it shall seem clear to him that it is required in the interest of justice. In the present case it would seem that a map of the locality and the evidence of witnesses should have been amply sufficient

to convey to the jury an intelligent comprehension of the entire contention of the parties.

The objections to the jurors were properly overruled. It was not a disqualification that a juror was a surety on the prosecution bond of another plaintiff, or related to such plaintiff, in another action against this defendant for a similar cause of action.

The court below committed error in failing to put its charge, as to the law, in writing when requested, as here, in apt time. The Code, sec. 414. The reason given by the court, that while it reduced nearly its entire charge to writing, it did not fully comply with the statute, "because it was impracticable to put the whole charge in writing in the time within which it was necessary to conclude the trial," does not cure its failure to observe the requirement of the statute. If there was not time to do so, the court could, in its discretion, have made a mistrial. The defendant had a right to insist on the entire charge as to the law being put in writing, either to the end that it should be handed to the jury on their retirement (Laws 1885, ch. 137), or to avoid differences between counsel as to its purport, in making up a case on appeal, though this does not require that the recapitulation of the evidence should be put in writing. *Dupree v. Insurance Co.*, 92 N. C., 417; *Drake v. Connelly*, 107 N. C., 463; *Lowe v. Elliott*, 107 N. C., 718.

As the case goes back for a new trial, it is but proper that we should notice some of the general principles which are applicable to this and similar cases. In doing this, we deem it unnecessary to refer to the multitude of conflicting decisions in other states upon this (443) much debated subject. We are content to accept, in a great measure, the conclusion of such discriminating authors as Mr. Angell (on Watercourses) and others. First, we are of the opinion that, in respect to the drainage or diversion of surface water, a railroad company enjoys the same privileges as any other landowner, but no greater, to be exercised under the same restrictions and qualifications. Secondly, a railroad company or other landowner has a right to cut ditches and conduct the surface water into a natural watercourse passing through its land, and if this right is exercised in good faith, and in a reasonable manner, for the better adaptation of the land to lawful and proper uses, no damage can be recovered if the lands of a lower owner are injured. Mr. Angell (p. 134) says: "No doubt, the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow of water in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation reasonably used which the stream may give him."

The foregoing passage is quoted with approval by the Court of Appeals of New York in *Waffle v. R. R.*, 53 N. Y., 11. The Court says: "The authorities in this country and England upon this subject are collected and revised by the author, and clearly establish the right claimed by the defendant. *Goodale v. Tuttle,* 29 N. Y., 459; *Rawsbron v. Taylor,* 11 Exch., 369; *Gannon v. Hargadin,* 10 Allen, 106; *Miller v. Lanbach,* 47 Penn., 154. A proprietor having the right to reclaim his land by draining the surface water therefrom by ditches discharging into a stream running thereon, which is the natural outlet of the water, the object of doing so, whether for the erection of buildings, agri-
(444) culture, or constructing a railroad thereon, is wholly immaterial."

The principles thus laid down are not only founded upon sound reasoning and natural justice, but they underlie the entire system of drainage as to surface water in North Carolina, and if they are departed from because of a few "hard cases" (which are the "quicksands" of the law), the evil results by way of vexatious litigation among neighboring landowners, as well as by doubts and confusion as to their respective rights and liabilities, will be simply incalculable. It would amount to a revolution in the law, which, for convenience, as well from a sense of justice, has been tacitly adopted and acted upon by them for a century or more. This right, however, must be exercised in a reasonable manner, and this must necessarily be determined in view of the particular circumstances of each case. For instance, if the stream is inadequate, and injury may result to a lower owner, the right to cut such ditches must be confined strictly to mere surface water, and the ditches must not be so constructed as to divert the surface water from a direction in which, by the general inclination of the land, it naturally flows.

Skillful farmers, in the hill country and in the mountains of our State, are accustomed to construct hillside ditches so as to discharge the surface water through either of two ravines on opposite sides of a hill, and we are not to be understood as holding that, in so doing, they incur any liability to those through whose land the water passes, if the ditches are made skillfully and with an eye single to affording the best protection to the land against washing.

In the present case it is admitted that "the ditch complained of was wholly situate upon the defendant's right of way; that it was necessary; that it was skillfully constructed, and that it was adequate in its capacity to carry the surface water into a natural drain," which was not flooded except in case of a heavy rainfall; and that it carries
(445) off only surface water, that is, the rainfall, and empties it into the natural channel into which, by the configuration of the land, the rainfall would naturally go if the land was drained. Whether

there was an accumulation of water in "Devil's Garden" to such an extent that the drawing of it off would inflict damage upon the plaintiff is not a question before us. It had heretofore been drained off, and this action was not brought on that ground. Since such drawing off of the accumulated water, the area of "Devil's Garden" has been, like any other redeemed and drained area, and the defendant's ditches cut for the purposes of its roadbed, it is admitted, only drained the surface water which comes down by rainfall thereon, and thence upon the right of way, and which is conducted by these ditches into a natural channel. It is contended by the defendant that this natural channel (Coburn Swamp) is the drainway of thousands of acres, probably over a hundred thousand, and these ditches only add to it the rainfall of 250 acres, part of which already went into said natural channel before the ditches were cut (the rest having, therefore, been retained in the pocosin and evaporated), and that so infinitesimal an addition to its volume of drainage could not possibly make the channel, by reason of such addition, inadequate. It is further contended by the defendant that, by the uncontradicted testimony, the natural channel of Coburn Swamp was 200 yards wide and 7 or 8 feet deep; that nature had thus furnished a channel more than adequate, hence the flow was sluggish and shallow, and formed a swamp; that the plaintiff seeing this and wishing to utilize a part of the useless bed of the swamp, made an artificial narrower and deeper channel, or canal, within the natural channel or swamp; that, while he had a right to do this, and his enterprise should be encouraged, yet it gives him no right to complain that the defendant, by better and necessary drainage of its own land, has made the artificial channel inadequate. The defendant asserts that the natural channel was big enough, but that it is the plaintiff's artificial (446) channel which is too small. The plaintiff's contention is equally earnest to the contrary of this, and he also insists that by reason of the cutting of the rim of "Devil's Garden," much water that heretofore collected there from a large area, and which disappeared by way of percolation and evaporation, is now thrown into an inadequate watercourse. The facts are not all admitted or found, and hence we need not express any conclusion beyond the general principles above laid down, as upon another trial the facts will doubtless be more explicitly found.

MERRIMON, C. J., concurring: I concur in the order of the Court directing a new trial, but I cannot concur in all that is said in the opinion of the Court.

It is unquestionably true that a railroad corporation has the right to cut through and along its right of way and keep in repair such appropriate ditches, culverts, and appliances as are necessary to carry off the

surface water coming upon the right of way to a natural drain or outlet adequate to receive it. But it has not the right, by artificial means, to collect, divert, and turn such surface water from its natural flow or condition through such ditches into a natural stream or outlet not of sufficient capacity to receive and carry it off without flooding the lands along and adjacent to the banks of such stream to such extent as to destroy or seriously impair its usefulness and value; nor has it the right to collect, divert, and turn surface water not on its own land from land adjacent and near to its right of way into such stream, and so flood and injure land situate along and near to the stream. As is said in *Staton v. R. R.*, 109 N. C., 337, "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 (447) 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."

It seems to me that it would be manifestly subversive of common right and justice to allow the owner of land, as of right, to so collect and turn the surface water upon or coming upon it into a stream into which it would not naturally go unless by slow percolation through the soil, and thus overflow, flood, and destroy the usefulness and value of the land of others situate along such stream. In such case, the party thus relieving himself of natural disadvantages incident to his own land would do so by practically enlarging the natural capacity of the stream to the positive injury of other landowners. He would thus supplement—enlarge—the natural stream by destroying the value of the land of others; he would do so as certainly and palpably as he would injure the land of another adjoining his own if he were to collect all the surface water on his own land by artificial means and thrust it in a body upon the adjoining land. The law does not allow and will not tolerate such rank injustice, caused either by direct or indirect means. It will not, however, take notice of the increased flow of the natural stream caused by such diversion of surface water, unless it is so great as to do substantial injury to the lands of persons complaining. The use of a natural stream by those entitled to have it must be reasonable—not so large as to really change its size and do substantial injury to others.

In the present case, "Devil's Garden" is not a watercourse; it is a low depression in the surface of the earth, having the shape of a basin; the water accumulating in it did not flow through "Arden Branch" into "Coburn Swamp," a stream on which the plaintiff's land is situate, except so much of it as sometimes overflowed its rim. Its water seems to have remained stagnant, except as it escaped mainly

by evaporation; it did not go into "Coburn Swamp," gen- (448) ally, at all, except, perhaps, to some slight extent by percolation through the soil. Before the defendant cut its ditches, the water of "Devil's Garden," it seems, did not swell the flow of "Coburn Swamp" to any considerable extent. The case states that the defendant's ditches, intended to drain its right of way, not only drained the latter, but as well turned all the water of "Devil's Garden" into "Coburn Swamp." The evidence tended to prove that, prior to cutting the defendant's ditches, the current of the swamp was effectual as a drainage-way; that afterwards ten times as much water passed down the swamp as before, overflowing the stream and the plaintiff's land, and doing it substantial injury, which did not happen before the ditches were cut.

The defendant had the right, by means of suitable ditches, to drain its right of way, and free it of surface water, into the stream called "Coburn Swamp," if the latter was capable of receiving it without doing substantial injury to the plaintiff's land situate near to and adjoining that stream; but if that stream was inadequate for such purpose, and the effect of turning the water on the defendant's right of way and of "Devil's Garden" into it was to cause it to overflow to such an extent as to do the plaintiff's land substantial injury, as alleged, then the defendant would be liable to him in damages for such injury.

It is said this stream was adequate for such purpose. But this does not appear. It seems that whether it was or was not was not made a question on the trial. The evidence went to prove that the swamp where the defendant's road crosses it was two to three hundred yards wide, "with hills on either side 8 or 10 feet high," but it did not appear that the whole swamp made up and constituted the stream—the current of running water. A material question in the case, as it appears from the record, is as to the capacity of the stream to receive the (449) water turned into it by the defendant.

The defendant is on no better footing as to the drainage of its right of way than a natural person in like case. There is nothing in its charter that purports to give it greater right or advantages in such respect, nor is there anything in its nature or purpose that entitles it to have them. If its purposes and necessities in the interests of the public require that it shall flood and destroy the usefulness of the land of an individual situate at a distance from its right of way, it must obtain authority from the Legislature to condemn that land, and pay for it, as it did its right of way. It has no right to do injury to a citizen's land simply because it is a railroad corporation. Private property shall not be taken for public uses except by the due exercise of the power of eminent domain.

It may turn out that the plaintiff is not entitled to recover, but it does not appear from the record before this Court that the defendant is now entitled to judgment, as contended by its counsel.

Error.

PER CURIAM.

Cited: *Staton v. R. R.*, 111 N. C., 278; *Fleming v. R. R.*, 115 N. C., 695; *Parker v. R. R.*, 119 N. C., 688; *Mizell v. McGowan*, 120 N.C., 138; *Hampton v. R. R., ib.*, 539; *S. v. Perry*, 121 N. C., 535; *Parker v. R. R.*, 123 N. C., 73; *Hocutt v. R. R.*, 124 N. C., 219; *S. v. Dewey*, 139 N. C., 561; *Sawyer v. Lumber Co.*, 142 N. C., 162; *Briscoe v. Parker*, 145 N. C., 17; *S. v. Khoury*, 149 N. C., 457; *Roberts v. Baldwin*, 151 N. C., 408; *Brown v. R. R.*, 165 N. C., 396; *Barcliff v. R. R.*, 168 N. C., 269; *Long v. Byrd*, 169 N. C., 660; *S. v. Jones*, 175 N. C., 714.

J. G. WILSON ET AL. V. THE CITY OF CHARLOTTE.

Contract—Notice—Water Supply.

Where a section in a contract with a water company sets out that it should furnish water in the manner there specified, "when required": *Held*, (1) that the terms of such requirement should be clear and explicit; (2) merely stating to the company's officer that "it should bring its water up to the requirements of the contract, so as to throw water on fires," is too vague, no reference being made to the section making the specification, or to its other provisions.

(450) APPEAL from *Hoke, J.*, at August Term, 1891, of MECKLENBURG, for rent alleged to be originally due to the waterworks company from 1 July, 1887, to 31 December, 1887, and assigned for value to the plaintiffs.

The city paid rent for water supply up to 1 July, 1887. The only sections of the contract necessary to be set out here are the first, second, third, sixth, and seventh, which are as follows:

"1. That they will erect and establish in or near the city of Charlotte, N. C., a system of waterworks, with all proper and necessary mains, pipes, hydrants, fixtures and appurtenances of every kind, to supply said city with pure and wholesome water, fit for domestic purposes, and sufficient for all purposes hereinafter stipulated for; to be made of the best material and constructed in workmanlike manner. The work shall be commenced within sixty days after the execution of this agreement, and

shall be completed within eight months thereafter; but if the work has made reasonable progress, they shall have reasonable time to complete the same, in no event to exceed twelve months. And it is further stipulated that if the contractors shall at any time be restrained from working, or be delayed therein, by any injunction or other legal process, or by ordinance of the city, the time during which they may be so delayed or restrained shall not be counted in estimating said time.

"2. That they will erect and establish forty fire hydrants; that is, twenty-five double and fifteen single hydrants, with sixty-five hose openings, at points not more than 500 feet apart, along their street mains, and to furnish at said hydrants all water necessary for all fires, sanitary and other public purposes. The city of Charlotte shall have the right to select the streets along which the mains are to be laid, and the places said hydrants shall be established along the line of said mains, within the limits prescribed.

"3. That they will, at any time, when so required by the proper (451) authorities of the city of Charlotte, erect and establish other fire hydrants and furnish thereat all water necessary for fire, sanitary and other public purposes. And for such additional hydrants as the city of Charlotte may order erected, the same annual rental shall be paid as for the forty hydrants herein stipulated for, to wit, $50 each per annum.

"6. That if the said contractors shall fail at any time after the said waterworks are completed to furnish an adequate supply of water for all fire, sanitary and other public purposes, as herein stipulated, excepting by reason of accidents or injury to machinery and making necessary repairs, no rent shall be paid by the city of Charlotte during the time of such failure. And if they shall, at any time, for a period of three months, continuously fail to give an adequate supply of water for all purposes herein enumerated, then this contract shall cease and be at an end.

"7. That they guarantee at all times to furnish, if required, one hundred gallons of water *per day* of twenty-four hours, for each inhabitant of the city of Charlotte, and a sufficient force or pressure to throw from any five of said fire hydrants at one and the same time through 1-inch nozzles and 50 feet of 2½-inch hose, five streams of water to the height of 75 feet."

In May, 1887, a new board of aldermen came into office, and the usual committees were appointed. John H. McAden being appointed chairman of the committee on waterworks. The duties of these several committees were prescribed in chapter 9, section 54, of the published ordinances, as follows: "The mayor shall appoint from the board of aldermen the following standing committees for the preparing and

consideration of business for the action of the board, to whom may be referred such business as the board may deem appropriate."

In May, 1887, McAden notified Fleming, president of the (452) waterworks company, that he must comply with his contract, or that rents would cease; that he must bring his works up to the requirements of the contract, and so as to throw water on fires. (Printed record, bottom p. 15.)

McAden did not expect of Fleming that he should furnish pressure as provided in section 7, and did not make his demand in terms of that section. He asked a proper supply and service of water in time of fires, and the notice was that he must comply with his contract. (Printed record, bottom p. 17.) Fleming claimed that he could throw streams provided in section 7, and at Fleming's suggestion tests were made to see, and it was ascertained that the company could not, on some of the mains. After this notice, given by McAden in May, the city paid the rent for the quarter, embracing the month of May, and ending 1 July.

The city continued to use the water all during the time, for which it now refuses to pay.

The following issues were submitted:

1. Did the waterworks company, during the period from 1 July, 1887, to 1 January, 1888, furnish the city of Charlotte, at all times, an adequate supply of water for all fire, sanitary and other public purposes, as required by the contract (except for accidents and repairs)?

2. If not, during what portion and for how much of said time did such failure continue?

3. What is due and owing from defendant to plaintiffs during said time?

4. Did plaintiffs purchase for value the account sued for at the time set out in complaint?

5. Did defendant, before 1 July, 1887, notify the waterworks company that they were required to bring their works to the standard of section 7, as to the quantity of water and pressure therein prescribed, and at what time was such demand made?

6. Did the waterworks company, at any time after completion (453) of its plant and before account assigned to plaintiffs, and before notice, furnish the city with the amount of water and pressure provided for in section 7 of the contract?

7. What damage did defendant sustain by reason of such failure?

8. What damages has defendant sustained by such failure from time demand made to comply with section 7 to assignment and notice to city?

There was much other testimony not necessary to be here set out.

On the fifth issue the court charged the jury that the burden was on defendant, and told them that if the jury should find that Dr. McAden, as chairman of the committee on waterworks, and acting under the resolution of the board, described in his evidence, approached Major Fleming, as president and manager of the waterworks company, and notified him he must make his works comply with the contract—both parties talking at the time of the pressure (in section 7, contract), or if Dr. McAden, while such chairman of waterworks committee, so approached Major Fleming, as president and manager of the waterworks company, and made the demand in the language as given by him, and made the report of his demand to the board of aldermen, and same was approved by them—this would be a demand of the company that they were expected to comply with section 7, and answer to issue should be "Yes." Plaintiffs excepted.

The charges and exceptions are not essential to be given.

There was a verdict for defendant on the issues, and a motion by plaintiffs for new trial, which was refused. Plaintiffs appealed.

Jones & Tillett (by brief) for plaintiffs.
G. F. Bason and Burwell & Walker for defendant.

SHEPHERD, J.: We are of the opinion that the seventh para- (454) graph of the contract was not operative until the performance of its stipulations was, upon proper notice, expressly required by the defendant. We are also of the opinion that the charge of the court upon the question of such notice was erroneous, and that the exceptions of the plaintiffs in that respect should be sustained. The provision in question was construed when this case was before us on a former occasion (108 N. C., 121), and it was then held that its performance was not a condition precedent to the payment of rent, but was the subject of an independent covenant, for a breach of which the defendant would be entitled to recover damages. It is but just, therefore, that the notice to put in operation so important a part of the contract, imposing, as it does, so serious a liability, should have been clear and explicit. The seventh paragraph provides that the water company shall "at all times furnish, *if required,* one hundred gallons of water per day of twenty-four hours, for each inhabitant of the city of Charlotte, and a sufficient force or pressure to throw from any five of said fire hydrants, at one and the same time, through 1-inch nozzles and 50 feet of 2½-inch hose, five streams of water to the height of 75 feet.

It was in evidence that for a long period the water company had failed to furnish an adequate supply of water, etc., under the general

provisions of the contract, and it is insisted that the notice given by Dr. McAden (the only witness of the defendant upon this subject) had reference to these alone. It is needless to repeat here the entire testimony of the witness, except to remark that he stated that the notice given by him was that the water company should "bring its water up to the requirements of the contract, and so as to throw water on fires." He says nothing about requiring the enforcement of section 7, as to the one hundred gallons of water per day and the additional pressure. On the contrary, the witness said "I did not expect of Fleming (the
(455) superintendent) that he should furnish pressure as provided in section 7, and did not make any demand in terms of that section. I asked a proper supply and service of water in time of fire, and the notice was that he must comply with his contract." It is true that Fleming suggested a test of the five streams as required by section 7, but this surely was no direct evidence of an express demand for the performance of such independent covenant, when the witness McAden himself says that he did not expect that such part of the contract should be performed. We doubt very much whether there was any sufficient evidence of such an explicit notice as is required to put in operation the contingent provision of the contract above mentioned. However this may be (there was no prayer for instruction upon this point), we think that his Honor erred in not permitting the jury to draw their own inferences from the testimony, instead of charging them as he did.

As the case goes back for another trial, and may be presented in a new and different aspect, we think it best to refrain from discussing the other questions presented in the record. We will remark, however, that the provision as to the nonpayment of rent is a valid one, and that if the plaintiffs fail to show a performance of the contract during the first three months, they cannot recover for that period. As to the succeeding three months, we are inclined to the opinion that they are entitled to recover upon a *quantum meruit,* the special contract having been determined, by reason of its own limitation, at the end of the first three months.

New trial.

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(456)

A. B. WHITE v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Damages for Injury—Contract—Consideration—Release.

In an action against a railroad company for failure to comply with its contract (made in compensation for injuries received) in not paying plaintiff for services rendered under such contract, it appeared that plaintiff

executed a release for a sufficient consideration covenanting not to sue, and discharging defendant from all further liability: *Held*, to be a sufficient bar to an action for a balance unpaid for services rendered under said contract since the injury was received.

APPEAL at February Term, 1891, of GUILFORD, from *Boykin, J.*

The plaintiff alleges, in substance, that while he was properly engaged as servant and conductor of the defendant, he sustained serious injuries, and was greatly endamaged by its neglect; that it admitted such neglect, and agreed to pay him in discharge of its liabilities to him in such respect, "$6,000 in money, and retain him in the service of the company in some position or place not requiring much bodily activity, and one adapted to plaintiff in his condition, as it should turn out to be, during his life, at the sum of $70 per month, the same that he was getting at the time of the injury done, payment to be made at the rate aforesaid, from 16 October, 1885, whether he worked or not, and no labor to be required except when able"; that the defendant paid him the said sum of $6,000, and he continued in its service until it became indebted to him in about the sum of $3,430; that of this sum it paid him, from time to time, $1,748; that it refuses to pay him the balance so due him, and has discharged him from its service, etc. He demands judgment for this balance, and general relief, etc.

The defendant admits that it agreed to pay the plaintiff $6,000, and alleges that it paid the same to him; but it denies that it (457) owes him anything, or that it agreed to retain him in its service at the price of $70 per month for the term of his life, or at all. It further alleges that the plaintiff executed to it his release, acquittance, and discharge of liability to him on account of his said injuries, whereof the following is a copy:

$6,000.

Know all men by these presents, that I, A. B. White, of the city of Greensboro, N. C., for and in consideration of the sum of $6,000 to me in hand paid, the receipt whereof is hereby acknowledged, do hereby release the Richmond and Danville Railroad Company and the North Carolina Railroad Company, its lessor, from all claims upon them for damages received by me by a collision which occurred near the Yadkin River, about 19 August, 1884, and covenant with them that I will not sue them, or either of them, for damages received in said collision.

That by this instrument I hereby release said companies from any further liability or care of me on account of said accident.

Witness my hand and seal, this 26 October, 1885.

A. B. WHITE. [SEAL]

Witness: R. L. VERNON.

The plaintiff made reply to the answer, among other things, as follows:

"And the plaintiff showeth that on 24 October, 1885, when the instrument pleaded as a bar was executed, the $6,000 was paid and the paper-writing set up as a release was given to have, and intended to have, and had only the operation in law to bar the action as to the money consideration, leaving the cause of action now sued on a distinct
(458) cause of action, not within said money consideration and unaffected by said paper-writing."

As a further reply to the defense of release set up in the defendant's sixth paragraph of its answer, the plaintiff showeth—

"1. That the defendant by its agent agreed with the plaintiff on an adjustment of the injury sustained by the plaintiff from the collision by and through the negligence of the defendant by the payment of $6,000 for the plaintiff's bodily injury, and the retention of the plaintiff in defendant's service for life at the same wages he was receiving before the injury was sustained, to wit, $70 per month; and when said paper, which is now pleaded as a release, was executed it was understood to cover and discharge from the money consideration only, and was then and there expressly mentioned and agreed as having nothing to do with the contract of lifetime employment aforesaid; and the plaintiff showeth that the said paper pleaded in bar not only was so understood as not interfering with the distinct contract of retention of plaintiff in the service of the company as aforesaid, but in point of fact and in law it had not such interference as plaintiff alleges; but if it be construed to the contrary, then plaintiff insists that said release be set aside and held inoperative *pro tanto* the present action and the plaintiff allowed to recover, notwithstanding said paper-writing; the same was given on the understanding and agreement that the same was not to extend to and did not extend to the distinct contract of life employment aforesaid, and if of meaning in law to the contrary, it was so expressed unintentionally and by mistake."

The following issues were submitted to the jury:

1. Was it a part of the agreement between plaintiff and defendant that defendant would retain plaintiff in its service for life at $70 per month?

2. Was said part of the agreement intended to be covered and
(459) effected by the deed of release pleaded by the defendant?

3. What damages has plaintiff sustained by defendant's failure to keep and perform said contract of continued employment?

After the evidence had all been received and the argument of counsel begun, "the judge presiding stopped the counsel and intimated that the paper pleaded as a release did include and bar the plaintiff's present

action, and further intimated that, under the pleadings, the evidence adduced for the correction and reformation of the release was not sufficient to authorize the submission of the second issue to the jury. And thereupon he directed the jury to find all the issues in favor of the defendant.

"And, in accordance with the verdict, the court adjudged that the plaintiff take nothing by his said action, and that the defendant recover its costs, to be taxed by the clerk."

The plaintiff assigned error as follows, and appealed to this Court:

1. In that the court, as a question of law, in the course of the trial, after all the evidence was in, ruled that the release pleaded by the defendant was a release of the present cause of action, and barred the action therefor.

2. In that upon the face of the paper pleaded as a release, to say the least of it, its extent and scope was equivocal, and the jury should have been allowed to pass on the question whether the cause of action sued on was designed and intended to be affected by the release.

3. In that, upon the evidence adduced, the release was in part execution of a contract of adjustment previously made, with which both parties meant to abide by and perform, and it was error to take the case from the jury and not allow them to respond to the second issue.

Motion for new trial overruled.

L. M. Scott for plaintiff. (460)
D. Schenck and F. H. Busbee for defendant.

MERRIMON, C. J.: The very broad and comprehensive purpose of the release of the plaintiff relied upon by the defendant, as this appears from its face, is too manifest to admit of any serious question. The release recites in plain, explicit terms that in consideration of $6,000 (no other consideration is expressed or suggested by implication) paid to the plaintiff, he releases the defendant and "its lessor from *all claims* upon them for damages received by the plaintiff at the place and time specified," and he covenants that he "will not sue them, or either of them, for damages received in said collision." Cautiously, and on purpose, it seems, he further covenants that he releases the defendant "from any further liability *or care* of me (himself) on account of said accident." The purpose to discharge the defendant from all liability, and the consideration paid for the release, could scarcely be more clearly expressed.

It is insisted, however, that the plaintiff does not sue to recover damages for the injuries he sustained, but the unpaid compensation due to him which the defendant promised and agreed to pay him as part, and

a substantial part, of the consideration of the release. This claim cannot be sustained, because the contract whereby the plaintiff was to receive from the defendant compensation for his injuries sustained, and by which he was to release and acquit the defendant on account of the same, purports to be wholly embraced in the acquittance relied upon by the defendant. It recites and declares that the consideration of such release was $6,000. It is not said or intimated that this was not the whole consideration. Indeed, to cut off any possible inference or contention to the contrary, the plaintiff expressly covenants therein that he thereby releases "said company from any further liability or care of me (himself) on account of said accident." It would be singular, (461) indeed, not to mention so unusual and important a part of the consideration as that which the plaintiff contends was omitted by mere mistake. In the nature of the matter, it was appropriate and orderly to specify the whole consideration. The language employed was appropriate and apt for that purpose, and in the absence of any provision or implication in the release to the contrary, it must be taken that it does. It, by its terms and effect, concludes the plaintiff, and he cannot be allowed to allege that there was other and further consideration for it than therein expressed. The parties made it written evidence of their settlement, and they must abide by it, unless, in some appropriate way and for sufficient cause, it shall be made to appear that it does not express truly the contract of settlement it purports to embody, and be evidence of, as expressed therein.

The plaintiff alleges that the release "was given on the understanding and agreement that the same was not to extend to, and did not extend to, the distinct contract of life employment aforesaid, and if of meaning in law to the contrary, it was so expressed unintentionally and by mistake." He does not allege mutual mistake of the parties to it, nor does he allege facts and circumstances that give rise to the presumption that its execution was induced by some undue influence, misapprehension, imposition, mental imbecility, surprise, confidence abused, or fraud of the defendant, or the like. He simply alleges that it was executed by mistake. It is clear that the mere mistake of one party to a contract will not entitle him to relief. He must allege and prove his mistake, and, in that connection, surprise, undue influence, misapprehension, imposition, fraud, or the like cause, which gave rise to and occasioned such mistake. *Crowder v. Langdon,* 38 N. C., 476; *Briant v. Corpening,* 62 N. C., 325; *Day v. Day,* 84 N. C., 408; *McMinn v. Patton,* 92 N. C., 371; *Sandlin v. Ward,* 94 N. C., 490; *Kornegay v. Everett,* 99 N. C., 34; *Moffitt v. Maness,* 102 N. C., 457; *Harding v. Long,* 103 N. C., 1; *Bean v. R. R.,* 107 N. C., 731; Smith's M. (462) Eq., 45.

The plaintiff insists that there is error in that the court declined to submit the evidence of mistake to the jury. We do not think so, because there was the simple allegation of mistake, and the absence of allegation that it was occasioned by surprise, misapprehension, fraud, or the like. The evidence of the plaintiff alone tended to prove no more than mistake—not facts that entitled him to have the release corrected if there had been sufficient allegations in the pleadings on his part. There was neither allegation nor evidence that could have entitled him to the relief demanded. The court was, therefore, warranted in its refusal to treat the evidence as sufficient, in any view of it, to go to the jury.

No error.

Cited: *Jeffries v. R. R.*, 127 N. C., 383; *Jones v. Warren,* 134 N. C., 394.

E. J. PIPKIN, GUARDIAN, v. J. A. GREEN, SHERIFF OF HARNETT COUNTY.

MOTION of appellee to dismiss.

E. C. Smith for appellee.
No counsel contra.

PER CURIAM: This case was tried at November Term, 1890. It should have stood for argument here at Spring Term, 1891. In August, 1891, the appellant agreed to take no advantage of appellee's delay till then to serve a countercase. But this did not release appellant from the duty of docketing case here at Fall Term, 1891. The case, however, was not docketed till February Term, 1892; nor is it printed. The motion to dismiss should be allowed. *In re Berry,* 107 N. C., 326; *Hinton v. Pritchard,* 108 N. C., 412; *Johnston v. Whitehead,* 109 N. C., 207.

Appeal dismissed.

Cited: *S. c.,* 112 N. C., 355.

(463)

*GEORGE L. PHIFER v. B. A. BERRY ET AL.

Creditors—Administration—Statute of Limitations—Assets.

When the creditors of an estate promptly reduced their claims to judgments against the administrator, who has still assets in his hands, and whose administration is still unsettled, the assets are held by him in trust for the creditors, and the statute of limitations does not run.

SPECIAL PROCEEDING, begun before the clerk by summons issued 19 November, 1890, by the next of kin and heirs at law of C. M. Avery against his personal representative, B. A. Berry, for an account and settlement of said estate, and to recover their share of the fund in his hands, which plaintiffs contended arose from the sale of lands of C. M. Avery by said administrator.

Upon the hearing before the clerk on 23 December, 1890, the said clerk ordered an account and referred the cause to W. S. Pearson as referee to take and state the same. On appeal of defendant from said order, the judge of the district affirmed the said order.

This case was referred to Pearson with direction to take and state the account after advertisement for creditors, who presented their claims. Plaintiffs filed replications, and pleaded the statutes of presumptions and limitations to said claims. It appeared that a portion of the fund in the hands of the administrator was proceeds of real estate. C. M. Avery died in 1864, and A. C. Avery was appointed his administrator in 1866. The present administrator *de bonis non* was appointed and qualified in 1870.

The following findings of the referee, with the other facts appearing, are sufficient for the proper understanding of this case:

(464) That the estate of C. M. Avery, after the sale of the real estate by defendant administrator and the collection of all debts due the estate, which, on the *prima facie* showing made by the administrator Berry, were presumed to be collectible, was, and to the present time continues to be, insolvent; that there are now outstanding claims against the estate of C. M. Avery reduced to judgments against the former and present personal representatives more than sufficient in amount to absorb the fund now in the hands of the administrator *de bonis non* or which would be in his hands were the contention of the plaintiffs conceded; that since 27 August, 1884, he was properly chargeable with $503.74 and interest thereon at 6 per cent, less cost of actual returns to the clerk since; that all of the judgments now unpaid and outstanding against the defendant administrator are of more than ten years standing on the docket of Burke Superior Court. The other facts

*AVERY, J., did not sit on the hearing of these appeals.

in the case appear from the judgments following, and from the opinion of the court:

"This cause coming on to be heard before me at chambers in May, 1891, on appeal from Superior Court, Burke County, and it appearing to the court that there is a fund in the hands of defendant administrator, claimed by the plaintiffs as heirs at law and distributees of C. M. Avery, deceased, and also claimed by the creditors of said estate; and it appearing that the claims of said creditors have been reduced to judgments for more than ten years before this action brought, and the greater portion, including a judgment *quando,* in favor of Harshaw's executors, have been reduced to judgment for more than twenty years before this action was commenced, and that more than ten years have passed since any payment or recognition has been made on these debts by the defendant administrator, or other person authorized or empowered to make any acknowledgment or payment thereon; and it further appearing that the plaintiffs have only pleaded the statutes of limitations and presumptions to said claim, it is considered and adjudged that the plaintiffs are entitled to plead said statutes to protect funds in hands of administrator, and that after suit com- (465) menced and decree to account had in the cause, the power of the executor or administrator to make the plea was no longer exclusive, and that the claims of said creditors to the fund is barred by said statutes of limitations and presumptions, and that plaintiffs are entitled to recover of the defendant administrator the amount in his hands, to be ascertained on final account.

"2. That said administrator is chargeable with the commissions allowed which were in excess of the statutory limit, and with interest thereon from the time said excess was allowed him.

"3. That the administrator is not chargeable with interest on the funds remaining in his hands, the account being unsettled and unknown, and it not appearing that defendant used the money, or realized any interest therefrom.

"4. That the costs be paid out of the fund.

"5. That payments made by the administrator on valid claims prior to the commencement of this action be allowed as valid vouchers to the administrator.

"6. That a reasonable counsel fee be allowed the attorney of the defendant Berry for advice and services, and same to be paid out of the fund.

"7. That the clerk of the Superior Court of Burke County shall enter up judgment in conformity to this decision, and make such further orders and decrees as may be in accordance with law and the course and practice of the court."

J. T. Perkins for plaintiff.
S. J. Ervin for defendant.

DEFENDANT'S APPEAL.

(466) SHEPHERD, J.: As this action is governed by the former law, and no good purpose is to be subserved by an elaborate discussion of the questions involved (all of which have been settled by previous decisions), we will simply announce the conclusion we have reached after a careful examination of the record. The creditors promptly reduced their claims to judgments against the personal representatives, and as the estate has never been settled (the last annual returns having been filed in 1890), we are of opinion that the assets in the hands of the administrator are held by him in trust for the said creditors, to be applied by him in satisfaction of their judgments, less the costs of administration, etc. The trust has never been closed, and the statute of limitations provided in the Code of Civil Procedure is inapplicable to this case. In this respect the judgment of his Honor is reversed; in all other respects it is affirmed.

PLAINTIFF'S APPEAL.

SHEPHERD, J.: The questions presented are disposed of by what we have said in the defendant's appeal.

Affirmed.

Cited: Edwards v. Lemmond, 136 N. C., 331; *Brown v. Wilson,* 174 N. C., 670.

MOSES WILLIAMS v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Excusable Neglect—Judgment, When Set Aside.

Upon the facts found by the court (which are set out in the report of the case), there was such excusable neglect as warranted the trial court in setting aside the judgment.

CLARK, J., dissenting.

(467) MOTION to set aside and vacate the judgment rendered at DUPLIN, August Term, 1891, before *Boykin, J.*

The court found the following facts: The summons was served 7 July on the station agent at Goldsboro, and by him duly forwarded to

the headquarters of the company at Atlanta, according to regulations; by the managing officer delivered to the general Southern counsel, and by them, on 18 July, 1891, all the papers were sent to David Schenck, the counsel of the North Carolina Division; that by mistake the papers were sent to Mr. Cothran, the counsel for the South Carolina Division, along with papers in two other cases. On 20 July, fifteen days before court met, Mr. Cothran sent the papers to Mr. Schenck, but by some mischance the papers were not received by Mr. Schenck until the night of 4 August; that these papers were sent by railway mail, a method of transmission of papers and letters through baggage-masters universally adopted by this and other railroads, and usually safe and reliable; that Mr. Schenck was sick when the papers were received, but on the next day sent the papers to F. H. Busbee, who was an attorney, resident in Raleigh, N. C., having charge of the business of the Richmond and Danville Railroad in Eastern North Carolina, including Duplin County; that Mr. Busbee had left Raleigh, by the advice of a physician, the day the papers were sent, 5 August, and did not receive them; that if he had been in Raleigh on 5 August, he could not have reached Duplin court by 6 August, at noon; that as soon as the fact of Mr. Busbee's absence was communicated to Mr. Schenck by wire, he telegraphed Mr. I. F. Dortch, local attorney of the company at Goldsboro, to repair to Duplin court, but the court had adjourned the same day the message was received.

