ANNOTATIONS INCLUDE 182 N. C.

NORTH CAROLINA REPORTS
VOL. 111

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1892

REPORTED BY
THEODORE F. DAVIDSON

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2 ANNO. ED. BY
WALTER CLARK

REPRINTED FOR THE STATE
CAPITAL PRINTING COMPANY
STATE PRINTERS
RALEIGH, N. C.
1922

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4 Iredell Eq.	"	39	"
5 Iredell Eq.	"	40	"
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Busbee Eq.	"	45	"
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5 Jones Law	"	50	"
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SEPTEMBER TERM, 1892.

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ASSOCIATE JUSTICES:

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ATTORNEY-GENERAL:

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CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

MARSHAL AND LIBRARIAN:

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*Chief Justice MERRIMON died 14 November, 1892, and was succeeded by Associate Justice SHEPHERD; and ARMISTEAD BURWELL, Esq., was appointed Associate Justice *vice* SHEPHERD.

†Associate Justice DAVIS died 7 August, 1892, and was succeeded by Hon. JAMES C. MacRAE.

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†Appointed by the Governor *vice* FRANK I. OSBORNE, resigned.

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SHEPARD BRYAN,
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CASES REPORTED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1892

A. W. SHAFFER v. A. & M. HAHN.

Boundary—Corporation—Deed, Execution and Probate of—Evidence—Banks, National.

1. A copy, duly certified, of the organization of a National banking association, under sections 5133, 5134, Rev. Stat. U. S., is sufficient evidence of the corporate existence of such organization.
2. A deed from a corporation, properly executed and containing in its body the true name of such corporation, is not rendered invalid by the recital therein that it is made by "the President and Directors" of the corporation, as these words may be rejected as surplusage.
3. Where a deed was signed by one representing himself to be the President of a corporation, and the probate thereof recited the fact that the proofs showed such person was, in fact, such officer: *Held*, that it was not necessary, upon a trial involving title under the deed, to offer further evidence of the official character of the person signing the deed.
4. Where there is a subscribing witness to a deed, its execution may be proved by such witness without the acknowledgment of such maker.
5. If the calls of a deed are sufficiently definite to be located by extrinsic evidence, that location cannot be changed by parol agreement, unless it was contemporaneous with the making of the deed.
6. Where a deed contains conflicting or even irreconcilable descriptions, that interpretation will be given it which will support it if possible, and that description will be adopted which will carry out the certain intent of the maker.

ACTION for recovery of land, tried at Fall Term, 1890, of BEAUFORT, by *Connor, J.*

Both parties claimed title through Noah W. Guilford, who was admitted to have been the owner of the land in controversy prior to 1 September, 1871, when he executed a deed to his son Charles F. Guilford, who, in turn, conveyed to the defendants by deed, dated 22 Decem-

ber, 1879, referring to the deed executed by Noah W. Guilford to himself for description.

The plaintiff, to show title in himself, offered:

1. A sheriff's deed, dated 6 January, 1872, to Samuel T. Carrow, reciting a levy and sale by sundry executions.

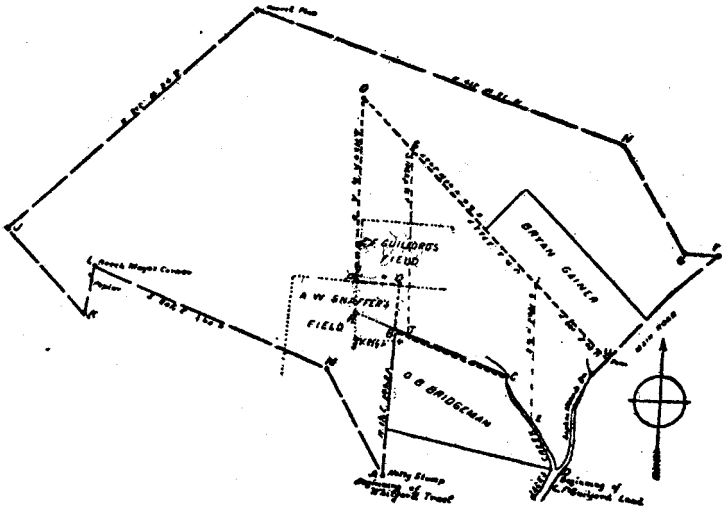
2. A deed of trust from S. T. Carrow and wife to John C. Blake, dated 24 December, 1873, conveying the land in controversy.

3. A deed of trust from J. C. Blake, trustee, to the Raleigh National Bank of North Carolina, dated 31 January, 1876.

4. A certified copy of an organization certificate of the Raleigh National Bank of North Carolina, dated 22 October, 1872.

5. A deed from said bank to the plaintiff, A. W. Shaffer, dated 31 October, 1883.

The boundary, D, U, O, P, Q, B, C, indicated by dotted lines on the plot, shows the possession of the defendants, covering two hundred acres. The plaintiff Shaffer contends that defendants' boundaries include only 38.2 acres, beginning at D on plot and running thence
(3) to U; thence with Gainor's line 100 poles to Fig. 1; then south 160 poles to Bridgeman's line (but the line run south actually reached Bridgeman's line at a distance of 130.5 poles at Fig. 2); thence to the beginning. The plot of the surveyor is made a part of the statement.



The deed, purporting to be a conveyance from the Raleigh National Bank, was signed by E. G. Reade, president; Charles H. Belvin, director, and W. G. Upchurch, director. The probate of said deed was as follows:

NORTH CAROLINA—Wake County:

On this 1 November, 1883, personally came before me, D. Reid Upchurch, an acting justice of the peace of said county, Fabius H. Briggs, who, being duly sworn, sayeth that he knows the common seal of the Raleigh National Bank, of Raleigh, North Carolina, and is also acquainted with E. G. Reade, president of said bank, and also with Charles H. Belvin and W. G. Upchurch, two of the directors of said bank, and that he, the said Fabius H. Briggs, saw the said (4) E. G. Reade, president, as aforesaid, affix said seal to the annexed deed, and also saw him and the said Charles H. Belvin and W. G. Upchurch sign the deed, and that he, the said Fabius H. Briggs, became a subscribing witness to the said deed in their presence.

Witness my hand and private seal, the day and year first above written.

D. REID UPCHURCH, J. P. [SEAL.]

The foregoing certificate of D. Reid Upchurch, a justice of the peace of Wake County, is adjudged to be correct, and I certify that D. Reid Upchurch is an acting justice of the peace of said county, and that his signature thereto is in his own handwriting.

Witness my hand and official seal, this 1 November, 1883.

CHAS. D. UPCHURCH, *C. S. C.*

BEAUFORT COUNTY, N. C.:

It appearing to my satisfaction, from the foregoing certificate of D. Reid Upchurch, a justice of the peace for Wake County, and from the certificate and official seal of Chas. D. Upchurch, Clerk of the Superior Court of said county of Wake, that the foregoing deed of conveyance has been duly executed. It is adjudged that the same, with the certificates, be registered. This 22 September, 1885.

C. D. WILKENS, *C. S. C.*

Received in office at 11 a. m., 22 September, 1885, and registered 24 September, 1885.

B. STILLEY, *Register.*

6. The defendants then showed by the testimony of several witnesses, that in 1872 the said S. T. Carrow, then owning and being in possession of the lands claimed by the plaintiff, including the (5) Whitford tract, together with said Charles F. Guilford, had the land claimed by the latter survey; that the said Carrow went with the surveyor around the lines claimed by the defendant, the dotted lines upon the map; that these lines were then distinctly marked by the said Carrow, or by persons under his direction, as the lines of the C. F. Guilford land; that C. F. Guilford was present upon the said survey; and the lines so run and marked were agreed upon between them as the

lines of the C. F. Guilford land; that the line from P to Q upon the map is a ditch, and from Q to B is an avenue, and these lines were then agreed upon between said Carrow and Guilford, instead of extending the line O P so far that a line east from said extended line would strike Bridgeman's line, and a north course with Bridgeman's line would run to B.

This agreement was in parol.

The defendants asked the court to charge the jury:

1. That if the lines S O and P O, and the lines P Q and Q B were marked by S. T. Carrow and Charles F. Guilford, or by anyone under their authority and direction, about the years 1873 or 1874, and were agreed upon or recognized by them as the lines which separated their lands, then it is evidence of the true location of such lines.

2. That if the defendants, and those under whom they claim, have been in the possession up to such lines for more than seven years prior to the institution of this suit, then the plaintiff cannot recover.

3. That the deed from N. W. Guilford to Charles F. Guilford conveys the land marked upon the map D, U, O, P, Q, B, C, D, if the jury should believe that the lines S O and O P, and the lines P Q and Q B, were marked and defined by S. T. Carrow and Charles F. Guilford, as stated in the first prayer for instructions.

(6) The court declined to give these instructions, and the defendants excepted.

The court was of the opinion that, by a proper construction of the descriptive clause in the deed from N. W. Guilford to Charles F. Guilford, the said deed conveyed the land comprised within the following lines, as shown on the map: Beginning at D and running thence to the pine at Gainor's corner, U; running thence with said Gainor's line N. 45 degrees W. 273.2 poles to the letter "S," that being fixed by the surveyor as the point from which a line south to O B, Bridgeman's line "T," thence to C, thence to D, the beginning, would make 150 acres, and that no parol agreement between S. T. Carrow and Charles F. Guilford could extend or change the said boundary, so instructed the jury—whereupon the issues were answered as appears in the record.

The defendants moved for a new trial upon the grounds that the Court erred: (1) In admitting the deed from Bryan Whitford and wife to Noah W. Guilford; (2) the deed from F. J. Satchwell to S. T. Carrow; (3) the deed from John C. Blake to the Raleigh National Bank of North Carolina; (4) the deed to A. W. Shaffer, and in holding that the latter deed was the deed of the Raleigh National Bank of North Carolina and conveyed the land of the said bank; (5) in refusing to admit the conveyance of the *locus in quo* by N. W. Guilford to Felix Guilford, unless defendants could connect themselves with said

conveyance; (6) the refusal of the court to charge as requested; (7) that portion of the charge as to what was conveyed by the said C. F. Guilford deed, and the marking of the lines by C. F. Guilford and S. T. Carrow.

Motion for a new trial refused.

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

AVERY, J., after stating the case: The burden being upon the (7) plaintiff to offer *prima facie* testimony tending to connect himself with N. W. Guilford, the common source of title, it is proper first to consider and pass upon exceptions to the refusal to exclude *mesne* conveyances, constituting an essential part of such connecting line, for want of proper probate, or upon exceptions impeaching such deeds for inherent defects or raising the question whether the evidence, if undisputed, was sufficient to fit the description to the land. Objection was made to the probate of the deed executed by John C. Blake to the bank in 1876, because the certificate set forth that the deed was acknowledged by the grantor when the name of W. H. Battle appeared upon its face as a subscribing witness. The Statute then in force [ch. 35, sec. 2 (1), Bat. Rev.] provided that the proof of the execution by a grantor residing in the State might be made either by his acknowledgment or on the oath of the subscribing witness. Construing the subsection mentioned, in connection with the first section of the same chapter, it seems too plain to admit of serious argument that the probate is sufficient. *Black v. Justice,* 86 N. C., 504.

It is now conceded, or not disputed, that the copy of the organization certificate was properly certified, and that the original certificate was drawn, acknowledged and deposited in accordance with sections 5133 and 5134, Rev. Stat. U. S., and such being the fact, it would follow that the copy offered was an exemplification of the original, upon the filing of which the statue made the persons composing the association, formed for the purpose of entering into banking business, a body politic with all the powers of a National bank. Rev. Stat. U. S., sec. 5136.

The objection that the name of the corporation does not appear as grantor in the body of the deed to Blake, is untenable. An inspection of the instrument shows that the full corporate name is set forth in its proper place. The words, "The president, direc- (8) tors, etc., of," prefixed before the words, "The Raleigh National Bank, a corporation organized and transacting business under the laws of the United States, at Raleigh, N. C.," may be treated as surplusage, leaving the full and proper corporate name as the description of the person. Where the name of a corporation is signed to the deed as gran-

tor, if it is to be found also in the premises, the fact that it is preceded by the words quoted, which merely indicate that the corporation is acting through the officers empowered by law to convey land for it, does not destroy its efficacy as a conveyance of the interest of the corporation. *Bason v. Mining Co.,* 90 N. C., 417. We see no reason why, in furtherance of the purpose to carry out the intent of the parties, the Court should not disregard immaterial words or punctuation, or resort to transposition, in order to find in the body of a deed the proper designation of the grantor who has signed it, adopting, with that end in view, the rule of construction applicable where the question is whether a deed, executed before the passage of the Act of 1879, contains words of inheritance and passes the fee simple interest. *Anderson v. Logan,* 105 N. C., 266. This case is clearly distinguishable from that where the name of the wife is signed with that of the husband to a deed, while it does not appe,ar in the body of the deed in any connection, and the question involved does not depend for its solution upon the well-recognized rule that a corporation must sue and be sued by its proper corporate name, and not in the name of its officers. The question here, is whether the manifest purpose and effort of a corporation, through the officers appointed by law to act for it, to alien land (conveyed to it to secure a debt, and to which it was not empowered to hold title longer than five years), shall be defeated by the act of the draughtsman in unnecessarily prefixing the words mentioned. It is equally clear that the doctrine of latent ambiguity has no bearing upon the point involved in this controversy, since, by disregarding surplus words, we (9) have left the proper corporate name of the bank, not another name or designation by which it was popularly known, as in *Institute v. Norwood,* 45 N. C., 65. There was no necessity for the introduction of testimony to show the existence of a corporation in Raleigh, known by a particular designation, since the certificate of organization was proof of the existence of the very corporation named as a party in the premises, and purporting to execute the deed through its proper officers. We think the objection to the deed from the bank, on the ground that there was no evidence that E. G. Reade was its president, is equally untenable. If the inference would not have arisen, from the mere certificate of proof by the witness, that the deed was executed by the person named as grantor, it is unquestionably competent to embody in the certificate the explicit statement of the witness, that the party signing held the office which he purported to fill, and thus identify him. The object of the probate is to establish the facts; not simply that the deed was signed by one purporting to be, but by one known by the witness to be the person described in the deed, and on this principle the actual signing by a grantor and a subscribing witness

(both dead), in the presence of a person whose name was not signed as a witness, was allowed to be shown by such person, who, it was declared, was a competent witness to prove the execution for registration. *Miller v. Hahn,* 84 N. C., 226.

The deed from N. W. Guilford to C. F. Guilford, being of older date than the deed of the sheriff to Carrow, the defendants would hold as against the plaintiff all the land included within the boundaries of his deed, while it is conceded that the sheriff's deed passed all of the adjacent land of N. W. Guilford to Carrow, and through the *mesne* conveyance, if admitted in evidence, to the plaintiff. If the boundaries of the defendants can be so located as to cover the territory on which the trespass is alleged to have been committed, and which was, when the action was brought, in the possession of the defendants, then (10) the plaintiff's *prima facie* case would be rebutted, and he would not be entitled to recover. The descriptive clause of the deed to C. F. Guilford is as follows: "Beginning at the mouth of Josephus Moore's Branch on Jack's Creek and runs up the branch to the main road; then with the road, Bryant Gainor's line, and with his line one hundred poles; then south one hundred and sixty poles, or far enough on the northwest or south lines to make one hundred and fifty acres; then east to Bridgeman's line; then with his line north to his corner; then east with Bridgeman's line to Jack's Creek; then with the run of said creek to the beginning." The beginning corner, marked "D" on the plot, is a known point, at the mouth of Moore's Branch on Jack's Creek, and the three succeeding calls it is admitted run with the natural boundaries, the branch, the main road, the Gainor's line by U to figure 1. It is also conceded that the last call in the description runs from the intersection of Bridgeman's line with Jack's Creek down that stream in a southeasterly direction to the beginning at D. If after running the three first lines to figure 1, the next call, "160 poles south," should follow the course, it would intersect with Jack's Creek at a distance of 130½ poles, and northwest of the beginning, and would intersect there also with Bridgeman's line where said creek is his boundary. If the course is to be blindly followed, without regard to any limitation implied from the context, for the full distance, 160 poles, it would run entirely across Bridgeman's land and beyond any of Bridgeman's lines. But the descriptive words, "then south 160 poles," are followed by an alternative description which is inconsistent with a purpose on the part of the grantor to locate the next course south from figure 1. It is manifest that the intent was to run northwest along the line between N. W. Guilford and Gainor so far as it extended, to the point where, by running south to Bridgeman's line, and with it east to Jack's Creek, and down Jack's Creek to the beginning, there should (11)

be included in the whole boundary 150 acres. In *Proctor v. Pool,* 15 N. C., 370, *Chief Justice Ruffin,* delivering the opinion of the Court said: "It is also a general rule that the deed shall be supported, if possible; and if by any *means* different descriptions can be reconciled, they shall be, or if they be irreconcilable, yet if one of them sufficiently point out the thing so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain." If instead of running northwest along Gainor's line, we interpret the description as a call for running first north, then west, and then south to Bridgeman's line, the 150 acres might be measured off in many ways by prolonging the north line and diminishing the length of the west line; but a description that may be met by running in many ways and including different areas, is void for uncertainty. Where a description is substituted, as controlling course and distance, as we propose to do in this case, it must be sufficiently certain to be identified. *Addington v. Jones,* 52 N. C., 582. A competent surveyor could unquestionably run so far northwest that by letting fall a south line to Bridgeman's line, and running thence east with the line to Jack's Creek, and with Jack's Creek to the beginning, the lines so located by him, together with the lines previously known, would embrace one hundred and fifty acres. *Cox v. Cox,* 91 N. C., 263; *Stewart v. Salmonds,* 74 N. C., 518. As suggested by *Chief Justice Pearson* in the case last cited, the surveyor could fix the location in a crude but practical way by laying off experimental lines on a plot before going into the field, or, with a knowledge of higher mathematics, could determine the location of the line by proper calculation, with absolute certainty. *Id certum est quod certum reddi potest.* This maxim embodies the test to be applied in all such cases. By running northwest to S, on the plot, then south to P, on Bridgeman's line,
(12) then east to C, which is Bridgeman's corner at the creek, then down Jack's Creek to the beginning, and including precisely 150 acres in the boundary, the surveyor has practically demonstrated the feasibility of locating the land according to the alternative description, and at the same time carrying out the expressed purpose of the grantor to convey 150 acres. It appears, too, in evidence that neither the northwest, the south or the east line could have been prolonged or shortened without so readjusting them as to embrace either more or less than the prescribed quantity. Moreover, if the northwest line had been extended much further, as plaintiff contended was the correct running, the south line would have failed to intersect with Bridgeman's eas tand west line, passing entirely west of it; while if it had been extended not over 100 poles, as we have seen, the south line would have passed to the east of the said line. The location adopted by the jury

under the instruction of the court fills another requirement of the deed by disregarding course and running a natural boundary, Bridgeman's line. According to the plaintiff's contention defendants' deed covered only 38.2 acres, and according to plaintiff's view it embraced 402 acres; but by adopting the line indicated by the court, the leading purpose of the grantor to include 150 acres by locating the northwest and south lines with that end in view, was complied with in the only way consistent with a due regard for the residue of the description.

It is settled law that where the calls of a *mesne* conveyance are clear enough to be comprehended and located by extrinsic testimony, that location cannot be changed by a parol agreement between coterminous owners, unless it related to the running and marking contemporaneous with the making of the deed. *Caraway v. Chancy,* 51 N. C., 361. The instruction asked that the marking of a line two years after the land was conveyed to C. F. Guilford, in 1873, by said Guilford and S. T. Carrow, was evidence to establish the true location, was (13) properly refused. By running the line so as to include 150 acres, a portion of the land in the actual possession of the defendants when the action was brought, is left outside and falls within the boundary to which the plaintiff has shown title. The plaintiff was therefore entitled to recover.

NO ERROR.

Cited: Buckner v. Anderson, post, 575, 577; *Cox v. McGowan,* 116 N. C., 134; *Brown v. House, ibid.,* 869; *Shaffer v. Gaynor,* 117 N. C., 23; *Brown v. House,* 118 N. C., 880; *Batts v. Staton,* 123 N. C., 48; *Peebles v. Graham,* 128 N. C., 228; *Haddock v. Leary,* 148 N. C., 380; *Withrell v. Murphy,* 154 N. C., 90; *Boddie v. Bond,* 158 N. C., 206; *Hurley v. Ray,* 160 N. C., 380; *Johnson v. Mfg. Co.,* 165 N. C., 108; *Power Corp. v. Power Co.,* 168 N. C., 221; *Lumber Co. v. Lumber Co.,* 169 N. C., 94; *Millard v. Smathers,* 175 N. C., 60.

WINBORNE & BROTHER v. J. S. MITCHELL, SHERIFF, ET AL.

Bail—Escape—Damages—Sheriff.

1. Insolvency of the principal is no defense to an action against the bail; nor can a sheriff, when sued as bail, show in mitigation of damages such insolvency.

2. A sheriff having permitted one arrested by him upon *mesne* process in a civil action, to go into an adjoining room, from which he escaped, was guilty of an escape and subjected himself to the liability as bail. The Code, secs. 299, 313.

WINBORNE *v.* MITCHELL.

MOTION in the cause to subject J. S. Mitchell, a sheriff, to liability as special bail by reason of the escape of the defendant, who had been arrested upon *mesne* process in this action, heard at Fall Term, 1891, of HYDE, by *Brown, J.* The defendants appealed

B. B. Winborne (by brief) for plaintiff.
No counsel contra.

SHEPHERD, J. It appears, from the testimony of the deputy, that after making the arrest he permitted the defendant to go into his bedroom, from which the defendant escaped by a back door and
(14) has never been recaptured. This surely amounted to an escape in the eye of the law, and brings the sheriff within The Code, sec. 313, which provides that, "If, after being arrested, the defendant escape, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail," etc.

The obligation of bail is, "That the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein." The Code, sec. 299.

The foregoing provisions are also to be found, *ipsissimis verbis,* in the Code of New York, and it is there held that the insolvency of the debtor is no defense to an action against the bail. In *Metcalf v. Stryker,* 31 N. Y., 255, it is said: "That it does not enter into the engagement of bail that they shall be relieved if the debtor is unable to pay the debt. On the contrary, the engagement is to produce the body of the principal so as to be amenable to process, or, in default thereof, to pay the judgment. . . . It would virtually repeal the statute which allows of the arrest of the defendant in certain cases, to hold that the sheriff might assume the right to release from imprisonment any who, in his judgment, he should consider insolvent, and to excuse him from paying damages for that act on proof that the debtor was unable to pay." Mr. Murfree, in his work on Sheriffs (sec. 191), in discussing the same statute, says: "That when the sheriff is sued *as bail* he cannot give in evidence, in mitigation of damages, the defendant's insolvency." Accepting these authorities as a correct interpretation of our law upon the subject, we are unable to see how his Honor could, in this case, have adopted any other rule as to damages than the amount of the judgment recovered by the plaintiff. Even if insolvency could be considered in mitigation, it would be incumbent upon the sheriff to show that it was of such a character as to have prevented the collection of the judgment. So far from showing this, we are informed by

his own witness that, while the defendant was insolvent, "he had (15) property enough to pay several hundred dollars."

We can see no error in the rulings excepted to, and the judgment must therefore be

AFFIRMED.

S. GINSBERG v. GEORGE T. LEACH.

Appeal—Trial.

The Supreme Court will not consider exceptions arising upon the trial of other issues, when one issue, decisive of the appellant's right to recover, has been found against him by the jury.

ACTION for damages, commenced before a justice of the peace, and tried upon appeal at Fall Term, 1891, of HYDE, by *Brown, J.*

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

CLARK, J. The following issues were submitted to the jury:

1. Did the defendant unlawfully commit the trespasses and damages as alleged in the complaint?

2. What damage has the plaintiff sustained?

There were no exceptions, other than to the charge and the refusal to give a prayer in the words asked. There was but one witness (Bishop) introduced by the plaintiff, and there was no testimony for the defendant. The court instructed the jury that, if they believed the witness, to answer the first issue "Yes." The jury, on their return, responded to this issue, "No." The court then asked the jury if they had understood it to charge that, if they believed the witness, to answer the first issue "Yes?" A juror arose and stated that the jurors (16) had understood the court so to charge.

The instruction of the court, as to the first issue, was all the plaintiff could possibly have asked. There was no evidence that the defendand ejected plaintiff, *"molliter manus,"* but if the witness was to be believed, he did so violently and roughly. The jury having on the first issue returned that they did not believe the witness, it becomes immaterial to consider the correctness of the instructions applicable to the second issue. The Court will not deal with abstract propositions of law.

NO ERROR.

Cited: Malloy v. Fayetteville, 122 N. C., 485; *Hamilton v. Lumber Co.,* 160 N. C., 52.

M. L. BROWNE ET AL. v. E. F. LAMB.

Trust and Trustee.

B. sold and conveyed to T. a tract of land, and the latter conveyed the same land to L., in trust to secure the payment of the purchase money; this deed contained a provision that if T. should make sale of any of the timber on the land, he should apply the proceeds on the purchase money. Soon after the execution of the deed, T. went into possession, and did cut and sell timber, devoting a portion of the money arising therefrom to the payment of the purchase notes, which were then in the possession of D., but T. being unable to complete the payment, L., the trustee, at the request of B., sold the lands under the trust, when B. became purchaser and took title, and thereupon brought suit against L. to recover the value of the timber cut by T., and certain taxes which the latter had permitted to accrue: *Held*, that L. was only a trustee for the sale of the land, in the event T. should make default in the payment of the purchase notes, and that he was not liable for the conduct of T., or the custody of the property while T. was in possession, especially as his conduct and possession were with the knowledge and consent of B.

(17) ACTION tried at Fall Term, 1891, of PASQUOTANK, by *Brown, J.*

It appears from the pleadings that, on 18 January, 1887, the plaintiffs, through the agency of the defendant, sold and conveyed to W. O. Temple certain lands in Pasquotank County; part of the purchase money was paid in cash, and for the balance notes were given by said Temple to plaintiffs, as set out in the complaint, for the sum of $7,000, and, to secure payment of the same, said Temple and his wife executed to the defendant a deed of trust of even date with the deed from the plaintiff to Temple on the following trust: . . . "To secure

(18) the purchase money for which, in part, this present deed is made. If the said Temple shall make any sale or disposition of the timber of the aforesaid lands, it is hereby agreed he shall apply the proceeds therefrom in payment of the bonds herein secured. To have and to hold the above described pieces of land, with all the improvements thereunto belonging, unto the said E. F. Lamb, trustee aforesaid, and his heirs, in fee simple forever. But on this special trust and confidence: That if the said W. O. Temple shall well and truly pay off and discharge each of the aforementioned bonds, with the accrued interest, as they shall severally fall due, or cause the same to be paid off and discharged, then the trustee herein mentioned shall reconvey to said Temple and his heirs, or unto such person as shall be legally entitled, all the right, title and interest hereby conveyed, the necessary cost and expense of such reconveyance to be paid by the party of the first part.

But if the said W. O. Temple shall fail to pay either of the

(19) aforesaid and described bonds at maturity, or at any time there-

after, within ten days after being requested so to do by the said payees or the legal holder of said bonds, or any of them, then the said trustee, at the request of said payees or the legal holder of said bonds, or any of them, shall sell the property herein described at public auction, at the courthouse door in Pasquotank County, for cash, or on such terms as the *cestui que trust* shall name, and apply the proceeds of such in payment of commissions to said trustee at five per cent, cost of sale, and all of the bonds herein secured, *pro rata,* principal and interest, those that may not be due as well as those that are, without any rebate whatever, and pay the surplus unto the said W. O. Temple, heirs or grantees.

The sale herein provided for may be had after sixty days' advertisement at the courthouse door in Pasquotank County and three other public places in said county, or in lieu of such advertisement, sale may be had after eight successive publications of day of sale and terms in some weekly newspaper published in said county."

(Signed by W. O. Temple, Blanche G. Temple, and E. F. Lamb, trustee.)

It appears further, that the defendant was paid by the plaintiffs $375 for his services in making said sale, and that the notes given by Temple to plaintiffs for the purchase price of the lands were taken by plaintiffs out of the possession of defendant before the trustee's sale, and that after some payments had been made by said Temple upon said notes he made default, and upon request of plaintiffs the defendant sold the lands under the provisions of the deed of trust, and the plaintiffs bid off the same and become the purchasers at a sum less than the amount of the balance of purchase money which was then unpaid, and that defendant, as trustee, executed to the plaintiffs a deed for said lands.

It further appears that after the sale by plaintiffs to Temple (20) and the contemporaneous execution of the deed of trust by Temple and wife to defendant, the said Temple went into possession of said lands and cut timber upon the same and sold said timber and paid part of the proceeds of said sales to plaintiffs, and made some improvements upon said lands with the knowledge of plaintiffs and without objection on their part.

The plaintiffs bring this action, alleging that defendant, as trustee in said deed of trust, in violation of his duty as trustee, negligently permitted said Temple to cut and dispoe of said timber, and failed to pay the taxes upon said lands, to the damage of plaintiffs $1,706.33.

And plaintiffs further allege that defendant, in consideration of the $375 paid him as aforesaid, agreed to look after the timber upon said lands, and if Temple should make any sale or disposition thereof, to attend to it and see that the proceeds therefrom were applied to the

payment of the balance of purchase price of said lands; and further, that the defendant, in consideration of the said commissions, agreed to collect the said notes without further charge, but that upon the sale of the lands by defendant under the deed of trust and purchase by plaintiffs, defendant refused to make a deed to the plaintiffs for the same until plaintiffs paid him the sum of $233 as commissions on said sale, and that, in order to procure a deed from defendant, the plaintiffs paid him said sum under protest. And they now seek to recover said sum, in addition to the damages named above.

The following issues were submitted to the jury:

1. Did the defendant, as trustee, in violation of his duties as set forth in the deed of trust, negligently permit the cutting and removal of the timber and the diversion of the proceeds by Temple?

(21) 2. Did the defendant wrongfully exact and receive from the plaintiffs the sum of $233 as commissioner for foreclosing the trust in violation of an agreement not to charge therefor, as alleged in the complaint?

3. Did the defendant, for a valuable consideration, contract with the plaintiffs to look after the cutting and sale of the timber and see to the proper application of the proceeds for the plaintiffs, as alleged in the complaint?

4. If so, did the defendant neglect to perform the same?

5. What damage, if any, have the plaintiffs sustained?

The following prayers for instructions were asked for by the plaintiffs upon the first issue:

1. When Lamb signed the trust, it was an acceptance of the trust by him and he became chargeable with it according to its true intent and meaning.

2. It is the fundamental duty of a trustee to do his utmost for the *cestui que trust,* and the rule is that he must act in good faith, which includes not only what is commonly understood by honesty and integrity, but care, diligence and attention.

3. If a trustee permit a debtor to retain possession of a trust estate, work and use it as his own, he will be held responsible for the injury to the trust fund out of his own estate.

His Honor charged the jury upon the first issue: That when the defendant signed the trust, it was an acceptance by him and he was bound by its provisions; that this issue relates exclusively to defendant's duties as trustee under said deed of trust, and that, upon all the evidence, the jury should answer the first issue No. And upon the second issue, that if the jury believe the evidence in the case, they should answer the second issue No.

Several exceptions taken to the evidence were not insisted upon in this Court, and no exceptions were taken to the charge upon the other issues.

The jury responded "No" to the first, second and third issues. (22) It was found by their response to the third issue, that there was no contract or agreement (independent of the deed of trust between the plaintiffs and defendant) that defendant was to look after the cutting and sale of the timber, and see to the proper application of the proceeds for the plaintiffs, as alleged in the complaint. There was judgment for defendant, and plaintiffs appealed.

E. F. Aydlett for plaintiffs.
R. H. Battle for defendant.

MACRAE, J., after stating the case: The case stands upon the refusal of his Honor to give the instructions upon the first issue, as asked, and his instructions upon the first and second issues as set forth above. And the only question presented us is as to the duty of defendant as trustee under the deed of trust.

The general principles governing all trustees in the administration of the trusts confided to them are too well settled to require the citation of authorities. They are to use diligence and faith; they are not permitted to wrest their opportunities to their own advantage, nor to suffer wrong to be done in the premises to their *cestuis que trustent;* their compensation is fixed by deed or allowed by order.

The defendant in the case before us was a trustee for sale; his duties were fixed by the deed; he was to reconvey to the trustor upon the payment of the debt secured, and in case of default in said payment, and upon the request of the payees, he was to sell the lands and apply the proceeds of sale: first, in payment of his commissions; next, to the satisfaction of the indebtedness; and the surplus, if any, he was to pay over to the trustor.

Was it incumbent upon the defendant under the terms of this deed to take possession of the land or to enjoin the cutting of timber by the trustor in possession, or to see to the proper application of the proceeds of sales of timber by him, or to see that the trustor (23) in possession paid the taxes accruing upon the land?

It seems to have been in contemplation of the parties to the deed that the trustor should remain in the possession and that he might cut the timber thereon; for it is provided in the deed that, "If the said Temple shall make any sale or disposition of the timber of the aforesaid lands, it is hereby agreed he shall apply the proceeds therefrom in payment of the bonds herein received." That he did remain in pos-

session and cut timber from the land was known to the plaintiffs, and they received at least a portion of the money arising from such sales in payment of the notes, and the defendant seems to have sold the land promptly upon default in payment and request made to him to sell.

We have carefully examined the authorities cited by the diligent counsel for the appellant to support his contention that the trustee was bound to take immediate possession of the land, to prevent the cutting of timber by the trustor, or to see to the application of the proceeds of sale thereof in payment of the debt to plaintiffs, and to see that the taxes were paid, and we find that these authorities simply enunciate the principles relating to the general duties of trustees, or refer to special trusts where other duties were imposed upon the trustees than to sell upon default in payment and request of the payees.

As to the plaintiffs' contention that by virtue of a distinct agreement, separate from the stipulations of the deed, the defendant undertook, in consideration of the $375 he had already received, to collect the notes without additional charge, it was provided in the deed that the trustee should retain five per cent as commissions upon the sale of the land by him, and it is not charged, that he withheld a greater sum.

It was in evidence that the notes were taken out of the trustee's
(24) hands, and that he was requested by plaintiffs to sell the land under the deed which provided for the payment of his commissions upon the sale. We therefore conclude that his Honor properly instructed the jury, that if they believed the evidence they should respond to the second issue No.

NO ERROR.

TIMOTHY ELY ET AL. v. JOHN F. DAVIS ET AL.

Malicious Prosecution—Pleading.

1. It is essential to the maintenance of an action for malicious prosecution that the complaint should contain an averment of the want of probable cause, or a statement of facts which, if proved, would establish a want of probable cause.

2. *Semble*, that an action will not lie for malicious prosecution in a civil suit, unless there has been an arrest of the person, seizure of property, or similar extraordinary proceedings, productive of special damages.

ACTION tried at Spring Term, 1892, of PASQUOTANK, by *Shuford, J.*

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

"5. That the said Davis and his co-assistants, by the employment of so vast an array of legal talent of this and other states, by their perseverance, technical pleadings, delays and obstructions, caused the said Ely and the said Terry a vast amount of labor, expense and time in defending said suit, in attendance at court for over four years, the expense of securing witnesses and their attendance at court, the expense of attendance and taking depositions before commis- (25) sioners, and employment and payment of attorney in defending said action to its final termination, and for the worriment of mind and the labor of body, plaintiffs claim damage three thousand dollars.

"6. That the charge of fraud perpetrated by the said Terry as the attorney of the said Ely for the benefit and advantage of Ely, was false, malicious, revengeful in spirit, intended to damage and defame both the good name, honor, honesty and commercial standing of both Ely and his attorney and agent, Terry, and to scatter broadcast the cloud of defamation of character through the channels of information that should be held the most sacred, to wit, the records of court proceedings, to be held up forever thereby against them, the infamous charge of fraud and attempted fraud, to the damage of the plaintiffs in their minds, in their occupations and in their commercial standing and relations, ten thousand dollars.

"7. That the bringing of the said action by the said defendants and its prosecution to get from said Ely so large an amount of the land conveyed to him by the foreclosure of said mortgage and sale of the said land under it to him, and the recording of the said contract by Davis, alleged by Davis to be fraudulent, caused and is a blight and damage to the plaintiffs' (Ely and Terry) title to his and their said lands, known as the 'Great Park Estate,' to a large amount; and has prevented and deprived the plaintiffs from making a sale thereof to great advantage, to wit, for the sum of one hundred thousand dollars, thereby damaging these plaintiffs, Ely and Terry, to the sum of twenty-five thousand dollars."

There was judgment sustaining the demurrer and plaintiffs appealed.

Harvey Terry for plaintiff.
No counsel contra.

MACRAE, J. Upon the demurrer *ore tenus* we are to decide (26) whether the complaint states grounds sufficient to constitute a cause of action. After alleging that in 1885 the defendant Davis had brought an action in the Superior Court of Pasquotank against the plaintiffs, in which it was charged that the said Terry had made false and fraudulent representations with regard to the number of acres in a

certain tract of land, and had procured by fraud the omission of a tract of land from a certain deed of partition, and after alleging that said charges were false and malicious, and that defendant Davis was assisted in bringing the said action by the other defendants, the plaintiffs make three distinct averments of damage, upon which they demand judgment, as will appear by reference to articles 5, 6 and 7 of the complaint.

This, then, is an action to recover damages for malicious prosecution, and we are met at the threshold with the fact that there is no allegation in the complaint of want of probable cause, nor statement of facts which, if proved, would establish the want of probable cause in the alleged malicious charge of fraud and false representation.

This omission is in itself fatal to plaintiffs' action. In the multiplicity of authority that both malice and want of probable cause must be alleged and proved to sustain such an action, we are content to refer to *Williams v. Hunter,* 10 N. C., 545; *Kirkham v. Coe,* 46 N. C., 423; *Hewitt v. Wooten,* 52 N. C., 182; *Burnett v. Nicholson,* 79 N. C., 548; *Barfield v. Turner,* 101 N. C., 357.

We may as well say that the law seems to be settled by the weight of authority, although there are some decisions to the contrary, that an action will not lie for malicious prosecution in a civil suit, unless there was an arrest of the person, or seizure of property, as in attachment proceedings at law or their equivalent in equity, or in the proceedings in bankruptcy, or like cases, where there was some special damage resulting from the action, and which would not necessarily result
(27) in all cases of the like kind.

In *Davis v. Gully,* 19 N. C., 360, it is broadly stated by the eminent judge who delivered the opinion of the Court, than "an action on the case lies against any person who maliciously, and without probable cause, prosecutes another *before any tribunal,* and thereby subjects him to an injury, either in his person, property or reputation." But a careful examination of all the cases in North Carolina has shown the fact that not one has been before this Court, unless the alleged malicious prosecution was in a criminal action, or in the prosecution of some extraordinary remedy on the civil docket, involving the liberty of the person, the seizure of property, injunction, or the like, and consequent special damage.

The Legislature has seen fit to provide for the award of costs to the successful litigant in civil actions, by way of compensation for expenses incurred, and these costs have been held to be the only compensation allowed by law, except in the cases mentioned above, since the fifty-third year of Henry III.

The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have

their claims determined in the courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause, an action for malicious prosecution would lie against him, would open the flood-gate to a species of litigation hitherto unknown in North Carolina, the absence of which, up to the present time, indicates that it has not heretofore been recognized.

Holding, as we do, with his Honor below, that the demurrer should be sustained and the action dismissed, it is unnecessary that we should examine the other exceptions.

AFFIRMED.

Cited: Davis v. Terry, 114 N. C., 31, 32; *Mahoney v. Tyler,* 136 N. C., 43; *R. R. v. Hardware Co.,* 138 N. C., 181; *Wright v. Harris,* 160 N. C., 646; *Carpenter v. Hanes,* 167 N. C., 559; *Jerome v. Shaw,* 172 N. C., 862.

(28)

E. F. AYDLETT v. GEORGE B. PENDLETON ET AL.

Partition—Estates, Contingent.

A sale for partition will not be decreed where there are contingent remainders, or other future conditional interest, unless all the persons who may be by any possibility interested unite in asking for such decree—Laws 1887, ch. 214, not applying to such contingent estates and interests.

SPECIAL PROCEEDING commenced before the clerk of the Superior Court, and heard before *Shuford, J.,* upon appeal at Spring Term, 1892, of PASQUOTANK.

The plaintiff asks for sale of the land described in the petition for partition.

The petitioner owns the interest of Jane R. Pendleton and R. D. Williams. The defendants, George and Kate Pendleton, are infants and unmarried and without issue and oppose the sale.

The land cannot be actually partitioned, but sale must be had for that purpose.

The court refused to grant an order of sale for partition. Plaintiff excepted and appealed.

All the parties claim under a deed from Charles Guirkin, trustee, and Andrew L. Pendleton to Jane R. Pendleton, George W. Pendleton and Kate Pendleton, executed on 1 March, 1888, the material portions of which are:

"That for and in consideration of the premises, and the further sum of ten dollars in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, the said Charles Guirkin, trustee as aforesaid, and said Andrew L. Pendleton have given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell and convey unto the parties of the second part in in-
(29) terest as to time and amount of enjoyment, and so forth, as hereinafter set out, the following pieces and parcels of land, to wit:

"To have and to hold the above-mentioned and described property

. . . . . .

unto the said Jane R. Pendleton for and during the term of her natural life free from the control and incumbrances of any and all persons whatsover.

"To have and to hold one-third of the remainder unto the said Robert D. Williams and his heirs forever. To have and to hold the other two-thirds of the said remainder in equal parts in severalty unto the said George W. Pendleton and Kate Pendleton each for his or her natural life, but if the said George or the said Kate shall die, leaving issue of their body, or the body of either, or the issue of said issue, living at the time of his or her death, then to have and to hold the part of the one so dying and so leaving lineal heirs unto the said George W. or unto her, the said Kate, and his or her heirs in fee forever. But if the said George W. or the said Kate shall die without leaving such issue, or the issue of such, at his or her death, then to have and to hold the remainder after their life estate unto the said Robert D. Williams and his heirs in fee. But if either the said George or the said Kate shall die, not leaving issue of the body of the one dying, but leaving the other surviving, then to have and to hold the part of the one so dying, one moiety thereof unto the said Robert D. Williams and his heirs, and one-half thereof unto the survivor for and during the term of their natural life, and if the survivor shall die, leaving issue living at his or her death, or the issue of such, then to have and to hold the part last mentioned unto the said survivor and his or her heirs. But if the survivor shall die, not leaving issue at his or her death, or the issue of such, then the remainder of said life estate herein granted to have and to hold unto the said Robert D. Williams and his heirs. The object of thus limiting the estate herein granted being to secure the same to the blood of the said Jane R. Pendleton in exclusion of the relations of the half-
(30) blood of the said George W. and Kate on side of their father and said Andrew L. Pendleton."

E. F. Aydlett for plaintiff.
E. C. Smith for defendant.

SHEPHERD, J. At common law there could be no compulsory partition between tenants in common, and it was within the power of each cotenant to annoy and injure the others by an unreasonable assertion of his undoubted right to be in possession of every part of the lands of the cotenancy. There being no right to the exclusive possession of any particular part, neither cotenant had that incentive to improve or even to cultivate the land so held in common, as would invariably attend a tenancy in severalty; and as the chief evils of the former species of tenancy grew out of the right of each tenant to the immediate possession of the whole, the statutes 31 and 32 Henry VIII, compelling partition by writ, have been held in England and America to apply only to such tenants in common as have a present right of possession. "By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainderman." *Wood v. Sugg,* 91 N. C., 93. This has always been the law in North Carolina until Laws 1887, chapter 214, in which it is provided, "That the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate." It is entirely clear that the statute does not apply to contingent remainders or other uncertain future interests, and as to these it is (31) well settled that they cannot be sold for partition. *Simpson v. Wallace,* 83 N. C., 477; *Williams v. Hassell,* 74 N. C., 434; *Watson v. Watson,* 56 N. C., 400; *Miller, ex parte,* 90 N. C., 625; *Irvin v. Clark,* 98 N. C., 445. Such being the law, we are unable to see how the court could have ordered a sale in the present case.

Conceding it to be true, as contended by the petitioner, that the issue of Kate and George can never take as such, and that their existence at the time of the death of said George and Kate is only a contingency, upon the happening of which the estates of the latter are to be enlarged into fees simple—thus putting into operation the rule in *Shelly's case*—such estates are nevertheless subject to open and be defeated or modified by certain contingencies which can only be determined at the death of the said George and Kate. Thus, if both of these parties should die without leaving issue, or the issue of such, then the whole estate, subject to these limitations (being two-thirds interest in the property) will go by way of remainder in fee to R. D. Williams. If, however, one of the said parties shall die leaving no such issue, then one moiety of his or her interest is to go to said R. D. Williams in fee,

and the other to the survivor during his or her natural life, and then to his or her issue; but failing in issue, or the issue of such, at the death of the survivor, then to said R. D. Williams in fee. Thus it will be seen that even according to this construction of the deed, there are future contingent interests, and though these may be represented by some person *in esse,* it cannot authorize the court in decreeing a sale for partition where there is objection by some of the parties interested.

It is true that in some instances a person may represent the interests of others of his class who are not *in esse,* but the court only decrees a sale in such cases where the interests of the parties will be materially and essentially promoted. Such is not the case before us. It
(32) is simply a petition for a sale for partition, and it is an inflexible rule of this Court that no such sale will be decreed where there are contingent remainders, or other future conditional interests, unless all of the persons, who may by any possibility be interested, unite in asking for such relief.

AFFIRMED.

Cited: Overman v. Tate, 114 N. C., 573; *Gillespie v. Allison,* 115 N. C., 545; *Hodges v. Lipscomb,* 128 N. C., 63; *Springs v. Scott,* 132 N. C., 553; *Makely v. Shore,* 175 N. C., 124; *Pendleton v. Williams, ib.,* 251; *Dawson v. Wood,* 177 N. C., 162; *Thompson v. Humphrey,* 179 N. C., 58.

E. T. VANN v. L. C. LAWRENCE.

Appeal—Examination of Adverse Party—Witness.

1. It is not necessary that a party to an action who desires to examine the adverse party before the trial, under sections 580 and 581 of The Code, shall first obtain leave from the court to make such examination. The words of the statute, "unless for good cause shown the judge shall order otherwise," apply only to the length of the time of notice, less than five days.

2. An appeal from an order of the court, before which such an examination is being made, directing the examination to proceed, is premature.

APPEAL from an order of *Shuford, J.,* made in the above entitled cause, at Spring Term, 1892, of HERTFORD.

On 26 March, 1892, the plaintiff caused a notice and subpœna to be served on the defendant, that at the time and place named he would examine the defendant as a witness in this action, then pending. The defendant filed the following answer before the clerk:

"1. That the defendant is advised and believes that the plaintiff is not entitled to examine the defendant and compel him to disclose his evidence in this case before a trial of said cause, without first obtaining an order in said cause upon notice of such examination.

"2. That he is advised that no such order has been obtained (33) and it does not appear that there is any necessity for taking said evidence prior to the trial of the cause.

"3. That the defendant will be at the trial and go on the stand as a witness, where and when the plaintiff can examine and cross-examine defendant about any and all matters pertaining to the issues in said matters.

"4. That the defendant is further informed and believes that the plaintiff has no just reason for asking for such examination, and he is advised by his counsel that he is not in law bound to testify under said notice.

"And he prays that said motion be discharged."

The clerk refused to discharge the motion, and the defendant thereupon objected to the examination for reasons stated in the answer to the notice, and appealed from the clerk's ruling. The judge affirmed the judgment, and the defendant appealed to the Supreme Court.

No counsel for plaintiff.
E. F. Aydlett for defendant.

CLARK, J. The Code, section 580, provides that "a party to an action may be examined as a witness by the adverse party . . . either at the trial, or conditionally, or upon commission." The next section provides that "the examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge or clerk of the court, on a previous notice to the party to be examined, or any other adverse party, of at least five days, unless for good cause shown the judge shall order otherwise." Nothing in these two sections, or in the succeeding sections on that subject, 582, 587, suggests that leave to examine the opposite party must be obtained. On the contrary, the examination is treated as a right to be exercised before trial "at the option of the party claiming it." The provision, "unless the judge orders otherwise," applies to the length of notice which he can make less than the five days prescribed. (34)

It is true that it is held in *Coates v. Wilkes,* 92 N. C., 376, and in *Hudson v. Jordan,* 108 N. C., 10, that this proceeding is a substitute for the old bill of discovery; that is to say, it serves the same purpose. But it is a *substitute* for the former proceeding, and not the

same. This is explicitly stated in section 579. *Helms v. Green,* 105 N. C., 251. In the bill of discovery leave was required to obtain the examination of the opposite party, but it was almost a matter of course, and possibly was, therefore, left out of the new procedure as a useless formality. That the omission was intentional, may be seen by reference to section 578, immediately preceding, in regard to the inspection and copy of books, papers, etc., of the adverse party, which can only be had upon the order of the court, made after due notice.

The appeal is premature. To stop the trial of a cause, pending an appeal to this Court, upon every isolated question of practice, or the admissibility of evidence, or the competency of a witness, and the like, would indefinitely protract litigation and swell its cost. *Guilford v. Georgia Company,* 109 N. C., 310, and cases there cited.

The defendant in the present case would have lost none of his rights, had he noted his exception and have proceeded with the trial. As the question before us is presented for the first time, we have, following the precedents cited in *Wylde's case,* 110 N. C., 500, passed upon it, but, none the less, it must be entered.

APPEAL DISMISSED.

Cited: Fertilizer Co. v. Taylor, 112 N. C., 145; *Holt v. Warehouse Co.,* 116 N. C., 490; *Pender v. Mallett,* 122 N. C., 164; *S. c.,* 123 N. C., 60; *Ward v. Martin,* 175 N. C., 288, 289; *Vyne v. Fogle,* 176 N. C., 352; *Smith v. Wooding,* 177 N. C., 548; *Jones v. Guano Co.,* 180 N. C., 320; *Monroe v. Holder,* 182 N. C., 79.

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(35)

THE ALBEMARLE STEAM NAVIGATION COMPANY v. Q. C. WILLIAMS ET AL.

Bail—Statute Limitations.

Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile.

In 1888 the plaintiff commenced an action in the court of a justice of the peace against the defendant, Q. C. Williams, to recover one hundred and fifty dollars (which it was alleged that he had embezzled as plaintiff's agent), and, pending the action, procured an order of arrest, which was executed, and the other defendants became bail. In August, 1888, the plaintiff recovered judgment for the amount claimed.

Q. C. Williams forfeited his bond and filed the State about two years before the making of the motion in this cause. The said judgment was docketed in the Superior Court in October, 1888, and execution issued against the property of the defendant shortly thereafter and returned *"nulla bona."* A few weeks before this motion was made, execution was issued against the person of the defendant, and returned not to be found. Thereupon, in November, 1891, the plaintiff moved for judgment against the sureties, J. T. Williams and B. F. Williams. The said sureties answered the motion and plead the statute of limitations, as set out in the record.

The justice of the peace overruled the plea and gave judgment for plaintiff. The sureties appealed to the Superior Court from said judgment. The Superior Court overruled the judgment of the justice of the peace and gave judgment in favor of the sureties. From this judgment the plaintiff appealed to the Supreme Court.

B. B. Winborne (by brief) for the plaintiff.
No counsel contra.

SHEPHERD, J. The condition of the undertaking of bail is, (36) "that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein." The Code, section 299. In the absence of any statutory provision to the contrary, we would be inclined to hold with the plaintiff that the statute of limitations does not begin to run until a return of *non est inventus* is made on execution, the principle being, "that the bail only guarantees that the debtor shall be forthcoming to respond to the execution, and do not become liable to pay the debt except upon failure in that respect. Consequently no right of action exists in favor of the creditor until it is ascertained that the debtor is not forthcoming upon the execution." Wood Limitations, section 155. Our statute, however (The Code, section 155), expressly provides that proceedings against bail shall be barred unless commenced within three years after *judgment against the principal.* There can be no doubt as to the meaning of this language, and it must therefore follow that the motion of the plaintiff is barred by the statute of limitations. The fact of the debtor having left the State, cannot, under section 162 of The Code, prolong the liability of the bail.

AFFIRMED.

W. O. TEMPLE, ADMINISTRATOR OF MARY A. THOMAS, v. THE BOARD OF COMMISSIONERS OF PASQUOTANK COUNTY ET AL.

Evidence—Will—Devise—Laws of Other States and Countries.

1. The existence of the unwritten law of another state or foreign country may be proved by competent witnesses.

2. A will made by one domiciled in another state, and which is there subject to be construed by the rules of the common law, will be construed as if it had been made in this State, unless it is made to appear by competent evidence, that a different construction would prevail in the state where the testator resided.

3. A testator, domiciled in the state of Maryland, devised to "M., for the benefit of S., all of Pasquotank County, N. C., the sum of $1,000, the interest to be paid her during her life, and at her decease M. to distribute the principal as her judgment may determine for the poor of said county." M. received the fund and paid the interest as directed, but died—leaving her husband surviving—without making any provision for the disposition of the fund after the death of S., who also soon after died. It was proved upon the trial that under the laws of Maryland, devises and legacies for charitable uses were void: *Held*, that upon the death of S. the fund should be paid to the heirs or distributees of the testator or their assigns.

(37) ACTION heard by *Shuford, J.*, on 27 April, 1892, at Chambers in Plymouth, by consent, on an appeal from a decree rendered by the clerk of the Superior Court of PASQUOTANK.

The clerk of the Superior Court made a decree adjudging (39) that the heirs at law of John A. Gambrill, or their assigns, were entitled to the fund, and directing the petitioning administrator to pay the fund over to such heirs at law and assigns, to wit, J. S. McCoy, two-thirds thereof, and John L. Hinton, one-third (40) thereof.

From the ruling of the clerk the respondents appealed to the judge of the district, who sustained the finding made by the clerk and affirmed the order of payment.

From the ruling and judgment the respondents, the board of commissioners of Pasquotank County and William Thomas, appealed to the Supreme Court.

No counsel for plaintiff.
E. F. Aydlett for defendant.

MACRAE, J. The first exception was to the admission of the testimony of J. Heywood Sawyer, who, after stating that he is an attorney at law, and has been practicing in North Carolina since 1878, that in

the course of his business connected with the subject-matter of the present litigation, he has thoroughly examined into the law of Maryland, and thinks, from this examination, he is qualified to state what that law is on this subject, and testifies, in substance, that, by the decisions of the Court of Appeals of that state, devises and legacies to charitable uses cannot be sustained and enforced. The objection to this testimony is that it is incompetent and inadmissible.

The existence of an unwritten law of another state, or foreign country, must be proved by competent witnesses. *Hooper v. Moore,* 50 N. C., 130.

The other exception was to the judgment of his Honor confirming the judgment of the clerk, which directs the distribution of the fund in the hands of the administrator between J. S. McCoy, one of the distributees, and J. L. Hinton, assignee of the other distributees, of that part of the personal estate of John A. Gambrill, deceased, as to which he died intestate, to the exclusion of the defendant William Thomas, who claims as the representative of his deceased wife, Mary A. Thomas, and the board of commissioners of Pasquotank County, who claim, as trustees, to hold the fund and administer it for the (41) benefit of the poor of said county.

The testator bequeathed the sum of $1,000 in trust to Mary A. Morgan, for the benefit of Mrs. Mary A. Scott, the interest to be paid her during her life, "and at her decease, Mrs. Morgan to distribute the principal, as her judgment may determine, for the benefit of the poor of said county."

This will was made in the state of Maryland, where the testator resided, and where it is subject to be construed by the rules of the common law. It will, in the courts of North Carolina, have the same construction as if it had been made here, unless it shall appear by judicial decisions, or by the opinions of men learned in the law, that a different construction would prevail in Maryland. *Worrell v. Vinson,* 50 N. C., 91. It has been adjudged by the court below, upon competent evidence, as we have seen in our examination of the first exception, that by the laws of Maryland this bequest is void, and the laws of that state govern the exposition of the testator's will, because he was there domiciled at the time of its execution and of his death. *Worrell v. Vinson, supra; Allen v. Pass,* 20 N. C., 207.

The trustee, Mary A. Morgan, who married the defendant Thomas, and died, could have had no beneficial interest in the fund if the bequest had been held good, and the defendant Thomas, her surviving husband, can have no interest in it, because of the failure of his wife to execute the trust in her lifetime.

It is admitted that the residuary clause in the will of John A. Gambrill has been declared void by the courts of Maryland, and it is further admitted that the defendants McCoy and Hinton are entitled to the fund, if the same cannot be held by the commissioners of Pasquotank as trustees, or by William Thomas as representative of the trus-
(42) tee, Mary A. Thomas.

The cause being now properly constituted in court, and the parties claiming the fund being present in the action, so that a determination of the controversy will bind all, it may now be decided, as suggested in *McKoy v. Guirkin,* 102 N. C., 21, "whether the bequest for the benefit of the poor is valid, or must return to legatees under the will, or to the testator's next of kin."

AFFIRMED.

THE G. A. GAMBRILL MANUFACTURING COMPANY
v. T. P. WILCOX.

Execution—Sale—Lien—Priority.

A sale of land under an execution on a junior judgment passes the title to the purchaser encumbered with the lien of prior docketed judgments; but where the sale is made upon execution on the senior judgment the title passes to the purchaser unencumbered; and the lien of any junior docketed judgments is transferred to the fund arising from the sale; and it is the duty of the officer making the sale to apply it to the satisfaction of the several judgments in the order of their priority, whether he has executions in his hands or not.

APPEAL at Spring Term, 1892, of PASQUOTANK, from *Shuford, J.*

The following are the facts:

On 6 March, 1891, George & Co. recovered judgments against R. D. Williams, and on the same day docketed them in the Superior Court of Pasquotank County.

Upon these judgments executions issued to the defendant Wilcox, sheriff of Pasquotank County, on 23 May, 1891, who sold the
(43) land of Williams on 6 July, 1891, for a sufficient sum to pay these executions in full, and in excess thereof the sum of $50.77.

On 15 March, 1891, the plaintiffs obtained judgment against said Williams, and docketed the same in the said Superior Court on the same day. No execution was issued upon this judgment until after the sale mentioned above, but on the day of sale the plaintiff's attorney notified defendant of the existence of the Gambrill Manufacturing Company judgment, and demanded that he pay the $50.77 upon it.

On 9 June, 1891, Obendorfer & Co. obtained judgment against said Williams, and docketed the same in said Superior Court and issued execution thereon 6 July, 1891, which execution was in the hands of the defendant at the time he made the said sale, and he paid the said sum of $50.77 to the attorney of Obendorfer & Co. upon the execution in his hands on the day of sale.

The plaintiff claimed that the judgment of the plaintiff against Williams was a lien upon the said sum of $50.77 in the hands of said sheriff, and the defendant wrongfully paid the same upon the execution of Obendorfer & Co., and it was agreed that if the court should be of opinion from these facts that the judgment of this plaintiff was entitled to receive the said sum of $50.77, and that the defendant wrongfully paid the same upon the Obendorfer & Co. execution, that the court should give judgment against the defendant for the sum of $50.77.

The court rendered judgment for the plaintiff. The defendant excepted and appealed.

No counsel for plaintiff.
E. F. Aydlett for defendant.

CLARK, J. In *Cannon v. Parker,* 81 N. C., 320, it is decided that the effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment, (44) and of a sale under both to vest the title in the purchaser and transfer the liens, in the same order of priority, to the proceeds of sale. That case is decisive of this. It was not necessary that execution should have been issued on the plaintiff's judgment, which was the next in priority of docketing. It is the docketing of a judgment, and not the issuing or levy of an execution, which creates the lien under the present system. *Sawyers v. Sawyers,* 93 N. C., 321; *Williams v. Weaver,* 94 N. C., 134; *Holman v. Miller,* 103, N. C., 118. In effect, the lien of a docketed judgment is in the nature of a statutory mortgage.

A rule was adopted by the Supreme Court, at June Term, 1869 (63 N. C., 669), that if a junior judgment creditor gave to a creditor whose judgment was first docketed twenty days notice, and the latter thereupon failed to take out execution and have it in the sheriff's hands the day of sale, he should lose his priority. This was held unconstitutional, because an interference with the vested rights of the older judgment creditor, in *Burton v. Spiers,* 92 N. C., 503, and the rule has been revoked.

In like manner, when the judgment debtor dies, and the personal representative finds it necessary to sell to make assets to pay debts, the lien of the judgments is transferred in the same order of priority to the pro-

ceeds of the sale. *Murchison v. Williams,* 71 N. C., 135; *Mauney v. Holmes,* 87 N. C., 428; *Sawyers v. Sawyers, supra.* Formerly, it was the duty of the sheriff to apply the proceeds of the sale to the executions in his hands according to their priority. Now it is his duty to apply the proceeds to the execution in his hands which was issued on the oldest docketed judgment (for the lien of any judgment docketed prior to that is not affected by the sale), and the proceeds should next be applied in satisfaction of the next oldest judgment lien, whether execution has issued thereon or not. *Motz v. Stowe,* 83 N. C., 434, (438).
(45) The sheriff has failed, in the present case, to apply the proceeds of the sale according to the priority of lien of the docketed judgments, and is liable for such misapplication.

AFFIRMED.

Cited: Baruch v. Long, 117 N. C., 511; *Bernhardt v. Brown,* 118 N. C., 710; *Gammon v. Johnson,* 126 N. C., 66; *Connor v. Dillard,* 129 N. C., 51; *Clement v. King,* 152 N. C., 460; *Jones v. Williams,* 155 N. C., 193.

B. W. BERGERON v. THE PAMLICO INSURANCE AND BANKING COMPANY.

Agency—Burden of Proof—Insurance—Waiver.

1. If an agent of an insurance company employs a clerk in the usual business of the company, and permits him also to solicit business, the company is bound by any waiver, by such clerk, of any stipulation in the policy which the agent could have made, notwithstanding a provision in the policy that no persons should be deemed its agents except those holding its commission as such.

2. While the burden of proving a waiver of conditions in a contract of insurance is upon the insured, it is sufficient if he do so by a preponderance of testimony.

3. A policy of insurance contained a stipulation that, if the insured building was located upon "leased ground," it must be so represented to the company and expressed in the contract. The clerk of the agent of the company solicited the insurance, and was notified that the building was on leased premises, and was requested to so state that fact, if necessary, in the policy, to which the clerk replied that it made no difference whether such was the fact, and issued the policy without any reference to it: *Held,* that this was a waiver of the condition, and the company was bound by it.

ACTION tried at the Fall Term, 1891, of BEAUFORT, before *Brown, J.*

One W. P. Baugham had been constituted agent of the defendant at Washington, N. C. There was evidence tending to show that one Bragaw was employed as clerk in the office of Baugham and to (46) solicit insurance, and that he did solicit the plaintiff to insure his house, which has been burned, and the loss of which gives rise to this action.

It was also in evidence that while he was soliciting the insurance, the plaintiff told Bragaw that the house belonged to him, but was located on leased land, and was told by Bragaw that it made no difference whether such was a fact or not, and further, that plaintiff told Bragaw, if it was necessary to do so, to be sure and state upon the policy that the house was located on leased land. After this conversation, according to the testimony offered for the plaintiff, premium was paid and Bragaw brought back a policy to which he had signed the name of W. P. Baugham. About a week after Baugham went to plaintiff's place of business, asked for the policy and erased the signature of his own name by Bragaw, but wrote his proper signature below that erased.

There was testimony offered by defendant tending to show that Bragaw did not solicit plaintiff to insure, but it was not denied that Bragaw was employed as clerk to solicit insurance and receive premiums.

The court instructed the jury that if they believed, from the testimony, that Bragaw was notified, while soliciting the plaintiff, that the house was on leased land, and replied that it made no difference, then the jury should find in response to the first issue that the company had notice, when the policy was issued, that the house was on leased ground. The defendant excepted to this, and to the further instruction that the burden was on the plaintiff to prove by a preponderance of testimony that the notice was given to Bragaw, while as authorized clerk of Bragaw soliciting insurance for the defendant company. One of the provisions of the policy was as follows: "If the interest in property to be insured be a leasehold, rented, mortgaged or undivided partnership interest, or a building standing on leased ground, or interest not absolute, it must be also represented to the company and expressed in the policy in writing; otherwise the insurance shall be void. (47) Policies insuring lessee's interest must so state, and shall be construed to cover only the market value of the lease (at the time of the fire) for its unexpired term."

J. H. Small and W. B. Rodman, Jr. (by brief) for plaintiff.

C. F. Warren for defendant.

AVERY, J., having stated the case as above, proceeded: When the assured is guilty of no misrepresentation, willful concealment or fraud,

insurance companies are not allowed, after selecting and sending out agents to solicit business for the benefit of the corporation and receiving the premiums collected by them from the customer, to saddle upon him the blunders of such agents and make him pay the penalty by forfeiting his right of recovery. 1 May on Ins., section 131. "Facts material to the risk, made known to the agent (or a sub-agent entrusted with the business) before the policy is issued, are constructively known to the company, and cannot be set up to defeat a recovery on the policy." May, *supra,* section 132; *Bennett v. Insurance Co.,* 70 Iowa, 600.

The principle has been more than once announced by this Court, that where a soliciting agent is informed, before the policy is issued, of a fact, which, if fraudulently concealed by the applicant, would constitute a ground of forfeiture under one of its conditions, and afterwards receives the premium and delivers the policy, his knowledge is imputed to his principal, and, whether he actually communicates the fact to the principal office of the company or not, the condition is deemed to have been waived. *Dupree v. Insurance Co.,* 93 N. C., 240; *ibid.,* 92 N. C., 422; *Hornthal v. Insurance Co.,* 88 N. C., 73; *Follette v. Insurance Co.,* 107 N. C., 240; *ibid.,* 110 N. C., 377. These rulings rest upon the principle, that to permit the insurer to gather into its
(48) coffers premiums collected by one of its local agents and continue to recognize the validity of the contract made through him till it becomes apparent that a loss has occurred, and then, for the first time, to repudiate the agency, would be to lend the sanction of the law to a palpable fraud. But it is contended for the company that this Court has never recognized the right of a mere clerk in the office of a general or local agent, by any act or omission on his part, to waive the enforcement of a forfeiture under the terms of a condition in a policy of insurance. The questions raised in the cases heretofore considered by this Court have been how far the right of the insurer to insist upon a forfeiture under a condition in a policy, or for a material misrepresentation contained in the application, can be waived by conduct of an agent or sub-agent which induces the assured to spend money upon the risk in the reasonable belief that the enforcement of such condition or stipulation will not be insisted upon. *Grubbs v. Ins. Co.,* 108 N. C., 472; *Dupree, Hornthal* and *Follette cases, supra.* But the principle decided in all of these cases applies with equal force when the agent sends out (instead of a sub-agent) a clerk in his office who induces the assured to pay premiums by statements inconsistent with the enforcement of a condition in the policy, or where he has full knowledge of the falsity of a stipulation in the application. The rule is, that in both classes of cases the knowledge of the agent is properly imputed to the principal, because to allow such agent (or clerk) to take

the premiums paid by the insured, turn them into the treasury of the company, and deliver, in consideration of the money paid, a policy of insurance, with a knowledge of facts upon which its validity may be disputed, and then insist upon those facts as a ground of avoidance, is to protect the principal in the practice of a palpable fraud. 2 May, *supra,* sec. 497, and notes.

In our case, the clerk Bragaw, solicited insurance, and being (49) informed by the plaintiff Bergeron that the building was on leased ground, told him that it made no difference whether it was on leased ground or not, and thereupon Bergeron paid the premium, still insisting that if Bragaw should find it was necessary to state the fact communicated, he should indorse it upon the policy. Bragaw delivered the policy the same day without indorsement, and a week later, Baugham, who presumptively had knowledge of every statement made by his subordinate which was reasonably calculated to induce the insured to pay his money for the premium, went to Bergeron's place of business and told him, not that Bragaw was unauthorized to solicit and receive premiums, but in effect only that he had no power of attorney to sign his name as general agent of the company and thereby bind it. Baugham made no proposition to return the premium procured by the representation which was in conflict with a condition of the policy. When a company uses the talent and address of any man to solicit and obtain premiums, it is but just, if it claims the benefit derived from his misleading statements, that it should be estopped from denying that they were true or authorized by it.

In *Arff v. Insurance Co.,* 125 N. Y., 57, the Court of Appeals of that State held that, notwithstanding a provision in a policy of insurance that no person should be deemed its agents except such as hold its commissions, an ordinary agent of a fire insurance company had the power to employ clerks necessary to discharge the usual business of the agency, and "that any waiver which the agent himself could make is to be attributed to him when made by his clerk." In that case there was also a condition requiring the assured to notify the company of any other insurance upon the property, and that notice was given to the clerk employed by the agent to solicit insurance. See also *Bodine v. Insurance Co.,* 57 N. Y., 117; *Kaney v. Insurance* (50) *Co.,* 36 Hun., 66; *Chase v. Insurance Co.,* 14 Hun., 456. In *Bennett v. Insurance Co., supra,* it was held that the knowledge of a clerk of the agent who was sent by him to solicit insurance and take an application, that there was other insurance upon the property, bound the company as fully as if the agent, the master of the clerk, had had the same knowledge.

This is not an action brought to correct a mistake in a deed or written agreement, but, on the contrary, the plaintiff's right of recovery depends upon its enforcement. If Bergeron and the builder who constructed his house had entered into an agreement under seal and signed by both, by the terms of which the builder stipulated to forfeit his right to an unpaid balance, as liquidated damages, if the house should not be completed before a certain day, a suit brought for the balance under the contract would not be deemed an equitable proceeding to correct a mistake in a written instrument, because Bergeron had set up the stipulation in avoidance of the contract, and the builder had replied setting up certain acts amounting to a waiver of the enforcement of the stipulation. Where the relief sought in the action is the correction of a deed on the ground of mutual mistake, mistake of one of the parties and fraud on the part of the other, or mistake of the draughtsman in drawing an absolute deed, when it was the intention of the parties that it should be a mortgage or deed of trust, or the setting up of a lost deed or of a resulting trust arising from an agreement to buy for another—in all these cases, such allegations of the party seeking the relief as are necessary to show his right to it must be clearly proved. *Harding v. Long,* 103 N. C., 1; *Loftin v. Loftin,* 96 N. C., 94; *Ely v. Early,* 94 N. C., 1. It is also settled that a deed absolute upon its face cannot be corrected so as to convert it into a trust without some facts *dehors* the deed inconsistent with the idea of absolute ownership, as well as upon full and convincing proof. *Hemphill v. Hemphill,* 99 N. C., 436; Pomeroy Eq., sec. 859. On the other hand, where the relief demanded is that a deed shall be declared void because its execution was procured by false and fraudulent representations, or
(51) undue influence, or that it was executed with intent to hinder, delay or defeat the recovery of creditors, the allegations material to establish the fraud must be proved to the satisfaction of the jury, or so as to produce belief in its truth. *Lee v. Pearce,* 68 N. C., 77; *Harding v. Long, supra;* Bump. on F. Convey., 562 and 563; Kerr on Fraud and M., 382 and 384.

In the case at bar the plaintiff brought his action upon the policy, alleging the loss by fire, which made the defendant company liable by its terms. The defendant company, in its answer, set up the defense that the building insured was built upon leased land, and that the failure to note that fact upon the policy was fatal to the plaintiff's demand. The plaintiff replied, setting up the alleged conversation between himself and Bragaw, the clerk, before the policy was delivered, as a waiver of the condition relied upon by the defendant. The plaintiff set out specially the facts relied upon on his part to show the waiver of that condition. The jury have found, in effect, under the instruc-

tions of the court, that the conversation was as stated by the plaintiff, and whether, therefore, such conduct of the agent is an estoppel *in pais* or a waiver, it is distinctly pleaded in the reply and proved on the trial by a preponderance of testimony. It was set up as amounting to a waiver, and though it would be giving the sanction of the Court to a fraudulent practice, to allow a company to take shelter under the condition, when its agent had induced the payment of the premium by the representation that its enforcement would not be insisted on, still it was no more necessary to allege that the conduct of Bragaw was fraudulent, than it would be in the case of the contract for building a house, which we have mentioned, or where any other facts are set up in a pleading as a waiver of the right to insist upon a penalty or (52) forfeiture under the terms of a contract. *Grubb's case, supra.*

Where an agent of an insurance company induces the assured to incur expense in making proofs of loss, such conduct has been declared to be a waiver of the right of the company to insist upon a forfeiture for failure to enter additional insurance on the policy. *Grubb's case, supra; Dibbrell v. Insurance Co.,* 110 N. C., 193. Indeed, acts of agents of insurers, done in the line of duty and inconsistent with the enforcement of a forfeiture under a policy, are, as a general rule, waivers of the right to insist upon such penalties; but the burden is on the plaintiff in such cases to show facts constituting a waiver under the rule usually obtaining in civil actions by a preponderance of testimony only. *Non constat* that the agent acted with any fraudulent intent, for his honest purpose may be, in such cases, to waive the rights of the company, and the plaintiff has a right to assume that he understood the legal consequences of his acts and intended they should follow. The plaintiff need not allege fraud in terms, because it would be fraudulent in the company to exact a forfeiture from him, when the conduct of its agent has induced him to pay money into its treasury by statements inconsistent with the idea of insisting upon its enforcement. If the insurer ratifies the act of its agent by admitting notice of facts known to its agent, or of representations made by him to induce the assured to enter into the contract, then no fraud is attempted, much less perpetrated. When the insurer, in an aswer, insists upon the forfeiture in the face of such conduct on the part of its agent, while it would be unjust and inequitable to sustain such a defense as sufficient, it is not essential for the plaintiff to allege and prove that the intent of the agent was to defraud. His honest purpose may have been to waive the condition as a matter of minor importance, and the purpose subsequently conceived by his principal of repudiating (53) his acts in so far as they operated to the detriment of the company, and of ratifying, at the same time, the receipt of money by him,

which went into its treasury, is an intent, if permitted by law, to avoid the contract upon inequitable grounds, but the issue of fact raised by such a defense, and the reply to it, involved no question whether the policy shall be amended, altered or corrected. Both parties propose to leave it standing intact as the agreement between the parties, but one insists that the enforcement of one of its provisions has been waived.

After a careful scrutiny of the authorities relied on to sustain the exceptions to the ruling of the court below, we think that there is

NO ERROR.

Cited: Fagg v. Loan Asso., 113 N. C., 368; *Sydnor v. Byrd,* 119 N. C., 489; *Horton v. Ins. Co.,* 122 N. C., 504; *Sprinkle v. Indemnity Co.,* 124 N. C., 409; *Strause v. Ins. Co.,* 128 N. C., 65; *Robinson v. Brotherhood,* 170 N. C., 549; *Johnson v. Ins. Co.,* 172 N. C., 147; *Hart v. Woodmen,* 181 N. C., 490.

S. D. GRIST v. CHARLES H. WILLIAMS.

Sale—Vendor and Vendee—Agency—Evidence—Contract, Rescission of —Statute of Limitations.

1. If a vendee refuses to receive any pay for goods delivered him in pursuance of a contract, the vendor has the right either to rescind the contract or resell the goods and recover from the vendee the difference in price. Such resale is not *per se* evidence of the rescission of the contract, the vendor being regarded, *quoad hoc,* as the agent of the vendee.

2. The fact that a nonresident debtor has property within the State will not affect Section 162 of The Code, which suspends the operation of the statute of limitations for the period during which the person, against whom the demand is made, is out of the State.

ACTION tried before *Brown, J.,* at Fall Term, 1891, of BEAUFORT, on appeal from the judgment of a justice of the peace.

The plaintiff alleged that he had contracted to sell and deliver his potato crop in 1887 to defendant, and that defendant agreed to pay him $2.25 per barrel, delivered in Washington, North Carolina,
(54) in good condition; that there were seventy-three barrels delivered, according to contract, to defendant, and in good condition, and that the defendant had paid $22.86 thereon and had failed to pay remainder. The defendant admitted entering into a contract, as alleged by plaintiff, except that it was part of said contract that pota-

toes were to be delivered in good condition, and if they arrived in Norfolk sunburnt, the defendant was not to take them, and that said potatoes were not delivered in good condition, and were sunburnt.

The parties introduced testimony tending to prove their respective contentions. Immediately after receiving the potatoes the defendant sent to plaintiff the following telegram:

"Potatoes here, and in bad order; sunburnt. We cannot receive them. Wire us when and where to ship for your account. Answer by wire immediately."

To which one Brown, agent of plaintiff, replied:

"Dispose of Grist potatoes to best advantage. Hold proceeds for me."

Thereupon, defendant disposed of potatoes and remitted the proceeds to plaintiff, who testified that he received the amount on account. In 1891 the plaintiff brought suit to recover the difference between the contract price and the amount so remitted, he being, in the meanwhile, a resident of North Carolina, and the defendant a resident of Virginia, though owning property in the former State.

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

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

SHEPHERD, J. According to the findings of the jury the (55) plaintiff complied in every respect with the terms of the contract of sale and the potatoes were duly shipped to the defendant. Upon their arrival in the city of Norfolk, Virginia, the point of destination, the defendant wrongfully refused to receive them, telegraphing to the plaintiff, "We cannot receive them; wire us when and where to ship for your account. Answer by wire immediately." It is well settled that, under such circumstances, the vendor had a right, either to rescind the contract or resell the potatoes and hold the vendee responsible for the difference in price. It is also well established that such a resale by the vendor "is not *per se* evidence of a rescinding of the contract." *Hurlburt v. Simpson,* 25 N. C., 233. When the vendor makes such a resale he is considered as acting as the agent of the vendee (1 Benjamin Sales, 1077, note), and as he has a right to act as such agent for that purpose, we are unable to see why, in this case (considering the perish-

able nature of the article, the necessity for immediate action and the intervening distance) the vendor could not direct the vendee to make the sale without necessarily rescinding the contract. In the absence of any further testimony as to what actually transpired between the parties we cannot, merely upon this correspondence, reverse the finding of the jury that the contract was not rescinded.

The exception addressed to the ruling of the court excluding the testimony as to the indebtedness of several other parties in Washington, N. C., to the defendant, cannot be sustained. The testimony could not have affected the suspension of the Statute of Limitations under The Code, sec. 162, as the fact of the possession of property in the State by a nonresident does not put the statute in force so as to bar his personal liability. The real facts respecting the alleged rescission, being evidenced by the correspondence, and not being disputed, the testimony offered was not relevant for any other purpose than
(56) to show that the statute was suspended by reason of the nonresidence of the defendant. If admitted for any other purpose, without objection, the defendant had no legal right to introduce evidence in its rebuttal.

In looking over the record we can find

NO ERROR.

Cited: Alpha Mills v. Engine Co., 116 N. C., 804; *Green v. Ins. Co.,* 139 N. C., 310; *Clothing Co. v. Stadiem,* 149 N. C., 8; *Volivar v. Cedar Works,* 152 N. C., 34; *Love v. West,* 169 N. C., 14.

JOHN W. HODGES v. W. H. WILKINSON.

Assignment—Chattel Mortgage—Evidence—Burden of Proof—Sale—Warranty—Possession.

1. A warranty of title is implied in sales of chattels; this implication arises upon proof of sale, and thereupon the burden is cast upon the party denying the warranty, or resisting a recovery upon it, to show any special agreement which will relieve him from the liability.

2. It is not essential to a recovery in an action upon an implied warranty in the sale of chattel to show that the plaintiff has been deprived of possession under legal process; it is sufficient if he shows the paramount title is in another who has acquired possession. The burden of proving the true title in another is upon the plaintiff.

3. The assignee of a chattel mortgage acquires an interest in the debt secured and the property pledged, which will be protected in courts of law, as well as in courts of equity; such assignment may be either with or without seal; it need not be registered, and may be proved as any other indorsement.

4. In the trial of an action upon an implied warranty in the sale of a horse, it was in evidence that the true owner had brought suit against plaintiff for possession, and upon claim and delivery proceedings had been put into possession, but the cause was still pending: *Held*, (1) The record of that suit was competent evidence to show possession in the true owner; and (2) in connection with other circumstances, to show the paramount title in him.

APPEAL from justice of the peace, tried before *Brown, J.*, and (57) a jury, at Fall Term, 1891, of BEAUFORT.

The pleadings were oral. The contentions of the parties on the trial in this Court were as follows:

The plaintiff alleged that he had exchanged a mule with the defendant for a horse; that the defendant impliedly warranted the title to said horse, and that there has been a breach of said warranty; that at the time of said exchange there was a valid outstanding mortgage on said horse, unknown to plaintiff; that the quiet possession of the plaintiff of said horse had been disturbed; that the horse had been taken by one H. W. Wahab, by virtue of said mortgage; that the plaintiff had been endamaged to the amount claimed in the writ.

The defendant denied said allegations, and, in particular, denied that said Wahab was the legal owner of said mortgage, or that there was anything due thereon, or that there had been any legal eviction, or any breach of the alleged warranty, and contended further that a suit was pending in this Court wherein said Wahab is plaintiff, and the said John W. Hodges, the plaintiff herein, is defendant, wherein said horse was taken by said Wahab, the plaintiff therein, under claim and delivery proceedings, which suit has not terminated, and that this action cannot be maintained by Hodges until after it is terminated.

There was much conflicting testimony introduced by plaintiff and defendant.

The entire record in the action of H. W. Wahab v. John W. Hodges, including the claim and delivery papers, was also introduced.

The material portions of the charge were as follows:

First issue.—"That if defendant exchanged a horse for the mule with the plaintiff, and traded the horse to the plaintiff as his, the defendant's horse, if nothing else appeared, the law implies a (58) warranty of title upon the part of the defendant. But this warranty is an implied warranty. There is no evidence of an express warranty in this case.

"While the law implies a warranty of title when the vendor sells chattel property as his own, yet such implication may be repelled by the words or statements of the vendor as is claimed by defendant in this case. If Wilkinson stated to the plaintiff Hodges at the time of the trade, speaking in respect to the horse, 'that he would not warrant anything,' then that is a refusal to warrant at all and you should answer first issue No. But if you believe Wilkinson traded the horse, and nothing further was said or claimed by plaintiff, then you will answer first issue Yes. The burden of proof is on defendant to repel the implication of warranty. If the plaintiff asked Wilkinson, 'Will you warrant this horse to be sound?' and the defendant said he would not, and nothing more was said, this would not be sufficient to repel implied warranty of title. The defendant must have indicated to the plaintiff that he refused to warrant title."

Second issue.—"Has there been a breach of the covenant of warranty? The warranty of title implied by the law in the sale of personal chattels is a covenant for the quiet enjoyment and possession. Therefore, before the plaintiff can establish a breach of the alleged covenant of warranty, the burden of proof is on the plaintiff to show by a preponderance of evidence that his possession of the horse has been disturbed, either by lawful process or by some one holding the paramount true title to the horse.

"The plaintiff has undertaken to show both a legal eviction or seizure by legal process, and further, that the horse was taken by H. W. Wahab, holding a paramount superior title to Wilkinson and Hodges. The plaintiff has put in evidence the record in the case of H. W. Wahab v. John W. Hodges.

"There is no final judgment of the court in the suit, and if there was no other evidence the above would be insufficient to establish
(59) Wahab's superior claim, and would not be sufficient evidence of a breach of the covenant of warranty. The plaintiff undertakes to go further and show as a matter of fact that at the time of the trade H. W. Wahab held a valid mortgage on the horse, and that he took him by virtue of his mortgage.

"Upon this branch of the case the court charges that, if you believe that W. H. Green owned this black horse before Wilkinson got him, and had executed a mortgage on him, which is in evidence, and was a valid lien on said horse at date of the trade, and that said mortgage was due and unpaid and became the property of Wahab, and that Wahab took the horse from Hodges by virtue of such mortgage, then there has been a breach of warranty, and you should answer second issue Yes.

"It is true, that any defense is open to Wilkinson in this action against the validity of Wahab's claim that was open to Hodges in the suit Wahab brought against him, and therefore, it is incumbent on plaintiff to show that at the time Wilkinson traded him the horse the mortgage was a valid lien on him, was unpaid, and that the horse has been taken from him by virtue of it and by the owner of it."

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

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

AVERY, J. The warranty of a title implied in every sale of a chattel has been declared by this Court to be in effect a covenant for quiet enjoyment. *Cowan v. Silliman,* 15 N. C., 46; *Webster v. Laws,* 89 N. C., 224. The distinction drawn by the Supreme Court of Kentucky between the breaches of express and implied warranties of personal property (*Scott v. Scott,* 2 Marsh, 218; *Tipton v. Triplett,* 1 Metcalf, 570), has not been generally recognized by other courts of this country (*Gross v. Keesske,* 41 Cal., 111; Rawle on Cove, 5 Ed., (60) sec. 60), though at least one court and text-writers of the highest respectability have given their sanction to it. *Metheny v. Mann,* 73 Mo., 677; 5 Louis R. & R., sec. 2379, p. 3971.

If the question had been left an open one, however, strong reasons, well supported by authority, might be adduced in favor of the contention that covenants of warranty of the title to chattels, whether express or implied, are analogous rather to the personal covenant that the grantor is seized of land, has full right to convey it, and that the land is free from incumbrances, than to the covenants of warranty and quiet enjoyment, which run with the land, and that a breach is created and the right of action accrues at the time of the sale, if the title of the seller is then defective. *Perkins v. Whelan,* 116 Mass., 542; *Harrington v. Murphy,* 109 Mass., 299.

But it seems to be settled by the decisions of this Court that it is not an essential prerequisite to recovery on the covenant of warranty or quiet enjoyment in a deed for land even that the plaintiff should show that he has been actually evicted under legal process. *Parker v. Dunn,* 47 N. C., 203. If he has not been so evicted, yet if he show that he has yielded the possession to the owner by title paramount, or that the lands being unoccupied, such true owner has entered and acquired possession, it is sufficient evidence of a breach of the warranty. *Hodges v. Latham,* 98 N. C., 243; *Duvall v. Craig,* 1 Wheat., 45; *Read v. Staton,* 3 Hay. (Tenn.), 159; *Kellogg v. Plott,* 33 N. J. L., 332; Greenleaf on

Ev., sec. 244. Proof of "the existence of a better title with an actual possession in another under it," is equivalent to evidence of an eviction (*Grist v. Hodges,* 14 N. C., 200), and the plaintff will be relieved of the burden of showing a breach of the covenant which he takes upon himself in bringing the action when he adduces such proof of title as makes further contention probably useless. *Lee v. Gause,* 24 N. C., 444. The law does not require one to do a vain thing. It is
(61) not incumbent on him to make himself a trespasser by an actual entry, nor to incur the useless expense and suffer the needless delay incident to bringing a hopeless suit. *Ibid. Coble v. Wellborn,* 13 N. C., 388; *Jackson v. Hanna,* 53 N. C., 188. The covenant of warranty is "subject to the same construction with a covenant for quiet enjoyment." *Herrin v. McEntyre,* 8 N. C., 410.

Actions on the warranty of title implied in the sale of personal property being then governed by the same rules as to the burden of proving the breach as those brought upon covenants for quiet enjoyment of lands (*Cowan v. Silliman, supra; Parker v. Dunn, supra; Webster v. Laws, supra),* it necessarily follows that it was sufficient for the plaintiff to show that Wahab had title to the horse in controversy by virtue of the mortgage when Wilkinson sold to the former, and that the horse had been seized and the possession of him acquired by Wahab by virtue of the warranty in the claim and delivery proceeding brought against the plaintiff. Upon principle it was no more necessary for Hodges to await the recovery of Wahab in the pending action, than it would have been to prosecute an unsuccessful suit against Wahab, had the latter acquired possession by bridling the horse while it was straying in the public highway and without objection from any person. *Coble v. Wellborn, supra.* The record as corrected by consent of counsel, makes no material change in the status of Hodges and Wahab when this action was brought. If Hodges had actually surrendered the horse to Wahab on demand, or if he agreed to give no trouble if claim and delivery proceedings should be instituted, still he had the burden on him of showing the title in Wahab with the advantage to the defendant of having the opportunity to meet and contradict, if he could, the testimony offered to prove title in him, which he could not have done in the suit already instituted against Hodges. If there was a combination between Wahab and Hodges, the defendant's safety depended upon being allowed on his own behalf, to dispute Wahab's claim to paramount title. If Wahab had such title, and it could be established
(62) despite the resistance of the defendant, it is but just that he should have the horse, and that Hodges should recover his value from the defendant. If the contest between Wahab and Hodges was but a sham battle, Wilkinson has no reason to complain that it was not

acted out and that he has compelled Hodges to show in this action what Hodges had refused to make Wahab prove in that primarily brought and still pending. If Hodges offered testimony sufficient to satisfy the jury that Wahab had paramount title, then Wilkinson, by implication at least, must have falsely warranted the title to the horse and would have no ground of complaint if Hodges had surrendered possession to the true owner on being convinced of his right, and even with the assurance from Wahab that he would not insist on his rights in case the plaintiff should fail to recover in this action.

The plaintiff, in order to show paramount title as well as possession in Wahab, offered a chattel mortgage, dated 9 May, 1885, executed by W. H. Green to Harriet Cohen, which had been regularly proven and registered in Hyde County. After objection the court admitted the chattel mortgage, except the writing on the margin of it purporting to be an assignment of the mortgage by Harriet Cohen which plaintiff proposed to prove subsequently. The deed, except the indorsement, having been proved and registered in due form, it was premature to raise a question as to the effect of the deed or indorsement at that stage of the trial. *Vickers v. Leigh,* 104 N. C., 248; *Cox v. Ward,* 107 N. C., 507.

But it is contended for the appellant that the testimony offered, if competent, does not *prima facie* show title in Wahab, because the assignment did not divest it out of Harriet Cohen. Even where land was conveyed by absolute deed, and the grantee subsequently indorsed on the deed, "I transfer the within deed to A. B." or "I relinquish all my right and title to the within deed," it was declared by (63) this Court that such indorsements, if supported by a valuable consideration, constituted contracts for reconveyance, which the courts could enforce by a decree for specific performance. *Linker v. Long,* 64 N. C., 296; *Tunstall v. Cobb,* 109 N. C., 326; *Beattie v. R. R.,* 108 N. C., 429. Such indorsements, upon mortgage deeds conveying land, as do not purport to act upon the land or the mortgagee's interest in it, will not pass the legal interest or power of sale. *Dameron v. Eskridge,* 104 N. C., 621; *Williams v. Teachey,* 85 N. C., 402. But the assignee of a chattel mortgage acquires an "interest in the debt secured and the property pledged, which courts of law as well as courts of equity, will recognize." The effect of assigning the mortgage deed without transferring the note which it is executed to secure, says *Anderson, J.,* in *Campbell v. Rich,* 60 N. Y., 214, is "to transfer to the assignee the property embraced in the mortgage as security for his advances." If the mortgagee assign the debt secured in a chattel mortgage before or after forfeiture, said *Southerford, J.,* in *Langdon v. Bush,* 9 Wendell, 80, the interest of the mortgagee passes to the assignee, and if the prop-

erty be taken by a stranger, trespass must be brought by the assignee, not by the assignor. The principle involved, if not the precise question presented in this case, was passed upon by the Supreme Court of Michigan (*Graves* and *Cooley* concurring with *Martin, J.*, in the opinion) in *Ellsworth v. Hall,* 48 Mich., 411, when that Court held that the assignee, under a *bona fide* mortgage, is entitled to the same protection as the mortgagee in an action of replevin, brought by a claimant of the goods. If Wahab would be entitled to the same protection as Harriet Cohen in the auxiliary proceeding of claim and delivery (which, as a substitute for replevin), he must, by virtue of the assignment, be considered the owner, in law and equity, of the property, until his debt is paid. The law, for reasons which it is useless to explain here, makes it essential that a deed for land, in order to pass the
(64) legal estate, should not only be signed, but sealed. Without a seal, a paper otherwise in the form of a deed of bargain and sale, does not pass the legal, but only the equitable estate. *Avent v. Arrington,* 105 N. C., 392. On the other hand, personal property passes by an assignment, either with or without seal, and where it is the purpose of the parties to transfer all of the rights of the mortgage, under a chattel mortgage, to another, there is no reason why an indorsement, like that made in this case on the instrument, should not be held to put the assignee, in law and equity, in the place of the assignor. *Kost v. Bender,* 25 Mich., 516; Jones on Ch. Mort., secs. 506 to 510; *Barbour v. White,* 47 Ill., 154; *Moody v. Ellsbee,* 4 Richardson (S. C.), 21; *Gilchrist v. Patterson,* 18 Ark., 579.

The plaintiff first offered to prove by H. W. Wahab that he sent Dick Howard, a constable, to take possession of the horse, and upon objection being made to the competency of that testimony, the record of the action entitled H. W. Wahab v. John W. Hodges (the plaintiff in this action), then pending in the Superior Court of Beaufort County, was offered. This was the action in which the ancillary proceeding of claim and delivery was instituted, and the warrant was issued under which the seizure was made and the horse delivered to Wahab. It appeared from the record that no final judgment had been rendered. If the law has been correctly stated by us, it was clearly competent to introduce the record to show possession in Wahab under the process of the court in connection with other testimony tending to prove that the paramount title was also in him. After the defendant objected to showing by parol how that possession was acquired, we cannot see upon what ground he could complain of the plaintiff for showing not only the actual possession, but the record of the judicial proceeding in which the warrant of seizure was issued. The lien of the chattel mortgage was created by registering the original

instrument, and such registration was notice to the world of the (65) existence of the lien. It was not material to the public whether the debt and property were transferred by the mortgagee. The purpose of the Legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarass trade and tend to encourage fraud. There is no provision in our statute (The Code, sec. 1274), which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often they may be assigned, they are still good to protect the interest of the holder of the debt.

Here it was competent to prove the signature of Harriet Cohen to the indorsement, "Value received, I hereby transfer this mortgage to H. W. Wahab," she being dead, just as it would have been to prove the execution of an assignment written on a separate and distinct piece of paper.

In view of all of the testimony on the subject, we think there was no ground for the complaint that the judge in his charge assumed that the black horse was identified. All of the mortgagor's horses were conveyed in the deed, but according to all the witnesses who knew the animals, except Ed. Spencer, there was one black horse and only one. Spencer testified that the mortgagor had a mare and two horses all told, and that one of the horses was "a dark bay, and the other was darker still." It cannot be reasonably insisted that in testifying that a horse is darker than a dark bay, the witness meant to be understood as denying that the horse in dispute was what is known as a black horse, as other witnesses had stated. There was no such conflict in the testimony as to the identity of the horse, as to make it the duty of the judge to leave the question to the jury.

The implication of warranty of title arises on proof of any (66) sale of a chattel, and when the sale was shown the burden was upon a party denying the warranty and resisting a recovery growing out of it, to show some special agreement that the seller should be discharged from such liability.

Upon a review of the whole record, we think that the rulings of the court as to the competency of testimony, and the portions of the charge that were excepted to, should be sustained. There is

NO ERROR.

Cited: Everett v. Newton, 118 N. C., 921; *Faulkner v. King,* 130 N. C., 496; *Herring v. Warwick,* 155 N. C., 350; *Martin v. McDonald,* 168 N. C., 234.

JOHN R. BONNER v. R. T. HODGES.

Evidence—Fraud—Expression of Opinion by Judge.

1. It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight.
2. Upon the trial of an action involving the *bona fides* of an assignment for the benefit of creditors, it was in evidence that, at the request of the assignor, one of his creditors postponed taking judgment before a justice of the peace until an hour of the day later than that named for the return of the summons, the debtor alleging that he was making arrangements to borrow the money, but before the expiration of the extended time, the debtor made an assignment, preferring other creditors: *Held*, that an instruction to the jury that the circumstance was a strong badge of fraud was not warranted under the Act of 1796 (The Code, sec. 413).

ACTION against the sheriff for trespass, tried at Spring Term, 1892, of BEAUFORT, before *Shuford, J.*

W. B. Rodman, an attorney, held a claim for collection in favor of one Thomas against one Gaskins. He brought suit against Gaskins, and on the urgent solicitation of Gaskins postponed the hearing before the justice of the peace for several days till 6 February, at 10
(67) o'clock a. m., when Gaskins induced him to agree to a postponement of the trial till after 12 o'clock by a promise to try to borrow the money before noon. At 11 o'clock of that day Gaskins executed a deed of assignment, preferring other creditors, whose debts will exhaust all of his property. The attorney subsequently obtained judgment for his client and caused the defendant sheriff to seize the goods on execution issued on his debt. The sheriff is sued for making this seizure. The other material facts are stated in the opinion.

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

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

AVERY, J. The charge of the court embodied a full, clear, and for the most part, correct statement of the law applicable to the testimony. But in response to a request of counsel made when the instruction proper was finished, the jury were told that a circumstance shown in evidence was a strong badge of fraud. The testimony so characterized was to the effect that the debtor had asked the attorney of a creditor to postpone taking a judgment against him before a justice of the peace, and that while the attorney was holding the case open till 12 o'clock

of the same day to see if the debtor could borrow the money to pay his debt, as he had proposed to do, the debtor made an assignment at 11 o'clock, preferring other creditors, and making no provision for the payment of the claim upon which the attorney had sued.

The trial judge must, upon the request of counsel, and sometimes his own motion, instruct the jury upon the weight of testimony in cases of this kind, where it is sufficient to raise a presumption of fraud, "but he is not at liberty to say to the jury that any fact, proved or admitted, that does not raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to estab- (68) lish it." *Berry v. Hall,* 105 N. C., 164; *Ferrall v. Broadway,* 95 N. C., 551. In the case of *Berry v. Hall,* the Court said further: "But opinions of chancellors, as to the weight of evidence in particular cases, when they are often inconsistent with ideas of testimony, expressed by the same court or the same judge, upon a state of facts almost identical in some other suit, must not be mistaken for rules of evidence. When the facts tending to establish the right of the plaintiff to equitable relief demanded are in dispute, the jury must pass upon the testimony, and the judge has no right to express an opinion as to its weight, but may, and under some circumstances must, explain the law as to presumptions arising on the evidence." Expressions used by chancellors, when giving the reasons for reaching certain conclusions of fact, as that circumstances mentioned had more than ordinary weight with them, are not to be relied upon as authority upon the law, since, in passing upon the facts, they were discharging the duties now devolving upon jurors. The judge may explain the law arising on the facts, but he is not at liberty to give an opinion as to "whether a fact is fully or sufficiently proved." The Code, sec. 413. It is true that the language of chancellors used in discussing the weight of evidence was sometimes repeated inconsiderately in discussing cases tried in a court of law, and this mistake has led to some confusion, but under our statute it is only where the law gives to testimony an artificial weight that the judge is at liberty to mention the sufficiency of proof at all in delivering his instructions to the jury. *Bobbitt v. Rodwell,* 105 N. C., 236; *Helms v. Green, ibid.,* 265; *Harding v. Long,* 103 N. C., 1; *Woodruff v. Bowles,* 104 N. C., 197.

We think, therefore, that there was error, for which the plaintiff is entitled to a

NEW TRIAL.

H. T. BELL v. W. F. HOWERTON ET AL.

Principal—Surety—Jurisdiction of Justices of the Peace—Equitable Defenses—"Splitting Actions."

1. One who has become surety for the performance of a contract has the duty imposed upon him of seeing that the contract is performed, and he cannot require the creditor to assume any obligation which he has incurred.

2. While a creditor is not bound to exercise diligence to enforce the collection of a demand upon which he has surety, he has no right to release any other security which he has acquired, and which might be available in satisfaction of the debt, and if he does so it will discharge the surety.

3. A landlord instituted in the court of a justice of the peace two separate actions, each for the recovery of a bale of cotton to which he claimed title under a contract with his tenant, and which he alleged had been wrongfully converted: *Held*, that this was not such a splitting of causes of action as would authorize a dismissal of the suits.

4. Although the courts of justices of the peace cannot affirmatively administer equity, they have jurisdiction of equitable matters set up by way of defense in actions properly cognizable before them.

ACTION tried on appeal from a justice of the peace, at Spring Term, 1892, of EDGECOMBE, by *Brown, J.*

The plaintiff appealed. The case is stated in the opinion.

G. M. T. Fountain for plaintiff.
Jacob Battle for defendant.

SHEPHERD, J. The defendant Howerton was the tenant of the plaintiff, and executed to him a bond for the payment of rent, with the defendant Braswell as surety. The plaintiff, in November, 1888, by virtue of his lien as landlord, sued for the possession of two bales of cotton grown on the leased premises, and the same having
(70) been seized under claim and delivery proceedings, were, upon the execution of the usual undertaking, surrendered to Alexander Greene, a defendant in said suit, who claimed the same under an agricultural lien executed to him by the tenant. The sureties to the undertaking, as well as the said Greene, were perfectly solvent; but the plaintiff, instead of prosecuting his action, submitted to a nonsuit at the Spring Term, 1891, of the Superior Court of Nash County, and now brings this action before a justice of the peace on the bond above mentioned.

The foregoing facts appear in the answer of the defendant surety Braswell; and the plaintiff, having demurred to the same, the only

questions presented are whether the said facts constitute a defense by way of discharging the surety, and whether such a defense can be entertained in the court of a justice of the peace.

Except when required by written notice under The Code, (sec. 2097), it is not the legal duty of the pricipal to institute a suit against the debtor, or to pursue such a suit with diligence and to call to his aid all of the remedies provided by the law. If he has brought suit, he is not compelled to prosecute the same to judgment; or if he has recovered judgment, he may fail or refuse to sue out execution; and, indeed, if execution has been issued, he may cause it to be returned without a levy. All this may be done, although judgment, execution and levy would have resulted in the collection of the debt against the principal debtor, and still the surety will not be discharged. *Pipkin v. Bond,* 40 N. C., 91; *Kesler v. Linker,* 82 N. C., 456; Baylies on Sureties, 219.

The principle of the foregoing conclusions is that the duty of performing the contract, or seeing that it is performed, is on the surety, and that he cannot require the creditor to assume any part of a burden which he has made his own. But while the creditor need not take active measures to enforce the payment of the debt, and (71) may therefore discontinue those which he has instituted, he has no right to relinquish any hold that has actually been acquired and which might have been made effectual as a means of payment. It has accordingly been held that "if the creditor takes the goods of the principal debtor in execution, and afterwards withdraws that execution, he discharges his surety *pro tanto.*' *Mayhew v. Crickett,* 2 Swann, 191. So, in *Law v. East India Co.,* 4 Ves., 829, it was, says *Judge Gaston* (in *Cooper v. Wilcox,* 22 N. C., 90), "considered as incontestible that where a creditor has a fund of a principal debtor sufficient for the payment of the debt and gives it back to the debtor, the surety can never after be called upon. 'The creditor, by virtue of the seizure in execution, or of the deposit, becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in the execution of that trust. For it is a rule that if he be not only creditor, but trustee, then even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled, will *pro tanto* discharge the surety. *Capel v. Butler,* 2 Sim. & Stew., 457." The learned Judge further remarks that, "in justice he (the creditor) must be regarded as having *interfered* (the italics are his) with the collection of the debt at his peril, and not at the risk of those who neither consented to the course pursued nor were consulted respecting it." *Nelson v. Williams,* 22 N. C., 118; *Smith v. McLeod,* 38 N. C., 390; *Pipkin v. Bond, supra;* Brandt on Suretyship, 381. "It is difficult (says Mr. Brandt, *supra*), to per-

ceive why the release of an attachment lien on the property of the principal should not have the same effect as the release of any other specific lien upon the property of the principal acquired by the creditor after the surety becomes bond"; and in this he is supported by abundant authority. *Maquoketa v. Willy,* 35 Iowa, 333; *Bank v. Watson,* 24 Mo., 333; *Ashby v. Smith,* 9 Leigh, 162; *Rees v. Barrington,*
(72) and notes; White & Tudor's L. C. The same principle necessarily applies to a case like the present, where the creditor actually seized the property upon which he had an undoubted lien, and then voluntarily released the undertaking, given for the return thereof, by submitting to a nonsuit of his action. By his interference he constituted himself a *trustee,* and he should be held responsible for the loss or impairment of the security resulting from his neglect or unfaithfulness. The surety had a right to assume that the plaintiff, as such trustee, would not surrender the undertaking given in lieu of the property, and thus practically destroy the subject matter of the lien. In *Pipkin v. Bond, supra,* it is said that "while the creditor is not bound to diligence, he is bound not to increase the risk of the surety by any act of his; and if he does anything that has that effect, he can no longer look to the surety." By the action of the plaintiff in seizing the property, the surety was lulled into inactivity for two or three years, the subject of the lien converted, and the undertaking for the return thereof released. Thus the surety, if now required to pay the plaintiff, is stripped of all remedy except an action for the conversion of the property. Under these circumstances, it cannot be seriously contended that his security has not been impaired or his risk increased by the act of the plaintiff; and it would seem more in accordance with natural justice, as well as the firmly established principles of equity, that he who by his own conduct has sacrificed the security, should alone be required to pursue the remaining and more doubtful remedy.

We see nothing in the case which justified the taking of the nonsuit. It is true that separate actions were brought for each bale of cotton before different justices. These were afterwards consolidated in the Superior Court, where they were pending by way of appeal. The case of *Jarrett v. Self,* 90 N. C., 478, cited by counsel, relates to the "splitting up" of the items of a single contract for the purpose of con-
(73) ferring jurisdiction upon justices of the peace, and is not in point, as these actions were not brought upon the contract for the recovery of the indebtedness, but for the possession of distinct pieces of property which had been tortiously taken. There are no circumstances tending to show any fraud upon the jurisdiction, and which, on that ground, would have authorized the dismissal of the actions.

It is further insisted that, conceding the conduct of the plaintiff operated as a release of the surety, the defense, being of an equitable nature, cannot be set up in the court of a justice of the peace.

In *Cooper v. Wilcox, supra,* in speaking of such a defense, the Court said: "The principle is spoken of as one of equity, but it prevails in all courts where the relation of principal and surety can be recognized. . . . But the form of the security frequently puts it out of the power of any but a court of equity to apply the principle"; as in the case of a bond where all the obligors appear to be principals. There can be no question but that under our present system a party to a bond may show, in a justice's court, that he executed the same as a surety. *Capell v. Long,* 84 N. C., 17; *Goodman v. Litaker, ibid.,* 8. This being so, the case of *Cooper v. Wilcox* is decisive of the jurisdiction of the justice as to the defense in this action. Indeed, it has been expressly decided that "whenever such a court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination. *Garrett v. Shaw,* 25 N. C., 395. And though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense. *McAdoo v. Callum,* 86 N. C., 419."

In *Howerton v. Sprague,* 64 N. C., 451, cited by plaintiff, the question now before us was not directly presented, and the remarks of the Court as to jurisdiction cannot prevail over the reason as well as the express authority of the later decisions.

AFFIRMED.

Cited: Johnson v. Williams, 115 N. C., 35; *Holden v. Warren,* 118 N. C., 326; *Walters v. Starnes, ib.,* 844; *Malloy v. Fayetteville,* 122 N. C., 485; *Bank v. Nimocks,* 124 N. C., 361; *Fidelity Co. v. Jordan,* 134 N. C., 238; *Rouse v. Wooten,* 140 N. C., 560; *Levin v. Gladstein,* 142 N. C., 494; *Mfg. Co. v. Holladay,* 178 N. C., 421.

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(74)

JOSEPH GREGG ET AL. v. J. P. MALLETT ET AL.

Depositions—Evidence—Witness—Set-off—Pleading—Trial—Possession, when Evidence of Title.

1. A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown.

2. It is now well settled that other corroborative acts and declarations of a witness may be introduced in support of his testimony, even in anticipation of an attack upon it.

3. Where the issue was whether the person making a particular sale was acting as broker for another, or for himself, testimony that it was generally understood in the community that he was dealing on his own account and not as broker, was incompetent, as hearsay evidence.

4. An answer having alleged a set-off, the replication thereto alleged that such answer is "untrue and denied" and reiterated the cause of action stated in the complaint: *Held*, sufficient to put the plea of set-off in issue and require evidence in its support.

5. The possession of an open account in favor of another is not evidence of the ownership thereof in the holder.

6. Where there is a direct conflict between the witnesses of each side as to a material fact, it is not error to instruct the jury that if they believed the witnesses for the plaintiff they should find for him, but if, on the other hand, they believed the defendant's witnesses, they should find for him.

ACTION tried on appeal from a justice of the peace, at Spring Term, 1892, of EDGECOMBE, by *Brown, J.*

The plaintiffs sued for the nonpayment of $115.45, and interest on the same from 20 August, 1890, due on account for corn sold by them to the defendants.

The defendants, answering the complaint, say:

"1. That they deny that they owe plaintiffs anything.

For a second defense, they admit they purchased corn of one E. V. Murphy of the value of $176.45, but they deny that Murphy was acting in this transaction as agent for the plaintiffs.

(75) 2. That they expressly allege that Murphy had the corn in his possession, and sold it to them in his own name on thirty days time, that the purchase was made by them because Murphy was indebted to them in a large amount, to wit, $102.30, which amount they applied as a set-off, to the amount due Murphy for corn.

3. That afterwards, and before the claim was due for said corn, Murphy applied to them in his own name for money on said account, and discounted a part of said amount due him for said corn, to wit, $61.

4. That the balance due said Murphy, that is to say, $13.15, they tendered him before this suit was brought, but he refused to accept it; that they have, at all times, been willing, ready and able to pay said balance when said Murphy, or anyone he should authorize them to pay, would accept the same."

The plaintiffs filed the following replication:

"1. That allegation one of said answer is untrue and denied, and that the defendants are indebted to them for the corn sold to the value of $176.45, to be due 20 August, 1890; that on 7 August, in the course of the delivery of said corn, the defendants paid on account of said indebt-

edness the sum of $61, leaving a balance due and unpaid of $115.45, with interest from 20 August, 1890, which still remains due and unpaid, notwithstanding payment of the same has been repeatedly demanded.

2. That the allegation and understanding of the defendants, as set out—the 'second defense' of said answer—is untrue and denied.

3. That the claim of $102.30 mentioned in said answer, or any claim or demand of defendants against 'one E. V. Murphy,' if any they have, is barred by the statute of limitations, the right of action on the same having accrued more than three years ago, and the statute (76) of limitations is hereby plead in bar of said claim or claims.

The other facts necessary to an understanding of the questions presented by the appeal are stated in the opinion.

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

J. L. Bridgers for plaintiffs.
G. M. T. Fountain (by brief) for defendants.

MACRAE, J. The defendants excepted to the admission in evidence of the deposition of Joseph Gregg, because "it does not appear that Philip A. Hoyne, the commissioner who certified the same, is of kin to neither party in the action." The contention of defendants is, that while objections as to insufficiency of notice, and the like, must be supported by evidence on the part of the party objecting, yet that it should appear either in the commission or in the return of the commissioner, or in some application for the issuing of the commission, that the commissioner is of kin to neither party to the action; that, as by section 1357 of The Code, this disqualification is plainly fixed, it should appear in the proceeding that the commissioner was not qualified to act as such. But, by the general rules of evidence, certain presumptions are continually made in favor of the regularity of proceedings and the validity of acts. It presumes that every man in his private and official character does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption. Thus it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer, and like instances abound of these presumptions. *Bank v. Dandridge,* 12 (77) Wheat., 64.

In the present case the commissioner to take depositions having been appointed by the court, is presumed to be duly qualified to execute his commission, until the contrary is shown.