Upon these facts, the court adjudged that the default was occasioned by unavoidable accident and ordered that the judgment by default be vacated, and that the defendant be allowed to file an (468) answer or demur.

Plaintiff appealed.

Upon the call of the case in the Supreme Court, counsel of the parties agreed as follows:

"It is agreed that the judge in the court below did not base his ruling, setting aside the judgment rendered at August Term, 1891, upon his discretion, and that upon the facts found he held as a matter of law that the defendant was entitled to have the judgment set aside; but this agreement is not to be construed as an admission by defendant that if the matter was wholly within the discretion of the judge, such discretion was not exercised in favor of defendant. It is also agreed that upon the hearing of said motion the defendant filed affidavits in which it was alleged that the defendant was not negligent, and that the plaintiff was guilty of contributory negligence."

W. R. Allen and W. J. Peele for plaintiff.

F. H. Busbee for defendant.

PER CURIAM: Taking all of the circumstances into consideration, we think that the ruling of his Honor was correct, and should be affirmed.

AVERY, J., concurring: The question upon which the correctness of the judgment rendered in this case hinges is not whether the agents of the defendant company exercised due diligence in transmitting the notice of the institution of the suit of its local attorney. It is conceded that if we apply the rule laid down in *Finlayson v. Accident Co.*, 109 N. C., 196, and which marks the extreme limit to which this Court has gone in defining negligence on the part of suitors, the defendant's agents were guilty of such laches that the company would not have been
(469) deemed excusable if Mr. Dortch had, in fact, received his notice to repair to Duplin court, too late. But if he had received notice of the pendency of the action within two days after the service of summons, or twenty-eight days before the term began, and had, nevertheless, remained at his office (in an adjoining county, from which he could reach Kenansville, where the court was being held, in a few hours) until Thursday of the first week of the term, and being ready to take the train of that afternoon, received information that the court had adjourned at 12 m., after rendering judgment by default against his client, the very same question would have confronted us that we are now called upon to decide.

The attorney had notice on Thursday, and would have been in attendance on the court if it had continued in session the whole day. The law permitted the plaintiff, if his complaint was prepared thirty days before the beginning of the term, to withhold it from the files of the court till the first Wednesday night of the term at midnight, or the last moment of the first three days. The practice for many years after the introduction of the new Code in 1868 was to allow the defendant till 12 o'clock of the last night of the term to answer; but the rule was first questioned in *Warren v. Harvey*, 92 N. C., 137, and since that time it has become the established practice to call the summons docket when the court is on the eve of adjournment, and enter judgment final or by default, according to the nature of the case, where the plaintiff has filed a complaint and there is no appearance for the defendant.

If counsel for defendant had gone to Kenansville on Wednesday, he could not have calculated on having an opportunity to examine the complaint till the hour when the court was opened, 9 o'clock or 10 o'clock a. m. on Thursday. So that he could not by extreme diligence have gained access to the record for more than two to three hours for the purpose of answering a complaint which the plaintiff had had thirty-three days, in this particular instance, to consider, and which, in
(470) any case, he would have been allowed thirteen days at least to

prepare. Had Mr. Dortch been present, therefore, it is altogether probable that he would have appealed to the court to give further time to present his defense, after due deliberation and examination of authorities, and it is almost certain that a judge would have granted the request unless it appeared to have been preferred merely for the purpose of delay. Had he refused a motion for further time to make a meritorious defense, his ruling would have been, to say the least of it, an extremely rigid exercise of the discretion with which he was clothed by the statute.

The judge, in passing upon the motion to set aside the judgment, did not maintain that no discretion was allowed him by law, nor did he (admitting that it was vested in him) refuse, to the prejudice of the mover, to exercise it. On the contrary, he said, in effect: "I have discretionary power to grant or refuse the motion, but out of abundant fairness to the plaintiff, I wish to give him the opportunity of appealing from a ruling on the question of law really involved in the legal exercise of the power by holding that, upon the facts found by me, the failure on the part of the company to have an attorney at the court before the adjournment on Thursday was excusable neglect." While the granting or refusing of the motion upon the facts found, nothing more appearing, would not have been reviewable, yet, if the judge really allowed it because he thought excusable neglect had been shown, he had a right, waiving his discretion, to rest his ruling upon the true ground and to let this Court determine, as it always may do, whether a legal reason was given for the exercise of an unquestioned discretion. In *Rex v. Peters,* 1 Burr., 270, *Lord Mansfield* said that discretion was "another word for arbitrary will," but declared that it was (as *Lork Coke* had said) *discernere per legem quid sit justum. Judges v. People,* 18 Wend., 99; *Platt v. Munroe,* 34 Barb., 293.

This Court has repeatedly held that where a judge was gov- (471) erned, in passing upon a matter entirely within his discretion, by an erroneous view of the law, the party injured by the mistake might, on appeal, have his judgment set aside. The appellate Court must determine, upon an admitted state of facts, whether there was excusable neglect on the part of a litigant in the conduct of an action, just as it must decide whether, according to an undisputed finding of facts, a party has shown such diligence as to save him from liability in an action brought to recover for negligence. The present Chief Justice, in *Foley v. Blank,* 92 N. C., 478, said: "This Court has authority to determine what constitutes mistake, inadvertence, surprise, or excusable neglect under The Code, sec. 274; but it has no authority to review or interfere with the discretion exercised by the judges of the Superior Court under that section." If the judge had granted or refused the

motion without assigning a reason for his action, it would have been final; but when he said, in effect, "I grant the motion because, in law, the facts found by me constitute excusable neglect or surprise," then the appellate Court is called upon to say whether he was misled by an erroneous view of the law in the exercise of his authority, and, if he was in error, to send the case back so that it may be acted upon again; but if his view of the law was correct, his judgment must be affirmed. In the case last cited, this Court held that when a judge "does not state the ground upon which he founded his order setting aside the judgment, . . . if, in any respect of the motion before him, his action can be upheld, it must be done," thus clearly contemplating the possibility that a judge might, at any time, state the grounds upon which he rested his ruling that a given state of facts constituted excusable negligence. In that case, looking at the most favorable aspect of the evidence, the court held that a judgment was properly set aside where the defendant filed his answer on Saturday of the second week of the term, after the judge had left on Friday before, without formally ad-
(472) journing the court. The facts before us constitute a much stronger case than was presented, by any view of the evidence, in *Foley v. Blank*.

A party who came into court on Thursday with an attorney ready to answer a complaint that the plaintiff was not required to file till 12 o'clock the previous night, exhibited such diligence as the circumstances required. It must be remembered that the effect of the decision of this Court is to strike out a judgment rendered under a technical rule, and allow the defendant to answer, so that the case may be tried hereafter by a jury upon its merits. If, therefore, the court has done more than justice to a corporation, an impartial jury of the country can be trusted, with the aid of a judge to apply the law to the facts and determine whether the plaintiff is entitled to recover at all, as well as fix the amount of damage, if any, that shall be awarded.

I am unable to perceive how a grievous wrong can be done to the plaintiff by leaving the merits of his cause to be reached by the ancient method of trial by a jury of the country. I think that where counsel is employed at all, and is ready to answer for a defendant, on the fourth day of the term, a complaint which the law has allowed a plaintiff thirty-three days to prepare, it is not inequitable to strike out a judgment by default entered within three hours after the defendant's attorney could reasonably expect, by the utmost diligence, to have an opportunity to examine the complaint and know how to prepare his defense. The law does not expect or require a defendant to know intuitively what the cause of action is, or how to answer immediately on reading the summons. I do not think that it was intended that a de-

fendant with his attorney should be required to leave other engagements and sit in a courtroom to await the pleasure of counsel on the other side, who will be held to have shown sufficient diligence if he arrives at the courthouse on the third night of the term. If it is equitable and lawful to allow this case, under all the circum- (473) stances, to be tried in the usual way, on its merits, it seems to me that the court may venture to do justice, though the relief is granted to a corporation. This Court can know judicially no more of the capacity of this particular corporation to employ counsel than it knows of the financial status of a citizen.

The right to relief against a judgment under a technical rule of practice must not be made to depend solely upon the movements of the sand in the hour-glass, or the uncertain progress of the judge in disposing of the docket, but upon sound principles of equity and justice. Where there is doubt as to the proper method of disposing of such an application, it is always safe, when it can be done without violating the law, to have an action tried upon its merits, rather than determined upon a technicality.

MERRIMON, C. J., concurring: This is a motion to set aside a judgment against the defendant through surprise and excusable neglect, in the Superior Court of Duplin County. It appears that the return term began on Monday, 3 August, 1891, and the court adjourned on Thursday next thereafter, it being the 6th. The plaintiff filed his complaint and obtained judgment by default and inquiry for want of an answer, before the court adjourned. The defendant intended to make defense, and took steps to that end, but its counsel failed to reach the court at the return term. He was instructed by telegram, on the day the court adjourned, to attend and appear for the defendant. Subsequently, in apt time, it moved to set the judgment aside for surprise and excusable neglect. The court heard the motion upon affidavits, found the facts, and that "the default was occasioned by unavoidable accident," and allowed the motion, upon the ground that the defendant, as a matter of law, was entitled to have the judgment set aside; it did not allow the motion in the exercise of its discretion. The (474) plaintiff excepted, and appealed to this Court.

The exercise of his discretion by a judge of the Superior Court in relieving a party from a judgment taken against him, "through his mistake, inadvertence, surprise, or excusable neglect," is not reviewable in this Court. The statute (The Code, sec. 274) expressly invests the judge with discretionary power in such respects. But when he allows a motion to set aside a judgment upon a state of facts found by him that in no legal view of them constitute "mistake, inadvertence, sur-

prise, or excusable neglect," or when he refuses to allow such motion upon the ground that the facts do not constitute such cause, this Court may review the question of law as to whether the facts, in some view of them, do or do not constitute such cause, and leave the judge to exercise his discretion as allowed by the statute. If it appears in this Court that such cause existed, and the judge, in the exercise of his discretion, allowed the motion to set the judgment aside, the order, in that respect, will be affirmed. If, however, it appears that, in no view of the facts, such cause existed, and he allowed the motion, the order allowing the same will be reversed. If he finds the facts, and allows such motion simply because such cause does or does not exist as a matter of law, and not in the exercise of his discretion, the order will be set aside, and he will be directed to allow or disallow the motion, in his discretion. The statute intends that the judge, seeing all the facts and circumstances pertinent, and considering the merits of the motion, shall allow or disallow it in the just exercise of his discretion. He is better qualified to determine its merits than this Court, and, besides, such motions should be disposed of promptly. *Branch v. Walker,* 92 N. C., 87; *Foley v. Blank,* 92 N. C., 476; *Taylor v. Pope,* 106 N. C., 267; *Skinner v. Terry,* 107 N. C., 103; *Albertson v. Terry,* 108 N. C., 75; *Finlayson v. Accident Assn.,* 109 N. C., 196.

(475) In case of appeal in cases like this, the judge should always decide that there was or was not "mistake, inadvertence, surprise, or excusable neglect," so that this Court might review his decision in that respect. It would be error if he declined to do so. The complaining party has the right to have that question decided, and afterwards reviewed here.

In this case the findings of fact are not so full as they should be to enable us to decide that there was surprise or excusable neglect. It seems there was surprise. The plaintiff had the first three days of the term to file his complaint, and the defendant might have filed its answer at any time during the term, as it appears it intended to do; but the court adjourned on Thursday of the week, the day, it seems, the counsel of the defendant intended to attend and appear for it. He may have been surprised by the adjournment of the court at so early a day of the week. Granting, for the present purpose, that there was "surprise or excusable neglect," the judge decided, as a matter of law, that the defendant was entitled to have the judgment set aside, and he did not exercise his discretion at all, as he should have done. If he had done so, it may be that he would have declined to allow the motion; he might have been of opinion that the motion was unimportant, and that it would not promote the ends of justice to allow it; he might have thought otherwise; but in any case, he should have allowed or dis-

allowed the motion in his discretion, and not upon the simple ground that the defendant had the legal right to have it allowed.

CLARK, J., dissenting: This was a motion to set aside a judgment for excusable neglect. An agreement of counsel is filed, and thereby made a part of the case on appeal, which recites that the judge did not base his ruling upon his discretion, but held, as a matter of law upon the facts found, that the defendant was entitled to have the judgment set aside. From the facts found, it appears that the summons was served on the defendant at Goldsboro on 7 July, returnable (476) to Duplin court, which began 3 August; that on Tuesday, 4 August, the complaint was filed; that the court adjourned in the afternoon of Thursday, 6 August; that no answer having been filed, a judgment by default and inquiry was entered; that the defendant did not select a counsel to represent it at such court till that very day, and then chose one fifty miles away, instead of some lawyer in the county or at the court, who, if selected, even at that late day, could have been reached and instructed by telegraph. It is hard to see how it could be held, as a matter of law, that this entitled defendant to have the judgment set aside.

The law requies the summons to be served ten days before court, to give the party time to employ counsel and instruct him as to his defense. This defendant was served twenty-six days before court met, and thirty days before the judgment was taken. If its agents were negligent in securing counsel, that has been always held by this Court to be the negligence of the defendant. *Finlayson v. Accident Assn.*, 109 N. C., 196, and cases there cited. It appears in "the facts found" that the agent on whom the summons was served at Goldsboro on 7 July sent it to another agent (as required by defendant's "regulations" in such cases) at Atlanta, Georgia; that the head agent there delivered it to another general agent in that place, who, after a delay (not attempted to be accounted for) of ten days, sent it on 18 July to another representative of the defendant at Greensboro, who, by mistake (whether excusable or not is not explained), sent the papers—it does not appear that there was anything more than the simple summons—to another general agent in South Carolina; that by this latter, on 20 July, the papers were sent back to the company's representative at Greensboro, but by "some mischance" (as to which general expression no facts are found) they were not delivered till 4 August, though (477) it is found that the transmission was not by United States mail, but by the hands of another agent of the defendant. It is stated that, being sick that day, the representative of the company on the next day, 5 August, sent the papers to another general representa-

tive living in Raleigh. It does not appear whether the latter was to act as counsel, or was another supervising agent to select counsel; but however that may be, he was not in Raleigh, and the telegraph being then first resorted to by still another agent, the general representative at Greensboro is advised of such fact. And then, some time on Thursday, 6 August, after the adjournment of court (for it is found as a fact "the court *had* adjourned the same day"), counsel for the first time is asked to appear, and he is not at the county-seat where the case is pending, but 50 miles away. During the thirty days which had elapsed since service of process, the matter had been in the hands of nine different agents of the defendant that we know of, and at last the counsel selected was the regular counsel of the defendant in the same town of Goldsboro in which the summons had been served a month before. That some of these general agents were gentlemen of high distinction and lawyers of eminent ability did not, in my judgment, justify the court below in holding, "as a matter of law," that neither they nor any of the other numerous agents had not been guilty of inexcusable negligence.

The simple summons, giving notice that the defendant should appear and answer the complaint of the plaintiff, which would be filed on the first three days of Duplin Superior Court, which would begin on 3 August, and in default thereof that this very judgment, by default, would be taken, had been served in Goldsboro, had been sent "by regulations" of the defendant from one of its agents to another through three states, from point to point, from office to office, with no legal explanation of a single day's delay, and we are asked to say, as a matter (478) of law, that such negligence was excusable. That some of these agents were counsel (if the negligence was indeed theirs, and not that of some other of the agents who had the handling of this document) does not alter the fact that the negligence of a lawyer, who is not to appear in the cause himself, but is to employ other counsel, is the negligence of an agent *pro hac vice,* and that his neglect is the neglect of the defendant. The Court so held at last term in *Finlayson v. Accident Assn.,* 109 N. C., 196, and that case cites several precedents in this Court to the same effect. The ten days delay of the summons in Atlanta, Georgia, from 8 July to 18, is *prima facie* neglect, and no facts are found to excuse it. If the other twenty days are accounted for, there would still be inexcusable neglect. That the defendant's agent in South Carolina chose to send the papers by another agent of the company to its general representative in Greensboro, on 20 July, and that they were not received there till 4 August, "by some mischance," is *prima facie* negligence, at least of the intermediary agent, and being unaccounted for, and no inquiry made for the missing paper, it is diffi-

cult to see how, as a matter of law, it can be held that the defendant was not liable for such neglect of its agent. *Churchill v. Ins. Co.*, 92 N. C., 485; *Boing v. R. R.*, 88 N. C., 62. Again, when the papers were received by the defendant's representative at Greensboro on 4 August, he knew from the face of the summons itself that Duplin court had then been in session two days. He wrote a letter to the representative in Raleigh, who, being a prominent lawyer in large practice, could not be expected to be always at home. Use of the telegraph instead of the mail would have brought that information, and a telegram to the counsel finally employed at Goldsboro could have been sent Wednesday morning in full time for counsel to have attended, if, indeed, the court being in session, the telegram, in view of previous delays, should not have been sent direct, on Wednesday, to some counsel in Duplin.
Such counsel could have been instructed by telegraph as to the (479) answer, or the defendant could, at least, have shown diligence by laying the facts before the court and applying for time. The failure, under the circumstances, to use the telegraph was inexcusable neglect. *Bradford v. Coit*, 77 N. C., 72; *Finlayson v. Accident Assn., supra.* The court was a one week's term. The complaint was filed on Tuesday. The answer certainly could have been filed before adjournment on Thursday, which was no "surprise," and not unusual in practice. To hold such adjournment to be "legal surprise" would render judgments by default invalid in all cases except where the court has business to occupy it the full term. There can be no pretense that there was not ample time in which to file the answer, as could legally have been done at any moment of the forty-eight hours which elapsed between the filing of the complaint and the judgment of court, in the regular course of business, on Thursday afternoon. The true reason why the answer was not filed is not this at all, but because the defendant had no attorney, and did not secure one till that day, and after the adjournment of the court, and he many miles away from the place where the court was being held. It was the duty of the defendant to take notice of summons and process served upon it, and when its failure to do so was caused by the negligence of its agents, it became liable to a judgment by default, like anyone else. The plaintiff, it is true, was entitled to three days to file his complaint. This was a privilege. He was not compelled to wait that long. When he filed his complaint on Tuesday, the defendant, having been put in court by service of summons, was fixed with notice. It then became its duty to file its answer before court adjourned. There were forty-eight hours in which to do so between the time the complaint was filed and the adjournment of the court. It is not found, or even suggested, that the defendant could not then have filed its answer before the adjournment, as doubtless all other litigants

at that term did. But if it could not, it was inexcusable neglect
(480) that the defendant did not have counsel there to apply to the court for an extension of time, which the court had the discretion to grant, and doubtless would have granted in a proper case. Had the defendant been a citizen of Duplin, and waited thirty days after service of process, and two days after complaint filed, and not employed counsel till the day court adjourned, and after its adjournment, and then employed one not attending the court, but 50 miles away, would not this have been inexcusable neglect, and does not the same rule apply to the defendant here? The fact of its being a nonresident of the county could make no difference after summons actually served.

Amid all this commotion, and marching and counter-marching of this mere copy of a summons, there is danger of forgetting that there is a plaintiff who, ordinarily, would have the legal right to a judgment by default, if the defendant paid no attention to the action after having been served with summons ten days before court. That the defendant chooses to do its business in this way is a matter of which no one can complain. If it wishes to enjoy the luxury of a "circumlocution office," it has a right to do so. But when it seeks to have it held "as a matter of law" that the use of such methods is excusable neglect, and that the plaintiff must yield his rights, and the courts conform their procedure to the defendant's peculiar method of taking thirty days to get notice of the summons, served on the defendant in Goldsboro, to its counsel living in Goldsboro, neither reason nor precedent can be found to support the position. The delay of thirty days to procure counsel after service of summons is inexcusable neglect. It was the neglect of some agent or agents of the defendant. It is not so difficult to find a lawyer to represent any defendant that more than thirty days was required here, when the law allows only ten days for that purpose to other defendants.
(481) The neglect of the defendant's agents was its neglect. It is immaterial which one of the agents was responsible for it. Their aggregate neglect was at the door of the defendant. It had the selection of its own agents. If the fault, as is probable, was in the peculiar "regulations" of the defendant, it is the negligence of the corporation that it has such. It cannot ask that, therefore, the Court should construe the law differently as to it from the rulings heretofore made in numerous cases. The Court say, in *Sluder v. Rollins,* 76 N. C., 271, that "The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business," and that a failure to do so is inexcusable neglect. *Kerchner v. Baker,* 82 N. C., 169. *Sluder v. Rollins* has been cited and approved, also, in *Hodgin v. Matthews,* 81 N. C., 289; *Cobb v. O'Hagan, ibid.,* 293; *University v. Las-*

siter, 83 N. C., 38; *Henry v. Clayton,* 85 N. C., 371; *Depriest v. Patterson, ibid.,* 376; *Chuchill v. Ins. Co.,* 88 N. C., 305; *Roberts v. Allman,* 106 N. C., 391. The attention given this case by the agents of the defendant was not such as "a prudent man would give his important business." That the neglect here was that of agents gives the defendant no greater privilege than an individual, as a corporation must necessarily act through agents, and their neglect is the neglect of the corporation. In no aspect is this case as strong for the defendant as in *Churchill v. Ins. Co.,* 92 N. C., 485 (which is more nearly like it than any other), where the Court say the facts were not sufficient legal excuse which should be allowed to deprive the plaintiff of his legal rights in the premises. If this state of facts constitutes excusable neglect, it would be difficult to conceive any possible combination of circumstances under which this defendant could be guilty of inexcusable neglect, unless it be that the "regulations" of the defendant might possibly have required this copy of a summons to be submitted to the scrutiny and gaze of a still greater number of its representatives (482) in a greater number of cities and states.

It would seem that amid the "numerous and multitudinous" handlings of this summons for thirty days by so many agents, the defendant should be fixed with notice of its contents, and of the place and time where and when it should appear, and of the notice therein that if it did not, this judgment would be entered, and that it was inexcusable that it did not pay enough regard to it to employ counsel. I cannot concur in the ruling below, that the whole thing was in law "an unavoidable accident."

The defendant's contention that the case should be tried by a jury, and not upon a technicality, if logical, would, by a judicial construction, abolish all judgments by default (if such judgments can be called a technicality). The statute gives the plaintiff a legal right to have such judgment when the defendant neglects in apt time to put in his defense. If such judgments can always be struck out as of right, defendants could always obtain delay by showing a contemptuous disregard of the process of the court, or neglecting to answer the complaint till it suited their convenience. In truth, in law and in reason, a judgment by default is as valid as any other, and can only be set aside when the failure to answer in apt time was not caused by the negligence of the defendant or its agents. The rule that where the negligence is that of counsel the defendant can have the judgment set aside is a matter of grace, and has never been extended beyond the negligence of the counsel actually appearing in the cause, and not even that far unless the defendant was diligent, and himself without laches. *Bradford v. Coit,* 77 N. C., 72; *Roberts v. Allman,* 106 N. C., 391. It is true, if defendant had employed counsel in time, he *might* have been negligent in putting in the

answer in time, and the defendant usually would be excused; but it is a *non sequitur* that therefore the defendant's negligence in not employing counsel in time is excusable.

(483) Whether the facts found constitute excusable or inexcusable neglect is subject to review. Our decisions are uniform that, if there is excusable neglect, the court, in its discretion, may grant, or not, the motion to set aside the judgment. But if the neglect is inexcusable, it cannot set it aside. I think the court below erred—(1) in not holding the neglect inexcusable; (2) if it had been excusable neglect, in holding that, as "a matter of law," the judgment should be set aside. It would, in that case, have been matter of discretion.

Upon the findings, in any aspect of them, the defendant is not entitled to have the default set aside, for it is not found that it has a meritorious defense. *Bank v. Foote,* 77 N. C., 131. It is not entitled to have the case sent back to have an express finding on that fact. Not having been found, it is to be deemed not to exist.

It is said by *Ashe, J.,* in *Churchill v. Ins. Co.,* 88 N. C., 205: "A party seeking to vacate a judgment under section 133 (now 274) of The Code is always at default, and the *onus* is upon him to show facts which would make the refusal to vacate an abuse of discretion. *Kerchner v. Baker,* 82 N. C., 169."

I think the ruling below should be reversed, and the case sent back; that the plaintiff should execute his inquiry before a jury at the next term, according to the regular procedure of the courts.

PER CURIAM. Affirmed.

Overruled: Manning v. R. R., 122 N. C., 831; *Ham v. Person,* 173 N. C., 74.

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(484)

THE STATE v. WILLIAM NORMAN.

Amendment—Constitution—Statute—False Pretenses.

1. The power conferred upon the Superior Courts by The Code, sec. 908, to amend any process, pleading, or proceeding begun before a justice of the peace, is unrestricted, save only that the effect of the amendment must not change the nature of the offense originally intended to be charged. It is not necessary that the amendment should have the concurrence of the justice of the peace who heard the cause, nor that the amended charge should be resworn.

2. Laws 1889, ch. 444, making it an indictable offense to procure advances "with intent to cheat and defraud" by false promises to begin work, is not unconstitutional. The gist of the offense is not the obtaining the

advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances and making the promise.

3. Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday: *Held*, to be a failure to begin work within the meaning of the statute.

INDICTMENT, tried before *Brown, J.*, at Fall Term, 1891, of BEAUFORT.

The defendant is charged with violating chapter 444, Laws 1889, amended by chapter 106, Laws 1891, which, as amended, provides: "If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will commence or begin any work or labor of any description for said person or corporation from whom said advances are obtained, and said person so making said promise or agreement shall unlawfully and willfully fail to commence and complete said work according to contract without a lawful excuse, the person so offending shall be guilty of a misdemeanor, and punished by a fine not exceeding $50, or imprisonment not exceeding thirty days." (485)

The affidavit and warrant were as follows:

J. R. Beasley, being duly sworn, etc., says that at and in said county, and in Bath Township, on or about 24 October, 1891, William Norman did unlawfully and willfully obtain advances from me by false pretence for the amount of $2.09, by promising me to settle the same, and failed to comply, against the form of the statute in such cases made and provided, and contrary to law and against the peace and dignity of the State.

J. R. BEASLEY.

To any Constable or other lawful officer of Beaufort County—

GREETING:

You are forthwith commanded to arrest William Norman, and him safely keep, so that you have him before me at my office in Bath, or some other magistrate in said county, immediately, to answer the complaint and be dealt with as the law directs.

Given under my hand and seal, this 26 October, 1891.

J. S. MARSH, *J. P.*

The defendant was convicted before the justice of the peace and fined $3, and appealed to the Superior Court. In that court leave was granted to amend the warrant. This was executed by amending the

affidavit, so that it reads as follows, the additional words being in italics:

"J. R. Beasley, being duly sworn, complains and says that at and in said county, and in Bath Township, on or about 24 October, 1891, William Norman did unlawfully and willfully obtain advances from me by false pretense to the amount of $2.09—*meat, flour, money*—by promising me to work to settle the same, and failed to comply. *The*
(486) *defendant William Norman on 24 October, in Beaufort County, unlawfully, with intent to cheat and defraud J. R. Beasley, did obtain from said Beasley $1 in money, one pound of flour and other advances, upon and by color of his promise then and there made to said Beasley that the said Norman would begin work for the said Beasley to pay for said advances; and then and there unlawfully and willfully did fail to begin and complete said labor, according to said contract, without lawful excuse, contrary to the statute*—against the form of the statute in such cases made and provided, and contrary to law and against the peace and dignity of the State." (Signed J. R. Beasley.) Warrant as above.

The defendant excepted because the justice of the peace was not present, and because the prosecutor did not swear to the warrant after it was amended.

The prayer for instruction (which was refused) and the charge of the court are stated in the opinion. Verdict of guilty. Defendant moved in arrest of judgment on the ground that the statute for the violation of which the warrant was issued was unconstitutional and void, as being in violation of Article I, sec. 16, of the Constitution, forbidding imprisonment for debt. Motion denied. Exception by the defendant. Judgment. Appeal.

Attorney-General and J. H. Small for the State.
Charles F. Warren for defendant.

CLARK, J., after stating the case: The Code, sec. 908, provides that in any proceeding begun before a justice of the peace, whether in a civil or a criminal action, the court in which such action shall be pending "shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance," and either before or after judgment. It is held that the section confers "unrestricted power of amendment" in such cases, provided the amendment does not change the nature of the offense intended to be charged. *S. v.*
(487) *Vaughan,* 91 N. C., 532. "Any amendment may be made that perfects the charge of the offense, whether such amendment affects the form or the substance," provided it does not "charge an entirely different offense in substance from that at first intended." *S. v.*

Crook, 91 N. C., 536; *S. v. Smith,* 103 N. C., 410; *S. v. Baker,* 106 N. C., 758. The warrant may refer to the affidavit, which thereby becomes a part of it, and the court can amend either affidavit or warrant, or both. *S. v. Sykes,* 104 N. C., 695; *S. v. Winslow,* 95 N. C., 649. The charge in the present case, as set out in the affidavit and warrant before the justice, was, of course, defective. Had it not been, there would have been no need of amendment. But the amendment did not change the offense intended to be charged. It merely perfected and made the charge more correctly and specifically, and was within the power of the court. The defendant contends, however, that it was improvidently allowed in this case, because the justice was not present, and the affidavit was not sworn to after the amendment. This is a misconception of the object of the act. The amendment is not for the purpose of perfecting the process to secure the arrest of the defendant. That has been already done. There is no need, after amendmnt, that the affidavit be resworn, or that the warrant be again served, nor can there be any necessity that the justice be present. The amendment rests in the discretion of the court, and does not require the concurrence or consent of the justice. The amendment is to perfect and make more regular the same charge which had, theretofore, been insufficiently or defectively made before the justice of the peace. Essential words, such as "unlawfully," "willfully," and others, without which the warrant treated as an indictment on the trial in the Superior Court would be fatally defective, can be supplied by amendment even after verdict. *S. v. Crook,* and other cases cited above. This differs from an amendment of an affidavit in attachment, which should be again sworn to after amendment. *Bank v. Frankford,* 61 N. C., 199. Here (488) the court has jurisdiction by the arrest of the defendant who is before it, and the amendment of the affidavit is only because it is made a part of the warrant by being referred to therein, and the amendment is really of the warrant.

The defendant asked the court to charge, "If the jury should believe, from the evidence, that the defendant agreed to begin work on the following Monday for Beasley, and to pay him for advances by picking cotton during the week, but was arrested by Beasley on Tuesday, then he was not guilty." This was properly refused. Having failed to begin work according to contract, the defendant had necessarily failed "to begin and complete the work" as agreed. The criminal offense is not the promise to pay for the advances in work and the failure to do so. That would be a mere breach of contract, and could not subject the party to liability to imprisonment. The offense charged is that the defendant, with intent to cheat and defraud, "obtained the advances upon an agreement to begin work to pay for the same on Monday," and "un-

lawfully and willfully failed to commence and complete said work according to contract, without a lawful excuse." If the defendant, *with such fraudulent intent,* procured the advances on the promise to begin work on Monday, and unlawfully and willfully failed to begin on that day, without lawful excuse, the offense was complete. The charge of the court, which was very clearly and correctly expressed, was as follows: "In order to convict, the State must show to the full satisfaction of the jury something more than obtaining the advances, a promise to work to pay for the same, and a breach of that promise. Nothing else being shown, these facts would constitute only a breach of contract, and for this the defendant could not be prosecuted criminally. The jury must be fully satisfied of an element of fraud in this transaction. If the jury believe, from the evidence, that the defendant obtained
(489) these advances and promised to commence work on Monday morning to pay therefor, and at the time he obtained the advances and made the promise, intended to keep his word and commence work, and afterwards, being attracted by higher wages, or for other cause, failed to do so, he would not be guilty. But if the jury are fully satisfied that at the time he obtained the advances and made the promise (if he did make it) the defendant did not intend to commence work, but used the promise as an artifice or fraud for the sole purpose of obtaining the advancements, then he would be guilty. The jury must be satisfied that the defendant's object and purpose was to cheat and defraud."

In view of this charge, and what we have already said, it is not necessary to discuss the motion made in arrest of judgment, on the ground that the act creating the offense was in violation of section 16, Article I of the Constitution of North Carolina. That section provides, "There shall be no imprisonment for debt in this State, *except in cases of fraud.*" The offense denounced by this statute is not the failure to comply with the contract, but the fraud in making it to obtain advances *"with intent to cheat and defraud."* Ordinarily it might be somewhat difficult to show such intent, in the absence of admissions of the defendant. Certainly evidence merely of the agreement to wrok, the obtaining advances thereon, and the failure to comply, would not warrant or support a verdict. But here there is no exception that the evidence was not sufficient to go to the jury, and, indeed, for that reason probably the entire evidence is not sent up.

No error.

Cited: Sheldon v. Kivett, ante, 410; *S. v. Davis,* 111 N. C., 732; *Cox v. Grisham,* 113 N. C., 280; *Starke v. Cotton,* 115 N. C., 84; *McPhail v. Johnson, ib.,* 302; *S. v. Wernwag,* 116 N. C., 1063; *S. v. Williams,* 150 N. C., 803; *S. v. Griffin,* 154 N. C., 612.

(490)

THE STATE v. S. W. LATHAM.

Justice of the Peace—Statute, Construction of.

A justice of the peace is not guilty of a violation of the statute (The Code, sec. 906) by failing to make report to the clerk of the Superior Court when there have been no criminal cases disposed of by him within the time therein prescribed.

INDICTMENT for violation of section 906 of The Code, tried at February Term, 1891, of CRAVEN, *Bryan, J.*

The indictment charges that the defendant, being a justice of the peace, did, "on certain days in the years 1890 and 1891, try and formally dispose of certain criminal actions, and that he did willfully and unlawfully fail to furnish the clerk of the Superior Court at February Term, 1891, with a list containing the names of all parties tried in all criminal actions finally disposed of by him," etc.

The special verdict finds that the defendant failed to return such a list, but that such failure was attributable to the fact that "the defendant had no criminal proceedings of any kind before him, and no criminal cases of any kind were tried or to be tried and finally disposed of before him as a justice of the peace" during the period set forth in the indictment. It was also found that the defendant "had no papers in any criminal case or proceeding tried or to be tried before him between said terms to return to the Superior Court clerk."

Upon this finding, the court was of opinion that the defendant was not guilty, and the verdict was entered accordingly, and the solicitor appealed.

Attorney-General for the State.
No counsel for defendant.

SHEPHERD, J.: We are of the opinion that his Honor was clearly right in holding that the defendant was not guilty. The Code, sec. 906, under which the indictment was drawn, does not provide that a justice of the peace shall make a report stating that he has had no such (491) final proceedings before him. If such had been the purpose of the Legislature, it would undoubtedly have said so. The statute only requires a return of such final criminal proceedings as may have been tried and disposed of. If no such proceedings have been had, how can the justice furnish the clerk "with a list of the names and offenses" of the parties tried before him?

We cannot stretch the plain letter of the law so as to make the failure to do an impossible thing an indictable offense.

Affirmed.

THE STATE v. JACK JORDAN AND DRED FRANCIS.

Rape—Indictment—Evidence—Witness.

1. Two or more persons may be guilty of the single crime of rape, and be jointly indicted therefor.
2. Upon the trial of an indictment for rape, the prosecutrix swore that one of the defendants held her while the other perpetrated the crime, and neither she nor her husband (who was present) assented to the act; the defendants admitted the carnal intercourse, but testified that it was with prosecutrix's consent, and, to break down her testimony, proposed to show by her examination on the preliminary hearing before a justice of the peace—which had been reduced to writing by the magistrate, but had not been signed—that she had then stated her husband told her to allow defendant to have intercourse with her; the justice of the peace did not remember what she had sworn in that respect, nor could he refresh his memory by reference to the paper; but testified that the document was a correct statement of what she swore: *Held*, (1) that the proposed evidence was relevant and pertinent, although the witness had not been given opportunity to admit or deny the statement; (2) that the paper, while not competent as substantive evidence, was competent for the purpose offered.

(492) INDICTMENT for rape, tried at January Term, 1892, of NORTHAMPTON, *Winston J.*

The prisoners are charged in the first count of the indictment with a rape committed upon the prosecutrix; and, in a second count, one of them is charged with being present, aiding and abetting the other to perpetrate the offense.

Upon the plea of not guilty, there was a verdict of guilty, and a motion in arrest of judgment upon the ground that the indictment charged that the prisoners jointly committed the offense. The court overruled the motion, and the prisoners excepted.

The prosecutrix was examined as a witness before the committing magistrate, and the latter reduced her evidence to writing, as she gave it. She was afterwards examined as a witness on the trial in the Superior Court. In order to contradict and discredit her the defendants proposed to ask the witness (the committing magistrate) if he did not hear the prosecutrix say, at the trial before him, in answer to a question asked her by the defendant Joe Jordan, that her husband told her to let him, the said Joe Jordan, have intercourse with her while he had hold of her. The witness testified that the proceedings were in his handwriting, and he was certain that what was there written was a true statement of what occurred before him at the trial. After objection to the evidence by the State, he was cautioned by the court that he might refresh his memory from the papers, and then testify from his memory, but that

he could not simply read the papers. The witness said, while he was certain as to the truth of what was in the papers, which he had written at the time of the trial, he could not remember what the prosecutrix said, except from the papers in his hands. The court told him he could not read from the papers. The defendants thereupon proposed to offer the paper in evidence to show what the prosecutrix did say, (493) in order to contradict and discredit her. This was excluded by the court. The defendant excepted. The evidence was not signed.

The other material facts are stated in the opinion.

From the judgment of death, the prisoners appealed.

Attorney-General for the State.
T. W. Mason for defendants.

MERRIMON, C. J.: The indictment is sufficient, and the court properly denied the motion in arrest of judgment. Two or more men may commit the single crime of rape by being present, aiding and abetting the actual ravisher in the perpetration of the offense. At the common law, all such offenders are equally principals and alike participate in the crime and guilt. They may, therefore, all be indicted together in the same manner as the one who directly does the injury. The statute of this State in respect to rape does not change or modify the common law as to persons present, aiding and abetting in the perpetration of that crime. Hale Pl. Cr., 269; 1 Bish. Cr. L., sec. 1090; *Rex v. Folks,* 1 Moody Cr. Cases, 354. The second count is unnecessary, and is no more than redundant matter. The evidence for the prosecution went to prove that both the prisoners actually ravished the prosecutrix, and that there were two distinct rapes—one by each of them—committed upon her; but it also went to prove that each of the prisoners was present aiding and abetting the other in the perpetration of the offense actually committed by him. There was evidence to prove that they were each guilty of both offenses. But this state of evidence did not affect the sufficiency of the indictment. The latter was sufficient, and there was evidence from which the jury might render a verdict of guilty upon it.

The assignment of error as to the exclusion of the evidence of the committing magistrate must be sustained. On the trial, the prosecutrix, testifying as a witness for the State, among other things, (494) said: "Then Jack held her husband while Dred raped her; that it was done violently, with force and intimidation, neither she nor her husband assenting thereto, and she had been sick ever since."

Each of the prisoners were examined as a witness for the defense, and admitted that he had had carnal knowledge of the prosecutrix at the time and place alleged, and "testified that she consented to sexual intercourse."

The prosecutrix had been examined as a witness before the committing magistrate. On the trial, the prisoners proposed to contradict and impeach her by showing that she testified before the magistrate on the preliminary examination "that her husband told her to let him, the said Jack (one of the prisoners), have intercourse with her while he had hold of her." That such was the purpose of the examination of the magistrate, and the introduction of the written evidence of the prosecutrix taken by him, sufficiently appears from the evidence of the prosecutrix above recited, the testimony of the prisoner just recited, and the questions put to the magistrate. It appears, from strong implication and inference, that the purpose was to contradict the prosecuting witness in the respect just mentioned.

The magistrate testified clearly that the written statement of the evidence of the prosecutrix, taken by him on the preliminary examination of the prisoners, was correct and true. It must be assumed that it would tend to show what the prisoners proposed to prove by it. Then, was that written statement competent evidence? We think it was competent for the purpose of showing, in some measure, that the prosecutrix had given, under oath, a different account of material facts connected with the rape charged, in her examination before the committing magistrate, from what she testified to on the trial, and thus to discredit her. The magistrate said he could not state on the strength of his recollection what she testified to before him, but he said that he took
(495) her evidence down in writing, and he took it truly; that the written evidence before him was taken by him, and contained a correct and true statement of what she said. It is clear he might, if he could, have testified as to what she said before him. Then, if he could so testify, why was the written evidence, taken and identified by him as true, not competent? His memory in the lapse of time and from other causes might fail, but the true written statement could not change; it spoke the truth when it was offered in evidence as certainly as it did the day it was written. If it was taken truly, it was safer, stronger, more reliable than the unaided memory of any witness. It has been held by this Court, after much reflection, in *S. v. Pierce,* 91 N. C., 606, and *Bryan v. Moring,* 94 N. C., 687, that the evidence of a witness reduced to writing and properly identified as correct and true is competent when pertinent and relevant on the trial of actions. Those cases were well considered, and we see no reason to modify them in the respect

pertinent here. On the contrary, we again approve them. See, also, *Davenport v. McKee,* 94 N. C., 325.

It is to be observed that the purpose of the evidence excluded is not to contradict the prosecuting witness as to something merely collateral, but to show that she gave contradictory accounts of the very matter in question. It was not, therefore, necessary to ask the witness what she said on the preliminary examination before offering evidence of her contradictory statements. *Jones v. Jones,* 80 N. C., 246; *S. v. Garland,* 95 N. C., 671; *S. v. McQueen,* 46 N. C., 177.

It is further to be observed that the written statement of the evidence of the prosecutrix was not offered as substantive evidence, as allowed in appropriate cases by the statute (The Code, sec. 1157). It was not sufficient for that purpose, because, as appears, it had not been taken in conformity with the statute. That it was not signed by the witness did not render it incompetent when offered as evidence in the present case. *S. v. Pierce, supra; Bryan v. Moring, supra.* (496)

The contradictory evidence was relevant and competent. The prisoners testified that the prosecutrix assented to their sexual intercourse with her. In view of their contention, if the husband, who was present at the time of the perpetration of the alleged rape, told the prosecutrix to have such intercourse with the prisoner Jordan, this would be some evidence of what was said and done, and it might have had some weight with the jury. But the contradictory statement was not offered to prove that the husband did so instruct his wife, but to discredit the wife as a witness by showing that she made the statement under oath at one time in one way, and a statement on the trial under oath just the reverse, as to what was said by her husband at the scene of the rape. The purpose was to satisfy the jury that she was unworthy of credit.

It is not sufficient to say that the evidence was unimportant. It was evidence the prisoners were entitled to have submitted to the jury, and it was their province to determine its weight in connection with other evidence before them. It is our province and our solemn duty to determine and apply the law.

The prisoners are entitled to a

New trial.

Cited: Bank v. Deposit Co., 128 N. C., 370; *Trust Co. v. Benbow,* 135 N. C., 308; *S. v. McKenzie,* 166 N. C., 294.

(497)

THE STATE v. JOSEPH H. SHIELDS.

Assault—Indictment—Deadly Weapon.

1. The description, in an indictment, of the instrument with which an assault was made, as "an axe," *ex vi termini* imports a deadly weapon.

2. One who by conduct calculated to produce a breach of the peace provokes an assault cannot protect himself from responsibility therefor upon the ground that he fought in self-defense.

CRIMINAL ACTION, tried before *Winston, J.*, at November Term, 1891, of ORANGE. The facts appear in the opinion.

Attorney-General and J. B. Batchelor for the State.
J. S. Manning for defendant.

DAVIS, J.: The defendant was charged with an assault and battery on one Samuel P. Carden, with a deadly weapon, to wit, an axe. The defendant and prosecutor were at the house of Frank Carden, a brother of the prosecutor. It was in evidence that Sam Carden was in the yard sharpening an axe, when the defendant asked Frank Carden's wife for a gun, which she refused to let him have, her husband being absent; whereupon the defendant used opprobrious and insulting language to her, calculated to provoke a breach of the peace, and went into the house to get the gun, after being forbidden; that afterwards he went to the prosecutor and seized the axe in his hands, and in the struggle to get possession of it struck him over the head, and also broke his collar-bone.

It was also in evidence that the prosecutor had raised the axe to strike the defendant, and that each had hold of the axe and was endeavoring to get possession of it when the blows were struck; that John
(498) Shields, a son of the defendant, testified that the prosecutor said, "If you go in the house I will mash your brains out with the axe." There was much other conflicting testimony, some of it tending to show that the prosecutor had assaulted the defendant, and that there was an affray.

No special instructions were asked of the court, but counsel for the defendant, in his address to the jury, laid much stress upon the alleged fact that the prosecutor had assaulted the defendant with an axe, and defendant used only sufficient force to disarm the prosecutor. His Honor charged the jury, among other things: "In this case all the witnesses having stated that a blow was struck, by which the defendant, in the difficulty, broke the shoulder-blade of the prosecuting witness, the defendant cannot justify such blow unless he was acting in self-defense. If he used no more force than was necessary to protect his person from hurt or harm, he is not guilty, but if he used excessive force, or was not acting in self-defense, but assaulted Carden, Carden

not assaulting or attempting to strike the defendant, he is guilty." The case on appeal states: "The court also fully recapitulated the testimony, and explained the law as applicable to the same, and gave the instructions of counsel for State and defendant. Counsel excepted upon the ground that his Honor failed to state, in a correct and concise manner, the evidence given in the case, and to explain the law arising thereon, and particularly that he had failed to call the attention of the jury to the law governing the defendant's right to disarm his adversary, if they believed the evidence of John Shields, but did not request the court to do so."

The defendant moved in arrest of judgment, which was refused, and the defendant excepted. The only ground alleged for the motion in arrest of the judgment is that the deadly weapon is simply described as an axe, without giving its size, weight, etc. An axe is *ex vi termini* a deadly weapon, and without further description the (499) court must conclude that a blow given with it, by a man of ordinary strength, would produce death or great bodily harm, and the motion was properly refused. *S. v. Phillips,* 104 N. C., 786.

It is insisted by the counsel for defendant that his Honor failed to recapitulate the testimony, and especially that of John Shields, and to state the law applicable thereto. The case on appeal expressly states that "The court fully recapitulated the testimony and explained the law as applicable to the same," and there is nothing in the record to show to the contrary, and we must accept this as true. But counsel for the defendant insists that, according to the testimony of John Shields, his Honor should have told the jury that the defendant had a right to disarm the prosecuting witness. No such instruction was asked, and there was no error in failing to give it. But it would have been an error in his Honor to have singled out any particular witness, and told the jury if they believed that witness they must find the defendant guilty or not guilty. This is too clear to need citation of authority, for there was conflicting testimony; besides, his Honor charged the law correctly as applicable to the testimony of John Shields, for the jury were told if the defendant used no more force than was necessary to protect his person from hurt or harm, he was not guilty, and this was as favorable as the defendant could have asked in any aspect of the case, and more so in view of the fact that there was evidence tending to show that the defendant was the original aggressor, and provoked the breach of the peace. *S. v. Harrell,* 107 N. C., 944.

There was no error of which the defendant can complain.

No error.

Cited: S. v. Crisp, 170 N. C., 791.

(500)

THE STATE v. GEORGE H. WYLDE.

Bigamy—Marriage—Evidence—Appeal Without Security.

1. On an indictment for bigamy, the first marriage, like any other fact, may be proved by the admission of the defendant, or by circumstantial evidence. The weight to be given to the evidence is a matter for the jury.
2. An application for leave to appeal without security under section 1235 of The Code, is fatally defective if the affidavit does not state that the application is made in good faith.

INDICTMENT for bigamy, tried at February Term, 1892, of GUILFORD, *Whitaker, J.* The defendant appealed.

The facts are stated in the opinion.

Attorney-General and J. E. Boyd and L. M. Scott for the State.
Dillard & King and D. Schenck (by briefs) for defendant.

CLARK, J.: There are several exceptions to the evidence, as well as exceptions for failure to give the prayers for special instructions. But the point raised by all the exceptions is, in effect, that the first marriage, which was alleged to have taken place in England, could not be shown by the admissions of the defendant, nor by proof of cohabitation and the admissions, but that the proof must be by an eye-witness of the ceremony, or a certified copy of the registration of the marriage, with proof that the minister officiating was authorized by the laws of England to administer the sacraments and solemnize marriage.

The court charged that the admissions of the defendant, standing alone, would not be sufficient evidence of marriage; but that such admissions, together with proof offered in this case of the parties start-
(501) ing to chapel with the avowed purpose of being married, their return, saying they had been, and their subsequent open and continued cohabitation as man and wife, would be sufficient evidence, if believed by the jury, to establish marriage. While some authority may be found in other states to sustain the charge of the court, we think it more favorable to the defendant than by the best precedents he was entitled to have. But of this the defendant cannot complain.

Proof by an eye-witness of the ceremony, with proof of the authority of the minister, under the laws of the place, to solemnize it, which the defendant contends is requisite, would be certainly plenary proof. It is not, however, the only proof. The circumstances in proof here of the parties starting off to be married, their return as from a marriage, and subsequent open cohabitation as man and wife, were certainly strongly corroborative of the admissions of the defendant, but are not

indispensable. We think the true rule is laid down in *Miles v. United States,* 103 U. S., 304, where it is held, approving *Regina v. Simmonds,* 1 Car. & Kir., 164, that "On an indictment for bigamy the first marriage may be proved by the admissions of the prisoner, and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized." The Court, of itself high authority, cited, as also sustaining this view, *Regina v. Upton,* cited in 1 Russ. Cr., 218; *Duchess of Kingston's case,* 20 How. St. Trials, 355; *Truman's case,* 1 East P. C., 470; *Cayford's case,* 7 Me., 57; *Ham's case,* 11 *id.,* 391; *S. v. Libby,* 44 *id.,* 469; *S. v. Hilton,* 3 Rich. (S. C.), 434; *S. v. Brittain,* 4 McCord, 256; *Warner v. Commonwealth,* 2 Va. Cases, 595; *Norwood's case,* 1 East P. C., 470; *Commonwealth v. Murtagh,* 1 Ashm. (Pa.), 272; *Regina v. Newton,* 2 Moo. & R., 503; *S. v. McDonald,* 25 Miss., 176; *Wolverton v. State,* 16 Ohio, 173; *S. v. Seals,* 16 Ind., 352; *Quinn v. State,* 46 *id.,* 725; *Arnold v. State,* 53 Ga., 574; (502) *Cameron v. State,* 14 Ala., 546; *Brown v. State,* 52 *id.,* 338; *Williams v. State,* 44 *id.,* 24; *Commonwealth v. Jackson,* 11 Bush (Ky.), 679. The Court then goes on to say (103 U. S., 312) that the declarations of the defendant "appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that they had reference to a formal marriage contract," and held that there was no error in the court below admitting the declarations, nor in the charge of the judge, which was: "The declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage, and that such marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence."

In *Regina v. Newton,* 2 Moo. & Rob., 503, *Wightman, J.,* held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. 1 Roscoe Cr. Ev. (8 Am. Ed.), 454.

The rule is consonant with reason as well as with the great weight of authority, *ut supra,* that in indictments for bigamy "marriage can be proven, like any other fact, by admissions of the party or by circumstantial evidence," and no reason is shown why this should not be so. The weight to be given the admissions is properly a matter for the jury, not for the court.

The affidavit for leave to appeal *in forma pauperis* is fatally defective under The Code, sec. 1235, in that it does not state that the application is in good faith. This has been often held. *S. v. Tow,* 103 N. C., 350; *S. v. Divine,* 69 N. C., 390; *S. v. Morgan,* 77 N. C., 510;

(503) *S. v. Moore,* 93 N. C., 500; *S. v. Payne,* 93 N. C., 612; *S. v. Jones,* 93 N. C., 617. Owing to the nature and importance of the case, we have, however, notwithstanding, considered the point intended to be presented. *Milling Co. v. Finlay, ante,* 411.

Appeal dismissed.

Cited: Vann v. Lawrence, 111 N. C., 34; *S. v. Shoulders, ib.,* 637; *Joyner v. Roberts,* 112 N. C., 114; *Fertilizer Co. v. Taylor, ib.,* 148; *S. v. Jackson, ib.,* 850; *S. v. Rhodes, ib.,* 857; *Hinton v. Ins. Co.,* 116 N. C., 26; *Farthing v. Carrington, ib.,* 336; *Thurber v. B. & L. Assn.,* 118 N. C., 131; *Walters v. Starnes, ib.,* 844; *S. v. Melton,* 120 N. C., 593; *S. v. Bramble,* 121 N. C., 603; *Cooper v. Wyman,* 122 N. C., 788; *Comrs. v. Steamship Co.,* 128 N. C., 561; *Clinard v. White,* 129 N. C., 252; *S. v. Council, ib.,* 519; *Meekins v. R. R.,* 131 N. C., 2; *S. v. Goulden,* 134 N. C., 744; *Christian v. R. R.,* 136 N. C., 324; *S. v. Smith,* 152 N. C., 842; *Dowdy v. Dowdy,* 154 N. C., 558; *Shields v. Freeman,* 158 N. C., 127; *Mfg. Co. v. Spruill,* 169 N. C., 621; *Taylor v. Johnson,* 171 N. C., 86; *Bradshaw v. Bank,* 172 N. C., 633; *Barbee v. Penny,* 174 N. C., 573; *Williams v. Bailey,* 177 N. C., 43.

THE STATE v. JOHN COX.

Murder—Manslaughter—Evidence.

1. When the entire charge of the judge is not sent up, it will be presumed that it is correct, except in those particulars in which errors are assigned in the case on appeal.

2. The only testimony in relation to the fact of the homicide was that witness and deceased were standing on opposite sides of the fence engaged in conversation, when prisoner approached and told deceased he wished to see him a minute, to which deceased replied, "Come on, and see me now"; thereupon witness turned to go into the house, and as she did so, she heard prisoner say, "What you put your hand back there for?" then she heard a noise like running, and then a pistol fired and a body fall, after which she heard some one running off. Deceased was found next morning near the spot, with a bullet-hole in his breast: *Held,* that the evidence disclosed no element of manslaughter, and the court committed no error in charging the jury that the prisoner was guilty of murder or nothing.

MURDER, tried before *Boykin, J.,* at Fall Term, 1891, of JONES.

The indictment charges the defendant with the murder of William Sutton. He pleaded not guilty. The evidence produced on the trial

tended very strongly to prove the murder as charged. Numerous witnesses were examined for the State. The prisoner introduced no evidence.

Alice Simmons, a witness for the State, testified as follows: "Remember evening Sutton was killed; I was at home at my mother's; I was in the house putting on supper; Sutton came up and called me to the door; he told me to come out there; he asked me if anyone (504) helped to take up certain fodder. I went to the gate; Sutton was on the outside, I on the inside, right at him; he gave me his pipe to smoke some—I had carried fire to him to light it; we saw a man coming up the road; he asked who it was; I said I don't know; it seems as if he was going by, but he came to the gate; he said, 'Sutton, is that you?' Sutton said, 'John, is that you?' John said, 'Umph, yes.' The man said, 'I want to see you a minute.' Sutton said, 'Come on and see me, then.' I whirled off and went towards the house; as I did so, the man said to Sutton, 'What you put your hand back there for?' I went on then to the house and heard a noise like they were running; I hurried on then, and just as I got in the door, I heard the pistol shot and heard the body fall; I then heard one running off. The man was the defendant Cox. . . . The man came walking straight up to the gate. Cox came up right to the gate; I was just on the other side; he could have touched me when he first came up; it was deep dark; Sutton was asking me to have him some fish cooked by next morning. . . . I did not see the shooting—as I got up in the door, I saw the flash of the pistol; after the shooting I heard a man running up the road towards Kinston; he came from towards the fork. Sutton came from the direction of Kinston. The dead body was found above the gate towards Kinston."

This witness was the only person, except the deceased and prisoner, present at the homicide.

Dr. Hughes testified: "Saw dead body of Sutton next morning; . . . I saw the wound; it was about halfway between the left nipple and medial line; it was at a vital point—it was near the heart. If the wound had gone straight in and through, it would have penetrated the heart. I did not examine the wound; it might have been made by a bullet or any sharp-pointed round instrument, like a spindle; I cannot say how the death was produced; a pistol ball could (505) have made the wound."

There was much other testimony as to the identity of the prisoner and antecedent declarations of malice.

The court, among other things, charged the jury that, upon the testimony, the defendant was guilty of murder, if he were guilty of any offense at all; that there was no element of manslaughter in the case.

This is assigned as error. There was a verdict of guilty and judgment of death, from which the prisoner appealed.

Attorney-General for the State.
No counsel for prisoner.

MERRIMON, C. J.: The whole charge of the court to the jury is not sent up. The presumption is that the instructions given were sufficient and correct except in the respect as to which error is assigned. To that alone we can properly advert.

There was evidence of express malice, and the whole evidence on the trial tended strongly to prove the murder as charged in the indictment. The court instructed the jury "that the defendant was guilty of murder, if he was guilty of any offense at all; that there was no element of manslaughter in the case." Assuming, as we must, that it gave other appropriate instructions, it might give that assigned as error, if there was no evidence from which the jury might find the prisoner guilty of the lesser offense of manslaughter. The burden of proving the lesser offense was on the prisoner, and to prove the same, not by mere preponderance, but to the satisfaction of the jury. *S. v. Jones,* 98 N. C., 651; *S. v. Dickerson, id.,* 708; *S. v. Byers,* 100 N. C., 512.

He insists that the evidence above recited constituted such evidence, and that the court erred in failing to tell the jury. We concur (506) with the court in saying that the evidence, in no just or reasonable view of it, presented any element of manslaughter. So far as appears, the prisoner and the deceased did not fight by consent upon a sudden quarrel, nor did the latter give the former legal provocation in any way. It does not appear that the deceased struck, or offered to strike, the prisoner, or that he had a pistol, knife, or other weapon from which it might be inferred he intended to, or did so, in the dark. It does not appear that the deceased said or did anything to provoke the prisoner to slay him in the heat of passion. The mere fact that the witness heard the prisoner say to the deceased, as they walked off, "What you put your hand back there for?" and that she "heard a noise like they were running," did not prove that they fought suddenly, or that the deceased struck or offered to strike the prisoner. Nor did the fact that the fatal wound was inflicted in front of the deceased's person, of itself, prove that the parties had fought, or that the deceased had given the prisoner legal provocation. These facts could give rise to no more than vague conjecture in the absence of evidence of some positive hostile action of the deceased. The prisoner had a pistol, and the evidence tended to prove his aggressive, deadly purpose, and he may, probably did, suddenly seek his opportunity to shoot his victim from

the front of him. But be this as it may, the facts in evidence did not constitute evidence of manslaughter. The whole evidence went to prove that the prisoner slew the deceased, moved to do so by express malice. The jury, if they believed the evidence, could not justly have reached a different conclusion.

No error.

Cited: S. v. McKinney, 111 N. C., 684; *Watkins v. R. R.,* 116 N. C., 967; *S. v. Ridge,* 125 N. C., 657; *Gilbert v. Shingle Co.,* 167 N. C., 290; *S. v. Wiseman,* 178 N. C., 796.

(507)

THE STATE v. CHARLES CHANCY.

Fornication and Adultery—Evidence—Former Acquittal.

1. On the trial of an indictment for fornication and adultery, evidence was offered tending to prove that the male defendant, white, and the female defendant, colored, had several times been seen riding together in male defendant's vehicle; that they frequently ate at the same table; that the female defendant, who was a married woman, but who had left her husband, had given birth to two children after separating from her husband; that the male defendant had been seen nursing and playing with them, and had his picture taken with theirs, and that the female defendant employed servants for both: *Held,* to be sufficient to be submitted to the jury, and warrant a conviction.
2. Former acquittal or conviction, to be available as a defense, must be specially pleaded.
3. Upon an issue of former acquittal or conviction, the record thereof is the best evidence, and must be produced, or its loss shown.

INDICTMENT, for fornication and adultery, tried before *McIver, J.,* at Fall Term, 1891, of BLADEN.

There was a verdict of guilty, and from a judgment imposing a fine of $500 and costs on the male defendant, he appealed.

The other facts are sufficiently stated in the opinion.

Attorney-General for the State.
No counsel for defendant.

SHEPHERD, J.: The duty which the law imposes upon the judges of deciding whether there is *any* evidence to be submitted to the jury, is one of much delicacy and importance, and its proper performance is often attended with grave doubt and embarrassing difficulty.

The line which divides the province of the court and jury in this respect is not easily defined, although several attempts in that direction have been made by this Court. Thus, in *S. v. Allen,* 48 N. C., (508) 257, it is intimated that a mere *scintilla* of evidence should be submitted to the jury, while in *Wittkowsky v. Wasson,* 71 N. C., 451, this is denied, and it is said that by "some evidence" is meant "such only as that from which a jury might reasonably infer the existence of the alleged fact." In the former case it was stated that "When there is evidence of a fact which, in connection with other facts, if proven, would form a chain of circumstances sufficient to establish the fact in issue, the fact so calculated to form a link in the chain, although the other links are not supplied, is, nevertheless, some evidence tending to establish the fact in issue." This rule would include an apparently isolated fact, having no bearing upon the fact in issue. Indeed, it might be entirely colorless without the light of other circumstances, and utterly incapable of raising even a mere conjecture of the fact to be proved. This would, of course, offend the authorities, all of which unite in saying that a mere conjecture or suspicion should not be submitted to the jury. The rule as stated in *Wittkowsky's case, supra,* has been frequently approved by this Court. *Best v. Frederick,* 84 N. C., 176; *S. v. White,* 89 N. C., 462; *S. v. Atkinson,* 93 N. C., 519; *S. v. Powell,* 94 N. C., 965; *Jordan v. Lassiter,* 51 N. C., 131, and other cases; but even this, by reason of the inherent difficulty of the subject, is necessarily indefinite. In some jurisdictions it is held that if the testimony be such that the judge would set aside the verdict as being against the weight of the evidence, it should not be submitted to the jury; but this, according to our decisions, would be an usurpation of the functions of that body. *S. v. Allen, supra; Wittkowsky's case, supra,* Perhaps what is "reasonably sufficient" evidence, as understood in North Carolina, is best stated by *Battle, J.,* in *Jordan v. Lassiter, supra.* He says that if the circumstances "be such as to raise more than a mere conjecture, the judge cannot pronounce upon their sufficiency to establish the fact, but must leave them to be weighed by the jury, (509) whose exclusive province it is to decide upon the effect of the testimony."

The remedy for a finding against the weight of the testimony is a motion for a new trial, and this power of the court should, in proper cases, be unsparingly and fearlessly exercised. However difficult it may be to formulate a satisfactory definition as to what is "some evidence," we think that the circumstances deposed to in the case before us are entirely sufficient to meet the requirements of any of the rules above stated.

It is well settled that in order to convict of fornication and adultery, "it is not necessary to show by direct proof the actual bedding and cohabitating of the parties; it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties." *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564.

The female defendant, a colored woman, was separated from her husband, and since such separation has given birth to two children. The male defendant, a white man, is so fond of these children that on several occasions he has been seen *nursing* and playing with them. He has "been heard teaching one of them to sing" the following inspiring couplet:

> "We have got the money, and we have got the land,
> And we don't care for any poor white man."

In addition to this, he has had "his own and the said children's picture taken together, and witness thought the female defendant's also." There is also testimony tending to show that he has been seen riding several times with the female defendant; that a part of the time "they ate at the same table"; that the female defendant employed "cooks to cook for them both," and that they have "their clothes washed together." All of these circumstances certainly amounted to more than a "mere conjecture" of the guilt of the defendants, and were sufficient, we think, to sustain the verdict of the jury. (510)

The other exceptions are without merit. There was no plea of former acquittal; and if there had been such a plea, the record was the best evidence to establish it. The testimony, as to acts more than two years before the indictment, was received and acted upon simply in corroboration of evidence of other acts committeed within two years, and was, therefore, admissible. *S. v. Eliason,* 91 N. C., 564.

Cited: S. v. Varner, 115 N. C., 745; *Spruill v. Ins. Co.,* 120 N. C., 149; *Hodges v. R. R., ib.,* 556; *S. v. Satterfield,* 121 N. C., 560; *S. v. Gragg,* 122 N. C., 1091; *Williams v. R. R.,* 140 N. C., 627; *Powell v. Strickland,* 163 N. C., 402; *S. v. Wade,* 169 N. C., 307, 309.

THE STATE v. BRYANT FOSTER.

Appeal—Case.

If there is no case on appeal and no errors appear in the record proper, the judgment will be affirmed.

MOTION of the Attorney-General to affirm the judgment of the court below, rendered by *Bryan, J.*, at January Term, 1892, of FRANKLIN.

Attorney-General for the State.
No counsel for defendant.

CLARK, J.: No statement of the case on appeal accompanies the transcript, and no error appears on an inspection of the record proper. The judgment must be affirmed. *S. v. Freeman,* 93 N. C., 558; *Mfg. Co. v. Simmons,* 97 N. C., 89; *Walker v. Scott,* 102 N. C., 487; *Peebles v. Braswell,* 107 N. C., 68.

Affirmed.

Cited: S. v. Green, 111 N. C., 647; *S. v. Carpenter, ib.,* 706.

(511)

THE STATE v. WRIGHT EDWARDS.

Bastardy—Rules of Superior Court Practice.

A bastardy proceeding is, in its principal features and purposes, a civil action, and is within the operation of Superior Court Rule 24, which provides that appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term.

BASTARDY PROCEEDING, tried before a justice of the peace on 23 October. From his judgment an appeal was taken and docketed in the Superior Court of BLADEN on 26 October, 1891, being the first day of the term.

At that term, when the case was called for trial, before *McIver, J.*, the defendant objected that, under Rule 24 of the Superior Courts, the case could not stand for trial till next term. The objection being overruled, the defendant excepted. Trial was had, and the verdict and judgment being against him, the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

CLARK, J.: Rule 24 of the Superior Courts is as follows: "Appeals *from* justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties." The power of this Court to prescribe its own rules is conferred by the Constitution, and is not subject to legislative control. *Horton v. Green,* 104 N. C., 400. But the power lodged here to prescribe rules for the lower courts being conferred by statute (The Code, sec. 961; *Barnes v. Easton,* 98 N. C., 116; *Cheek v. Watson,* 90 N. C., 302), is subject to legislative modification. We find, however, no statute in conflict with this rule, and, being (512) authorized by law, it has the force and effect of a statute. The rule is a reasonable regulation, that though, under The Code, secs. 565 and 880, the appeal stands ordinarily for trial at the first term, it must be docketed ten days before such term. *Sondly v. Asheville, ante,* 85.

It is, however, contended that bastardy proceedings do not come under this rule, it not being a civil action. It is true that proceedings in bastardy are somewhat anomalous. They begin by a warrant; a *capias* lies to enforce defendant's appearance (*S. v. Green,* 71 N. C., 172); an indictment lies for escape against an officer who permits the escape of one arrested in such proceedings. *S. v. Ritchie,* 107 N. C., 857. The defendant, even under the present Constitution, may be imprisoned for failure to give the required bond, or pay costs and fine (The Code, sec. 32; *S. v. Palin,* 63 N. C., 471), and a fine is imposed by the statute. But notwithstanding these peculiarities, it has always and uniformly been held that the proceeding is, in the main, civil in its nature. *S. v. Peeples,* 108 N. C., 768. Either party has the right to appeal (*S. v. Crouse,* 86 N. C., 617; *S. v. Wilkie,* 85 N. C., 513); and the law of costs as to civil actions applies. *S. v. Bryan,* 83 N. C., 611. In *S. v. Carson,* 19 N. C., 368, it is held to be a police regulation, and not a criminal proceeding, and this is cited with approval in *S. v. Brown,* 46 N. C., 129, and *S. v. Higgins,* 72 N. C., 226. The true test between a criminal and a civil proceeding is that in the former the act complained of will support an indictment, and in the latter it will not; hence a bastardy proceeding is civil in its essence. *S. v. Pate,* 44 N. C., 244. This is cited and approved in *S. v. Thompson,* 48 N. C., 365, and *Ward v. Bell,* 52 N. C., 79. It is pointed out that the object is not to punish the father, but to prevent the support of the child from becoming a public charge. *S. v. Brown,* 46 N. C., 129; *Ward v. Bell, supra.* It is also held that being a civil proceeding, each (513) party has the right to challenge peremptorily four jurors. *S. v. Pate, supra.* Depositions may be used because it is a civil proceeding. *S. v. Hickerson,* 72 N. C., 421; also, *S. v. McIntosh,* 64 N. C., 607.

From a review of the authorities, it is clear that though the proceeding has some anomalous features, it has uniformly been held to be in its nature and essentially a civil action. As such it comes within the purview of the rule relied on by the defendant, and in overruling his objection to going into a trial at that term, there was

Error.

Cited: *S. v. Burton,* 113 N. C., 663, 665; *Myers v. Stafford,* 114 N. C., 689; *S. v. Ostwalt,* 118 N. C., 1217; *S. v. Ballard,* 122 N. C., 1028, 1030; *Calvert v. Carstarphen,* 133 N. C., 27; *S. v. Liles,* 134 N. C., 736; *S. v. Morgan,* 141 N. C., 731; *S. v. Addington,* 143 N. C., 685, 687; *Lee v. Baird,* 146 N. C., 364.

THE STATE v. J. C. SULLIVAN ET AL.

Jurisdiction—Removal of Causes to Federal Courts—Statutes, Construction of—Clerks and Deputies.

1. Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction.
2. The jurisdiction of State courts over the persons and subject-matter enumerated in the act of Congress (Rev. Stat., sec. 643) does not cease upon the filing of the petition for removal in the Circuit Court; that result follows only when the petition setting forth the facts required by the statute has been duly filed, and the appropriate writ has been issued and made known to the State court.
3. The filing of the petition and issuing of the writ are judicial acts which cannot, in the absence of statutory authority, be performed by a deputy clerk.

CRIMINAL ACTION, tried at February Term, 1892, of IREDELL, *McIver, J.*

The indictment charges the defendants with an assault and battery done with a deadly weapon. After the case was called for trial, but before the trial began, the marshal of the United States in and for the Western District of North Carolina served the clerk of the (514) Superior Court with a paper-writing below set forth, by leaving a copy thereof with him, signed by the clerk of the Circuit Court of the United States at Statesville, in the Western District of North Carolina, by his deputy, the clerk being absent. The defendant's counsel caused this paper-writing to be read before the court, and "demanded that any further action in the cause by the State court be

stayed, considering that this action of the said Circuit Court gave the Circuit Court jurisdiction in the cause." The solicitor for the State insisted that said writing was of no effect, and did not deprive the State court of jurisdiction. The court denied the motion to stay proceedings, and directed that the trial take place. The defendants "protested," excepted, and pleaded not guilty. There was a trial, and a verdict of guilty; a motion in arrest of judgment, which was denied; and judgment, from which the defendants appealed to this Court.

The following is a copy of the paper-writing above mentioned:

UNITED STATES OF AMERICA,
Western District of North Carolina.

The President of the United States of America to the Marshal of the Western District of North Carolina—GREETING:

You are hereby commanded to make known to J. H. Hill, clerk of the Superior Court, that whereas the defendants J. C. Sullivan, J. H. Ayres, and J. H. McNeely, now in court, have filed their petition before the undersigned, setting forth that a bill of indictment was returned into the Superior Court of Iredell County by the grand jury at February Term, 1892, of said court, charging said defendants with the offense of an assault and battery upon the person of one James Mitchell; and whereas the said J. C. Sullivan, J. H. Ayers, and J. H. McNeely showeth in their said petition that at the time of the alleged offense they were an officer and employee of the United States (515) Government, employed by a commission of the Collector of Internal Revenue of the United States for the Western District of North Carolina, said Sullivan being a deputy collector and the other defendants acting by his authority, and by virtue of such authority did the act complained of. Whereas, they have demanded in their said petition the removal of the aforesaid indictment into the Circuit Court of the United States of America for the Western District of North Carolina, under section 643 of the Revenue Laws of the United States: Now, therefore, you are commanded to make known to the said Superior Court of North Carolina, by the delivering of a copy hereof to the clerk of said court, or by leaving it at his office, that the said cause is hereby removed for trial into the said Circuit Court of the United States next to be holden for the said district at Statesville on the third Monday in April, 1892.

And that it is entered on the docket of said Circuit Court of the United States, and will be proceeded with as a cause originally commenced in said court; and further, that it is required of said Superior Court of North Carolina to send to the said Circuit Court of the United

States, distinctly and plainly under the seal of said Superior Court, a transcript of the record and proceedings in said cause in that case in that court, with all the things touching the same, by whatever name the parties may be called, so that we may have them before the judges of our said Circuit Court of the United States at the time and place aforesaid, to wit, at Statesville, on the third Monday in April, 1892; and further to do therefor what of right we shall see fit to be done. Herein fail not, and have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Statesville, in said district, this the 12 February, 1892, and in the 116th year of the Independence of the United
(516) States. H. C. COWLES, *Clerk.*
By H. V. FURCHES, *Dep. Clerk.*

A true copy.
Teste: H. C. COWLES, by H. V. FURCHES, *D. C.*"

Attorney-General for the State.
No counsel for defendant.

MERRIMON, C. J., after stating the case: The statute (Rev. Stat. U. S., sec. 643) provides that "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, etc., . . . the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and together with a certificate signed by an attorney or counseller at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court, but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same
(517) had proceeded to final judgment and execution in the State Court.

When the suit is commenced in the State court by summons, subpœna, petition, or any other process, except *capias*, the clerk of the Circuit Court shall issue a writ of *certiorari* to the State court, requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by *capias*, or by any other similar form of proceeding by which an arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or by some person duly authorized thereto, *and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State court shall be void,"* etc.