The defendants objected to a large portion of the deposition as irrelevant and incompetent, as it related to transactions and communications between the plaintiffs and one E. V. Murphy, who is not a party to the action.

The action was brought by plaintiffs to recover the alleged balance due them from defendants upon a sale of corn; the defense set up was that the defendants bought the corn of E. V. Murphy as his own, and without knowledge or notice that said Murphy was not the principal in the sale to them; and that the purchase was made by them to secure a debt owing them by said Murphy. The testimony of Murphy in behalf of the plaintiffs was that he was acting as broker for plaintiffs, and that, while the name of his principal was not disclosed, the sale was made by him as a broker and not upon his own account, and that this fact was made known to defendants before the sale. The testimony objected to was competent in corroboration of Murphy, and the presiding judge instructed the jury to that effect when the objection was made. That portion of the deposition referring to transactions with Lewis was ruled out.

There was a direct conflict of testimony between the witnesses Murphy for the plaintiffs and Lewis for defendants. It was entirely competent for plaintiffs to sustain and strengthen the testimony of Murphy, even in anticipation of the testimony to be offered by defendants; and whatever restrictions and modifications may be recognized elsewhere, there is no room for further contention in the courts of this State as to the competency of such testimony or corroboration. *Roberts v. Roberts,* 82 N. C., 29. It was not necessary, in the absence of a special request to that effect, for the presiding judge to repeat the instruction
(78) which he had already given to the jury when the testimony was admitted after objection.

The defendants proposed to prove by their witness, Lewis, that at the time of this transaction, in July, 1890, it was generally understood in this community that Murphy was selling corn on his own account, and not as broker. This was properly ruled out by his Honor upon objection by plaintiff.

The matter at issue was the character of the sale by Murphy to defendants; the conflict between Murphy and Lewis was clear-cut; that proposed to be given as above stated in corroboration of Lewis, was simply hearsay, and by all the rules of evidence was inadmissible—it comes under none of the exceptions to the general rule against hearsay evidence.

The defendants excepted to the charge of his Honor that there was no evidence of defendant's set-off, and they earnestly insist that, as the set-off was alleged in the answer, and not denied by a reply, that it

should be taken as admitted, and they rely upon sections 268 and 248 of The Code in support of their contentions.

The reply filed by plaintiffs, while not carefully drawn, cannot be construed otherwise than as a general and specific denial of the set-off or claim set up in the answer, and in addition thereto a plea of the statute of limitations.

Was there any evidence to establish the set-off which should have been submitted to the jury? There was no evidence of any authority on the part of Mr. Fountain to assign the account of J. B. Jeffries & Co. to defendants. The possession of an open account in favor of another has never been held to be evidence of ownership in the holder. The "decisions referred to are based upon the principles of commercial law that govern and regulate the transfer of *negotiable* securities in the interests of trade, and to facilitate and render safe, dealings in such paper." They have no application to open accounts, and the diligent counsel for defendants frankly admits he can find no authority for his contention.

The defendants except to the charge to the jury that if they believed the evidence of Murphy, they would find for the plaintiffs. There were but two witnesses for the plaintiffs. The witness Murphy, in his testimony, set out fully the claim of the plaintiffs, and the depo- (79) sition of Gregg, as we have seen, was offered solely in corroboration of Murphy. There were two witnesses for defendants, and there was direct conflict between the testimony on each side. The presiding judge had just told the jury that if they believed the witnesses for the defendants, the plaintiffs cannot recover, and they should answer the first issue "Nothing." It was but the counterpart to this instruction to charge that if, on the other hand, they believed the plaintiffs' witness, they should find for the plaintiffs, and we cannot see that undue prominence was given in this case to the testimony of one witness, as was said to be the case in *Long v. Hall,* 97 N. C., 286.

There is one other exception on the part of defendants. After the evidence closed, a dispute arose between counsel as to what Murphy testified in respect to the debt alleged to be due by him to defendants. The court recalled Murphy and told him to repeat his testimony on that point, which he did. The defendants then asked to be allowed to introduce other evidence in order to show that Murphy owes them the debt, and that it belongs to them. The presiding judge refused to open the case for any purpose, and defendants excepted.

There must necessarily rest somewhere the power to regulate the conduct of proceedings in the trials of causes. Formerly, the whole matter was left in the sound discretion of the presiding judge. The Legislature has seen fit to distribute this power, giving now to counsel the dis-

cretion with regard to the length of time in addressing the court and jury; but all the responsibility, with this one exception, is still upon the judge. The dispatch of the public business within a limited
(80) time, and the prompt and dignified administration of justice, require that it should so remain.

Having disposed of all the exceptions, we find

NO ERROR.

Cited: *S. v. McKinney, post,* 684; *Street v. Andrews,* 115 N. C., 423; *Burnett v. R. R.,* 120 N. C., 518; *Bank v. Drug Co.,* 152 N. C., 143; *Younce v. Lumber Co.,* 155 N. C., 240; *Poplin v. Hatley,* 170 N. C., 167; *Howell v. Hurley, ib.,* 404.

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

Railroad, Construction of—Damages from Overflow of Water—Negligence—Prescription—Estoppel.

Where a railroad company, in the construction of its road, erected an embankment leading to a bridge over a stream, whereby the natural channel of the stream was considerably contracted, and plaintiff's lands became liable to frequent overflows, but were not made entirely useless for agricultural purposes, being cultivated with varying results each year, and the damages such as could have been apportioned from time to time: *Held,*

1. It was the duty of the railroad to so construct its road that a sufficient space should be left for the discharge of the water through its accustomed channel, whether artificial or natural, and this duty is a continuing one.

2. It was not contributory negligence on the part of the plaintiff to continue planting crops on the lands so subject to overflow. (*Emry v. R. R.,* 109 N. C., 598, distinguished.)

3. The delay of the plaintiff for a period less than twenty years to notify the company of his injuries, could not estop him or give the company a prescriptive right to maintain the embankment without liability for damages.

ACTION tried at EDGECOMBE, Spring Term, 1892, by *Brown, J.,* to recover damages from flooding land.

(82) *Don. Gilliam for plaintiff.*
J. L. Bridgers for defendant.

SHEPHERD, J. "It is the duty of a railroad company, in constructing its roadbed, to leave a space sufficient for the discharge of the water through its accustomed drainway, whether natural or (83) artificial. If it fails to do so, any owner whose land is injured, whether he be one, a part of whose land is taken for the road or not, may compel the company to discharge its duty by opening the drain to its previous capacity." *R. R. v. Wicker,* 74 N. C., 220. This duty is a continuing one (*Brown v. R. R.,* 83 N. C., 128), and the space to be kept open must be sufficient "to carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected." *Emry v. R. R.,* 102 N. C., 209.

The defendant, having demurred to the evidence, must be deemed to have admitted its truthfulness in the aspects most favorable to the plaintiff (*Bond v. Wool,* 107 N. C., 146), and viewed in this light, and applying the foregoing well-established principles, it cannot be doubted that it establishes negligence on the part of the defendant in the construction of its embankment over Conetoe Creek at the point indicated by the witnesses. The testimony abundantly shows that in 1882 the defendant so altered its embankment as to extend it farther into the stream, thus decreasing the width of the latter, according to the plaintiff's statement, one hundred and thirty-six yards. It also appears that, in consequence of this alteration, the water was obstructed in its passage, the lands of the plaintiff flooded, and his crops thereby endamaged.

In order to escape liability for its negligent conduct, the defendant insists that the plaintiff ought not to have planted any crops during the years mentioned in the complaint on the lands thus subject to occasional overflow; and that in doing so he was guilty of contributory negligence, and is therefore not entitled to recover.

It will be observed that there is nothing in the testimony to show that the use of the land for agricultural purposes was entirely destroyed. On the contrary it appears that the plaintiff cultivated (84) the land with varying results since the alteration of the embankment in 1882. In 1883 and 1884 he made "tolerably good crops" and, while he was seriously injured more or less from year to year until the commencement of this action, the damage was nevertheless but partial in its character and could easily have been apportioned from time to time.

The contention of the defendant that, under these circumstances, the plaintiff was guilty of contributory negligence, would, if sanctioned by judicial authority, work such a complete subversion of the rights incident to the ownership of real estate, as well as of the ancient and

usual remedies provided for the redress of their invasion, that only a slight recurrence to fundamental principles is necessary to demonstrate its unsusceptibility of being sustained as a correct legal proposition.

"The right of property," says 1 Bl. Com., 139, "is an absolute right inherent in every Englishman, and consists in the free use, enjoyment and disposal of all his acquisition without any control or diminution save by the laws of the land." It is guaranteed by Magna Charta, whose great principles form a part of our fundamental law; and except in the exercise of the right of eminent domain, not even the government itself, with all its powers and resources, much less a private person or corporation, can compel the owner, either to part with his property or impose upon it any servitude that tends to impair its value or obstruct its uninterrupted enjoyment. Especially is this so in respect to land, which species of property, says *Pearson, J., Kitchen v. Herring,* 42 N. C., 192, is "a favorite and favored subject in England and every country of Anglo-Saxon origin," and, in relation to which, courts of equity are constantly decreeing the specific performance of contracts because of the *pretium affectionis,* which cannot be estimated by mere dollars and cents.

(85) If the principle insisted upon by the defendant be admitted, these great privileges, which have been guarded for centuries with such anxious solicitude, may easily be invaded, and, without authority of law, the owner may be forced to part with the actual use of his land by any person, either natural or artificial, who may be able to respond in damages.

The result is all the more remarkable when we consider that it is to be accomplished by a breach of duty to the owner. In other words, while I may be unable to purchase my neighbor's land, or the right to subject it to any burden for my benefit, I may nevertheless practically effectuate my purpose by the erection and maintenance of a nuisance, and, instead of being compelled to abate the nuisance by successive actions for damages, I may purchase immunity for its further continuance by the payment of a yearly pecuniary consideration.

The proposition is aptly illustrated by the facts of the present case; for if the plaintiff can only plant his crops at the risk of incurring the penalty of forfeiting all rights to compensation for the injuries resulting from the unlawful acts complained of, then he must abandon his land altogether to the use of the defendant, and thus be deprived of his property against his consent and the organic law of the land. On the other hand, the consequences to the defendant and other similar corporations, would, in many instances, be none the less serious; for if the owner is guilty of contributory negligence in planting his crops where there has been only partial and occasional injury for several

years, he would of course be justified in folding his hands in idleness and thus recover the full rental value of his premises from year to year, although during a part of the time he might have cultivated his crops with but trifling damage, if any. To say nothing of the contravention of public policy because of the diversion of land from agricultural uses, a strong temptation would be afforded to idleness and cupidity, and railroad companies might unjustly be compelled to substantially lease the lands of adjacent proprietors by reason of slight or (86) pretended injury to their crops for a few preceding years.

The intelligent counsel for the defendant was unable to refer us to any direct authority in support of the principle under consideration. In *Emry v. R. R.* (109 N. C., 589), cited by him, the plaintiff was asked "whether or not the water was backed by the culvert upon his land every year since he owned it, so as to damage his crops and brickyard, or whether the ponding back of water was done at intervals, some years there being no ponding of water." He replied that "this did not occur every year, but did occur about an average of four years out of five years." The court held that "no prudent business man would place and keep his brickyard and brick kilns at a place like that in question, where he would hazard the loss or serious injury described by the plaintiff for four years out of five," and that he was guilty of contributory negligence. The case is easily distinguishable from the former one between the same parties (102 N. C., 209), in which a recovery was permitted for damages inflicted to the plaintiff's brick-yard and kilns during the year 1887, it only appearing that the brick-yard had been flooded and damaged in the year 1885. There is a vast difference between a flooding for one previous year and an accustomed overflow of four out of every five years.

We cannot understand how the decision in the first case can be considered as authority in the one now before us.

In our case, the injury was inflicted while the owner was using his land in the ordinary course of agriculture, and he had no option but to cultivate or abandon it. The use of it for the manufacture of brick is exceptional, besides the necessary machinery may be moved from one point to another; and in *Emry's case* (109 N. C.), it did not appear that the industry could not have been conveniently and profitably conducted on a part of the premises not subject to overflow.

Neither in the case from Wisconsin (*Hassa v. Junger,* 15 (87) Wis., 598), in point, as there the plaintiff could have put up the division fence and sued the defendant for the expenses occasioned by his pulling it down. He should not have planted his crop without making the necessary repairs, as the fence was on his own land

and he could easily have protected himself against injury. *Roberts v. Cole,* 82 N. C., 292.

Under the view we have taken of the rights of an owner respecting the ordinary use of his lands as against one who maintains a nuisance of the character complained of in this action, the other authorities relied upon by defendant are inapplicable. The simple acquiescence alone of the plaintiff for several years, or his failure to notify the defendant of his injury, cannot, by way of estoppel or otherwise, affect his common law remedy. "His recovery can be defeated only by proof of a prescriptive right acquired by (twenty years) user to maintain the culvert in its present state with the consequent injury." *Emry v. R. R.,* 102 N. C., 232. The duty of the defendant was a positive and continuing one, and the failure to perform it is in no way excused by the mere silence for a few years of the party in whose favor the duty existed. Wood's Nuisance, secs. 360 and 798.

NO ERROR.

Cited: Gwaltney v. Land Co., post, 552; *Ridley v. R. R.,* 118 N. C., 1004; *Geer v. Water Co.,* 127 N. C., 354; *Mullen v. Water Co.,* 130 N. C., 504; *R. R. v. Land Co.,* 137 N. C., 335.

THE HUYETT & SMITH MANUFACTURING COMPANY v. S. H. GRAY.

Contract—Evidence—Burden of Proof—Damages—Warranty.

Plaintiff sold and delivered to defendant machinery under a contract which contained a stipulation that the title should be retained until the purchase money was paid, and that if the machinery should fail to work as warranted, by reason of defects in its construction, and the plaintiff was notified thereof in reasonable time, the plaintiff should have an opportunity to remedy any defects, and failing in this, should take back the machinery and refund whatever purchase money might have been paid. The defendant kept and used the property for some time, but failed to pay the purchase money, and plaintiff brought action to recover possession, and for damages for use and deterioration: *Held,* that the burden was on the defendant to show that he was relieved from liability by defect of the machinery; that he was bound to give notice of such defect within a reasonable time; and that he was liable for any damages caused by him other than those which might result from an attempt to use the machinery in a proper way.

ACTION tried at Spring Term, 1892, of CRAVEN, by *Winston, J.*

(91) *M. DeW. Stevenson for plaintiff.*
W. W. Clark contra.

PLAINTIFF'S APPEAL.

CLARK, J. The purchaser of the machinery, by the terms of the contract, had a reasonable time after he received it to make known its defects. But he seems to have kept and used the machinery without complaint for some length of time, indeed until the plaintiff sought to recover the property under the contract because of failure to pay for it. If the objection was not made known within reasonable time, and the purchaser continued to use the machinery without objection, this was a ratification. If the plaintiff then proceeded to recover the property, it was entitled to claim the forfeiture provided for in (92) section 5 of the contract, unless for any reason that should be relieved against in equity, and it certainly would have been entitled at least to the freight both ways and to show the damage to and deterioration of the property. If the objection was made known to the seller within reasonable time so as to avoid the sale, still, if there was any damage, caused by the purchaser, other than the deterioration from attempting to use the machinery in a proper way, it could be shown. The burden was on the defendant to show that the presumption of liability for the purchase money from receipt and use of the machinery was rebutted by objection made within a reasonable time. Upon the state of facts found it was error to reject the testimony offered by the plaintiff that "the property had been greatly endangered by the defendant, and greatly deteriorated by its constant use by him ever since its delivery to him."

It may be that the purchaser within a reasonable time notified to the seller the objections to the machinery and offered to return it. But this is neither pleaded nor shown in evidence. Nor is there anything in the reply which (as defendant contends) cures the failure to allege in the complaint that notice of the defect in the machinery was given within a reasonable time.

ERROR.

Cited: S. c., 124 N. C., 326 and 129 N. C., 439; *Parker v. Fenwick,* 138 N. C., 215.

DEFENDANT'S APPEAL.

1. Where there is a breach of warranty of quality, the vendee may (1) refuse to accept the goods; (2) if he has paid the purchase money, return the goods and recover the money paid, or (3) plead the breach of warranty in diminution of the price.

2. Special damages for breach of warranty must be specially pleaded, and it must be shown that they are in contemplation of the parties; they are rarely allowed except in cases of fraud.

(93) CLARK, J. We concur with his Honor that the defendant was not entitled to recover by way of counterclaim the cost of the house which he had specially built for the use of the machinery. This is not pleaded as special damages, and besides, it is too remote. It is settled by the leading case of *Hadley v. Baxendale,* 9 Exch., 341, and in many others, that where there is a breach of warranty as to quality, the purchaser (1) may refuse to accept the goods; (2) if purchase money is paid, he may return the goods and sue to recover back the money paid; (3) or he may plead the breach of warranty in diminution of the price. 2 Benjamin on Sales, sec. 1348; 4 Ed. Ledg. Dam., 291.

Special damages for breach of warranty must be specially pleaded, and must, besides, be such as were within the contemplation of the parties as the necessary result of the breach of warranty, and are rarely allowable except in cases of fraud in inducing the contract. Where an action was for breach of warranty of a reaping machine, it was held that the plaintiff could not recover for the time and grain lost in attempting to operate the defective mower. *Frohrich v. Gammon,* 28 Minn., 476. There are many similar cases in the books, but this illustrates the principle sufficiently without further citation.

The defendant is not entitled to nominal damages for breach of warranty, as by failure to give notice in a reasonable time or pay for the machinery, the plaintiff was driven to his action to recover the property under the terms of the contract.

NO ERROR.

Cited: S. c., 124 N. C., 326; *S. c.,* 129 N. C., 439; *Food Co. v. Elliott,* 151 N. C., 396, 397.

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(94)

T. L. EMRY AND WIFE v. THE ROANOKE NAVIGATION AND WATER-POWER COMPANY.

Negligence—Trespass—Evidence—Pleading—Damages.

1. The essential element of negligence is a breach of duty, and in actions thereon it is necessary that the plaintiff should state and prove the facts sufficient to show what the duty is and that the defendant owes it to him.

2. A proprietor of land is not generally responsible for injuries to other persons arising from the condition in which the premises have been left, or from the prosecution of a business in which the owner has a

right to engage; and a trespasser or mere licensee cannot recover for such injuries unless the use of the property by the owner was *per se* unlawful, or unless the injuries were inflicted willfully, wantonly, or through gross negligence of the owner.

3. The plaintiff and defendant made an agreement by which the former, in the event he could not agree with the latter for the rent of certain buildings which he had erected on defendant's land, stipulated that he would, upon six months' notice, remove the buildings; the defendant demanded that plaintiff enter into a contract for the rent, and plaintiff declined; thereupon defendant served notice to remove the structures, but the plaintiff failing to do so, defendant endeavored to remove them and was prevented by the force of plaintiff. Soon thereafter the buildings were destroyed by fire occasioned by blasting, by defendant, who was improving property near by; there was no evidence that defendant acted willfully or recklessly: *Held*, that plaintiff was a trespasser and not entitled to recover damages for the destruction of the buildings.

ACTION to recover damages for the alleged negligent burning of plaintiff's mills, caused by the defendant in blasting near said mills, tried at March Term, 1892, of HALIFAX, by *Brown, J.*

The facts pertinent to the questions discussed and decided by the Court are stated in the opinion.

R. O. Burton and L. P. McGehee for plaintiffs.
T. N. Hill and W. H. Day for defendant.

SHEPHERD, J. The argument before us was based upon the (95) assumption that the defendant, in conducting certain blasting operations on its own land, was guilty of negligence by reason of its failure to exercise ordinary care, and that its liability for the same can only be avoided by establishing contributory negligence on the part of the plaintiffs.

In our opinion, the true principle upon which the case is to be determined lies quite beyond that discussed by counsel, and involves a consideration of the question, not whether there was contributory negligence, but whether the defendant was guilty of any negligence whatever, for which, under the circumstances, it is liable to the plaintiffs.

While there may be some shades of difference in the various definitions of negligence, all the authorities agree that its essential element consists in a breach of duty, and that in order to sustain an action, "the plaintiff must state and prove facts sufficient to show what the duty is and that the defendant owes it to him." 1 Shear. & Red. Neg., sec. 8; Beach Cont. Neg., 6; Thompson Neg., preface.

A legal duty has been well defined by Dr. Wharton, as "that which the law requires to be done, or forborne to a determinate person, or to the

public at large, and is a correlative to a right vested in such determinate person or in the public." Whar. Neg., sec. 24. "The duty itself arises out of various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation. Thus it may be dependent on a mere license to enter upon land, or the bare obligation, to avoid inflicting a willful injury upon a trespasser, while, upon the other hand, it may be a duty to care for the safety of a specially invited guest, or of a passenger for hire." 16 A. & E., 412, and the numerous cases cited.

This much being premised, we must now ascertain what duty, if any, was imposed by law upon the defendant in the present
(96) action, and this involves an inquiry into the relation of the parties in respect to the buildings, for the accidental destruction of which the action is brought.

It is conceded that the defendant was the owner of the land upon which the buildings were located, and it appears that, in January, 1887, a suit between the present parties was settled according to the terms of the following agreement, to wit: "That the said T. L. Emry and wife do further agree that if they cannot agree with said company upon rent for the use of the water and land of the company, upon which the mills and foundry of said Emry and wife, described in the complaint, are situated, then, upon six months' notice from the said company, they will remove their mills, foundry and machinery from the lands of said company. This 14 January, 1887."

We cannot concur in the contention of the plaintiffs that, under this agreement, they were entitled to keep their buildings upon the premises, without the payment of rent, until the defendant had improved the canal so as to increase the supply of water. The agreement contains no such provision, and we feel that we would be doing violence to the ordinary rules of interpretation by so extending its terms beyond the meaning of the plain and unambiguous language employed. The argument can derive no support from extrinsic circumstances, as it appears that the plaintffs had been using the water of the canal to some extent by keeping it cleaned out, and that shortly after making the agreement, they proposed to continue the use of the same. There was, therefore, an existing subject upon which the agreement could presently operate, and it is with reference to this, as well as to any contemplated improvement, that it must be construed. If the actual contract was such as is contended, it is to be regretted that it was not incorporated into the written agreement, as it seems that the conduct of the agent
of the plaintiffs was influenced by a reasonable misapprehension
(97) of the legal effect of the said instrument.

It is further insisted by the terms of the agreement that it was the duty of defendant to entertain in good faith a proposition to fix the rental value of the water and land therein mentioned; and that if it refused to do so, it had no right to require the removal of the buildings, etc. Granting this to be a correct interpretation of the agreement, we are unable to find anything in the testimony which discloses that the defendant arbitrarily or in bad faith declined to consider any such proposition of the plaintiffs. On the contrary, the plaintiffs' agent (who seems to have had full control and management of the whole matter) explicitly testified that before the notice to remove was served on him, the defendant's attorney demanded that the plaintiffs enter into a new contract of rent, and that failing to do so they should remove the buildings. The said agent further testified that in response to the proposition he replied as follows: "I stated that I would go on as I had been, and keep the canal cleaned out for the use of the land and water, but I could not pay rent, as the canal was in bad repair and supplied scarcely any water." The witness also stated that the defendant's attorney declined to accept his proposal, and that they had no further negotiations.

Here then was a distinct offer to "enter into a new contract for rent," and this offer was declined, except upon the terms demanded by the plaintiffs. We fail to perceive how the refusal to accept these terms can be considered as evidence that the defendant was unwilling to make a *bona fide* effort to agree upon a reasonable rental value. If, under the contract, it was the duty of the defendant to make a fair effort to agree, it was surely released from that obligation after the plaintiffs, without hearing any proposal from the defendant, had expressly refused to accede to any other but the previously existing terms.

There having been a failure to agree as to the rent, the defendant (98) had a right to insist upon the removal of the buildings upon six months' notice, as provided in the agreement, and it was not bound to entertain any further propositions on the part of the plaintiffs. Accordingly, a notice to remove the buildings was given, pursuant to the agreement, on 3 February, 1887; but notwithstanding this notice the plaintiffs failed to remove the same, and kept them on the defendant's land after they knew that the defendant had commenced its blasting operations, and until they were accidentally destroyed by fire in September, 1890. As early as 6 June of that year the defendant complained of the plaintiffs' failure to comply with the notice, and at the same time stated that as the land occupied by the buildings were absolutely necessary for its use, it would proceed to remove them unless the plaintiffs did so in eleven days. At the expiration of that time the defendant attempted to remove the buildings, but was prevented by the plaintiffs

from doing so by means of a shotgun. Without pausing to consider whether the long and unreasonable delay to remove the buildings did not have the effect of vesting the same in the defendant as a part of its freehold (a point which was waived by the answer), it cannot be questioned, that in their failure to remove them after said notice, and especially in the violent prevention of the defendant from exercising its right of removal, the plaintiffs were trespassers upon the lands of the defendant. Taylor Landlord and Tenant, secs. 62 and 63. This *status* of the plaintiffs is in no way affected by the conversation between their agent and the secretary of the defendant in 1890. Giving full effect to the testimony of the former, it amounted to no more than a parol license to continue the lower mill on the defendant's land in view of the establishment of an oil mill at some indefinite time in the future, which was in fact never done. The license was revocable at the election of the defendant (*Kivett v. McKeithan,* 90 N. C., 106; *McCracken v. McCracken,* 88 N. C., 272; *R. R. v. R. R.,* 104 N. C., 658), and was actually revoked on 6 June, 1890, by the notice given on that day.

(99) The plaintiffs had until the 24th of September of that year (the date of the accident) to remove the buildings, and not only failed to remove them, but, as we have seen, forcibly prevented the defendant from doing so. It cannot be seriously insisted that the effect of this conversation was to revive the broken agreement of 1887, so as to entitle the plaintiffs to another six months' notice of removal. Much clearer testimony than this is necessary to work a result so restrictive of the rights of a property owner. Besides, the alleged agreement was essentially different from the old one, as it related to and was conditioned upon the establishment of a new industry, and the supply of water was to be furnished "at the same rates as to others." The old agreement, as we have construed it, had reference to the existing state of affairs, and contemplated the present payment of rent of some character.

The plaintiffs then being trespassers upon the land of the defendant, we will now proceed to inquire into the nature of the duty which the latter owed to the former in respect to the said buildings.

It is a well settled principle that a landowner has a right to the exclusive use and enjoyment of his premises, and that he incurs no liability for injuries caused by its unsafe condition to a person who was not at or near the place of the accident by lawful right, and when the owner has neither expressly nor by implication invited him there. *Sweeny v. R. R.,* 10 Allen, 368; *Bennett v. R. R.,* 102 U. S., 577; *Carlton v. Steel Co.,* 99 Mass., 216; Cooley on Torts, 605 and 606; *Pierce v. Whitcomb,* 46 Vt., 127; *Pittsburg v. R. R.,* 29 Ohio St., 367; 1 Thompson on Neg., 283 and 303.

The doctrine is thus stated in *Schmidt v. Bauer,* 5 La. An., 580, and notes: "Unless contrivances are placed on such premises with an actual or constructive intent to hurt intruders, the proprietor is not liable for injury resulting to persons by reason of the condition (100) in which the premises have been left, or from the prosecution of a business in which the owner had a right to engage. *Evansville, etc., v. Griffin,* 100 Ind., 221; *Gillespie v. McGowan,* 11 Pa., 144; *Gramlich v. Wurst,* 86 Pa., 74; *Cauley v. Pittsburg, etc.,* 90 Pa., 398; *McAlpine v. Powell,* 70 N. Y., 126; *Hargreaves v. Deacon,* 25 Mich., 1; *Burdick v. Cheadle,* 26 Ohio, 393; *Indianapolis v. Emmelmon,* 6 West, 569."

The foregoing authorities, and many others that could be cited, abundantly sustain the proposition "that a trespasser or mere licensee who is injured by a dangerous machine or contrivance on the land or premises of another, cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly or through the gross negligence of the owner or occupier of the premises." *Galveston Oil Co. v. Martin,* 70 Texas, 400.

In the leading case of *Larmore v. Iron Co.,* 101 N. Y., 291, it was held that where one goes upon the premises of another, without invitation, to obtain employment, and is there injured by a defective machine, he cannot recover. *Andrews, J.,* in the course of a well reasoned opinion, uses the following language: "The precise question is whether the person, who goes upon the land of another without invitation to secure employment, from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained by the exercise of reasonable care. We know of no case which goes to that extent." After speaking of the liability of a landowner to an uninvited person for injuries caused by the setting of spring-guns or dangerous traps on his premises, and also the duty of railroad companies in running their trains to use proper (101) care in respect to persons on the track, where it has been used by the public without objection, the learned Judge continues: "But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury." It has also been held, where a sign of "No admittance" was placed on a door, that one who entered the room (being of the class meant to be excluded) cannot recover for injuries caused by the negligence in the management of the room, even though no attempt was made to exclude

him, nor any further warning given. *Zoebisch v. Tarbell,* 10 Allen, 385; *Victory v. Baker,* 67 N. Y., 366. So where a trespasser entered the defendant's abandoned freight house and the wind blew the wall down and injured him. *Larry v. R. R.,* 78 Ind., 323. To the same effect is the case of *McDonald v. R. R.,* 35 Fed. Rep., 38. There, the defendant corporation in working its coal mine threw out a pile of slack on its own land, the pile presenting the appearance of coal ashes. The land was not fenced, and a stranger in the neighborhood in passing over the slack was burned. It was held that he had no right of action against the corporation.

In *Batchelor v. Fortescue,* 47 J. P., 308 (Eng.), the defendant had contracted to do certain work on a plat of ground where buildings were erected and excavations were being made. To carry out the work, he, by his men, worked a steam-winch and crane, with a chain and iron tub attached thereto. The deceased was employed by the owner of the ground to watch the materials and buildings. He had no duty to take part in the excavating, and it was no part of his business to stand under the tub as it was raised. While watching the men working, the tub fell on his head and he was killed. It was held that the defendant was not liable. "The deceased was there to watch the material and
(102) buildings. He had no business with the machinery, nor any duty to watch the defendant's men at work. He was thus in a place where he had no right to be, and was a mere licensee to whom the defendant owed no duty."

It is true that the general principles we have enunciated are subject to some qualifications, under possible circumstances, in favor of certain licensees, or purely technical trespassers, and of persons walking on a railroad track, as in *Clark v. R. R.,* 109 N. C., 430, and *Deans v. R. R.,* 107 N. C., 686. Here, on the border-land between the doctrine we have stated, and that of contributory negligence, there is some obscurity and conflict in the authorities. But, however that may be, there is no difficulty in its application to a case like the present, where, in the eyes of the law, the plaintiffs must be regarded as willful trespassers. The authorities are practically unanimous in holding that, in favor of trespassers of this character, the landowner owes no duty to exercise ordinary care in the use of his premises or in the conduct of lawful operations thereon. If no such duty existed in the foregoing cases, which have been cited by way of illustration, and in which the lives of human beings were imperiled, it would be difficult, indeed, to understand how it could be imposed upon the defendant in this action. It would be a strange result if one who is involuntarily made the custodian of another's property by the coercive power of a shotgun, should be held liable for an accident to such property because of his failure to take all

of the precautions which would commend themselves to a prudent man. It is fully settled by the authorities above mentioned that the duty of a landowner, under such circumstances, can be no greater than to abstain from what is very generally called "wanton or willful negligence." The defendant had a right to improve its property, and, in blasting for that purpose, it was engaged in a lawful occupation. There is nothing to show that its servants acted willfully, wantonly or recklessly, and there is no testimony tending to prove that after they dis- (103) covered the accident, they could, by ordinary care, have prevented the destruction of the building. Certainly there is nothing to indicate the same indifference on their part as that shown by the plaintiff's agent, who, although he had his hands present, made no effort to arrest the flames, and, indeed, stated that, as he did not cause the fire, he would not assist in putting it out and "that it might burn." The defendant, therefore, having been guilty of no "willful or wanton negligence" (the abstaining from which constituted its only duty under the circumstances), it must follow that it cannot be held liable for the accidental destruction of the plaintiff's property.

We have carefully considered the other exceptions, and are of the opinion that they are without merit.

NO ERROR.

Cited: Mason v. R. R., post, 499; *Bottoms v. R. R.,* 114 N. C., 706; *Quantz v. R. R.,* 137 N. C., 138; *McGhee v. R. R.,* 147 N. C., 145; *Money v. Hotel Co.,* 174 N. C., 510; *Jones v. Bland,* 182 N. C., 73.

WALLACE, ELLIOTT & CO. v. W. H. COHEN ET AL.

Fraud—Contract—Rescission—Innocent Purchaser—Trusts—Mortgages—Registration—Notice.

1. Where a contract of sale has been induced by the fraud of the vendee, it is voidable at the election of the vendor, who has a right, upon the discovery of the fraud, to rescind the contract and recover the property delivered under it.

2. An innocent purchaser for a valuable consideration, from the fraudulent vendee, will, however, be protected against the vendor.

3. While the mortgagee or trustee of land conveyed to secure pre-existing debts is a purchaser for value, yet he takes the property subject to any equity or other right attached to it in the hands of the debtor. (*Brem v. Lockart,* 93 N. C., 191, commented upon).

4. While an unregistered mortgage is good *inter partes,* actual notice of its existence will not affect the rights of a junior registered mortgage.

(104) ACTION tried upon demurrer at Spring Term, 1892, of CRAVEN, by *Brown, J.*

(105) *O. H. Guion for plaintiff.*
W. W. Clark for defendant.

SHEPHERD, J. The demurrer admits that "W. H. Cohen was insolvent, and well knew of his insolvency at the time of his purchase, and fraudulently concealed his said insolvency from plaintiffs by falsely representing to them his financial condition to be largely in excess of all liabilities existing at the time of such representation, and at such time not having the intention of paying for the goods purchased."

(106) The foregoing facts bring the case within the principle of *Wilson v. White,* 80 N. C., 281; *Des Farges v. Pugh,* 93 N. C., 35; *Donaldson v. Farmer,* 93 U. S., 361, and 1 Benjamin on Sales, sec. 571. According to these authorities, the contract of sale, having been induced by fraud, was voidable, and the vendors had a right to rescind the same upon the discovery of the circumstances constituting the fraud. If, however, before rescission, the vendee had conveyed to an innocent purchaser for a valuable consideration, the rights of the original vendors would be subordinated to those of such innocent third party. The defendant Moore is the trustee in a deed of assignment executed by Cohen, the fraudulent vendee, to secure his pre-existing indebtedness, and he claims to be an innocent purchaser for value within the qualifying principle just stated. It is true, as laid down in *Southerland v. Fremont,* 107 N. C., 565, that such a trustee or mortgagee is a purchaser for value within the Statutes of 13 and 27 Elizabeth, but it is, in that case, conclusively determined, after some confusion in our decisions, that such a purchaser takes the property subject to any equity or other right that attached to the same in the hands of the debtor. This view is abundantly sustained, not only by our own previous decisions, but by the great weight of judicial authority. *Bassett v. Norsworthy,* White & Tudor's L. C. Eq., and notes. As applicable to the present case, the doctrine has been recognized and applied in a large number of decisions. "In order to entitle one to protection as a *bona fide* purchaser in such a case, he must have advanced some new consideration, or incurred some new liability, on the faith of the fraudulent vendee's apparent ownership." *Johnson v. Peck,* 1 Woodh. & M., 334; *McLeod v. Bank,* 42 Miss., 99; *Hyde v. Ellery,* 18 Md., 496; *Sargent v. Sturm,* 23 Cal., 359; *Ratliffe v. Sangston,* 18 Md., 383; *Pope v. Pope,* 40 Miss., 516. Hence, "an assignee of the fraudulent vendee for the benefit of creditors, incurring no new liability on the faith of his title, is not

protected." *Farley v. Lincoln,* 51 N. H., 577; *Harris v. Horner,* (107) 30 Am. Dec., 182; *Stevens v. Brennan,* 79 N. Y., 254; *Montgomery v. Bucyrus,* 92 U. S., 257; *Donaldson v. Farmer,* 93 U. S., 361. These authorities, with very many others we could cite, are directly in point, and sustain the right of the plaintiffs to recover without fixing the assignee with notice.

We presume that his Honor was misled by the case of *Brem v. Lockhart,* 93 N. C., 191. In that case there was quite a discussion by the late Chief Justice as to who were *bona fide* purchasers for value, but he finally quoted with approval the language of *Pearson, J.,* in *Potts v. Blackwell,* 56 N. C., 449, which enunciated the doctrine as subsequently declared to be the law in *Southerland v. Fremont, supra.* It is difficult to assume that the learned Chief Justice, after stating that this principle must be regarded as "conclusively settled," intended in the next sentence of his opinion to repudiate the same, by declaring that Mr. Lockhart, the assignee, was a purchaser for a valuable consideration, in the sense now insisted upon on behalf of the defendant Moore. The true ground for the decision seems to be that, although the assignee, Lockhart, was a purchaser for value, and notwithstanding he took the property, subject to the rights and equities attaching to it in the hands of the debtor, there was, in fact, no such right or equity which, *under the policy of the registration laws,* could be recognized or enforced in favor of anyone. *Todd v. Outlaw,* 79 N. C., 235. In *Brem's case* the sale was conditional, and, not being registered, the condition was said to be inoperative. It is true that, as between the parties, the condition was effectual (*Butts v. Screws,* 95 N. C., 215), and we can only reconcile the conclusion with the principles previously announced in the opinion by assimilating the case to that of *Todd v. Outlaw, supra,* in which it was held that though an unregistered mortgage is good as between the parties, even actual notice of its existence will not prejudice the rights of a second mortgagee whose mortgage has been regis- (108) tered.

For the reasons given, we think the demurrer should have been overruled.

REVERSED.

Cited: Walton Co. v. Davis, 114 N. C., 106; *Arrington v. Arrington, ib.,* 166; *Bank v. Adrian,* 116 N. C., 547; *Joyner v. Earley,* 139 N. C., 50; *Carpenter v. Duke,* 144 N. C., 294; *McBrayer v. Harrill,* 152 N. C., 713; *Wood v. Lewey,* 153 N. C., 403; *Bank v. Bank,* 158 N. C., 250; *Sykes v. Everett,* 167 N. C., 607; *Lanier v. Lumber Co.,* 177 N. C., 205; *Starr v. Wharton, ib.,* 325.

In re IOLA DICKERSON.

Infants—Judicial Sale—Decree, Confirmation—Guardian.

In an *ex parte* petition of an infant, by her guardian, it was stated, among other things, that the petitioner had received an offer of $125, which was more than the worth of the land. Upon the filing of the petition the court, without taking any means to ascertain the necessity for the sale, directed it to be made, and that it should be "first advertised at the courthouse and three other public places," and no bid be received less than $125, and that the guardian should make conveyance. The land was sold to W. for $130, who paid the purchase money and took conveyance; report of this sale was filed, but never confirmed. Subsequently the infant, by her next friend, moved to vacate the sale and for an order of resale: *Held*,

1. That the order of the sale was not a final decree.
2. That the terms of the decree required a public sale.
3. That while a formal direction to make title is not always necessary, a confirmation of sale cannot be dispensed with.
4. That it was not error to set aside the sale and direct another; but the decree for resale should direct an account of the rents and accounts paid by the purchaser, who would be entitled to a lien on the fund for any balance found due him on such accounting.

MOTION to vacate sale of land, heard before *Brown, J.*, at February Term, 1892, of CRAVEN, who "ordered and adjudged that the
(112) order of W. M. Watson, C. S. C., made 10 February, 1892, be and the same is hereby set aside and resale ordered of the said interest of Iola Dickerson, minor, in the lands described in the petition filed in this proceeding."

From this order J. N. and W. R. Bell appealed.

O. H. Guion and W. D. McIver for plaintiff.
W. W. Clark for defendant.

(113) MACRAE, J. It is contended by the counsel for the appellant that the order of sale made (on the *ex parte* petition of the guardian) by the clerk and approved by the judge 23 December, 1882, was a final decree, and that there was no need for a confirmation of the sale, it being admitted upon the argument, though it does not so appear in the case or in the record, that the interest of the petitioner brought $130 at the sale, this sum being more than the sum named in the petition as a fair price, and in the order as the lowest bid which should be received.

If this contention were correct—if by a proper construction of the order of sale directing a deed to be made "to the purchaser for said land, upon the payment of the purchase money by said purchaser," we were required to hold that the price was fixed at any sum not less than $125, and the sale confirmed in advance at such price, we could do no otherwise than hold the decree to be final and the parties bound. But impressed as we are by the extreme looseness of the whole proceeding, it is a relief to us to be able, upon examination of the order and of its approval, to hold it evident that the judge who approved it intended that there should be a public sale and that no bid should be entertained for a less sum than $125, and that it should take the regular course in such proceeding that it might be ascertained whether the land sold for a fair price, before the judgment should be made confirming the sale. We may with profit reproduce as applicable to the present case, the remarks of the venerable *Chief Justice Ruffin* in *Harrison v. Bradley,* 40 N. C., 136: "The Court cannot forbear expressing a decided disapprobation of the loose and mischievous practice adopted in this case of decreeing the sale of an infant's land upon *ex parte* affidavits offered to the Court, without any reference to ascertain the necessity and propriety of the sale and the value of the property, so as to compare the price with it. The Court ought not act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by the report of the master or (114) the finding of an issue; and after a sale it ought to appear in like manner to be for the benefit of the infant to confirm it, otherwise there is great danger of imposition on the Court and much injury to infants."

As was said by *Justice Merrimon,* delivering the opinion in *Morris v. Gentry,* 89 N. C., 248, "It is the duty of courts to have special regard for infants, their rights and interest when they come within their cognizance." And in the exercise of this duty, nothing but clear internal evidence of a confirmation of this sale should induce us so to construe the order.

The sale then not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner; the proceeding is still pending, the petitioner is still an infant, and she has a right to be heard upon the report of sale and the motion for confirmation, and to move to set aside the sale for inadequacy of the sum bid for the land. *Foushee v. Durham,* 84 N. C., 56.

While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. *Mebane v. Mebane,* 80 N. C., 34; *Latta v. Vickers,* 82 N. C., 501; *Brown v. Coble,* 76 N. C., 391; *England v. Garner,* 90 N. C., 197.

We concur in the view of his Honor upon his finding of fact that said sale had not been made for a fair price, that a resale should be ordered, provided it shall be made to appear as required in section 1602 of The Code, "that the interest of the ward would be materially promoted by a sale of her interest in said land, and that report of sale be made to the court." *Dula v. Seagle,* 98 N. C., 458. As it was admitted that the purchaser, S. S. Willis, paid the purchase money and took a deed for said land from the guardian, and that said Willis conveyed the land for value to R. W. Bell, who is now dead and whose interest in said land is now vested in W. R. and J. N. Bell, the
(115) appellants, it will be proper that an account be taken of the amount paid to the guardian by said Willis, and of the rents and profits of said land since said attempted sale and the possession of said Willis and those claiming under him, and that the balance of the sum so paid, after deducting the sum ascertained to be due for rents and profits, be a charge upon the fund arising from the sale now ordered in favor of the appellants.

MODIFIED AND AFFIRMED.

Cited: Vanderbilt v. Brown, 128 N. C., 500; *Joyner v. Futrell,* 136 N. C., 304; *Patillo v. Lytle,* 158 N. C., 97.

SPENCER WARD v. LETITIA ANDERSON ET AL.

Deed—Mortgage—Infancy—Ratification—Lien, Priority of.

An infant executed a mortgage of land, and after arriving at majority executed another mortgage of the same land to another mortgagee; in the last mortgage, immediately following the descriptive clause, was this recital: "Which said tract is subject to a prior lien in favor of J. B.," the first mortgagee: *Held,* that this recital was a ratification of the first mortgage, and thereby constituted it a first lien upon the land conveyed.

ACTION tried at March Term, 1892, of HALIFAX, by *Brown, J.*

(116) *Mullen & Daniel and S. S. Alsop for plaintiff.*
R. O. Burton and L. P. McGehee for defendants.

AVERY, J. The question presented by this appeal is whether the mortgage deeds executed by an infant, and purporting to convey land to John Beavans to secure two notes, one for $150, the other for $50, were

ratified by a recital in reference to the same land in a second con- (117) veyange of it to secure debts made after his arrival at the age of twenty-one, and in the following words inserted immediately after the description, to wit, "Which said tract is subject to a prior lien in favor of John Beavans, Sr., for the sum of $200," it being admitted that no other mortgage deeds were ever executed by the infant to said Beavans.

In *McCormic v. Leggett,* 53 N. C., 427, *Chief Justice Pearson* stated the rule governing the ratification of the voidable contracts of infants after attaining their majority to be "that the deed of an infant is not void, but is voidable by him after he arrives at age. That in order to avoid the deed mere words are not sufficient, but there must be some *deliberate act* done, by which he takes benefit under the deed or *expressly recognizes its validity.*" In *Hoyle v. Stowe,* 18 N. C., 320 (cited in *McCormic v. Leggett, supra*), *Chief Justice Ruffin,* after doubting *Houser v. Reynolds,* 2 N. C., 143, stated the rule in reference to verbal declarations, relied on as a ratification of an infant's contract, to be that they operate as a confirmation of the deed only where they "are directly between the parties to the deed and contain an explicit recognition of the deed and expression of the maker's satisfaction with it, as a conveyance." If the ratification is in words it must amount to an express promise, made to the party to be benefited by it, or *"an unequivocal act from which the inference is certain that a legal liability was meant to be acknowledged." Ibid.,* p. 328. But an infant can disavow his voidable deed after arriving at full age without directly treating with the grantee, either verbally or in writing, by executing a deed for the same land to a stranger. *Hoyle v. Stowe, supra.* It was held by the court of New York that a second conveyance after an infant attained his majority, was such a solemn act that even though the bargainor was out of possession, and it was therefore inoperative to pass the land, yet, being equally as notorious as the first conveyance, and inconsistent with the recognition of its validity, it was "an effectual avoid- ance of" the first deed. *Jackson v. Burchin,* 14 Johns., 124; (118) *Jackson v. Carpenter,* 11 Johns., 539.

In our case Beavans relies not on a verbal promise, but upon a solemn deed, which, though executed to a stranger, contained the most explicit acknowledgment, deliberately made, that the former conveyances had created a lien, still subsisting and superior to that created by the mortgage deed to Ward.

In the later case of *Turner v. Gaither,* 83 N. C., 362, *Chief Justice Smith* quoted the language of 2 Greenleaf, section 367, in which a distinction is drawn between executed and executory contracts.

We have in America two lines of authorities, the one holding that the infant's contract imposes no liability on him until created by a new ratification, having all of the elements of a new contract, except a new consideration; the rule being that there must be either "an express promise, or *such acts,* after the infant becomes of age, as practically lead to the conclusion that he inteded to ratify the contract." The other theory is that the infant, on attaining his majority, may ratify the contract "upon the same principles, for the same reasons, and by the same means, as a debt barred by the statute of limitations may be revived." 10 A. & E., 645. This Court may be classified as one of those that demands unequivocal evidence of an intention to ratify the voidable act, but the distinction is clearly recognized that mere words relied upon as a confirmation must have all of the elements of a new contract between the parties, while a solemn and notorious act, such as executing a deed that contains a recital inconsistent with the disaffirmance of the voidable conveyance, or a new deed aliening the land to another, may operate as a ratification or repudiation, though the grantee in both cases is a stranger, and the grantee in the original
(119) deed, made during infancy, is not present nor a party to the subsequent deed.

We find in support of our view, that the Supreme Court of Massachusetts, at a very early period of its history, held that a subsequent deed of a grantor made after arriving at his majority for the whole of a piece of land, recognizing by a recital a former conveyance for a part of the same land executed during infancy and conveying subject to it, ratified his former deed and made it effectual in law to pass the land purporting to be conveyed by it. *Bank v. Chamberlin,* 15 Mass., 220. Other courts of this country have approved the principle laid down in that case. *Scott v. Buchanan,* 11 Humph. (Tenn.), 468; *Palmer v. Miller,* 25 Barb., 399; *Irvine v. Irvine,* 9 Wall., 617; *Linde v. Budd,* 2 Paige, 191. Precisely the same question, however, has been passed upon by some other courts, and they have followed the rule stated in *Bank v. Chamberlin, supra; Losey v. Bond,* 95 Ind., 67.

There is a striking analogy between the case at bar and that of *Hinton v. Leigh,* 102 N. C., 28, in which it was held that a similar recital in a mortgage deed of a lien created by a deed of trust executed previously but admitted to registration after the deed of later date, created a charge upon the land mentioned in the recital for the payment of the debt intended to be secured by the first mortgage, which the courts would enforce by ordering a sale, unless the debt should be discharged by a certain day. The judgment of the court below in our case declares the lien created by the ratification of the deed executed during infancy,

and a sale is ordered on default in the payment of the debt due to the defendant Beavans before the day mentioned.

For the reasons given, we think that in holding that the mortgage deed executed during infancy was made effectual by the subsequent recital as far as to create a charge superior to the lien of the second conveyance, there was

NO ERROR.

Cited: Weeks v. Wilkins, 134 N. C., 521.

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(120)

THE BEAUFORT COUNTY LUMBER COMPANY v. ELIAS DAIL.

Innocent Purchaser—Mortgage—Lien—Judicial Sale.

The owner of land mortgaged it to A, and subsequently conveyed the right to cut timber therefrom to B for fifteen years; thereafter A assigned the mortgage to B, who assigned it to C, but with a verbal agreement that the timber was released from the mortgage. The last assignee foreclosed, and under decree of sale, which contained no reference to the verbal agreement, D purchased without notice of the agreement and received a conveyance: *Held*, that D was an innocent purchaser, and should be protected against the operation of the agreement to release the timber.

CASE agreed heard at Chambers, in CRAVEN, before *Bryan, J.*, on the ..... day of ....., 1892.

O. H. Guion and W. D. McIver for plaintiff.
W. W. Clark for defendant.

CLARK, J. The following are the facts agreed: The owner of land made a mortgage 1 January, 1886, to A without reserving the timber rights, which was duly registered on 8 March, 1886. Subsequently, on 23 January, 1888, the owner of the land conveyed the right to cut the timber thereon to B for a term of fifteen years. On 24 January, 1888, A assigned his mortgage and note to B. On 1 February, 1888, B in writing, assigned the mortgage and note to C, it being verbally agreed and understood between B and C that the timber on said land was discharged from the lien of the mortgage. On 5 April, 1888, C assigned in writing, the note and mortgage to D, with a similar verbal agreement that the timber was released. D brought an action to foreclose, and at the sale, 30 May, 1892, under the decree in said action, the defendant bought at public auction for full value, and without notice that the timber was agreed to be released from the mortgage, and there was no reference to such release in the pleadings or judg- (121) ment.

By deed, 31 January, 1888, and registered 3 February, 1888, B conveyed the right to cut timber for above term of years (as conveyed to it) to the plaintiff, who brings this action to enjoin the defendant, the purchaser under the mortgage sale, from cutting the timber. The successive assignments of the mortgage and note were in writing, but none of them were recorded, and none of them contained any agreement to release the timber, such agreements having been verbal only.

The purchaser under the mortgage had no notice, either actual or constructive, of the private agreement between the assignee of the mortgage and his assignee. This is not the case of an agreement between the mortgagor and mortgagee, which the purchaser at the mortgage sale might have ascertained by inquiry of the debtor. Nor was the purchaser required to examine the record for any conveyance executed by the mortgagor subsequent to the mortgage. On the other hand, the plaintiff, when he took the deed for the timber right from B, had he exercised reasonable care would have ascertained that the deed to B for the same was subject to the prior mortgage under which the defendant eventually bought. The assignment of the mortgage by B bore date prior to the registration of the conveyance of the timber right by B.

Both parties being innocent purchasers for value, the plaintiff must suffer for its negligence. Before taking the deed for the timber right, reasonable diligence required the plaintiff to see that the release of the timber right was indorsed on the mortgage, or on the margin of its registration, by the holder of the mortgage. The Code, sec. 1271. The failure of the plaintiff to have this done ought not to be allowed to prejudice the defendant, who has been guilty of no default.

AFFIRMED.

Cited: S. c., 112 N. C., 353.

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(122)

THE MADDOX-RUKER BANKING COMPANY v. THE ATLANTIC & NORTH CAROLINA R. R.

Agency—Draft—Evidence.

1. A draft, with a bill of lading attached, with the indorsements thereon, having been introduced without objection, it was error to exclude evidence that they came to the collecting bank in the usual course of business, unless the letter to the bank, containing them, was proved to be in the handwriting of the then owners.

2. Where a bank receives, in the usual course of business, a draft for collection, its possession is *prima facie* evidence that the person for whom the bank received it is the owner, the bank being a trustee or agent in that respect.

BAXTER *v.* ELLIS.

APPEAL at May Term, 1892, of CRAVEN, from *Winston, J.*

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

(123)

CLARK, J. The draft assigned by A. A. DeLoach, President, with bill of lading attached, was in evidence without objection, as was also the testimony that "the handwriting purporting to be the signature of A. A. DeLoach on both draft and bill of lading, was the same handwriting as the signature to his evidence in the deposition taken in this action." This deposition was also in evidence without objection. It was therefore error to exclude the evidence offered "that the draft and bill of lading came to the bank in New Bern in the course of business in a letter purporting to be sent by the payees," because of the absence of proof that it was in the handwriting of the plaintiff. The evidence already admitted as to the genuineness of the signature of A. A. DeLoach on the draft and to the assignment of the bill of lading, was sufficient to go to the jury, and it is immaterial who sent to the bank the letter enclosing them, whether the plaintiff or someone else. If the letter came in the course of business, with the draft and bill of lading duly assigned to the plaintiff by A. A. DeLoach, with in- (124) structions to hold the same for the plaintiffs, the possession of the papers by the bank was *prima facie* a possession of them as trustee or agent for the plaintiffs, and there would be a presumption that the plaintiffs were the owners of the draft and bill of lading. This evidence was offered to show ownership in the plaintiffs. In its exclusion there was

ERROR.

Cited: Maddox v. R. R., 115 N. C., 644.

J. J. BAXTER v. WILLIAM ELLIS.

Elections—Devices on Ballots.

1. The term "device" in the statute regulating elections (The Code, sec. 2687), means any distinguishing mark; and hence when certain ballots cast at an election had upon the outside or back the letters "O. K." in pencil, they were within the prohibition of the Statute and were properly rejected.

2. The statute prohibiting devices upon ballots embraces elections for town and city officers.

QUO WARRANTO to try the title to the office of councilman in the first ward of New Bern, heard before *Winston, J.,* Spring Term, 1892, of CRAVEN.

(125) The defendant in his answer alleges, that while it is true eighty-one votes were cast for plaintiff and seventy-four for himself, but that of the eighty-one votes cast for relator twelve of the ballots had marked upon the back the letters "O. K." in pencil, which was (as defendant is advised and believes) a device under the law, and rendered said ballots illegal and void.

(126) It was admitted that if said mark in pencil was not a device, then the relator was elected. The court overruled the demurrer, and gave judgment for defendant, and the plaintiff appealed.

C. R. Thomas and O. H. Guion for plaintiff.
W. W. Clark for defendant.

CLARK, J. The Code, sec. 2687, prescribes that the ballots shall be "without device." It is contended that the inscription "O. K." upon the back of the twelve contested ballots is not a "device" within the meaning of this statute.