The purpose of this statutory provision is to create jurisdiction in the Circuit Court of the United States, and to transfer to that court the jurisdiction of the State courts in the classes of cases specified therein when such cases shall be removed as contemplated by it. It is hence very important, and should be strictly observed in all material respects. Such observance is the more important, as the method of removal prescribed does not require the Circuit Court to supervise and scrutinize applications for removal, unless it shall happen to be in session at the time the same shall be presented. The removal of causes is no doubt subject to abuses, and, as suggested, frequently prostituted with a view to evade and delay, rather than obtain justice on the part of the party professing to seek it. This statute has been the subject of much judicial criticism. Its validity as a whole and that of some of its material parts has been much questioned. But it is now settled that it is valid and operative. It is therefore the duty of the courts, both (518) State and Federal, in good faith, to give it effect in all proper cases. *Tennessee v. Davis*, 100 U. S., 157; *Davis v. South Carolina*, 107 U. S., 597; *S. v. Hoskins*, 77 N. C., 530.

The State court will lose, be deprived of, and relinquish its jurisdiction only in the case and in the way and manner prescribed. Courts do not readily give up or abandon their jurisdiction of cases before them. It is of their nature and purpose to administer justice as contemplated and intended by the laws of their creation and being. It is not to be presumed that they are incapable, unjust, or untrustworthy. On the contrary, the presumption is in their favor in all these respects. Hence, statutes depriving them of their jurisdiction, particularly where it has already attached, are to be strictly interpreted.

The present case is a criminal prosecution begun by indictment and a *capias* whereby "a personal arrest is ordered." It intends that the

defendants shall be arrested and held in close custody by the sheriff, unless they shall give bail as allowed by law. In such case, if it be granted that the defendants regularly and sufficiently presented their petition for removal of the action to the clerk of the Circuit Court of the United States at his office, that court not being in session at that time, and that the clerk duly filed it and entered the case on the docket of that court, the jurisdiction of the latter was not then complete, nor was that of the State court over and at an end. It then became necessary, in order to completely and efficiently transfer the jurisdiction from the State court to the Circuit Court, for the clerk of the latter court to "issue a writ of *habeas corpus cum causa,* a duplicate of which should have been delivered to the clerk of the State court, or left at his office, by the marshal, his deputy, or some person duly authorized to do so." Thereupon it would become the duty of the State court "to stay all further proceedings in the cause." This being done, the prosecu-
(519) tion would "be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State court," would be void. The statute above recited so expressly declares and provides. The case is not removed, the State court does not lose its jurisdiction, until the writ last mentioned is so delivered to its clerk. The State court cannot know of the intended removal, except in the way thus prescribed. The statute, on purpose, prescribes such method of procedure in case of criminal prosecution; and it in like manner prescribes that "the clerk of the Circuit Court shall issue a writ of *certiorari* to the State court," in case of the removal of other causes of other classes, "requiring it to send to the Circuit Court the record and proceeding in the cause." These writs, and the proper service of them, are essential to perfect the jurisdiction of the Circuit Court and put an end to that of the State court. The method of removal prescribed so expressly requires, and no other method is prescribed in terms or by implication. Any other method adopted by the courts, for the sake of convenience, or to cure irregular or defective procedure, would put a very delicate subject, regulated by statute, at the discretion of the courts, and lead to intolerable confusion. The only just and tolerable course is to observe the statute, at least, substantially in all respects.

In the present case the clerk of the Circuit Court did not issue a writ of *habeas corpus cum causa,* as he should have done. The paper-writing he signed by his deputy, and had served on the clerk of the State court, was not such writ in form or substance, nor does it purport to be. It was not the writ the law prescribed and required to be issued in such cases, nor did it charge the State court with notice, and put an end to its jurisdiction of the prosecution. It is more like a writ of *certiorari,* and was probably intended to be such, but it was not addressed to the

State court or any of its officers; it was addressed to the marshal of the district, commanding him to make known the facts recited. Such writs must be addressed to the parties commanded and (520) required by them to do the matters and things therein specified to be done. The State court was not bound to take notice of and treat the paper-writing delivered to its clerk as the writ of *certiorari* (if that writ could have been appropriate in this case), prescribed by the statute. See appropriate forms of such writs in Dillon on Removal of Causes, p. 87; Spear on Removal of Causes, pp. 109, 110.

It appears that the petition of the defendants was not presented to the Circuit Court while it was in session, nor to the clerk thereof at his office out of term-time, but it was presented to his deputy, who filed it in the clerk's office, and entered the cause on the docket of the court. The Attorney-General insisted, on the argument, that the deputy clerk could not receive and pass upon and file the petition and the certificate of counsel accompanying it. The presentation of the petition is important—must be made to the court, if it be in session, or to the clerk in vacation time. The statute so expressly requires. To what end is this required? Obviously to the end the court or clerk may examine and allow it to be filed. It must be seen and adjudged that it is sufficient, upon its face, to serve the purpose contemplated by it. It must be, in substance, a petition alleging the essential facts, and accompanied by the certificate of counsel, and the court or clerk, as prescribed, must so determine. Granting that the deputy might act in the name of and for the clerk in all matters simply ministerial in their nature, he could not do so in matters judicial in their nature, requiring the exercise of his official judgment and discretion, unless authorized to do so by statute. In such matters the law charges the clerk to act for and by himself, and not by another. In such case the action of the deputy would be void and of no legal effect.

While the Circuit Court or the clerk must decide upon the sufficiency of the petition, and allow the same, if sufficient, it must appear by the writs issued to the State court that the Circuit Court or (521) clerk allowed the petition; that it was filed and the cause entered upon the docket of that court. Surely it cannot be that the Circuit Court has the authority to simply *command* the State court to surrender its jurisdiction of an action and certify the record thereof to that court. Such procedure would be absurd, monstrous, and despotic! The process going from the Circuit Court to the State court must state the substance of the ground of the authority of the former, and the purpose of the command of the writ. It is the writ thus framed and duly served that perfects the removal of the action, and puts an end to the jurisdiction of the State court. The law does not invest the Circuit Court with

arbitrary authority, nor does it intend to transfer the jurisdiction in particular cases from the State court to that court simply by the latter's command. The authority and pertinent action must appear in an orderly and authorized way. Here it did not appear that the Circuit Court in session, or the clerk in vacation time, had allowed the petition of the defendants to be filed; the contrary appears by the paper-writing served upon the clerk of the State court. It appears that the deputy clerk of the Circuit Court allowed the petition and filed it. This he had no authority to do. It cannot justly or reasonably be said that the Circuit Court alone must decide that he had or had not such authority. The State court must, in the very nature of the matter, decide that a writ came to it, the nature and purpose of the command contained in it, and that it upon its face came from lawful authority. If the writ should upon its face show that it was unlawful and void, it would not, could not, serve the purpose of the law, and the State court would not, ought not, to recognize or act upon it. It is not sufficient to say that the Circuit Court would, in the course of procedure afterwards, correct the error and remand the case. The
(522) State court is possessed of judicial authority, and it is its duty to part with its jurisdiction of cases only in the cases and in the way prescribed by law. Moreover, it is within its jurisdiction and authority to interpret and apply statutes of the United States in appropriate cases, and such statutes are binding upon it in pertinent cases and connections. There is no conflict, in contemplation of law, between the United States and State courts. Any seeming conflict arises from misapprehension and misapplication of the law, or from a willful purpose to pervert it. The State court must decide that it has or has not jurisdiction, and pertinent questions in that respect. Its errors may be corrected in an orderly, lawful way, by an authoritative judicial tribunal. In this case it decided that the case before it was not removed to the Circuit Court of the United States, and proceeded to try and dispose of it in the ordinary course of procedure, and we think it did so correctly.

Affirmed.

Cited: *Baird v. R. R.*, 113 N. C., 609; *S. v. Pridgen*, 151 N. C., 652.

THE STATE v. PHILLIP HATLEY ET AL.

Judgment—Punishment—Certiorari.

Upon a conviction the defendants were adjudged to be imprisoned and pay costs, but the court at the same time directed that if the defendants left the State within thirty days, no *capias* was to be issued; defendants did leave, but returned into the State very soon afterwards, when they were arrested and imprisoned: *Held*—

1. That while the court had no power to banish the defendants, the judgment in respect to the imprisonment and costs was valid, and could be enforced upon their return to the State.

2. That the defendants having failed to appeal from the judgment in apt time, a writ of *certiorari* would not be granted.

PETITION of defendants for writ of *certiorari,* heard before the (523) Supreme Court.

The petitioners allege that at Fall Term, 1891, of Stanly Superior Court they were tried upon an indictment for keeping a disorderly house, and pleaded guilty to the charge with the understanding and agreement with the prosecutor in said cause that judgment was to be suspended upon the payment of costs; that the solicitor for the State prayed the judgment of the court, and the court thereupon made the following order: "Ordered by the court, that the defendants Philip Hatley and Martha Hatley be imprisoned for twelve months in the county jail, but if the defendants leave the State in thirty days no *capias* to issue; otherwise, *capias* do issue and defendants to be imprisoned for twelve months each. Judgment against defendants for costs, to be taxed by the clerk."

They further allege that their imprisonment is illegal, for that, upon being so sentenced, they left the State within thirty days from the expiration of the term of the court, and went to the State of South Carolina and remained there for . . . months, and returned about 7 December, and they insist that they had complied with the judgment of the court, but the sheriff of Stanly County, in obedience to a *capias* issued by the clerk of the Superior Court of said county, arrested them and imprisoned them in the common jail of the county, where they still remain. They also insist that their imprisonment is illegal, because the judgment of the court is an alternative judgment, and therefore void. They further insist that the judge transcended his power in passing sentence of banishment from the State as a punishment, which was illegal.

The petitioners further say that, intending to comply with the judgment of the court, they did not appeal at the time the judgment was rendered, and having left the State within the time limited by the judgment, they did not take an appeal. (524)

Attorney-General for the State.
S. J. Pemberton for defendants.

DAVIS, J., after stating the case: It is earnestly insisted by counsel for defendants that the judgment is an alternative judgment, and as such is void.

Is it an alternative judgment? If so, the authorities are abundant to settle the question of its invalidity. *Strickland v. Cox,* 102 N. C., 411, and cases there cited.

The court had no power to pass a sentence of banishment, and we think the judgment of the court cannot be fairly construed as a judgment of banishment; if so, it would be void. The only judgment passed by the court was that the defendants be imprisoned twelve months, and the words, "but if the defendants leave," etc., constitute no part of the sentence or judgment of the court, but were manifestly intended only as a note or memorandum directing the clerk to postpone the period at which the sentence shall go into execution, and not as a punishment for the defendants or an infliction upon some other community, predicated upon the assumption that it would be desirable and beneficial both to the community in which they were engaged in the bad calling of keeping a disorderly and disreputable house, and to the defendants, in giving them an opportunity to reform under new surroundings.

Such course is not unfrequent, and though dictated by the best intentions to benefit the public as well as offenders, is not to be commended. We think it quite clear, when the defendants left the State and speedily returned (for it appears that the court was held in the latter part of October and they returned early in December), they came within the condition upon which the clerk was to issue the *capias.*

(525) The application for the writ of *certiorari* is not as a substitute for a lost appeal, for it is manifest that the defendants did not intend to appeal, and if they did, they have been guilty of laches, and the judgment, as we have seen, being valid, the petition is

Denied.

Cited: In re Hinson, 156 N. C., 252.

THE STATE v. M. L. BARRINGER.

Constitution—Liquor Selling and Manufacture—Police Regulations—Statute, Suspension of.

1. The statute, chapter 4, Private Laws 1891, prohibiting the manufacture of spirituous liquors within three miles of the Orphans' Home, near Barium Springs, Iredell County, without the written permission of the superintendent of the home, is a constitutional exercise of the power of police regulation, and operates on those who, at and before the time of its enactment, were engaged in the manufacture of such liquors within the prescribed territory.

2. The fact that, upon the destruction of a portion of the buildings connected with the home, the inmates were removed temporarily to another place, while the buildings were reconstructed, did not have the effect to suspend the operation of the statute.

3. An act may be in part a public statute and in part a private one.

INDICTMENT under chapter 4, Private Laws 1891, for manufacturing spirituous liquors within three miles of the Orphans' Home, at or near Barium Springs, tried before *McIver, J.*, at February Term, 1891, of IREDELL.

The State offered evidence tending to show that the corporation had been regularly organized under its charter, and elected the superintendent, Rev. R. W. Boyd, and other officers; that the defendant had a distillery within three miles of said home, and had operated the same before the passage of said act and the establishment of said home, but had suspended for a time after the organization of the said (526) home; and then, afterward, on 12 November, 1891, began distilling spirits within the prohibited distance; that after the corporation was organized, it located and established the home near Barium Springs, consisting of a 40-acre farm, the main building being the residence of the orphans and superintendent, and four or five other buildings, consisting of barns, etc.; that said distillery continued in operation by defendant from 12 November till the time of the finding of this indictment, but on 19 November, 1891, the main building of the home, to wit, the residence building, was burned; that temporarily the board of regents removed the orphans for care to a building near Statesville, some five miles from Barium Springs, but that neither the synod nor any other authority had changed the location of the home; that the board of regents had determined to rebuild the burnt house, and plans to that end were now in progress, and the other buildings constituting a part of the home had not been burned, and had never been abandoned, but had been all the while in use for the purposes appertaining to the home, and the defendant never had obtained the written consent of the superin-

tendent of the home to manufacture within three miles of the home. The evidence tending to show the above facts came out on direct and cross-examination of the State's witnesses.

Defendant offered no evidence.

The defendant's counsel contended that the act of the Legislature under which the bill was found was unconstitutional and void, and asked the court to so instruct the jury. This prayer was refused.

There was a verdict of guilty, and judgment thereon, from which defendant appealed.

(527) *Attorney-General for the State.*

D. M. Furches and Armfield & Turner (by briefs), for defendant.

CLARK, J.: Private Laws 1891, ch. 4, authorized the establishment of an orphans' home at or near Barium Springs, in Iredell County, and forbade, among other things, the manufacture of spirituous or malt liquors within three miles thereof. The orphans' home was established at that point, and the defendant thereafter manufactured spirituous liquor within the forbidden distance without written permission of the superintendent thereof, as provided by the act.

The power of the Legislature to make such enactments is beyond question (*S. v. Stovall,* 103 N. C., 416; *S. v. Joyner,* 81 N. C., 534; *S. v. Moore,* 104 N. C., 714), and has been exercised by each succeeding Legislature till, now, it is estimated by some, that in one-half the area of the State the manufacture or sale of spirituous liquor is forbidden. Nor is the power of the Legislature to make such enactment restricted by the fact that prior to the passage of the act the defendant, under authority of a license, was already engaged in such manufacture within the three-mile limit, and no compensation has been made him for his outlays. This has been held by the United States Supreme Court, for the reason given by it, that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas,* 123 U. S., 623 (663). And here the Legislature, in the exercise of its police power, has deemed it injurious for the defendant to manufacture liquor within three miles of an orphans' home.

It is contended, however, that the enactment became invalid because the orphanage was subsequently abandoned. It is not necessary to consider whether the principle laid down in *S. v. Evans,* 106 N. C., (528) 752, applies to this case, for the evidence, which is not conflicting, in no aspect of it supports the contention. It is in evidence that the main residence building was burned, and that temporarily the

orphans were removed for shelter to Statesville, five miles distant, but that the authority which established the "orphans' home" had not changed its location from Barium Springs; but, on the contrary, the regents of the orphanage "had determined to rebuild the burnt house, and plans to that end were now in progress, and the other buildings constituting a part of such home had not been burned, and had never been abandoned, but had been all the while in use for the purposes appertaining to the home." Indeed, it appears that the defendant was engaged in manufacturing spirituous liquor within the prescribed distance on 12 November, 1891, which was after the establishment of the home, and before the burning of the principal building, as above stated, on 19 November. But we prefer to rest our decision on the ground just stated—that it appears that, in fact, the home was never abandoned.

It is, however, further contended that the provision in the act that it is unlawful to make, sell, give, or transmit to any inmate of the home, or anyone connected therewith, or to any person within three miles of said home, any spirituous or malt liquors, "without the written permission of the superintendent of the home," is unconstitutional and void, as it makes the operation of the act within the territory depend upon the will of the superintendent. Suppose the act had forbidden the sale within these limits except upon a permit or prescription from a physician, or the sale within a county except upon a license from the county commissioners, or within a town except upon a permit from the county commissioners, and then only when endorsed by the town authorities—would such restriction have been invalid? By what constitutional provision is the legislative discretion so restricted that it is forbidden from placing the power to authorize such sale within this three-mile district in the person designated in this act? (529) Indeed, authority conferred very similar to this is held valid in *S. v. Yopp,* 98 N. C., 477. Besides, an act may be constitutional in part and unconstitutional in part. *Johnson v. Winslow,* 63 N. C., 552. The Legislature had the power to forbid the manufacture and sale of spirituous liquor within this territory. It clearly exercised this power. If, for any reason, it had no power to authorize the superintendent of the home, notwithstanding, to permit, in his discretion, such sale or manufacture, such authority, or attempt to authorize, would be null and void. The act, so far as it prohibited the sale or manufacture of liquors within those limits, would remain valid and would simply be subject to no exception, if the exception be invalid. In fact, however, it is too well established to admit of controversy that the manufacture and sale of spirituous liquors is a subject of police regulation by the Legislature, and the advisability or propriety of the regulation here made is a mat-

ter for legislative discretion. No constitutional provision prohibits it, and the courts are not authorized to supervise or interfere with matters left to the legislative department. *Powell v. Pennsylvania,* 127 U. S., 678. It may be noted that while the act incorporating the home is a private statute, the provision therein against the sale of spirituous liquors is public and need not be averred in the indictment. *S. v. Wallace,* 94 N. C., 827. This is not unusual. Many public statutes contain provisions which are in the nature of private acts, and *vice versa. Durham v. R. R.,* 108 N. C., 399; *S. v. Wallace, supra.*

No error.

Cited: S. v. Snow, 117 N. C., 776; *Broadfoot v. Fayetteville,* 121 N. C., 422; *Guy v. Comrs.,* 122 N. C., 474; *Green v. Owen,* 125 N. C., 222; *S. v. Sharp, ib.,* 632; *Bailey v. Raleigh,* 130 N. C., 213; *S. v. Knotts,* 131 N. C., 706; *S. v. Ray, ib.,* 817; *S. v. Patterson,* 134 N. C., 615; *S. v. Holloman,* 139 N. C., 646; *S. v. Piner,* 141 N. C., 762; *S. v. Wolf,* 145 N. C., 445; *S. v. Blake,* 157 N. C., 609; *Newell v. Green,* 169 N. C., 463.

(530)

THE STATE v. F. S. CRANE.

Fornication and Adultery—Evidence—Trial—Juror—Verdict—Judge's Charge.

1. A new trial will not be awarded for the admission of incompetent evidence, where it appears that the evidence was subsequently withdrawn, and the jury instructed not to consider it, or to consider it only as bearing upon a particular aspect of the case to which it was relevant.

2. Upon the trial of an indictment for fornication and adultery, the defendant, being examined as a witness, denied his guilt, and swore that he was surprised at the charge when he first heard of it, and that his wife had never made such a charge, or referred to it: *Held,* that his admission that he did know of the charge prior to the time to which he had sworn, and that he had been charged by his wife with the offense, was competent in contradiction.

3. Where the State relies upon circumstantial evidence of such kind that each circumstance is a necessary link, an instruction to the jury that it is incumbent on the State to establish each circumstance beyond a reasonable doubt would be proper; but where various independent circumstances are relied upon to establish a fact, an instruction that the jury must be satisfied, upon the whole evidence, of the guilt of the defendant, is sufficient.

4. Upon a motion to set aside a verdict on the ground that a juror had been tampered with, the finding by the trial judge of the fact that the juror had not been influenced by the effort to tamper with him is conclusive.

AVERY, J., dissented.

STATE *v.* CRANE.

INDICTMENT for fornication and adultery, tried at Fall Term, 1891, of UNION, before *Hoke, J.*

The State offered one T. J. Ezzell as a witness, who testified that he and Dr. Rone were appointed to go and see defendant and ask him about the charges preferred against him, and that they went to him and had a conversattion with him on 29 May, 1890; that Dr. Rone read to the defendant, at the request of the witness, the following paper:

"We, the undersigned citizens of Marion and vicinity, do (531) hereby this day, this 28 May, 1890, have decided that you, F. S. Crane, by your conduct, have brought shame and reproach upon your family, and we have decided that we will tolerate it no longer, unless you change your manner of living and treatment to your wife and children, if we have to appeal to the laws of our land to do so.

"We understand that you have proposed to your wife that you will return home if she will bring her two oldest daughters home and let you satisfy your carnal appetite upon them." (Signed by witnesses Ezzell, Rone, and others.)

That defendant said, in answer to an inquiry as to his guilt or innocence after this paper was read to him, that he had been guilty of keeping the oldest girl (his stepdaughter and codefendant in this bill) for some three or four years, but that the other girl was innocent.

Defendant objected to the introduction of the paper above recited, for the reason that it purported to be the resolutions of an indignation meeting based entirely upon hearsay, and wholly *ex parte* as to him, and was calculated to mislead the jury and prejudice his cause. The court stated to the jury that the paper was not itself evidence of defendant's guilt, nor of the facts therein stated, nor as purporting to give the proceedings of any meeting, nor that any meeting had been held, but was admitted simply as a part of the conversation between the witness and the defendant, and in order to make defendant's answer to witness's question intelligible, and permitted the paper to be read for this purpose. Defendant excepted.

In the charge the court cautioned the jury as to the restricted (532) purpose for which the paper was permitted to be read.

The witness Ezzell further testified that he said to defendant that he was 65 years old, and this was the meanest thing he ever knew a man to be guilty of, black or white. That defendant replied, "Well, it's the only mean thing you can bring against me." Defendant excepted to the language of the witness Ezzell, which was overruled, and the defendant excepted.

The defendant Crane was examined as a witness in his own behalf. He denied his guilt, and denied the admission testified to by witness

Ezzell. Among other things, he stated he was much surprised at hearing the charge made by Ezzell and Rone; that he had never had any information before that time that he was suspected of being too intimate with his stepdaughter; that his wife had never made any charge against him, nor referred to it. He further denied that he had ever stated to one J. T. Rogers, some time in June or July, 1890, shortly after the conversation with Ezzell, that his wife had left him at Greenwood, S. C., some time in February or March, 1890, because she said he wished to sleep with her two oldest daughters, etc.

The witness Rodgers was examined by the State, and testified that in June or July, 1890, in South Carolina, the defendant approached witness, and they had a conversation. Witness asked defendant why his wife had left him at Greenwood. Defendant replied that his wife told him when she went back to Marion (defendant being absent) that she left him because he wished to sleep with her girls. Witness asked, which girls? Defendant said her oldest girls. Witness asked if her complaint was that he wished to sleep with them to take care of them, or gratify his evil nature; to which defendant replied, for the reason that he wished to gratify his evil nature.

Defendant objected to this evidence for the reason that the
(533) sole effect was to mislead the jury, and lay before them declarations of his wife in defendant's absence; that there was nothing therein in the shape of a confession, and the evidence could only mislead. The evidence was admitted, and the defendant excepted.

The court told the jury, in reference to this evidence, that the declarations of the wife, made in the defendant's absence, was not evidence of his guilt, and not substantive evidence on that question; that the conversations were admitted as statements of the defendant, tending to contradict or impeach his evidence, and should only be considered for such purpose.

There was a large amount of evidence both for the State and the defendant. That for the State included quite a number of witnesses who testified to facts and circumstances tending to fix guilt on the defendant, occurring at different times and independent of each other. There was also two confessions of defendant to having had adulterous intercourse with his stepdaughter continuously for two or three years prior to the bill of indictment. The one to the witness Ezzell above referred to, and another to one J. B. Sullivan. The defendant asked the court to instruct the jury as follows:

"In this case the State relies in a large measure upon evidence of circumstances, and it is incumbent on the State, therefore, to prove all the circumstances on which it relies, beyond a reasonable doubt, and it is the duty of the jury in passing upon the guilt or innocence of the

defendant to discard any and all circumstances that are not so proven." The court declined to give this instruction, and the defendant excepted.

The court charged the jury, explaining the nature of the charge and the evidence as it bore upon it, and pointed out to the jury what evidence was to be considered as substantive evidence, and what was only corroborative and impeaching, and told the jury that, before they could convict the defendant, they must be satisfied upon the whole evidence, as so classified and applied; that the defendant was in (534) the habit of having sexual intercourse with his stepdaughter, Jennie Helms, and within two years prior to the finding of the bill of indictment; that one act of adulterous intercourse was not sufficient to make out the charge, nor two, nor three, but the jury must be satisfied that such intercourse was habitual between the parties within the prescribed period; they must be so satisfied beyond a reasonable doubt; they must be so convinced of defendant's guilt as to exclude every other reasonable hypothesis, and if, on the whole evidence, they were so convinced, they should return a verdict of guilty, and, if otherwise, they should return a verdict of not guilty. There was a verdict of guilty.

After the verdict was rendered, the defendant offered the affidavit of D. F. Sapp, one of the jurors who tried the cause, tending to show that he had been tampered with; but the court found, as a fact, that the juror had not been influenced by the effort of the witness Watson to tamper with him, and declined to disturb the verdict.

From judgment rendered by the court, the defendant appealed.

Attorney-General for the State.

D. A. Covington, J. B. Batchelor, and John Devereux, Jr., for defendant.

CLARK, J.: As to the first exception, it is unnecessary to discuss whether the question was incompetent, for, if that be conceded, the error, if any, was cured by the explicit instruction to the jury at the time, and again in the charge, that the recital of facts in the question was not admitted as evidence, and was not to be considered as such by the jury. *S. v. Collins,* 93 N. C., 564; *Bridgers v. Dill,* 97 N. C., 222; *S. v. Eller,* 104 N. C., 853; *Blake v. Broughton,* 107 N. C., 220. In *S. v. Collins, supra,* the defendants were indicted for the larceny of some hams. The confessions of one of the defendants was (535) erroneously received in evidence against the other. After one of defendants' counsel had spoken, and when the solicitor was addressing the jury, the judge withdrew from the jury the confessions, and it was held that this cured the error. The point is well considered by *Ashe, J.,* who cites with approval the older cases, *S. v. May,* 15 N. C., 328; *S. v.*

Davis, id., 612; and *McAllister v. McAllister,* 34 N. C., 184. Indeed, our authorities are uniform on this subject. If juries should be deemed incompetent to comprehend, or unable to obey, so plain a direction as that a paper read in their hearing is "not to be considered as evidence, and that it had only been admitted to make the defendant's reply to it (when read to him) intelligible"—if so low an estimate should be placed upon juries, then the jury system is a failure, and should have no place in our jurisprudence. If unable to comprehend this, why so often contention whether instructions, frequently far more abstruse, should be given to the jury? But such a view is an unjust one; the jury is an essential part of the judicial system among every English-speaking people, and while not perfect, the experience of ages and the observation of the present are that it performs fairly well its part. Certainly no better substitute has ever been found. To underrate the intelligence of twelve honest, impartial men who try the questions of fact submitted to them is a mistake. When aided by a just and intelligent judge, their verdicts are generally correct. Jurors are not expected to possess legal training. Their province is not to pass on questions of law. But their grasp of the facts is usually just and accurate, and probably not a court passes that upon the jury there are not men of equal mental capacity with the judge who presides, or the counsel who addresses them. Jurors are not in their nonage, and it is not just to underrate their in-
(536) telligence. This Court has heretofore said as much in *S. v. Jacobs,* 106 N. C., 695.

The second exception is without merit. The jury were entitled to the benefit of the *quasi* admission, and the language of the witness was necessarily given as a part of the conversation.

The third exception is equally without merit. The defendant, who was a witness in his own behalf, denied, on his examination, that he had stated to one Rodgers that his wife had left him in February or March, 1890, because she said he wished to sleep with her daughters, and said his wife had never charged him with it, nor referred to it. He had also testified that he had never been charged by his wife, or by anyone else, with such offense till the witness Ezzell and one Rone charged him with it on 29 May, 1890, and that he had, therefore, been much surprised when it was made by them; never having had so much as an intimation before that time that he was suspected of being too intimate with his stepdaughters. It was, therefore, competent to prove by Rodgers that the defendant did make such statement to him in June or July, 1890, of what his wife had alleged when she left him in February, 1890. The court instructed the jury that it was not substantive evidence, but was admitted only to contradict or impeach defendant's testimony. That his wife had left him, and that defendant admitted

she had given such conduct on his part as the reason for doing so, was competent in view of his denial of any intimation of such charge having been made, and somewhat corroborative of the evidence of his two admissions of being guilty of the crime charged.

The prayer for instruction was properly refused. When the State relies upon a chain of circumstances, such that each circumstance is a necessary link in the chain, it would then be proper to charge that "a chain is no stronger than its weakest link"; but when various facts and circumstances are relied on, as in this case, to prove a fact, it would not be correct to charge, as asked, that "It was incumbent (537) upon the State to prove all the circumstances on which it relies, beyond a reasonable doubt." If, however, the prayer did not mean this, then upon the only other construction which can be placed on it, it was substantially given in the charge of the court that, "upon the whole evidence," the jury must be satisfied beyond a reasonable doubt of defendant's guilt, and if not, they must acquit him.

As to the fifth and last exception, the court found as a fact that "the juror had not been influenced by the effort of the witness Watson." The finding of such fact by the presiding judge, who is far better acquainted with the surroundings than we can possibly be, is conclusive, and we cannot look into the affidavits, whether one or more, to reverse such finding. We need not, therefore, consider whether the verdict of the jury could be impeached by one of its members. Certainly, it cannot be maintained that, as a matter of law, the verdict must be set aside because a juror is spoken to, when it is found as a fact that the verdict was not affected thereby. *S. v. Morris,* 84 N. C., 756; *S. v. Brittain,* 89 N. C., 481. Such a principle would place every verdict at sea whenever the losing party might be anticipatory and adroit enough to procure a witness of the winning side to address an improper remark to one of the jurors. When it appears only that there was opportunity whereby to influence the jury, but not that the jury was influenced—merely "opportunity and chance for it—a new trial is in the discretion of the presiding judge." *S. v. Brittain, supra; S. v. Gould,* 90 N. C., 658; *S. v. Miller,* 18 N. C., 500, and especially *S. v. Tilghman,* 33 N. C., 513, where this point is elaborately discussed by *Pearson, J.*

No error.

Cited: Wilson v. Mfg. Co., 120 N. C., 96; *S. v. Flemming,* 130 N. C., 689; *Gattis v. Kilgo,* 131 N. C., 208; *S. v. Boggan,* 133 N. C., 766; *S. v. Exum,* 138 N. C., 606; *S. v. West,* 152 N. C., 834; *S. v. McKenzie,* 166 N. C., 297; *S. v. Trull,* 169 N. C., 367; *S. v. Lunsford,* 177 N. C., 119; *S. v. Baldwin,* 178 N. C., 691; *S. v. Lovelace, ib.,* 770.

(538)

THE STATE v. W. T. CUTSHALL.

Bigamy—Constitutional Law—Marriage—Jurisdiction—Extra-territorial Crimes—Statute—Legislative Powers.

The statute of North Carolina (The Code, sec. 988) which declares that "Any person who being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, shall be guilty of felony," is an unconstitutional exercise of legislative power, and inoperative in so far as it attempts to constitute a second, or bigamous, marriage in another state without the subsequent living together of the parties, a crime in North Carolina.

SHEPHERD, J., concurring, and MERRIMON, C. J., dissenting.

THE defendant was arraigned at August Term, 1891, of the Criminal Court of MECKLENBURG, before *Meares, J.*, upon the following indictment:

"The jurors for the State, upon their oaths, do present, that W. T. Cutshall, late of Mecklenburg County, on 1 January, 1880, did marry a woman whose name is to the jurors unknown, and the said person last mentioned the said W. T. Cutshall then and there had for a wife, and that the said W. T. Cutshall afterwards, to wit, on 1 March, 1890, with force and arms, in York County, South Carolina, feloniously and unlawfully did marry and take to wife one Susan Ella Pickard, of the county of Mecklenburg, in the State of North Carolina, and to the said Susan Ella Pickard then and there was married, the said unknown woman, his former wife, being then alive, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that said W. T. Cutshall, late of Mecklenburg County, on 1 January, 1880, did marry one ....., a woman whose name is to the jurors unknown, and the said person last mentioned the said

(539) W. T. Cutshall then and there had for a wife, and that the said W. T. Cutshall afterwards, to wit, on 1 March, 1890, with force and arms, in York County, South Carolina, feloniously and unlawfully did marry and take to wife one Susan Ella Pickard, of the county of Mecklenburg, in the State of North Carolina, and to the said Susan Ella Pickard then and there was married, and afterwards, to wit, on said 1 March, 1890, did return to Mecklenburg County, North Carolina, with said Susan Ella Pickard, and then and there did live with her as man and wife, the said unknown woman, his former wife, being then alive,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that W. T. Cutshall, late of Mecklenburg County, on 1 January, 1880, did marry one ....., a woman whose name is to the jurors unknown, and the said person last mentioned the said W. T. Cutshall then and there had for a wife, and that the said W. T. Cutshall afterwards, to wit, on 1 March, 1890, being then and there a resident of the county of Mecklenburg and State of North Carolina, with force and arms feloniously and unlawfully did procure and induce one Susan Ella Pickard to accompany him to York County, in the State of South Carolina, with intent then and there unlawfully and feloniously to marry the said Susan Ella Pickard, the said unknown woman, his former wife, being then alive, and with intent thereafter to return to the county of Mecklenburg and State of North Carolina, and to live with the said Susan Ella Pickard as his wife, and intending thereby to commit a fraud upon the laws of North Carolina against the crime of bigamy, and that the said W. T. Cutshall, on the said 1 March, 1890, with force and arms feloniously, and in pursuance of the said fraudulent intent, did procure and induce said Susan Ella Pickard to accompany him to York County, in said State of South Carolina, and her, (540) the said Susan Ella Pickard, with force and arms, feloniously and unlawfully then and there did marry and take to wife, the said unknown woman, his former wife, being then alive, and that thereafter, to wit, on said 1 March, 1890, the said W. T. Cutshall, with force and arms, feloniously and unlawfully, and in pursuance of his said fraudulent purpose, did return to the county of Mecklenburg and State of North Carolina, and then and there did bed and cohabit with the said Susan Ella Pickard, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

A *nolle prosequi* was entered as to the third count. Upon being called upon to plead, the defendant moved to quash the indictment, which motion was allowed, and the State appealed.

Attorney-General for the State.
No counsel for defendant.

AVERY, J.: The Code, sec. 988, provides that "If any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, every such offender, and every other person counseling, aiding or abetting such offender, shall be guilty of a felony, and imprisoned in the penitentiary or county jail for any

term not less than four months nor more than ten years, and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county."

The general rule is that the laws of a country "do not take effect beyond its territorial limits, because it has neither the interest nor the power to enforce its will," and no man suffers criminally for
(541) acts done outside of its confines. 1 Bishop Cr. L. (7 Ed.) secs. 109 and 110; *People v. Tyler,* 3 Cooley (Mich.), 161; *ibid.,* 4 Cooley, 335; *S. v. Barnett,* 83 N. C., 616; *S. v. Brown,* 2 N. C., 100; *S. v. Mitchell,* 83 N. C., 674.

In *S. v. Ross,* 76 N. C., 242, the Court said: "Our laws have no extra-territorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that State," thus recognizing the principle, generally accepted in America, that a state will take cognizance, as a rule, only of offenses commited within its boundaries. Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act which takes effect in our own State, as where one who is abroad obtains goods by false pretences or circulates libels in our own State, and contrary to our laws or from a point beyond the lines of our State fires a gun or sets in motion any force that inflicts an injury within the State, for which a criminal indictment will lie. 1 Bishop Cr. Law, sec. 110; *Horn v. State,* 4 Texas, 659; *Cambose v. Mappell,* 2 Wash. (C. C. R.), 98.

Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when, under the provisions of extradition laws or the terms of treaties, they are allowed to be brought into its limits to answer such charges.

As a rule, the validity of marriages contracted in any foreign country must be determined by the courts of another nation with reference "to the law of the country wherein they exchange the mutual consent to be husband and wife, which consent alone is by the law of nature a perfect marriage." 1 Bish. on M. and D., secs. 855 and 856; *S. v. Ross, supra.* Such marriages may be declared unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all
(542) civilized nations, like marriages between persons very nearly related or those that are polygamous. 1 Bish. M. and D., secs. 857 to 862. So a foreigner, not accredited to another government as a representative of his own nation, is subject to the law of the country in which he may travel or establish a temporary domicile, and may be

tried in its tribunals for any violation of its criminal laws while within its territorial limits.

Wheaton International Law, sec. 127, note 77, says: "In Great Britain, France, and the United States the general principle is to regard crimes as of territorial jurisdiction. . . The question whether a state shall punish a foreigner for a crime previously committed abroad against that state or its subjects also depends upon its system respecting punishing generally for crimes committed abroad, Great Britain and the United States respecting strictly the principle of the territoriality of crime."