In *DeLoach v. Rogers,* 86 N. C., 357, this Court (*Smith, C. J.*) says, approving *Oglesby v. Sigman,* 58 Miss., 52, that one of the objects of this provision was "that ignorance and blind party devotion might not be led to the adoption of ballots by the guidance of some mark and device, as to which they were instructed by their leaders, and which, instead of intelligent comprehension of whom or for what they are casting their ballots, should determine their selection of ballots to be cast." In *Yeates v. Martin* (from the 1st N. C. Congressional District), 5 Cong. El. Cases, 389, it was held, construing this act, that the heading "Republican ticket" was a device and the ballots bearing it were invalid. This reason given for the statute applies peculiarly to the cases where the device is on the face, or inside of the ballot, and has not met with concurrence in some courts in states having a similar statute. But there is another reason given for it, which has met with universal approbation; where the device, as in this case, is on the outside

(127) of the ballots, and that is that the statute is intended to preserve the secrecy of the ballot and to protect the voter from intimidation. In this view of the purport and object of the statute, as well as the other, the "device" denounced is any distinguishing mark reasonably intended as such. It is true "device" sometimes means an emblem or pictorial representation, though in the Bible and by Shakespeare it is almost always used in the sense of contrivance, plan or trick. But these are all secondary and derivative meanings. Webster tells us

that the word comes "from the Latin *dividere,* to separate, to distinguish." This is its primary signification, and is that intended by the statute. The inscription "O. K." is popularly supposed to mean "Orl Korrect." But whether it has that meaning, or any meaning, is immaterial. Those letters written (or printed) on the outside of the ballots would serve as fully to destroy the secrecy of the ballot and give opportunity for intimidation of the voter as if a cotton bale or an "arm and hammer" were imprinted there; and if within the ballot would serve the purposes mentioned in *DeLoatch v. Rogers,* quoted *supra.* In either case they fall within the denunciation of the statute, in the purview of which the word "device" means simply a "distinguishing mark." Instances showing that this is not an unusual meaning of the word, and that a device may be by words or letters as well as by pictorial representation, will readily occur to anyone—among them those lines of the poet,

"A banner with the strange *device*—Excelsior."

The other point raised by the demurrer is, that this section (2687) does not apply to municipal elections. The Code, sec. 3789, provides that in such elections the inspectors "shall conduct the election *in like manner,* and during the same hours of the day, as elections for members of the General Assembly. And at the close of the poll shall declare elected such persons as have the highest number of votes." This statute evidently intends that the same rules and regulations shall apply to the conduct of the poll-holders from the opening (128) of the polls down to and including the count by them of the vote and announcement of the result. In section 2689 it is provided that when the registrar and judges of elections (who are the inspectors, The Code, sec. 2678), open the boxes and count the ballots, any ticket which "shall have a device upon it . . . shall not be numbered, but shall be void." These twelve ballots which had this device upon them were void, and when the inspectors of the municipal election were proceeding with this important part of their duty in "conducting the election," they should, *in like manner* with the inspectors in an election for members of the General Assembly, have refused to number these void ballots. The Code, secs. 2689, 3789. It is true that section 2689 says "when the election is finished," but the whole paragraph shows that this means simply that when the election is finished as to the reception of votes, the poll-holders shall proceed with the counting of the vote.

In this case the inspectors erroneously counted the contested ballots, but on the *quo warranto* their action was properly reversed by the court. The relator contends that the return of the canvassing board

was *prima facie* correct, and that the courts should now seat him and drive the defendant to his *quo warranto*. But the courts will not do a vain thing, merely to reverse the position of the parties by making the defendant plaintiff and the plaintiff defendant. A case in point is *Ellison v. Raleigh*, 89 N. C., 125. This matter being before the Court, it was properly adjudicated upon the merits.

AFFIRMED.

Cited: Mfg. Co. v. R. R., 121 N. C., 517; *Wright v. Spires*, 152 N. C., 6.

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(129)

WILLIAM F. FOY, EX'R., v. COMMISSIONERS OF CRAVEN COUNTY.

Contract—Evidence.

Plaintiff made a written contract with defendant to erect a bridge in accordance with specifications at a point where there was an old bridge, and in the execution of the contract removed the timber from the first structure to another point; plaintiff having been paid the contract price, brought suit to recover compensation for services rendered in the removal of the old bridge: *Held*, that there being no allegation or proof that this service was performed at the request of defendants, or that they took benefit under it, he was not entitled to recover.

APPEAL from *Winston, J.*, at Spring Term, 1892, of CRAVEN.

(131) *W. W. Clark for plaintiff.*
C. R. Thomas for defendant.

MACRAE, J. The exception to the exclusion of evidence was not insisted upon here. The only point presented to us is whether the plaintiff would be entitled to recover for moving the material of the old bridge to Brice's Creek bridge, some distance below the point where the old Cleremont bridge was taken down and the new bridge erected by plaintiff.

The contention of the defendant is that there was a written contract between plaintiff and defendant for the building of the Cleremont bridge on Trent River where the old bridge stood, which contract provided for the building by plaintiff of the new bridge and the payment by defendant of $3,000 to plaintiff therefor, and that parol evidence was inadmissible to vary the terms of said written contract. The claim of plaintiff for taking down the old bridge and removing it to the lower Brice's Creek bridge, is entirely separate and independent of the writ-

ten contract for the building of the Cleremont bridge. The first exception for the exclusion of testimony might have raised some question with regard to the written contract and its bearing upon (132) the necessary removal of the old bridge before the building of the new, but as we have said, this exception was not insisted upon.

The question we have now to consider, is whether the plaintiff could, in any view of the testimony, have recovered of defendant for the removal of the material of the old bridge to the lower Brice's Creek bridge. The testimony upon this point is that of the plaintiff, "that a large part of the timber of the old bridge was rafted and taken about four miles, to the defendant's bridge at Brice's Creek, and that to take down the old bridge and remove it to Brice's Creek was worth one-third as much as the contract price to build a new bridge." There is no allegation in the complaint, and there is no proof, that this service was performed at the request or for the benefit of defendant, or that defendant accepted or took benefit by the same. 1 A. & E., 884 (note 2), 889. So, without passing upon the correctness of the opinion expressed by his Honor, we hold that upon the complaint and upon the evidence the plaintiff was not entitled to recover, and the judgment of nonsuit is

AFFIRMED.

SARAH F. TRENWITH v. MARGARET SMALLWOOD ET AL.

Clerk—Deed, Probate of—Subscribing Witness.

A clerk is not incompetent to take the *acknowledgment* of the execution of a deed because he is a subscribing witness to the document.

SPECIAL PROCEEDING tried at Spring Term, 1892, of CRAVEN, by *Winston, J.*

The plaintiff appealed.

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

MACRAE, J. This was a special proceeding for partition, the (133) plaintiff alleging that she was tenant in common with defendants. The defendants denied the tenancy in common, and it was agreed that the facts should be found by the judge. The *feme* defendant, in support of her plea of sole seizin, offered a deed of mortgage, made by plaintiff to her, conveying the land in controversy to defendants in fee

simple. Plaintiff objected to the reception of this deed in evidence, because it appeared upon its face that E. W. Carpenter was the subscribing witness thereto, and it further appeared that acknowledgment of the execution of said deed was made before said E. W. Carpenter, who was, at the time of the execution and of the acknowledgment, Judge of Probate of Craven County, and that he, as Probate Judge, admitted the said deed to probate. The contention of the plaintiff's counsel was that the probate of the said deed was void under subdivision 3 of section 104 of The Code.

"No clerk can act as such in relation to any estate or proceeding . . . if he or his wife is a party or a subscribing witness to any deed of conveyance, the testamentary paper or nuncupative will."

It is found as a fact by the presiding judge "that at the time of said acknowledgment and probate by the said clerk, the said clerk entered his name on said mortgage as the subscribing witness thereto at request of parties, telling them it was not necessary, but that the probate was made upon the acknowledgment of said mortgagors, and not upon the proof of said mortgage by the clerk as the subscribing witness thereto."

It seems, then, that the signing as witness by the clerk of the court, who was then designated by law as "Probate Judge," and the taking probate of the deed were contemporaneous acts, and that the said Probate Judge was not a subscribing witness to the deed before the taking of probate of the same.

(134) But were it otherwise, we cannot give this strict construction to the statute, which is contended for by the plaintiff's counsel. While we are not at liberty to depart from the plain meaning of the words of the statute, we are required to consider it in connection with the other sections of The Code relating to the same subject, and we are not confined to such strained and narrow construction as will do violence to the intent of the Legislature and the spirit of all the laws in *pari materia.*

By section 103 the clerks of the Superior courts, succeeding to the jurisdiction of the probate judges, have jurisdiction (1) "to take *proof* of deeds," etc.

By section 1246 "all deeds conveying lands, letters of attorney, or other instruments requiring registration, must be offered for probate . . . before the clerk of the Superior Court of any county in the manner following: (1) When the grantor or maker, or subscribing witness, resides in the county wherein the land lies, the deed . . . requiring registration must be *acknowledged* by such grantor or maker, or proved by the *oath of such subscribing witness* before the clerk, etc., who shall enter his certificate thereon." And then it is to be admitted by the clerk to probate and ordered to be registered.

Section 104 disqualifies the clerk to act in relation to any estate or proceeding (1) (in affirmance of the common law which forbids any judge to sit upon his own case) if he has or claims any interest in the subject matter; (2) if he is closely related to any of the parties in interest; (3) if he or his wife is a party or subscribing witness to any deed, etc.

Taking these sections together, the distinction is evident between taking *proof* and taking *acknowledgment* of any deed. He cannot take proof of a deed of which he is the subscribing witness, because he cannot swear himself. He ought not to take proof where his wife is a party or a subscribing witness, because of his interest in the (135) one case, and the relation between them, which, in the view of the Legislature, renders it improper in the other. No error, and the judgment is

AFFIRMED.

THE LORD & POLK CHEMICAL COMPANY v. THE BOARD OF AGRICULTURE ET AL.

Actions Against the State—Jurisdiction—Agriculture, Department of.

1. The Board of Agriculture is a department of the State government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the State not having given its consent to be sued in that respect.
2. The objection to the jurisdiction of the court because the action is against the State may be made *ore tenus* at any stage in the proceedings when the fact is made apparent.

ACTION tried upon complaint and demurrer at April Term, 1892, of FRANKLIN, by *Bryan, J.*

The plaintiff alleged that in the year 1888 it paid, under protest, to the Board of Agriculture the sum of one thousand dollars, the license tax imposed upon dealers in fertilizers under the Act of 1877, for the years 1888 and 1889, and that they had demanded a repayment, which was refused. Thereupon this action was instituted against the Commissioner of Agriculture, the Board of Agriculture and the State Treasurer, to recover back the sums with interest.

The defendants demurred, assigning as ground, among others, therefor—

"For that it appears on said complaint that this court has not jurisdiction of the persons of the defendants, the defendant D. W. Bain

(136) being the Treasurer of North Carolina, the defendant the Board of Agriculture of North Carolina being under the law a department and part of the State government, and the defendant John Robinson, Commissioner, etc., being an officer of said department, and no relief being asked against him personally."

The court sustained the demurrer, and the plaintiff appealed.

S. F. Mordecai for plaintiff.
F. S. Spruill for defendants.

CLARK, J. The demurrer was properly sustained. The Board of Agriculture is a department of the State government. Cons., Art. III, sec. 17, and Art. IX, sec. 14; The Code, sec. 2184, *et seq.;* Laws 1889, chap. 431; Laws 1891, chaps. 9 and 555. This tax was collected as a license tax and was receipted for by the State Treasurer as such. The action being against a department of the State government, the State Treasurer and the State Commissioner of Agriculture, to recover this money, is, in effect, an action against the State, and cannot be maintained without the consent of the State. If the subject ever required discussion, it is needless since the full consideration of the question in the United States Supreme Court in the late cases—*North Carolina v. Temple,* 134 U. S., 22, and *Hans v. Louisiana, ibid.,* 1. This case differs from that of an action against agencies of the State which the Legislature has incorporated and expressly authorized to "sue and be sued," as in *County Board v. S. Board,* 106 N. C., 81, and cases there cited; since as to them the State gave its consent by the terms of the act of incorporation to their being sued. But here there is neither act of incorporation nor authority conferred to be sued. There is simply the Department of Agriculture, with a Commissioner and Board of Directors for its government.

(137) The complaint alleges the public act under which the tax was laid, and has appended as exhibits the receipts given to the plaintiff by the State Treasurer for the taxes paid by virtue of such law into the State Treasury. It is useless, therefore, to consider the plaintiff's contention that the demurrer admits the Board of Agriculture to be a corporation, since upon the face of the complaint the Court has no jurisdiction of an action to recover from the State money paid into its treasury by virtue of an act levying a license tax. This is a defect which could be taken advantage of *ore tenus* at any time (*Manufacturing Co. v. Simmons,* 97 N. C., 89), and the Court will take notice of it *ex mero motu. Hagins v. R. R.,* 106 N. C., 537.

We would not be understood as intimating an opinion that the tax was unconstitutional, notwithstanding it has been so held in another court. The point is not before us. The plaintiff might have raised the point, if so advised, by a proceeding to enjoin the seizure of its property for non-payment of the tax. *R. R. v. Alsbrook,* 110 N. C., 137. Having paid the tax into the State Treasury, an action does not lie to recover it back, except in the cases provided in sec. 84, chap. 137, Laws 1887 (and Laws 1889, chap. 218, sec. 82; Laws 1891, chap. 323, sec. 78), of which statute the plaintiff cannot avail itself, as there was not demand made, nor action brought within the times therein limited. *R. R. v. Reidsville,* 109 N. C., 494. Besides, there is nothing in that act, nor in the case of *R. R. v. Commissioners,* 77 N. C., 4, which is relied on by the plaintiff, which authorizes an action against the State.

AFFIRMED.

Cited: White v. Auditor, 126 N. C., 599; *Teeter v. Wallace,* 138 N. C., 268.

(138)

GEORGE F. UZZLE & CO. v. A. B. VINSON.

Judgment, Confession—Irregularity—Fraud—Parties.

1. A judgment may be set aside for *irregularity* only upon the application of a party thereto; if it is sought to set it aside for *fraud,* an independent action should be instituted by the party desiring such relief.

2. A confession of judgment containing a duly verified statement of defendant that the amount for which the judgment was authorized to be rendered was "$2,250, with interest at six per cent from 2 November, 1876, is justly due by him to the plaintiff," and "that said amount is due from him to the plaintiff on a bond under seal for borrowed money due and payable 2 November, 1876," is a compliance with the statute (The Code, sec. 571), prescribing the manner for confessing judgments. (*Davidson v. Alexander,* 84 N. C., 621, and *Davenport v. Morris,* 95 N. C., 203, distinguished.)

MOTION tried before *Bryan, J.,* at the August Term of JOHNSTON.

It appeared upon the hearing of the motion that on 31 October, 1891, A. B. Vinson had confessed judgment in favor of his sister, Esther Vinson, for the sum of $2,250, with interest from 2 November, 1876, and that judgment was duly docketed in the office of the clerk of the court of Johnston County on the same day, to wit, 21 October, 1891.

The following is a copy of the judgment-roll which was introduced as evidence:

JUDGMENT BY CONFESSION.

"IN THE SUPERIOR COURT—Johnston County.

Esther Vinson v. A. B. Vinson.

I, A. B. Vinson, hereby confess judgment in favor of the above-named plaintiff for the sum of twenty-two hundred and fifty
(139) ($2,250) dollars, and authorize the entry of judgment therefor against me, with interest at six per cent from 2 November, 1876. This confession is for the amount due on a bond under seal executed by the defendant to plaintiff, dated 1 November, 1876, and the defendant, A. B. Vinson, maketh oath:

"1. That said amount of $2,250, with interest at six per cent from 2 November, 1876, is justly due by him to the plaintiff.

"2. That said amount is due by him to the plaintiff on a bond under seal for borrowed money due and payable 2 November, 1876.

A. B. VINSON."

NORTH CAROLINA—Johnston County.

A. B. Vinson, being sworn, says that the facts set forth in the foregoing confession are true.

A. B. VINSON.

Sworn to and subscribed before me 31 October, 1891.

W. S. STEVENS, *C. S. C.*

On the back of the judgment-roll was indorsed:

"Upon the foregoing confession and affidavit of the defendant, it is adjudged by the court that the plaintiff recover of the defendant the sum of $2,250, with interest at six per cent from 2 November, 1876. This 31 October, 1891, at 4:30 o'clock p. m.

W. S. STEVENS, *C. S. C.*"

Firmly stuck to the judgment-roll with mucilage was a paper-writing in the following words and figures:

"$2,250.

"One day after date, I promise to pay to Esther Vinson the sum of twenty-two hundred and fifty dollars for value received. This 1 November, 1876.

A. B. VINSON. [Seal.]"

Witness: D. T. VINSON.

The plaintiffs obtained judgment against the defendant, A. B. (140) Vinson, for the sum of $112, with interest from 15 October, 1885, at eight per cent. This judgment was docketed 2 November, 1891, at 12 o'clock, m. The plaintiffs, J. M. Wilson and G. F. Uzzle, also obtained other judgments against the same defendant (A. B. Vinson), which were docketed subsequently.

The plaintiffs, J. M. Wilson and G. F. Uzzle, moved to set aside the confessed judgment, and have the same declared void:

1. Because it did not conform to the requirements of the statute.

2. Because sufficient facts were not, by the affidavit and confession, disclosed to enable the court to acquire jurisdiction.

3. Because the judgment was void upon the face of the facts set forth.

Motion dismissed. Plaintiffs excepted and appealed.

E. W. Pou for plaintiff.
F. H. Busbee for defendant.

MACRAE, J. We are of the opinion that his Honor properly dismissed the motion made by Uzzle and Wilson to set aside the judgment confessed by A. B. Vinson in favor of Esther Vinson. If the ground upon which it sought to set it aside were irregularity only, none could be heard to impeach it upon such ground but a party thereto. Out of the many decisions to this effect, we select *Dobson v. Simonton,* 86 N. C., 492, and the cases there cited.

If it were sought to vacate this judgment upon the ground of fraud, it could not be attacked by motion in the cause, but only by an independent action. *Sharp v. R. R.,* 106 N. C., 308. The ground upon which this motion is made, however, is that the confession of judgment is void, because of a failure to comply with the requirements of the statute, sec. 571 of The Code, which provides for the man- (141) ner in which judgments may be confessed without action.

The three grounds upon which the motion to vacate is made are all comprehended in the first, "because it did not conform to the requirements of the statute." Section 571 of The Code reads: "A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: (1) It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. (2) If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due." The third subdivision of this section does not concern our present inquiry.

The confession states the amount, $2,250, and authorizes the entry of judgment therefor, with interest at six per cent, from 2 November, 1876. This is in strict compliance with the first requisite of the statute.

It further states that it is for the amount due on a bond under seal, executed by defendant to plaintiff, dated 1 November, 1876; that it is justly due, and that it is for borrowed money. This seems to us to be, but for a little tautology, as concise a statement of the indebtedness, with the facts out of which it arose, as could be made. It sets forth the debt and the consideration, so that any other creditor may scrutinize the transaction and inquire into its honesty and good faith.

In *Davenport v. Alexander,* 84 N. C., 621, where this statute was lucidly considered and construed, the confession was for a certain sum, "said to be a debt now justly due said plaintiff by said defendant, arising from the acceptance of a draft, of which the following is a copy," etc. The draft was drawn upon and accepted by J. A. Smith. The confession of judgment was made upon this draft by J. A. Smith, president of the Empire Mining Company, and it was sought to bind the property of this company by the judgment so confessed. The
(142) demands of the statute were in that case, said to be, what was the real consideration of that draft, the time and manner of its creation. The information upon those points was meagre and insufficient. In the case of *Davenport v. Morris,* 95 N. C., 203, the attempted confession was upon a note, the consideration of which was not stated, and upon an open account appended to the affidavit, but not made a part of the same.

Without in any way relaxing the strictness of the rule adopted for the construction of these confessions of judgment, for the reasons given in the above-cited opinions we hold that the confession in the case before us is a full compliance with the terms of the statute. The bond, which is presumed to have been in possession of the obligee, is fully described in the affidavit, and a bond of the precise description of that in the confession is affixed thereto to make up the judgment roll.

AFFIRMED.

Cited: Bank v. Cotton Mills, 115 N. C., 523; *Smith v. Smith,* 117 N. C., 351; *Rawles v. Carter,* 119 N. C., 597; *R. R. v. Stroud,* 132 N. C., 415; *Moody v. Wicker,* 170 N. C., 544.

*JAMES A. BRYAN AND WIFE v. CAROLINA ALEXANDER.

Betterments—Improvements—Res Judicata.

1. The remedy for betterments provided by The Code, sec. 473, *et seq.*, is confined to those cases where those who set up such claim are in possession under color of title, believed by them to be good, and to such persons as claim under them.

2. Where, in a former action between the same parties, an issue was joined involving the question of the claim of defendants under color of title, and it was determined adversely to defendants: *Held*, that such adjudication was conclusive upon a petition for betterments, the matter being *res judicata*.

THIS cause was heard at Spring Term, 1892, of CRAVEN, by (143) *Winston, J.*, upon a petition for betterments; *vide* same case, 109 N. C., 57. The defendants appealed. The case is stated in the opinion.

W. W. Clark for plaintiff.
J. W. Hinsdale for defendant.

MACRAE, J. An actoin for the recovery of land having previously been determined in favor of plaintiffs, the defendants presented their petition for betterments, under the statute, in which petition they allege that they "went into possession of the said several parts of said land and held such possession since 25 September, 1867, by themselves and those under whom they claim said land, under a title believed by them to be good, as petitioners are informed and believe; and that defendants and those under whom they claim, while holding the said premises under a color of title, believed by them to be good, as petitioners are informed and believe, have made permannet improvements threon."

The plaintiffs in answer to the petition plead, among other things, that the defendauts are estopped by the finding of fact on the trial of the action, that the defendants were in possession of said premises without any color or claim of title whatever.

It was agreed in the court below that if his Honor were of the opinion that the defendants were estopped by such decree and judgment, he should deny and decline the application for betterments. His Honor held that so many of the defendants as are *sui juris* are estopped by the judgment of the court, declaring that they have not color of title to the land in controversy, and that they are not entitle to the relief demanded in their petition.

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

In the action for the recovery of the land it was submitted to the judge presiding to find the facts and declare the law—a jury (144) trial being waived. His Honor, after finding the facts, held:

"10. That the entry of the defendants upon the land and the occupation of the several lots or parcels thereof by them on 14 March, 1863, was without color of title, and that such entry constituted an ouster of the true owners.

"11. That after the signing of the deed of 25 September, 1867, by Southey B. Hunter and others to James Salter, the defendants continued to occupy their said several lots inclosed by them in the same manner as before, and the character of their possession was thereby unchanged. This finding is based upon the fact that the testimony in respect thereto is conflicting, and taken in connection with the answer, 11 November, 1890, the court is unable to find that they were holding under the provisions of said deed for seven years prior to the commencement of this action."

It plainly appears from the above statement that the question whether the defendants held under color of title was in issue and was determined by the judgment of the court adversely to the defendants. The provisions of the statute (The Code, sec. 473, *et seq.*) confine the relief to be obtained by petition for betterments to those who, while holding the premises under color of title believed by him or them to be good, made permanent improvements thereon, and to those claiming under such parties. There is nothing better settled than that where an issue between parties has once been determined by a judgment of a competent court the principle of *res judicata,* often called an estoppel, prevails. *Williams v. Clouse,* 91 N. C., 322.

The proceeding before us is the statutory mode of seeking equitable relief under the doctrine of betterments. *Barker v. Owen,* 93 N. C., 198. "In the application of the principle of *res judicata,* there is no difference between courts of law and courts of equity. Where an issue of fact or of law has been adjudicated upon the merits in either tribunal, it cannot be again litigated in the other." 2 Black on (145) Judgments, 518. It having been determined that these defendants did not hold the land under color of title when the improvements were made thereon, and this judgment of the court having been affirmed on appeal (*Bryan v. Spivey,* 109 N. C., 57), we are precluded from reviewing the finding that the deed to Salter did not constitute color of title.

In holding that the petitioners are not entitled to the relief sought in their petition, there is no error.

AFFIRMED.

Cited: Burwell v. Brodie, 134 N. C., 546.

L. D. ESTIS AND WIFE v. M. J. JACKSON.

Estoppel—Fraud.

1. In order to work an estoppel *in pais*, it is essential that there should be some conduct of the party against whom the estoppel is alleged, amounting to a representation or concealment of material facts; where the circumstances are equally well known to both parties, although they were mistaken in regard to their rights at law, the doctrine will not apply.

2. L., being seized in fee of lands, believed she had only an estate for life with remainder to her children, and in order to signify her assent to their conveyance of their supposed estates, signed the deeds which they executed for that purpose, her name not being in the body of the instrument. The deed under which L. took title to the fee was produced at the time of the execution of the conveyances from the children, and was read in the presence of vendee: *Held*, in the absence of any misrepresentation or concealment, there was nothing in the nature of fraud, actual or constructive, and L.'s act in signing the deed did not work an estoppel.

ACTION for damages for waste alleged to have been committed by defendant, tried at November Term, 1892, of GRANVILLE, by *Winston, J.* (146)

His Honor having intimated an opinion that the plaintiffs were not entitled to recover, the plaintiffs submitted to a non- (148) suit.

Under the instruction there was a verdict and judgment for the defendants, and the plaintiffs appealed.

The following motion for a new trial was made: "The plaintiffs move the court for a new trial upon the ground that the court misunderstood the testimony of witnesses Duncan M. Loyd and William E. Bullock as to the reading of the deed from N. E. Cannady and wife to Mrs. Sally Loyd, in the presence and hearing of L. D. Estis and wife, Sarah J. Estis."

The said motion was based upon the foregoing affidavits, but was refused. Plaintiffs excepted and appealed.

J. W. Graham, A. W. Graham, and J. T. Strayhorn for plaintiff.
J. H. Fleming for defendants.

SHEPHERD, J. Without discussing the general doctrine, it is (149) sufficient to say in the present case that, in order to work an estoppel *in pais*, "there must be conduct—acts, language or silence—amounting to a representation or a concealment of material facts," and that "the truth concerning these facts must be unknown to the

party claiming the benefit of the estoppel." 2 Pom. Eq., 264. "The estoppel is removed by proof that the party claiming its existence, even though mistaken in regard to his rights at law, had notice of the actual state of the facts at the time of acting upon the representation, and this, though the representation was made under oath." Bigelow Est., 520. "The estoppel does not apply where everything is equally well known to both parties." Herman Est., sec. 957; Bispham Eq., 288; *Dutchess Kingston's case,* notes Smith, L. C.; *Holmes v. Crowell,* 73 N. C., 613; *Loftin v. Crossland,* 94 N. C., 76; *Exum v. Cogdell,* 76 N. C., 139; *Mayo v. Leggett,* 96 N. C., 237. In *Exum v. Cogdell* the Court uses the following language: "In this case it appears, either by admission or the findings of the jury, that the plaintiff knew all the material facts in regard to the title, and could not have been deceived by misrepresentations of the defendant."

Applying the foregoing principles to the facts before us, it is plain that there is no estoppel. Mrs. Loyd was the owner in fee of the land in controversy, the same having been conveyed to her by one N. E. Cannady. She, her children, and the purchaser were all alike ignorant of the legal effect of the conveyance which was read to the parties at the time of the present transaction. It was supposed by them that Mrs. Loyd had but a life estate, and that the children were entitled to a remainder in fee. The plaintiff purchased what she understood was the interest of the children, and the consideration was paid to them alone. Mrs. Loyd appears to have had nothing to do with the transaction but to signify her assent to the sale, which, in view of the understanding of the persons interested, was entirely unnecessary. She
(150) made no representation as to the rights of the children, except to state in effect that she was willing that they should sell their supposed interest, reserving to herself a life estate. This, as we have seen, was done in view of a misapprehension of her title, which misapprehension was common to all of the parties, and it cannot reasonably be inferred that anything she said or did had the slightest effect in misleading the plaintiff. There was no withholding of information on her part, but, on the contrary, every fact which she knew concerning her title was equally well known to the purchaser. She was no party to the deeds executed by her children, and her signature to the same was of no effect. *King v. Rhew,* 108 N. C., 696. Having received no consideration, and being guilty of no misrepresentation or concealment as to the real facts constitutiing her title, there is nothing in the nature of fraud, either actual or constructive, which can estop her grantee from asserting her interest in the premises.

The affidavits filed before his Honor in reference to his alleged misunderstanding of the testimony cannot be considered by us. The grant-

ing of a new trial upon such a ground is a matter of discretion, and not the subject of review in this Court. *Munden v. Casey,* 93 N. C., 97; *McCullock v. Doak,* 68 N. C., 267.

AFFIRMED.

Cited: Bishop v. Minton, 112 N. C., 529; *Clark v. Moore,* 126 N. C., 7; *Boddie v. Bond,* 154 N. C., 368.

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(151)

ALEXANDER BLACKWELL, ADMINISTRATOR, v. THE LYNCHBURG AND DURHAM R. R. ET AL.

Issues—Damages—Negligence—Railways—Eminent Domain—Presumption.

1. The trial court may exercise a discretion in altering or substituting issues, when those so altered or substituted will permit any specific view of the law arising out of the testimony to be presented.
2. While excavating by blasting is a legitimate means of construction of railways, and its prudent use is deemed to have been in contemplation in the assessment of damages for right of way, nevertheless where damage results therefrom to the lands of an owner adjacent to those condemned, because of the unskilled or careless method in which it is employed, or if the material adopted as an explosive is unnecessarily powerful, the corporation, or other person, so employing such agency will be liable for any damage produced thereby.
3. The acquisition by a railway corporation of the right of way does not carry with it the privilege of throwing stones, or other material, by blasting, to a distance of two hundred yards or more on the lands of an adjacent proprietor, whereby the family of the latter is exposed to danger while engaged in their domestic duties.
4. Where those engaged in the construction or operation of railways have been accustomed to give warning of approaching danger, and thereby induce the public to act upon the presumption that the usual signal will be given, and it is not given, whereby one who relied upon it was injured, the latter is entitled to recover damages.
5. Where those engaged in the construction of a railway employ a powerful explosive in blasting—with the effects of which they will be presumed to have knowledge—it is their duty to cover the blast, or otherwise restrict the effect of the explosion, so as to prevent danger to others, and if this be impracticable, they should give timely warning of the explosion to all persons who may be in danger from it.

APPEAL at November Term, 1891, of PERSON, from *Winston, J.*

The action was brought by plaintiff administrator to recover damages for the killing of his intestate by blasting in the construction of the

(152) railway of the Lynchburg and Durham R. R. The defendants, Moorman & Co., were jointly sued with the railroad company.

The testimony in substance was that Moorman & Co. were contractors engaged in the construction of the roadbed of the defendant company; that while blasting in a cut, distant some two hundred yards from the residence of the deceased, they exploded a blast, by which a stone was thrown through the air, and struck and killed intestate, who was engaged in some of his ordinary occupations in the yard close to his dwelling; that the explosive used was "Jutson Powder," which acts in all directions; that the railroad company had acquired the right of way for its roadbed from intestate, but it did not embrace the land where the killing occurred. There was some evidence that the defendants had been accustomed to give intestate's family notice of the explosion of a blast, and they offered evidence that such notice was given on this occasion, but there was evidence offered by the plaintiff tending to contradict that fact. The blast was not covered, nor was there any evidence that other means were taken to lessen the damages from it.

There was a verdict for plaintiff as to Moorman & Co. only, and from the judgment thereon they appealed.

J. Parker for plaintiff.

J. W. Graham, W. A. Guthrie and V. S. Bryant for defendant.

AVERY, J. The defendant does not contend that any specific view of the law, arising out of the testimony, could not be presented to the jury through the medium of pertinent instructions upon the issue submitted. This being the test of the question whether the judge below kept within the bounds of his discretionary power when he refused to add the issue suggested, the first exception is manifestly not well founded.

(153) *McAdoo v. R. R.*, 105 N. C., 151; *Emry v. R. R.*, 102 N. C., 209; *Meredith v. Coal Co.*, 99 N. C., 576; *Boyer v. Teague*, 106 N. C., 633. This Court has, moreover, repeatedly held that in cases like that at bar it is not an error to submit a single issue involving the question whether the injury was caused by the defendant's negligence with an inquiry as to damages, though it has been suggested that by modifying that and adding one, and in some cases two others, a jury might be made to comprehend their duty more clearly. *Scott v. R. R.*, 96 N. C., 428; *McAdoo v. R. R., supra; Denmark v. R. R.*, 107 N. C., 185; *Braswell v. Johnston*, 108 N. C., 150; *Bottoms v. R. R.*, 109 N. C., 72.

Excavating by blasting is one of the approved methods of constructing a railway, and the prudent use of such an agency in removing hard material is always deemed to have been in contemplation when the damage was assessed for the right of way, as a necessity incident to the

privilege. But where damage is done to the land of the owner adjacent to that within the condemned boundary, if it result from managing or handling explosive material carelessly or unskillfully, or from the unnecessary use of such as is so powerful that the injury might be expected to follow as a natural or probable consequence, the corporation is answerable in a new action. 1 Wood R. R. Law, 634, and note; *Sabine v. R. R.*, 25 Vt., 363; *St. Peter v. Denison*, 58 N. Y., 416; *Bellinger v. R. R.*, 23 N. Y., 47; *Losse v. Buchanan*, 51 N. Y., 476; *Heeg v. Licht*, 80 N. Y., 579; *R. R. v. Eagles*, 9 Cal., 544; *Hunter v. Farmer*, 127 Mass., 481; *Dodge v. Commissioners*, 5 Met., 380; 2 Shearman & Red., sec. 717. Where there is testimony tending to show that injuries done to the adjacent land, or the buildings on it, were due to the use of unsafe or unnecessarily violent explosive material, or were caused by the careless management of the materials in common use, and also contradictory evidence, it is for the jury to find the facts upon which the question of negligence depends. Where a human (154) being is killed or injured at his dwelling on his own land by a blast on the right of way, condemned out of the same tract, in addition to passing upon the questions whether proper material was used and handled with skill, the testimony may make it material for the jury to determine whether the agents of the corporation had been accustomed to give the injured party a signal before igniting the powder, and, if so, whether such notice was given before the explosion which caused the injury. *Hinkle v. R. R.*, 109 N. C., 473; 2 Wood's R. R. Law, p. 1313, and note 3; *Sweeney v. R. R.*, 10 Allen (Mass.), 368; *Newsome v. R. R.*, 29 N. Y., 383; *Spencer v. R. R.*, 29 Iowa, 55; *Langdon v. R. R.*, 3 A. & E., R. R. Cases, 355. Where a corporation, by habitually giving some warning of approaching danger, whether from passing trains or expected explosions, induces the public to act upon the idea that the usual signal will be given at the accustomed time, the failure to meet this just and natural expectation, which has arisen from observation of the custom of the company's agents, will subject the corporation to liability for an injury inflicted on one who puts himself in danger because he is misled by such omission. *Hinkle v. R. R., supra;* 2 Wood's R. R. Law, *supra.* Indeed, the decision of the Court of Appeals of New York imposed upon the corporation, in cases like that at bar, the duty of either adopting some means for preventing projectiles from being thrown so as to subject a person to danger in his own house or yard, or of giving him personal and timely notice so that he may escape. *St. Peter v. Denison, supra.* The application of the principle that we have stated to the facts of this case, will enable us without difficulty to dispose of most of the exceptions relied on and set out in the formal assignment of error.

We do not think that the privilege of throwing stones through the air two hundred or more yards and beyond the right of way, so as to endanger the lives of the owners of adjacent land and of the (155) members of their families, when engaged in their domestic duties in and around their dwelling house, passes with the right of way as a necessary incident to the easement. "In determining what is the duty, the failure in which constitutes negligence, regard is to be had to the growth of science and the improvements in the arts which take place from generation to generation, and many acts or omissions are now evidence of carelessness which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill which in a few years will be considered the height of imprudence." 1 Shearman & R., section 12. The Supreme Court of Michigan held, where one was passing along a public road and was injured by a blast in a mine on land adjacent to the road, it was negligence in the owner not to cover the mine so as to protect travelers from missiles thrown up by the explosive material. *Beauchamp v. Mining Co.*, 50 Mich., 163. The defendants introduced as a witness an acknowledged expert (one Gleves), who was a civil engineer. He testified that on ordinary railroad work in the country, and remote from dwellings, it was not customary to cover blasts, but when blasting was done near a city or a dwelling house, that a covering could be made of green hides or timber so as to break the force of the projectiles or prevent their going so far as to subject persons passing along the streets or in their own yards or houses to danger. There was evidence tending to show that stones had been thrown into the intestate's yard by previous blasts at the same place, and that the plaintiff, his wife, having received warning, had been compelled to gather her children to the house to get them out of danger. If the defendant or his employees did not know that the missiles had been thrown to such a distance, they ought, in the exercise of ordinary care, to have known it if they were subjecting the intestate and his family to danger, and to have taken proper precaution to guard against it. Indeed, their own testimony tended to show such knowledge, (156) since some of the defendant's witnesses testified to having given, or heard warning given by others, to intestate's family, by calling out "Fire." At any rate, persons using such an inflammable and powerful instrumentality are charged with knowledge of any fact in reference to its actual effect, that they could by reasonable diligence have ascertained. Knowing, then, that previous blasts had endangered the persons of intestate, his wife and children, if the explosion occurred in a shaft or in a deep cut, so situated that covering could be easily constructed out of timbers or hides, so as to protect intestate against the

danger, it was the duty of the defendant to have provided such structure. If it was not practicable at any cost, reasonably commensurate with the nature of the work, to prevent the projectiles from being thrown into intestate's yard, then it was incumbent on defendant to see that intestate and his family had actual and timely notice of impending danger before igniting the fuse. The Supreme Court of Massachusetts held that where a contractor (like Moorman & Co. in this case) caused stones to be thrown, by blasting, upon a building in process of construction, he was liable to respond in damages, not only for the injury done to the building by the falling stones, but for loss of time of the workman in putting it up, when, in consequence of actual notice, they went into a place of safety till the danger was over. *Hunter v. Farmer, supra.*

We concur with the judge below in the opinion that if the defendant contractor, or his agent in charge of the work, knew, or could by reasonable diligence have known, that the stones thrown out by his blasts had been falling on or around the dwelling of intestate, so as to imperil the safety of the family engaged in their ordinary household work, it was his duty to have protected them by constructing a covering, if his work was in such a depression, that he could erect barriers at reasonable cost, and thereby obviate the danger. But if the costs of such coverings would have been so great as to consume all or (157) more than all of the profit he would otherwise have derived from performing his work under the contract, we think that in any event he could not escape the duty devolving upon him so soon as he had knowledge, or ought to have known of the danger, of giving actual warning to those who were in peril. When it was shown that the family of the intestate were exposed to such danger from the blasts, and that the defendants, in the exercise of reasonable diligence, ought to have known that fact, it was incumbent on them, if they would relieve themselves from responsibility, to show that they had provided the covering, or given the warning, or that the negligent conduct of plaintiff's intestate was the proximate cause of the injury.

As the judge below left the liability of the defendant dependent upon actual knowledge of the danger, before the duty of constructing a covering or giving warning would arise, the defendant has no reason to complain of the legal propositions laid down by him. Nor can he assign as error the fact that the judge embodied in his charge, as an abstract proposition, what is known as the "rule of the prudent man," in response to and in compliance with the request contained in both clauses, three and nine, of his prayer for instructions, especially when, in specific instructions given afterwards, he correctly applied the law of negligence and contributory negligence to the facts of this case as a

guide to the jury in their deliberations. If the plaintiff's intestate had remained in his yard, or at his well, when he was engaged in his ordinary work, instead of going behind the corner of the house, the negligence of the defendant, which, under instruction of the court, was to be considered as a cause of injury only on condition of his failure to erect a covering, if practicable, or, at all events, to give warning of the danger, would have been the proximate cause of the injury. The jury
(158) were instructed in effect that they should respond No to the issue involving defendant's negligence unless they found he had failed in his duty as to erecting a covering or giving warning, and if they so responded to that issue, it would be necessary to consider the other issues. So that they could not reach the second issue till they had found that "plaintiff's intestate was killed by the wrongful act or negligence of Moorman & Co., evinced in the omission, when it was practicable to do so at reasonable cost, to erect a covering or to give timely notice." There was conflicting evidence as to the giving of actual warning, as the intestate's wife testified that "nobody hallooed at all," while two of the defendant's witnesses testified as to notice. Contradictory statements, if made by her, went to the jury as bearing upon her credibility, of which they were the sole judges. After finding that the defendant was in fault in not giving timely notice, or failing to construct a covering, the intestate would not be culpable if he remained in the open yard without warning. So we fail to see how, after passing upon the first issue, it was material to consider whether the intestate took refuge behind the house or not. But the jury evidently reached the conclusion that he did, and that it was a safe place. We do not think that intestate was bound to find an absolutely safe place. He, at most, was expected, in the hurry of the moment, and when in peril, brought about by defendant's negligence, to have made an effort to protect himself, and, like a passenger who errs in judgment in seeking safety in case of derailment of a train, he was not culpable if he made a mistake. 2 Wood Ry. Law, 1141, 1146, notes. If the judge left questions to the jury that were not properly within their province, the defendant can assign it as error only on condition that he shows that he was thereby injured, and that he cannot do in this case.

The rule for determining the amount of damages in which he mentions the net earnings, with health, habits, etc., as factors in making the estimate, was not erroneous, as far as it went, and there was no
(159) such failure to comply with the requests as to furnish ground for complaint.

It was not error to give a summary of the contentions on both sides, nor was it error to mention the fact of killing as the point of departure

in enumerating plaintiff's contention, and in giving a summary of the testimony relied on by him. *S. v. Boyle,* 104 N. C., 800.

Upon a view of all the exceptions relied on, we think that there was no error of which the defendant could justly complain.

NO ERROR.

Cited: Mason v. R. R., post, 487; *Smith v. R. R.,* 114 N. C., 163; *Patton v. Garrett,* 116 N. C., 856; *Gates v. Latta,* 117 N. C., 191; *Bradley v. R. R.,* 126 N. C., 738; *Kimberly v. Howland,* 143 N. C., 401; *Settle v. R. R.,* 150 N. C., 644; *Sanford v. Junior Order,* 176 N. C., 448.

PERRY & PATTERSON v. DUNCAN BRAGG.

Deed—Probate—Registration—Lien, Agricultural.

1. Where the proof of the execution of a deed, or other instrument requiring registration, has been duly made within the State, it is not necessary that the fact of probate should be registered, unless there is some special direction in the statute to that effect. (The Court, however, does not commend the practice of omitting the registration of the certificate of probate.)

2. The execution of a deed was proved before a justice of the peace in the county of Franklin, and the clerk of the Superior Court of that county certified the official character of the justice of the peace under his official seal; the deed was thereupon registered in Granville County upon the fiat of the clerk of the Superior Court of that county, but the official seal of the clerk of Franklin Superior Court was not registered: *Held,* that the registration was valid.

3. An agricultural lien contained the stipulation that, if the debt secured was not paid from the proceeds of the crop, or otherswise, by 15 October following, the mortgagee might take possession and sell; the debt was not paid, nor did the mortgagee take possession, but shortly after the date named the defendant purchased: *Held,* that the mortgagee had not waived his lien, and the defendant took subject to it.

ACTION tried on facts agreed after an appeal from a justice (160) of the peace, at April Term, 1892, of GRANVILLE, by *Whitaker, J.*

N. Y. Gulley (by brief) for plaintiffs. (163)
J. W. Hays (by brief) for defendant.

AVERY, J., after stating the case: The plaintiffs offered in evidence a chattel mortgage, executed to them by one Ira N. Purkerson, which

had been proven before the clerk of the Superior Court of Franklin County, and to which his certificate, attested by seal, had been affixed in proper form. The defendant excepted to the ruling of the court that the mortgage was competent, on the ground that in the registry of it in Granville County the seal of the clerk was not recorded.

In *Freeman v. Hatley,* 48 N. C., 115, the Court, after distinguishing the cases where an examination is taken out of the State, and where there is a special requirement in the statute as to the record of such probate, say that the statute then in force (Rev. Code, ch. 37, sec. 1) did "not require the fact of probate to be registered." *Judge Pearson,* for the Court, pointed out the practice where the deed was proven in the county court, in the following language: "The regular course is, when a deed is proven or acknowledged in the county court, to make an entry of the fact in the minutes, and for the clerk, by way of identifying the deed, to indorse on it 'proved and ordered to be registered'; *but there is no statute which requires the register to put the indorsement on his books,* and if the original be lost, we suppose the most plenary proof would be a certified copy from the register, and also a certificate of the clerk of the county court that the deed had been proved and ordered to be registered."

The Court say further, in substance, that where the certificate and fiat were made by a judge of the Supreme Court, not the Superior
(164) Court, there is no secondary evidence of it if lost, but in that event the maxim *omnia presumunter rite acta* comes to the aid of the clerk's indorsement. The Code, sec. 1245, is, in so far as it bears upon our case, in the same language as chapter 37, section 1, Rev. Code, construed by the Court in *Freeman v. Hatley,* while another statute (The Code, 112 [3]) requires the clerks of the Superior courts to record in their general order books copies of all fiats made by them. This construction of the statutes finds support in other adjudications of this Court. *Love v. Harbin,* 87 N. C., 249; *Johnson v. Pendergrass,* 49 N. C., 480. We do not commend the practice of omitting the certificate and fiat when the deed is recorded by the register of deeds, because a full record will prove covenient and useful in case the original should be lost; but it would often prove hard measure if the statutory requirement were made more stringent, or the interpretation of the law now in force were less liberal. If it is not essential that the clerk's certificate should be entered of record at all, it is certainly not material that a seal should have been omitted in the attempt on the part of the register to record it with the deed.

The case of *Williams v. Griffin,* 49 N. C., 31, cited by the defendant, was one where a deed which had been registered, but had no indorsement of a probate on it, not even that declared sufficient in *Freeman v. Hatley,*

supra ("proved and ordered to be registered"), was held not competent as evidence, because it did not appear to have been proven. In *Todd v. Outlaw,* 79 N. C., 235, it appeared that an attempt had been made to prove a deed before a justice of the peace of Ulster County, New York, whose official character was sustained by a certificate of a clerk of a court of record of the same county. The judge of probate of Bertie County had added his fiat to this proof, and the mortgage deed had been registered. The case of *DeCourcy v. Barr,* 45 N. C., 181, is one of those distinguished by *Pearson, J.,* in *Freeman v. Hatley, supra,* because the deed was proven by a commissioner outside (165) of the State.

The mortgage provided that "if by 15 October, 1888, the aforesaid indebtedness has not been discharged by the proceeds of the sale of said crops, or otherwise, then the party of the second part is authorized to take possession of said property and sell the same, or so much thereof as will satisfy the amount then due and all costs and expenses in any way incurred by said seizure and sale. But if said indebtedness shall be paid off and discharged by 15 October, 1888, then this conveyance to be null and void."

The plaintiffs advanced to Purkerson the sum of thirty dollars at the time of the execution of the deed, and subsequently, from time to time, twenty dollars in addition, which sum it is admitted is now due under the contract entered into by him by virtue of the mortgage. But the defendant contends that in fixing 15 October as the earliest time at which a seizure could be made, the parties evinced a purpose that the mortgagor should sell the crop and pay out the proceeds, and that the defendant was safe in assuming, after the failure of plaintiffs to seize before November, 1888, that the mortgagor was selling to him under the privilege given in the mortgage for the purpose of applying the proceeds to the payment of the debt.

We think the contention of defendant is utterly untenable. We know no principle upon which a mortgagee can be fairly deemed to have waived and surrendered his lien upon a crop by a failure to enforce it by seizure for thirty days after his debt becomes due and his lien enforcible; nor can we concur in the very liberal construction of the terms of the contract, which would have left the mortgagor at liberty to sell all crops maturing before 15 October, 1888, and appropriate the proceeds of sale to his own use. In the absence of any agreement as to the time for enforcing a crop lien as between landlord and tenant, it is proper that a crop should be divided as soon as it (166) can reasonably be done after any portion of it is gathered without awaiting the gathering of the whole (*Smith v. Tindall,* 107 N. C., 88), though the landlord can bring claim and delivery before the time

fixed for division, unless the tenant is about to remove or dispose of or abandon the crop. *Jordan v. Bryan,* 103 N. C., 59. By extending indulgence to a debtor until such time as some portion of his crop would in the ordinary course of husbandry be matured, the creditor cannot justly be held by implication to release his lien upon the crop conveyed to secure him.

AFFIRMED.

Cited: Long v. Crews, 113 N. C., 258; *Cochran v. Improvement Co.,* 127 N. C., 396; *Cozad v. McAden,* 148 N. C., 12.

MARY L. HARGROVE ET AL. V. JOHN W. ADCOCK.

Pleading—Evidence—Contract to Convey Land—Frauds, Statute of—Registration—Vendor and Vendee.

1 Plaintiff having set out in the complaint the contract sued upon, the defendant, in answer thereto, stated that he did sign a paper similar to that stated in the complaint, but there was no consideration: *Held,* that this was not sufficient to raise an issue as to the execution of the instrument, but, in effect, was an admission of that fact and dispensed with further proof.

2. Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. Chapter 147, Laws 1885.

3. It is a sufficient compliance with the Statute of Frauds if the contract to convey lands be signed by one who is proved or admitted to have been authorized to execute it by the party to be charged therewith, although the agent signs his own name instead of that of his principal, and the authority of the agent may be shown *aliunde* and by parol.

4. The vendor in a contract to sell land will be bound by it if he has duly executed it, although the vendee has not signed it; and the contract of the vendee may be established by his obligation to pay, though it contains no reference to the contract of sale.

(167) APPEAL from *Whitaker, J.,* at April Term, 1892, of GRANVILLE.

(168) *J. W. Graham for plaintiffs.*
J. T. Strayhorn for defendant.

AVERY, J. The plaintiffs set forth as the basis of their action the following contract, viz.: "I this day agree to buy the Houghtaling

place from R. W. Lassiter, agent of Mrs. Mary L. Hargrove, (169) for twenty-three hundred and fifty dollars (contract agreed upon), and I am to have possession 1 January, 1892, and I obligate myself to carry out the contract on my part, and R. W. Lassiter also does upon the part of Hargrove, this 14 November, 1891." (Signed by J. W. Adcock and R. W. Lassiter.)

The plaintiffs allege that defendant executed it, and in his answer the latter says "that he did sign a paper-writing similar to that stated in the complaint, and that there was no consideration, implied or expressed, therein binding upon defendant." The defendant now contends that, by this evasive answer, he has put in issue the fact of the execution of the paper by him. We think not. Plaintiffs would derive little benefit from the privilege of filing sworn complaints if an issue of fact could be raised by an equivocal answer, or anything short of a direct denial. The defendant simply avers in effect that he did not execute a paper in the form of that set forth, but that he did sign one similar to it. Having admitted that he executed it by the failure to deny the allegations, it remains to determine how such admission affects the competency of the original paper as evidence of the contract where it has never been proven or registered. There is no direct denial that the paper which defendant admits was executed by him was in the identical language set forth, but the defense seems to have rested, so far as appears from the answer, upon the want of consideration, expressed or imlied.

If the contract was admissible in evidence, the consideration, if there was one, might have been shown for the purpose of enforcing the agreement by extrinsic proof, though no consideration was mentioned, and there was nothing in its terms from which it could be inferred that a consideration had passed. *Mizell v. Burnet,* 49 N. C., 249; *Linker v. Long,* 64 N. C., 296; *Tunstall v. Cobb,* 109 N. C., 327; *Beattie v. R. R.,* 108 N. C., 429; *Neaves v. Mining Co.,* 90 N. C., 412.

The provision of the statute (The Code, sec. 1245), which (170) was construed in *White v. Holley,* 91 N. C., 67, was that no conveyance of land nor contract to convey, etc., shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved, etc., and registered. At the next session of the General Assembly the law was so amended as to provide that "no conveyance of land or contract to convey, etc., shall be valid to pass any property, *as against creditors or purchasers for a valuable consideration* from the donor, bargainor or lessor, but from the registration thereof in the county where the land lies." The manifest purpose of the Legislature in amending the statute was to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands *inter se* to litigate

their rights under the rules of evidence in force before the enactment of section 1245. Section 1264 would not have affected the admissibility of such an instrument as that under consideration, and only "conveyances for land" were within the requirements of section 1, chapter 37, Rev. Code. *White v. Holley, supra; Edwards v. Thompson,* 71 N. C., 177; *Mauney v. Crowell,* 84 N. C., 314. The terms of the Act of 1885 evinced as clearly a legislative intent to dispense with the requirement that contracts for the sale of land should be registered as a prerequisite to their being read in evidence, as did the amendment of the older statute (Rev. Code, ch. 7, sec. 1), by inserting "nor contract to convey," etc., manifest a purpose to make registration necessary to their enforcement in the courts, even as between the parties.

There being no defect apparent upon the face of the agreement that would invalidate it, and no denial of the allegation that it was executed by the parties whose names are signed to it, it was manifestly unnecessary to offer to prove its execution, even by the common law method. *Avent v. Arrington,* 105 N. C., 377.

(171) It was in evidence as an admission in the answer that the contract *in ipsissimis verbis* was executed by Adcock, and by R. W. Lassiter as agent of Mrs. Hargrove. The requirement of the Statute of Frauds is that the contract, or some memorandum or note thereof, should be signed by "the party to be charged therewith, or by some other person by him thereto lawfully authorized." The Code, sec. 1554. If there be a written memorial of so much of the contract as is binding on the party to be charged therewith, so expressed that its terms can be understood, and it be signed by one who is proved or admitted by the principal to have been authorized as agent to act for him, it is a sufficient compliance with the statute if the agent sign his own name instead of that of his principal by him. *Washburn v. Washburn,* 39 N. C., 306; *Phillips v. Hooker,* 62 N. C., 193; *Oliver v. Dix,* 21 N. C., 158. The authority of the agent, like the consideration, may be shown *aliunde* and by parol, while the contract of the purchaser to pay may be embodied in a note which contains no reference whatever to the contract of sale, and the agreement to sell is none the less binding on the party to be charged, when there is a failure on the part of the purchaser to bind himself by any writing to perform the stipulations on his part. *Neaves v. Mining Co., supra; Mizell v. Burnett, supra.*

In the exercise of a regulated judicial discretion, the court unquestionably could adjudge, upon the coming in of the verdict, that the plaintiff recover the sum of $2,300, which was the contract price, less $50, the amount found as damage for waste in the destruction of buildings after the contract was entered into, and before the time appointed for the defendant to take possession, and that, unless the defendant

should perform his contract by the payment of said sum before a day certain, the land should be sold by commissioners, etc.

For the reasons given, we are of opinion that there is

NO ERROR.

Cited: Love v. Atkinson, 131 N. C., 547; *Rodman v. Robinson,* 134 N. C., 515; *Robinson v. Daughtry,* 171 N. C., 202.

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(172)

J. N. AMIS ET AL. V. L. J. STEPHENS ET AL.

Tenant in Common—Color of Title—Possession, Adverse—Sale, Judicial and Execution.

The vendee of a tenant in common, or the purchaser at execution sale of land belonging to a tenant in common, takes only such estate or interest as such tenant had, and hence twenty years' adverse possession will be necessary to bar the cotenants; but where a purchaser claims under a judicial sale, based upon a decree which purports to cover the whole estate in the tract, and a deed in conformity therewith, it constitutes color of title to the whole, and seven years' adverse possession will bar the other tenants.

APPEAL from *Whitaker, J.,* at Spring Term, 1892, of PERSON.

W. W. Kitchin (by brief) for plaintiffs. (174)
V. S. Bryant for defendants.

CLARK, J. This case is "on all fours" with *McCulloh v. Daniel,* 102 N. C., 529, which is decisive of it. His Honor's attention was doubtless not called to that case. This is not a deed made by one tenant in common purporting to convey the whole, nor a deed of a sheriff under an execution sale against one tenant in common. In those cases the purchaser takes the right—neither more nor less—which the tenant in common had, and becomes a tenant in common in his stead. Hence twenty years' adverse possession of the whole is necessary to bar the other tenants in common. *Ward v. Farmer,* 92 N. C., 93.

But here the sale, made by order of the court in 1860, purporting to convey the whole, and the decree and deed of the commissioner to same effect, is like the deed of a stranger. It was color of title, and the defendants, and those under whom they claim, have been in adverse possession ever since. It has been more than three years since 1882 (when all the plaintiffs ceased to be under disability) to the beginning

of this action, and the defendants have acquired a good title. The Code, secs. 141, 148; *Johnson v. Parker,* 79 N. C., 475.

Upon the facts found, judgment must be entered below in favor of the defendants.

REVERSED.

Cited: Ferguson v. Wright, 113 N. C., 544; *Lumber Co. v. Cedar Works,* 165 N. C., 86; *Alexander v. Cedar Works,* 177 N. C., 143; *Adderholt v. Lowman,* 179 N. C., 550.

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(175)

JOHN HOPKINS ET AL. V. ELIZA BOWERS ET AL.

Evidence—Marriage—Trial—Demurrer—Judgment, Conditional.

1. Upon the trial of an issue involving the validity of a marriage, it was not error to admit evidence that the wife was reputed to be of mixed blood within the prohibited degrees, or to permit the witness to state his opinion on that point, although not an expert. It was also competent in corroboration of other evidence tending to prove the taint of blood, to show that the wife usually associated with colored people.
2. If a party demurs to the evidence introduced by his adversary, he admits the truth of it with such inferences as may be reasonably drawn therefrom.
3. An alleged widow who is a party to an action by the heirs at law of the husband is not competent to prove the fact of the marriage, or that she lived with him as man and wife, when the marriage is in issue.
4. When the judge signed a judgment, but directed the clerk to strike it out if a bond was filed within five days: *Held,* the condition was invalid, and the judgment was regular and would be enforced.

APPEAL at August Term, 1892, of ORANGE, from *Connor, J.*

(177) *J. W. Graham for plaintiffs.*
C. D. Turner for defendants.

CLARK, J. The issues as submitted were sufficient, and there is no ground to support the exception for refusing to submit those tendered by the appellants. *Humphrey v. Church,* 109 N. C., 132, and cases there cited.

The plaintiff rested his case upon the invalidity *ab initio* of the alleged marriage between Nash Booth and Anne Bowers (or Booth), one of the defendants, under the provisions of The Code, secs. 1084, 1284

and 1810; Const., Art XIV, sec. 8. We see, therefore, no force (178) in the first exception, which was to the witness testifying that Anne Booth was a colored person and reputed to be such. *S. v. Patrick,* 51 N. C., 308. Nor to the second exception, which was to the testimony of the witness who knew her and had had opportunities of observation, that in his opinion said Anne was of mixed blood. It was not necessary that the witness should be an expert to testify to a matter which is simply one of common observation. It has been held in the leading case of *Clary v. Clary,* 24 N. C., 78 (which has been repeatedly approved), and upon the same grounds that one not an expert can give his opinion as to the sanity or insanity of a person he has had opportunities of observing. Besides, the witness really qualified himself as an expert. *S. v. Jacobs,* 51 N. C., 284.

The counsel, in his argument here, objected to the expressions "colored person" and "mixed blood," and cited *S. v. Chavers,* 50 N. C., 11. While those terms might not be accurate in an indictment, it does not appear that any objection to the evidence on that ground was interposed below so as to give the witness opportunity to correct his language, and we must assume the jury understood the words in their usual signification.

When the defendants demurred to the evidence, the ruling of his Honor that thereby the defendants admitted the truth of the testimony, together with such inferences favorable to the plaintiffs as could be reasonably drawn therefrom, was unquestionably correct. *Bond v. Wool,* 107 N. C., 139; *Nelson v. Whitfield,* 82 N. C., 46. Instead of having ground for exception, the defendants are indebted to the favor of the court that they were allowed to withdraw the demurrer. The exception, if any, should have come from the other side.

The fourth exception is also without merit. There was much testimony tending to show that Anne Booth was a colored woman. It was certainly competent, therefore, to put in evidence, as a circumstance in corroboration, to be weighed by the jury, that she usu- (179) ally associated with colored people. Juries are peculiarly fitted to give the proper weight to such evidence in accordance with the social customs prevailing around them and which are matters of common observation.

Nor is there any merit in the 5th, 6th, 7th, 8th and 9th exceptions, which have already been passed upon in the former appeal. *Hopkins v. Bowers,* 108 N. C., 298. The court, under The Code, sec. 590, properly ruled out the evidence sought to be elicited of Anne Booth to show marriage between her and Nash Booth. She was a party to the action and interested in the result, for both plaintiffs and defendants claimed under Nash Booth. If marriage is not a personal transaction between

the contracting parties, what is it? We are unable to accept the view of the defendant's counsel that it is solely the act of the officiating minister or justice of the peace. The rejection of the evidence did not prejudice the defendants, as the marriage certificate was in proof, and the presumption arising was unrebutted as to the act.

Neither is there any merit in the 10th exception, and for the reason given by the court below. The Code, sec. 1360; *Kerchner v. Reiley,* 72 N. C., 171; *Katzenstein v. R. R.,* 78 N. C., 286. Besides, the matter was *res judicata, Roulhac v. Brown,* 87 N. C., 1. The prayers for instructions, so far as they were correct, were substantially given in the charge. The court properly refused to give as a charge the rule formerly prevailing in equity courts. *Ferrall v. Broadway,* 95 N. C., 551. The "broadside challenge" to the "charge as given," has been held invalid in *McKinnon v. Morrison,* 104 N. C., 354, and in the twenty-odd cases since, in which it has been cited and approved, besides in the numerous prior opinions cited in that case.

The judgment upon the verdict in favor of the plaintiffs was signed by the court, and contains no condition. The judge made a (180) verbal conditional order to the clerk in favor of appellants to set aside the judgment and verdict if a bond was filed in five days. This was conditional and of no effect. *Strickland v. Cox,* 102 N. C., 411, cited and approved in *In re Deaton,* 105 N. C., 59, and had it been acted on, the present appellee would have had ground to complain. The judge could not thus delegate his authority to the clerk. We are at a loss to understand how the invalid order in favor of the defendants could impeach the valid judgment in favor of the plaintiffs. In *Strickland v. Cox, supra,* the judgment signed in favor of the plaintiffs was conditional "to be stricken out if," etc., and hence invalid. Here, it is the order setting aside the verdict and judgment "if bond is filed," which is conditional, and hence void. The direction not to docket pending the conditional order was simply a nullity. The Code, sec. 435. The court did not set aside the verdict and judgment, and distinctly stated that it could not say that the verdict was against the weight of the evidence. The sympathy evinced by his Honor for the infant defendants was creditable to his sensibilities, but the practice attempted by him has been often ruled invalid, and could only result in adding to the complications of the litigation, with benefit to no one.

NO ERROR.

Cited: Ward v. R. R., 112 N. C., 179; *Hemphill v. Morrison, ib.,* 757; *Hare v. Board of Education,* 113 N. C., 15; *S. v. Sherman,* 115 N. C., 775; *Hinton v. Ins. Co.,* 116 N. C., 25; *Rickert v. R. R.,* 123 N. C., 258; *Cogdell v. R. R.,* 130 N. C., 326; *Taylor v. Security Co.,* 145 N. C., 396; *Puette v. Mull,* 175 N. C., 536.

L. W. HALL ET AL. v. EMMA TURNER, ADMINISTRATRIX, ET AL.

Contract—Ponding Water on Land.

H. agreed with T. that the latter might pond water upon H.'s land by the erection of a dam of prescribed dimensions: *Held*, that T.'s rights under the contract were not exhausted by the erection of one dam, but he might maintain a dam at that place by the erection of new ones from time to time.

ACTION tried before *Connor, J.*, and a jury, at August Term, (181) 1892, of ORANGE. (See same case, 110 N. C., 292).

Judgment was rendered for plaintiffs, and defendants ap- (182) pealed.

The following is the agreement sued upon:

"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 the said Evans Turner will allow the said L. W. Hall as much woodland along the line fence south of the road. Said Turner is allowed to raise a dam eight or nine 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.]

J. W. Graham for plaintiffs.
J. S. Manning for defendants.

PER CURIAM: Even had there been a misjoinder of causes of action, it could not have been taken advantage of by demurrer until the defendants had withdrawn their answer. *Burns v. Ashworth,* 72 N. C., 496; *Finley v. Hayes,* 81 N. C., 368. The plaintiffs were entitled to recover any damages caused by erecting a dam higher than nine feet.

The court correctly ruled that "the right of the defendant an- (183) cestor and intestate Evans Turner was not exhausted by the building of one dam, but that he had the right to keep up and maintain a dam, and, if necessary to do so, to erect a second dam to the height of nine feet."

We have considered the other exceptions, and they also are without merit.

AFFIRMED.

Cited: Hocutt v. R. R., 124 N. C., 216; *Teague v. Collins,* 134 N. C., 64.

J. EVANS BROWN v. WILLIAM CARTER.

Deed, Construction of—Pleading—Counterclaim.

B., in consideration of services theretofore rendered and thereafter to be rendered him, and with a view to make provision for the children of C., in compliance with provisions to that effect theretofore made, conveyed to C. and his heirs an undivided half-interest in several large bodies of land, together with any moneys which might arise from any subsisting contracts relating to them, subject to certain conditions, among which was that in the event of the death of either the vendor or vendee the survivor should be constituted "a trustee for the heirs of the deceased, with authority to sell and convey the interest of the deceased for the use of his heirs and devisees." Subsequently, the vendor brought suit against the vendee to recover divers sums of money alleged to have been loaned at different times; the vendee answered, alleging that the sums sued for were really advancements made in connection with the management of the joint property, and were to be paid from its proceeds, and that there was due him upon the settlement of the accounts thereof $5,000, for which he demanded judgment: *Held,*

1. The deed conveyed the fee to C., unencumbered with any trust for his children.

2. That the demand of the defendant arose out of the contract, and was properly set up by counterclaim.

AVERY, J., dissenting.

(184) APPEAL from *Brown, J.*, at March Term, 1891, of BUNCOMBE.

The plaintiff brings this action to recover divers sums of money, aggregating $900, which he alleges the defendant owes and refuses to pay to him. The defendant denies the material allegations of the complaint, and also alleges as a counterclaim that the plaintiff is indebted to him in large sums of money by virtue of a deed, the parts of which material to be stated here are as follows: "This indenture, made 5 August, 1885, between John E. Brown and Jane Brown, his wife, of New Zealand, of the first part, and W. B. Carter, of the State of Tennessee, of the second part, witnesseth, that for and in consideration of services rendered for many years past, and for like services hereafter to be rendered to and for said Brown by the party of the second part, as his agent in the supervision, management, protection and disposal of the lands hereinafter described, and with the view to make provision for the children of the party of the second part, and to comply with promises heretofore made by said Brown to the party of the second part to make such or like provision for his said children, the parties of the first part have bargained and sold, etc., unto the party of the second part and his heirs, subject to the trust, limitations, provisions and ex-

ceptions hereinafter expressed, an undivided half-interest in all the mines and minerals thereto belonging, to wit (large bodies of land with certain exceptions, certain rights and credits with specified exceptions), to have and to hold hte same, etc., mines and minerals, moneys, net proceeds of sales, etc., unto the party of the second part and his heirs, but subject, nevertheless, to the exceptions hereinbefore expressed, and to the trusts, limitations and provisions following, to wit: First, the said lands, etc., and the proceeds of all sales shall be liable and subject to a lien for all claims of whatever nature and extent by anyone against the said Brown for or on account of any discrepancies, deficiencies, defaults or obligations growing out of the past management, contract or disposal in any manner whatever of any of the lands of said Brown by any of his agents in North Carolina or Tennessee. (185) Second, in the event of the death of either of the said Brown or the party of the second part, the survivor is hereby constituted and appointed a trustee in respect of said lands, etc., for the heirs of the deceased, with authority to sell and convey the interest of the deceased, etc., for the use and benefit of the heirs and devisees of the deceased, subject, however, to the above provision. Third, the absolute expenditure for the conduct of the business by either party shall be paid out of the first proceeds, and all proceeds received by either shall immediately be divided between the parties entitled, after paying expenses. The said Brown, for the consideration aforesaid, hereby releases unto the party of the second part the balance of $1,352.21 due said Brown as per account rendered to him by the party of the second part. In testimony whereof," etc. Signed and sealed by Brown and wife.

The plaintiff demurred to the counterclaim upon the ground that the said deed creates, declares and provides for a trust in favor and for the benefit of the children of the defendant, and secures to the defendant himself no beneficial interest whatever in the property thereby conveyed, and he is not bound to account in this action with the defendant as to the trust fund, etc. The court held that the defendant has an estate and interest in the property described in the deed, and gave judgment accordingly, and the plaintiff appealed.

F. H. Busbee for plaintiff.
W. H. Malone for defendant.

CLARK, J., having stated the case, proceeded: The only question raised by the appeal is the construction of the deed, and whether, under it, the defendant has any personal interest or holds solely as trustee for his children.

On a careful perusal of the deed, it is incapable of any con- (186)

struction other than a conveyance to Carter and his heirs—not as trustee for his children. The recital therein as a motive for the conveyance, of a desire and a former promise to provide for the grantee's children, cannot control the plain expressions of the deed, especially in view of the sole consideration being recited to be services rendered and to be rendered to the grantor by the grantee. This, it is true, would not control if the deed had been made in fact to the grantee in trust for his children; but the language is not capable of that construction. The deed is a conveyance of a half-interest in the land described therein, and specifies the trusts and conditions as, "first, liability of fund for certain charges; second, in case of death of either party the survivor to hold moiety of deceased for his heirs; third, subject to actual expenditures," etc.; and on these trusts the conveyance is to Carter and his heirs in fee. The intention that Carter should hold for his children is not expressed in the deed anywhere.

The provision in the deed, "All proceeds received by either shall be immediately divided between the parties entitled, after paying expenses," is a contract between the parties, and matters arising thereon, whether legal or equitable, may be pleaded as a counterclaim to the plaintiff's cause of action, which arose upon contract. In such case the counterclaim need not arise out of the same transaction if it existed at the commencement of the action. The Code, sec. 244, sub-sec. 2.

NO ERROR.

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(187)

J. S. BROWN ET AL. v. THE POSTAL TELEGRAPH COMPANY.

Contract, Invalid Against Public Policy—Telegraph Messages—Negligence—Damages.

1. A condition, printed upon the form used for telegraphic messages, that the person or company undertaking to transmit the message would not be liable for damages resulting from delays or mistakes, unless repeated, and then only to an amount therein limited, is contrary to public policy and invalid. (*Lassiter v. Telegraph Co.*, 89 N. C., 334, overruled).

2. There are no "degrees of negligence" in estimating the damages resulting from a failure to properly transmit a telegraphic message; the injured party is entitled to recover, not according to the degree of negligence, but for the injury he has received, unless in a case where punitive damages are allowed.

APPEAL from *Whitaker, J.*, at February Term, 1892, of GRANVILLE. Plaintiffs' agents and commission merchants in Richmond, in May,

1891, wrote and delivered to defendant's agent a message stating that they had received an offer of *twenty*-seven cents per pound for tobacco belonging to plaintiffs on deposit with them, and asked a speedy reply. The defendant's agent negligently substituted the word *"forty"* for "twenty" in the message. Plaintiffs, believing they were offered forty-seven cents, directed a sale, and upon discerning, after the sale, the error, brought this action to recover damages. The message was not repeated.

The following issues were submitted to the jury, who for their verdict returned the answers written below:

"Did the defendant operate and control the line of telegraph between Henderson and Oxford? Answer—Yes.

"What was the value of the tobacco in the hands of M. T. Smith & Co., on 25 May, 1891? Answer—$1,766.53."

The plaintiffs thereupon tendered the judgment for the differ- (188) ence between the sum received and the value of the tobacco as found by the verdict, which his Honor refused to sign upon the ground that as the message delivered to Brown & Knott was an unrepeated message, and the defendant stipulated on the back of the blank upon which said message was written, that it would not be liable for damage on account of unrepeated messages, the defendant was not liable beyond the amount paid by plaintiff for said message, to wit, thirty-seven cents. Plaintiffs excepted.

His Honor then signed the judgment for thirty-seven cents and costs. Plaintiffs excepted and appealed.

J. W. Graham and A. W. Graham for plaintiffs.
John Devereux, Jr., for defendant.

MACRAE, J. The plaintiffs were damaged by the negligence of defendant's agent in substituting the words "forty-seven" in the message as delivered, for "twenty-seven" in the message sent, by reason whereof the plaintiffs' tobacco was sold for a price less than it would otherwise have brought on the market. The message was written on the blank furnished by the Western Union Telegraph Company, with the well-known stipulation upon it that the company would not be liable for damages caused by mistakes or delays, unless repeated. This message was delivered to and sent by the agent of the defendant, The Postal Telegraph Co., but we prefer to treat the question presented as if there were but a single and controlling point involved, and to this we address ourselves.

It was not ordered by the sender to be repeated, and was therefore what is known as an unrepeated message. Upon the admissions in the

pleadings, and the verdict in response to the issues fixing the value of the tobacco at the time of the sale, the plaintiffs moved for judg-
(189) ment in their favor for the difference between the sum actually received by them and the value of the tobacco. His Honor, in accordance with the decision in *Lassiter v. Telegraph Co.*, 89 N. C., 334, denied the plaintiffs' demand and signed judgment in favor of the plaintiffs for the sum paid by the sender to the defendant for the transmission of the message. The plaintiffs appealed, and this brings up again the question whether the stipulation upon the back of the blank, and made part of the contract, as before referred to, is valid and binding upon the parties.

It was held by a divided court in *Lassiter v. Telegraph Co., supra,* that a stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for mistakes in transmitting unrepeated messages, is a reasonable one and will be enforced by the courts. Lassiter's was the first case which came before this Court involving a construction of the said stipulation and its effects upon the rights and liabilities of the parties thereto. This Court, recognizing the persuasive authority of the courts of last resort in other states, adopted the views expressed in a majority of the cases which had been decided, although even then there were very respectable authorities to the contrary. Since this decision was made, there has been much discussion, and many and conflicting adjudications upon the same question have been made in other courts. And we are induced to review the opinion heretofore announced by this Court.

It was early held that telegraph companies were not common carriers and therefore not insurers, but that there was an analogy between the duties and responsibilities of these transmitters, for reward, of messages, and those of carriers of goods for hire, and that the former were, like the latter, held to a high degree of diligence in the conduct of their business. Thompson on Electricity, sec. 137, and note.

(190) When the art of telegraphy was yet in its infancy, when its operators were untrained, its appliances crude and its efforts tentative, it would have been unreasonable to require that skill which would be demanded in a more advanced stage when, with practiced operators and perfected machines, the system had become an indispensable part of the business of the world.

The condition printed as a part of the contract upon the back of the blank upon which messages were written, that, to ward against mistakes and delays, the sender of a message should order it repeated at an additional charge of one-half the regular rates, was considered not so much a stipulation against negligence, as a reasonable precaution in order to procure accuracy in the transmission of messages by means

of the electric current. It was then that by the fancied analogy between this system and the business of the common carrier, the courts came to use the terms which had been used with regard to the latter, and to hold that the telegraph companies might, on account of the novelty of their operation, provide against negligence on the part of their employees, or by reason of imperfections in their instruments, by means of which negligence or imperfections, mistakes and delays were permitted to occur in the transmission of messages. The then recognized distinction between what was called gross and ordinary or slight negligence was invoked, and it was held that while for ordinary or slight negligence they would not be responsible, yet they would be held to account for gross or willful negligence.

But negligence is the failure to exercise that care which, under the circumstances of the case, a prudent man ought to use. There can be no degrees in negligence in this matter. In ascertaining what damages may be awarded against one for injury by reason of negligence, the question whether it was gross or ordinary may determine as to punitive or compensatory damages; or where the doctrine of comparative negligence is recognized, it may be necessary to distinguish be- (191) tween degrees; but where there is a contract to transmit a message for reward, a failure to perform the undertaking is either excusable or negligent—if negligent, the party injured thereby is entitled to his damages, not according to the degree of negligence at all, but in proportion to his injury, unless it be a case in which punitive damage is allowed. If, on account of an electrical disturbance in the atmosphere a message could not be sent, so that there was delay; or it could not be but imperfectly sent, so that words were dropped; or if from any other cause, not to be provided against with the appliances afforded by science and by reasonable foresight, there was a failure to comply with the contract, these were matters provided for by law, and not necessary to be stipulated against in the contract.

The old principle that one cannot provide by contract against liability for negligence, applies to every species and degree of negligence or tort. Cooley on Torts, 687. In *Lassiter v. Telegraph Co., supra,* this exemption from liability "is not extended to acts of omission involving gross negligence, but is confined to such as are incident to the service, and which may occur when there is but slight culpability in its officers and employees."

In *Pegram v. Telegraph Co.,* 97 N. C., 57, it is said that the stipulation on the back of the blanks restricting liability for unrepeated messages, where the complaint is not a mistake in the message, but for delay or failure in delivery, is unreasonable and void. In *Cannon v. Telegraph Co.,* 100 N. C., 300, the doctrine in *Lassiter's case* is affirmed,

but the language of the opinion in *Telegraph Co. v. Hall,* 124 U. S., 444, is quoted with approval: "Of course, where the negligence of the telegraph company consists not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts
(192) in the purchase or sale of property, the actual loss, based upon changes in market value, are clearly within the rule for estimating damages."

In *Thompson v. Telegraph Co.,* 107 N. C., 449, reasserting that this stipulation, as far as delay is concerned, is void, a doubt is intimated as to its validity at all, and it is plainly said, though not necessary to be declared in the decision upon the point involved in that case, "The more recent cases, founded upon the more thorough investigation and thought given to the subject, are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void." We refer to the cases from other states cited in the opinion just referred to. *Gillis v. Telegraph Co.,* 61 Vt., 461; *Ayer v. Telegraph Co.,* 79 Me., 493.

We have come to the conclusion, after a natural hesitation, to overrule a decision of a majority of this Court announced by the former very learned *Chief Justice,* that the true principle is, that telegraph companies are corporations erected for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and, in cases where celerity and dispatch are necessary, taking the place of the postal service, that at least ordinary skill and diligence are required of them, and that public policy forbids they should be protected from liability for damages by reason of any degree of negligence. Gray on Communications by Telegraph, sec. 46, and cases there cited; Thompson on Electricity, secs. 235, 236, and note.

As the art of telegraphy has now attained such high efficiency, there is less reason why any rule of safeguard to the public interest should be relaxed.

The principles of the law are always the same, but they extend their grasp and take in the necessity for those new things which the advance in science and art provide for the public safety and convenience,
(193) and require them to be used. The increasing number of higher courts, both State and Federal, with their ever accumulating decisions, render it impracticable that we should cite many of the authorities bearing upon the subject we have under consideration. Most of them are referred to in Gray Telegraph, chap. 5; Thompson Electricity, chaps. 6 and 8; 2 Harris Damages by Corporations, sec. 869, *et seq.*

There is an additional proviso in the printed indorsement upon the telegraphic message blank to that which we have just considered: "Nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured." The reasons which have brought us to the conclusion that the condition we have already considered is void, will apply with equal force to the one now presented. "The precept of public policy which, on the ground of the inequality of the parties, the compulsion of the employer and the duties of a telegraph company towards the public, dictates the invalidity of a stipulation limiting the liability of a telegraph company to nothing beyond the price paid for transmission, must equally deny validity to a stipulation limiting the liability of a telegraph company to fifty times that price." Gray on Tel., sec. 51.

There is error. Upon the admissions and the verdict, judgment should be rendered in favor of the plaintiffs and against the defendant for the sum claimed in the judgment presented by them as set out in the record.

REVERSED.

Cited: Sherrill v. Tel. Co., 116 N. C., 658; *Hendricks v. Tel. Co.*, 126 N. C., 311; *Thomas v. R. R.*, 131 N. C., 591; *Efird v. Tel. Co.*, 132 N. C., 271; *Helms v. Tel. Co.*, 143 N. C., 394; *Williamson v. Tel. Co.*, 151 N. C., 228, 229; *Winslow v. R. R., ib.*, 253; *Young v. Tel. Co.*, 168 N. C., 37.

(194)

THE BANK OF OXFORD v. WILLIAM A. BOBBITT ET AL.

Clerks—Execution—Salaries and Fees—Penalty—Statutes, Construction of.

Clerks of the Superior Court will not incur the penalty prescribed in section 470 of The Code for failure to issue execution within sixty days, unless the plaintiff pays or tenders him his fees for that service. (*Williamson v. Kerr*, 88 N. C., 10, distinguished.)

MOTION for judgment, heard February Term, 1892, of GRANVILLE, by *Winston, J.*

His Honor refused the motion, and plaintiff appealed. The case is stated in the opinion.

L. C. Edwards for plaintiff.

J. W. Graham for defendants.

MACRAE, J. This is a motion for judgment absolute on amercement of the defendant, the clerk of Granville Superior Court, for neglect to issue execution upon a judgment of said court within six weeks from the rendition thereof, according to the provisions of section 470 of The Code.

The presiding judge found as a fact that no money was ever paid or tendered to the defendant as fees for issuing said execution.

This statute is highly penal and must be construed strictly (*Bank v. Stafford,* 47 N. C., 98); it was passed in 1850, and brought forward into The Code when it was enacted. Standing alone, there could be no doubt of its plain meaning; but it is our duty to consider all other statutes *in pari materia,* in arriving at our conclusions as to the meaning of this one.

Section 555 of The Code of Civil Procedure, as adopted in August, 1868 (it being the first section of chapter 1 of title XXI, on Fees), provides "that the several officers, hereinafter named, shall re-
(195) ceive the fees hereinafter prescribed for them respectively, from the persons for whom, or at whose instance the service shall be performed, except persons suing as paupers, and no officer shall be compelled to perform any service unless his fees be paid or tendered." Upon examination of the chapter following in the same title prescribing the fees to which the clerk of the Superior Court shall be entitled, we find no fee for issuing execution. So that, as the law stood under the statutes above quoted, there would be no valid ground for relief from the penalty prescribed in the Act of 1850 for neglect to issue execution as therein directed.

Laws 1868-69, ch. 279, amends materially title XXI of The Code of Civil Procedure, but reënacts section 555. Laws 1870-71, ch. 139, sec. 11, prescribes the fees for clerks of the Superior Court, and provides a fee for execution, which can mean nothing but for the issuing of execution. It repeals chapter 1 and others of title XXI of Code of Civil Procedure, which includes section 555. It also repeals part of chapter 279, Laws 1868-69, but does not repeal that section of said chapter 279 which reënacted C. C. P. section 555. *Andrews v. Whisnant,* 83 N. C., 446.

So, from 1870, we have had the two statutes upon our books, the one requiring the clerk to issue the execution, unless otherwise directed; the other providing for his fees for issuing execution, and providing further that he shall not be compelled to perform any service unless his fees be paid or tendered. The two sections of The Code must be construed together. We must advert to their history to reach the spirit and meaning of them. The object of the Act of 1850 was to secure as part of the fruits of the judgment a lien upon the property of the de-

fendant. The clerk was directed not only to issue execution, but to indorse upon the record the date of such issuing, that the *teste* of the execution might be preserved to which the lien of the levy (196) on land might relate; and the clerk was directed to issue *alias* if necessary. Under our present system of docketing judgments, the lien is otherwise attached and preserved. The necessity for the issue of the execution, unless directed so to do, has ceased. The effect is simply to increase the size of the bill of costs against the day of satisfaction. The practice, as a matter of fact, has fallen into disuse, and this shows the view of the profession generally upon the question.

It seems that this section, 555 of The Code of Civil Procedure, and of the Act of 1870-71, was not brought forward in Battle's Revisal, but it was none the less the law. *S. v. Cunningham,* 72 N. C., 469.

The case of *Williamson v. Kerr,* 88 N. C., 10, is relied upon by the plaintiff as plain authority in favor of his motion. It will be observed that no counsel appeared for the defendant, and no reason was suggested to the court why the judgment should not be absolute. It was left to the court to search the statutes to ascertain the ground relied upon by defendant. In Battle's Revisal, ch. 44, sec. 28, was found the Act of 1850 requiring the clerk to issue execution. Section 555 of The Code of Civil Procedure had not been brought forward, and the court was misled in not adverting to it.

This section, however, was brought forward and reënacted in The Code of 1883 as sec. 3758 of ch. 57—on Salaries and Fees—and in the same chapter, section 3739, among the fees prescribed for clerks of the Superior Courts, there is one for execution and return thereof; so that here was the fee prescribed for issuing execution and the proviso that the officer could not be compelled to perform the service unless his fees were paid or tendered. Section 470 of The Code, the Act of 1850, still stands upon the statute book; but it is "sticking to the letter" to say that, notwithstanding the reason has failed and the latter statute has provided that the clerk cannot be compelled to per- (197) form any service unless his fee be paid or tendered, section 470 must be construed alone, to force the clerk to do that which, in a majority of cases, is now unnecessary, and the result of which is only to oppress the debtor by heaping up costs against him.

The other cases relied on by plaintiff, *Badham v. Jones,* 64 N. C., 655, and *McIntyre v. Merritt,* 65 N. C., 558, were where judgments had been rendered before the passage of section 3758, and therefore were not authority for our present purpose. Section 551 of The Code expressly requires the clerk, on receiving a copy of the case settled, to make copy and transmit the same to the Clerk of the Supreme Court.

The case of *Andrews v. Whisnant, supra,* holds that he is protected from failure to do so, unless his fees are paid or tendered.

We conclude that the requirement of section 470 of The Code is qualified by section 3758, and, construing them together, that the law now is that the clerks of the Superior court shall issue execution within six weeks after the rendition of judgment, unless otherwise directed by the plaintiff, provided the plaintiff pays or tenders him his fees for the service, and that there is no error in the judgment below.

AFFIRMED.

J. H. PERRY, EXECUTOR, v. W. S. WHITE.

Mortgage—Subsequently Acquired Property.

A mortgage upon subsequently acquired property, other than crops, is valid, *inter partes,* and their assignees.

(198) APPEAL from *Shuford, J.,* at Spring Term, 1892, of CHOWAN.

The following are the facts agreed:

1. On 2 September, 1887, W. W. and Samuel E. Morris, executed to W. S. White a lease.

2. On 14 December, 1887, W. T. and W. S. White, to secure two notes of $400 each, payable to said Morris, executed a deed of trust to W. D. Pruden for the following property, to wit: "The steam engine, sawmill and fixtures of all kinds, with the buildings and other structures now erected, or hereafter erected on the land of W. W. Morris and Samuel E. Morris, in Chowan County, known as the Chambers Ferry. The engine and mill now on hand being the same moved from Pasquotank County."

3. After the execution and registration of the said deed of trust, W. S. White and W. T. White erected a mill-house and other buildings on the land described in said lease to said W. S. White. And on the..... day of ....., 1890, Pruden, trustee, sold the mill-house and shelters under said trust, and said White being present at the sale, forbidding the same. Morris purchased the said buildings at said sale and subsequently sold the same to plaintiff's testator, A. A. Perry, who instituted the present proceedings of claim and delivery, and took possession of said buildings and removed them, and since that time they have been destroyed by fire.

At the institution of this suit, the said buildings had not been severed from the land and were worth seventy-five ($75) dollars.

The court, with consent of all parties, upon facts agreed upon in writing and filed, and being considered, on motion, adjudged that the property described in the pleadings is the property of the plaintiff, and that his seizure of the same in this action was rightful. From which the defendant appealed.

No counsel for plaintiff.
Skinner & Leary for defendant.

CLARK, J. This is not the case of a mortgage upon realty in (199) which improvements put upon the land by the mortgagor become additional security for the debt. *Wharton v. Moore,* 84 N. C., 479; *Barker v. Owen,* 93 N. C., 198. Nor is it the case of a mortgage upon crops, as to which it has been held that there could not be a mortgage enforceable at law, upon a crop other than that of the year immediately ensuing the execution of the mortgage. *Loftin v. Hines,* 107 N. C., 360, and cases there cited. The mortgage here is upon trade fixtures, which the mortgagor had the right to remove, and not only upon those existing when the mortgage was executed, but also on those thereafter "to be affixed."

The question presented, therefore, is as to the validity of a chattel mortgage upon subsequently acquired property, other than crops. At common law no mortgage was valid except upon property in existence and actually or potentially the property of the mortgagor when the mortgage is given. This doctrine has been modified to a varying extent in different jurisdictions. We need not consider the much discussed question whether a mortgage upon subsequently acquired property is valid as to third parties who have acquired rights by attachment or levy of an execution. The decisions on that point are diametrically opposed, and by courts of the highest dignity. Herman on Chattel Mortgages, sec. 46; *Long v. Hines,* 10 Am. St., 192, and notes; *Borden v. Crook,* 19 Am. St., 23; Jones Chat. Mortgages, secs. 138, 171, 173, 174; *Gregg v. Sandford,* 76 Am. Decisions, 719, and notes 723-733; *Moody v. Wright,* 46 Am. Dec., 706, and notes. There is, however, almost a consensus of opinion that a mortgage upon subsequently acquired property is valid as to third parties when given upon the rolling stock of a railroad, upon the ground that such acquisitions are not for the purposes of resale, but for permanent addition and betterment in the use of the road which is mortgaged, and for the further reason that generally there is a legislative act authorizing it. *Pennoc v. Coe,* (200) 23 Howard, 171; 1 Jones Mort., secs. 152-155; *Cotten v. Willoughby,* 83 N. C., 75; Herman, *supra,* sec. 48; Jones on R. R. Securities, secs. 121-145.

In the present instance the controversy is between the mortgagor and the assignee of the purchaser at the mortgage sale. No rights of third parties have intervened. In such cases the great weight of authority now is in favor of the validity of such contract in equity, *inter partes. Beale v. White,* 94 U. S., 382; Jones Chattel Mort., secs. 161-166, and cases there cited; *Ludwig v. Kitt,* 20 Hun., 265; *White v. Thomas,* 50 Miss., 49; *Wisner v. Ocumpagh,* 71 N. Y., 113; *Moody v. Wright, supra.* It is needless to consider here whether or not claim and delivery proceedings lay for the recovery of the fixtures before being severed. The plaintiff under such proceedings actually took possession and removed the buildings "afterwards erected," as specified in the mortgage; they have since been destroyed by fire, and as the mortgage thereon was valid as between the parties, it is clear the defendants cannot recover the value of the property, which ceased to be theirs after the sale under the mortgage.

AFFIRMED.

Cited: Cooper v. Rouse, 130 N. C., 204; *White v. Carroll,* 146 N. C., 233; *Lumber Co. v. Lumber Co.,* 150 N. C., 286; *Dry Kiln Co. v. Ellington,* 172 N. C., 484.

RUFFIN LEE ET AL. v. ANNA B. WILLIAMS ET AL.

Exceptions—Appeal—Trial—Will—Evidence.

1. Exceptions to the refusal of the court to grant a prayer for instructions, or in granting a prayer, or to instructions generally, cannot be taken for the first time in the Supreme Court; properly, they should be made on a motion for a new trial, but it is sufficient if they are assigned in the statement of the case on appeal.

2. Upon the trial of an issue *devisavit vel non,* the caveators offered testimony tending to show that the testator had made a will devising his property to propounders—a second wife and her daughter—to the exclusion of his children by a former marriage; that subsequently he became dissatisfied with its provisions and expressed a purpose to alter it and make some provision for his children; that the wife had possession of the instrument and would not produce it, and that she, at times, was not kind to him, and that testator died without making any alteration in his will. There was no other evidence of threats or undue influence: *Held,* that it was error to submit the testimony to the jury, as it contained no evidence to support the allegation that the paper was not a valid will.

(201) ISSUE of *devisavit vel non,* tried at Fall Term, 1891, of ORANGE, before *Winston, J.* Judgment for the caveators. Appeal by the propounders.

The following is so much of the evidence as need be set out:

Ben Howard: "Deceased said to me that he 'had made a will; Mr. Parrish wrote it; willed all to his wife Jane, and if he lived to see Monday he was going to send for Mr. Parrish to come and alter it'; Jane then came into the room; she was about 'half snapped' (which he explains to mean drunk); he told Jane to please go out; she did so; she then came back twice and said she had toothache; deceased said, 'You disturb me so I can't have any peace with my friends'; said to me he had left all to Jane and Annie, and was dissatisfied, and was going to alter it Monday; that his daughter Sallie had run away and married a man he did not like, else he would have left her his property; none of deceased's family lived with him since he married Jane—disagreeable for them there," etc.

Ellen: "Often visited deceased; Jane was very kind to him; after he got sick she was very ill to him; I said to him that I had heard he had not willed his children anything; he said, 'Yes, I was very mad then, but now I think they ought to have something, and I (202) want to see Mr. Parrish and have it changed'; was dissatisfied now with the will; said his wife was not the woman he took her to be; did not say how or why that he treated her bad."

William Allison: "Son of deceased; father said to me, 'I was mad when I made the will, and am dissatisfied; you were gone and the children were gone; I could not hear from you, but now I want it changed.' After that Mr. Parrish came, and Jane said, 'Don't change the will, and I will give William a lot on the hill'; deceased could not get the will, because his wife had locked it up; Jane, the wife, said, 'If I go away, you children will throw me out of the house'; father told me after Christmas that Jane treated him like a dog; she was drunk at that time; I ran away because stepmother treated me bad in 1885."

William Rogin: "Deceased told me that the will did not satisfy him; that he made it to keep peace and on account of his wife; that he wanted to see Howard and was going to have it altered; Jane then had toothache."

J. W. Graham for caveators.
C. D. Turner for propounders.

MACRAE, J. The following is the issue presented to the jury: "Is the paper-writing, or any part of same, propounded for probate, and if so, what part, the last will and testament of Augustus E. Allison, deceased?"

The propounders rested after proving the formal execution of the instrument, which was not controverted. The ground upon which the

validity of this instrument as a will was impeached, was "that its execution was procured by the undue influence of Jane Allison, *alias* Jane Wheaton, and the said Augustus Allison was prevented by the conduct and threats and undue influence of said Jane Wheaton from altering and canceling said paper, as he desired and intended to do."

(203) The caveators examined several witnesses offered in support of their contention, and, having closed, "his Honor stated that if the jury should set aside the will on the testimony, the court would be compelled to set the verdict aside, and in order that the caveators may have full benefit of the exception, the court will charge the jury that the proof is not sufficient to go to the jury. The caveators ask to have the jury pass upon the matter anyway, and the court again says: 'Well, gentlemen, you may do so if you choose, but you have the views of the court.'" Thereupon the *propounders* called additional witnesses.

We have carefully examined all the testimony, as reported in the case on appeal, and we concur in the opinion expressed by his Honor when the caveators closed. It was a useless consumption of time and protraction of the trial by the propounders to have introduced further testimony, and we can see nothing in the additional evidence offered, on both sides, which would have changed the view already expressed by his Honor. The testimony is voluminous and extended, and no good purpose would be subserved by setting it out here; but there was no testimony which in itself tended to establish the fact either of threats or of undue influence. The counsel for the propounders, however, presented no request in writing for a special instruction to that effect, though he seems to have made it orally at the close of the caveator's testimony and again during his argument.

Section 415 of The Code provides that "counsel praying of the judge instructions to the jury, shall put their requests in writing, entitled of the cause, and sign them; otherwise the judge may disregard them."

The authorities on the subject are so numerous that we will cite only the last cases, *S. v. Horton,* 100 N. C., 443, and *Posey v. Patton,* 109 N. C., 455.

There are several exceptions to the charge of his Honor, all of which but the one we shall notice hereafter are without merit, and indeed were not relied upon in this Court. His Honor instructed the jury,

(204) among other things: "If the jury believe that the will was executed by the deceased in his lifetime, a man capable of making a will, that is, of sound mind and disposing memory, and the same was witnessed by James Norwood and Calvin E. Parrish, who signed the same as witnesses at the request and by the direction of the deceased and in his presence, then the court charges you that this is the last

will and testament of Augustus E. Allison, the deceased, unless the caveators have shown you from the evidence that the will was procured by the undue influence and conduct the witness, Jane Allison, exercised over the deceased." To this the propounders except.

By section 412, sub-section 3 of The Code, it is provided: "If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections." This section is not to be construed to permit an exception to be taken for the first time in the Supreme Court, but it is sufficient if set out in appellant's case on appeal, although the proper method of taking advantage of it is to assign error on a motion for a new trial. Clark's Code, 2 Ed., p. 382. Here we find an exception noted and an assignment of error in this particular; and we hold the exception well taken, although the propounders could not take advantage of the refusal of his Honor to give the instruction asked, because it was not in writing, as required by the statute.

The error in the charge is in leaving it to the jury to decide whether the caveators had shown from the evidence that the will was procured by the undue influence and conduct of the witness, Jane Allison, exercised over the deceased, when there was no evidence to go to the jury to enable them to find such to be the fact. If there had been any evidence, however slight, it would have been the duty of his Honor to submit it to the jury, and if they should have found against its weight, it would have been in his discretion to have set the verdict aside; but that province does not belong to this Court, and we could (205) not have disturbed it.

The evidence in this case was not sufficient to raise a conjecture, and was an insufficient foundation for a verdict, and therefore was no evidence to be left to the jury. *S. v. Vinson,* 63 N. C., 335.

Although it was not error to refrain from giving instructions, unless they are asked, yet care must be taken when the judge thinks proper, of his own motion, or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury. *Bynum v. Bynum,* 33 N. C., 632; *Burton v. R. R.,* 84 N. C., 192.

NEW TRIAL. Error.

Cited: Linebarger v. Linebarger, 143 N. C., 238; *In re Fowler,* 159 N. C., 208.

JUDITH W. HARRISON ET AL. V. T. L. HARGROVE ET AL.

PETITION OF PLAINTIFF TO REHEAR. (See 109 N. C., 346.)

Batchelor and Devereux (by brief) for petitioners.
E. C. Smith contra.

PER CURIAM: We have carefully examined the petition filed in this case, as well as the learned brief of the counsel for the petitioners. Upon due consideration, our conclusion is that the judgment heretofore rendered should not be disturbed. As the opinion of the Court fully sets forth our views, it is needless to repeat them in disposing of the present proceeding.

PETITION DENIED.

(206)

WILLIAM A. BARBER v. WILLIAM H. BUFFALOE.

Assignment in Fraud of Creditors—Exemptions—Evidence—Fraudulent Intent.

1. The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent.
2. Employing an attorney who resides at some distance, and in another county, to draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud.
3. In an action by the assignee, under a deed of assignment for the possession of certain articles conveyed and described therein, in the possession of a constable under execution, it appeared that the assignment, which preferred one creditor, was made after summons served and promise made to pay some of the debts on a day certain, and immediately after such service and promise the assignee sent some distance to another county and procured an attorney to write the assignment in great haste, and in the night, and the same was in like manner recorded: *Held*, (1) that these circumstances are not inconsistent with an honest intent; (2) that such haste and secrecy might well have been in the interest of the preferred creditor; (3) that, it appearing further, by the assignor's testimony, that his intent was not fraudulent, the court erred in not giving the instruction asked, "that there was no sufficient evidence to go to the jury that the plaintiff was not the owner of the property described in the complaint."

MACRAE, J., dissenting.

APPEAL at September Term, 1892, of NORTHAMPTON, from *Brown, J.* The debtor, J. C. Lassiter, assigned his stock of goods and many other

articles of personal property, subject to his exemption "to be set apart to him in the manner provided by law," and also all his notes and other evidences of debt, to the plaintiff as trustee, with power to sell publicly and privately and apply the proceeds as they might arise from sales and collections: first, to the payment of the costs incident to the execution of the trust and five per cent as the commissions of the trustee; second, to the discharge of the residue of a debt due to a particu- (207) lar creditor for borrowed money remaining unpaid after the sale of a tract of land already conveyed to such creditor to secure the same debt; and thirdly, any residue left after paying the personal property exemption, costs and commissions *pro rata* in satisfaction of all other outstanding debts.

The defendant Buffaloe served summons in two actions, brought by one Augustus Wright, on Lassiter, Saturday, 7 December, 1889, and obtained judgment the same day, but he did not place execution in the defendant till 11 December, 1889. On Saturday, when defendant served summons, Lassiter told him, if defendant's testimony is to be believed, that he would come to Jackson on the following Thursday, would see Mr. Peebles, counsel for Wright, and make arrangements to pay the debt. But on Saturday night one Riddick was sent by Lassiter, for whom he was then acting as clerk, eighteen miles to bring a lawyer from Scotland Neck (Jackson, the county seat, being only fourteen miles from his home). The attorney arrved at Lassiter's house on Sunday morning, and at 1 o'clock on Monday morning wrote the assignment, which was taken to Jackson by Riddick, who was accompanied by plaintiff, so early that it was necessary to arouse the clerk and register of deeds in order ot have the assignment proved and registered. Riddick and Barber returned to the store in about two hours, and the latter took possession of the property conveyed, on the same day, Monday. Four days later, the defendant, as constable, levied the execution in favor of Wright on the unsold goods in the store and seized them. Lassiter testified, among other things not material, as follows: "I made the deed in trust to pay the creditors named in the trust, not to cut out Augustus Wright. I wanted to prefer Norman & Emmett, because I owed them borrowed money, and I put all other creditors on equality." The defendant, as an officer, levied the executions placed in his hands on the day he received them (11 March, 1889), on the stock of goods, and the plaintiff, as trustee (208) named in the deed of trust, brought the action to recover them.

Upon the testimony, of which the foregoing summary sets forth all that is material, the plaintiff asked the following instructions: "That there is no sufficient evidence to go to the jury that the plaintiff is not the owner of the property described in the complaint." The request

was refused, and the plaintiff excepted. Verdict and judgment for defendant. Plaintiff appeals, and assigns as error the refusal to give the instruction asked.

R. O. Burton for plaintiff.
S. F. Mordecai for defendant.

AVERY, J. The testimony of Lassiter as to his intent was not contradicted, unless the circumstances, shown by him and other witnesses, were badges of fraud to be submitted to the jury as tending to prove a purpose on his part to hinder, delay or defeat other creditors. The fact that the goods were in express terms assigned "subject to his personal property exemption to be set apart to him in the manner prescribed by law," is no evidence of a fraudulent intent whatever, and it would be error to submit the fact to the jury as tending to show such purpose. *Eigenbrun v. Smith,* 98 N. C., 207; *Bobbitt v. Rodwell,* 105 N. C., 244. The circumstances that the deed clothes the plaintiff, as trustee, with power to sell for cash, either publicly or privately, is not inconsistent with perfect good faith, and is not a badge of fraud to be considered by the jury as bearing upon the intent. *Bobbitt v. Rodwell, supra.* The employment of a lawyer who lived outside of Northampton County and eighteen miles from the debtor's residence, while (209) the courthouse was distant only fourteen miles, was not a circumstance to be left to the jury as tending to show the intent. It is not necessary to adduce authority in support of the proposition that the court could not leave the jury at liberty by express instruction to infer fraudulent intent from the fact of employing counsel living outside of the debtor's county, or more remote from his home than the courthouse of his county. But after telling the defendant when he served the summons on him in two cases on Saturday morning about 10 o'clock, to say to Mr. Peebles (counsel for the creditors suing) that he would "come up on the next Thursday and try to make arrangements," the debtor sent his clerk on the same evening to Scotland Neck for his own counsel (Mr. Dunn), who arrived on Sunday morning, and, after waiting for the Sabbath to pass, wrote, at 1 o'clock Monday morning, the assignment which, upon being duly executed, was sent by his clerk Riddick, accompanied by the plaintiff, to Jackson, where they aroused the clerk and register of deeds from their slumbers in order to prove the assignment and cause it to be registered. The main question, therefore, is whether the conduct of the debtor, in making all of these arrangements to expedite the execution and registration of the deed, was sufficient of itself to go to the jury as evidence of fraudulent purpose to hinder, delay or defeat the creditors, other than

Norman & Everitt. It must be remembered that Lassiter had previously mortgaged a tract of land to secure the debt due to Norman & Everitt, and in the assignment, after preferring them as to any balance due over and above the sum realized by selling the land, had provided for the payment *pro rata* of all other debts owing by him, whether mentioned therein or not. So that the only practical effect of his haste in the preparation, execution and recording of the deed, was to give Norman & Everitt a lien upon the goods before the other creditor, Wright, could thwart his purpose by seizing them. The law recognizes the debtor's right to prefer, by assignment, duly registered, one or more creditors over all others up to the very moment when (210) a superior lien is acquired by seizure under execution. The facts in this case, in any aspect, show that the debtor has but exercised the privilege which is universally according to him in this State. *Guggenheimer v. Brookfield,* 90 N. C., 232; *Hofner v. Irwin,* 23 N. C., 496.

Waite, on Fraudulent Conveyances, sec. 390, in note, says: "The right of a debtor under the rules of the common law to devote his whole estate to the satisfaction of the claims of particular creditors, results from the absolute ownership which every man claims over that which is his own. It makes no difference that the creditor and debtor both knew that the effect of the application of the insolvent's estate to the satisfaction of the particular claim, would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce the satisfaction of their claims. If there is no secret trust agreed upon between the debtor and creditor in favor of the former, the transaction is a valid one at common law." If the debtor makes choice of creditors, merely, without contriving that any other particular creditor or class of creditors shall never be paid, or shall be delayed, hindered or embarrassed in the enforcement of their demands, he exercises a right accorded to him by law. Bump. Fraud. Con., p. 223. "A preference may be given," says Bump., p. 218, "and received for the express purpose of defeating an execution, for the mere intent to defeat an execution does not of itself constitute fraud. This is not delaying or hindering within the meaning of the statute. It does not deprive other creditors of any legal right, for they have no right to a priority. It is a race in which it is impossible for everyone to be foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled to what he wins, provided he takes no more than his honest due."

If Wright had actually obtained judgment and caused execution to issue, the mere preference of another creditor after that, (211)

though the assignment was executed in the night time, was not fraudulent, if there was no purpose to defeat the collection of Wright's claim, except in so far as such a result was necessarily incidental to the preference.

The creditor, represented by the defendant, is not attacking for fraud a conveyance of the property to another, or in trust for the exclusive benefit of others, but an assignment under which he (Augustus Wright) with all creditors, other than the preferred firm, is to share as a beneficiary in proportion to the amounts of their respective claims. If the debtor's right to prefer by assignment can be exercised in favor of any one debt up to the very moment when a lien is acquired by some other creditor, have the courts power to restrict this privilege, of which the Legislature has refused to deprive debtors since the repeal of the stay laws, by arbitrarily declaring that if arrangements are made on Saturday night, and after suit brought on Saturday morning, for its exercise before daylight on Monday morning, the jury may be left to draw a distinction more subtle than any of the diversities of *Lord Coke,* or the refinements of mediæval metaphysicians between knowingly preferring a given claim on the day before suit is brought, and the exercise of the same right which the Legislature persistently refuses to take from him, on Monday morning before daylight? Assignments are usually made by men who are not able or not willing to meet their obligations and perform their promises, and it would seem not simply paradoxical, but absolutely absurd to assert for a debtor, who assigns because of failure to keep his promises, the unqualified power to create a superior lien on his property in favor of any given creditor up to the moment of docketing a judgment, and at the same time claim for the creditor the right to appeal to a jury to set aside the deed giving the preference because the suit had been brought (not judgment (212) entered) before its execution, and because he had superadded a vague promise to make arrangements on a given day to his already broken agreement to pay at maturity. Bump. F. C., 218. If the last false promise is a circumstance to be considered at all, then the failure to meet his obligation to each creditor, as debts fall due, can be arrayed in solid phalanx to show that his intent was to defraud. Law is founded upon reason, and it would be not only sticking in the bark to attempt to follow such a nice refinement, but would lead to a contradiction of another well settled and important principle, often called in aid to determine a question of motive or purpose. A person is always presumed to intend the natural, much more the inevitable, consequences of his own act, and if the only purpose was to prefer Norman & Everitt even to the extent of appropriating all of the assets, if necessary, to the payment of that debt, such a consequence might

reasonably and naturally be expected to result from the exercise of the power to prefer. The debtor testified that his whole purpose was to discharge the debt to Norman & Everitt, which is conceded to be a *bona fide* claim, and not to hinder, delay or defeat the claim of Wright, or of any other creditor. Are the circumstances relied on such as should be submitted as testimony tending to contradict him? There is no expression in the assignment which shows it to be fraudulent in law, or which raises a presumption of bad faith in its execution, or which gives rise to such a suspicion of fraud as may be rightfully considered by the jury upon an issue involving the question. The extreme limit to which this Court has gone in subordinating the right of preference to the requirement of good faith imposed by statute (The Code, sec. 1545), was in *Savage v. Knight,* 92 N. C., 493. But the complaining creditor in that case (Savage, Son & Co.) was not provided for at all in any class; whereas all other creditors were to share equally in any assets remaining after discharging the residue of the debt due Norman & Everitt, Bump. F. C., p. 224. Another marked dis- (213) tinction between the two cases, grows out of the fact that while the denial by Lassiter of any intent but that to prefer, which was not unlawful (*Hafner v. Irwin,* 23 N. C., 496; *Lee v. Flannagan,* 42 N. C., 471), is not contradicted, it appeared there that one of the *cestuis que trust* declared in presence of the assignor, with the assent of the latter, that the actual purpose of both in making the assignment was to defeat the collection of the claim of Savage, Son & Co.

In *Moore v. Hinnant,* 89 N. C., 455, the question presented was, whether there was upon the face of the deed anything so suggestive of fraud as to raise a question for the jury, and the main point in several other cases was precisely the same. *Bobbit v. Rodwell,* 105 N. C., 244, and cases cited; *Phifer v. Erwin,* 100 N. C., 59. It is a well settled principle that a voluntary assignment, not upon its face fraudulent in law, and containing no provision which raises a presumption of fraud in its execution, may nevertheless be subject to attack before the jury because of some provision in the deed looking to the benefit of the debtor and to the detriment of the creditor, and where no inference of bad faith may be drawn from the instrument itself by testimony *dehors.* But the authorities already cited, and many others that might be adduced, fully sustain the position that the mere exercise of the right of preference in an assignment is not sufficient of itself to go to the jury in support of the contention that it was executed for a fraudulent purpose. It would seem equally clear that the right of preferring creditors, if it exists at all, carries with it, as incidental to its proper exercise, the further right, without giving rise to suspicion, to secure the services of counsel living inside or outside of the county,

and to execute the deed at any hour in the day or night, certainly where all creditors, including those who attack the deed, come in *pro rata* after the satisfaction of one debt that is preferred. The failure to examine Barber raises no presumption of fraud. It does (214) not appear that he was actually present at the time of the execution, though he accompanied Riddick to Jackson very early in the morning. But had he been present, the plaintiff was not bound to examine all of the witnesses present to rebut any inference which the law would draw against him for withholding testimony, even had it been a secret transaction exclusively between relatives. The testimony of Lassiter that he executed the deed for no purpose other than to give a preference to Norman & Everitt, was ample to destroy a presumption, if, in fact, any could have arisen, when the deed was drawn, not in the presence of the family or parties only, but by his counsel, an attorney of high standing. *Helms v. Green,* 105 N. C., 251. The fact that Lassiter wished to give a superior lien to Norman & Everitt over Wright, before the latter could obtain his judgment and cause execution to issue, and that with that end in view he and his attorney prepared the assignment soon after midnight, is not evidence of fraud for the jury, the claim of the complaining creditor not being left out entirely, as in *Savage v. Knight, supra,* but standing on a footing with all other debts. There is no testimony that should go to the jury as evidence of the intent except the deed itself and the testimony of Lassiter, and the judge should have told the jury that there was nothing upon the face of the instrument to show a fraudulent purpose. We conclude, therefore, that in refusing the instruction asked there was

ERROR.