While, in our external relations with other nations, our Federal head, the United States, is the only sovereign for the purpose of internal government, such portion of the sovereign power as has not been surrendered to the general government is retained by the states. 11 A. & E., 440, and notes.

In the exercise of their reserved powers, especially in the execution of the criminal law, questions arise which are settled and determined either according to the principles of international law or by analogy to them. It is contended that nothing but comity between nations, in the absence of express provisions of treaties, prevents one nationality from making laws to punish persons who commit criminal offenses in another country and afterwards come within its territory, and that admitting this principle to be correct, there can be no treaty stipulation, and there is in fact no constitutional inhibition, that restricts the Legislature of one of our internal sovereignties from enacting laws to punish a person who comes into its domain, so as to be apprehended there, for a crime committed in a sister state. (543)

Article 29 of the confirmatory charter granted by Henry III, provided that "No freeman should be taken or imprisoned or disseized of freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him but by lawful judgment of his peers, or by the law of the land."

In the formal Declaration of Independence the King of Great Britain, after being charged with many violations of fundamental principles and invasions of common rights, was arraigned before the world "for depriving us in many cases of trial by jury; for transporting us beyond the seas to be tried for pretended offenses." This language evinces the purpose of our representatives to risk their lives and their fortunes, in part at least, to secure not simply the ancient right of trial by jury, but trial by a jury of the vicinage within easy reach of all evidence material for the vindication of the accused, where the charge might prove unfounded upon a fair investigation.

During the same year these principles were embodied in the Declaration of Rights by the Colonial Congress, in what now constitutes sections 13 and 17 of Article I of the Constitution, which are as follows: "13. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men." Sec. 17: "No person ought to be *taken, imprisoned,* or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or *in any manner* deprived of his life, liberty, or property, but by the law of the land."

Not only has section 13 been construed to guarantee to every person (whether a citizen of this State or of another Commonwealth) a trial by jury in all cases, which are so triable at common law (such as an indictment for a felony), but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to re-
(544) move the case to some neighboring county in order to secure a fair trial. *Judge Cooley* says (Const. Lim., marg. pp. 319, 320): "Many of the incidents of a common-law trial by a jury are *essential elements of right.* The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, both for cause and also peremptory without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." *Kirk v. State,* 1 Cold. (Tenn.), 344; *Armstrong v. State,* 1 Cold., 338; *S. v. Denton,* 6 Cold., 539. This strong language is used in commenting upon the clause which, in substantially the same terms, guarantees the right of trial by jury in all serious criminal prosecutions in every one of the states.

Mr. Charles A. Dana published some years since an article in his paper, the *New York Sun,* which it was claimed was libelous in its strictures upon the conduct of a public official at Washington City, and *Judge Blatchford,* upon his being arrested in New York City by virtue of a warrant of a United States commissioner and brought to Washington, heard the facts, after granting a writ of *habeas corpus,* and discharged the prisoner. *Matter of Dana,* 7 Ben. (D. C.), 1. Commenting upon this case, *Judge Cooley* said: "It would have been a singular result of a revolution, where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a Federal officer to every territory in which his paper might find its way, to be tried in each in succession

for offenses which consisted in a single act not actually done in (545) any of them." If every state of the American Union should enact a statute identical in its terms with that under which the indictment is drawn (The Code, sec. 988), the enforcement of these laws might lead to just such a series of prosecutions as the learned jurist seemed to consider so absurd, outrageous, and palpable a violation of a fundamental right asserted in our own national *Magna Carta,* the Declaration of Independence. The defendant might travel through any or all of the states, and be apprehended or in custody in any one or all of them, and thus subject himself to indictments for an offense not committed in any jurisdiction where he is tried.

Every state has embodied in its organic law the guarantee that no person shall be taken or imprisoned, etc., "but by the law of the land," and this term *Judge Cooley* treats as synonymous with "due process of law." Const. Lim., marg. p. 353. "Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to him or his property." Cooley's Const. Lim. (4 Ed.), 460 (marg. p. 369); *Taylor v. Miles,* 5 Kansas, 498.

In *Hoke v. Henderson,* 15 N. C., 16, *Chief Justice Ruffin* said: "The clause itself (Art. I, sec. 17, Const.) means that such legislative acts as profess in themselves directly to *punish persons,* or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes."

After the Federal Constitution had been ratified, the people (546) of the states, with the recollection of the flagrant invasion of their rights by transporting freemen abroad to be tried for "pretended offenses" still fresh, amended it so that, says Ordronaux, "the crime and its punishment are attached to the jurisdiction within which it was committed." Ordronaux Const. Leg., 259; Constitution of U. S., Art. III, sec. 2, clause 3.

These amendments apply only to Federal tribunals; but the fact that they were prohibited from trying, except in the state where the crime should be committed, is evidence of a purpose to put it beyond the power of Congress to have a citizen tried for a criminal offense except by a jury of the vicinage, and at a point not so remote as to deprive him of the benefit of his witnesses.

Another amendment (Art. IV, sec. 2, ch. 2) supplements that already referred to, and shows by its terms that the purpose in enacting it was

to definitely localize the forum of every crime committed by a person not in the land of naval forces, by providing for the extradition of criminals on demand of the Governor "to the state having jurisdiction of the crime." It was evidently contemplated by the framers of the Constitution that, ordinarily, there would be but one state where a crime could be properly said to have been committed and whose courts would have cognizance of it. It was natural that they should cling to the old territorial rule which limited the jurisdiction to the courts of the county.

The State of South Carolina was the sovereign whose authority was disregarded when the bigamous marriage was celebrated. If the defendant married a second time in South Carolina, or elsewhere outside of North Carolina, the act had no tendency at the time to affect society here, nor can that unlawful conduct be punished as a violation of our criminal laws. On the other hand, the completed act of entering into a second marriage in a neighboring state is not analagous to the (547) cases where a mortal wound is inflicted in one state, and the wounded man lingers and dies from its effects within the limits of another state during the next ensuing twelve months.

It is needless now to discuss the question whether on account of the fact that the ultimate effect of the wound is the resulting death, the state in which the death occurs in such cases should not be held to have common-law jurisdiction to try the murderer, since nearly all of the states have enacted statutes providing for such trials, and some of them have declared such enactments essential. *Commonwealth v. McLorn,* 101 Mass., 101; Bishop's Cr. Law, secs. 112 to 117. Our statute is a reënactment of that passed in England, in the assertion of the almost omnipotent power of the Parliament; yet, as we have seen by reference to Wharton's statement of the rule adopted in England as to jurisdiction of crimes, the courts of that country would never have held "elsewhere" to refer to bigamy committed by citizens of other nationalities, but to second marriages contracted by her own subjects while a former wife or husband was living. Parliament is not, of course, prohibited by any constitutional provision from passing an act which makes a particular offense, contrary to the general rule, indictable and punishable, not only in a country of England other than that in which it is committed, but when committed in a different dominion of the empire of a foreign land. *Walls v. State,* 32 Ark., 568; 2 Wharton's Cr. Law, sec. 1685. The powers of Congress on this subject are well defined in the Constitution, and the powers of the states are limited by the clause we have cited and others, as well as by the nature of our government, containing, as we look upon it, internally, as many sovereignties as there are states. Our statute was not amended so as to incorporate the English

idea until The Code was enacted in 1883; but it seems that in most of those states where attention was attracted to the subject at an earlier date, the legislatures doubted their power to make the act (548) done in another state punishable as a felony, merely because the offender placed himself within reach of criminal process of his own state. But according to the express terms of their statutes, the offense was not the act of unlawfully marrying a second time, but the continuous bedding and cohabiting afterwards. *Commonwealth v. Bradley,* 2 Cush., 552; *Bower v. State,* 59 Ala., 102; *S. v. Palmer,* 18 Vt., 570. The statute of the State of Missouri, by its very terms, seems to amount to a recognition of the principle which, we insist, is the correct one. It provides that "Every person having a husband or wife living, who shall marry another person without this State, in any case where such marriage would be punishable if contracted or solemnized within this State, and shall afterwards cohabit with such person within this State, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this State." *S. v. Fitzgerald,* 75 Mo., 571. It is the subsequent cohabitation, and not the fact that the person simply invades the jurisdiction of its courts, which subjects the offender to the same punishment as would the bigamous marriage had it been celebrated within that state. Under our statute we provide for the punishment of any person who has contracted a bigamous marriage in another state, if he can be caught here, even *in transitu* to another state.

The attempt to evade the organic law by making the coming into this State (after commiting an offense in another) a crime is too palpable, in view of the admitted fact that the Constitution of the United States gives to citizens of all the states the immunities and privileges of its own citizens, and of their guaranteed right, under the interstate commerce clause, to pass through another state without arrest and inquiry into their accountability for offenses against their own sovereignty, but especially because the trial for the new felony involves an investigation of the original bigamy by a jury not of the vicinage and remote from the witnesses. (549)

No court has ever questioned the power of a state to pass quarantine laws and statutes regulating the entrance of paupers within its limits, but this does not include the authority to impose a tax per capita, even on immigrants from a foreign nation arriving at its ports, or on passengers *in transitu* from one state to another. *Norris v. Boston,* and *Smith v. Turner,* 6 Myers' Fed. Digest, 665, 675, 677, 678 and 684. *Mr. Justice Wayne,* in the case last cited, said: "Some reliance in the argument was put upon the cases of *Holmes v. Jennison,* 14 Peters, 546; *Groves v. Slaughter,* 15 Peters, 449; and *Priggs v. Com-*

monwealth, 16 Peters, 539, to maintain the discretion of a state to say who shall come to and live in it. Why either case should have been cited for such a purpose I was at a loss to know, and have been more so from a subsequent examination of each of them. All that is decided in *Holmes v. Jennison* is that the states of the Union have no constitutional power to give up fugitives from justice to the authorities of a nation from which they have fled. That it is not an international obligation to do so, and that all authority to make treaties for such a purpose is in the United States." The learned justice, in a subsequent portion of the same opinion (p. 684), said: "I have never, in any instance, heard the case of *Miln* cited for the purpose of showing that persons are not within the regulating power of Congress over commerce, without at once saying to the counsel that that point had not been decided in that case. . . . Indeed, it would be most extraordinary if *Gibbons v. Ogden,* 9 Wheaton, 1, could be considered as having been reversed by a single sentence in the opinion of *New York v. Miln,* 11 Peters, 102, upon a point, too, not in any way involved in the certificate of division of opinion by which that case was brought to this Court. The sentence is that 'they (persons) are not the subjects of commerce, and, not being imported goods, cannot fall within a train of (550) reasoning founded upon a construction of a power given to Congress to regulate commerce, and the prohibition to the states from imposing a duty on imported goods.'" It thus appears that the language relied upon to sustain the assertion on the part of a state of the power to legislate in reference to persons coming from a foreign country has been expressly declared a *dictum,* and overruled. This principle approved by the Court is still more explicitly stated in *Henderson v. New York,* 2 Otto, 259, and in *Chy Lang v. Freeman, ibid.,* 275. The Court suggested in the latter case that, in the absence of all legislation on the subject by Congress, a state might possibly assume authority to prohibit the entrance from abroad of "paupers and convicted criminals." A treaty entered into by the United States at once operates as a repeal of all State laws repugnant to its provisions. *Baker v. Portland,* 5 Saw., 566; *Denn v. Herndon,* 1 Paine, 59; *In re Parrot,* 1 Fed. Reporter, 81; *Gordon v. Kerr,* 1 Wash., 322. "It is not competent for the legislature of a state to deprive a citizen of any other state of his legal or equitable rights under the Constitution and laws of Congress, by declaring that they must be enforced in a local court." *Armory v. Armory,* 18 Int. Rev. Rec., 149. Our statute applies, by its terms, as well to a citizen of another state who *in transitu* affords to our local authorities the opportunity to apprehend him as to those who become domiciled within our borders. As a citizen of another state, he has the privilege of demanding a trial in a particular locality, and by a jury

of the vicinage, and it would deprive him of that right guaranteed by the Federal Constitution to arrest him while temporaily in this State under the pretence of punishing him for the felony of coming into the State after a bigamous marriage, try him remote from the locality where the marriage was celebrated and his witnesses reside, for an offense involving only the question whether the second marriage was in fact bigamous.

Wharton (2 Cr. Law, sec. 1685), after discussing the English (551) statute, says: "In some of the United States a similar statute has been enacted; in others a continuance in the bigamous state is made indictable, no matter where the second marriage was solemnized. But when the act of bigamous marriage is made the subject of indictment, then at common law the place of such act has exclusive jurisdiction." The Court of Alabama has expressly held (in *Biggs v. The State,* 55 Ala., 108) that where a person is indicted for the bigamous act of marrying a second time in another state, as distinguished from continuing to cohabit within the State after such marriage, the indictment could not be sustained; but the Court did not find it necessary in that case to discuss the question of legislative power, as the Legislature had modified the English statute in the same way that it had been altered by law in Vermont, Massachusetts, Tennessee, Missouri and other states.

It will not be insisted that the courts of the State of Maine would have power to enforce a statute which provided for punishing with death any person who had committed murder in another state and then gone within its limits, by apprehending a Texan and requiring him to send to the banks of the Rio Grande for testimony to meet and refute that of a malignant neighbor who had followed him almost across the continent to wreck his vengeance. If a state has the power to punish one caught within its borders as a felon for a bigamous marriage committed within another state, what is to prevent the trial of a citizen found in a neighboring state for a homicide, if the statute were broad enough to include murder as well as bigamy—if the statute made it a felony punishable with death to come into the State after committing murder in another? The assertion of such authority would jeopardize the security of every American citizen who ventured beyond the confines of the state in which he resided. The express provision for the extradition of criminals excludes the idea of trying them outside of the limits of the state where the offense is committed, even if there (552) were no direct guarantee that they should not be subject to arrest and trial for offenses against their own sovereign when beyond her limits.

The additional counts, in which it is charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina and cohabited with the person to whom he was married, cannot be sustained, because the offense is not covered by our statute. The North Carolina statute would, if enforced, subject him to indictment if he should come across the border and leave the woman behind.

While we do not recognize the validity of marriages of parties when they leave the State for the purpose of evading a law which makes a marriage between them unlawful, and with the intent, after celebrating the rites in another jurisdiction, to return and live in this State (*S. v. Kennedy,* 76 N. C., 251), we have no express statute making such acts indictable as a felony, nor as a misdemeanor, where they live in adultery here. *S. v. Cutshall,* 109 N. C., 764. This fact is fatal to another count of the indictment. But we do not wish to be understood as questioning the power of the State to punish one of its citizens who goes out of the State with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction and returning to live within its borders.

For the reasons given, we think that there was no error in the judgment of the court below quashing the indictment.

SHEPHERD, J.: I concur in the conclusion that the indictment was properly quashed.

(553) MERRIMON, C. J.: dissenting: The indictment charges the defendant with the crime of bigamy, as defined and forbidden by the statute (The Code, sec. 988). It charges that the second marriage took place in the State of South Carolina, and that shortly thereafter the defendant came into the county of Mecklenburg and there resided with the second wife. He appeared, and moved to quash the indictment upon the ground that it appeared from it that he had committed no offense in this State. The motion was allowed, whereupon the solicitor for the State assigned error and appealed to this Court.

The statute declares that "If any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the State of North Carolina or elsewhere, every offender and every person counseling, aiding and abetting such offender, shall be guilty of felony, and imprisoned in the penitentiary or county jail for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county," etc. (The Code, sec. 988). This enactment is not very aptly, precisely, or clearly expressed, and hence

its validity is seriously questioned. But it must receive such reasonable interpretation as will render it intelligible, operative, and effectual, if this can be done consistently with the Constitution.

It does not necessarily imply or intend that the offender shall be indictable and convicted in this State for the offense of bigamy in another state; such is not its meaning. It intends that whoever shall be in this State, being married to two living wives, or two living husbands, as the case may be (except in the cases excepted in the proviso to the statute), shall be guilty of felony, and that without regard to whether the second marriage took place in this State, or elsewhere, and without re-
gard to whether the second marriage constituted the offense of (554)
bigamy in the state or country where it took place. It makes
the bigamist here answerable because he is here, an offense to, and an offender against this State and society here. The fact of bigamy—having two living wives or two living husbands—and the presence of the offender in this State constitute the offense. It is not simply the second marriage that constitutes the offense—the felony—but it is the existence of that fact and the presence of the offender in this State that makes it. The statute does not treat the second marriage as the offense, nor the *offense* as committed elsewhere than in this State.

It is said that in such case no offense is committed in this State or against it. This is a serious misapprehension. The statute, its purpose, makes the presence of the bigamist in this State an offense—makes him here a bigamist and guilty of a felony, whether he was so where the second marriage took place or not. Suppose the statute under consideration had declared in terms that if a bigamist shall come into this State he shall be deemed and held to be guilty of bigamy and felony here, could its validity be seriously questioned? This is what the statute, in effect, declares.

The Legislature, in the exercise of the essential police powers of government, may, for the protection of the people, the safety and purity of society, exclude from its borders criminals of other states and countries. To that end, it may make their coming here, their presence in this State, a felony, if they were guilty of a specified offense committed by them in the state from which they came, or if they were chargeable with doing specified acts in the state from which they came, constituting no criminal offense there, but declared and deemed to be an offense here. It is their coming into this State, their presence here, and the fact that they did in the state from which they came the acts deemed and held to be a specified criminal offense here, that constitutes the
statutory crime and felony in this State. Such exercise of (555)
legislative power may be unusual, and perhaps not very expe-
dient; but the power exists, and it is not the province of courts to de-

termine when it shall or shall not be exercised. Criminals have no right to commit crime and go from state to state, or from one country to another, and inflict themselves upon society wherever they may be. It is the right and the duty of government to protect itself and its people against them by all manner of appropriate legislation.

It has been suggested that the exercise of such power, except to a very limited extent, is not consistent with that provision of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." To what extent and exactly in what respects this provision restricts the exercise of the police power of the states is not very definitely settled, but it is very clear that it does not inhibit the enactment of statutes like that under consideration. The right of the State to make and enforce such laws is fully recognized in *New York v. Miln,* 11 Peters, 102. In that case the Court said: "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiciton is not surrendered or restrained by the Constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its existence is not surrendered or restrained in the manner just stated. That all these powers which relate to merely municipal legislation, or what may perhaps (556) more properly be called internal police, are not surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

That case is cited with approval in *Holmes v. Jennison,* 14 Peters, 540, *Chief Justice Taney* saying for the Court: "Again, the question under this *habeas corpus* is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interest. The power in that respect was fully considered by this Court and decided in *New York v. Miln,* 11 Peters, 102. Undoubtedly they may remove from among them any persons guilty of or charged with crime, and may arrest and imprison them in order to effect this object. This is a part of the ordinary police powers of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think proper, in order to deter offenders in other countries from coming among them,

make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases the State acts with a view to its own safety, and is in no degree connected with the foreign government in which the crime was committed." The first of the cases here cited is to some extent criticised in *Henderson v. Mayor,* 92 U. S., 259, and *Chy Lang v. Freeman, ibid.,* 275, but not in the aspect of it material here. It is difficult to see any substantial reason why the Legislature may not by proper enactment make it indictable—a misdemeanor or a felony—for persons who have done acts in one of the states deemed dangerous to its safety, or that of the morals or property or the prosperity of its people, if they be found within its limits. It may by such means keep out of and drive beyond its borders foreign paupers, common gamblers, bigamists, and the like. It must be the judge of the wisdom and expediency of such legislation. Offenders against such statutes are such, wherever they may be found in the State, and hence may (557) be tried wherever found, without invading any fundamental right secured to them. The acts forbidden having been done, the presence of the offender in the State anywhere, constitutes the offense.

This case is very different from *S. v. Knight,* 1 N. C., 143. In that case the statute declared void undertook to make the offense of counterfeiting in another state indictable in this State.

The indictment does not charge the defendant with bigamy committed in South Carolina; it charges him with a statutory crime (a felony) committed in this State, one of the essential acts constituting it having taken place in South Carolina. The statute does not make the second marriage the offense; it simply treats this as a fact to be taken in connection with others, all constituting the offense in this State. The offense is wholly statutory in its nature, and must be so treated.

I think the order quashing the indictment should be reversed, and the case disposed of accordingly.

PER CURIAM. Affirmed.

Cited: S. v. Hall, 114 N. C., 912; *S. v. Caldwell,* 115 N. C., 803; *S. v. Hall, ib.,* 817; *Wilson v. Jordan,* 124 N. C., 709; *Green v. Owen,* 125 N. C., 215; *S. v. Buchanan,* 130 N. C., 662; *S. v. Long,* 143 N. C., 672, 673; *S. v. Ray,* 151 N. C., 712, 715; *S. v. Collins,* 169 N. C., 324; *S. v. Herron,* 175 N. C., 759.

Corrected in accord with dissenting opinion: Rev., 3361; *S. v. Herron,* 175 N. C., 759.

(558)

THE STATE v. J. N. KERBY.

Indictment—Abandonment—Parent and Child—Jurisdiction.

1. The failure by the father to provide for the support of the children is as much a violation of the statute (The Code, sec. 972) as the failure to provide support for the wife, and an indictment charging such violation following the words of the statute is sufficient.

2. It is not necessary that an indictment charging an offense of which a justice of the peace has exclusive original jurisdiction should allege that the offense was committed more than twelve months before the finding of the bill. The fact may be shown as a matter of defense on the trial, or upon a motion to quash.

INDICTMENT for failure to provide an adequate support for children, tried at Spring Term, 1892, of ALEXANDER, before *Bynum, J.*

The indictment is as follows: "The jurors for the State, upon their oaths, present, that J. Nelson Kerby, late of Alexander County, on 1 January, 1890, with force and arms, at and in said county, while living with his wife, one Mary Kerby, unlawfully and willfully did neglect to provide an adequate support for the children, which he had begotten upon her, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendant moved to quash, and the motion was allowed, and the solicitor for the State appealed.

Attorney-General for the State.
No counsel for defendant.

AVERY, J.: The indictment follows the words of the statute (The Code, sec. 972), which provides that where the husband, while living with his wife, shall willfully fail to provide adequate support for such wife, *or the children* which he has begotten upon her, he shall
(559) be guilty of a misdemeanor. It is unquestionably as much a distinct criminal offense to fail to make sufficient provision for the children as for the wife, and the solicitor might charge the omission to discharge either or both of the duties the disregard of which the law is intended to punish.

It was not necessary to aver in the indictment that no justice of the peace had taken cognizance of the offense charged for twelve months after it was committed, because the fact, if true, that the bill had been sent before the jurisdiction of the higher court attached was matter of defense, to be shown on the trial; *non constat* upon the motion to quash, on the face of the indictment, but what it may be shown that the offense

was committed twelve months before the indictment was found. *S. v. Porter,* 101 N. C., 713; *S. v. Moore,* 82 N. C., 659; *S. v. Taylor,* 83 N. C., 601; *S. v. Earnest,* 98 N. C., 740; *S. v. Cunningham,* 94 N. C., 824; *S. v. Shelley,* 98 N. C., 673.

We can conceive of no grounds for sustaining defendant's motion, except those stated. The judgment quashing the indictment is reversed.

New trial.

Cited: S. v. Carpenter, 111 N. C., 707; *Sanders v. Sanders,* 167 N. C., 319.

(560)

THE STATE v. GEORGE W. KITTELLE.

Agency—Liquor, Sales to Minors—Dealers Criminally Responsible for Acts of Agents.

A licensed liquor dealer is criminally responsible for the unlawful sale by his agent of liquors to minors, although such sale may have been against his instructions and without his knowledge.

SHEPHERD, J., dissenting.

INDICTMENT for selling intoxicating liquor to a minor, tried before *Meares, J.,* at January Term, 1892, of the Criminal Court of MECKLENBURG.

The defendant Kittelle was, at the time of the alleged sale, the proprietor of the Buford Hotel, in Charlotte, and of the bar connected therewith. The defendant had two clerks in his barroom. Shuman testified that he was a minor and unmarried, and that one of the clerks sold him beer, but he could not state which one it was, and that Kittelle was not present when he bought the beer. The defendant Kittelle testified that he had given his clerks "special instructions not to sell liquor to minors or on Sunday, and otherwise to comply with the law"; that he closely scrutinized the conduct of the clerks, and if liquor had been sold to Shuman, or to any other minor, it was done "without his knowledge, in violation of his instructions and against his wishes." Kittelle was a licensed retailer. This was the substance of the evidence.

The defendant Kittelle requested the court to instruct the jury that if his clerks had sold liquor to the minor Shuman, without defendant's knowledge, in violation of his instructions and against his wishes, they should acquit him. The prayer was refused, and the court charged the jury that if they found that either of the clerks had sold to Shuman, they should convict the defendant Kittelle. Defendant excepted.

Verdict, judgment, and appeal. (561)

Attorney-General for the State.

Burwell & Walker, H. C. Jones, and Osborne & Maxwell for defendant.

CLARK, J.: The Code, secs. 1077 and 1078, makes it a misdemeanor for any dealer in intoxicating liquor to sell directly or indirectly, or give away, such liquor to any unmarried person under 21 years of age, knowing such person to be under that age, and that such sale or giving away shall be *prima facie* evidence of such knowledge, and further, that the father, mother, guardian, or employer of a minor to whom intoxicating liquor shall be sold or given away may maintain an action for exemplary damages, and that in no case can the jury award the plaintiff a less sum than $25.

The defendant contends that no one can be held criminally liable for an act which is done without his knowledge or consent. This is the strength of his contention. It is, in substance, that guilt cannot be attributed to him in this matter, because guilt consists in the *intention,* and that he had no intention to violate the law, because he neither knew of nor consented to the sale. There is, however, a well defined distinction between those acts which are criminal only by reason of the intent with which they are done, and those in which the intent to commit the forbidden act is itself the criminal intent. As to this very matter of the sale of spirituous liquor to minors, it has often been held that the lack of intention to violate the law did not exculpate, if, in fact, the defendant did the act, or authoried it to be done, which constituted a breach of the law. *S. v. Wool,* 86 N. C., 708; *S. v. McBrayer,* 98 N. C., 619; *S. v. Scoggins,* 107 N. C., 959; *S. v. Lawrence,* 97 N. C., 492; *Farrell v. The State,* 30 Am. Rep., 614, and numerous cases cited (562) in the notes thereto.

A principal is *prima facie* liable for the acts of his agents done in the general course of business authorized by him, as where a barkeeper sells liquor, or a clerk sells a libel, or prints one in a newspaper. 1 Whar. Cr. Law, 247, 341, and 2422. And a vendor of spirituous liquors is indictable for the unlawful sale by his agent employed in his business, because all concerned are principals. 2 Whar. Cr. Law, 1503. In *Carroll v. The State,* 63 Md., 551, it is held that if, in the conduct of the business of selling liquors, a prohibited sale is made by the agent to a minor, the principal cannot shield himself from liability on the ground that his agent violated his general instructions, and did not inquire, or was deceived by the purchaser as to his age; that while deriving profit from the sale, the principal cannot delegate his *duty* to know that the purchaser is a lawful one to the determination of an agent and be excused by the agent's negligence or error; that intention

not being an essential ingredient of the offense, the principal is held bound for the acts of his agent in violation of law while pursuing his ordinary business as such agent; being engaged in business where it is lawful to sell only to such persons as are not excepted by law, it is his *duty* to know, when a sale is made, that it is to a properly situated person, and therefore it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and if he does not do so, the law holds him answerable. The same is held in *S. v. Denson,* 31 W. Va., 122; *S. v. Dow,* 21 Vt., 484; and to the same effect are numerous other decisions. 11 A. & E., 718.

The same principle of the principal being criminally liable for the misconduct of his agents applies to many other offenses. In the leading case of *Rex v. Gutch,* M. & M., 433, cited in 1 Taylor Ev., 827, which was a prosecution for libel, *Lord Tenterden* said: "A person who derives profit from, and who furnishes the means for carrying on, the concern, and entrusts the business to one in whom he confides, may be said to have published himself, and ought to be an- (563) swerable."

In *Redgate v. Hayes,* L. R., 1 Q. B. Div., 89, the defendant was charged with *suffering gaming* to be carried on upon her premises. She had retired for the night, leaving the house in charge of the hall porter, who withdrew his chair to another part of the hotel and did not see the gaming. It was held that the landlady was responsible. The same principle was maintained in *Mullins v. Collins,* L. R., 9 Q. B., 292, where the servant of a licensee supplied liquor to a constable on duty, and the court held the licensee answerable, though he had no knowledge of the act of his agent.

In the present case, had the defendant himself sold the liquor to the minor, he would be fixed *prima facie* with the knowledge that the purchaser was a minor. The contention of the defendant that such *prima facie* knowledge is rebutted by the fact that he was not personally present omits consideration of the fact that the knowledge of the agent is the knowledge of the principal. This is always true, though the *intent* of the agent (when material) is not necessarily the intent of the principal. The law requires the county commissioners to issue license to retail liquor only to persons whom they shall find properly qualified. This is construed in *Muller v. Commissioners,* 89 N. C., 171, to mean that, among other things, the applicant must possess a good moral character. It would be a vain thing to require the commissioners to take the pains and trouble to ascertain whether the applicant is properly qualified, and to reject him if he is not, if the licensee may immediately upon opening his bar set up as his clerk another applicant who has, perhaps, just been rejected by the county commissioners, after due

inquiry, as not properly qualified, and may claim, upon a violation of the law by such clerk, that he, the licensee, is not liable, because he had instructed his clerk when he employed him not to violate the law, had often visited his barroom without seeing any sales made to (564) minors, and no one had informed him that such sales were being made. If such were law, the safeguard intended to be obtained by placing the licensing power in the hands of the county commissioners, who shall issue license only to those whom they find "properly qualified," would be a delusion and a sham. If the only safeguard is an indictment of the person actually selling, that exists against the principal, and there would be no need of requiring a license of anyone.

The defendant's clerks had no license to retail liquor. Every sale by them to anyone is indictable, and the defendant is indictable with them as coprincipal (there being no accessories in misdemeanors) for aiding and abetting them in their illegal traffic, *unless it is true that their sales are his sales.* If it is valid to protect such sales by them under the authority of the license to him, then their sale is also his sale to make him liable if the terms of the license are not complied with. The licensee cannot put his clerks in his shoes, give them the benefit of the license issued to him upon the confidence reposed in his moral character, and not be held responsible for their violations of the law in the scope of such employment. He cannot set up his bar, receive its profits, and abdicate his duties. The duty is imposed on him that the law shall not be violated by a sale to a minor. Here the sale was to a minor. The defendant put it in the power and authority of the clerk to sell. It was the defendant's own risk and peril that he was not present, and that he did not make the sale himself. That his agent did not obey his instructions, and negligently or purposely violated the law, does not exculpate the defendant. The law has been violated. It looks to the man it authorized to sell—the licensee—this defendant. The sale by the clerk was in law a sale by the principal, and the violation of the law must be laid upon the defendant, who gave the clerk (565) the means and the authority to sell, but did not take proper care in selecting his agent or use means sufficient to prevent illegal sales by him. It will not do for the defendant to say that he authorized legal sales and the clerk made illegal sales. The law authorized the defendant to sell. Whether his sales are legal or illegal is at his peril, and it can make no difference whether he sells by his own hands or through an agent whom he improperly selected or insufficiently supervised. The violation of the law is at the door of the man whom alone

the law authorized to sell. The agent or clerk (if identified) is also liable as aiding and abetting in the illegal sale. *S. v. Wallace,* 94 N. C., 827.

Either the licensee is responsible for illegal sales by the clerk (*S. v. McNeely,* 60 N. C., 232) or the licensee has no authority under his license to sell through the medium of a clerk, and all sales must be by the person himself whom the commissioners have found "properly qualified," and have licensed to sell. *Any other view of the matter would be illogical, and would be a virtual repeal of the law. It would empower the barkeeper to appoint others as barkeepers, whom, perhaps, the county commissioners would have refused to license.* However well "qualified" the commissioners may find the party whom they license, there is no guarantee that he will select clerks who are so, or that he has the energy, the judgment, or the skill to prevent violations by them. The law will look to the man it licenses, and he must select his clerks and be responsible for them at his peril.

In *Carroll v. State, supra,* the Supreme Court of Maryland, upon a state of facts and a statute almost identical, comes to the same conclusion. It says: "When the agent, as in this case, is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on the business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a *bona fide* intent to obey the law, which all the authorities (566) say is immaterial in determining guilt. The court may regard such fact, in graduating punishment, when it has a discretion. The cases, therefore, which hold that such orders will exculpate the principal are inconsistent with the rule that in such cases the intent is immaterial. If intent is not an ingredient in the offense, it logically follows that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person must be responsible for the agent's acts. In fact, it is his act. It cannot be that by setting another to do his work and occupying himself elsewhere and otherwise, he can reap the benefit of his agent's sales and escape the consequences of the agent's conduct. It would be impossible to effectually enforce a statute of this kind if that were allowed, and it would speedily become a dead letter." This case cited, also, *McCutcheon v. The People,* 69 Ill., 606, in which it is said: "It is immaterial whether the sale was made by an appellant or an agent. The agent had no license to sell to anyone, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption is conclusive that the agent or servant acted within the

scope of his authority in making the sale." This latter case is cited and expressly followed in *Noecker v. The People,* 91 Ill., 494. To the same purport, that "when, in the absence of a saloon-keeper, a sale of liquor is made by his bartender, the directions of the former not to sell to minors will not exempt him from liability for the sale," are *Mugler v. State,* 47 Ark., 110; *Edgar v. State,* 45 Ark., 356; *Waller v. State,* 38 Ark., 656; *Loeb v. Georgia,* 75 Ga., 258; *Snider v. State,* 7 S. E. Rep., 631; *Whitton v. State,* 37 Miss., 379; *Riley v. State,* 43 Miss., 397; *Dudley v. Sautbine,* 49 Iowa, 650, and many others; though in these cases the statute varies somewhat from that in this State.

(567) In *People v. Roby,* 50 Am. Rep., 270 (52 Mich., 577), and *People v. Blake,* 52 Mich., 566, it is held that "The owner of a saloon whose clerk, without his knowledge or consent, but while he was on the premises, opened it on Sunday morning to clean it out, and sold a drink to a customer, may properly be convicted of keeping a saloon open on Sunday." The opinion in the first-named case is delivered by *Cooley, C. J.,* the eminent writer on Constitutional Limitations, and in the course of it he says: "As a rule, there can be no crime without a criminal intent; but this is by no means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible," and numerous incidents and precedents are cited to support the proposition. *Bona fides* was held also to be no defense in an indictment for extortion, *S. v. Dickens,* 2 N. C., 407; nor for unlawful voting, *S. v. Boyette,* 32 N. C., 336; *S. v. Hart,* 51 N. C., 389; nor generally in statutory offenses, *S. v. Presnell,* 34 N. C., 103.

The defendant relies on *S. v. Privett,* 49 N. C., 100. There the court charged the jury that if the principal instructed his clerk not to sell, he would not be liable for the sale by the clerk unless such instructions had been abrogated expressly, or by a course of conduct which would tacitly amount to the same. The appeal by the defendant, of course, could not bring up for review this charge which had been made in his favor; but *Nash, C. J.,* takes occasion to say: "The defendant has, as we think, no cause to complain of his Honor's charge; it was as favorable to him as it could have been." And he adds: "As to

(568) the effect of general instructions in such a case as this, it is not necessary for us to give an opinion. But we can say that if they are to have the effect given to them by the charge in this case, and in the argument of the defendant's counsel, the act under which this

prosecution is had will be very easily evaded." This is a strong intimation, we take it, that if the correctness of the charge had been before the court it would have been reversed. Accordingly, in *S. v. McNeely*, 60 N. C., 232, it is held that a licensee may have a clerk or agent, "he remaining responsible for the good conduct of his agent."

The defendant also relied upon *S. v. Divine*, 98 N. C., 778, in which it is held that a statute making one railroad officer criminally responsible for the act of another was unconstitutional. We do not see the analogy. If the statute had forbidden the doing of a certain act by a railroad company, and provided that if it was done by any of the officers or agents of the company in the scope of their employment, the corporation, being the principal, should be indictable, the case would have been on "all-fours" with the present, and the act constitutional. Indeed, it is pointed out in that very case that the principal might be held criminally liable for the acts of the agent, but a coemployee could not. Without any express statute, corporations have been repeatedly indicted for the negligence, or nonfeasance, and misfeasance of their agents, when neither the corporation nor its managing officers had any intention to violate the law, and, in fact, had given instructions forbidding such acts. The corporation is held criminally liable, such instructions being, as in the present case, held not a matter of defense, but in mitigation of punishment. It is needless to cite cases. The doctrine is settled law.