Cited: Rouse v. Bowers, post, 364; *Wolf v. Arthur,* 112 N. C., 693; *Davis v. Smith,* 113 N. C., 100; *Barber v. Buffaloe,* 114 N. C., 228; *S. c.,* 122 N. C., 129, 133; *Royster v. Stallings,* 124 N. C., 65.

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(215)

ELLEN E. HOOD v. ROBERT B. SUDDERTH.

Seduction—Arrest and Bail—Party in Interest—Feigned Issues—Constitution—Code—Breach of Promise—Fraud—Deceit.

1. An action for seduction may now be brought by the woman seduced.
2. An order for the arrest of the defendant may be granted in such action.
3. "Feigned issues" being abolished by the Constitution, the woman, when of age, and not her father, is the real party in interest.

4. When the complaint in setting forth a breach of promise to marry shows facts sufficient to make out a case of seduction, the action may be treated as one for seduction.

5. Seduction is such an injury to "person or character" as authorizes arrest under section 291 of The Code; and involves also "fraud" and "deceit," *ex vi termini.*

SHEPHERD, J., dissenting.

ACTION begun in CALDWELL, and heard by *Graves, J.*, at Chambers, on motion to vacate order of arrest.

It is alleged in the complaint that the plaintiff, being an inmate of the home of the defendant, and a dependent and employee of his mother, was seduced by the defendant under promise of marriage. It is alleged that the defendant and plaintiff, being engaged to be married to each other, the former repeatedly solicited sexual intercourse, saying that they would soon be married; that it would make no difference and would be no harm; which solicitations the plaintiff repulsed, but that after repeated solicitations her resistance was overcome, and "about the first of April, 1891, upon his urgently begging her to submit to him, saying that in a short time they would be man and wife, and they were already as good as married, she did submit to his embraces, fully trusting to his most solemn declaration that he would marry her in a month from that time, 'before anybody would ever find out anything,' as defendant solemnly promised and declared; (216) that fully believing and trusting in the honor and faith of the defendant that he would marry her in a month, she allowed the intercourse between them to go on for three or four weeks, until it became evident to her that she was most probably with child, which fact she communicated to defendant, and begged him to save her from shame and ruin, as he had promised to do," whereupon defendant appointed 24 May, 1891, for the marriage, and procured the marriage license, but subsequently left the county and refused to marry her. It is further alleged that "by reason of the belief she had in his honor and good faith, and because of his contract and agreement to marry her at an early date, she was seduced, and as a consequence of such seduction, is now pregnant, and will in due time become the mother of a child of which the defendant is the father. And that by reason of his forsaking and abandoning her, and refusing to marry her as he contracted to do, and solemnly promised to do, she has been put to great distress and suffering—suffering mental anguish and bodily pain—and bringing sorrow and distress upon herself and her family, and in consequence of which she has been greatly damaged."

In the affidavit it is set forth "that the said Robert Sudderth did, under promise of marriage, seduce and lead her astray, in consequence of which she is about to become the mother of a child of which he is the father, and that he refuses to comply with his agreement and contract." The defendant moved before the clerk to set aside the order of arrest which had been issued in this case, and that he be discharged from custody on the ground:

1. That the facts stated in the complaint filed in this cause, and in the affidavit also filed herein, do not entitle the plaintiff to have the defendant arrested, and do not justify an order for the arrest
(217) of this defendant.

2. That this being an action for damages for breach of contract of marriage, the order of arrest was improvidently granted and should be vacated.

3. That this is not one of those cases where an order for the arrest of the defendant could be granted.

The motion was refused by the clerk, and defendant appealed. On hearing the appeal, his Honor, *Graves, J.*, affirmed the ruling of the clerk, and the defendant appealed to this Court.

Edmund Jones for plaintiff.
S. J. Ervin for defendant.

CLARK, J. The Code, sec. 291 (4), provides that defendant may be arrested in a civil action when he "has been guilty of a fraud in incurring the obligation for which the action is brought," or "when the action is brought to recover damages for fraud and deceit."

If the allegations are taken to be true (and they must be for the purposes of this motion), the defendant, by false and fraudulent representations as to the nature and consequences of the act he solicited, and by means of undue influence, taking advantage of the position of the plaintiff as his affianced wife, the trust and confidence thereby obtained, and her absence from her relatives and friends and natural protectors, and her isolation in his home and dependent position there, inflicted this gross wrong and outrage upon her, and thereafter abandoned her, leaving his home for a distant place and refusing to marry her. Taking the allegations to be true, it needs no argument or citation of opinions of other courts to show that the defendant has wronged the plaintiff, and that in accomplishing his purpose he has been guilty of "fraud and deceit." The word seduction *ex vi termini*, imports as much.

(218) Indeed, Laws 1885, ch. 248, makes it a felony. To procure gratification of his lust, the defendant has taken advantage of a dependent girl, violated the laws of hospitality, and by false representa-

tions and undue influence inflicted a wrong upon the plaintiff. Surely this was a tort committed by "fraud and deceit," and an action lies to recover damages for the same. The injury to the woman's character is irreparable, and the procuring her to be with child might well, under such circumstances of fraud, be held an injury to her person. If so, the defendant's arrest would have been warranted also under the first sub-section of The Code, sec. 291, which authorizes arrest "where the action is for injury to person or character."

It would seem that it must be so, since it is held in *Hoover v. Palmer,* 80 N. C., 313, that "the seduction of the daughter is an injury to the person of the father" within the meaning of this section. If that is so, it would be difficult to see why, when the action is brought by the woman herself, who alleges that she was seduced by the fraud, deceit and undue influence of the defendant, and made pregnant by him and her character ruined, there is not injury to her person as much so as there would have been to the person of her father if he had brought the action, as he might have done formerly, even when the daughter was of full age, if living with him.

This would seem beyond question. But in addition, under the letter and spirit of the present Constitution and system of procedure, this action could be brought by the woman herself, not merely for the "fraud and deceit," but for the wrong known as seduction, and the defendant arrested under sub-section 2, section 291, of The Code. It is true that at common law an action for seduction could technically only be brought by a father, master or employer, and that damages were alleged *per quod servitium amisit,* for value of services lost, and this, though in fact no services were lost, and even when the woman was of full age and the father was not entitled to recover her serv- (219) ices of anyone else. It was well understood that this was a mere fiction, and that damages were awarded really for the wrong and injury done her. Indeed, damages were always allowed out of proportion to any possible estimate of the value of services, and even when no services were lost, as when there was no pregnancy. In fact, the highest damages were often awarded precisely in those cases where the woman, by her social position, was not expected to render any services of value to the father or master or other plaintiff. The Code, sec. 177, having provided that an action should be brought by the real party in interest, it should be beyond controversy that where an action is for seduction of a woman of full age, she, and not the father, is the proper one to bring the action. The Constitution, Art. IV, sec. 1, provides that "feigned issues" should be abolished. To give this constitutional provision its common sense construction, it would seem that the "feigned issue" in actions for seduction, of a loss of services and for damages

based thereon, was abolished, and the action should and does rest on the true issue of damages for the wrong done. For centuries damages have been awarded on that basis, and a more transparent fiction than that the action of seduction is for the value of services was not known to the law. As just said, in many cases no services were lost, or they were without value, and sometimes the nominal plaintiff had no right to claim them. While ordinarily, at common law, an action for seduction could not be brought by the woman, there are instances in which it has been allowed: *Hutchinson v. Horn,* 1 Ind., 363 (50 Am. Dec., 470); *Smith v. Richards,* 20 Conn., 232; and in many states the right of action has been expressly given to the woman by statute. 3 Laws, Rights & Rem., sec. 1112. The right of action was denied to the woman at common law on the illogical ground (as it seemed to many eminent writers and judges) that the woman consented, but consent procured by fraud is not consent. Indeed, seduction is de-
(220) fined to be "the wrong of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions overcoming her reluctance and scruples." Abb. Law Dict. Even upon an indictment for the offense, the consent of the woman is no defense, because the fraud in procuring such consent is the gist of the crime, especially when obtained under promise of marriage. *State v. Horton,* 100 N. C., 443; 2 Whart. Cr. Law, 1758, 1759. Formerly the action of ejectment was nominally between tenants. Really it was for the title and possession of the land between those claiming to own it. By virtue of the Constitution abolishing "feigned issues," and The Code requirement that the action should be brought by the party in interest, the action is now so brought. So, when damages for the seduction of a woman of full age were sought to be recovered, the action was nominally by the father upon the fiction that he had lost his daughter's services, when in fact he was not entitled to them, and need not give in any evidence tending even to show that they were worth the amount given by the jury. The real party in interest was the female who had been seduced and deceived, and the real issues were as to whether she had been really seduced, and the amount of damages the jury should award as compensation for the injury done her and as punishment against the wrongdoer. In *McClure v. Miller,* 11 N. C., 133, *Taylor, C. J.,* says of this action: "It is in substance for a wrong done to the person of the child, the loss of services is, in most cases, purely *imaginary,*" and that "it is characterized by the sensible writer as one of the *quaintest fictions* in the world." Though, as the law then stood, the court properly held that the action, "being an action to recover vindictive damages abated on the death of the father." In *Kinney v. Laughenour,* 89 N. C., 365, *Merrimon, J.,* says that the requirement

that the action must be brought by the father for loss of service is "a fiction of the law," and it is again styled by the Court "a fiction of the law" in *Young v. Telegraph Co.*, 107 N. C., 370 (221) (384). Being "a fiction of the law" it has been swept away equally with the fictitious proceedings in ejectment and all other fictions. The plaintiff being of age, is the real party in interest. She is the only one who now could maintain the action. The father certainly cannot. He (if indeed he be living) has not lost his daughter's services, for she was of age. The common law fiction was ingeniously imagined; it served its purpose; it had its day; but it has been swept away by the plain straightforward enactment of the Constitution, which, applying business methods to legal procedure, has "relegated to the rear" the antiquated fiction which had served only to make it ridiculous in the eyes of a practical age. The action of seduction remains unaltered in any essential, but it is an actino to recover damages for the tort. This cause of action certainly has not been abolished, and where the woman is of age it must be brought by her as the "real party in interest." In *Harkey v. Houston*, 65 N. C., 137, the Court held that these provisions of the Constitution and The Code had abolished the fictitious proceedings in ejectment with its leases and releases, casual ejectors, John Does and Richard Roes. What reason can be given that they did not abolish equally the fiction of "lost services" in an action for seduction which henceforward became, upon a "plain statement of the facts constituting a cause of action" in legal construction, an action for exemplary damages? It would be singular, to say the least, to retain the fiction that the action is based on the loss of services and not for the wrong itself, when the Legislature has made the conduct complained of a felony.

If weight is to be given to what may be deemed a legislative construction of the provisions in regard to arrest and bail, it may be noted that when the Court held in *Moore v. Mullen*, 77 N. C., 327 (where the plaintiff was the woman herself), that arrest and bail would not apply to an action for "breach of promise of marriage," the (222) next Legislature struck out those words in section 291 (2), and inserted "seduction," which seems a legislative construction that where a woman should sue for the seduction, instead of a mere breach of promise, an arrest would lie. In that case (*Moore v. Mullen*) the Court had intimated that if there was an allegation of "fraud in attempting to evade performance" of the contract, or that "the defendant, by means of the promise to marry, seduced the plaintiff and attempted to abandon her," the arrest might lie, and this has been held in *Shehan's case*, 25 Mich., 145, and *Perry v. Orr*, 35 N. J. L., 295.

It is true that the complaint may be construed as an action for breach

of promise to marry, with the aggravation of seduction. But it may also with equal justice be construed as an action for damages for "fraud and deceit," or for "injury to character and person," or also for "seduction." This being so, the plaintiff was entitled to any relief jutified by the complaint and proofs, whether demanded in the prayer for relief or not. *Knight v. Houghtaling,* 85 N. C., 17; *Jones v. Mial,* 82 N. C., 252; *Moore v. Cameron,* 93 N. C., 51; *Lumber Co. v. Wallace,* 93 N. C., 22; *Moore v. Nowell,* 94 N. C., 265, and numerous other cases. If the complaint may be construed either as an action in tort or in contract, the plaintiff may elect. *Lewis v. R. R.,* 95 N. C., 179; *Stokes v. Taylor,* 104 N. C., 394; *Purcell v. R. R.,* 108 N. C., 422; *Craker v. R. R.,* 36 Wis., 657, and cases there cited.

The facts stated in the affidavit present a case which authorized an order to issue for the arrest of the defendant, and in refusing to vacate the order, the court below committed no error.

AFFIRMED.

MACRAE, J. I concur in the conclusion arrived at.

(223) SHEPHERD, J., dissenting: I am unable to agree with my brethren that an order of arrest can be made in the present case. The action is brought upon a breach of promise of marriage, and it is well settled that in such an action the defendant cannot be arrested. *Moore v. Mullen,* 77 N. C., 327. The plaintiff, however, alleges that "by reason of the belief she had in his (the defendant's) honor and good faith and because of his contract and agreement to marry her at an early day, she was seduced," etc. Under the liberal construction now given to pleadings, we may treat this as an action for seduction, but as it is conceded that at common law such an action cannot be prosecuted by the woman, it is first insisted, in order to sustain the order of arrest, that it is not an action for seduction, but for "fraud or deceit," or an "injury to the person," within the provisions of The Code, sec. 291. Now, it is true that a defendant may be arrested in such actions, but when the facts constituting the actionable injury consist in that species of fraud or deceit or injury to the person known as "seduction," it is difficult to understand how this latter specific and well defined cause of action can, for the purpose of meeting the exigencies of some "hard case," be resolved into its constituent elements, and each of these made independent actionable injuries entirely relieved of those incidents which invariably attend the peculiar cause of action of which they are component parts. I am very sure that the language referred to is confined to ordinary actions of fraud or deceit, etc., and that it has no application to those facts which constitute a cause of action for seduction. If

this be not so, it is hard to explain the presence of the word "seduction" in the same statute. If the facts amounting to seduction are comprehended in the said language, why, it may be asked, was a particular provision made for the arrest of the defendant in an action for seduction? This, I think, is entirely conclusive of the question. I am, therefore, of the opinion that this action for the purpose (224) of the motion for arrest, must be considered as an action for seduction alone and governed by the law applicable thereto. To hold otherwise would, it seems to me, result in inextricable uncertainty and confusion.

It is a well settled rule in the interpretation of statutes, that where words of definite signification are used, "and there is no intention manifest that they are to be taken in a different sense, they are to be deemed employed in their known and defined common law meaning." Sutherland on Statute Construction, sec. 291; *Adams v. Turrentine,* 30 N. C., 147.

It has also been settled by a number of decisions that the Code of Civil Procedure did not have the effect of conferring any cause of action that did not previously exist, but that it was simply what it purported to be, a method of procedure only. As was said by *Pearson, C. J.,* in *Lee v. Pearce,* 68 N. C., 76, the present Constitution and subsequent legislation "affects only mode of procedure and leaves the principles of law and equity intact. . . . In other words, the principles of both systems are preserved, the only change being that these principles are applied and acted on in one court and in one mode of procedure." See also, *Katzenstein v. R. R.,* 84 N. C., 688.

In the light of these principles, it would seem clear that when the statute used the words "In an acton . . . for seducton" (The Code, sec. 291), it referred to that action as it existed at common law. If it were otherwise, it is difficult to account for the several actions which have been brought in the name of the father or the stepfather since the enactment of The Code, and the citation with approval of cases decided by this Court under the former system. *Kinney v. Laughenour,* 89 N. C., 365. If the new procedure gave a right of action to the woman, how could anyone else, not being the "real party in interest," have prosecuted such suits? It is evident that neither this Court, nor the profession, ever entertained the idea that such an important change had been wrought in the law. That the same view has (225) been taken by the courts of other "Code States," is evident from the fact that it required positive legislation (as in the states of California, Indiana, and a few others) to confer a right of action upon the woman. Even in Kentucky, where it was enacted that "an action for seduction might be maintained without any allegation or proof of the

loss of service of the female by reason of the wrongful act of the defendant," it was held that it did not give the right of action to any other persons than those who could maintain it at common law. *Woodard v. Anderson,* 9 Bush., 624.

The principle upon which a cause of action is denied the woman is embodied in the maxim *volenti non fit injuria;* but it is argued by counsel that this does not apply, because the consent, being procured by fraud, is no consent. It is sufficient to say, in reply to this position, that as far back as we know anything of the common law in reference to the action of seduction, and throughout the succeeding centuries, the contrary has been held to be the law; and that it is universally conceded by the courts of England and America, as well as the text-writers, that the principle we have mentioned is applicable to the action for seduction.

The learned *Chief Justice Gibson* (2 Pa. St., 80), in reference to this very point, expresses the consensus of judicial opinion in this and the mother country. He says: "Still, illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common natures. A woman is not seduced against her consent, however basely it be attained; and the maxim *volenti non fit injuria* is applicable to her as to a husband whose consent to his own dishonor bars his action for criminal conversation. This maxim runs through a variety of actions, such as those for injury from mutual negligence, as for the recovering back money involuntarily paid where there was no debt, and some others. It extends even
(226) to contracts in the forming of which the parties are equally culpable, the consideration being immoral or illegal."

Parsons, C. J., remarks that "she is a partaker of the crime and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting." *Paul v. Frazier,* 5 Mass., 71.

Mr. Bigelow says that "at common law the child is not entitled to sue for her own seduction, since she has consented to the act." Torts, 151.

The principle is so well established that further citation of authority is deemed to be unnecessary.

The counsel further contended, that the principle upon which the action is permitted the parent, upon the theory of master and servant, is but a fiction, and that "feigned issues" and fictions of law, as in the old action of ejectment, are abolished. The principle upon which the action is based was originally, and, indeed, still is based upon the relation of master and servant, but what has been generally criticised as fictitious, is the awarding to the parent damages, not merely for loss

of service, but also for his outraged feelings, although his action is based upon the relation of *master* alone.

Admitting, however (what I do not think is true), that the action is based upon a fiction, and is embraced in the meaning of "feigned issues," as used in The Code, I am still unable to understand how the abolition of such a fiction can help the plaintiff. If, as we have seen, she has no cause of action, I cannot understand how the repeal of the "fiction" by which her parent is enabled to sue can confer any right of action upon her. If, then, the "fiction" is taken away, it must follow that there is no civil remedy whatever against the seducer. Neither do I see the force of the argument based upon the abolition of fictitious parties in the old action of ejectment. The lessor of the plaintiff had a cause of action based upon some right, and the former action of ejectment was but a convenient remedy by which that right could be asserted. In our case the woman never had a right (227) of action, and if the fiction by which her parent can recover is abolished, the seducer, as we have seen, will be amenable to the criminal law only.

Very few of the states have ventured upon the experiment of bestowing a cause of action upon the woman in cases of seduction; but in several of them the seduction of an innocent woman under promise of marriage is, as in North Carolina, an indictable offense. This is as far as we have gone, and it has always been considered a grave question of public policy whether the woman should be permitted to sue and recover damages. The following from the distinguished *Chief Justice Parsons* suggests a doubt as to the wisdom of such a change, and at the same time supports the view which I have deemed it my duty to express in this case: "It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage, and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided, and we do not profess to be wiser than the law."

Cited: Scarlett v. Norwood, 115 N. C., 285; *Gillam v. Ins. Co.,* 121 N. C., 372; *Abbott v. Hancock,* 123 N. C., 102; *Willeford v. Bailey,* 132 N. C., 404; *Snider v. Newell, ib.,* 616; *Howell v. Howell,* 162 N. C., 287; *Strider v. Lewey,* 176 N. C., 449; *Tillotson v. Currin, ib.,* 482.

J. P. HAYNES v. DAVID ROGERS ET AL.

Fraudulent Conveyances—Evident Intent—Notice—Questions for Jury.

1. When a plaintiff attacks a deed absolute on its face for fraud, it is incumbent on him to show by a preponderance of testimony a fraudulent intent on the part of the grantor, and knowledge of that intent on the part of the grantee.
2. These questions of intent and knowledge are for the jury, and it was error for the court to charge them to find for the plaintiff, where there was evidence upon which they might have found otherwise.

ACTION to recover land, tried at Spring Term, 1892, of JACKSON, before *Hoke, J.*

(230) *G. A. Jones for plaintiff.*
T. F. Davidson for defendants.

(231) BURWELL, J. The deed which the plainitff attacks in this action is an absolute one from N. A. Coward to the defendant Rogers, made for a valuable consideration. It was therefore necessary for him to establish by a preponderance of testimony, not only the fraudulent intent of the grantor, but also the knowledge of that intent on the part of the grantee. *Reiger v. Davis,* 67 N. C., 185; *Beasley v. Bray,* 98 N. C., 266; *Savage v. Knight,* 92 N. C., 493. It was within the province of the jury alone, under proper instructions, to determine whether or not the defendant Rogers had that knowledge, and his Honor erred when he told them to find the issue for plaintiff if they believed the evidence; for by this instruction he took from them a question which they alone had the right to determine. There was no admission of this knowledge on the part of the grantee Rogers, nor any direct evidence of it. There were other facts established, some by the testimony of Rogers himself, from which it seems the jury might most reasonably have inferred that he knew of his grantor's fraudulent intent; but it was their duty to say what weight should be given to this evidence, and whether or not they would draw this inference.

ERROR.

Cited: Calvert v. Alvey, 152 N. C., 613.

THOMAS S. WOOD ET AL. v. W. H. WHEELER ET AL.

Lex Loci Contractus—Lex Rei Sitae—Laws of South Carolina—Consideration—Note—Mortgage—Account.

1. A note executed by a married woman in South Carolina, valid under the laws there, is valid here if for a sufficient consideration, though it be secured by a valid mortgage executed to convey lands in this State, but in such case there can be no judgment for foreclosure; she holds the land free from every lien on account of the mortgage.
2. As the plaintiffs by this suit upon the note elect not to accept her proposed surrender of the land and the annulment of the contract, no account for the rents and profits and for the purchase money paid for the land is necessary. As far as appears now the plaintiffs have a right to a judgment on the note, and the defendant *feme covert* has a right to keep the land.
3. The conveyance to her by deed executed in South Carolina of the land is a sufficient consideration to support the note.

ACTION upon a note and mortgage, tried at Spring Term, (232) 1892, of TRANSYLVANIA, before *Hoke, J.*

W. A. Gash and W. A. Smith for plaintiffs. (234)
T. F. Davidson for defendants.

BURWELL, J. The decision of the Court in this cause (106 N. C., 512) was founded on the facts as they then appeared, and it was correctly determined that both the note and mortgage executed by the *feme* defendant were void, because, as we were then informed, they were executed in this State. The admissions of the parties have now very materially changed their rights and liabilities.

It is conceded that the note sued on was executed in South Carolina; and it is a valid obligation of the *feme* defendant, since, by the laws of that state, she had power to execute said note and bind herself thereby, as if she were unmarried.

In the complaint, the plaintiffs demand judgment on this note, and upon the facts now admitted they are entitled to such judgment against the maker, Mrs. S. P. Wheeler. *Taylor v. Sharp,* 108 N. C., 377; *Williams v. Carr,* 80 N. C., 294. The *feme* defendant was (235) authorized by the laws of South Carolina to purchase the land, and the execution and delivery of the deed by A. C. Williams vested in her title to it, and this was of course a sufficient consideration to support the promise contained in the note. The mortgage made to secure it is void for the reasons stated in the opinion filed upon the former

hearing of this cause (106 N. C., 512), but the plaintiffs, under the new aspect put upon the matter by the admissions of the parties, have the right to demand the enforcement of the contract made in South Carolina and take judgment for the amount due on the note. The effect of this action on their part will be to leave the title to the land in the *feme* defendant free from any lien of the alleged mortgage. As the plaintiffs, by this demand of judgment against her, elect not to accept her proffer to surrender the land and annul the contract of purchase, no account of rents or of purchase money paid by her is necessary. Her right is to keep the land. The plaintiff's right is to have judgment against her on the note, provided no valid defense is established on the trial.

ERROR.

Cited: Armstrong v. Best, 112 N. C., 63; *Smith v. Ingram,* 130 N. C., 106, 109; *S. c.,* 132 N. C., 967; *Bank v. Granite Co.,* 155 N. C., 45.

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(236)

GEORGIANA NORWOOD, ADMINISTRATRIX, v. THE RALEIGH & GASTON R. R.

R. R. Accident—Negligence—Evidence—Burden of Proof.

1. Where the body of the plaintiff's intestate was found, just after defendant's freight train had passed, lying about 71½ yards north of the bridge of the defendant railway company, over which there was a plank crossing used by persons as a footway leading to a house to which he had just before declared his purpose to go, with the head resting against the end of a cross-tie, a fracture in the skull and bruises upon the hip and shoulders, but no other wounds, it was *Held,* (1) that in the absence of direct proof as to the position and conduct of the intestate at the time of the killing, the necessary inference was that his own carelessness in going upon defendant's track and exposing himself to injury, was the proximate cause of his death; (2) that if the engineer could, by proper watchfulness, have seen intestate standing or walking on the track, he would not have been negligent in acting on the assumption that intestate would step off in time to avert injury; (3) that if intestate was seen, or could, by proper care, have been seen by the engineer, sitting upright on the end of a cross-tie, as the testimony tended to show his position to have been, the latter was justified in believing that he would get out of danger.

2. That, whether intestate was a trespasser or a licensee, it was his duty to keep out of the way of a passing train, and his failure to do so would be considered the proximate cause of his death, in the absence of testimony tending to show that the engineer could, by proper watchfulness, have

seen him lying apparently insensible on the track, or in peril upon the bridge in time to have avoided the injury by using the appliances at his command, and without jeopardy to persons on the train.

3. After contributory negligence is shown, the plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of the defendant to have been the proximate cause, by offering testimony that merely raises a conjecture. He must show the nature of such act or omission, so that the jury may fairly infer that it was the immediate cause of the injury.

4. The testimony that the headlight shone in the door of a house 150 yards up the road, did not tend to show the actual condition of intestate when stricken, or that the engineer could have seen him.

5. The testimony of the engineer and fireman, that they kept a careful lookout, is not contradicted directly, and does not seem to be in conflict with any other evidence.

ACTION to recover damages for the negligent killing of plain- (237) tiff's intestate by the defendant's engine, tried at April Term, 1892, of WAKE, by *Connor, J.*

After the testimony was closed the court intimated that the plaintiff was not entitled, in any view of the evidence, to recover. The plaintiff submitted to judgment of nonsuit and appealed.

The substance of all the material testimony was as follows: The body of plaintiff's intestate was found on the night of 27 December, 1891, about two hours after dark, seventy-one and one-half yards north of a bridge over a creek on defendant's road, on the right hand side of the track (going north), the top of his head resting against the end of a cross-tie, to which some of his hair seemed to be adhering. There was a bruise upon his hip, another on his shoulder, and a fracture which made a hole in his skull. There were no other injuries appearing from an external examination of his person. There was a curve twenty-one yards south of the bridge, and the bridge was fifty-four and three-fourths yards long. Intestate lived north of the bridge, and there was a path that came upon the track one hundred and twenty-six yards south of the bridge. There was a single plank way for the use of persons walking, which was laid along the middle of the bridge for its entire length. The usual route for persons on foot from the house of intestate to the house of one Jeffries, who lived a half-mile north of the bridge, and to whose house intestate had announced his purpose to go after his wife, on leaving home after dark, was along said path over the bridge on said plank way, and along the track, to about the point where the body was found. There the path diverged from the road.

An engine and tender belonging to defendant passed over the bridge going north a short time before the body was found at the end of the

(238) cross-tie. Neither the engineer nor his fireman, nor any other witness, testified that he saw the engine strike intestate. The engineer and fireman both testified that a constant lookout was kept by the engineer at and near where the body was found; that they did not see intestate at all, and that it would have been very difficult, if possible, to have seen a man sitting on the end of the cross-tie on the side of the track, but on account of the curvature of the track an object could have been seen from that side eight or ten yards further than from the left side. All the testimony tended to show that if intestate had been lying prostrate on the track, his body would have been mutilated, and if standing on the track his legs would have been crushed, broken, or injured in some way. He had apparently received no injuries but those already mentioned. The engineer testified that he looked out carefully all the time from his place on the right side of the cab; had a good headlight; his engine was in good condition; that he could have seen a man seventy-five yards if he were standing on a straight track in his front, but could not have stopped his engine in less than seventy-five yards; that an object like a man sitting on the cross-tie where intestate's body was found could not be seen more than fifty or sixty yards, and that a man's body being so located would probably be run over before the engineer could distinguish it as the body of a man; that he examined the engine next morning on hearing of Norwood's death, and found no blood on it; also examined the track on the bridge, and north of it, and found no blood on it. The foreman of the shops testified that on a straight track a good headlight would enable an engineer to see a man on the track one hundred and fifty yards, but that at the point where intestate was lying, if he had been sitting on the end of the cross-tie, the engineer would first have discovered, at a distance of thirty or forty yards, that there was an object on the track, but could not have distinguished what it was. The fireman testified that when not engaged in putting wood on the fire he
(239) kept a constant lookout on the left side of the engine, as did the engineer on the right, and saw no one; that the engine and tender could have been stopped sooner than a train; that the engine was going down grade.

There were conflicting opinions as to the rate of speed at which the engine was running, being estimated from twenty-five to fifty miles an hour. A witness who lived near the track, about one hundred and fifty yards on the east side of the track and north of the bridge, testified that the headlight would shine on his house when an engine reached the curve on the south, but did not say whether the light was sufficient to enable an engineer to distinguish objects at any particular distance on the track.

There was evidence that tracks were found at the end of the cross-tie, as if made by some one sitting on it. It was also in evidence that intestate had been drinking, and seemed somewhat intoxicated on the night he was killed. There was an embankment about five feet high where the intestate was killed, but a person could have walked up to the top of it. There was testimony tending to show that persons living in the neighborhood had used the path along the road and the bridge as a means of crossing the creek for thirty-five years, but there was no evidence that the company had assented to such use of its road, or that it had been so used under a claim of right, and with the knowledge of the defendant, or any of its officers or employees.

The engineer did not blow his whistle in approaching the bridge or the crossing, which was a short distance below it.

Armistead Jones and S. G. Ryan for plaintiff.
John Devereux, Jr., for defendant.

AVERY, J., after stating the case, proceeded: Plaintiff's intestate could not have received the wounds, which caused his death, without going at least upon the end of a cross-tie on defendant's track. When he placed himself in a position where he was liable to be (240) stricken by a passing engine, it was his duty to keep a sharp lookout, and if he carelessly, recklessly, or in a drunken stupor, remained on the track when the engine was approaching and till it came in contact with him, he was negligent. If he put himself in the way of the moving engine and was killed by it, his negligence was, at least, a contributory cause of his death. *McAdoo v. R. R.*, 105 N. C., 140. If the engineer was negligent in failing to blow at the crossing, or on approaching the bridge, intestate's subsequent refusal or failure to get off the track was, nevertheless, the proximate cause of the injury sustained, unless it can be reasonably inferred from the testimony that, after intestate went upon the track, the engineer did see, or could by ordinary care have seen, not simply that he was on the track, but that he had placed himself in peril by going upon the bridge, or appeared to be lying, drunk or insensible, in the way of the engine, and that after he could by proper watchfulness have had reasonable ground to believe that such was the condition of intestate, it was in the power of the engineer, by the use of the appliances at his command, and without peril to any passenger on his rtain, to have stopped the engine in time to have avoided the injury. *Deans v. R. R.*, 107 N. C., 686; *Clark v. R. R.*, 109 N. C., 430; 1 Shearman & Red., sec. 97.

If it were conceded that the engineer saw the deceased walking along the track, or sitting upright on the end of a cross-tie, in time to have

stopped the train without peril or difficulty, he was justified in believing, up to the last moment, in the absence of knowledge or information, that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way. *McAdoo v. R. R., supra; Daily v. R. R.,* 106 N. C., 301. It is not material whether (in passing upon the questions involved in this case) the intestate went upon the road under a license or as a trespasser. "The license (241) to use does not carry with it the right to obstruct the road and impede the passage of trains." *McAdoo's case, supra.* If he was an admitted trespasser, the plaintiff had a right to recover, if by the use of ordinary care after he went upon the track the defendant's servant might have averted the injury. *Lay v. R. R.,* 106 N. C., 404; *Clark's case, supra.*

Were we to concede, for the sake of the argument merely (what we do not propose to announce as the law), that the presumption of negligence on the part of the defendant company would arise upon proof that plaintiff's intestate was killed by defendant's engine on its track (2 Wood R. R. Law, 1096, note 1101), there would be no presumption, in the absence of proof, that such negligence was the proximate cause of the injury to intestate. No such presumption would be stronger than that created by express provision of the statute in reference to killing stock, and that is rebutted upon the facts being shown by witnesses present. *Doggett v. R. R.,* 81 N. C., 459. No witnesses as to the management of the train, or the position and conduct of intestate at the moment when the injury was inflicted, were offered except the engineer and fireman. Both of them negatived the fact of seeing intestate, or the possibility of seeing him by keeping a proper lookout, till it would have been too late to save him by an attempt to stop the engine. They are corroborated, rather than contradicted, by other testimony. The nature of the wounds was such, according to the evidence, as to lead to the conclusion that they must have been inflicted on the end of the cross-tie, where intestate could not have been seen. The fact that at a house 150 yards off the road, or up the road, the headlight shone, without further evidence that it shone so brightly as to make the figure of a man distinguishable and show his danger, is not sufficient to go to the jury to show that the injury might have been avoided. There was no testimony tending to show that (242) intestate could have been seen while on the bridge or on the track, and in the absence of such evidence the fact that there was a bridge or a bank, such as was described, in the vicinity, is entitled to no weight in passing upon the single question to be considered. The fact that an engine was running at the rate of twenty-five or fifty miles an hour in a place remote from town, may be important in de-

termining within what distance the train could have been stopped after the engineer could, by proper watchfulness, have seen intestate on the track in an apparently helpless condition. But it was incumbent on plaintiff, if she would avoid the consequences of intestate's negligence by showing some act of defendant's servants to be the real cause, to show from her own testimony, or that of defendant, that when the engineer could first have seen intestate, he was not only on the track, but was in such a situation or condition that he could not probably escape if the train continued to move on without diminishing its speed, and neglected to use the means available and safe to stop it. *Dean's* and *Clark's cases, supra.* It was not sufficient to prove only that he was seen standing or walking on the track. *McAdoo's case, supra.*

After contributory negligence is shown, the plaintiff cannot relieve himself of the burden of proving some subsequent act or omission of the defendant to have been the proximate cause, by offering testimony that merely raises a conjecture. He must show by facts or circumstances the nature of the act or omission, so that the inference may be fairly drawn that it was the immediate cause of the injury.

Upon a review of the testimony, we concur with the court below.

AFFIRMED.

Cited: High v. R. R., 112 N. C., 388; *Syme v. R. R.,* 113 N. C., 565; *Pickett v. R. R.,* 117 N. C., 631; *Neal v. R. R.,* 126 N. C., 638, 644; *Wycoff v. R. R., ib.,* 1152; *Upton v. R. R.,* 128 N. C., 176; *Stewart v. R. R., ib.,* 519, 520; *McArver v. R. R.,* 129 N. C., 384; *Bessent v. R. R.,* 132 N. C., 941; *Pharr v. R. R.,* 133 N. C., 611; *Beach v. R. R.,* 148 N. C., 162, 164; *Strickland v. R. R.,* 150 N. C., 8; *Exum v. R. R.,* 154 N. C., 411, 413; *Patterson v. Power Co.,* 160 N. C., 580; *Talley v. R. R.,* 163 N. C., 576; *Abernathy v. R. R.,* 164 N. C., 95; *Ward v. R. R.,* 167 N. C., 151, 154; *Treadwell v. R. R.,* 169 N. C., 699; *Davis v. R. R.,* 170 N. C., 586, 590.

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(243)

G. C. FARTHING v. J. H. DARK.

Negotiable Instruments—Notice of Equities—Inadvertence of the Court—Plan of Payment—Evidence.

1. A negotiable note, payable at the *Durham Fence Factory, or the office of W., W. & Co.,* does not, upon its face, show a circumstance calculated to excite suspicion of a purchaser for value before it was due, even though he knew of no such fence factory in operation there, the other place of payment being well known, and such purchaser was not bound by the equities existing between the original parties.

2. In the former decision of this case (109 N. C., 291), this Court was not advertent to the fact that there was an alternative description of the place of payment in the note, and was not warranted in the assumption that the plaintiff knew the place named in the note had no existence.

3. The fact that the negotiator of the note was a stranger, and sold it and others for considerably less than their face value, and the other circumstances relied upon by the defendant, were not so suspicious as to put the *onus* of further inquiry upon the purchaser.

PETITION of the plaintiff to rehear this case, as reported in 109 N. C., 291.

J. S. Manning and W. W. Fuller for plaintiff.
J. W. Graham, T. B. Womack and Junius Parker for defendant.

AVERY, J. The note assigned for value and before maturity was, upon its face, made "negotiable and payable to Durham Fence Factory, *or office of Wortham, Warren & Co. Planing Mills.*" The plaintiff testified that when he bought the note he knew there was no factory in Durham called "the Durham Fence Factory"; but neither plaintiff, defendant, nor any other witness, disputed the fact stated by the witness Wortham, as well as Justice, who was introduced by the (244) defendant, that there was a place of business in the town well known as the "office of Wortham & Co." If, therefore, we concede the correctness of the legal proposition laid down in the former opinion in this case (109 N. C., 291), the Court was not advertent to the alternative description of the place of payment, and the mere prefixing of another description, which might be interpreted either as the designation of a distinct place, or a different name for the office of Wortham, Warren & Co., was not in any view of the law a circumstance calculated to excite suspicion and stimulate inquiry as to the character of the note. A more careful examination of the testimony shows, therefore, that we were not warranted in assuming as the basis of the legal conclusion reached, that the plaintiff knew the place named in the note had "no existence." He did know that Wortham, Warren & Co. had planing mills and an office in the town, and the note being offered before maturity, there was no reason why he should have taken the trouble to ascertain whether the machinery for making fences was being operated, or whether there was an agent on the ground to fill orders. If he had prosecuted his inquiries and ascertained that the machinery bought for that purpose was still outside of the building of Wortham, Warren & Co., not adjusted for working, such information would not have been sufficient to require inquiry as to the good faith of Pallet & Co. If, owing to some misunderstanding, the machinery should have

been moved and the fence made and furnished elsewhere, the note might still be made payable, when it was the original purpose to manufacture the fence, and without any fraudulent purpose existing at the time.

But we must be understood as adhering to the principle laid down in the former opinion, and as modifying the ruling heretofore made on the ground only of inadvertently mistaking the facts. Upon more mature consideration we are not prepared to dispute the correctness of the legal propositions laid down by the court below (245) without regard to the plaintiff's knowledge of the existence or nonexistence of the place of payment at the time of purchase. The purchaser might well conclude that, though the office and plant might not then have been established, it would be before the maturity of the note. The production of the note was *prima facie* evidence of present ownership, and it being admitted that it was bought for $100, though less than its face value, $125, and before maturity, in the absence of actual notice of fraud in the factum at the time of assignment, the purchaser took it discharged of all equities in favor of the maker. 1 Dan. Neg. Inst., secs. 770, 782, 789 and 789*a*; *R. R. v. Schutt,* 103 U. S., 145; *Tredwell v. Blount,* 86 N. C., 33; *Campbell v. McCormac,* 90 N. C., 491; *Jackson v. Love,* 82 N. C., 405. There is no testimony whatever tending to show actual and explicit notice, at the time of the transfer, of fraud on the part of the payee when the note was executed, and the circumstances relied on were not so suspicious as to place the *onus* on the purchaser, of extending his inquiries beyond the solvency of the maker. In *Hulbert v. Douglass,* 94 N. C., 122, cited to sustain the opinion of the Court, it appears to have been found as a fact that the plaintiff did not purchase the note "for value and in good faith before it was due and without notice of any defense, set-off or equities in favor of defendant Douglass, as set forth in his answer," and it did not appear that they were not warranted in so finding.

There was not evidence sufficient to constitute this case an exception to the general rule and shift the burden of proof upon the plaintiff as purchaser of the note before maturity.

On a review of the exceptions, we find no error in the rulings of the court below.

PETITION ALLOWED.

Cited: Carrington v. Waff, 112 N. C., 121; *Loftin v. Hill,* 131 N. C., 111; *Bank v. Hatcher,* 151 N. C., 362; *Myers v. Petty,* 153 N. C., 468; *Bank v. Walser,* 162 N. C., 60; *Smathers v. Tel. Co., ib.,* 351.

(246)

S. H. BOYD, TRUSTEE, v. M. E. TEAGUE, SHERIFF.

Sheriff's Return—Negligence.

A sheriff who fails to make return of process before the adjournment of the court to which it is returnable, is liable to the penalty prescribed by statute. This case is governed by *Turner v. Page, post,* 291.

RULE on the sheriff of FORSYTH to show cause why a judgment *nisi* should not be made absolute, which was taken at the February Term, 1892, of said court, for failure to return an execution issued from the Superior Court of Rockingham on 30 November, 1891, and mailed to him on 1 December, 1891, returnable to the said February Term.

The said February Term of court began on 15 February, 1892, and was a two weeks' term, but all the business of the term having been disposed of, the court adjourned at noon on 20 February, 1892, and the defendant, sheriff of Forsyth, did not return said execution until 22 February, 1892, two days after the said adjournment, and did not deliver the horse and buggy, taken under said execution, to the clerk, until 1 March, 1892. The Court, *McIver, J.,* presiding, upon the hearing of the rule, adjudged that the sheriff was not required to return the execution before the adjournment of the court, but at any time within two weeks allotted by statute for the sitting of the court, and adjudged that said rule be discharged upon said sheriff paying the cost of the same.

To this ruling the plaintiffs excepted and appealed.

(247) *A. J. Burton and Boyd & Johnston for plaintiff.*
R. B. Glenn for defendant.

CLARK, J. The point presented by this appeal has been passed upon at this term in *Turner v. Page,* 291, post. There the reason of the decision is so clearly laid down by *Mr. Justice MacRae* that it is unnecessary to do more than refer to that case, and to say that after the aid given us by the able argument of appellee's counsel, we are nevertheless satisfied of the correctness of our former ruling. The sheriff is not compelled to make his return of an execution on the first day of the term, though it is more regular, and for many reasons desirable that he should do so. It is sufficient if he make the return *during the term* (The Code, sec. 449), unless ruled to make it on an earlier day of the term. *Ledbetter v. Arledge,* 53 N. C., 475. But the term expires when, the business being dispatched, the judge adjourns court or leaves. *Branch v. Walker,* 92 N. C., 87; *Foley v. Blank,* 92 N. C., 476. In the

latter case it is said "a pleading placed on the files of the court in the absence of the judge, after he has left for the term, is not filed in contemplation of law." So a return made at such time is not made to the term. The term of the court is held by the judge, and there can be none after he leaves. It was the sheriff's negligence that he did not make his return promptly as he should have done, but held it back under the impression that the term would last full two weeks. It is public policy that officers should be prompt, diligent and careful.

The term having expired before the return was made, the judgment *nisi* should have been made absolute. The Code, sec. 2079. The case will be remanded, that the judgment shall be so entered.

REVERSED.

Cited: Swain v. Phelps, 125 N. C., 44.

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(248)

THOMAS FLOWERS v. JULIUS E. ALFORD.

New Trial—Newly Discovered Evidence—Discretion of the Judge—Code—Excusable Neglect—Verdict—Judgment—Practice.

1. A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the court, and is not appealable unless the ruling is based upon a mistaken view of the law. This motion may be made for the first time in the Supreme Court.
2. If a motion "to vacate the judgment" be treated as a motion to set it aside under section 274 of The Code, for excusable neglect, it would not avail, if granted, for it would leave the verdict still standing.
3. The statute is not intended to embrace judgments which *necessarily* follow verdicts.
4. To afford the relief desired, a new trial was necessary, and this could not have been obtained at the term of the trial.

MOTION in the Supreme Court for a *certiorari* to the judge below, requiring him to find the facts upon which the judgment was rendered as hereinafter stated.

Jones & Tillett (by brief) for plaintiff.
William Black, contra.

MACRAE, J. It appears from the affidavits filed that an action for the recovery of land, between the parties hereto, was tried at February

Term, 1891, in the Superior Court of Richmond County, and resulted in a verdict and judgment for the plaintiff. The defendant, on 19 September, 1891, gave notice of a motion "for a new rtial, and for the setting aside and reforming the judgment heretofore rendered in this cause," to be made before the judge presiding at Richmond Superior Court, on 1 October, 1891. The record sent up does not show a continuance, but, at February Term, 1892, of RICHMOND, before
(249) his Honor *Judge Boykin,* this entry was made: "Thomas Flowers against J. E. Alford: Motion to vacate judgment; motion refused; defendant excepts; notice of appeal to Supreme Court; notice waived; bond in the sum of $25 adjudged sufficient." There is no statement of the case on appeal filed.

In this Court the following motion is made: "Black & Patterson, attorneys for the defendant above named, move the Court that an order for a *certiorari* to Judge E. T. Boykin be made in this cause, directing a finding of the facts upon which his judgment was rendered. 11 November, 1892." Recurring to the affidavits filed in the Superior Court, the ground of the motion before his Honor below was the newly discovered evidence of an unregistered deed, which was necessary to complete the defendant's chain of title, and which had been lost, but was found after the term at which the trial was had, and which, according to the defendant's affidavits, would have established his title to the land in controversy if the same had been produced as evidence upon the trial. These affidavits set out the efforts of defendant to procure said deed before the trial, or evidence sufficient to establish it, and his failure to do so. The affidavits in reply on the part of the plaintiff are to the effect that defendant relied entirely upon his possession under color of title, and tend to negative diligence on the part of defendant in his efforts to procure the deed, or evidence to establish it as a lost deed, and have it set up and registered before the trial.

While a motion for a new trial for newly discovered evidence may now be made after the trial of the cause in the Superior Court, and in the Supreme Court pending an appeal, the granting of it is addressed to the discretion of the Court. The matter is fully discussed in the case of *Carson v. Dellinger,* 90 N. C., 226, in which many authorities are cited, and it is summed up in these words: "In this case a counter-affidavit was offered, and as of course the judge was required to consider the opposing proof and determine the facts established,
(250) clearly this was not reviewable on appeal." *Munden v. Casey,* 93 N. C., 97. In the case before us there were conflicting affidavits; the matter was in the discretion of the judge below; if he had denied the motion upon the ground that he had no power to grant it, a question of law would have been granted to us, upon appeal, which

we might have reviewed; he gives no reason, however, but simply exercises his discretion and refuses the motion.

If this was a motion to set aside a judgment, under section 274 of The Code, for excusable neglect, it could not have the desired effect, if granted; for, if the judgment was vacated, the verdict would stand, and, as is said in *Beck v. Bellamy,* 93 N. C., 129, in regard to this section of The Code, "the statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. To vacate both is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place. *Clemmons v. Field,* 99 N. C., 400.

So, it appearing from the affidavits that his Honor had no power to set aside the judgment under section 274 of The Code, because this is not one of the cases embraced in the provisions of that section, and that he exercised his discretion in refusing to grant a new trial for newly discovered evidence, the motion is

DENIED.

Cited: Brown v. Rhinehardt, 112 N. C., 777; *Faison v. Williams,* 121 N. C., 153; *Fleming v. R. R.,* 168 N. C., 250; *Sanford v. Junior Order,* 176 N. C., 446.

(251)

S. M. ASBURY v. R. G. FAIR ET AL.

Trespass on Land—Title—Grant—Evidence—Insanity—Limitation—Privity—Possession.

1. When neither claimant is seated on the lappage in dispute, and when both are on it, the law adjudges the possession to follow the older title.
2. Seven years' possession and cultivation of land under a junior grant makes title against an older one; and where there was evidence from which such possession could be found, it was error to hold that plaintiff (claiming under the junior grant) could not recover.
3. The Statute of Limitations, if it began to run before the commencement of insanity, or other disability, would not, on that account, cease, and when there was any testimony from which such a state of facts could be found, their consideration should not have been withdrawn from the jury.
4. Under the law in force, no connection need be shown between the successive occupants to establish the presumption of a grant for the actual *possessio pedis.*

5. Insanity is a question for the jury; and even where the testimony as to the *fact*, while not directly disputed, was capable of more than one construction, it was not proper to withdraw it from the jury.

6. Privity of estate between the plaintiff, and those under whom he claims, is not necessary to entitle him to the advantage of their possession to show title by the Statute of Limitations.

7. Statute of Limitations need not be pleaded specially to show title.

8. Unless the defendants connect themselves with their elder grant, it serves them no purpose, except to take title out of the State, and in this it is of equal avail to the plaintiff also.

ACTION of trespass on land, to try title, and for damages, tried at Fall Term, 1892, of BURKE, by *Armfield, J.*

M. Silver and F. H. Busbee for plaintiff.
S. J. Ervin for defendants.

(254) AVERY, J. The defendants offered a grant issued in 1804, and the plaintiff introduced one issued in 1818, both of which, according to the evidence, cover the twenty-three acres in dispute. The plaintiff offered other title deeds, but the defendants introduced none, so far as appears from the record. The testimony was conflicting as to whether the defendants, and those under whom they claim, ever had a possession of the lappage under the old grant or not, until they recently engaged in cutting trees thereon. D. W. Stacy testified that he did not think that John Dale, ancestor of defendant, had any clearing on it at all when the former took possession as predecessor of plaintiff in 1856, while Jamison Queen, the predecessor of Stacy, testified that Dale had cleared and had under fence a field on the lappage, while he occupied the house in which Stacy afterwards lived. Queen testified further that Dale cultivated this portion of the lappage for years, but did not state when such occupancy began or when it ended. Hezekiah Fair, the son-in-law of John Dale, testified to a continuous possession by John Dale from 1859 to 1869, when it was abandoned, and the rails around the field were hauled off by Stacy, the adverse claimant. So that if it was material to ascertain whether Dale had possession of any part of the lappage before he became insane, or at any other time, or how long he held it adversely, it should have been left to the jury to pass upon the conflicting evidence and arrive at the truth.

If neither of the claimants is seated on the lappage, the law adjudges the possession to be in him who has the older title—in our case John Dale, and those claiming under him, if they derived title through the Morgan grant, issued in 1804. If Queen, Stacy and plaintiff, claiming under the Brittain grant of 1818, were in possession of a part of the

lappage, and John Dale, and those claiming under him, neither occupied nor cultivated any part of it (as Stacy testified), then the occupant under the junior title held constructively the whole (255) interference. If both were cultivating some part of the lappage, then the possession of the true owner, who connected himself with the older grant, extended to all of the land not actually occupied by those claiming under the junior title. *McLean v. Smith,* 106 N. C., 172. Such occasional acts of ownership, as cutting and removing wood from land susceptible of cultivation, do not amount to an occupancy that will serve the purpose of maturing title in the occupant. *Ruffin v. Overby,* 105 N. C., 78.

The judge assumed that a possession on the lappage in John Dale had been shown by all of the witnesses, but D. W. Stacy said explicitly, on his cross-examination, "I don't think Dale was cultivating any lappage." If the jury had found that the plaintiff, and those through whom he claimed, held adverse possession on the interference for seven years (while John Dale was cultivating no portion of it), then, if the statute was running, the plaintiff was entitled to recover, since it appeared that the land had been twice granted by the State, and that the deeds offered by plaintiff, executed respectively by Ferree to Stacy in 1856, and by Brittain to Stacy in 1869, covered the whole disputed boundary.

But it was contended, that in any aspect of the testimony, the jury must assume as an undisputed fact, not only that John Dale was insane, but that he became insane before the statute began to run by reason of any adverse occupancy. The testimony, viewed in the most favorable light for the defendants, fails to sustain this contention. If the jury had reached the conclusion that Queen and Stacy held possession of a house or garden on the lappage, while neither Dale nor his tenants were occupying any part of it, and before Dale became insane (provided, always, they did actually find that he became incapable of understanding what he was doing, or what others were doing, in so far as their conduct affected his rights), then the statute (256) would not cease to run by reason of Dale's subsequent disability.

Stacy testified that Queen was his predecessor in the possession, though no evidence was offered to connect Queen directly with the (Craige & Brittain) junior grant, the jury were at liberty to connect his possession with that of Stacy, if Queen entered upon the lappage before Dale became insane, let Stacy into possession in his stead, and Stacy held the only possession on the lappage from 1856 to 1890, when plaintiff entered under the deed from him, or the only possession except that which, as Hezekiah Fair testified, began in 1859 and lasted till 1869, when it was abandoned, and the rails surrounding it were hauled

off by Stacy (the statute being suspended from May, 1861, till 1 January, 1870). This possession began when the old law was in force, and no connection need be shown between occupants for the purpose of establishing the presumption of a grant for the actual *possessio pedis*. So, as we shall see, there is abundant ground to contend that the thirty-year statute was running *pro tanto*. The court had no right to assume that John Dale became *non compos mentis* at any given period. Queen testified that when he entered Dale was "scrambled, addled, and sometimes had pretty good sense." The testimony, if accepted as true, did not show beyond question the mental condition and capacity of Dale, and as it was the province of the jury to pass upon the credibility of, as well as draw such inferences from, testimony of this kind, as they thought proper, if believed, the court erred in announcing the conclusion of fact that Dale was insane from 1847, or 1849, in presence of the jury, and the conclusion of law predicated upon the fact so found. It was even within the range of possibility that the jury would determine that there was no satisfactory evidence of Dale's insanity till after Stacy entered, and no satisfactory testimony of a possession by Dale, on the lappage, in which con-
(257) tingency Stacy's title would have matured in seven years from 1856.

But as the plaintiff might have relied in part, at least, upon actual possession for the statutory period commencing with Queen's entry in 1847, if the defendant subsequently entered upon territory presumptively so acquired by him, it was not necessary to show privity in estate between Stacy and Queen in order that the possession of both should be counted in determining, not only the question of trespass involved, but how to render judgment as to the whole lappage. *Candler v. Lunsford,* 20 N. C., 542; *Melvin v. Waddell,* 75 N. C., 361; *Phipps v. Pierce,* 94 N. C., 514; *Freeman v. Sprague,* 82 N. C., 366; *Allen v. Sallinger,* 103 N. C., 14.

The thirty-year Statute of Presumptions having begun to run if Dale was not shown to be *no compos mentis* until after Queen entered, it would seem that when Stacy was let into possession by Queen it would continue to run, certainly as to the actual *possessio pedis* to which Stacy succeeded as occupant.

It is not necessary to determine whether if the thirty-year statute were running in favor of Stacy when he entered, he could extend the benefit of Queen's occupancy, not only to the *possessio pedis* at the storehouse and stables, if it began when Dale was *compos mentis,* but to the whole lappage covered by his deed bearing date in 1856, though Dale had in the meantime become deranged and though no connection was shown between the proper title of Stacy and Queen, but only the

fact appeared that Stacy was let in under Queen, who claimed adversely to Dale. His Honor declared his purpose to tell the jury that "*no statute* ran against defendants after Dale became insane," and, as we have seen, if he became insane after Queen entered, the thirty-year statute was certainly put in motion.

It was not incumbent on plaintiff's counsel, as has been suggested, to point out in a labored argument how such instruction would be erroneous. This is not a case where the evidence was volumi- (258) nous, and the judge having intimated upon the whole of the mass of testimony (as in *Gregory v. Forbes,* 94 N. C., 220, and *Holly v. Holly, ibid.,* 639) that the plaintiff could not recover, it became the duty of plaintiff's counsel to call the attention of the court to some part of the evidence bearing upon some legal proposition; on the contrary, the court not only declared a position taken by counsel to be untenable, but added that upon a review of the whole evidence he would tell the jury that in no view would any statute run after Dale became insane, thus narrowing the controversy to a single point. The judge had his notes, presumably, before him, and had better opportunity than counsel for analyzing and determining its legal effect. We do not think that the plaintiff was precluded from taking advantage of errors unless his counsel then and there submitted an argument upon the facts and law, outlining in substance the ground we have taken. *Mobley v. Watts,* 98 N. C., 284; *Pescud v. Hawkins,* 71 N. C., 299; *Tiddy v. Harris,* 101 N. C., 589; *Warner v. R. R.,* 94 N. C., 250; *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551. In view of all these authorities, the late *Chief Justice Smith,* in *Tiddy v. Harris, supra,* said: "But the practice has long prevailed, when the proofs are all in and the judge intimates an opinion that under the old practice the plaintiff cannot recover, or, under the new, the testimony fails to establish the issues necessary to his having judgment, he may suffer nonsuit, and by appeal have the correctness of the ruling reviewed." This Court has repeatedly held that it is not necessary to plead specially the statute of limitations in order to show title by possession, but that it is included in the issue of ownership, though the title may depend entirely upon proof of possession for the statutory period. *Freeman v. Sprague,* 82 N. C., 366. When the judge declared his purpose to tell the jury that "no statute ran against the defendants after Dale (259) became insane," and had previously said in presence of the jury that "all of the evidence showed that John Dale had been insane since 1847 or 1849, and that there had been a possession under him on the lappage since 1847," when both propositions were disputed and put in doubt by more than a scintilla of testimony, as we have seen, it is difficult to distinguish the case where the judge says in direct terms

that the issue must be found for the defendant, from that where he states conclusions of fact and law that must inevitably lead to the same result. If John Dale was insane in 1847, when Queen entered on the lappage, and no statute ran against him after that time, the issue of title must of necessity have been found for the defendants if they exhibited an older title for the land or connected themselves with the elder grant.

We have not thus far adverted to the fact, however, that though the surveyor in his examination speaks of the Morgan grant as the defendants' grant, and though he describes a Derry Berry line and states that Dale's beginning corner was the same as that of the Morgan grant, there is absolutely no testimony tending to connect John Dale, the ancestor of the defendants, by a chain of title with the Morgan grant. True the judge said, apparently after the cross-examination of the surveyor, and when no paper title had been offered by the defendants, that the Morgan or Dale grant seemed, according to all of the evidence, to cover the land in dispute, and plaintiff made no objection. If the defendants intended to insist upon the advantage of the elder title for the lappage, it was incumbent on them to connect themselves with the grant to Morgan, or show an older title, in some way, than that offered by plaintiff. In the absence of such proof, the Morgan grant serves the purpose of taking the right out of the State and opening the way to either party for showing title by continuous adverse possession under color for seven years, when the statute was running. We assume
(260) that the court below has sent up all the testimony, since the exception necessarily involves a review of all that was offered. According to the record, the plaintiff was at liberty to rely on either grant to show possession out of the State. The proof of a counter-possession, within the lappage of the two grants, on the part of the defendants, could not be extended beyond their actual *possessio pedis* in the absence of testimony connecting them with the elder grant or an older title, so as to give them thereby a constructive possession superior to that which the law would otherwise give to the plaintiff to the outside boundary of the Ferree and Brittain deeds to Stacy, since they were proved by the surveyor to be coterminous with the Craige and Brittain grants. In this view of the evidence, the *prima facie* proof of the title in the plaintiff would be shown by all of the witnesses as to boundary. The failure of the plaintiff's counsel to object when the court stated a conclusion as to the facts not warranted by the testimony, would not supply the want of testimony not offered but necessary to sustain the contention of the defendants. In this aspect of the evidence, even if Dale was insane prior to the entry of Queen in 1847, the defendants claiming under his heirs could only hold in the absence of paper title such portion of the

land as was actually occupied by him for twenty years. If they exhibited and located, so as to cover the disputed territory, an older title or connected him by an unbroken line with the elder grant, then only would the questions—first, as to the possession, and then as to the sanity of John Dale—arise; and when they arose, it would have been the province of the jury to pass upon them.

For the reasons given, we think that the court below erred. The judgment of nonsuit must be set aside and a new trial awarded.

ERROR.

Cited: *Shaffer v. Gaynor,* 117 N. C., 21; *Ins. Co. v. Edwards,* 124 N. C., 117; *Weaver v. Love,* 146 N. C., 417; *Currie v. Gilchrist,* 147 N. C., 654; *White v. Scott,* 178 N. C., 638.

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(261)

T. L. EMRY ET AL. v. J. H. PARKER ET AL.

Parties—Appeal—Practice.

Appeal from an order making parties cannot be allowed to other parties who do not show that some substantial right of their own is thereby affected.

AVERY, J., dissenting.

MOTION to make parties, heard by *Brown, J.,* at the May Term of HALIFAX. The court allowed the motion, and the defendants appealed. The facts are sufficiently stated in the opinion.

R. O. Burton and L. P. McGehee for plaintiffs.
T. N. Hill and W. H. Day for defendants.

SHEPHERD, C. J. At the instance of the plaintiffs, a notice was issued to J. J. Daniel to show cause why he should not be made a party defendant, and said Daniel making no resistance, an order to that effect was made by his Honor. From this order the original defendants appealed, and the only question to be considered is whether the appeal can be entertained at this stage of the action.

An appeal cannot be taken from an order of the Superior Court which does not determine the action, and which does not deprive the appellant of any substantial right which he might lose if the order is not reviewed before final judgment. Under such circumstances, the party may have his exception entered of record, and, if necessary, may have it consid-

ered by the Supreme Court on appeal after the final judgment. *Clement v. Foster,* 99 N. C., 255; *Welch v. Kinsland,* 93 N. C., 281; *Hailey v. Gray, ibid.,* 195. Tested by the foregoing rule, it is entirely clear that the appeal was prematurely taken, as it is well settled by this Court, in the language of *Pearson, C. J.,* that "a misjoinder of one (262) who is not a necessary party is surplusage, . . . as to the unnecessary parties plaintiff, it is their own concern to be made liable to costs; as to the unnecessary parties made defendants, they are allowed to disclaim and have judgment for costs." *Green v. Green,* 69 N. C., 294; *Righton v. Pruden,* 73 N. C., 61; *Tuck v. Hunt, ibid.,* 24. Daniel does not object to being joined as a defendant, and if he is an unnecessary party it is "surplusage," and if he is an "improper" party there is nothing whatever in the record which discloses that his joinder can in the least affect any substantial right of his codefendants. Whether the making, or refusal to make, additional parties, may not in some cases affect a substantial right, and therefore become the subject of immediate appeal, are questions not presented in the record. These questions are discussed in previous decisions of this Court, and need not now be considered by us.

APPEAL DISMISSED.

AVERY, J., dissenting. It is insisted that the appeal in this case should be dismissed upon the ground that no order allowing or refusing a motion to make an additional party defendant affects a substantial right. In *Merrill v. Merrill,* 92 N. C., 660, *Merrimon, C. J.,* delivering the opinion of the Court, stated the principle applicable to this case very clearly and tersely when he said: "Who shall and who shall not be made additional parties are questions, in many cases, of serious moment, and we can see no reason why the decision of a question of law, arising in the exercise of the power to make them, shall not be reviewed like the decision of any other question of law affecting the merits in the progress of the action. There is nothing in the statute nor in the nature of the power that forbids it, and justice may require it." In *Keathly v. Branch,* 84 N. C., 204, *Smith, C. J.,* after noting the fact that the case of *Rollins v. Rollins,* 76 N. C., 254, had been reaffirmed in *Lytle* (263) *v. Burgin,* 92 N. C., 301, quotes with approval the rule of practice stated in the former case, and the reason given by the Court for its adoption. The rule is that in all controversies involving a question as to the title of land, every landlord has the right to defend, either with or without the tenant, and that under the term "landlord" all persons have a right to come in as parties "whose title was connected or consistent with that of the occupier, and is divested or disturbed by any claim adverse to such possession," even though such per-

sons may never have previously exercised their right of dominion or ownership. It was also explicitly declared to be the duty of the court to pass upon the application "as a question of right in law, upon the interest of the party being manifested by affidavit." It is settled, therefore, as firmly as precedent can effect a final determination of a question, that any person whose title to or interest in the thing in controversy is consistent with that of one of the parties litigant, and may be divested or disturbed by granting the judgment demanded in the complaint or a counterclaim, has such an interest in the action, that his affidavit setting forth his relation to the controversy is, if uncontradicted, to be treated, on motion to make him a party, as *prima facie* evidence of a substantial right in the applicant to become a party. *Rollins v. Rollins, supra; Lytle v. Burgin,* and *Keathly v. Branch, supra.* If the refusal of a judge to grant the motion is a denial of a substantial right, it must follow inevitably that the granting of the same motion so "affects a substantial right claimed" as to entitle the party aggrieved to demand immediate review of the order, though it may be that he may, *at his election,* enter an exception to the ruling and await the final determination of the action before assigning it as error. The questions involved in this controversy, as distinguished from the thing (the goods) in dispute, is whether the deed of trust which purported to convey property that is the subject of the action, to J. H. Parker as trustee, was registered before that subsequently executed to J. J. Daniel as trustee, and if so, whether it was executed to hinder, (264) delay or defraud creditors. If the deed to Daniel was registered before that previously executed, as to which the pleadings raised an issue of fact, or if the deed of trust to Parker should be declared fraudulent and void, then, in either event, Daniel would be declared, as trustee, the legal owner of the property in controversy, and if it is to be subjected to the payment of plaintiff's debt as demanded in the complaint, it would become the duty, as it would unquestionably be the right, of Daniel to make the sale and receive his commissions for such service. Daniel is therefore "a necessary party to the complete determination of the questions involved." The Code, sec. 184; *Wade v. Sanders,* 70 N. C., 277; *Ten Broeck v. Orchard,* 74 N. C., 409; *Hancock v. Wooten,* 107 N. C., 9. The notice to Daniel to show cause why he should not be made a party was an invitation to make himself a party plaintiff if he chose, or notice of a motion to make him a party defendant *in invitum.* It was, therefore, a substantial compliance with the requirement of the statute (The Code, sec. 185) to serve such notice on him. *McCormac v. Wiggins,* 84 N. C., 278. Having pursued the course pointed out by the statute as to the manner of making the new party, the plaintiffs have the right to insist that the practice of the courts of

equity must be adopted, and that in any action or proceeding involving the validity of the deed of trust executed to him as trustee, or the question of its priority as a lien over another mortgage deed, the *cestuis que trust* under the former deed have the right to demand that Daniel be made a party, or to insist that it is not competent for the court to pass upon or try any question in the determination of which he had an interest, or where his presence is necessary in order to administer the remedy provided by law. *Ten Broeck v. Orchard,* and *Hancock* (265) *v. Wooten, supra.*

The right of Emry and wife and Hilliard, as *cestuis que trust,* to have a complete determination of the question whether the goods should be subjected to their debt, through the exercise of the power conferred in the deed of trust, by the trustee Daniel, is unquestionably a substantial right on their part, and the refusal of a motion to make him a party, supported by so much of the plaintiff's complaint used as an affidavit as is not denied in the answer, would unquestionably entitle the plaintiffs to an immediate hearing and review of the interlocutory ruling. The motion involves the same question, however decided, and the granting of it must affect the interests of the defendants adversely, as the refusal would tend to do substantial injury to the plaintiffs.

The test is, first, whether Daniel is a necessary party to a complete determination of the questions whether the deed to Parker as trustee is fraudulent and void, and whether the deed executed to himself is fraudulent (both questions being raised by the pleadings), and second, whether the order making him, or refusing to make him a party, affects a substantial right of any party to the action. It is not material if the demand for the presence of Daniel as a party "involves a matter of law which affects a substantial right claimed" by any party to the action, whether the court grants the demand or refuses it. The courts cannot ignore the fact that while an appeal lies from any order which in effect determines or discontinues an action, or grants or refuses a new trial, the statute in terms provides for the immediate review of another class of "judicial orders and determinations." If the question involved in this motion falls within that class, the courts have no power to put a strained construction upon it in the vain effort to expedite the determination of the action. It is manifest that it is more expedient, indeed, to make haste slowly by bringing before the court all parties who must be concluded, in order to have a complete and final determination of the controversy, than to plod through all of the weary stages of (266) a suit, like that at bar, to be informed, after the supposed conclusion of the trial below that the work must all be done a second time, in order to estop Daniel from raising the questions involved, by instituting another action. The fact that no such inconvenience will

probably arise from granting this particular motion makes it none the less a judicial order affecting a substantial right, it being immaterial, according to the terms of the statute, which party claims the right, or whether the decision is adverse or favorable to such claim. The Code, sec. 548.

The *argumentum ab inconvenienti* urged against the view we have presented is, that if the right of appeal from an order granting or refusing a motion to make additional parties is conceded, parties to actions will resort to such motions for the purpose of delay, and will prolong litigation so greatly as often to amount to a denial of justice. To this it would be sufficient to reply, *ita lex scripta.* The Legislature alone has power to provide a remedy for inconveniences growing out of the interpretation of statutes according to their obvious meaning. But it must be remembered that the court below was not required to enter a record of an appeal, nor can this Court entertain the appeal unless the motion to make new parties was supported in the lower court by an affidavit manifesting, so as to place beyond dispute, if true, the fact that the presence of the proposed new party is necessary to a complete determination of the action.

The prophecy of evil and inconvenience resulting from giving the natural meaning to the terms of the statute, and following former adjudications, is necessarily, therefore, founded upon the idea that parties, for the mere purpose of delay, will incur the danger of prosecution for perjury, to which they would subject themselves by misrepresentations that are willful, or not founded on probable cause, of the relation to the action sustained by the proposed new party. *State v. Knox,* 61 N. C., 312. If the *argumentum ab inconvenienti* has weight in exceptional cases, as we admit, it certainly should have no force when (267) founded upon the supposition of such wholesale dishonesty among litigants, as would make the willingness to commit perjury for the mere purpose of delay almost universal. When the court requires, not only an affidavit, but an affidavit making it palpable that the presence of the new party is essential to a final determination of the matter in controversy, there will be no danger of raising the flood gates too high in declaring the introduction of such an affidavit in support of the motion sufficient as *prima facie* evidence of a subbstantial right to give to either plaintiffs or defendants the privilege of appealing from an adverse ruling.

Where all of the necessary parties are before the court, and one judge tries some of the issues and continues as to other material issues, which are subsequently tried by another judge, it is not conceivable how it can affect a substantial right to postpone the review of rulings in this Court till two *nisi prius* judges have accomplished what is usually done by

one, preliminary to an appeal. *Hilliard v. Oram,* 106 N. C., 467; *Hicks v. Gooch,* 93 N. C., 112. No substantial right can be affected by postponing a review of the rulings of the trial judge, on the admission of evidence or instruction to a jury, until an account, which it is necessary to take before the rendition of judgment, shall have been passed upon by another judge. Every right of the parties in all such cases can be fully protected by entering the proper exceptions as the ground for assignment of error on the final hearing. *Blackwell v. McCaine,* 105 N. C., 460.

The case of *Lane v. Richardson,* 101 N. C., 182, is relied upon as supporting the contention that the appeal should be dismissed, and the question whether Daniel should be made a party reserved on exception until there is a trial and judgment upon the issues. It will appear from a critical examination of that case, that it was not the purpose of the Court to overrule *Merrill v. Merrill, supra; Lytle v. Burgin,*
(268) *supra,* and *Rollins v. Rollins, supra,* and it is so explicitly stated. *Chief Justice Smith* evidently intended to distinguish the two cases in that the appeal in *Lane v. Richardson, supra,* was not simply from an order making a new party, but from a refusal to strike out a portion of the answer filed by a party who had previously been allowed without objection to be made a defendant. To give it any other construction would be to overrule *Merrill v. Merrill, supra,* in which *Justice Merrimon* stated explicitly that questions of law arising out of a motion to make new parties were often very important, as involving substantial rights. It will not be denied that Daniel is named as trustee in the assignment of the later date, in which the plaintiffs, Thomas L. Emry and wife and Louis Hilliard, the defendants, James H. Parker and Pope and Pender and others, not parties to the action, are *cestuis que trust.*

While it may not be essential to the proper determination of the cross allegations of fraud in the execution of the two deeds under which the contestants respectively claim the right to sell the property, and appropriate to their own debts the proceeds of the sale, and of the issue as to the time of registration, to have all of the *cestuis que trust* before the court, it is necessary that those whose interests are to be guarded by Daniel as trustee should be represented by him when the validity of the deed under which they claim is drawn in question. *Hancock v. Wooten, supra.*

Cited: Bennett v. Shelton, 117 N. C., 105; *Bernard v. Shemwell,* 139 N. C., 447; *Spruill v. Bank,* 163 N. C., 45; *Joyner v. Fiber Co.,* 178 N. C., 635; *Farr v. Lumber Co.,* 182 N. C., 727.

(269)

D. BEAM ET AL. v. S. WILEY BRIDGERS ET AL.

Judgment—Amendment of the Record—Res Judicata—Motion to Correct a Judgment—Appeal.

1. The Superior Court has power to correct and amend its judgments so as to make them express fully and plainly the rights of the parties as ascertained in the trial of the cause, and appeal lies to the Supreme Court from a refusal to make such correction.

2. When, upon a motion to correct a judgment which had been carried by appeal to the Supreme Court, it appeared that such judgment was not according to the admitted rights of the parties, and the court below refused the motion, on the ground that such judgment was *res judicata*, it was *Held*, that there was error.

MOTION heard by *Bynum, J.*, at the Spring Term, 1892, of RUTHERFORD. The facts may be gathered from the opinion.

Justice & Justice (by brief), for plaintiffs.
J. A. Forney (by brief), for defendants.

BURWELL, J. This cause was before the Court at February Term, 1891 (108 N. C., 276), upon an appeal by the plaintiffs from a judgment rendered by his Honor *Brown, J.*, at Fall Term, 1890, of the Superior Court of Rutherford, upon the verdict of the jury upon issues submitted to them by consent of the parties, as appears from an inspection of the record of that appeal. The case was heard here, and the judgment was affirmed.

Before the Spring Term, 1892, of the Superior Court of Rutherford County, the defendants notified the plaintiffs that at that term a motion would be made "to correct the judgment rendered against the defendants at Fall Term, 1890," said judgment being that one from which plaintiffs had appealed, and which had been affirmed by this Court, as above stated. It appears from the transcript sent (270) up that the motion really made before his Honor, *Bynum, J.*, was "to set aside the verdict of the jury and to amend the judgment." The motion was overruled, and it was "adjudged that the decision and judgment of the Supreme Court, filed in this action, is the judgment of this court." From this judgment, and from the refusal of his Honor to grant the motion above set out, the defendants appealed.

It appears from the pleadings that a part of the controversy between the parties related to a tract of land of one hundred and fifty acres, of which, as the complaint alleged, the plaintiffs owned *six-sevenths*, and the defendants *one-seventh*. The answer denied that the plaintiffs owned any part of this tract, and averred that the deed to plaintiffs' ancestor, under which they claimed six-sevenths thereof, was made to him by

mistake, and that it was the intention of the grantor to convey, not to plaintiffs' ancestor, John Beam, but to Elizabeth Beam, under whom the defendants claim, and who, as the complaint alleged, owned one-seventh by inheritance, at the date of the deed to John Beam. The issue relating to this part of the controversy, which was agreed to by the parties, was as follows: "Was the deed from James Bridgers and wife and others, the heirs of James Bridgers, dated 16 September, 1844, covering and describing the second one hundred and fifty acre tract described in the complaint, made to John Beam by mistake, as alleged in the answer?" To this issue the jury answered, "No"; and yet, upon these pleadings and this verdict, the court appears to have adjudged the plaintiffs owned all of this tract of land, and, if the judgment stands as it is, the defendants, as it appears, will lose the undivided one-seventh part thereof, which, as plaintiffs seem to admit, belongs to them.

We think that his Honor had power to make the record express truly the ruling of the court and the action taken in the cause, and to
(271) hear evidence for the purpose of ascertaining the facts, and if fully satisfied that the rulings of the former judge were not correctly put in writing, and that the record does not truly express his judgment on account of some inadvertence—that he meant to adjudge that the plaintiffs owned what they claimed, to wit, *six-sevenths* of the tract, and that, by some clerical error, he was made to say that plaintiffs own the entire tract—his Honor had power to so amend the judgment at Fall Term, 1890, as to make it speak the truth. *Brooks v. Stephens,* 100 N. C., 297, and cases there cited. We think, therefore, that there was error in holding that the matter was *res adjudicata,* and we remand the cause, that the record may be so amended as to make it truly express the judgment of the court at Fall Term, 1890, if, upon investigation, it is found that there was a mistake made in putting that judgment into writing and on the record.

REVERSED.

Cited: *Murray v. Southerland,* 125 N. C., 178; *Mann v. Mann,* 176 N. C., 376.

M. M. CURETON v. JOHN GARRISON.

Costs—Witnesses—Practice.

1. A motion to retax costs may be heard by the judge in the first instance, or on appeal from the clerk.

2. Only the costs of witnesses duly subpœnaed and examined or tendered can be taxed against the party cast, and then not more than two to prove one fact.

MOTION to retax the costs, heard at POLK, by *Hoke, J.*

The court ruled that if the witnesses were not sworn, and examined or tendered, even though attending under subpœna, and though they would have given material evidence, their fees could not be taxed against the losing party.

Plaintiff excepted and appealed.

No counsel for plaintiff. (272)
H. H. Justice for defendant.

CLARK, J. Where a witness, though duly subpœnaed, is neither examined nor tendered to the opposite party on the trial, his attendance can be taxed only against the party who summoned him. *Loftis v. Baxter,* 66 N. C., 340; *Wooley v. Robinson,* 52 N. C., 30. Besides, not more than two witnesses summoned by the successful party to prove a single fact can be taxed against the party cast. The Code, sec. 1370; *State v. Massey,* 104 N. C., 877. The motion to retax can be made before the clerk who has made the taxation, whence an appeal lies to the judge at chambers; or it can be made in the first instance before the judge at term time by virtue of his supervisory power over the action of the clerk. *In re Smith,* 105 N. C., 167.

AFFIRMED.

Cited: Sitton v. Lumber Co., 135 N. C., 541; *Moore v. Guano Co.,* 136 N. C., 250; *Brown v. R. R.,* 140 N. C., 156; *Herring v. R. R.,* 144 N. C., 209, 210; *Hobbs v. R. R.,* 151 N. C., 136; *Chadwick v. Ins. Co.,* 158 N. C., 381; *Staley v. Staley,* 174 N. C., 642.

NELSON WHITFORD v. THE CITY OF NEW BERN.

Negligence—Damages—Evidence — Charge—Prayer for Instructions—Contributory Negligence—Practice.

1. In an action against a city for damages for injury, resulting from falling on a "slippery place," upon an issue as to whether such place was a part of the defendant's street, among other testimony admitted, tending to show it was used as a street, the court allowed a witness, the mayor of the city, to testify that "To obstruct it was a violation of law, and parties who did it were tried before me": *Held,* that this testimony, though incompetent, did not entitle defendant to a new trial.

2. The admission of incompetent testimony, unless it might have misled the jury or worked injury, is not a ground for setting aside a verdict.

3. In response to a prayer that if plaintiff knew slime was on the plank, and did not use extra care, it was "contributory negligence," the court charged, after explaining what negligence is, "If the plaintiff knew the place was slippery it was his duty to use more care than if he were wholly ignorant of its condition": *Held*, sufficiently responsive.

4. It was not necessary in this case for the court to instruct the jury that the plaintiff could not recover upon contributory negligence found; it was its duty, upon issues found, to determine if the plaintiff could recover.

5. It is not essential to give instruction in the language of the prayers.

6. Though there was no testimony but the plaintiff's, and that was to the effect that "he noticed the place was slippery, but was not expecting anything to throw him down, and kept no more lookout than usual"; yet the defendant cannot complain that it was the duty of the court to find the facts—or instruct the jury more distinctly what they constituted—as the court gave in substance the charge he asked, and especially as the charge was fair as it stood.

ACTION tried at the Spring Term, 1892, of CRAVEN, before *Winston, J.* The facts sufficiently appear in the opinion.

W. W. Clark for plaintiff.
M. DeW. Stevenson for defendant.

MACRAE, J. The action was brought to recover damages for the alleged negligence of defendant in failing to keep its street in good condition, by reason of which failure, and the slippery state of the street, plaintiff fell and was injured. The defendant denies negligence on its part, denies that the place where the injury was sustained was upon its street, and alleges contributory negligence on the part of plaintiff.

In the second cause of action the negligence and the injury are alleged to have occurred upon a public wharf of defendant, instead of upon its street, but by the issues the contention seems to have been narrowed down to the questions whether plaintiff was injured upon a public street which defendant was bound to keep in good repair, was
(274) he injured because of the negligence of defendant in permitting the street to remain in an unsafe condition, and as to contributory negligence, and damages.

The first exception we will consider, it being the second noted in the case, was to the admission of the testimony of R. P. Williams, who testified that he was mayor of New Bern in 1890, and that he made the report recommending the extension of Middle Street. "This extension was controlled by the city like any other street of the city. We extended Middle Street, and it was afterwards used by every one as a street. People went there and bought fish, and people from James City got off the ferry-boat and walked over it."

The objection to the above testimony, and exception thereto, was not insisted upon in this Court, but the witness further testified: "To obstruct it was a violation of law, and parties who did so were often arrested and tried by me." To this testimony there was an objection and exception by defendant.

It was alleged, and denied, that the place where the accident occurred was upon one of the public streets of New Bern.

One of the issues was, "Was the plaintiff injured while walking on Middle Street?" There had been testimony tending to prove that the defendant had authorized and directed the extension of Middle Street sidewalk by the construction of a plank walk to a fish-dock, and that this extension was kept in repair under the direction of the defendant and was used by the public; and to show further that the city exercised authority over this extension, there can be no valid objection to the testimony of the mayor to the fact that persons were tried by him for obstructing it.

It was not competent for him to testify that to obstruct it was a violation of law, but his Honor, in charging the jury, said: "Mayor Williams' evidence, and that of the other witnesses, that people passed and repassed over the walk, that the police exercised con- (275) trol over the walk, and that when parties obstructed the walk or street, if you find it to have been such, that they were arrested and tried by the mayor, and all other evidence of this kind the court submits to you, as it tends to prove or to disprove that the city authorities exercised control over it, to show that the street was opened under the order of the defendant."

The admission of irrelevant or incompetent testimony is not always ground for setting aside a verdict. Unless it appear to the court that it is calculated to mislead the jury, or work a prejudice to the party objecting, it ought not to have this effect. Taken in connection with the charge of his Honor upon this point, we are of opinion that the defendant could not have been prejudiced by it. *Bank v. McKethan,* 84 N. C., 582.

The defendant requested the court to instruct the jury that the wharf upon which the plaintiff fell was not a part of the street of the city of New Bern. This prayer for instruction was denied, and the defendant excepted. The plaintiff had alleged, and the defendant denied, that the injury was sustained upon defendant's street. An issue had been submitted to the jury involving the same question. It was to this point that most of the testimony was directed. It was properly left to the jury under instructions that they must first find that it was a street, and to do this they must find that the defendant directed it to be opened, and that it was opened and used as a street.

The defendant requested the further instruction "that if plaintiff knew slime was on the planks, and he did not use extra care it was contributory negligence, and plaintiff cannot recover." His Honor, upon the question of contributory negligence, instructed the jury that the burden of showing that the plaintiff was negligent rests on the defendant. "But evidence of this contributory negligence may come from the plaintiff and his witnesses, and in this case, if the jury shall (276) find, from all the evidence, that the plaintiff was negligent, then he cannot recover." Then he goes on to explain to the jury what is negligence. "If the jury find that the place where the plaintiff fell was a part of the street, then they may consider the evidence that the same ran through the fish market, and that parties who bought fish and brought the same away, dropped fish slime on the said street. In this case, and on the fourth issue, if the plaintiff knew that the place was slippery, it was his duty to use more care than if he were wholly ignorant of its condition, and it is the duty of the plaintiff to show that he used reasonable care adapted to the circumstances of the case." To this part of the charge the defendant excepts. And defendant excepts to the failure by the court to use the language of defendant's request.

We think that the language used by his Honor in instructing the jury upon the question of contributory negligence was quite as strong as that which he was requested to use. The request was, "If he knew slime was on the planks, and he did not use extra care, it was contributory negligence, and plaintiff cannot recover." The charge was, "If he knew the place was slippery, it was his duty to use more care than if he were wholly ignorant of its condition."

It was not necessary for the judge to have instructed the jury upon the issue presented, that the plaintiff cannot recover. The issue presented the simple question, Was the plaintiff guilty of negligence? To which they were to respond, Yes or No—and upon their response to this issue, it was for the court to determine whether the plaintiff could recover. *Bottoms v. R. R.*, 109 N. C., 72. However, it will be seen that his Honor did instruct the jury, that if the jury found from the whole evidence that the plaintiff was negligent, then he cannot recover.

It is not necessary that the judge shall give the instructions asked in the very words of the prayer; it is sufficient if he give the (277) instruction in substance, and this he seems to have done.

The defendant's counsel contends that his Honor should have found the fact and declared whether it was contributory negligence, as the only testimony upon the point whether plaintiff, knowing that the place was slippery, used reasonable care, was that of the plaintiff himself that he noticed the place was slippery, but was not expecting anything to throw him down, and kept no more lookout than usual; and

defendant relies for this position on *Emry v. R. R.*, 109 N. C., 589, where the duty of the presiding judge is discussed and declared to be, when the facts are ascertained, to instruct the jury whether they constitute negligence.

Whatever force there may be in the contention, it is clear that it cannot avail the defendant, inasmuch as the court, as we have before remarked, gave, in substance, the instructions prayed for by its counsel. The words, "reasonable care adapted to the circumstances of the case," as used by his Honor, very plainly refer to the preceding language that "it was his (plaintiff's) duty to use more care than if he were wholly ignorant of its condition." Construed in this way, the charge was not obnoxious to the rule laid down in the decision referred to.

Having disposed of all the exceptions, we are of the opinion that there is

NO ERROR.

Cited: S. v. Craine, 120 N. C., 602; *Smith v. Lumber Co.,* 142 N. C., 38.

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(278)

THOMAS M. STATON v. THE NORFOLK AND CAROLINA R. R.

Damages—Drainage of Surface Water—R. R. Charter—Constitution—Magna Charta—Legislative Powers—Taking Private Property for Public Purposes—Eminent Domain.

1. The authority granted to a corporation by its charter to construct a railroad does not thereby confer upon it an immunity from liability for damages to others in respect of their adjacent lands, when, under the same circumstances, a private individual would be liable.
2. Such immunity expressly granted by the Legislature would be in conflict with the Magna Charta and the Constitution.
3. The words "deprived" and "taken," in the Magna Charta (Declaration of Rights, sec. 17), are broad enough to include *damages* to land.
4. The use of "ordinary skill and caution" in the construction of the work is not sufficient to protect from liability if there was a failure to provide against a danger which might have been foreseen.

APPEAL from *Brown, J.,* at May Term, 1892, of HALIFAX.

The suit was for damages for flooding land. There was a verdict and judgment for plaintiff. Defendant appealed. The material facts may be gathered from the opinion of the Court.

R. O. Burton for plaintiff.

T. N. Hill and W. H. Day for defendant.

SHEPHERD, C. J. In *Jenkins v. R. R.,* 110 N. C., 438, we had occasion to say, in respect to the drainage and diversion of surface water, that "a railroad company enjoys the same privileges as any other landowner, but no greater, to be exercised under the same restrictions and qualifications," and that it "has a right to cut ditches (on its (279) right of way) 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 damages can be recovered if the lands of the landowner are injured." In the opinion in that case we did not attempt to lay down any precise rule as to what would be a reasonable exercise of the privilege under all circumstances, and in confining ourselves to the enunciation of a few general principles, we but followed the example of the highest courts both in England and America.

Indeed, it would be impossible to anticipate the many and varied phases in which this difficult subject may be presented, and it is believed that any effort to do so would be attended with a practical denial of justice in many instances. We stated, however, that "if the watercourse 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 that it would be an unreasonable exercise of the right if the ditches were so constructed "as to divert the surface water from a direction in which, by the general inclination of the land, it naturally flows."

In the present case there was abundant testimony tending to show the existence of the qualifying conditions just stated, and the charge of his Honor in this respect is fully sustained by the principles declared in the decision to which we have referred. If his Honor deviated at all from these principles (and we are rather inclined to the opinion that he did in a slight degree), it was in favor of the defendant, and it can therefore have no just ground of complaint.

As we understand it, the exceptions most seriously relied upon are addressed to the refusal of the court to give the instructions prayed for, and these substantially involve the proposition, that inasmuch as the Legislature has authorized the defendant to construct its road, (280) it is not liable to an adjacent proprietor for any damage incident to such construction, provided the work is necessary and is skillfully and carefully performed. In other words, it is insisted (notwithstanding our declaration to the contrary in *Jenkins' case*) that a railroad company, under such circumstances, is entitled to greater privileges than an individual, and that where the latter would be liable for a violation of the principles embodied in the maxim *sic utere tuo ut alienum non laedas,* the former would be exempt from all responsibility whatever,

and this upon the theory that the damage is supposed to be "consequential," for which no action can be maintained. In support of this view it is asserted that a railroad is for the benefit of the public, and that, in the very authority to construct it, there is an implied subordination by the Legislature of the rights of individuals. This may all be true when compensation is provided, as where land is actually condemned and taken as a right of way, but it would be a strange measure of justice to require a railroad company to pay only for a narrow strip of land about fifty or one hundred feet in width, and at the same time practically confer upon it the privilege of destroying thousands of acres of the land of adjacent proprietors without either the duty of making compensation, or the liability to a common law action for damages. It would be of small comfort to the ruined proprietor to be told that he must bear his loss for the benefit of the public, and it would not be unnatural if he answered that if the public good required the destruction of his property, an enlightened sense of public justice should demand that he be compensated for his loss. In this he would be sustained by the words of Sir William Blackstone, that "the public good is in nothing more essentially interested than in the protection of every individual's private rights." 1 Blackstone Com., 138.

It is true that some of the cases from other states, cited by the defendant's counsel, go to the extraordinary length of sustaining his proposition; but these are not in accord with the more recent and better authorities, and they are rapidly being submerged by the steady (281) and increasing current of judicial decision. Mr. Lewis, in his excellent work on Eminent Domain, sec. 566, referring to cases of a similar character, remarks that underlying such decisions "is an erroneous assumption as to the rights acquired by the purchase or condemnation of property for public use. This assumption is that there is acquired, not only all the ordinary proprietary rights in the property taken, but also certain proprietary rights which pertain to the property not taken. . . . There is no warrant for this assumption, either in reason or authority, outside of the particular cases referred to. There is no reason why a railroad, in purchasing or condemning property for its use, should be held to acquire anything more than would be acquired by a private individual purchasing the same property for the same use." After speaking of the liability of such a private individual for any actionable injury to the adjacent land, "either by depriving the soil of its support, by interfering with the flow of running streams or otherwise," the author proceeds: "So, with a railroad when it acquires a right of way through a tract of land; it becomes an adjoining proprietor with the owner of the tract, with precisely the same rights and duties with respect to such owner as though the strip of land had been acquired

by an individual for ordinary use, except the unqualified right of operating the road in a reasonable and proper manner; and so with every description of taking for public use. In adapting the property taken to the use proposed, the public, or its agent, is subject to the law of adjoining proprietors, and to the maxim *sic utere,* etc. If, in such adaptation, the adjacent owner's rights of property are violated, he is entitled to compensation, not on the ground of a want of skill or diligence in constructing the works, but *because his constitutional rights of* (282) *property have been violated."*

At an early period in our history, some of the constitutions of the states contained no provision that private property should not be taken for public use without just compensation, but so repugnant to natural justice, as well as to the constitutional principles of the mother country, was the assertion of the right, that the courts of these states unhesitatingly pronounced against such an assumption of legislative authority. Some of them declared that it was against the fundamental principles of natural justice and equity; others rested their decision upon the ground that it was in conflict with a provision of the Federal Constitution upon the subject (which, however, is only a limitation upon the Federal Government); while others reached the same conclusion upon the more satisfactory principle that it was inhibited by certain provisions of Magna Charta which had been incorporated into their organic laws. All of the states, however, except North Carolina, now contain express provisions that "private property shall not be taken for public use without just compensation," and owing to the restricted interpretation of the word "taken" (improperly, we think, applying it exclusively to property actually condemned), several of them have added the words "or damaged," or language of similar effect. We cannot ascribe to our law-makers, in authorizing the construction of railroads or other corporate works, the purpose of granting them privileges so violative of the rights of the private property owner, and, we feel assured, that in conferring such privileges, it was intended that they should be accompanied in their exercise with the same restrictions and duties as those which are applicable to adjacent proprietors. Had the Legislature done otherwise, its action would have been contrary to the principles of our Constitution, and therefore of no validity. It is true, as is said in *S. v. Wilson,* 107 N. C., 865, that we have no specific provision in our fundamental law upon this subject, but we have the broad and comprehensive language of Magna Charta: "No person (283) 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." Declaration of Rights, sec. 17.

In *R. R. v. Davis,* 19 N. C., 451, this provision was referred to by *Judge Gaston,* who intimated that it was "restrictive of the right of the public to the use of private property, and impliedly forbids it without compensation." In *Cornelius v. Glen,* 52 N. C., 512, the power of the Legislature to take property for public use without compensation is expressly denied, and to the same effect is *S. v. Glen, ibid.,* 321. In the latter case, *Judge Battle,* in delivering the opinion of the Court, after quoting the words of *Judge Gaston, supra,* and referring also to the Declaration of Rights, said: "Had the case demanded it, we cannot doubt that the judges who then composed the Court would have decided in favor of the restriction, and in so doing they would have found themselves sustained by similar decisions in many of our sister states." In *Johnson v. Rankin,* 70 N. C., 550, the Court (*Rodman, J.*) referred to the foregoing cases with approval, and stated that the principle had "never been denied to be a part of the law of North Carolina."

The cases which hold that the use of the word "taken" in constitutional provisions for compensation excludes the common law, and indeed, all other remedy for the redress of injuries to adjacent property not actually condemned or purchased under circumstances where an individual would be liable, are, in our opinion, unsupported by either reason or principle. We suspect that they were influenced to a great extent by English decisions upon statutes which either expressly or by implication, deprived the adjacent proporietor of his right to damages. the above mentioned provision of Magna Charta, which was considered that, while the legislation upon which they are founded may be clearly in conflict with the constitutional principles of the English government, it is nevertheless valid because of the omnipotence of (284) Parliament, and it is therefore the duty of the courts to administer the law as it is enacted. With us, however, these principles operate as limitations upon the authority of the Legislature, and when it exceeds such limits its acts are invalid, and of no force whatever. Cooley Const. Lim., 6. It seems clear that such legislation is in conflict with the above mentioned provision of Magna Charta, which was considered broad enough by Blackstone and other writers, not only to inhibit the mere taking of property, but also to protect the owner in its "free use and enjoyment, . . . without any control or diminution." 1 Bl. Com., 138. The word "deprived," therefore, as used in our Constitution, has been substantially declared by the great commentator to be insusceptible of such a narrow and restricted meaning. Even if the word were synonymous with "taken," the weight of authority is decidedly against such construction. Without attempting to quote to any extent from the opinions of the various courts, we will reproduce the

following language of the Supreme Court of the United States (*Justice Miller*) in *Pumpelly v. Green Bay,* 13 Wall., 166:

"It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of (285) that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into restriction upon the rights of the citizen, as these rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under pretext of the public good, which had no warrant in the laws or practices of our ancestors."

It will be noted that this was an action of trespass for overflowing the plaintiff's land, and it was claimed that there was no "taking" and that the damage was a consequential result of a work authorized by the Legislature of Wisconsin. This case is, therefore, exactly in point.

In *Eaton v. R. R.,* 51 N. H., 504 (a leading case which has been recognized as authority in many of the states), the plaintiff sued the defenant for damages for cutting through a ridge in constructing its road, whereby his lands were flooded. It was conceded in the case that if the cutting had been done by a private landowner, he would be liable. The Court said: "To constitute a 'taking of property' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' a 'total assumption of possession,' a 'complete ouster,' an 'absolute or total conversion of the entire property,' a 'taking the property altogether.' These views seem to us to be founded upon a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term 'property' . . . denotes a right over a determinate thing. 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' *Seldon, J.,* in *Wynehamer v. People,* 13 N. Y., 378; 1 Bl. Com., 138; 2 Austin on Jurisprudence, 817. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes' *pro tanto* the owner's property. . . . The injury complained of in this case is not a mere personal incon-

venience or annoyance to the occupant. Two marked charac- (286)
teristics distinguish this injury from that described in many other cases: First, it is a physical injury to the land itself, a physical interference with the rights of property. . . . Second, it would clearly be actionable if done by a private person without legislative authority. We think there has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted made no provision for the plaintiff's compensation, they afford no jurisdiction; that defendants are liable in this action as wrongdoers, and that the ruling of the Court (that they are liable) was correct."

The clearness and strength with which the above principles are expressed must be our excuse for such lengthy quotations. They represent the better reasoning upon the subject, and are sustained by a considerable number of authorities, collected in Lewis on Eminent Domain, and other works of a similar character. Mills on Eminent Domain, 184; Cooley Const. Lim., 670; *Armond v. Green Bay Co.,* 31 Wis., 316; *Grand Rapids v. Jarvis,* 30 Mich., 308; *Weaver v. Miss. Co.,* 28 Minn., 534; *Rhodes v. Cleveland,* 10 Ohio, 159; *Pettigrew v. Evansville,* 25 Wis., 228; *Cannif v. San Francisco,* 67 Cal., 45; *Hooker v. New Haven,* 14 Conn., 146; *Nevins v. Peoria,* 41 Ill., 502; *R. R. v. Dick,* 9 Ind., 433; *Kemper v. Louisville,* 14 Bush., 87; *Lee v. Pembroke,* 57 Me., 481; *Fall River Co. v. Plymouth,* 14 Gray, 155; *O'Brien v. St. Paul,* 25 Minn., 534; *Foster v. Stafford,* 57 Vt., 128; *Lahr v. R. R.,* 104 N. Y., 268.

We are not unmindful of *Meares v. Wilmington,* 31 N. C., 73, in which there are some expressions which seem to support the contention of defendant. It is there stated that the city would not have been liable for the injury incident to the grading of the street if the work had been done with "ordinary skill and caution." The force of that decision is broken by the construction put upon it by the Court in *Wright v. Wilmington,* 92 N. C., 156, as it seems that how- (287)
ever carefully and skillfully the excavation may have been conducted, the city would still have been liable (and, indeed, was held liable) in failing to provide against any danger that might have been foreseen. This is not deemed by Mr. Dillon (see quotations in the opinion) as consistent with the general principle stated, and in *Wright's case, supra,* it seems to have been further stripped of the peculiar significance for which it is now urged, by the intimation, if not, in fact, the substantial declaration of the Court, that it is the duty of the city "to cause the streets so to be made, and with sufficient side-drains as to remove, without injury to adjacent lots, such surface water as, from experience and knowledge of the past, may be reasonably anticipated to fall and may be provided for." The rule thus applied would not be inconsistent with the principle we have laid down. Without attempting

to state the principle as applicable between a municipal corporation and its citizens, it is sufficient to say that it is subject to many modifications under certain conditions, and that what would be "consequential" damages as between them, in some instances, would be actionable by a proprietor whose lands were adjacent to the city. Those who purchase lots in a city bordering on streets are supposed to calculate upon such changes as the increasing population may require, and there are many injuries which are considered to have been within the contemplation of the parties when the street was either purchased or condemned. These considerations, however, are not applicable to railroads or even municipal corporations, when actionable injury is inflicted by them upon the lands of adjacent owners, and the decisions we have noticed have never, so far as we are aware, been judicially recognized in this State as authority in such cases. On the contrary, the point now under consideration seems never to have been passed upon, and the late *Chief Justice Smith,* in *Salisbury v. R. R.,* 91 N. C., 490, considered it an open question and (288) "not free from difficulty."

In consideration of the foregoing reasons and authority, we are of the opinion that the principle laid down in *Jenkins' case* is correct, and that the authority granted to the defendant to construct its road does not confer upon it an immunity from liability for damages inflicted upon the lands of adjacent proprietors where such damage would, under the same circumstances, be actionable against individuals. We are also of the opinion, as we have before stated, that had such immunity been expressly granted by statute, such legislation would have been in conflict with the Constitution, and therefore void.

NO ERROR.

Cited: White v. R. R., 113 N. C., 620; *Fleming v. R. R.,* 115 N. C., 695; *Motley v. Warehouse Co.,* 122 N. C., 350; *Motley v. Finishing Co.,* 124 N. C., 234; *Phillips v. Tel. Co.,* 130 N. C., 520; *Dargan v. R. R.,* 131 N. C., 629; *Thomason v. R. R.,* 142 N. C., 308, 331; *Clark v. Guano Co.,* 144 N. C., 76, 77; *Willis v. White,* 150 N. C., 203.

R. M. MARTIN, EXECUTOR, v. MARY F. GOODE, ADMINISTRATOR.

Parties—Jurisdiction—Pleading—Administration—Will.

1. The aggregate sum demanded in good faith is the test of the jurisdiction of the court, though this aggregate is made up of several causes of action.

2. The jurisdiction of the Superior Court is not ousted by failure of proof, or by sustaining a demurrer as to part of the demand.

3. When the complaint alleged a liability of the defendant administratrix *c. t. a.*, for $150 and interest, balance due on an annuity devised, and another liability for $359.46 due because of her failure to board her mother according to the direction of her testator's will, it was *Held*, that a demurrer to the jurisdiction was improperly sustained, and this, though the court below ruled that the second cause of action could not be maintained.

4. The Superior Court has a right *ex mero motu* to direct that pleadings shall be more explicit, as that an entire will, instead of one clause thereof, shall be set out.

5. The clause of a will, "my mother is to have $150 out of my estate annually as long as she lives, and that she remain with my wife during the remainder of her life" imposes no charge upon the testator's estate for board of his mother.

ACTION heard upon demurrer, by *Brown, J.*, at the Spring (289) Term of NORTHAMPTON.

The complaint alleged a liability of the defendant administratrix *c. t. a.*, for $150, an annuity charged against her testator's estate, and another liability for $359.46 for the value of board refused to be furnished by the administratrix, and which it was alleged she was liable to furnish under the following clause of the will which was set out in the complaint: "My mother, Letitia Edwards, is to have one hundred and fifty ($150) dollars out of my estate annually as long as she lives, and that she remain with my wife, Mary F. Parker, during the remainder of her life." The facts are sufficiently set out in the opinion.

W. W. Peebles & Son (by brief) for plaintiff.
R. B. Peebles (by brief) for defendant.

CLARK, J. It is the sum demanded in good faith which is the test of jurisdiction. Const., Art. IV, sec. 27; The Code, sec. 834. Though there may be several causes of action, each of which is for less than $200, if the aggregate demand is for more than $200, the Superior Court has jurisdiction whenever the causes of action are such as can be joined in the same action. *Maggett v. Roberts,* 108 N. C., 174; *Moore v. Nowell,* 94 N. C., 265; Estee's Code Pleading, sec. 1609.

Should the sum demanded be reduced under $200 by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted (*Usry v. Suit,* 91 N. C., 406, 414; *Brickell v. Bell,* 84 N. C., 82), except when the sum demanded is so palpably in bad faith as to amount to a fraud on the jurisdiction (*Wiseman v. Witherow,* 90 N. C., 140), or where there is a misjoinder of parties. *Mitchell v. Mitchell,* 96

N. C., 14. If there is simply a misjoinder of causes of action, the judge should order the action divided, not dismissed. The Code,
(290) sec. 272; *Street v. Tuck,* 84 N. C., 605; *Finch v. Baskerville,* 85 N. C., 205; *Hodges v. R. R.,* 105 N. C., 170.

In the present case there are two causes of action alleged against the defendant as administratrix *c. t. a.*—one of $359.46, and another of $150—both bearing interest from dates set out. Both are alleged specifically in the complaint as liabilities to be satisfied "out of the estate" of the testator. There was on the face of the complaint no misjoinder of parties, and there was error in dismissing the action.

If the court below was correct in holding that the first cause of action was not a valid charge against the estate (and should more properly have been sued for against the defendant personally), still that would not make it a case of misjoinder. There would be simply a failure as to a part of plaintiff's demand.

It may be there was defective pleading in attempting to obtain the construction of a will with so small a part thereof set out. In such cases much often depends upon the context, and all the will, or at least all material parts, should be appended to the complaint as an exhibit, unless set out in the body of the complaint. It is probably a case where the court below *ex mero motu* should have directed the pleadings to be made more explicit under The Code, sec. 261; *Turner v. Cuthrell,* 94 N. C., 239; *McKinnon v. McIntosh,* 98 N. C., 89; *Buie v. Brown,* 104 N. C., 335.

As it may avoid the necessity of another appeal, we will say, however, that if the only clause of the will bearing upon the subject is section 4, which is set out in the complaint, we concur with his Honor below that there was no charge imposed by the will upon the testator's estate for the board of his mother. Whether the wife, by taking benefit under the will, has taken it *cum onere,* so as to be chargeable individually with the mother's board, is a question not material in this action.

(291) The judgment of dismissal must be set aside, and the case remanded to the Superior Court, that the complaint may be reformed in accordance with the opinion.

REVERSED.

Cited: Carter v. R. R., 126 N. C., 444; *Sloan v. R. R., ib.,* 490; *Austin v. Stewart, ib.,* 527; *Knight v. Taylor,* 131 N. C., 85; *Shankle v. Ingram,* 133 N. C., 259; *Brown v. Southerland,* 142 N. C., 227; *Fields v. Brown,* 160 N. C., 300; *Sewing Machine Co. v. Burger,* 181 N. C., 265.

JOSIAH TURNER v. M. W. PAGE, SHERIFF.

Amercement—Sheriff—Return—Amendment—Execution—Excuse.

A sheriff received an execution 19 August, 1892, entered his return on it 5 November, and forwarded it to the court from which it issued, but the clerk of that court did not take it out of the postoffice until the next day. The court met on 2 November and adjourned on the 5th, but the sheriff was ignorant of the day of adjournment. In amercement proceedings, after answer filed and the hearing of the cause was entered upon, the plaintiff moved to amend his affidavit in order to charge failure to execute and make due return: *Held*, (1) that the denial of this motion and the discharging of the rule against the sheriff was error; (2) no sufficient excuse was offered for failure to return the execution.

AMERCEMENT proceeding against defendant, the sheriff of WAKE, for failure to return an execution in favor of plaintiff, tried before *Whitaker, J.*, at March Term, 1892, of ORANGE.

C. D. Turner for plaintiff. (292)
W. W. Fuller for defendant.

MACRAE, J. The term of the court to which the sheriff was bound to return the execution adjourned *sine die* on the afternoon of Thursday, 5 November, 1891. The sheriff mailed the execution with his return indorsed thereon at Raleigh on the morning of the said 5 November. It was taken out of the postoffice at Hillsboro by the clerk of Orange Superior Court on the day after the adjournment of the term.

Executions shall be returnable to the term of the court next after that from which they bear *teste*. The Code, sec. 449. The sheriff is allowed all the days of the term to return an execution, unless he be ruled, upon motion and cause shown, to return it on some intermediate day. *Person v. Newsom*, 87 N. C., 142. While the term may last for the full time given it by law, it may be adjourned at an earlier day. *Branch v. Walker*, 92 N. C., 87; *Foley v. Black, ibid.*, 476. (293) It seems that this execution was received by defendant on 19 August, that the plaintiff was restrained by order of the judge from proceeding under it, and that at any time after such restraining order was served upon plaintiff the execution might have been returned, but that it was delayed until too late to reach the court before its adjournment. Section 2079 of The Code imposes the penalty for neglect to make due return, unless such sheriff can show sufficient cause to the court at the next succeeding term after the order.

It is true that, as appears by the answer of defendant, an alias execution afterwards came into his hands and he collected the money thereon and the plaintiff has received the same. We are precluded from giving relief on account of the hardship of the case. The letter and spirit of the law are plain, and the statute is older than the State. Its purpose is to secure promptness and efficiency on the part of its officers. A failure to execute it from motives of sympathy would lead to losseness in administration and impair the strength and dignity of the law. No sufficient excuse was offered for the failure to return the execution and it was error to discharge the rule.

REVERSED.

Cited: *Boyer v. Teague, ante,* 247; *Swain v. Phelps,* 125 N. C., 44.

COLUMBUS ETHERIDGE v. JOHN F. DAVIS ET AL.

Personal Property Exemption—Estoppel—Pleadings.

A defendant is not estopped by his pleading alleging property in another from claiming his exemption in such property after the verdict of a jury negativing such averment.

APPEAL at Fall Term, 1892, of CAMDEN, from *Hoke, J.*

(294) *E. F. Aydlett for plaintiff (appellant).*
No counsel contra.

CLARK, J. The logs were attached as the property of the defendant Brite. In his answer he denied ownership, and averred that they belonged to his codefendant Davis, to whom he had sold them before the levy of the attachment. The verdict of the jury negatived this allegation. The defendant Brite then claimed, before judgment was signed, to have his personal property exemption allotted in said logs. This his Honor properly allowed.

The plaintff contends that the defendant Brite is estopped to claim the logs for his exemption after denying in his answer that they belonged to him. But if this would work an estoppel, the plaintiff would be equally estopped from opposing the property being so set apart, since in the complaint he had averred that the logs were the property of Brite. If they were, Brite certainly could claim his exemption. *Duvall v. Rollins,* 68 N. C., 220; *Pate v. Harper,* 94 N. C., 23.

But in fact there was no estoppel. There was nothing done which induced, or could have induced, the opposite party to act, relying upon it. For the purposes of the trial only, an averment in the pleadings is conclusively true as against the party making it.

It may be that the jury found, under the charge of the court, (295) that Brite was mistaken as to the law applicable to the state of facts which he believed had constituted a transfer of title to Davis. But, however that may be, the verdict settled it that the logs were the property of Brite, and that he had not conveyed them to Davis. Had Brite in fact fraudulently conveyed them, he could still have claimed that his exemption be allotted therein... *Rankin v. Shaw*, 94 N. C., 405, and cases there cited. A *fortiori* is he entitled to do so when the jury find that he had not in fact conveyed them at all.

NO ERROR.

S. P. WILLIAMS v. WILLIAM BOWLING.

Justice of the Peace—Jurisdiction—Summons—Practice—Constitution —Courts of Record—Bastardy.

1. A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy), and was properly dismissed by the latter.
2. The new Constitution has increased the jurisdiction of justices of the peace and requires them to keep a record of their proceedings, but these are not courts of record.

ACTION tried at August Term, 1892, of PERSON, before *Connor, J.*, on appeal from a justice of the peace. The facts are sufficiently stated in the opinion of the Court.

W. W. Kitchin (by brief) for plaintiff.
J. W. Graham and V. S. Bryant for defendant.

MCRAE, J. Section 832 of The Code provides that "the sum- (296) mons shall be issued by the justice and signed by him. It shall run in the name of the State and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also contain the amount of the sum demanded by the plaintiff."

Section 833, after directing how the officer shall execute the same, proceeds: "When executed, he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same."

The form of the summons prescribed in section 909 (No. 1), commands the officer to summon the defendant "to appear before G. W. H., one of the justices," etc., at a time and place specified therein, and concludes, "and have you then and there this precept with the date and manner of its service. Hereof fail not. Witness, our said justice this ..... day of ....., 18..... G. W. H., justice of the peace."

Section 907 provides for the removal of all proceedings and trials from the justice before whom the writ or summons is returnable to another, upon affidavit in certain cases.