The retailing of liquor is not a matter of natural right, and the whole subject is within the police power of the State, which can leave it unrestricted or hedge it about with regulations, or (569) forbid it entirely. *Mugler v. Kansas*, 123 U. S., 623, and countless other cases. When regulations are imposed, as in this case, the licensee is criminally liable for their nonobservance. The defendant was found by the county commissioners "qualified," and a license was issued to him upon the personal trust that he would conduct the business according to the regulations. The sale here made to a minor was a violation of that trust, and a violation of law. It is no defense that the defendant had no intention to violate the law. "Good intentions" are said by the proverb to be the pavement of another place, but they are not a sound one for a barroom. The law has been violated. It looks to the man it entrusted with the management of this business, and holds him liable. It is immaterial whether his liability is based upon his negligence in permitting the sale, or upon the principle of agency, or upon both, for the defendant is liable for a negligent sale from insufficient supervision of an agent as much as if he had ordered the sale. If the clerk, as *Judge Cooley* says, *supra*, being in possession of the keys, opened the saloon on Sunday for traffic, the licensee could not excuse himself from liability by his absence or ignorance, nor

can he do so in the present case of a sale to the minor by being temporarily absent from the room. The defendant chose to seek for and assume the liabilities of the calling of a saloon-keeper that he might enjoy its profits. He cannot be allowed to enjoy its profits and assign its duties and liabilities to another.

The elaborate argument for the defendant is based on the fallacy that our statute requires a *scienter* to be proven. This would be so if the section was abruptly cut in two. But taken as it stands, when the State has proven an illegal sale as to a minor, the case is made out. The statute only permits the defendant to withdraw himself from liability by showing that the actual seller did not know that the purchaser was a minor. This was not done in this case. The argu-
(570) ment made for the defendant, that a merchant might, on the same grounds, be convicted of a larceny by his clerks, is not very complimentary to the defendant, and it is as little beneficial to him. If, however, the law forbade larceny, except upon a license (if it is possible to conceive of such a thing), granted after examination, and theft by all not so licensed, or even by them from minors, were indictable, and the clerks, without being themselves licensed, committed a theft by virtue of the defendant's license, from a minor, then only would the case be analogous.

The evidence is uncontradicted that the sale was to an unmarried person who was a minor. No exception was made as to the charge in regard to the purchaser being unmarried, and hence we cannot pass upon a point not raised, and about which, indeed, there was no controversy. Neither the whole of the charge nor of the evidence is stated to have been sent up, only so much as is necessary to present the exceptions made.

The fact that the clerks were acquitted because it could not be determined which one sold to the minor is a strong argument against the defendant. If the principal were not liable for all illegal sales made under his license, he could, by having several clerks, or changing them often, easily evade punishment for illegal sales. The law looks to the responsible party—the licensee—who has been permitted to carry on the calling, and who is held for its proper exercise. He is to receive the money from the illegal sales, and he can always be identified.

The amount of supervision exercised by the defendant here is a matter in mitigation to be considered by the court in passing judgment. It was not enough to prevent the illegal sale, and hence is not a defense.

No error.

AVERY, J.: Concurring fully in the line or argument adopted (571) by my learned brother who has delivered the opinion of the Court, and in the conclusion to which it has led, I desire to add some reasons and authorities which it seems to me tend to sustain and strengthen it.

The statute (The Code, sec. 1077) provides that "It shall be unlawful for any dealer in intoxicating drinks or liquors to sell or in any manner to part with, for a compensation therefor, *either directly or indirectly,* or to give away, such drinks or liquor to any unmarried person under the age of 21 years, *knowing* the said person to be under the age of 21 years: *Provided,* that such sale or giving away shall be *prima facie* evidence of *such knowledge.*"

Retail dealers are licensed by the order of boards of county commissioners "upon satisfactory evidence of good moral character of the applicant." Laws 1891, ch. 323, sec. 32. Proof of moral character is made an indispensable prerequisite to granting the privilege, and this requirement imposes upon the dealer thus clothed by implication with a public trust the duty of using extraordinary diligence to prevent all violations of the letter or spirit of the law under cover of the immunity from indictment for retailing which the license gives him.

In construing the general statute (The Code, sec. 1076) which makes a sale "by the small measure, in any other manner than is prescribed by law," a misdemeanor, this Court has not hesitated to look through specious evasions in order to determine the real quality of an act. Whether there was direct and positive proof of an actual criminal purpose of the dealer, or such testimony as raised a presumption only of his unlawful intent to evade, or to carelessly permit his agents to evade its provisions, the *nisi prius* judges have been sustained in instructing the jury that the evidence, if believed, would warrant a verdict of guilty. *S. v. McMinn,* 83 N. C., 668; *S. v. Poteat,* 86 N. C., 612; *S. v. Kirkham,* 23 N. C., 384. (572)

The defendant Kittelle employed two clerks in his barroom, both of whom are indicted with him. The prosecuting witness testified that he bought beer from one of the clerks, he did not remember which one, but could not testify that both were present when he purchased, and that he was at the time under the age of 21 years. Though no actual knowledge, on their part, of the age of the witness was shown, the proof of selling was *prima facie* evidence that they knew he was a minor, and if either had been identified by the testimony as the seller, the court would have allowed the jury to pass upon the question of his guilt. In the absence of testimony tending to identify the actual seller, the question addressed to the court was whether the unrebutted presumption that the clerk who did the selling knew that he was dealing with a minor was *prima facie* proof of the guilt of the defendant

Kittelle, though the jury believed that the sales were made in violation of his instruction, and when he was absent, and could have no actual knowledge of the transaction.

Conceding, for the sake of argument, as has been contended on behalf of the defendant, that where a legislative act, in unqualified terms, makes a guilty intent of the essence of the offense, the burden is on the State to prove the *scienter*, the peculiar proviso to our statute would involve a novel question, not presented, as far as my investigations have extended, in any of the cases involving the construction of liquor laws that have been cited. It is too clear and well settled to admit of argument that the mere proof of the sale to a minor by a clerk raised a presumption of knowledge on the part of the clerk that the purchaser was under 21 years of age, notwithstanding the express requirement that the act should be done *"knowingly." S. v. Scoggins,* 107 N. C., 959. If the artificial force of this *prima facie* proof extends (573) both to agent and principal, and the guilt of the servant is thereby imputed to the employer, the presumption of the willful violation of the statute by the former can be rebutted only by showing a want of knowledge of the age of the purchaser on the part of the actual seller, not by proof that the owner was absent, in no wise participated in the act, and had expressed his disapproval of such conduct, as in this case. The clerk who made the sale, if the testimony had identified him, and he had chosen to risk his case upon the credibility of evidence offered to identify, might have been convicted under the statute making guilty knowledge of the essence of the offense, by force of the presumption, when, in fact, he honestly believed the purchaser was an adult. The proviso makes "such sale to a minor *prima facie* evidence of such guilty knowledge," not solely against the active agent who conducted it, but against anyone who might have been convicted upon the evidence adduced, if both the word "knowingly" and the peculiar qualifying proviso by which it is followed had been omitted by the Legislature. In that case it would have been unnecessary to prove the *scienter* at all, while under the statute as it is it is essential to do so but *sub modo,* viz., by proof sufficient to raise a presumption of guilty knowledge, and that presumption arises when the fact of being a minor is proved. Is the guilty knowledge of selling to the minor, the presumption of which arose on proof of the age, imputed by the artificial effect of the statute to the dealer as well as to the clerk?

If such is the proper interpretation of its language, it is needless to discuss the question of applying the doctrine of *respondeat superior* to criminal prosecutions. Where a sheriff is indicted (under The Code, sec. 1022) for the escape of a prisoner lawfully placed in his custody, though the prisoner may have escaped from the jail in the immediate

charge of a jailer, and in the absence of the sheriff, the statute imposes the burden on the accused, upon proof that the prisoner was duly committed to his custody, of showing that "such escape was not by his consent or negligence, but that he used all legal means to (574) prevent the same and acted with proper care and diligence." The punishment for the offense is removal from office, and, in addition, a fine at the discretion of the court; yet it has never occurred to anyone to doubt the legislative power to make such a law, or question the propriety of enacting it. The statute provides that any dealer in intoxicating liquors who sells, etc., "either directly or indirectly," to a minor, shall be guilty of a misdemeanor. What meaning are we to give to the words "directly or indirectly"? They were not intended to extend the provisions of the law so as to punish attempts to evade it, because that was entirely unnecessary. The general statute had made it indictable "to retail spirituous liquors" in any other manner than is prescribed by law, without additional description of the manner of selling, yet it was held a violation of that act to let another go by permission to a barrel and draw a drink at a time until he should get pay for a debt of $1.25, or to place a table in a room, with a hole in the top communicating with a drawer, and a bottle of whiskey and glass sitting on it, and suffer persons to help themselves to a drink of whiskey and drop money into the drawer without communication with the owner. In the latter case, for the purpose of preventing the attempted evasion, the jury were allowed to draw the inference of the agreement to take a given price, and to draw the inference also of a deposit for the customer instead of a manual delivery, which was an essential element of the sale. *S. v. Poteat,* and *S. v. McMinn, supra.* So, where one made a bargain with the dealer to buy a quart of spirituous liquor, but to take it from time to time, in parts of a quart, till in the aggregate he should get that quantity, it was held that the jury were warranted in finding the dealer guilty of unlawful retailing, without an explicit provision in reference to evasions, which were deemed prohibited by necessary implication. (575)

The language used in the Illinois statute was, "Whoever, by himself, clerk or servant, shall sell, etc., shall be liable"; and the Supreme Court of that State held that testimony offered to show that the sales to a minor were made by the dealer's clerk was properly excluded. *Noecker v. People,* 91 Ill., 494. The material words of the Georgia statute were, "No person, by himself or another, shall sell, etc., or furnish any minor or minors spirituous, intoxicating, or malt liquors," etc. The Court of that State held that a dealer could be convicted for a sale by his clerks in his absence, and without his knowledge or consent. *Loeb v. State,* 75 Ga., 258; *Snider v. State,* 81 Ga., 753. The statute

of Arkansas made it a misdemeanor to be "interested" in a sale of liquor to a minor without the written consent or order of the parent or guardian. *Mugler v. State,* 47 Ark., 109; *Waller v. State,* 43 Ark., 384; *Edgar v. State,* 45 Ark., 356. The Court held that "the dealer's absence from the saloon when the bartender sold the liquor to the minor" was not a sufficient defense to an indictment under that statute.

I think that the purpose of the Legislature in inserting the words "directly or indirectly" in the statute was not needlessly to notify the people that the court would tolerate no attempts at evasion by resorting to artifice, but to meet the very difficulty which seems to have suggested itself to lawmakers in other states, and express the same idea conveyed in Illinois by using the words "by himself, clerk or servant," in Georgia "by himself or another," and in Arkansas by extending the criminal liability to every one who might be interested in the sale to a minor. If, therefore, the words "directly or indirectly" are susceptible of two interpretations, and might be construed to have been aimed either at evasions by artifice or at violations perpetrated through agents negligently selected, we should adopt that construction which harmonizes with other legislation upon the same subject, and which manifestly looks to the end of entrusting the business, which had required so much legal supervision, to men whose characters would be a guaranty that the power would not be abused. This guaranty would be worthless if they could shift the responsibility upon agents who could carelessly or purposely override all laws imposing safeguards on the business. It would seem an unaccountable oversight if intelligent representatives in our legislatures had attempted to protect the public against nuisance by requiring that all persons applying for license, as an essential prerequisite to obtaining the privilege, should satisfy the county commissioners that they had established good moral characters, and for a generation past had left them at liberty to employ the most immoral men in the community to conduct the business without incurring liability for such flagrant violations of the liquor laws by these agents in selling to minors. Why require the solemn mockery of proof of moral character by the applicant if, in an hour after the license is issued, he can constitute the worst man in the community his chief clerk, exhort him to obey the laws of the land, bow himself out, and leave the employee free from oversight to sell on commission till the term of license expires?

(576)

The section under which the indictment is drawn does not, as we have said, stand alone, but all of our legislation on the subject points with unerring certainty to the one central object of selecting with care the trusted agents of the Government, who shall, by virtue of their high moral characters, enjoy the privilege, and, in view of the temptations

incident to the traffic, incur the responsibility of licensed dealers in liquors. In *People v. Utter,* 44 Barb. (N. Y.), 172, the Court said, in order to convict, proof must be made on the part of the defendant of an intent to violate the statute. Where, as in this case, the sale is not made by the defendant personally, or in his presence, the presumption is not overcome by merely showing that the sale was made on his premises by his bartender. But if that were a correct statement (577) of the law, in our case the presumption of innocence, which the law raises in favor of the accused, is rebutted by force of the proviso, the effect of which is intended to be felt not simply against the servant, but against one who has proved unmindful of the high trust confided to him by society in employing unreliable agents. The law, which looks so closely to his character, does not intend that he shall reap the profits of illicit sales and escape the responsibility for the consequent injury to society. This question does not depend upon analogies drawn from the construction given to statutes of other states widely different from our own. It is the duty of this Court to give a construction to our own act, which is peculiar in two important respects: First, in the use of the words "directly" and "indirectly," in order to put the dealer into the shoes of the agent or servant; and, secondly, in neutralizing, by certain evidence, the force of the word "knowingly" by the proviso following immediately after it, and imposing upon the employee, as well as upon the employer, who is acting "indirectly" through him, the burden of showing that the former did not have knowledge of the fact, proved otherwise to be true, that the purchaser was a minor. Where the presumption of the *scienter* may be raised by proving other facts, upon adducing the requisite proof the burden may be shifted so as to dispense with the necessity of offering, in behalf of the State, any direct evidence to show intent at all. Just as soon as the presumption of the *scienter* is raised, then the prosecution, until rebutting proof is offered, stands in the same position as if the statute had been silent as to proof of intent. In construing section 41, ch. 34, Revised Code, which made "persons neglecting to keep and repair their fences during crop time, in the manner required by law, viz., five feet high," guilty of a misdemeanor, this Court held expressly that the "foreman, when acting under the general direction of his employer, was not liable to indictment for failure to keep (578) the fences of the owner in repair, but that the absent employer was indictable." *S. v. Taylor,* 69 N. C., 543; *S. v. Bell,* 25 N. C., 506; *Rex v. Gutch,* 1 Mord. & Molk., 437. This is a direct recognition of the principle that where no proof of unlawful intent is required, or where the presumption of guilty knowledge is raised in a way provided by statute, a defendant who was not present when the act was done or

the duty omitted by another, the doing or omission of which constitutes in law the criminal offense, may, nevertheless, be convicted of it. Kittelle, instead of acting directly as salesman at his own bar, chose to perform that important trust through another. So long as the presumption of guilty knowledge on the part of the employee who made the sale remains unrebutted, the testimony, if believed by the jury, must be considered *prima facie* proof of the guilt of an absent hotel-keeper, just as the neglect of the overseer to repair fences is imputed to the absent planter, or as the criminal conduct of an employee was imputed to another, assumed by law to act through him, in the cases of indictment for sales to minors cited above.

The fact that our statute by its express terms makes the dealer responsible for the act of unlawful selling done indirectly through his servant, and imputes to him the purpose or neglect of the subordinate, easily distinguishes our case from those arising under statutes which contain neither this provision, that requiring express proof of intent, nor that specifying certain evidence that may raise a presumption of guilty knowledge.

As I understand it, these differences exist between our statute and those of Mississippi and Michigan, to which our attention has been called, and account for the conclusions reached in the cases cited from the courts mentioned.

It is true that the statute of Maryland did not in express
(579) terms, make the *scienter* of the essence of the offense, but it enunciated the very important principle, drawn in question in the argument for the defense, that the act of the bartender would be imputed to his employer, who was held to stand in his shoes, even where the principal offered as a defense the identical evidence introduced in our case, viz., that the sale was made by the clerk in his absence, without his knowledge, and contrary to his instructions. When, therefore, in the consideration of the case at bar, we recall the fact that, by raising the presumption, the prosecution dispensed with the necessity for further proof of *scienter,* just as if it had not been required in any event, then the defendant Kittelle is placed by the principle laid down in that case under the same burden imposed by the presumption on the clerk.

S. v. Hayes, 67 Iowa, 27, went off on a question quite different from that raised here. While the Court laid down, in unmistakable terms, the proposition that a dealer engaged in the business of selling intoxicating liquors "is criminally liable for the acts of his servant or agent done in the course of the business," under a statute which made a guilty knowledge necessary and provided that he should be responsible for sales "by himself, his servant, or his agent," the defendant was dis-

charged for want of proof to support an averment of the indictment, drawn under another clause of the act, to the effect that the proprietor kept the spirits with unlawful intent.

I do not contend that the opinion of the Court is sustained by all of the American courts. Indeed, I find two cases that seem to be plainly in conflict with it. *Anderson v. State,* 22 Ohio, 305, and *Bower v. State,* 19 Conn., 398. The Missouri statute, which was construed in *S. v. Shortell,* 93 Mo., 123, failed expressly to prohibit sales made through another, and the decision is put upon that ground, thus plainly distinguishing it from the case at bar. The Supreme Court of New York, in *People v. Schoffer,* 4 Hun., 23, and *People v.* (580) *Mahoney, ibid.,* 26, approved the principle which I have stated: that on making proof which, according to the terms of the statute, raises a presumption of guilty knowledge, the necessity for further evidence of intent is dispensed with. It will not be seriously contended that the Legislature has not the power to give such artificial weight to testimony in criminal actions. The tendency in America, during the last twenty years, has been to provide, by express legislation, for punishing the real proprietors of drinking saloons for the unlawful acts of their agents and servants. And the various statutes have given expression to the common purpose in different terms, as will appear by reference to the quotations from the acts of Arkansas, Georgia, Iowa, and other states. In later years, the courts of most of the states, in construing the statutes, show no disposition to follow the older line of cases, like those cited from the Reports of Ohio, Connecticut, and Massachusetts. Following the general current of more modern authority, and the giving to the law under which the indictment is drawn the construction of which it seems so clearly susceptible, I have eliminated the questions that have given rise to the most serious controversy. If the Legislature had the power to declare that a sale made by a clerk should be deemed to have been made by his employer, and the words of the statute can be fairly construed to mean that it has so declared, then the necessity for discussing the general doctrine of the criminal responsibility of principals for the acts of agents done in the absence of the principals, would seem to be obviated. If we were compelled to fall back upon general principles, we would find that, after taking a survey of all the conflicting authorities, Wharton (2 Cr. Law, sec. 1503) states his conclusion as to the general liability of principals to indictment for unlawful sales by agents as follows: "A shop or hotel keeper is indictable for an unlawful sale of spirituous liquors by a servant employed in his business, as all concerned are principals; nor in such a case is it any defense that the agent was directed by the principal not to make the particular sale complained of. (581)

Where the sale is not in the immediate line and direction of the principal's business, the fact of agency is only *prima facie* evidence of the principal's guilt." The implication being, as is declared by other writers, that if the sale is made at a hotel bar by a clerk employed to attend to it in the regular course of the business, it will be deemed, for all purposes, the act of the principal himself, who can avail himself of no defense that would not exculpate the agent.

The statement of the case on appeal does not purport to contain the whole of the testimony. No question seems to have been raised as to whether the witness, to whom the sale was made, was married and a minor. It seems to have been admitted, as it doubtless appeared by the evidence, that he was not married, and no question was raised as to the fact that he was a minor.

I see no cause to apprehend danger from giving to our statute a reasonable interpretation, and one that will afford to society the protection that necessarily grows out of the consciousness of responsibility by dealers in intoxicating liquors for acts of their agents done in the line of that business. We will be following in the wake of our sister states of Arkansas, Iowa, and Georgia in construing our statute so as to carry out the manifest legislative intent, and at the same time we will reach such a conclusion as will be in harmony with the manifest purpose of the Legislature in passing other kindred laws. If the General Assembly should see fit to declare in express terms that general merchants should be held criminally liable for felonies or misdemeanors committed by their clerks in the ordinary course of business, I think that such a law would stimulate the proprietors of such stores to very great diligence in the search for honest and law-abiding salesmen; but

(582) until such action shall have been taken by the Legislature, nothing, it seems to me, can be construed to place the merchants in peril of vicarious suffering for the crimes of their clerks.

Upon the payment of the prescribed amount the merchant, be he the veriest villain in the land, has a right to demand any license that he may be required to have. Should the Legislature, in the exercise of its police power, and in order to protect agriculture, require him to prove a good moral character, and pay for the privilege of buying certain products after night, and make him liable for purchases of stolen cotton, made by his agents between sunset and sunrise, a different question would be presented. *S. v. Moore,* 104 N. C., 714.

SHEPHERD, J., dissenting: Fully sympathizing, as I do, in the solicitude of my brethren that there should be a rigid enforcement of all laws which are intended to suppress the pernicious practice of selling intoxicating liquors to minors, I am, nevertheless, unable to follow

them to the extreme position of sustaining the conviction in the present case. To my mind, it involves not only a radical departure from well settled legal principles, as illustrated by the current of judicial decision, but it establishes a most dangerous precedent, the effects of which, in unsettling the old and well defined safeguards of personal liberty, cannot well be estimated.

The defendant is indicted for selling intoxicating spirits to an "unmarried person under 21 years of age, *knowing such person to be under that age*" (The Code, sec. 1077), and the refused instruction assumes that the unlawful sale was made by one of the clerks of the defendant, not only without his knowledge, but "in violation of his instructions and against his wishes." We thus have the legal paradox of a man being convicted of *knowingly* doing an act of which he was entirely ignorant, and which was done in opposition to his wishes and commands. (583)

So strange a result cannot but challenge an inquiry into the principles by which it has been reached, and I am very sure that they cannot be found in the common-law doctrine which, in misdemeanors, treats as principals all persons who would ordinarily be accessories before the fact; for there can be no accessory, and therefore no such principal, unless the accused shall have procured, counseled, or commanded another to commit the criminal act. 1 Hale P. C., 616; 4 Blackstone, 36; *S. v. Mann,* 2 N. C., 4.

The conviction, therefore, must necessarily be sustained on the ground of the liability of a principal for the acts of his agent, and while this doctrine of *respondeat superior* is fully recognized by the law, and even applied in some instances to criminal cases, it has never before, I think, been stretched to the same extent as in the case now under consideration. Without attempting to discuss the general doctrine of the criminal responsibility of the principal for the act of the agent, it is sufficient to remark, with *Judge Cooley,* as quoted in the opinion, that many statutes which are in the nature of police regulations impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. Under statutes of this character the principal has, in a very few of the states, been held conclusively liable for the act of his agent in the unlawful sale of liquor to minors, while in others the doctrine has been expressly repudiated, and amendments to the statutes thereby necessitated. It is under such statutes or amendatory acts that the decisions which are cited in the opinion are made. The law is otherwise where the statute makes the criminal intent or knowledge an essential ingredient of the offense, and I trust that I may be pardoned for remarking that it is in the failure to observe this all-

(584) important distinction that the fundamental error of the court is to be found. All that has been so well said about the policy of the law in dispensing with the element of intent or *scienter* and the consequent liability of the principal is applicable to the class of cases mentioned by *Judge Cooley,* and clearly has no relation to the class to which the present case belongs, in which *scienter* is an indispensable requisite to a conviction. It is not a little remarkable that this very distinction is to be found in the authorities cited in the opinion of the Court. Take, for instance, *Farrell v. State* (32 Ohio St., 456; 30 Am. Reports, 614), and the notes there referred to. In these notes I find the following propositions, viz.:

"(1). When to an offense, knowledge of certain facts is essential, then ignorance of these facts is a defense. (2) When a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defense."

It is also remarkable that it is under the second proposition that the learned annotator has placed *McCutcheon v. People,* 69 Ill., 601, one of the leading authorities cited in support of the present decision. The foregoing propositions are also sustained in *S. v. McBrayer,* 98 N. C., 621 (cited in the opinion), in which the present Chief Justice says: "It is only when the positive willful purpose to violate a criminal statute, as distinguished from a mere violation thereof, is made an essential ingredient of the offense that honest mistake and misapprehension excuses and saves the alleged offender from guilt." See, also, *S. v. King,* 86 N. C., 603. It is further to be observed that this very doctrine is substantially stated in the opinion of the Court and wholly ignored by the decision. The Court says: "There is, however, a well-defined distinction between those acts which are criminal only by reason of the intent with which they are done, and those in which the intent to commit the forbidden act is itself the criminal act." It is manifest that knowledge and intent are used as interchangeable terms, and even if it did not so appear, they must, of course, as a matter (585) of law, be considered as synonymous when applied to cases of this character. 1 Whar. Cr. L., 297. *S. v. Wool,* 86 N. C., 708, and *Farrell v. State, supra,* fall within the latter branch of the above proposition, and it will be seen hereafter that the other cases cited in its immediate connection have but little or no bearing upon the point before us.

Having fully established the distinction above mentioned, I will not proceed to an investigation of the other authorities upon which the decision is based. *Farrell v. State, supra,* so far from sustaining, seems to be in direct conflict with the view of the Court, as it is there held, even under a statute which did not require any *scienter* or

intent, that the defendant could show in his defense that the liquor he sold was represented to him as free from alcoholic properties, and that he sold it with that understanding and belief.

In *Carroll v. State,* 63 Md., 551; *People v. Robey,* 52 Mich., 270, and the cases from Illinois, Arkansas, Georgia, West Virginia, Mississippi, and England, I find upon examination that the statutes involved in their decision *do not require the existence of a guilty intent or knowledge.*

The only case that comes anywhere near sustaining the contention of the State is that of *Redgate v. Haynes,* L. R., Q. B. Div., 89, but it will be noted that the statute punishes the "suffering" of gaming to be carried on upon the premises, under which it is possible that the negligence of the landlady might be held sufficient. *Blackburn, J.,* however, used the following language: "I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not 'suffering' the gaming to be carried on, and if the justices were of a different opinion, they were wrong; but I think if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable." Of the same opinion was *Lush, J.,* (586) the other sitting judge, who said: "The only question here is whether there was any evidence of such connivance, and I think there was." Thus it appears that even this case seems to conflict with the principle in support of which it is cited; and among the other decisions referred to in the opinion (which, as I have observed, are founded upon statutes not requiring intent or *scienter*) there may be found some which conflict with the doctrine laid down by the Court. For instance, in *Whitton v. State of Mississippi,* the indictment was for selling to an intoxicated person, and the statute did not require a guilty knowledge or intent; the Court said that "It was certainly necessary that the defendant should either have known or have had good reason to believe that the person to whom the liquor was sold was intoxicated at the time of the sale." Another striking instance may be found in *Mullins v. Collins,* 9 Q. B., 292, of which I will speak hereafter. The passages cited from Wharton's Criminal Law are broad enough to sustain the position of the State, but I find that they are all based upon statutes which make the forbidden act indictable irrespective of a guilty knowledge or intent, and that in some of the statutes it is expressly provided (as in West Virginia and Illinois) that a sale to minors by any person, "by agent or otherwise," is an offense against the criminal law. In West Virginia it is also provided that a sale "by one person for another shall, in any prosecution for such sale, be taken and deemed a sale by both," etc.

In *S. v. Mugler,* 47 Ark., 110, much relied upon by the State, it is expressly said that the case was decided upon an act of the Legislature (1879) which changed the law to avoid the effect of the decision in the previous case of *S. v. Cloud,* 36 Arkansas, wherein it was distinctly held that a barkeeper could not be criminally liable for a sale made by his clerk in his absence, and without his authority.

In *Carroll v. State,* 63 Md., *supra,* the Court said that "It is
(587) not necessary to allege *scienter,* because it is not made an ingredient by the statute that the thing shall be *knowingly and willfully* done to make the violation of the statute an offense." It is manifest that if the statute had required such an ingredient, the Court would have held the principal criminally liable. In *Barnes v. State,* 19 Conn., 398, the defendant was indicted for selling liquor to a common drunkard, and it appeared that the sale was made by the clerks of the defendant, and it was held to be error to exclude evidence that the defendant had given his clerks specific directions to sell no liquor to common drunkards.

In *S. v. Wool,* 86 N. C., 708, the indictment was simply for an unlawful sale by a retailer (not by his agent) without the prescription of a physician, and no knowledge or intent is required by the statute to constitute the offense. The liability of the principal for the act of his agent did not arise in the case.

In *S. v. McBrayer, supra,* the indictment was upon the statute now under consideration, but the sole point determined was that a physician who keeps on hand intoxicating liquors for the purpose of sale or profit was a "dealer," and that if he prescribed it and gave it to a minor, he would be guilty. The case was put upon the ground that ignorance of the law is no defense, and the decisions in *S. v. Boyett,* 32 N. C., 336, and *S. v. Presnell,* 34 N. C., 103, for illegal voting under a mistake of law were cited. *S. v. Dickens,* 2 N. C., 407, was a case of extortion, and also a question of law, though it has been overruled by this Court, and a criminal intent is now required. *S. v. Pritchard,* 107 N. C., 921.

S. v. Scoggins, 107 N. C., 959, turned upon a question of evasion by an adult purchasing with money of the minor, and then giving him the liquor. *S. v. Lawrence,* 97 N. C., 492, simply decides that a father
cannot authorize a sale to his minor son. *S. v. McNeely,* 60
(588) N. C., 232, only decides that a licensee may employ an agent, and that the latter will be protected, but that his assignee will not be protected. It is said, *in passim,* "the master remaining liable for the acts and contracts of such clerk or agent done or made within the scope of his employment." This very clearly had no reference to the present or any other similar statute, as there were none such in existence at the time in this State.

In respect to the libel case of *Rex v. Gutch,* M. & M., 433, it is only necessary to refer to Bishop's Criminal Law (Vol. I, 219) to see that it lends no support to the contention of the State. The learned author says: "The master is never liable criminally for acts of his servant, done without his consent and against his express orders. The liability of a bookseller to be indicted for a libel, sold from his store by his clerk, is nearest to it. But the character of these cases has not always been understood. If carefully examined, they will be found to contain no new doctrine. . . . They make a sale in a master's store *high,* and, unexplained, decisive evidence of his assent and coöperation; but they will not bear out the claim that a bookseller is liable, at all events, for a sale by his general clerk. *Lord Mansfield* said, in *Rex v. Almon,* 5 Bur., 2686: 'The master may avoid the effect of the sale by showing that he was not privy nor assenting to it, nor encouraging it.' So, in Starkie, it is said that the defendant in such cases may rebut the presumption by showing that the libel was sold contrary to his orders or under circumstances negativing all privity on his part." See, also, 1 Hawk. P. C., 73; *Rex v. Walter,* 3 Esp. R., 21; *Gen'l v. Siddon,* 1 Crompt. & Jarvis, 220. In *Mullins v. Collins, supra,* cited by the Court, the distinction I have been endeavoring to draw is clearly recognized. The defendant was indicted for supplying liquor to a constable on duty, and it was held that the licensee was liable, although he had no knowledge of the act of his servant. *Archbold, J.,* said that "Section 16 is one of a series of clauses, headed offenses against the public order, and must, therefore, be construed in the way most effective for (589) maintaining public order. It contains three subsections, the first of which creates offenses which must be 'knowingly' committed, but the appellant has been convicted under the second subsection, where *the word 'knowingly' is omitted.* This seems to point to the conclusion that the licensed victualler will be liable for the act of his servant, although he himself has not knowingly committed an offense against the second subsection." In view of these authorities, chiefly cited in the opinion, it would seem unnecessary to produce any others to sustain the position that where the statute makes the guilty knowledge of the dealer an essential ingredient of the offense, the principal without such knowledge cannot be convicted by the act of his servant. Not a single authority has been produced where, under a similar statute, a conviction has ever been sustained under such circumstances, while most of the cases cited by the Court abundantly sustain the opposite view.

Mr. Bishop says (Bishop Stat. Crimes, 1022; 1 Bishop Crim. Law, 522, 523): "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege, or the government's evi-

dence show, that he knew the fact; his being misled concerning it is a matter for him to set up in defense and prove. Quite different are the law and procedure where the statute has the word 'knowingly,' or the like; knowledge there is an element in the crime; the indictment must allege it, and the evidence against the defendant must affirmatively establish its existence." See, also, 1 Wharton, 297. In *Hunter v. State,* 18 Tex., 444, the Court said that "Knowledge of this fact (minority) by the defendant, at the time of the act, is as essential to constitute this offense, as a fraudulent intent at the time of taking property is to constitute the crime of larceny." It is hardly necessary to say anything further in support of what I conceive to be so plain a proposition, and I will now cite a few of the numerous authori-
(590) ties which, in addition to those already referred to, bear directly upon the particular question before us. "Under the statutes forbidding the sale of intoxicating drinks without license, and the former enactments against selling goods to slaves without the consent of their masters (see *S. v. Privett,* 49 N. C., 100), it is sufficient in defense that the sale was made by the defendant's clerk unauthorized either absolutely or by implication." 1 Bishop C. L., 220; *S. v. Lawson,* 2 Bay., 360; *Ewing v. Thompson,* 13 Mo., 132; *Caldwell v. Sacra,* Litt. Sel. Cases, 118.

In *Commonwealth v. Nicholas,* 10 Met., 259, which was a prosecution for the unlawful sale of liquor, it was held that "If a sale of liquor is made by the servant, without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." The Court said "We are aware, as already intimated, the master is sometimes made responsible, civilly, for his servant's misconduct. The responsibility may grow out of an express or implied undertaking that the thing to be done shall be done, or out of that great principle of vigilance imposed upon a master that he must see that his business is conducted so as not to injure others, or that his servants shall be duly attentive and prudent. But the master is never liable criminally for acts of his servants, done without his consent and against his express orders." This case is cited with approval in the late decision in *Commonwealth v. Stevens,* 151 Mass., 26 N. E. Rep., 992. So in *Hipp v. State,* 2 Black., 149, it was held that an innkeeper was not liable for the selling of spirituous liquor to an intoxicated person by his barkeeper, in his absence and without his knowledge. So in *Commonwealth v. Bryant,* 142 Mass., 463, it was held that an unlawful sale of intoxicating liquor by a servant in his master's shop, and in the regular course of his master's lawful business, is not
(591) *prima facie* a sale by the master. The Court said that the

"fact that a man employes a servant to conduct a business expressly authorized by statute, and that the servant makes the unlawful sale in the course of it, do not necessarily overcome the presumption of innocence merely because the business is liquor selling, and may be carried beyond it." *Commonwealth v. Putnam,* 4 Gray, 16; *Commonwealth v. Dunbar,* 9 Gray, 298; *Barrington v. Simpson,* 134 Mass., 169; 45 Am. Rep., 314; *Commonwealth v. Hayes,* 145 Mass., 289.

In the American and English Enc., Vol. II, 711, *et seq,* many cases are collated, some of which I have been unable to examine. It is stated in the text that "A licensee to sell intoxicating liquors is bound, at his peril, to see that the conditions of the license are complied with by his servants or agents; but to render a defendant liable for sales made by agents or servants, a defendant's knowledge or consent must be shown." To the same effect are *People v. Utter,* 44 Barb., 170; *Anderson v. State,* 22 Ohio, 305; *Commonwealth v. Nicholas,* 10 Met., 259; *Wetzter v. State,* 18 Ind., 35; *Wreidst v. State,* 48 Ind., 579; *S. v. Hayes,* 67 Iowa, 27; *S. v. Shortell,* 93 Mo., 123; *Commonwealth v. Wachendarf,* 141 Mass., 170. In the last case the Court said "It would require a clear expression of the will of the Legislature to justify a construction of a penal statute which would expose an innocent man to a disgraceful punishment for an act of which he had no knowledge, which he did not in any way take part in or authorize, but which he had forbidden."

When we consider that the cases cited are upon statutes which, like those referred to in the opinion, do not require a guilty knowledge or intent, and that they indicate very clearly that the great weight of authority, even upon such statutes, is against the contention of the State, and when we further consider, as I have already observed, that not one decision has been produced which dispenses with a guilty knowledge or intent, where the law expressly requires it, I think it must be apparent that the doctrine of *respondeat superior* has, in this (592) case, been extended beyond the limits of precedent, and with all deference, I will add, beyond the well settled principles of the criminal law.

It is said that any other ruling would lead to an evasion of the law in many instances, and that the principal should be held to such an accountability because of the trust reposed in him by reason of his selection by the county commissioners as a fit person to retail intoxicating liquor. It must be remembered that the public is not without protection, as the agent or servant who makes an unlawful sale is liable to be indicted and punished. *S. v. Wallace,* 94 N. C., 829. The possible evils resulting from a failure to hold an innocent principal guilty is a matter which should be addressed to the lawmakers; and if they see fit to do so, they may enact laws similar to those in West Virginia,

Arkansas, Maine, Illinois, and other states, under which the principal is held to be chargeable with the guilty knowledge of the agent. It was because of the existence of the principle I am insisting upon that such laws were made, and that legislation was deemed necessary in this State in order to fasten a criminal liability upon the principal is apparent from section 90, ch. 34, Rev. Code, in which it was expressly provided that in unlawful sales to slaves the principal should be criminally liable for the act of his agent, unless he showed that the sale was made without his consent. Public policy may have much to do in the interpretation of statutory laws, but I do not see how it can control language, which is not only free from ambiguity and doubt, but has universally been held to be susceptible of but one meaning when used in criminal offenses. If the policy to be subserved requires a conviction in a case like the present, it is very strange that such great pains should have been taken to defeat its object by explicitly requiring that the unlawful act should be accompanied with a guilty knowledge.

(593) The position of the State cannot rest upon public policy alone, but it must be based upon some *principle,* and this principle must necessarily be that in criminal cases the actual or constructive knowledge of the agent is the knowledge of the principal.

The merchant whose clerk, against his instruction and without his knowledge, purchases cotton in the seed between the hours of sunset and sunrise (The Code, secs. 1043, 1046), must, upon this principle, be held guilty of a violation of the criminal law; and far worse than this, if the clerk purchases goods, knowing them to have been stolen, the innocent merchant may be convicted and imprisoned in the State's prison for a long term of years. It is a matter of public policy that the crime of larceny should be suppressed, but it would be startling, indeed, if the guilty knowledge which is required by the statute should be ignored on such a ground, and the most respectable merchants in the State exposed to the punishment of a felon. The Code, sec. 1074. The statute requires a guilty knowledge to constitute the offense of receiving, and I cannot see how the same language can be construed to mean actual knowledge in one case and a constructive knowledge in the other. It is said that the distinction consists in the fact that the dealer in liquors is selected by reason of his fitness to carry on that particular business, and therefore he must be held responsible for the acts of his servants, but it is submitted that such a reason cannot have the effect of overriding the *plain and unmistakable language of the law,* which is, in substance, the same in both cases. Such considerations may be influential with the Legislature in order that the law may be amended so as to hold the principal responsible for his negligence in the selection of

improper agents and for their unlawful conduct, but it cannot authorize a court to ignore its explicit requirements.

It is further argued that the act of the agent in selling to a minor makes out a *prima facie* case of knowledge, and there being no evidence on the part of the agent in rebuttal, the principal must (594) therefore be guilty. This is very true as to the agent, but it is a *petitio principii* to say that such constructive knowledge is the knowledge of the principal, as that is the very question we are called upon to determine. It is plain, from our statute, that the presumption of *scienter* arises only as against the person who does the selling, and the law has been careful to provide that such a person may rebut the presumption and show the truth of the transaction. If the law, then, is so careful as to the actual vendor, it would be strange, indeed, if it did not display some solicitude for one who had no knowledge whatever of the particular transaction. It must be evident that the Legislature never intended that anyone should be convicted under this law without being permitted to show his innocence, and if the agent who does the selling could rebut the *prima facie* case of guilty knowledge which is raised by his own act, it would be a hard measure, indeed, to deny the same privilege to one who is admittedly innocent both of the unlawful act and the guilty knowledge.

In providing that the unlawful sale should be *prima facie* evidence of knowledge, the law did not intend to dispense with the element of *scienter* as an ingredient of the crime. It simply shifted the burden of proof, reserving to the defendant the right to show his innocence. It was never intended, I think, to extend the *prima facie* case to one who did not commit the act, and at the same time put it in the power of the person who committed the act, either by neglect or connivance, to shut out all testimony whatever tending to show the absolute innocence of the party charged. I am very sure that the *prima facie* case applies only to the person making the sale; but if this is not true, and it is extended to the principal, why, pray, does not the right to rebut the *prima facie* case go along with it? It is said that the defendant has such a right, but it is to be restricted to the rebuttal of the guilty knowledge of the agent alone, and that however innocent, in fact, the principal may be, he is precluded from showing it. Thus we (595) have, as a result, the naked proposition that there can be such an anomaly as what may be termed an *irrebuttal constructive scienter*, when the plain language of the statute requires that the dealer shall not be convicted if he shows that he is without guilty knowledge.

It may be observed that the incongruity of the position is further illustrated by the fact that the record discloses that both of the clerks, who were indicted and tried with the defendant, were acquitted; and

thus we have the case of a principal being convicted for the act of an agent who himself has been declared innocent.

Now, it may be that a person can be convicted who commands two others to commit an offense, and the proof shows that it must necessarily have been committed by one of them, although both must be acquitted because of the inability of the jury to find which of the two committed the crime; but where the principal is absent and the offense is committed contrary to his wishes and commands, and his guilt is asserted solely on the ground of agency, it would seem to present, at least, a novel groundwork upon which to build a case of constructive crime, it being impossible for the defendant to ascertain upon which agent the *prima facie* case, which he is required to rebut, has been imposed. The genius of free and constitutional government is opposed to constructive crime, and while I do not say it may not be warranted in cases of this character, where, in the interest of good morals, a great evil should be suppressed, I cannot sanction such a doctrine when, as in this instance, the Legislature has not only failed to authorize, but, in my opinion, has expressly forbidden it. Ingenuity may be able to construct a plausible argument in support of the conviction, but I think it must be attended with difficulty, and especially must this be so when the rule which requires all penal statutes to be construed strictly has always been considered in this State to be
(596) something more than a mere idle expression. The rule is founded upon the great principles of the criminal law, and must be followed in this as well as in other cases. I can see no reason why the principle of the conviction in this case may not, as I have indicated, be extended to offenses of a more serious character, and it is chiefly because of this possible evil that I have felt it my duty to state the grounds of my dissent at such length.

"Bad precedents," it is said, "are like arrows shot from a bow. They cannot be controlled after they have left the string. Their logical sequence often runs terribly away to consequences never dreamed of. . . . I distrust the social advantages promoted by decisions of this nature. *Timeo Danaos et dona ferentes.* They have the fair semblance of handmaidens of morality. They may be wooden horses unwittingly drawn within the citadel of the Bill of Rights."

In conclusion, I will add that the defendant is also entitled to a new trial on the ground that his Honor charged the jury that if they believed that the witness bought of one of the clerks, the defendant was guilty. There could be no *prima facie* case against anyone until the fact of minority was found; but notwithstanding this, the guilt of the defendant was made to turn upon the simple fact of selling to the witness. There are no admissions in the case, and the charge of the court

in this particular was excepted to. The error is too plain for further elaboration, and thus the very foundation of this constructive crime is swept away. It may be said the refused instructions assumed the minority of the witness, but it surely cannot be insisted that every hypothesis contained in a refused instruction is to be construed into solemn admissions, and that the judge, in charging the jury on the whole case, is to assume them to be true. Besides, it was equally necessary that the State should establish the fact that the witness was unmarried, and not a word is said about this essential ingredient, (597) either in the prayer for instructions or in the charge as given.

For the reasons stated, I am of opinion that defendant has been improperly convicted, and that he is entitled to a new trial.

PER CURIAM. No error.

Cited: *S. v. Corporation,* 111 N. C., 664; *S. v. Austin,* 114 N. C., 858; *Epps v. Smith,* 121 N. C., 161; *S. v. McLean, ib.,* 595; *S. v. R. R.,* 122 N. C., 1062; *S. v. McDonald,* 133 N. C., 684; *S. v. Neal, ib.,* 690; *S. v. Holder, ib.,* 712; *S. v. Powell,* 141 N. C., 785; *S. v. R. R.,* 145 N. C., 541; *S. v. Winner,* 153 N. C., 603; *S. v. Fisher,* 162 N. C., 565, 569; *S. v. Parris,* 181 N. C., 587; *S. v. Johnson, ib.,* 643, 644.

THE STATE v. JOHN P. YOUNT ET AL.

Verdict, Special—Municipal Ordinance—Taxation—License.

Upon the trial of an indictment charging the defendants with the prosecution of a certain trade without paying a tax and procuring a license, in violation of a municipal ordinance, the jury returned a special verdict, but failed to find the facts in reference to the payment of the tax and issuance of the license: *Held,* that the verdict was fatally defective.

AVERY, J., dissenting.

CRIMINAL ACTION, tried upon appeal from the Municipal Court of Newton, at Spring Term, 1892, of CATAWBA, *Bynum, J.*

The case is stated in the opinion.

Attorney-General and M. L. McCorkle for the State.
L. L. Witherspoon (by brief) for defendants.

MERRIMON, C. J.: It is not sufficient that a special verdict finds simply the facts that raise the particular question or questions of law in-

tended to be submitted to the court; it must find unequivocally and explicitly all the material facts that might warrant the court in adjudging the guilt or innocence of the defendant. Otherwise, the court could not adjudge that he is guilty or not guilty, and in that case it (598) would direct a *venire de novo*. *S. v. Blue,* 84 N. C., 807; *S. v. Curtis,* 71 N. C., 56; *S. v. Bray,* 89 N. C., 480; Whar. Cr. Pl. and Pr., sec. 746 (9 Ed.).

In the present case the defendants are charged with a violation of an ordinance of the town of Newton, in that they kept a meat-stand and sold pork in that town without having a license so to do, as required by the ordinance. The special verdict fails to find as a fact that the defendants had or had not paid the tax and obtained a license as required and alleged in the warrant. It is hence fatally defective. The court could not, upon this verdict, adjudge that the defendants are guilty or not guilty, as contemplated and intended by it.

It was suggested that it was not necessary that the jury should have found as a fact that the defendants had no license as required, because they did not produce one in evidence, and it must, therefore, be conclusively taken against them that they had none. This suggestion is without force here. It is not found as a fact that they failed to put a license in evidence, or that they failed to produce evidence to prove that they paid the tax required of them. It seems they might have been allowed to do so under the ordinance in question. It may be there was such evidence—it does not appear there was not—and hence the question whether their failure to produce a license was to be taken as a conclusive fact against them does not arise.

The special verdict must be set aside, and a *venire de novo* awarded.

New trial.

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(599)

THE STATE v. J. W. PRICE ET AL.

Appeal, Case and Exceptions—Certiorari—Laches—Notice, Service of.

1. The statute [The Code, sec. 597 (2)] regulating the manner of service of notices is applicable to service of case on appeal and exceptions thereto.

2. Defendants in a criminal action served case on appeal upon the solicitor in due time, but it was agreed between counsel for appellant and the solicitor that the latter should have fifteen days within which to file exceptions; the exceptions were prepared and sent to the associate counsel of the solicitor, who resided in the same town with the defendants' attorney, on the fifteenth day, with instructions to hand them to defendants' counsel, but as he was absent, it was not done until next day: *Held*, that

there was laches in not causing the exceptions to be served within the stipulated time, and defendants were entitled to a *certiorari* to send up their case, which would be substituted for that settled by the trial judge.

MERRIMON, C. J., dissenting.

APPLICATION for *certiorari* to bring up defendants' case on appeal.

The appellant's counsel agreed, in writing, that the solicitor should have fifteen days within which to serve his countercase or exceptions to appellant's case. On the fifteenth day the countercase was sent by the solicitor to counsel who had been employed to assist in the prosecution, who lived in the same town (Monroe) with the defendants' counsel, and it is alleged that the countercase would have been served on the latter day within the stipulated time, but the defendants' counsel was absent from home that day at Greensboro, and on his return the next day the countercase was served on him. The papers having been sent to the judge, he notified counsel of the time and place of settling the case on appeal. The defendants' counsel did not attend, but wrote to the judge insisting that the countercase, not having been served on him till the day after the expiration of the agreed time, the judge had no power to settle the case, and that the defendants' statement (600) should be sent up as the case on appeal. The judge found the facts as above stated, and proceeded to settle the case on appeal, which is in the transcript. The appellant now asks that the judge's statement of the case on appeal be disregarded, and that a writ of *certiorari* issue to the clerk to send up the defendants' statement of the case, to the end that the case in this Court should be argued thereon.

Attorney-General for the State.

D. A. Covington, J. B. Batchelor, and John Devereux, Jr., for defendants.

CLARK, J.: If the appellee files no exceptions within the proper time to appellant's case, the latter should be certified to this Court, and will be taken here as the case on appeal. *Russell v. Davis,* 99 N. C., 115; *Simmons v. Andrews,* 106 N. C., 201; *Booth v. Ratcliffe,* 107 N. C., 6; *S. v. Carlton,* 107 N. C., 956. This, however, would not apply where the failure to serve the countercase in time was without laches on the part of the appellee. *Russell v. Koonce,* 102 N. C., 485; *Mitchell v. Haggard,* 105 N. C., 173, and cases cited in *Simmons v. Andrews, supra.* The appellee contends that such was the case here, because the countercase was in Monroe, and would have been served in time, but that this was prevented and made impossible by the absence of appellant's counsel. This contention loses sight of the fact that service of the countercase could not be prevented by such absence. The Code, sec. 597 (1), provides that "notices and other papers" may be served on

the attorney "during his absence from his office by leaving the paper with his clerk therein, or with a person having charge thereof, or when there is no person in the office, by leaving it between the hours of 6 in the morning and 9 in the evening in a conspicuous place in the office, or, if it be not open to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and
(601) discretion"; section 597 (2) provides for service of papers upon the party himself (*Turner v. Holden,* 109 N. C., 182); section 597 (4) provides that this mode of service shall not apply to "a summons or other process or of any paper to bring a party into contempt." It seems clear, therefore, that it applies to all other papers, including cases and countercases on appeal. It is reasonable that it should be so, since these must be served within a limited time; and if the statute did not apply, the service of cases and countercases would often be delayed or prevented by the temporary absence of the opposite counsel.

As the appellee is in default in not having served the countercase within the time limited, the burden was upon him to rebut the presumption of laches. This he has not done, even as to service on defendants' counsel, nor has he shown any reason why the case was not served on the defendant himself in the absence of his counsel.

Had the appellee given the papers to the officer in sufficient time to secure service, and the officer had willfully or negligently failed to serve them, the appellee would not have lost his right, if not guilty of laches, to have service made thereafter, and after the lapse of the prescribed time, if he acted with due diligence. But here there is nothing to excuse the laches in failing to serve the papers by leaving them at the counsel's office or residence, as above provided, or upon the defendant. Indeed, it does not appear that they were handed to an officer at all within the prescribed time. *S. v. Johnson,* 19 N. C., 852.

In *Walker v. Scott,* 102 N. C., 487, where the facts as to the service of the case on appeal and countercase within the time were in dispute, the Court held that the facts in regard thereto should be determined in the court below, and when that was done, the Court here passed upon the law applicable to such state of facts. *Walker v.*
(602) *Scott,* 104 N. C., 481. In the present case these preliminary facts have been found by the judge, and appear in the record. Upon them it appears that the appellee's countercase was not served within the time limited, and it has not been shown that such failure was without laches on the part of the appellee. An agremeent between counsel to extend time is often convenient, and sometimes almost necessary, for the judge has no power to grant the extension; besides, it is better in many ways, and saves debate, that the extension of time, if

allowed, should be made by agreement. Such agreements, if made in writing, or admitted, are recognized as valid by Rule 39 of this Court, and by repeated decisions. *Wade v. New Bern,* 72 N. C., 498; *Sever v. McLaughlin,* 82 N. C., 332; *Taylor v. Brower,* 78 N. C., 8; *Adams v. Reeves,* 74 N. C., 106; *Rouse v. Quinn,* 75 N. C., 354; *Walton v. Pearson,* 82 N. C., 464; *Hutchinson v. Rumfelt,* 83 N. C., 441; *Scroggs v. Alexander,* 88 N. C., 64; *Holmes v. Holmes,* 84 N. C., 833; *Office v. Bland,* 91 N. C., 1; *McCanless v. Reynolds,* 91 N. C., 244; *Short v. Sparrow,* 96 N. C., 348; *Manufacturing Co. v. Simmons,* 97 N. C., 89; *Graves v. Hines,* 106 N. C., 323. In a late case, *Mitchell v. Haggard,* 105 N. C., 173, the Court not only recognized such agreement, but construed its meaning. When here fifteen days for service of countercase was agreed on, the effect was merely to substitute fifteen days for the five days allowed by statute, leaving the rights of the parties in all other respects, including the manner of service of the countercase, intact. The appellant is, therefore, entitled to have the case on appeal, as stated by him, taken as the true case on appeal, and a writ of *certiorari* to bring it up will issue as prayed for.

MERRIMON, C. J., dissenting: The statute does not recognize or allow a practice that is observed by counsel and tolerated by the courts whereby gentlemen of the bar, for their common convenience, agree with each other to extend the time for stating and settling (603) cases on appeal to this Court, and in some other cases beyond that prescribed by the statute. This practice is solely for the ease and convenience of counsel, and is allowed when it cannot prejudice their clients. When such agreements are made in an action, they should be liberally interpreted as between the counsel making them, and not allowed to prejudice the parties to the action or either of them. Accident, mistake, misapprehension, sudden brief absence of the opposing counsel, and the like considerations, should not be allowed to determine the agreement, unless the delay should be unreasonable and seriously prejudice the party insisting upon a strict observance of it. The practice should be thus liberal, else the courts should uniformly require a strict observance of the statute. In the present case the time for filing amendments by the appellee to the case stated on appeal by the appellant was extended fifteen days. Such amendments were prepared by the appellee's counsel, and steps were taken in good faith to serve the appellant's counsel with them on the fifteenth day of the time so specified, but it so turned out that the latter was absent from his office, attending court at a distance on that day, and, on that account, he was not so served until the day after the time specified expired. The appellant, hence, insists that the service was not

within the time so agreed upon, and, therefore, the case stated by him is the case on appeal for this Court. I think there was a substantial compliance with the agreement. The appellee's counsel attended to and prepared such amendments; he would have served the appellant's counsel with them within the time agreed upon but for the latter's absence; he was served with them the next day, and the appellant could suffer no prejudice by the slight delay so occasioned.

It is suggested that the appellee's counsel might have served the amendments within the time by having the sheriff deliver them at the office of the appellant's counsel in his absence. Such service (604) would have had no legal effect. The statute makes no such provision; the agreement took the matter without the statute, and made it subject to the practice above pointed out. That practice, in my judgment, is not to be tolerated, unless it is subject to the just and liberal interpretation that I insist it must receive; otherwise, it may result, in possible cases that may frequently arise, in serious prejudice to litigants. *Owens v. Phelps,* 91 N. C., 253.

PER CURIAM. Motion allowed.

Cited: Sondley v. Asheville, 112 N. C., 696; *Hemphill v. Morrison, ib.,* 758; *Cummings v. Hoffman,* 113 N. C., 268; *Atkinson v. R. R., ib.,* 588; *Arrington v. Arrington,* 114 N. C., 116; *Rosenthal v. Roberson, ib.,* 595, 596; *Watkins v. R. R.,* 116 N. C., 966; *McNeill v. R. R.,* 117 N. C., 643; *Roberts v. Partridge,* 118 N. C., 356; *Herbin v. Wagoner, ib.,* 660; *Smith v. Smith,* 119 N. C., 317; *S. v. Marsh,* 134 N. C., 190; *Barber v. Justice,* 138 N. C., 21.

THE STATE v. JAMES SHARP ET AL.

Jurors, Grand—Challenges—Plea in Abatement—Indictment—Quashing.

1. Plea in abatement filed before pleading generally to an indictment is the proper way to raise the question of the qualification of an individual grand juror. Such plea will not be sustained unless it shows the want of some positive qualification prescribed by law. All other objections to the competency of grand jurors must be taken by challenge in apt time.
2. The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground.

INDICTMENT for the larceny of corn, the property of Nelson Howell, with a count for receiving, heard on demurrer to a plea in abatement, at Spring Term, 1891, of HAYWOOD, before *Brown, J.*

The defendants filed a formal plea, in which they ask that the indictment be quashed for that Kinsey Howell, a member of the grand jury that found the indictment, as they are informed, was a son of Nelson Howell, who is marked as prosecutor of said cause, and (605) whose goods are charged in the bill to have been taken, and that the said Kinsey Howell "actively engaged in finding said bill a true bill." The demurrer of the State to the plea in abatement was overruled, and the solicitor for the State appealed.

Attorney-General for the State.
J. C. L. Gudger (by brief) and G. S. Ferguson for defendant.

AVERY, J.: This is not a challenge to the array, but a motion to quash made before arraignment by plea in abatement, and founded upon the idea that a particular grand juror was disqualified because he is a son of the prosecutor, and that his incompetency vitiated the action of the whole inquisitorial body which found the indictment. It is well settled in this State that a plea in abatement, filed before the defendant has demurred or pleaded to the indictment, and founded upon the fact that a single member of the grand jury that returned it into court was at the time disqualified by law to serve in that capacity, must be allowed on sufficient ground for a motion to quash, if admitted by demurrer or established by a verdict. See ch. 36, Laws 1907; *S. v. Seaborn,* 15 N. C., 305; *S. v. Watson,* 86 N. C., 624; *S. v. Baldwin,* 80 N. C., 390; *S. v. Smith, ibid.,* 410; *S. v. Haywood,* 73 N. C., 437; *S. v. Wilcox,* 104 N. C., 847; *S. v. Gardner,* 104 N. C., 739.

The general rule is that such a plea will not be sustained, if admitted to be true, unless it show a want of some positive qualification prescribed by law; that all other objections to the competency of a grand juror must be taken, if at all, by challenge, and will not be heard after the time for challenging is passed. Thom. & Mer. Juries, sec. 533; Bishop Cr. Procedure, sec. 739; *People v. Jarrett,* 3 Wend., 314; 12 A. & E. 343*a*. It was held by the Supreme Court of Ohio, in a well considered opinion, that the fact that a member of the grand (606) jury which found an indictment for murder was a nephew of the person murdered was not sufficient to make good a plea in abatement to the indictment. *S. v. Easter,* 30 Ohio St., 542; 32 Ohio St., 353; *Commonwealth v. Tucker,* 8 Mass., 286; *U. S. v. Williams,* 1 Dillon, 485. This plea has not been regarded with favor by the courts because of the expense, delay, and danger of the escape of criminals that grow out of entertaining it. Thom. & Mer., *supra,* secs. 535 and 536, and the authorities referred to in notes; *S. v. Rickey,* 5 Hals., 83. It will appear by reference to authorities that are seemingly in conflict with our position that they depend upon the construction of some local statute

providing specially a mode of challenge. The Ohio decisions cited *supra* rested upon the principle that the court could not go beyond the disqualifications specified in their statute, and say "the grand juror must also be no kin to those injured by the accused."

S. v. Rockafellow, 1 Hals., 340, has been cited as sustaining the opposite view, yet that was in fact a case where a grand juror was disqualified by statute, and the plea in abatement was sustained on that ground. The same Court, however, afterwards, in *S. v. Rickey, supra,* held that a plea in abatement, on the ground that a grand juror who had acted in finding the indictment had previously expressed the opinion that the defendant was guilty, would not be sustained because such objection could be heard only, if at all, as a ground of challenge. While it would not be error in a judge to sustain a challenge to the competency of a petit juror, who was a stockholder and holder of notes of a bank, in an action brought to recover funds wrongfully taken from said bank by a defendant, a plea in abatement to an indictment for embezzling the same money, filed by the same defendant on the ground that the stockholder was a member of the grand jury that found the indictment, has been disallowed. The refusal to sustain such a plea rested upon the
(607) ground that the juror was not interested in the prosecution, as he would neither gain nor lose by a conviction. Thomp. & Mer., secs. 180 and 571. The Court of Ohio has gone much further, in holding that one who had contributed to a fund being subscribed to break up an unlawful traffic by prosecuting those engaged in it was not disqualified, if otherwise competent, to serve on the grand jury that passed upon indictments for the offense which he had so endeavored to suppress. *Koch v. State, supra.* The general principle seems to be that a desire to enforce the law is to be commended in a grand juror as in every other citizen. A trial by twelve of his peers is guaranteed to every man who is indicted, and the right of challenge is his protection against bias, interest, or prejudice on the part of that body. Thomp. & Mer., *supra,* secs. 181, 202, and 572. Apart from the disqualifications mentioned in sections 1722, 1728, and 1733 of The Code, there is no statutory bar to service on grand or petit juries in this State, and as there is no provision made by our statutes for challenging a grand juror on account of interest or bias, we can only superadd to those express disqualifications such others as were recognized at common law. *S. v. Seaborn* and *S. v. Wilcox, supra.*

In the two cases last cited, this Court held that an indictment should be quashed where it is made to appear, upon plea in abatement filed in apt time, either that a grand juror was not actually drawn or summoned or that he resided at the time of service in a county other than that in which he served.

In the case at bar the demurrer admits, what is alleged in the plea, that Kinsey Howell, a son of the prosecutor marked on the indictment, was a member of the grand jury and actively "engaged in finding said bill a true bill." This action cannot be fairly construed to mean more than that he took part in the discussion and favored the finding of the indictment. Such participation by him in the deliberations of the body, as we have shown, did not vitiate its action. *S. v.* (608) *Easter, supra.* The affidavit of the defendant does not attribute to Howell, at most, more than a commendable desire to bring persons against whom probable cause had been shown to trial for larceny. His motives were not impeached, nor was he charged with corrupt practices. Had it appeared that he resorted to any fraudulent trick or conspiracy to induce the body to favor the finding of the indictment, a different question would have been presented for our consideration, and one which we are not called upon to discuss. A delicate sense of the proprieties of life might suggest to one, so closely connected by consanguinity or affinity as to make him amenable to objection as a juror on the trial of the same case, that the foreman of the body is clothed with power to excuse him, if he ask to be excused lest his motives might be questioned, either temporarily or permanently, as under the circumstances might seem best to him. But if Kinsey Howell were allowed to remain unchallenged on a petit jury impaneled in this case, and that jury should return a verdict of guilty on this indictment, it will not be contended that the verdict could be disturbed on account of his relation to the prosecutor. Indeed, where a grand juror manifests a purpose to remain in the body while it is deliberating upon a charge against himself, there is conflict of authority as to the power of the court to compel him to retire, though the weight of authority and reason sustain the right of the court to make such an order. Thomp. & Mer., sec. 571.

It must be remembered that a plea, which is intended to vitiate the action of the grand jury for the incompetency of a single member of the body, is quite different and distinct from a challenge to the array, because the jurors were not chosen by the agency or in the manner prescribed by law. *Boyer v. Teague,* 106 N. C., 576. (609)

For the reasons given, and upon the authorities cited, we are of opinion that there was error in overruling the demurrer, and the judgment of the court below must be

Reversed.

Cited: *S. v. Paramore,* 146 N. C., 607; *S. v. Pitt,* 166 N. C., 269; *S. v. Brewer,* 180 N. C., 717.

THE STATE v. J. A. TENANT.

Police Regulation—Corporations, Municipal—Ordinances, When Void.

1. The ordinance of the city of Asheville providing that no person shall erect within the city limits any house or building of any kind, or add to, improve, or change any building without having first obtained permission from the board of aldermen, is void, for the reason that it does not prescribe a uniform rule of action for governing the exercise of the discretion of the aldermen, but, on the contrary, leaves the rights of property subject to their arbitrary discretion.

2. And a subsequent ordinance adopted to enforce the provisions of such invalid ordinance by providing penalties against any person who shall construct or work upon the construction of any building being erected without the required permission, is void upon the same ground; and in this case is void upon the further ground that it was enacted after the contract to construct the building was entered into and the work had commenced.

INDICTMENT for violation of a city ordinance, tried on appeal from the judgment of the mayor of Asheville, at October Term, 1891, of the Criminal Court of BUNCOMBE, before *Carter, J.*

The jury returned a special verdict, substantially as follows:

1. That the city of Asheville is a corporation, etc.

2. That the Asheville Mission Hospital is a corporation, etc., and has for several years been conducting a hospital for sick and destitute persons, on a lot of land owned by it in the city of Asheville.

(610) 3. That the city duly passed the following ordinance: "That no person, firm or corporation shall build or erect within the limits of the city any house or building of any kind or character, or otherwise add to, build upon, or generally improve or change any house or building, without having first applied to the aldermen and obtained a permission for such purpose."

4. On 15 May, 1891, the architect and agent for said Mission Hospital applied to the aldermen for permission to erect a building on said lot, to be used as a hospital for sick and diseased persons, in connection with the building already on said lot, and which had been previously used by said Mission Hospital for said purpose.

5. That the following is a by-law of said Mission Hospital: "No person afflicted with infectious or contagious disease shall be admitted to the hospital, except by special permission and arrangement of the board of managers, acting under the advice of the chief physician, or some other member of the medical board lawfully acting in his stead"; but cases of typhoid fever have been admitted into said hospital and cared for there.

6. That a petition was filed by a number of citizens of the city of Asheville asking the aldermen to refuse to permit said hospital to erect said building, and that the board of aldermen, on 12 June, 1891, appointed a committee to investigate the matter, and on 26 June, 1891, the aldermen refused to grant the permission asked for, without assigning any reason for such refusal.

7. That after said refusal, work was commenced on said building and prosecuted for some time under a contract previously made by the defendant with the said Mission Hospital, and under the direction of its managers.

8. That on 28 August, 1891, the aldermen passed the follow- (611) ing ordinance: "That no person or persons shall construct, or shall encourage or aid in the construction of, or shall work as a contractor, carpenter, laborer, brick or stone mason, or any other capacity in the construction of any building within the corporate limits of the city, for the construction of which building no permit has been granted by the city: *Provided, however,* that no act shall be deemed a violation of this ordinance except such as are committed by the party or parties charged with such violation after he or they shall have been duly notified by the chief of police that no permit has been granted for the construction of said building. Any person violating said ordinance shall, on conviction thereof, be fined $50."

9. The defendant had knowledge of the foregoing facts and ordinances, and was notified by the chief of police to stop work on said building, but he disregarded said notice and continued to work on the same until his arrest.

10. That on 5 October, 1891, the defendant was arrested by a warrant, tried and convicted before the mayor, and appealed to the Criminal Court of Buncombe County.

If the court is of opinion that said ordinances are valid and constitutional, the jury find the defendant guilty; but if the court be of opinion that they are invalid and unconstitutional, the jury find the defendant not guilty.

The court being of opinion that the ordinances are valid and constitutional, adjudged that the defendant was guilty, and that he pay a fine of $50 and costs. From this judgment the defendant appealed to the Supreme Court.

Attorney-General and T. H. Cobb for the State.
W. W. Jones and F. A. Sondley for defendant.

AVERY, J.: The Legislature is empowered under the organic law to restrict an individual by direct enactment in the exercise of such domin-

(612) ion and control over his own house or premises as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over others. And, though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. Cooley Const. Lim. (4 Ed.), 198; *Weith v. Wilmington,* 68 N. C., 24. Police power may be exercised by the sovereign State through the General Assembly in derogation of the absolute right of the individual only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon and are enforcible by the same species of process against all persons and classes. *S. v. Moore,* 104 N. C., 721; *S. v. Chambers,* 93 N. C., 600; *S. v. Stovall,* 103 N. C., 416; *Diset v. West Virginia,* 129 U. S., 114; *Mugler v. Kansas,* 123 U. S., 623. "Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the State who may come or live within the corporate limits." *S. v. Pendergrass,* 106 N. C., 664; *S. v. Summerfield,* 107 N. C., 898; 1 Dillon, sec. 380 (313).

It is equally clear that if an ordinance is passed by a municipal corporation which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons. *Newton v. Belger,* 143 Mass., 598; *Richmond v. Dudley,* 129 Ind., 112; *Yick Wo v.* (613) *Hopkins,* 118 U. S., 356; *May v. People,* 12 Col. App., 157; *Baltimore v. Rodeck,* 49 Md., 217; *Anderson v. Wellington,* 40 Ks., 173; *In re Frazee,* 63 Mich., 396; *Tugman v. Chicago,* 78 Ill., 405; *Braceville v. Doherty,* 30 Ill. App., 645; *Barthel v. New Orleans,* 564; *Bolls v. Goshen,* 117 Ill., 221; *Lake View v. Lutz,* 44 Ill., 81; Horr & Bemis Mun. Police Ordinances, sec. 13; *Evansville v. Martin,* 41 Ind., 145.

The first ordinance relied upon to support the indictment provides: "That no person, firm or corporation shall build or erect within the limits of the city of Asheville . . . any building of any kind or character, or otherwise add to, build upon, or generally improve or change any building, without having first applied to the aldermen and obtained a permission for such purpose." Whether the landowner pro-

poses to erect on his premises a storehouse, opera-house, dwelling, stable, kitchen, henhouse, and whether he proposes to use fire-proof or combustible material in the structure, he is required to apply to the aldermen of Asheville for a permit, and if the ordinance is valid he incurs liability for violation of it the moment he begins the work of building. Moreover, if he should add a porch, a tower, or improve by digging a cellar the dwelling-house occupied by him, he would subject himself to like danger, though he should use no material in making the improvement not generally considered fire-proof. But while the right to prohibit the erection of a building without regard to the material to be used in constructing it has been held unreasonable, the most objectionable feature of the ordinance is the reservation by the aldermen of the right to refuse the application of one landowner and grant that of another, arbitrarily and despotically, when, for all material purposes, the two apply for precisely the same privilege.

We concede that the constitutionality of an ordinance pro- (614) hibiting the erection of wooden buildings, or buildings with wooden or shingle roofs, in the thickly settled portions of towns, and requiring a license before beginning to build such structures, has been usually, if not universally, sustained where the ordinance laid down a general rule that precluded the possibility of discrimination and favoritism in granting the license so as to limit the privilege to certain persons. *Codes v. Miller,* 33 Am. Rep., 330; Tiedeman Police Power, 439, 440. We admit, also, that there are authorities which maintain the doctrine that even where contracts have been made with builders for the erection of such wooden buildings, before the passage of a valid ordinance, the builder is considered as having entered into the contract, subject to the right of the municipality to enact a prohibitory by-law and annul his contract at any time before he begins to build and expend money, that he may lose, if prohibited from finishing. *Knoxville v. Bird,* 12 Lea (Tenn.), 121.

In *Yick Wo v. Hopkins,* 118 U. S., 356, the Court held that it was a violation of the 14th Amendment (in withholding the equal protection of the law) to pass and enforce ordinances in the city of San Francisco which forbade persons to erect scaffolds on roofs, or carry on laundries in that city, without license or the consent of the supervisors, because it conferred upon the municipal authorities arbitrary power, at their will and without regard to the competency of the person applying, or the propriety of the place selected for carrying on the business." No matter, therefore, if the circumstances of a particular case were such that an applicant seemed about to create a nuisance, he could not be punished under a void ordinance, or one which prescribed no rule for the exercise of discretion on the part of city aldermen in restricting persons in the

enjoyment of their rights of property or person. *S. v. Webber,* 107 N. C., 962; *S. v. Hunter,* 106 N. C., 796.

In *Newton v. Belger, supra,* not only is the principle enun-
(615) ciated, but the ordinance is almost identical with that under consideration in the case at bar. The prohibiting portion was as follows: "No person shall erect, alter, rebuild, or essentially change any building or any part thereof, *for any purpose other than a dwelling-house, without first obtaining, in writing, a permit from the board of aldermen.*" The Court said: "It does not merely forbid the erection of any building which is hazardous, and which exposes other persons or property to danger. . . . On the contrary, it gives them the power, by refusing a permit, to prevent the erection of any building, except a dwelling-house, for any reason which may be satisfactory to them. Under the ordinances they may refuse a permit because, in their opinion, it is desirable that certain parts of the city shall be used for handsome dwelling-houses, and that all buildings for the purpose of trade shall be excluded, though in no sense dangerous." . . . What is there in the ordinance under consideration to prevent the aldermen, if they were so inclined, from prohibiting the construction of any houses, in a defined boundary, except costly dwellings, and thereby enhancing the value of the property, in which they have a personal interest? We have no idea that any such purpose exists, but we cannot sanction the enforcement of an ordinance by means of which the aldermen may at any time not only entertain, but act upon, such an improper motive.

Upon the principle which we have announced, an ordinance fixing the amount of city tax on theaters, roller-skating rinks, etc., at such sum of money as the council should determine in each particular case was held void, because it gave power to discriminate "between persons engaged in like business." *Bills v. Goshen, supra.* An ordinance aimed at the Salvation Army, which forbade any persons or society to parade a street, singing or beating drums, etc., without having first
(616) obtained the consent, in writing, of the mayor or, in his absence, of the president of the city council, was declared void upon the same ground. *Anderson v. Wellington, supra.*

In *Horr v. Bemis, supra,* sec. 263, the rule as to the proper form of ordinances in reference to granting license is laid down as follows: "As has already been stated, no discretionary powers should be vested in officers whose duty it is to execute the provisions of ordinances, and the rule is applicable to this class of ordinances. The *ordinance itself* should specify every condition of the license, and the officer should be merely entrusted with the duty of issuing licenses to all who comply with the prescribed conditions." In *State v. Hunter, supra,* this Court held an ordinance unconstitutional because it clothed a policeman with

an arbitrary discretion to determine what was a reasonable time to wait for persons to move off the sidewalk before making an arrest.

S. v. Yopp, 97 N. C., 477, stands upon a very different principle. While the Legislature has no right to enact a law forbidding all men in a certain section from building houses of any kind on their own land, it unquestionably is empowered to forbid riding bicycles on a particular road or street altogether, because the lives of other persons and the safety of the property of others are imperiled by their use on account of the danger of frightening horses attached to vehicles. *Sic utere tuo ut non alienum laedas.* Having power to prohibit using bicyles on the road entirely, the Legislature had the same power to authorize a person or tribunal to grant a license, when the road should be clear of vehicles, that it has to provide for licensing the sale of spirituous liquors.

"Where the nuisance consists not in the building itself, but in the use to which it is put, the building cannot be destroyed." Tiedeman, *supra,* 441. "If a house is used for the purpose of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business." *Ibid.* The same principle (617) must necessarily apply to construction as to destruction of buildings on account of health. So that if the ordinance, instead of being void for want of a rule governing the exercise of discretion by aldermen, had provided in plain terms that no person or corporation should be allowed to erect a building without a license, at any point within the city, if it were understood that the person or corporation proposed to use the house for a hospital for the infirm or sick, and that the same individual or corporation had admitted a patient suffering from typhoid fever into a hospital under their management on another portion of the same lot, the ordinance would have allowed an unreasonable interference with the rights of landowners, because it is not necessary, in order to protect health, to probihit a person from building a house according to any plan on his own land, but the end may be reached by prohibiting the reception of patients who are suffering from infectious or contagious diseases. The act incorporating the Asheville Mission Hospital, with which the defendant contracted to build, empowered the corporation to erect one or more hospitals "for unfortunate and destitute persons," and invested it with authority to make by-laws, etc. Private Laws 1891, ch. 306, secs. 3 and 4. So that the officers might, while the building was in the course of erection, have enacted a by-law providing that only aged and infirm persons who were destitute should be admitted. Instead of using their authority to prevent the spread of disease, the ordinance leaves it in the power of un-

principled officers to locate hospitals entirely with a view to enhancing the value of certain property. The erection of the hospital in a section where there were only tenement-houses might enhance values of property in the vicinity, while if located in a more fashionable quarter it might be considered an eyesore.

(618) It seems, however, that the corporation, in the case at bar, have already a building on the same lot, which had been used as a hospital, and had asked a permit to add another and thereby furnish additional accommodation for the sick, and had passed a by-law forbidding the reception of patients suffering from contagious or infectious diseases, except by special arrangement with the managers, under the advice of the physician. But cases of typhoid fever had been admitted to that hospital. We do not know, judicially, whether that disease is infectious or not; but if the city, instead of the Mission Hospital, will enact just such a prohibitory by-law applicable to all hospitals within the corporate limits, that question can be determined in the appointed way. *Arkadelphia v. Clark,* 27 A. & E. Corp. Cases, 586. After the license to build was refused, the work of building was commenced and prosecuted for some time under a contract previously made by the defendant with the Mission Hospital. Subsequently (28 August, 1891) the ordinance providing that a further prosecution of such work, after notice, should subject all mechanics, contractors, etc., to a penalty, was passed, and the warrant, which charges specifically a violation of the said ordinance of 28 August, 1891, was issued on 5 October, 1891. If it be conceded that the first ordinance was void because it prescribed no general rule for the exercise of discretion in granting permits, the ordinance passed after the contractor had expended money in disregard of the void by-law, and providing simply that all persons engaged in erecting such building should be subject to a penalty for failure of the owner of the property to get a permit under the old arbitrary law, would be subject to the same objection, if not of others equally as fatal to its enforcement against the defendant.

There was error in the ruling of the court that the defendant was guilty.

New trial.

Cited: Rosenbaum v. New Bern, 118 N. C., 97; *S. v. Williams,* 146 N. C., 631; *S. v. Eubanks,* 154 N. C., 632; *S. v. Lawing,* 164 N. C., 495; *S. v. Bass,* 171 N. C., 782; *Clinard v. Winston,* 173 N. C., 359; *Brunswick-Balke Co. v. Mecklenburg,* 181 N. C., 388.

APPENDIX A

PORTRAIT OF JUDGE BATTLE, PRESENTED TO THE SUPREME COURT ON TUESDAY, 15 MARCH, 1892

Mr. JOSEPH B. BATCHELOR said—

May it please your Honors:

The pleasant duty has been assigned to me of presenting to your Honors this portrait of Hon. WILLIAM H. BATTLE, so long a member of this Court, to be placed among these memorials of the honored dead. It was painted from life when he was in his fifty-ninth year, and represents him as he appeared during his service on the Superior Court bench, and for most of the time when he was a member of this Court. It will be recognized at once as a most accurate likeness by all who knew him. It is said "History is philosophy teaching by example"; it is, therefore, meet and right that these memorials of those who, by their lives, have illustrated history and earned the gratitude of their country should be preserved.

On an occasion like this, may we not turn for a moment from the beaten road of professional and official labor to recall the life which he led, the work which he accomplished, and to learn the lessons which they teach?

WILLIAM HORNE BATTLE was born in Edgecombe County on 17 October, 1802. Elisha Battle, his great-grandfather, removed to this State from Virginia and settled on Tar River. Here he became a leading citizen, and was a member of the Convention which met on 12 November, 1776, and adopted our first Constitution and Bill of Rights. Joel Battle, the father of Judge BATTLE, was also an influential and enterprising citizen of the same county, and was one of the first to engage in manufacturing, having established the Rocky Mount Mills, which were, until very recently, owned by the Battle family. His mother was a daughter of Amos Johnson, another large planter and leading citizen of Edgecombe County. Descended thus from ancestors who had lived in "the times that tried men's souls," and had taken part in its events, he held, by descent, the great principles taught in that heroic period.

His father having graduated at the University, and knowing and appreciating the value of thorough education, gave to his six sons the same advantages which he had enjoyed. William, the eldest, after receiving his preparatory training at the schools which were then taught in his neighborhood, entered the University in January, 1818, and, becoming a member of the sopohomore class, graduated at the commencement in June, 1820, in the eighteenth year of his age.

While at college he was distinguished by his cheerful and regular discharge of every duty, and the singular rectitude of his conduct; and, such was his industry and success in the prosecution of his studies that, although graduating at so early an age, he was awarded the honor of delivering the valedictory oration, which was then conferred on the second scholar in the class. The habits of industrious and patient study and investigation which he thus acquired at this early period lasted him through life, and contributed greatly to the success which he afterwards achieved.

Soon after leaving college he entered the law school of Judge Henderson. Here he remained until January, 1824, applying himself with his usual dili-

gence, and winning the affection and esteem of his great instructor, frequently accompanying him to Raleigh, and acting as his amanuensis during the terms of the Supreme Court. In January, 1824, he applied to the Supreme Court for license to practice law in the old Court of Pleas and Quarter Sessions. At that time, this, which was called the Court of the People, and was presided over by justices of the peace, was in existence in this State, and license was usually granted first for practice in this court only. After twelve months of additional study, the young attorney applied for license to practice in the Superior courts. But so favorable was the impression which Mr. BATTLE made upon the other members of the Court while acting as amanuensis for Judge Henderson, and such was their opinion of his legal acquirements at that early age, that they gave him both County and Superior Court license at the same time without the formality of an examination. I know of no other instance in which this has been done.

It seems that during this time the young student was not entirely engrossed by Coke and Blackstone and Feame and Chitty and other legal lights. The poet had taught him that "The proper study of mankind is man," and this he found was no less true if the *technical man* happened to be a lovely woman. While at the law school he formed many friendships which lasted through life, and among others he met and wooed, and won the heart of Lucy Martin Plummer, the daughter of Kemp Plummer, of Warrenton, who was a gentleman of the old school, and who, in addition to his ability as a lawyer and his unrivaled personal popularity, was called "the honest lawyer," by which title he is still remembered. North Carolina had no daughter who combined in a higher degree than did Miss Plummer all the characteristics which adorn and ennoble her sex. She embodied the ideal of the poet:

"A perfect woman, nobly planned,
To counsel, comfort, and command,
And yet a spirit too, and bright
With something of an angel's light."

They were married in January, 1825, and for nearly half a century they lived together in the enjoyment of a domestic happiness rarely vouchsafed to mortals. This I regard, in the influence that it exerted on his subsequent career, as the most fortunate event of his life. How many lives have failed and gone to ruin for the want of a happy home and a good wife! How many of us can truly say that here we have found the rock of our temporal salvation!

In January, 1827, he settled in Louisburg, in Franklin County, for the practice of his profession. Here the real struggle of life began. The Rubicon had been passed, and Rome was now to be conquered. Too many of us can, from our great experience, appreciate the struggle that followed, for of very few can it be said, as is so frequently uttered in *post obit* eulogy, that "He stepped at once into a large and lucrative practice." On the contrary, his practice was not large, and the forty shilling fee, that prize for which the young attorneys of that day so earnestly contended, was an infrequent visitor to his coffers. He was not a brilliant speaker, and his gifts were more of the solid than of the showy order. He was never of a sanguine temperament, and, pressed by the *"augustae res domi,"* he may sometimes have apprehended failure, and have even doubted whether he had the qualities which would bring success in his chosen profession. With him this success could only be attained by untiring labor and the moral qualities which noth-

ing could tempt to swerve from the right. But returning from his office day after day, fatigued and discouraged by labors that seemed to bring no reward, he found new strength and encouragement in that home, only the brighter by contrast with the outside gloom. In that happy circle, lighted by a faith that never faltered, a hope that never grew dim, and a cheerfulness that nothing could cloud, like Saint Paul, when he saw the brethren who had come out to meet him "as far as Appii Forum and the Three Taverns," "he thanked God and took courage." The history of our profession affords other striking instances of those whose early career gave little promise of the brilliant future awaiting them. I have heard Mr. Moore, who, to use the hunter's phrase, "taken from find to finish," was, in the trial of a difficult and complicated case, the strongest lawyer I ever met, say that he was at the Bar seven years before he made seven hundred dollars. Judge Daniel, than whom a greater judge never sat on our Supreme Court bench, was, I think, never a successful practitioner; and tradition informs us that so slow was Chief Justice Ruffin in obtaining a practice, he was advised by friends to quit the profession and turn to other pursuits. What a loss would have been sustained if such advice had been followed!

Judge BATTLE did not waste this time of enforced leisure in vain regret and idleness, but realizing, more and more as he advanced, the necessity for constant and systematic application if he aspired to the high places in the profession, in which there is always room, he continued the diligent student he had ever been.

Among the great lawyers and judges whom North Carolina has produced was JOHN HAYWOOD, who had published two volumes of Reports, the first being of cases decided from the year 1789 to 1798. This book, which had a high reputation with the profession, was now out of print, and a new edition was in demand. This Judge BATTLE undertook to supply, and, in 1832, he published a second edition of this valuable work, rendered more valuable by the well considered notes in which are "references, in each case, to such legislative enactments or judicial decisions as have been subsequently made upon the points adjudged or the doctrines embraced in the Reports." This work, manifesting as it did the learning, ability, and patient and laborious investigation of the editor, was received with great favor by the profession and gave him at once a place among the foremost young men of the State. It was followed by several other volumes of the earlier Reports—all executed with the same care, industry, and exhaustive learning which characterized the first.

Judge BATTLE was little fitted by nature for the character of a demagogue, or even of a popular leader, and therefore could have but little hope of success in politics. Besides, he belonged to the opposition party in the days when the influence and popularity of General Jackson were at their zenith, and the voters of the county of Franklin, in which he resided, were almost unanimous in supporting the Administration. Yet he was induced to become a candidate for the Legislature from that county, and, though twice defeated, a third effort was more successful, and he was, in 1833, elected to the House of Commons by a large majority. So faithfully did he serve his constituents that at the next election he was again chosen by an increased majority. The significance of these two elections is emphasized by the fact that at least three-fourths of the voters of the county belonged to the political party to which he was opposed, and by the further fact that, after he was elected, a majority of these voters signed a petition requesting him to cast his vote in the Legislature for Hon. Bedford Brown for United States Sena-

tor, a man to whom they knew Judge BATTLE was opposed in politics. Their confidence was not misplaced. Recognizing the right of the people to control the action of their representatives, he complied with their request, while, at the same time, he opposed the claim of a right on the part of the Legislature to control the action of Senators in Congress. It is difficult to realize the position which Judge BATTLE held in the esteem and confidence of the good people of Franklin, which could thus overcome the violence of party and twice honor him with a seat in the Legislature. He was not misled by these successes into the opinion that he was fitted for the life of a politician; on the contrary, being satisfied that this was not his true sphere of labor, he was never again a candidate for political office, but turned, with increased devotion, to the profession which he had made the work of his life, and in which success was now certain.

In 1833 Governor Swain earnestly impressed on the Legislature the necessity for a revisal of the statute law of the State, and urged the passage of an act authorizing the appointment of a commission for that purpose. This recommendation met the approval of the Legislature, and a bill was passed by that body authorizing the appointment of such commission. So well qualified had Judge BATTLE shown himself for this position by the manner in which he had edited the first volume of Haywood (2 N. C.), and by his conduct in the General Assembly, that he was appointed on this commission, with Gavin Hogg, Esq., and ex-Governor Iredell. Mr. Hogg, owing to his failing health, attended but one meeting, and having resigned, Mr. Nash, of Hillsboro, afterwards judge, and later Chief Justice, was appointed in his place.

The extent of the labor required for the performance of this work will be shown by a short extract from the act under which the commission was appointed. That enacted that "three commissioners be appointed by the Governor of the State to collate, digest, and revise all the public statute laws of this State, commencing with the earliest English statutes now in force, and includnig those which may be enacted during the present session of this General Assembly; that in the performance of this duty they shall carefully collect and reduce into one act the different acts and parts of acts which, from similarity of subject, ought, in their judgment, to be so arranged and consolidated, distributing the same under such titles, divisions, and sections as they shall think proper, omitting all such acts and parts of acts before passed as shall either have expired by their own limitation, become obsolete, or been repealed."

The colonies had brought with them from the mother country much of the common law of England, which, as a security for liberty and property, was justly regarded as a priceless inheritance. Many English statutes, changing or modifying the common law, introducing new principles, and aiding in that growth which has been compared to the growth of the bark around the tree, fitting and adapting itself to every new development, were in force here. Our statutes commenced in 1715, when an act was passed, among other things, "for repealing all former laws not herein particularly expressed." From that time there was constant legislation modifying, changing, and repealing former laws, and declaring, in terms so general that legal meaning could with difficulty be given to them, what English statutes were still in force and what were repealed. There was a long period of colonial government in which the people were restive, sometimes rebellious, under the rule of the mother country. This was followed by the Revolution, in which the whole theory and foundation of the Government was changed, and a new

government, under a written Constitution, with limited powers, was established, followed by the immense changes necessary to inaugurate the new system. After this was effected, there were sixty years in which the General Assembly met annually, and, though not so prolific in statutes as some of our more recent legislatures have been, they were sufficiently so to add to the confusion and uncertainty which perplexed and harassed our wisest and most learned lawyers and judges. The lawyers found the utmost difficulty in advising their clients, and the labor required, both of bench and bar, was immense, and frequently very unsatisfactory. The people knew not where to look for the laws under which they were living, and were in danger of violating them through sheer ignorance.

To evoke order out of this chaos of matter, the accumulation of over a century, was the labor imposed upon this commission. They completed the task in three years, making reports of their progress at intervals during that period. They made their final report to the Legislature of 1836-'37, which, after a careful examination, was adopted by that body with but few alterations and "The Revised Statutes of North Carolina" was given to the State, than which no greater boon of like kind, produced under circumstances of such difficulty, was ever conferred on any people. We of the present day, accustomed to frequent revisals, can but imperfectly estimate the difficulties under which our ancestors labored, the immense relief afforded people of every class and pursuit when the statutory law of the State, instead of being spread through innumerable volumes of badly conceived and frequently contradictory and uncertain legislation, hard to find and harder still to construe, was reduced to one volume of convenient size, well printed, accurate and perspicuous in language, and much less in bulk than the acts of one session of the Legislature have since frequently been. It may be said that it was not perfect, and it might suffer by comparison with the "Revised Code," whch followed it a score of years later. The wonder is that this stupendous work was not more imperfect than it was, and it should lose none of its glory because it may have been, in some respects, excelled by its successor, the Revised Code, which it made not only possible, but comparatively easy. If Judge BATTLE and his colleagues had done nothing else to merit the gratitude of the State, this work alone would entitle them to it.

While engaged in this great work he was, in 1834, associated with the late Thomas P. Devereux as Reporter of the decisions of the Supreme Court, which had been in existence only sixteen years, and had already achieved a reputation which grows brighter with time.

Here let us pause for a moment, and ask a rehearing and reversal of the opinion which has been somewhat frequently expressed, that, as a lawyer, his early life was unsuccessful. If by this is meant that he did not accumulate money, then he did not succeed either in his earlier or later life. But we trust that this will constitute but a small part of the success which the great and the good most value. Before he was thirty, he published the second edition of 2 N. C. Reports, before referred to as showing extensive reading and research, and astonishing familiarity with the Reports and statutes of the State. Before he was thirty-one, he had achieved such a position with the people of his county that, in a time of great partisan excitement and bitterness, his political opponents, whose chief was that great popular leader, General Jackson, elected him to the Legislature for two successive terms by large majorities, and, while never deserting his principles, he retained the esteem, confidence, and warm personal regard of a

constituency which has thus honored him. When just past thirty-one he was appointed one of the commissioners to revise the statute law of the State, which work was accomplished in three years, and was reported to and adopted by the Legislature when he was just past thirty-four. At the close of this period he became associated with that excellent gentleman and able lawyer, Thomas P. Devereux, who stood in the front rank of the profession, as Reporter of the Supreme Court. Looking back at this period, when he was not yet thirty-five years of age, at the life which he had led, the magnitude and importance of the works which he had accomplished, who can say that if his life had terminated here it would not have been full of that success which entitles him to a place among the great men who had preceded him?

To resume: Mr. BATTLE, as before stated, became, in 1834, associated with Mr. Devereux as Reporter of the Supreme Court decisions. This continued until 1839. During this period there were published three volumes of law and two of equity decisions, 18 to 22 N. C., delivered by RUFFIN, Chief Justice, and DANIEL and GASTON, Judges of the Supreme Court. I doubt if there ever was, in any country, at any time, a Court composed of three judges which was superior to this. These five volumes of their opinions, to which many more were added, will stand an imperishable monument to their glory, as long as right shall find an advocate and law a champion. In 1839 Mr. Devereux, finding that a large private fortune demanded all his time and attention, gave up his profession, and the position of Reporter which he then held with Mr. BATTLE, and the latter became sole Reporter. In order that he might more easily and efficiently discharge the duties of his office, he removed from Louisburg to Raleigh in the same year. His work in this position was of short duration. Judge Toomer resigned the office of Judge of Superior Courts in August, 1840, and Mr. BATTLE was appointed by Governor Dudley to fill the vacancy. At the session of the Legislature, which met in November of that year he was elected one of the judges of the Superior Courts. The salary attached to his office at that time was $1,950. How this curious sum was arrived at I do not recollect; perhaps some archæologist, filled with forgotten lore, will tell us. However, such was the fact, and Judge BATTLE soon discovered, as I have heard him say, that, as a money-making transaction, the acceptance of this office was a mistake, and that it was impossible for him to live on this sum and give six sons and two daughters the advantages of the thorough education which he intended for them. This, and the greater opportunities for such education afforded at Chapel Hill, the seat of our University, to which he was much attached, as all her children are, and of which he had been a trustee for many years, determined him to remove to that place, which he did in 1843. In 1845 he was elected by the trustees Law Professor—but without salary—and opened a law school, which lasted until 1866. Many of the leading men of the State received their professional education at this school, and, among others, three who are now judges of this Court.

As a judge of the Superior Courts, he manifested the peculiar fitness which was derived from his early training and study. Able, learned, firm, dignified, courteous and patient, of incorruptible integrity and absolutely impartial, no judge ever held the scales of justice more evenly balanced, whether the case was civil or criminal. To him, while the trial lasted, the opposing litigants were mere men of straw—the John Doe and Richard Roe of the law—impersonal objects through which and to which the law was to be applied. If to this is added natural quickness, an excellent memory, and thorough

knowledge of our statutes and decisions, little seemed to be lacking to make him a model *nisi prius* judge. I believe it was the general opinion that, taken all in all, he was never surpassed on our Superior Court bench. In criminal matters, though firm in inflicting punishment, when the offense deserved it, yet he could feel the tenderest sympathy with the distressed, and weigh, at its true value, every circumstance of mitigation or of extenuation, always remembereing that—

> "Earthly power doth then show likest God's
> When mercy seasons justice."

Elected to the Superior Court bench in 1840, he continued in the discharge of the duties of that office until May, 1848, when, a vacancy having occurred in the Supreme Court, by the death of Hon. Joseph J. Daniel, he was appointed by Governor Graham to fill this position until the meeting of the ensuing Legislature. That body failed to confirm this appointment. During the same session, however, the Hon. Augustus Moore having resigned the office of Superior Court judge, which he had held for a short time, Judge BATTTLE was immediately elected without opposition, being the choice of both the Whig and Democratic parties. Members of the Legislature, without distinction of party, united in a letter requesting him to accept this office, tendered him without his knowledge or solicitation. This letter, which is dated 9 January, 1849, is so creditable to the writers, and so honorable to Judge BATTLE, that it deserves more than a passing notice. At the risk of being tedious, I copy it in full, that it may speak for itself as a part of the history of the times:

HOUSE OF COMMONS, 9 January, 1849.

DEAR SIR:—We have today by a vote highly honorable to the General Assembly, determined, by electing you to the office of judge of the Superior Court, to do justice to the wishes of a large majority of the good people of the State of North Carolina without distinction of party.

The preference of another to you for a still higher judicial station was owing principally to your residing in a county where there are already three judges, a Governor, and a Senator in Congress.

In the name of our constituents, and your friends, we most respectfully ask that you will accept the honor now tendered you by a vote of so large a portion of both parties of the General Assembly.

We ask leave to offer our congratulations to you, that, in the midst of great excitement, no man has attributed to you the slightest impropriety, either in your personal or official conduct, and that you have not sought office, but office has sought you.

With high respect, your obedient servants,

EDWARD STANLY,	NEWTON COLEMAN,
WILLIAM L. LONG,	W. B. WADSWORTH,
RICHARD H. SMITH,	J. S. ERWIN,
F. B. SATTERTHWAITE,	A. G. LOGAN,
W. J. BLOW,	THOS. J. PERSON,
R. G. A. LOVE,	ROBERT GILLIAM.

To HON. WILLIAM H. BATTLE, *Chapel Hill.*

What cause other than the one assigned may have operated to defeat his election to the higher office we may never know, but men were human then, as they are now. It is remarkable that the same Legislature which defeated him for Supreme Court judge because of the honors heaped upon the county in which he resided should so soon forget or ignore this fact, and urge

his acceptance of another office nearly or quite as important, and but very little lower in honor. The fact of his election, under such circumstances, to the second office is the strongest evidence of the high opinion entertained by both political parties as to his eminent qualifications for either place, and it is most creditable to him that during the pendency of this election, which continued for several weeks, he refused to visit Raleigh, though frequently urged to do so, or to attempt to exercise any personal influence or solicitation with any member.

Thus urged by members of the Legislature, and many friends outside that body, he accepted the office tendered him, and entered again upon the discharge of its duties. He continued to ride the circuits as Superior Court judge until 1852, when he was elected judge of the Supreme Court to fill the vacancy caused by the resignation of Chief Justice RUFFIN. He continued to fill this office until the year 1865, when all the offices in the State were declared vacant. He was, however, immediately reëlected and continued in office until 1868, when the State Constitution of that year was adopted, and the judges of the new Court, which was created by it, were elected by the people. He then returned to the practic of law in connction with his two sons, Kemp and Richard. This continued until 1876, when he was elected President of the Raleigh National Bank. In 1877, his son Kemp having been elected President of the University, and having removed to Chapel Hill, Judge BATTLE returned with him to his old home; was again elected Law Professor of the University, and there spent the remainder of his days.

In 1866 Judge BATTLE published a digest of the decisions of the Supreme Court in three volumes, in the preface to the third volume of which he says that he "has read over every case ever reported in North Carolina, from the beginning to the end." To these he afterwards added a fourth volume.

In 1872 he was appointed by the Legislature to revise our statutes. Only one year was allowed for this work, and he was not given even the aid of a clerk. It is not surprising, therefore, that this revisal did not equal its predecessors, but considering the short time in which it was done, it must be regarded as a highly creditable work, and by many is considered as fully equal to The Code which we now have.

Judge BATTLE was for forty years a communicant of the Protestant Episcopal Church, to which he was devotedly attached. For twenty-five years he was a member of her diocesan and general conventions, in which his influence was great. In the first general convention that was held after the war, a measure was introduced which created strong feeling, and seemed likely to be adopted. To the astonishment of his Northern brethren he opposed it in an argument of such ability that it did what speeches rarely do—produced a change in the minds of those who had supported the measure. It was dropped, and never afterwards revived.

It is frequently the case that the most brilliant advocate does not make the best judge, and very different qualities are required in judges of the Superior and Supreme Courts. While in the one is required administrative talent, quickness of perception, readiness of application, and a capacity to express conclusions arrived at almost intuitively with accuracy, clearness, and force, in the other we expect the patient and laborious student who knows how to think, investigate, and reason, and most powerful is he who can utilize the rich treasures of learning which ages have accumulated and make them his own. Judge BATTLE was eminently fitted for both positions. To the qualities of which we have spoken that made him so excellent as a Superior Court judge, he added a most extensive and accurate knowledge of

the statutes and decisions of our own State, and a capacity for patient study and investigation rarely equaled. He was courteous, attentive to the arguments of counsel, and always gave them due consideration. He had an appreciation and love of truth and right, and a well-balanced judgment, never affected by outside influence. He was devoted to the law as a science, and loyal to its every teaching. He indulged in no dicta, but strove to decide correctly the point at issue. He eschewed judicial legislation, and had no systems of his own which he endeavored to promote. He knew no standard of right and wrong save that which the law afforded, and where that logically and truly led he unhesitatingly followed. He was not led astray by any *ignus fatuus* of an abstract justice which had its origin only in his own conceptions. His opinions were strong and logical, expressed in simple and perspicuous language, with no effort at show or effect. He stated his propositions with clearness and force, and supported them with reason and the authorities which his well stored mind always furnished in abundance. It was in the consultation room, in which the best labor of the Supreme Court judge is done, that Judge BATTLE was invaluable. It is said that when a question pertaining to North Carolina statutes and decisions was raised, Chief Justice PEARSON often said: "Ask brother BATTLE about that; he knows more of North Carolina law than any man in the State." And I have recently heard the present Chief Justice remark that there was no lawyer more learned in the law of this State than was Judge BATTLE. But a few days since I heard an able lawyer, in whose opinion I have great confidence, say that the opinions of none of our judges were better sustained by authority, and that no judge had written more opinions that have been approved by subsequent decisions, and fewer that have been overruled or departed from. While in some qualities he had superiors, yet in the roundness and fullness of his life and character, and the combination of the elements which make a good, a useful, a safe and a great judge, he must stand in the front rank of those whom the State has delighted to honor.

In stature, Judge BATTLE was below the middle size, but of a graceful and symmetrical figure, and moved with a quick and nervous step. In manner, he was simple, natural, and unostentatious; cordial and free from every affectation. In conversation he was pleasing, agreeable, and instructive; always refined, never attempting to shine, and quite as ready to listen to others as to talk himself. He was but little gifted with humor, and the anecdotes which he told were intended more to illustrate personal characteristics and real events than to excite the mirth of his hearers, and were always free from the objectionable features so common with the professed humorists. Though in manner extremely gentle and quiet, yet he was firm and fearless. He had the courage of conviction; never hesitated to express an opinion which he had deliberately formed.

It is said one of the precepts impressed by Judge HENDERSON on his students was this: "Never do anything that requires explanation; let your conduct explain itself." This lesson Judge BATTLE never forgot, and in his long life, full of public and private duties, he was never called on to explain his conduct. To think right, to be right, and to do right, was his purpose; and this done, he feared no consequences.

Judge and Mrs. BATTLE lived to educate eight children and to see them reach years of maturity. Two fell wearing the gray. Three still survive, one of whom spent fifteen of the best years of his life in efforts to revive our State University, in which he probably accomplished more than could have been done by any other man under like circumstances. Another is bound

to us by ties too close to admit of the words of praise which he so well deserves and which it would give us such pleasure to utter. The third, Dr. William H. Battle, is a most skillful and popular physician in the county of Anson.

In conclusion, as the key-stone is the beauty and strength of the arch, let us add that which was the crowning glory of Judge BATTLE'S life, and without which all else would have been of little worth. He was a Christian gentleman—a faithful follower of the meek and lowly Jesus. This gave to his life its beauty and its strength, and this it was that made that life so blameless and so pure.

And when, on 14 March, 1879, the final summons came, he fell asleep as quietly as a babe in its mother's arms, "in the communion of the Catholic Church, in the confidence of a certain faith, in the comfort of a reasonable, religious and holy hope, in favor with Thee, our God, and in perfect charity with the world."

As the representative of his children, I present this portrait to your Honors, and through you to the people of North Carolina, who honored him so greatly, and whom he so faithfully served. Here let it rest, among "the immortal names that were not born to die."

Reply of
CHIEF JUSTICE MERRIMON:

In the course of his life, the late Judge BATTLE was for a long period a learned, eminently useful and distinguished member of this Court. He was surpassingly familiar with the Reports of its decisions and the statute law of the State. He left a wholesome impress upon the administration of the law, that will last through all the future. His whole life was praiseworthy and noble; he set a high example of excellence, usefulness, and honor, that won for him the profound respect and affection of all who knew him for many years before his death, and his memory will long continue fresh in the minds of his grateful countrymen.

His dutiful and very worthy sons have done well and most appropriately in presenting to the Court so good a portrait of their late father. The Court accepts it with much satisfaction. It will be set in its place on the walls of this chamber, where it will ever remain in company with other portraits of judges of the Court, and serve to remind all who shall come here in the future of a good man and an able judge, who was deservedly respected and honored in his day and generation.

The Clerk will note upon the records the presentation and acceptance of this portrait.

APPENDIX B

PORTRAIT OF JUDGE DANIEL, PRESENTED TO THE SUPREME COURT ON WEDNESDAY, 27 APRIL, 1892

Mr. WILLIAM H. DAY said—

Mr. Chief Justice:

I am directed by the children of Judge JOSEPH J. DANIEL to present to this Court the portrait of their illustrious father. In doing this, it is proper I should speak somewhat of him as a man, and also as a judge. He was born on 13 November, 1784; entered the University in 1804; read law under Gen. William R. Davie in the county of Halifax; was a member of the Legislature from 1807 to 1811; was elected a judge of the Superior Court by the Legislature at its session of 1816; was a member of the Convention of 1835; was elected Associate Justice of the Supreme Court by the Legislature at its session of 1832.

On 1 January, 1822, he was married to Maria B. Stith, who was a daughter of Bassett Stith and Polly Long, whose beauty and virtues were such that her neighbors named her "the divine Polly Long." He died in Raleigh on 10 February, 1848, and left surviving him three children—William A. Daniel of Weldon, whose only child bears the name of his grandfather, Joseph J. Daniel, and resides in the county of Halifax; Mary Long Daniel, who married George L. Gordon of Albemarle, Virginia, and from which marriage were born James L. Gordon, of Charlottesville, Va., Mary Long Gordon, now the wife of Dr. R. H. Lewis, of this city, and Armistead C. Gordon, of Staunton, Va., who has enriched our literature with the beautiful idyl of "My Boy Kree"; Lavina Bassett Daniel, who married Turner W. Battle, of the county of Edgecombe, and from which marriage were born Jacob Battle, of Rock Mount; Joseph Daniel Battle, of Alven Texas; Turner W. Battle, Jr., of Norfolk, Va.; Gordon Battle, of New York, and Gaston Battle, of the county of Edgecombe. These, by the gentle qualities of a true manhood and true womanhood, have illustrated the virtues of their noble ancestor.

As a man, his marked characteristic was his gentle, genuine kindness to all. In the county in which I live, and where he was born and had his home, the traditions of his life, at this distant day into legends grown, follow after him, and are yet instinct with the life of what is good. His personality was antique in its simple grandeur. The first Alexander of Russia, after June, 1815, discussing the settlement of Europe with the French envoy, who was importunate for a written charter, said: "My people have no charter." Talleyrand replied: "Yes, sire, they have your personal character; that is their charter." So Judge DANIEL'S personal character was the patent which stamped him nature's nobleman. In his sympathies he was as broad as humanity itself. In his life's creeds he was more catholic than the Roman Catholic who benched by his side. The poor—his poor—looked for his coming from his duties at court as the return of a good angel. To him they came for material aid and for counsel. His purse opened to their demands; his supreme knowledge, almost universal in its scope, he gave for their guidance.

The poverty of our State's history comes from our ignorance of the lives of our dead men. With curious neglect we are willing such priceless ex-

amples should be forgotten. Give to us a man whose life is a mission of misery, whose days are spent in the desolation of homes by the red hand of war, we hail him conquerer and we immortalize his *infamy* in story and in song. We never salute the thoughtful man who kneels. These we forget, and yet their life's story would make for us rich history. Outside of our profession, and the traditions of a locality, how few are the North Carolinians who know that this great man has lived and passed from among us. It is woe to that people who consent that their dead men shall die. The Hebrew prophet cries, "Thy dead men shall live!"

Judge DANIEL was a brave man mentally, morally, physically. In him was nothing of the tyrant. In his family, on his farm, on the Bench, he was the affectionate father, the kindly master, the merciful judge. These characteristics gave to his younger years associations that grew stronger with the flight of his days. To his old age they gave "honors, love, affection, troops of friends," and the blessings of his neighbors. No heart ached for any spoken word of his; in no bosom rankled the stings of remembered wrongs. Children loved him. This to his gray hairs was a crown, nobler than those opinions that have changed the judicial currents of his native State.

In my section of the State many anecdotes of him, illustrative of his character and charity, still live. They are all commemorative of kindness said or done to neighbors or friends. He was one of the "simple great ones gone forever and forever by," but the good that he did lives after him. This man was also a philosopher. Wisdom broadened him into loving. He studied flowers, not that he loved botany, but because the beautiful in nature added to his happiness. He loved his fellowman, because he recognized the broad brotherhood of humanity. This man contemplated. He is worthy of our contemplation. He was an omnivorous reader. He absorbed knowledge. As a lawyer, he was accurate. Greatness followed. His opinions are clear, direct, at times limpid. In this judge is nothing of obscurity, because in the truthfulness of him he had convictions.

His was the first voice in this State to denounce the brutal barbarism of the common law. His dissenting opinion in *Madison Johnson's case* was a protest against a past without pity. From Draco and Moses he recoiled. From the Sermon on the Mount he drew his inspiration. No matter with what crime the criminal was charged, when the law spake through the judge we recognize this beautiful fact, that the man was dealing with *his brother*. He could say a thing, *and be done speaking*. Instance his opinions. His will covered eight lines of the old foolscap paper. In it he disposed of a large estate, gave his blessing to his children and his soul to his God in whose ordinances he walked. His wisdom was not greater than the wisdom of the law; this fact he never forgot. The judge never lessened into an arbitrator. His eye was single, his vision was undimmed by error, and in the light of his reason we felt the presence of truth. When he stood up to declare the law, sometimes dissenting from those who, like himself, were its chosen interpreters, his pure accents drew us to his side, and ere long they and we alike heard him gladly and followed.

He loved the voice of the people, and yet, so true was he in his great office, their changeful passions disturbed no tone of his clear utterances. His sympathies flowed full and strong. His opinions, based upon the unfailing principles of truth, find no colorings from the passing fashions of the hour. Among the judges past of this Court, to my mind, Mr. Ashe nearest measured

to his high standard. Both came from the same kindred stock. Both had in common the highest attributes of noble manhood. Both were our grandest North Carolinians.

In receiving the portrait

CHIEF JUSTICE MERRIMON said:

The late Judge DANIEL was of a former generation, but we know from tradition, history, and the reports of the decisions of this Court that he was a man of surpassing ability and excellence, possessed of extensive general information, a learned lawyer and a very able and upright judge. He was continuously a judge for about thirty-two years, and half that time was an influential and distinguished member of this Court. By his talents, his great learning, his industry, his high integrity and dignity of character, he contributed largely to its great usefulness, influence, and fame.

His judicial opinions are singularly strong, clear, logical, and practical. While they afford evidence of the learning of their author, they are remarkable for their intelligence and brevity. They briefly and yet fully embody the law applicable to the cases to which they belong. They are models of point, strength, and conclusiveness. They are entirely free from ostentatious display. They are not encumbered and confused by multiplied citations of authorities, and yet they cite with sufficient fullness such cases as add to their strength. Many of his opinions, by reason of their qualities of strength and justice, are of themselves authority.

It must be readily allowed that he ranks among the ablest of the judges who have been members of this Court. One of his great associates said of him that "He had a love of learning, an inquiring mind and a memory uncommonly tenacious, and he acquired and retained a stock of varied and extensive knowledge, and especially became well versed in the history and principles of the law. He was without arrogance or ostentation, even of his learning; had the most unaffected and charming simplicity and mildness of manners, and no other purpose in office than to execute justice and maintain truth, and, therefore, he was patient in hearing argument, laborious and calm in investigation, candid and instructive in consultation, and impartial and firm in decision."

We accept, and have much satisfaction in accepting, the portrait of him just now tendered to the Court by his descendants. They have thus done a dutiful and good service. It will be fixed at an appropriate place on the walls of this chamber, where it will ever remain to remind us and those who shall come after us, and all who shall come here, of one who was eminently fit and worthy to be remembered for the unsullied purity of his personal character, his learning, and long and useful official labors.

The Clerk will note on the record the presentation and acceptance of this portrait, and the Marshal will see that it is set in a proper place on the walls of this chamber.

INDEX