By the law as it existed before the adoption of the Constitution of 1868, the leading process in civil actions before justices of the peace, then called a warrant, was returnable before "some justice of his county," but this Constitution and the acts which have since been passed in relation to justices of the peace, largely increased their jurisdiction, and required them to make a record of the proceedings before them and to file the same with the clerk of the Superior Court. Const., Art. IV, sec. 27; The Code, sec. 827. It was held in *Reeves v. Davis,* 80 N. C., 209, that a justice's court is not a court of record, as it was not under the old system, but the intention is evident in the present Con-
(297) stitution and laws to preserve a memorial of its proceedings, and give them a stability in keeping with its extended jurisdiction. For this reason the justices are required to keep a record, and to make their process returnable to the justice who issues it. In case of bastardy proceeding (section 32), and in summary proceedings in ejectment (section 1767), the summons may still be made returnable before some other justice than the one who issues it, but in no other instances in civil actions of which we are advised.

This action, then, having been begun by the issuing of a summons by one justice returnable before another, was properly dismissed by the justice before whom it was returned, and upon appeal to the Superior Court should have been dismissed on motion.

This view of the case renders it unnecessary that we should examine the other exceptions. There is

ERROR.

Cited: Cherry v. Tilley, 113 N. C., 26; *Bldg. Co. v. Hardware Co.,* 173 N. C., 56.

SARAH SCHUFFLER ET AL. v. W. G. TURNER, ADMINISTRATOR.

Rents and Profits—Limitations—Charge—Measure of Damages—Agency—Trustee.

1. In an action for the value of the rents and profits of a tract of land, it appeared that the defendant, who was administrator of plaintiff's intestate, entered as such into the possession of said land and received the rents and profits to his own use for eleven years. The court charged that the plaintiffs were entitled to recover the reasonable rental value for the entire period: *Held*, no error.
2. The defendant was properly allowed a deduction for taxes and improvements.
3. The defendant, according to his own admission, assuming to act as plaintiff's agent in the collection and application of the rents, cannot plead the statute of limitations unless there was a demand and a refusal, and then only from the time thereof.
4. This action was properly brought within three years after he gave up possession of the land.

APPEAL at Fall Term, 1892, of BURKE, *Armfield, J.* (298)

No counsel for plaintiffs. (299)
S. J. Ervin for defendant.

BURWELL, J. The defendant admits that in 1877 he was appointed administrator of C. Schuffler, and in 1878 took possession of a tract of land, which had descended from his intestate to the plaintiffs, his heirs at law, and that he continued in possession of said land, receiving the rents and profits for eleven years, or till 1889.

His Honor told the jury that the plaintiffs were entitled to recover "the reasonable rental value of the land for the eleven years he had it in charge under proper cultivation."

We think this was the proper measure of the defendant's (300) liability upon his own statement of the matter. The jury found that the annual rental value was forty dollars, and from this his Honor allowed a deduction of $117.60 for taxes on the land paid by defendant, and for improvements, and gave judgment for the balance.

We do not think that the statute of limitations bars the right of any one of the plaintiffs to recover of the defendant his or her share of the balance. According to his account, he assumed to act as the agent of the heirs to collect their rents, in order that he might apply them to the payment of the debts of his intestate in exoneration of their land. Having failed to so apply this fund, he must pay it to those to

whom it belongs. He received their rents as agent for the plaintiffs, and no statute of limitations runs in his favor till demand and refusal, of which there is no evidence. This action was brought within three years after he gave up possession of the land.

NO ERROR.

Cited: *Lafferty v. Young,* 125 N. C., 299.

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*J. E. BLACK v. W. H. BLACK.

Practice in the Supreme and Superior Courts—New Trial—Acts 1887—Code—Judgment.

1. It is the settled practice that pending an appeal to the Supreme Court a motion for a new trial upon newly discovered testimony must be made in that Court; and before Laws 1887, ch. 192, concerning appeals, such motion must have been made in the Supreme Court, even after final decree therein.

2. Laws 1887, ch. 192, providing that The Code, title 13, ch. 10, must not be construed to vacate the judgment appealed from that its lien should remain the same until reversed or modified, notwithstanding any undertaking, and, upon its affirmation, execution should issue from the Superior Court, modifies the practice so that now after appeal and final decree in the Supreme Court, a motion for a new trial upon newly discovered testimony should be made in the Superior Court. Pending the appeal, the practice remains as it was before the act.

MOTION made by the defendant for a new trial, because of newly discovered evidence, heard before *Graves, J.,* at August Term, 1892, of MECKLENBURG.

(302) *Clarkson & Duls (by brief) for plaintiff.*
No counsel for defendant.

MACRAE, J. "Under the former system it was settled doctrine that a court of law could set aside its regular judgment at a subsequent term. If the enforcement of a judgment became inequitable for any reason of which a court of equity could take notice, it would be enjoined."

Soon after the Superior Courts were clothed with the blended jurisdiction both of law and equity, the practice was marked out. Instead

*BURWELL, J., having been of counsel, did not sit on the hearing of this cause.

of a proceeding in equity for an injunction against the enforcement of a judgment, a motion in the cause was indicated as the proper procedure for any sufficient cause which could have been, and by accident or fraud was not, pleaded in bar of the judgment, where the same was not provided for in section 133 of Code of Civil Procedure, now section 274 of The Code, on the ground of mistake, surprise or excusable neglect. *Jarman v. Saunders,* 64 N. C., 367.

In *Bledsoe v. Nixon,* 69 N. C., 81, where an action was brought in the Superior Court for the purpose of obtaining a new trial on account of newly discovered evidence in the case between the same parties which had been tried in the Superior Court, and brought by appeal to this Court and a final decree rendered, it was held that when an appeal had been taken from the Superior Court to this Court, a proceeding to obtain a new trial for newly discovered evidence cannot be (303) instituted in the Superior Court, but must be by motion here, and upon a proper case the Court will remand the cause so that the Superior Court may take jurisdiction and proceed to do what is right. And so the practice was settled. *Shehan v. Malone,* 72 N. C., 59; *Horne v. Horne,* 75 N. C., 101; *Henry v. Smith,* 78 N. C., 27; *Carson v. Dellinger,* 90 N. C., 226; *Simmons v. Mann,* 92 N. C., 12; *Dupree v. Insurance Co.,* 93 N. C., 237; *Munden v. Casey,* 93 N. C., 97; *Sikes v. Parker,* 95 N. C., 232.

Laws 1887, ch. 192, entitled "An Act concerning appeals," instituted a new feature in our law. It provides:

"SECTION 1. The stay of execution provided for in title 13, chapter 10, of The Code, shall not be construed to vacate the judgment appealed from, but in all cases said judgment shall remain in full force and effect, and the lien of said judgment shall remain unimpaired, notwithstanding the giving of the undertaking or making the deposit required in said title until the judgment appealed from is reversed or modified by the Supreme Court.

"SEC. 3. In civil cases, at the first term of the Superior Court after such certificate is received, if the judgment is affirmed, the court below shall direct the execution thereof to proceed, and if said judgment is modified, shall direct its modification and performance," etc.

We are called upon in this case to construe the effect of the Act of 1887 upon motions for new trials for newly discovered evidence in actions which have been tried in the Superior Court, judgment rendered therein, taken by appeal to the Supreme Court, and the judgment affirmed and certified down, as in the present case, and by force of the statute the Superior Court is required to direct the execution thereof to proceed. Shall the practice settled in *Bledsoe v. Nixon, supra,*

continue, or shall the motion now be made in the court where the judgment stands? We are again, as was said by the *Chief Justice*
(304) in *Bledsoe v. Nixon,* "Sailing without a compass, and can only look to the statutes and the reason of the thing in navigating this unknown water." Since the Act of 1887 "the cause" is no longer by the appeal taken out of the Superior Court and carried up to the Supreme Court; the judgment remains in the Superior Court, and when docketed, the lien continues, notwithstanding the appeal.

By virtue of Art. IV, sec. 8, of the Constitution, this Court has jurisdiction to review, upon appeal, any decision of the courts below upon any matter of law or legal inference, and has the "power" to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts. We do not mean to intimate that any of its powers or jurisdiction have been impaired by the act in question, but the effect thereof is to render it unnecessary in many cases to render any final judgment further than to indicate that the judgment below is affirmed.

It was held *In re Griffin,* 98 N. C., 225, that after a judgment of the Superior Court imposing a fine for contempt has been affirmed by the Supreme Court it becomes final and conclusive, and the court below has no power to remit or modify it, and it is said that "this is in harmony with the new enactment, Laws 1887, ch. 192, which, in criminal and civil actions alike, leaves in force from its rendition the judgment from which the appeal is taken, when there is found to be no error and the judgment is affirmed." The effect of the Act of 1887 has been discussed and explained by the late *Chief Justice Merrimon* in *Stephens v. Koonce,* 106 N. C., 222, which was a motion made in this Court after the appeal had been heard and the judgment below affirmed. It was said: "The motion is improvidently made in this Court. If it be a proper motion to be made at all, it cannot be entertained here, because the final judgment, as affected by the orders and judgment of this Court, is in the Superior Court, and all proper motion to enforce it, or
(305) that might appropriately be made in the action, should be made in the latter court, except such motions as may be made affecting the appeal and the action of this Court therein. But no motion can be entertained or allowed in the Superior Court that shall, or may be inconsistent with the judgment and directions of this Court. The latter are controlling in the action so far as they apply to and affect it, and must be observed in all appropriate connections; otherwise the decisions of this Court, as a court of errors, would not be authoritative, and there would be no end to controversy." What was said above is no way at

variance with our present utterances. The Superior Court cannot modify, correct or alter the judgment which has been affirmed by this Court.

But the right to equitable relief, upon proper proofs, rests somewhere, and is not affected by the action upon the appeal. There is no case pending, nor judgment rendered in this Court, except the order affirming the judgment below and imposing the costs of appeal. To the Superior Court alone can the application be made, for it alone retains jurisdiction of the action. Motions for new trials for newly discovered evidence have been entertained in this Court pending the appeal since the passage of the Act of 1887, *Brown v. Mitchell,* 102 N. C., 347; but our attention has been called to none, after a final disposition of the appeal by affirmance of the judgment. And the matter has been settled by the case last cited.

1. We conclude that the proper practice is, that pending appeals, such motions should be made in this Court, and when the final judgment has been rendered in this Court a petition to rehear should be filed for the purpose of making the motion here.

2. But when the judgment of the Superior Court has been affirmed and the opinion certified down and the matter finally disposed of in this Court, the motion (or action in the nature of a bill of review, as was resorted to in *Matthews v. Joyce,* 85 N. C., 258) should be made or begun in the Superior Court, where the judgment was ren- (306) dered.

The learned judge before whom this motion was made denied it upon the ground of want of power of jurisdiction to grant it, in order that the question might be passed upon and settled. And this we have endeavored to do.

We have expressed no opinion upon the merits of this motion.

The affidavits and motion should be passed upon by the judge in the Superior Court, to whose discretion it is committed (*S. v. Morris,* 109 N. C., 820), and to this end it is remanded to the Superior Court.

REVERSED.

Cited: Banking Co. v. Morehead, 126 N. C., 283, 291; *Turner v. Davis,* 132 N. C., 189; *Tussey v. Owen,* 147 N. C., 337; *Smith v. Moore,* 150 N. C., 159; *Chrisco v. Yow,* 153 N. C., 436; *Lancaster v. Bland,* 168 N. C., 378; *Allen v. Gooding,* 174 N. C., 273, 274.

J. C. COWEN v. T. J. WITHROW ET AL.

Notice—Unregistered Deed—Docketed Judgment—Principal and Agent—Acts of 1885.

1. Notice to an agent of matters coming within the scope of his employment is notice to his principal, and *actual* notice to the agent of an unregistered deed is "actual notice" to the principal, under section 1, chapter 147, Laws 1885; it is not necessary that such notice be personal.
2. The *proviso* in section 1, chapter 147, Laws 1885, declaring the act shall not apply to "one who purchases with actual or constructive notice of an unregistered deed" extends to purchasers at sheriffs' sales, and applies as against the lien of a docketed judgment.

ACTION for the recovery of land, tried by *Bynum, J.*, at the Spring Term, 1892, of RUTHERFORD.

(309) *Justice & Justice for plaintiff.*
J. A. Forney for defendant.

SHEPHERD, C. J. In the absence of fraud, Mrs. Withrow, the grantee in the unregistered deed, was the equitable owner of the land in controversy. *Ray v. Wilcoxson,* 107 N. C., 515. The land was sold under execution against her grantor and was purchased by the plaintiff through his agent. There was testimony tending to show that this agent was notified at the sale, and before the bidding, of Mrs. Withrow's claim under the said unregistered deed. The court charged the jury that the notice to the agent was not notice to his principal, and that only "actual" notice to the latter could affect him with the equitable claim of Mrs. Withrow. The proposition that notice to an agent, when acting within the scope of his employment, is binding upon his principal, is an elementary principle of law, which we do not understand to have been denied by his Honor. The ruling seems to have been based upon the language of the *proviso* in Laws 1885 (ch. 147, sec. 1), in which it is declared that the said act shall not apply
(310) to one who purchases with "actual or constructive notice" of an unregistered deed.

The court apparently was of the opinion that "actual notice," as used in the statute, was synonymous with actual knowledge or personal notice. In this there was error. "To qualify the rule in this manner, the notice which is given through an agent would be to cut off entirely from the possibility of notice a large class of litigants in cases requiring actual notice. . . . If the agent has actual notice, the principal is charged with notice of the *same kind*. . . . But if we wish to state

the rule with greater accuracy, its true meaning may be given by stating it as universally understood, that notice to an agent is *equivalent* to notice to the principal." Wade on Notice, sec. 672.

If it were otherwise, an agent would be employed whenever it was convenient to remain in ignorance. *Bank v. Davis,* 2 Hill, 461. *Lord Brougham* says the reason of the rule is that the "policy and the safety of the public forbid a man to deny knowledge while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge." *Kennedy v. Green,* 3 Mylune & Keen, 699.

The plaintiff, however, insists that the *proviso* to which we have referred does not extend to purchasers at sheriffs' sales and that the error in the charge as to notice was therefore harmless. This is true in respect to constructive notice arising out of actual possession (see this case in 109 N. C., 636), but the reasoning upon which the decision is founded has no application to actual notice. Indeed, the Court plainly intimates that actual notice to such purchaser will save the rights of a grantee in an unregistered conveyance, and we are of the opinion that such is the law.

We see no force in the contention that the notice should not have the effect of impairing the rights acquired under the lien of the docketed judgment. A judgment lien and execution operate only (311) upon the interest of the judgment debtor, and the purchaser at an execution sale takes only such rights as he possessed. *Rollins v. Henry,* 78 N. C., 352; *Rutherford v. Green,* 37 N. C., 121.

This principle is unaffected by the act under consideration, except, as has been held in the particular instance of an unregistered conveyance, when no notice has been given at or before the execution sale.

NEW TRIAL.

Cited: *S. c.,* 112 N. C., 736; *S. c.,* 116 N. C., 771, 775; *Patterson v. Mills,* 121 N. C., 267.

T. M. GILL, ADMINISTRATOR, v. T. N. COOPER ET AL., EXECUTORS.

Liability on Administrator's Bond—Statute of Limitations—Demand—Judgment.

1. G. was appointed administrator of D. in June and died in August, 1883. In September, 1899, judgment was rendered upon an action begun in 1884 against G.'s executors establishing G.'s liability, as administrator, for misuse of D.'s estate: *Held,* an action begun in October, 1889, against G.'s sureties was barred by the statute of limitations.

2. The plaintiff might have begun his action immediately after his demand upon G.'s executors and their refusal in 1884, and the statute runs from that date.

3. It is no breach of an administrator's bond to refuse to pay a claim until the same is established by judgment.

APPEAL at May Term, 1892, of IREDELL, from *McIver, J.*

Bingham & Caldwell for plaintiff.
Armfield & Turner for defendants.

(312) BURWELL, J. This action was referred by consent, and the referee found that the plaintiff's cause of action against the defendants, Cooper and Clegg, was barred by the statute of limitations (The Code, sec. 155 [6]). The plaintiff excepted; the matter was heard upon this exception, and it was overruled. There was judgment for said defendants, and plaintiff appealed.

A. F. Gaither was appointed administrator of the estate of John Diffie in June, 1883; the defendants Clegg and Cooper became sureties on his bond; Gaither died in August, 1883, without having rendered any inventory of the estate; the plaintiff was appointed administrator *de bonis non* of the estate of John Diffie in February, 1884; in April 1884, he brought an action against the executors of the will of A. F. Gaither for an account and settlement of the estate of Diffie, which had come into the hands of their testator, alleging in his complaint that the defendant executors had "failed, neglected and refused to make final settlement of the estate of said John Diffie, though often requested so to do." The defendant executors in their answer, filed in that action, denied that they had in their hands any assets belonging to the estate of John Diffie. In September, 1889, the plaintiff obtained a judgment against Gaither's executors, and in October, 1889, he began this action against Cooper and Clegg, the sureties on the bond given by Gaither in 1883.

The Code, sec. 155 (6), provides that an action against the sureties on the bond of an administrator shall be barred, unless brought "within three years after the breach thereof complained of." The breach of this bond which is "complained of" in this action is the failure to pay over to the plaintiff, the administrator *de bonis non* of the estate of John Diffie, the money due to that estate from the estate of A. F. Gaither, the first administrator. It was the duty of the personal representatives of A. F. Gaither to make this payment and deliver up to the plaintiff any assets found by them among the assets of their (313) testator, Gaither, as soon as demand was made therefor. Such

a demand was made in 1884, and not only did the executor of Gaither refuse to account and pay, but expressly denied that the estate of their testator was indebted to the estate of Diffie, and alleged that they had in their hands no assets belonging to that estate. Immediately after that demand and refusal, an action might surely have been brought against the sureties, Cooper and Clegg, to enforce compliance with that lawful requirement, and if a cause of action then arose in favor of the plaintiffs and against these sureties, time then began to run in their favor, and, as the plaintiff chose to wait from the time of his demand (1884) till 1889 before bringing suit against them, his cause of action against them is barred by the section of The Code above mentioned. Nor can he escape the effect of this statute by saying that the breach he complains of is not anything done by A. F. Gaither, the first administrator, who died in 1883, nor the refusal by his executors to pay over upon demand in 1884, but that the breach of which he complains is their failure to pay the judgment which he recovered against them in 1889 in an action brought in consequence of that refusal. In *Ream v. Davis,* 99 N. C., 425, the alleged breach was the failure to pay the judgment rendered in 1879, in a suit begun in 1876 against an administrator, and it was held that the cause of action against his surety was not barred till three years after his refusal to pay the judgment. In that case, the plaintiff was a *creditor* of the intestate, and it was no breach of the administration bond to refuse to pay a claim presented till it was established by a judgment. In this case the plaintiff is the administrator *de bonis non,* and the refusal of the personal representative of the deceased administrator to account with him was the breach of the bond.

AFFIRMED.

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(314)

L. O. CHESTER ET AL V. J. E. WILHELM.

Evidence—Witnesses—Impeachment of One's Own Witness.

The rule which prevents a party from impeaching the credibility of his own witness does not preclude him from showing the fact to be otherwise than testified to by such witness, even though the effect of such showing is to impeach his credibility.

APPEAL from a justice of the peace, tried before *McIver, J.,* at May Term, 1892, of IREDELL.

No counsel for plaintiffs. (315)
Bingham & Caldwell for defendant.

(316) MACRAE, J. The sole point in this case arises upon the exclusion by his Honor of testimony offered by defendants tending to contradict the testimony of one of the plaintiffs who had been introduced and testified also for the defendants. The evidence was admitted subject to the exception of plaintiffs, and was afterwards excluded "upon the ground that it tended to contradict the witness Chester first introduced." The fact that the witness offered by defendants and whose testimony defendants proposed to contradict by another witness, was one of the plaintiffs, cannot affect the principle—"A party may prove that the fact is not as it is stated to be by one of his witnesses, for that is merely showing a mistake to which the best of men are liable." *Spencer v. White,* 23 N. C., 236. But he is not at liberty to assail his reputation for truth and thus destroy his credit before the tryers. *Strudwick v. Broadnax,* 83 N. C., 401.

The testimony of no one or more witnesses precludes the party who introduces them from proving the contrary, and this, notwithstanding the indirect impeachment of their credibility in the repugnance of their evidence. This is not a violation of the rule that a party cannot discredit his own witness. *Gadsby v. Dyer,* 91 N. C., 311; *McDonald v. Carson,* 94 N. C., 497.

We think that his Honor erred in excluding the testimony of the witness Clendennin as to the condition of the tobacco.

NEW TRIAL.

Cited: *Wilhelm v. Smith,* 147 N. C., 608.

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(317)

THE BERLIN IRON BRIDGE COMPANY v. THE BOARD OF COMMISSIONERS OF WILKES COUNTY.

Contracts of Counties—County Commissioners—Justices of the Peace—Demand—Specific Performance.

1. In an action for the purchase and construction of a bridge exceeding in cost five hundred dollars brought against a board of county commissioners, it appeared that the contract had been entered into by the defendants without the concurrence of the majority of the justices of the peace: *Held,* there is no liability imposed on the county.

2. There being no allegation that the possession of the bridge has been demanded and refused, the question of plaintiff's right to hold possession cannot be considered.

APPEAL at March Term, 1892, of WILKES, from *Armfield, J.*

This action was brought to recover the value of work and labor done and materials furnished in building a bridge for a county for which a lien had been filed in the clerk's office. A jury trial was waived, and the case was submitted to the court for finding the facts and declaring the law.

Judgment for defendant, and the plaintiff appealed.

R. B. Glenn for plaintiff.
D. M. Furches for defendant.

SHEPHERD, C. J. The agreement upon which this action is founded was for the purchase and construction of a bridge exceeding in cost the sum of five hundred dollars. Such an agreement on the part of the board of commissioners, without the concurrence of a majority of the justices of the peace, has been decided by this Court to be invalid, and imposes no constructual obligation upon the county. The Code, secs. 707, 2014, 2035. The justices expressly refused to concur, (318) and it appears that they did not authorize any of the payments made to the plaintiff. Neither did they ratify the contract by levying taxes for its performance, as was done in *Cotton Mills v. Commissioners,* 108 N. C., 678. Whatever may be the effect of retaining the consideration of an *ultra vires* contract in the case of a private corporation, it is plain that under the foregoing decision it can impose no contractual liability upon a municipal corporation of this character. There being, then, no contract, either expressed or implied, there is nothing to sustain a lien under the statute. *Weir v. Page,* 109 N. C., 220.

The plaintiff, however, insists that the court should at least have given him a judgment for the possession of the bridge. As to this, it is only sufficient to say that this action is based upon the special contract, which, we have seen, cannot be enforced against the county. There is no allegation that the plaintiff has demanded possession of the bridge, or that defendant has refused to surrender the same.

Whether the defendant is excepted from the general principle, which forbids one to retain the fruits of a contract, and at the same time repudiate its obligation (*Skinner v. Maxwell,* 66 N. C., 45, and *Burns v. McGreggor,* 90 N. C., 222), is a question not presented in the record, and therefore need not be considered in this appeal.

AFFIRMED.

(319)

M. A. C. O. JOHNSON ET AL. v. S. H. LOFTIN ET AL.

Report of Referee—Exceptions—Direction of Court—Appeal—Married Woman—Prayer for Relief.

1. When the report of a referee was filed and confirmed at the November Term, 1891, of court, and at the May Term, 1892, the court refused to recommit upon motion and exception made at that term: *Held*, such ruling was not reviewable in the Supreme Court.
2. Where it is not pleaded and does not appear that a person is a married woman, there is no presumption of law to that effect.
3. The facts stated, and not the prayer for relief, show what remedy ought to be granted.

APPEAL at May Term, 1892, of LENOIR, from *Winston, J.*

(322) *George Rountree for plaintiff.*
No counsel contra.

CLARK, J. The report of the referee was filed and confirmed at November Term, 1891. The exception thereto and motion to re-
(323) commit the report for an additional finding of fact at May Term, 1892, were too late as a matter of right, and could only have been allowed as a matter of discretion. The refusal of the court was therefore not reviewable. *McNeill v. Hodges,* 105 N. C., 52.

The other three exceptions were to the report of sale, but were unsupported by anything appearing in the record or otherwise. The court overruled these exceptions and found that the commissioner was not a party to nor interested in the action, that the sale was open and fair, and that the land brought a fair price. These exceptions present no matter of law, and the findings of fact by the judge below are not reviewable. *Barrett v. Henry,* 85 N. C., 321; *Davie v. Davis,* 108 N. C., 501.

Nor is there anything in the pleadings and findings of fact, nor is it suggested by affidavit, that the plaintiff Johnson is a married woman. There is no presumption of law that she was. It does not appear from the pleadings even that she was a woman. There is, however, a presumption that the action of the court below was correct. *Rencher v. Anderson,* 95 N. C., 208. The burden is on appellants to show that there was error. This has not been done.

Nor is it material whether or not there was a prayer in the pleadings for a personal judgment. The court should grant such relief as the allegations and proof warrant, whether demanded in the prayer for

relief or not. *Moore v. Nowell,* 94 N. C., 265; *Skinner v. Terry,* 107 N. C., 103; *Knight v. Houghtaling,* 85 N. C., 17; *Patrick v. R. R.,* 93 N. C., 422.

AFFIRMED.

Cited: Adams v. Hayes, 120 N. C., 388; *Reade v. Street,* 122 N. C., 302; *Collins v. Pettitt,* 124 N. C., 736; *Williams v. Bailey,* 177 N. C., 44; *Henofer v. Realty Co.,* 178 N. C., 586.

(324)

R. H. T. HARPER v. ABRAM SUGG.

Motions and Orders—Judgment—Notice.

1. Judgments and orders are *in fieri* during the term they are rendered, and motions may be made to set them aside without notice; but after that term such motions can only be heard after due notice.

2. A motion heard upon verbal notice given on the day of the hearing is irregular, and should have been dismissed.

ACTION for the recovery of personal property, tried by *Winston, J.,* at April Term, 1892, of GREENE.

At November Term, 1891, an order was made referring the case to a referee to hear and determine the issues involved, and a report was accordingly submitted to the next term of the court (in January, 1892); and there being no exceptions to the report, it was confirmed, and judgment rendered in favor of the defendant.

And at the next term (in April, 1892), his Honor set aside said final judgment upon the *ex parte* affidavit of Swift Galloway, without any notice of a motion, for that purpose, being served on the defendant or his attorney, except an oral notice made in open court on Wednesday of the term.

The said affidavit was submitted to his Honor about 11:30 o'clock p. m. of the said Wednesday, and the court adjourned the following morning at 8 o'clock.

The following order was made:

"The court having read and considered the affidavit of Swift Galloway (attorney at law), is of opinion, and so adjudges, that the plaintiff has not been guilty of any laches in filing his exceptions, and that the judgment heretofore rendered was inadvertently given."

And the court thereupon adjudged that the same be vacated and set aside, and that the case stand for trial at the next term. From

which judgment the defendant appealed, and excepted upon the following grounds, to wit:

1. No notice of motion to set the judgment aside and allow plaintiff to file exceptions was given to defendant or his counsel.

2. The affidavit upon which the judge acted was *ex parte,* and failed to disclose any merits or any errors in referee's report.

3. The exceptions filed by plaintiff do not state clearly what facts or issues the plaintiff desired to be submitted to the jury.

4. His Honor erred in granting a trial upon the whole case, and in not specifying the issues to be tried by the jury.

No counsel for plaintiff.
George M. Lindsay for defendant.

CLARK, J. The action of the court below was erroneous, certainly on the first of the grounds specified by the appellant.

(327) While all orders and judgments are *in fieri* during the term at which they are made, and may be modified or set aside at such term without notice, after such term a final judgment cannot be set aside except upon notice given. *Branch v. Walker,* 92 N. C., 87; *Allison v. Whittier,* 101 N. C., 490; *Coor v. Smith,* 107 N. C., 430. This is but right and just. A judgment is *finis litium,* and parties are not required thereafter to keep counsel on hand at the succeeding terms of the court lest an order affecting the judgment should be made. When notice of a motion is necessary, the statute prescribes that it must be served ten days before the time appointed for the hearing, though the judge may, by an order to show cause, prescribe a shorter time. The Code, sec. 595. This was not done here. The notice was given verbally, and the appellant might, if he had chosen, have added this as a fifth ground of exception. The Code, sec. 597. It was given on the very day the motion was heard, and doubtless the appellant was deprived of opportunity to file counter-affidavits. The appellee was fixed with notice of the judgment taken at the preceding term (*University v. Lassiter,* 83 N. C., 38; *Hemphill v. Moore,* 104 N. C., 379); besides his affidavit sets out that he had actual notice. He had ample opportunity, and should have served legal notice in proper time of his intention to move to set the judgment aside so that the opposite party might have been prepared to meet him. This renders it unnecessary to consider the other assignments of error. As the case does not go off on the merits, the appellee is not deprived of the right to renew the motion upon proper notice, if within the time prescribed by the statute. The Code, sec. 274.

AFFIRMED.

(328)

THOMAS MOORE v. N. H. BEAMAN ET AL.

Usury—Code—Payment—Statute of Limitations—Evidence.

1. The Usury Act of 1866, Bat. Rev., ch. 114, does not essentially differ from the law now in force; this case is governed by *Gore v. Lewis*, 109 N. C., 359.

2. The Act of 1874-75, increasing the penalty for usury, does not affect pre-existing contracts.

3. The partial payment by either of two obligors before the bond is barred continues it in force.

4. It was competent to show that usurious interest constituted a part of the amount for which the bond and mortgage were given.

EXCEPTIONS to the report of a referee, heard by *Winston, J.*, at Spring Term, 1892, of GREENE.

The action was brought for foreclosure of mortgage and for possession of the land conveyed therein. By consent, the cause was referred to N. J. Rouse, Esq., under The Code, to try the issues and report his findings of fact and conclusions of law.

The report of the referee was as follows:

FINDINGS OF FACT.

1. That on 22 August, 1873, the defendant, N. H. Beaman, and his wife, S. C. Beaman, executed and delivered to the plaintiff, Thomas Moore, their writing obligatory under and by which they promised to pay to the plaintiff the sum of fifteen hundred and one dollars and fifty-one cents on 1 January, 1878; and that to secure the payment of said bond, the defendant, N. H. Beaman, and his wife, S. C. Beaman, on the same date, to wit, 22 August, 1873, executed and delivered to the plaintiff a mortgage deed conveying to him the tract of land particularly described in the complaint and in the mortgage (329) filed.

That the excess of said bond over $1,083.54 was interest charged thereon, the same being computed on the eight hundred dollar item above specified at twelve per cent per annum from the date of said bond till the maturity of the same; that no interest was computed on the other items above enumerated as composing the face of said bond.

4. That more than ten years intervened between the death of said S. C. Beaman and the institution of this action.

5. That the defendants, other than N. H. Beaman, are the children and heirs at law of said S. C. Beaman, together with the husbands of such females as have married.

6. That the defendants are in possession of the land, and that defendant, N. H. Beaman, is tenant by the courtesy of said land.

7. That no payment was made on said bond prior to its maturity; that defendant, N. H. Beaman, at his own instance, has made the following payments on said debt and mortgage, to wit: 24 January, 1880, $50.21; 9 April, 1881, $344; 28 June, 1882, $227.27; 4 June, 1886, $180; 16 March, 1889, $100; 20 July, 1890, $7.11. And that the defendants, other than N. H. Beaman, have paid nothing on said indebtedness.

8. That there remains due and unpaid on said mortgage indebtedness, on 11 April, 1892, computing interest as specified in conclusion of law No. 4, $1,359.27.

CONCLUSIONS OF LAW.

1. That the interest charged by the plaintiff on the indebtedness evidenced by said bond and mortgage was at a greater rate than was or is allowed by law.

2. That this action is not barred by the statute of limitations.

3. That the plaintiff is entitled to the possession of said land.

(330) 4. That there is recoverable in this action the amount actually due the plaintiff at the time of execution of said bond and mortgage, to wit, $1,083.54, with interest thereon at the rate of six per cent per annum from date of said bond, less the payments enumerated in paragraph 7 of findings of fact, computing interest under the rule of partial payments, and that the plaintiff is entitled to judgment that, upon default of payment of said mortgage indebtedness by defendants, said land be sold and the proceeds of sale be applied to the discharge of said indebtedness and costs, and the surplus disbursed under the direction of the court.

5. That plaintiff is entitled to recover of the defendants and sureties on defendant's undertaking, the costs of this action to be taxed by the clerk.

To the said report of the referee the defendants filed exceptions which (except those withdrawn on the argument before his Honor) are as follows:

First. For that in the 8th finding of facts the referee based his finding of amount due by defendants to plaintiff (to wit, $1,359.27) on a computation of interest, whereas the Act of 1866, under which the contract sued on was made, expressly provides that no interest should be recovered on a usurious contract, as the referee finds the one in suit to be; and, therefore, the referee should not have allowed the plaintiff any interest whatever, but should have found the amount of the actual debt—to wit, $1,083.54—and deducted therefrom the payments which

the referee finds were made by defendant, N. H. Beaman, amounting in all to $908.59, and thereby leaving a balance due the plaintiff of $174.95.

Third. That in the second conclusion of law the referee errs in finding that this action is not barred by the statute of limitations, in so far as such finding relates to the mortgage sued on and affects the heirs at law of S. C. Beaman, wife of N. H. Beaman, the (331) evidence having established and the referee having found as a fact that the said S. C. Beaman died more than ten years previous to the commencement of this action; and further, that every payment made on said debt was made by said N. H. Beaman, and after said mortgage became due.

Fourth. That the referee errs in the fourth conclusion of law in the awarding of interest to plaintiff, for that in law the plaintiff (for the reasons stated in exception 1) is not entitled to any interest on said bond, it being a usurious contract. And secondly, if entitled to any interest, the same should not be charged from the date of the bond, but from the time the bond fell due. It was agreed in writing by the parties to the action that S. C. Beaman died on 17 August, 1877, and that letters of administration on her estate were not issued until 11 May, 1891, her husband, N. H. Beaman, then qualifying as her administrator.

His Honor overruled the said exceptions and gave judgment confirming the referee's report, to which ruling and judgment the defendants except on the grounds set forth in said exceptions of defendants, and from said judgment the defendants appeal.

W. C. Munroe, T. C. Wooten and C. B. Aycock for plaintiff.
George M. Lindsay for defendants.

CLARK, J. The usury act in force when this contract was entered into was chapter 114, Bat. Rev.; chap. 24, Laws 1886. It does not essentially differ from the present act, and must receive the same construction. The facts of this case are similar to those in *Gore v. Lewis,* 109 N. C., 359, and for the reasons there given the plaintiff is entitled to recover no interest. The Act of 1874-75 increased the penal- (332) ties and could not affect a preëxisting debt. Besides, it expressly exempted prior valid contracts, which this was to the extent of liability for the principal sum loaned. The present act (The Code, sec. 3836), Laws 1876-77, ch. 91, sec. 3, specifies that it is to be substituted in the place of the Act of 1874-75. It could have no bearing upon this contract even if it had changed the penalty from that in force when the bond was executed. The defendants' first and fourth exceptions should have been sustained.

The second exception and part of the fourth exception were withdrawn on the argument below and are not before us.

The third exception was properly overruled. The partial payment by either of two obligors before the bond is barred continues it in force. *Green v. Greensboro College,* 83 N. C., 449; *Wood v. Barber,* 90 N. C., 76; *Moore v. Goodwin,* 109 N. C., 218.

The provisions of the law forbidding usury are very clear and explicit. No one can possibly misunderstand them. If moved by avarice a party deliberately violates this law, he has no ground of complaint that his punishment has been in the very respect which caused him to sin, and that in grasping after illegitimate interest he has lost also the legitimate interest which the law would have given a law-abiding citizen.

It was competent to show that usurious interest constituted a part of the amount for which the bond and mortgage were given. *Arrington v. Goodrich,* 95 N. C., 462. It was, therefore, properly struck out. The plaintiff is entitled to recover the true principal, $1,083.54, without interest and subject to the payments made thereon.

The appellant's case on appeal was served in time, and there being no countercase served, must be taken as the case on appeal.

REVERSED. Error.

Cited: *S. c.,* 112 N. C., 560; *Erwin v. Morris,* 137 N. C., 50.

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(333)

J. H. BARNARD v. E. L. HAWKS ET AL.

Trustees and Cestui que Trustant—Contract in Writing Not Varied by Parol Testimony—Corporations—Stock.

1. Oral testimony cannot be admitted to contradict or vary the terms of a written contract, and a defendant in a proceeding to convert him into a trustee for plaintiff to hold for his benefit money received on trust, as shown by a written contract, was not allowed to show by parol that it was intended as a loan.

2. When, in contemplation of the formation of a new company, it was agreed that upon purchase in their own name by the parties of the second part of a certain interest in an existing company's property, the said parties, in consideration of the advancement of the purchase money for one-half of their subscriptions by the parties of the first part, were to assign to them one-half of their entire interest to be acquired and the advancement was made pursuant to such agreement: *Held,* that the purchaser held the property or stock in trust for the parties of the first part, and that the same could be followed in the hands of third parties.

MOTION for an injunction, heard before *Whitaker, J.,* at Clinton, 11 October, 1892.

On the hearing the plaintiff introduced the contract mentioned in complaint (which was used as an affidavit), marked "A," whereupon the defendant proposed to show by affidavits that the money which the complaint, or affidavit, alleged to have been advanced under and in pursuance of said contract, was advanced as a loan simply, and that the stock which the defendant contemplated purchasing from the Electric Plant Company, as therein set out, was to be assigned to the plaintiff as a collateral security for the payment of said loan, and for no other purpose, which his Honor refused, holding that no evidence was admissible to vary or alter the written contract, and the defendant excepted.

It was further shown that the stock originally purchased by the defendant from the Electric Plant Company, had been sold by the defendant, and the stock now held by the defendant Hawks in (334) the Twin City Construction Company, as set out in plaintiff's affidavit, had been purchased by him with Electric Plant stock, and the certificate of said stock was issued to him in his own right, and so stands upon the stock books of the Twin City Construction Company.

His Honor held that the defendant Hawks having held the Electric Plant stock as trustee for the plaintiff, the plaintiff was entitled to follow the fund arising from the sale thereof and invested in the stock of the Twin City Construction Company; and that the defendant Hawks held the said stock as trustee for the plaintiff, to which ruling the defendant excepted.

It was further shown that the defendant was a resident of the State, and solvent.

His Honor held that the plaintiff was entitled to an injunction until the final hearing, and so ordered, to which the defendant excepted, from which judgment defendant appealed to the Supreme Court.

Defendant's Exceptions.—His Honor erred in refusing to allow the defendant to introduce affidavits to show that the money advanced under the contract between plaintiff and defendants was advanced as a loan, and for no other purpose.

His Honor erred in holding that the plaintiff had a trust in the stock purchased by Hawks from the Electric Plant Company, and that Hawks held the same as trustee for plaintiff's benefit.

His Honor erred in holding that the defendant Hawks held the stock now in the Bank of New Hanover, to wit, the $5,000 stock in the Twin City Construction Company, as trustee for plaintiff; and that the

plaintiff had the right to follow the fund arising from the sale of the Electric Plant Company and invested in the Twin City Construction Company stock.

His Honor erred in holding that the plaintiff was entitled to an injunction in this case until the final hearing.

EXHIBIT A.

MEMORANDUM OF AGREEMENT BETWEEN JOHN H. BARNARD, OF ASHEVILLE, N. C., PARTY OF THE FIRST PART, AND E. L. HAWKS, OF LEXINGTON, KY., AND J. H. WINGATE, OF ROANOKE, VA., PARTIES OF THE SECOND PART.

(335) Whereas, both parties are desirous of securing the formation of a company to extend the operation of the present electric plant in Winston, N. C., and to operate an elcetric street railway in that town and the adjoining town of Salem; and, whereas, the parties of the second part can secure the same by the advancement, before 18 December, 1889, of two-fifths (2-5) the cost of the present plant, with its charter, franchises, rights, business, etc.; and, whereas, the party of the first part is willing to advance for them one-half (½) of their subscription, the following conditions are mutually agreed upon:

First. That upon the purchase of the above property the parties of the second part shall assign to the party of the first part one-half (½) of their entire interest acquired by the same.

Second. That they shall divide equally with the party of the first part their share of the net earnings from the date of purchase to the date of sale to the construction company to be formed as set forth in the agreement of this date between E. L. Hawks, J. H. Wingate, F. J. Sprague, Edward H. Johnston and J. H. Clement.

Third. That upon the demand of this construction company, and upon the tender of a sum equal to the amount advanced, the party of the first part agrees to surrender all right, title and interest in the above property.

JOHN H. BARNARD,
E. L. HAWKS,
J. H. WINGATE, per E. L. H.

Signed this 13 December, 1889.

(336) *George Rountree and John D. Bellamy for plaintiff.*
John N. Staples for defendants.

SHEPHERD, C. J. The argument on the part of the defendants was predicated, to a great extent, upon the theory that the money furnished by the plaintiff was simply a loan to the defendants Hawks and Win-

gate, and it was insisted that, as they were impliedly authorized to purchase the stock in their own names, they acquired an unqualified property therein, and that the agreement to assign to the plaintiff was therefore nothing more than an executory contract for the sale of personal property, which, as a general rule, will not be specifically enforced in equity.

Under the view we have taken of the transaction, as evidenced by the written agreement (his Honor having very properly excluded the oral testimony tending to contradict or vary its terms), we deem it unnecessary to pass upon the points so ably discussed by the respective counsel, whether stock of this particular character is the subject of specific performance, and if so, whether it must be owned by a party at the time of his contract to sell and assign the same.

Our interpretation of the contract is that the stock of the electric company was to be purchased by the defendants, Hawks and Wingate, with a view of securing its plant, etc., to be used by a new company, which was to extend the business so as to operate an electric street railway in the towns of Winston and Salem. This new company, so far as it appears from the record, was to be composed not of these two defendants alone, but also of S. J. Sprague, Edward H. Johnston and J. H. Clement, and it was only for the purpose of facilitating the formation of such company that the plaintiff furnished one-half of the amount necessary for the purchase of the said stock. It was agreed that, upon the purchase of the stock by the said defendants, they were to assign one-half of it to the plaintiff, who was to hold the same and receive its net earnings until the particular company above (537) mentioned should demand its surrender upon tendering a sum equal to the amount advanced. It is very evident that, had these defendants performed their agreement and assigned the stock to the plaintiff, they could not, as individuals, have compelled him, upon tender of said amount, to surrender or transfer it to them. The contract is plain upon this point, and provides, in substance, that the plaintiff is to remain the owner until the formation of the new company, under an agreement between certain parties named therein, and, as it does not appear that such new company was ever constituted, we are unable to see how these two defendants, or, indeed, anyone else, could have compelled the plaintiff to transfer the said stock.

Such being the rights of the plaintiff had the said defendants performed their agreement, it remains to be determined whether there is any principle of law or equity which will enable them to profit by its violation.

If the money had simply been loaned to these defendants, and they had been authorized to purchase for themselves alone, it would be a

question, not altogether free from difficulty, whether a mere contract to sell the stock could be specifically enforced. Such, however, is not the case presented in the record. The defendants, as we have said, took the money of the plaintiff under an express agreement to purchase the stock and transfer it to him, and there is absolutely nothing to warrant the inference that the defendants were to become its beneficial owners, or that either party had the slightest conception that, in providing for its transfer to the plaintiff, the latter was purchasing from the defendants. It was the plaintiff's money that paid for it, and, in the absence of any agreement, there would have been a resulting trust in his favor. *Hargrave v. King,* 40 N. C., 430; Adams' Eq., 33; Malone R. P., 489.

We are unable to see how the express agreement of the defendants to do that which, under the same circumstances, a court of equity
(338) would have compelled them to do, can, in the least, affect the plaintiff's rights in the premises. Much importance is placed upon the fact that the defendants were authorized to take the stock in their own names, but, as we have seen that they were purchasing the same with the plaintiff's money under an agreement to immediately assign it to him, we are of the opinion that this circumstance did not prevent them from becoming trustees in the transaction. Even had this been land, and the defendants had paid the purchase money, and taken the title under a parol agreement to hold it for the plaintiff, subject to his right to repay the purchase money, the court, upon sufficient testimony, would have declared them trustees. This was substantially decided in *Cohn v. Chapman,* 62 N. C., 92, in which it was held, upon the principle of trust, that such an agreement was not within the Statute of Frauds. A case very similar to the one now before us is to be found in *Stevens v. Wilson,* 18 N. J. Eq., 447. The plaintiff filed a bill to compel a transfer of two hundred shares of stock purchased by the defendant with money advanced upon the following order to one Shippen: "Please pay to order of D. M. Wilson $5,000, for which he will give you a receipt to be paid in stock of the Newark Plank Road Company, say two hundred shares, or money return in same proportion at that rate, $25 per share." The defendant executed the following receipt: "Received, Hoboken, 20 April, 1860, $5,000 as per stipulation within, to be transferred to order or request of Mr. Stevens, when he shall desire." The relief prayed for was granted, upon the principle that the defendant held the stock in trust. The Court said that when the defendant "purchased the stock with Stevens' money, according to the rule of equity he held that stock as trustee for Stevens, and nothing but a clear, positive agreement by Stevens
(339) will enable him to speculate on the trust property for his own

benefit." In speaking of this decision in *Cutting v. Dana,* 25 N. J. Eq., 265, the Court stated that it "was a suit in which the complainant filed a bill to compel the defendant to deliver to him certain shares of stock purchased by the defendant with money furnished by the complainant, on an agreement that the defendant would transfer the same to the complainant on request. *There was a trust, however, in that case.*"

The present transaction, as we have seen, was not a mere loan of money to the defendants to use as they pleased, but it was for the special purpose of purchasing the stock for the plaintiff and an immediate transfer to him. But for this stipulation, it is fair to assume that the money would not have been furnished, and we are decidedly of the opinion that the defendants held the stock in trust for the plaintiff.

Instead of performing the trust by an assignment to the plaintiff, they exchanged it for stock of equal amount in the Twin City Construction Company. This stock was deposited with the defendant Bates as security for a loan of money to the defendants, which debt has been paid, and the stock is still in the hands of said Bates. The substituted stock, being thus traced and identified, may be followed in equity and impressed with the original trust. "A principal in all cases, where he can trace his property, whether in the hands of the agent or of his representatives or assignees, is entitled to reclaim it, unless it has been transferred *bona fide* to a purchaser of it, or his assignee, for value without notice. In such cases it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property, if it be distinguishable and separable from other property or assets, and has an earmark or other appropriate identity." *Whitley v. Foy,* 59 N. C., 34, and the cases there cited. See, also, *Edwards v. Culberson, post,* 342, where the authorities upon this subject are fully set forth. (340)

We think that the plaintiff has made out a *prima facie* case, and that his Honor committed no error in continuing the injunction to the hearing.

AFFIRMED.

Cited: Avery v. Stewart, 136 N. C., 439; *Brogden v. Gibson,* 165 N. C., 23; *Rush v. McPherson,* 176 N. C., 568.

JAMES G. TINSLEY v. JESSE F. HOSKINS.

Stipulation for Collection of Fee in Promissory Note—Public Policy.

A stipulation in a promissory note "that in case this note is collected by legal process the usual collection fee shall be due and payable," is not consistent with public policy, and is therefore not enforceable in our courts.

MACRAE, J., dissents.

ACTION tried at February Term of GUILFORD, before *Whitaker, J.*, upon appeal from a justice of the peace.

The facts may be gathered from the opinion of the Court.

L. M. Scott for plaintiff.
J. A. Barringer for defendant.

SHEPHERD, C. J. The defendant executed to the plaintiff a promissory note for the sum of $146.35, payable on 1 July, 1889, "with legal interest from maturity," and it was stipulated therein "that in case this note is collected by legal process, the usual collection fee shall be due and payable therewith."

The sole question presented for review is whether such a stipulation is valid and enforceable. The point has never been passed upon by this Court, and there is some conflict of judicial decision upon the subject in other states. We think, however, that the ruling of his
(341) Honor is sustained by the better reasoning, as well as by a decided preponderance of authority. In *Bank v. Sevier,* 14 Fed., 662, it is declared that "such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy and void." To the same effect are the cases of *Meyer v. Hart,* 40 Mich., 517; *Toole v. Stephen,* 4 Leigh., 581; *Boozer v. Anderson,* 42 Ark., 167; *Shelton v. Gill,* 11 Ohio, 417; *Martin v. Trustees,* 13 Ohio, 250; *Dow v. Updike,* 11 Neb., 95.

In *Bullock v. Taylor,* 39 Mich., 137, *Justice Cooley* uses the following very forcible language: "A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grevious wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeiture may be imposed to an amount without limit. The provision in those notes is as much void as it would have been, had it called the sum unpaid by its true name of forfeiture or penalty."

In *Witherspoon v. Musselman,* 14 Bush., 214, the agreement was to pay a reasonable attorney's fee in the event of the note being "collected by suit." The court placed its refusal to enforce such contract upon the ground that "they are not only in the nature of penalties, but that they are contrary to public policy and tend to encourage litigation."

A discriminating writer in 14 American Law Review, 858, remarks: "It seems to us to be more consistent with public policy to consider such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be under the guise of an attorney's fee."

1 Daniel, Negotiable Instruments, sec. 62*a,* expresses the opinion that, "unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments, and they are, (342) therefore, against the policy of the law, and void."

In consideration of the foregoing authorities, and in view of the serious evils that may result from such an innovation, we are of the opinion that stipulations like the one now sued upon, when incorporated into obligations of this particular character, are against public policy and therefore invalid.

AFFIRMED.

Cited: Brisco v. Norris, 112 N. C., 677; *Williams v. Rich,* 117 N. C., 240; *Turner v. Boger,* 126 N. C., 302; *Bank v. Lumber Co.,* 128 N. C., 195.

SAMSON EWARDS v. JENNIE CULBERSON.

Fraud—Money Converted Into Land, Land Subject to Payment—Marriage—Dower—Trusts and Trustees.

1. Where a person is deprived of his money by fraud he may recover it in specie if it can be found, and if it has been converted into land he may subject that to the payment of the debt.
2. When a woman fraudulently obtained from a man a sum of money upon her promise to marry him, and allow the land purchased with the money to be in lieu of her dower: *Held,* the land so purchased could be subjected to the payment thereof.
3. Discussions by *Shepherd, J.,* of the law relating to converting persons into trustees for the benefit of others.

APPEAL at May Term, 1892, of CHATHAM, from *Whitaker, J.*

T. B. Womack for plaintiff.
John Manning and J. W. Graham for defendant.

(343) SHEPHERD, C. J. According to the finding of the jury, the defendant fraudulently obtained of the plaintiff the sum of two hundred and seventy-five dollars and twenty-five cents for the purpose of purchasing the land described in the complaint, and the fraud consisted in "falsely and fraudulently promising and pretending that if the plaintiff would let her have the said sum of money for said purpose she would marry him in a very short time, and that the land to be purchased with the said money should be in lieu of her right of dower, which she would acquire" by the said marriage. Upon this verdict his Honor rendered a judgment in favor of the plaintiff for the recovery of the amount so fraudulently obtained, but refused to declare it a charge upon the land purchased by the defendant with the said money, the land still remaining in her hands.

Were there nothing more than a mere promise to marry, it is plain that a violation of it would not entitle the plaintiff to any equitable relief; but we must infer from the verdict that the defendant did not intend to perform the promise at the time it was made, and that she intended it, as well as the additional agreement to hold the land in lieu of dower, simply as a trick or contrivance by which to cheat and defraud the plaintiff of his money. By submitting to the verdict and judgment, the defendant (even if she could successfully do so) is precluded from denying that she obtained the money under circumstances which the law denounces as fraudulent, and this being so, it cannot be doubted that if the specific money had been retained by her, and could have been identified, the plaintiff, in a proper action, could have recovered it. If this be true, why may not the money be traced into the land and declared to be a charge thereupon? This is a somewhat novel question in this State, but in view of well settled equitable principles, as well as authorities in other jurisdictions, it is believed to be unattended with any very serious difficulty.

(344) The only decision of this Court to which we have been referred as bearing upon this question, is that of *Campbell v. Drake*, 39 N. C., 94. The plaintiff filed a bill in equity against the heirs at law of one Farrow, praying that they be declared trustees of certain land purchased by their ancestor with money stolen by him of the plaintiff while in the employment of the latter as his clerk. The Court said that it was "not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors and the like, in which the owner of the fund may elect to take either the money or that in which it was invested"; and it was accordingly held that the plaintiff was not entitled to the particular relief asked for. It was strongly intimated, however, by *Ruffin, C. J.*, in delivering the opinion, that the plaintiff might "have the land declared liable as a security for the money laid

out for it." It was not stated upon what principle this could be done, but we apprehend that it was based upon the general proposition that whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded for the purpose of recompense or indemnity. "One of the most common cases," remarks *Judge Story,* "in which a court of equity acts upon the ground of implied trusts, *in invitum,* is when a party receives money which he cannot conscientiously withhold from another party." Story Eq. Jurisprudence, sec. 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held in its new form liable to the rights of the original owner, or the *cestuis que trust.*" Section 1258; Hill on Trustees, 222; *Whitley v. Foy,* 59 N. C., 34; *Taylor v. Plumer,* 3 M. & S., 562; *Knatchbull v. Hallest,* 13 ch. Div., 696; *People v. Bank,* 96 N. Y., 32; *Bank v. Insurance Co.,* 104 U. S., 54.

Mr. Pomeroy says: "In general, whenever the legal title to (345) property, real or personal, has been obtained through actual fraud, . . . or through any other circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein, and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser in good faith and without notice, acquires a higher right and takes the property relieved from the trust.

The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." Pom. Eq. Jur., 1053. A confidential relation is not necessary to establish such trust, and there is no good reason why the owner of property taken and converted by one who has no right to its possession should be less favorably situated in a court of equity in respect to his remedy (at least for the purpose of "recompense or indemnity") than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. "The beautiful character, prevading excellence, if one may say so, of equity jurisprudence," says *Judge Story,* "is that it varies its adjustments and

proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." The trusts of which we are speaking are not what are known as technical trusts, and the ground of relief in such cases is, strictly speaking, fraud and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the wrongdoer. This principle is distinctly recognized (346) by our leading text-writers, and it is said by Mr. Bispham (Principles of Equity, 92) that "equity makes use of the machinery of a trust for the purpose of affording redress is cases of fraud." The principles above stated are illustrated by many decisions to be found in the reports of other states, and as our case may easily be assimilated to those in which money or other property has been stolen and converted, such cases must be recognized as pertinent authority in the present investigation.

In *Newton v. Porter,* 69 N. Y., 133, it was held that the owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker, or of his assignee with notice, and that this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified. The law, it was said, "will raise a trust *in invitum* out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense." *Andrews, J.,* said that "equity only stops the pursuit when the means of ascertainment fails, or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the cases, so as to protect the rights of the true owner." *Lane v. Dighton,* Ambler, 409; *Mansell v. Mansell,* 2 P. Williams, 679; *Lench v. Lench,* 10 Ves., 511; Perry on Trusts, sec. 829; Story Equity, sec. 1258.

In *Bank v. Barry,* 125 Mass., 20, it was held that equity will charge land, paid for in part with the proceeds of stolen property, with a trust in favor of the owner of the property for the amount so used.

In *Humphries v. Butler,* 51 Ark., 351, the defendant, in paying for a house and lot purchased by him for $400, wrongfully used $149.52 belonging to the plaintiff, and of which he had obtained possession without her authority, knowledge or consent. The Court declared the defendant a trustee to the extent of the money of the plaintiff used by him, and charged the same upon the property, and in default of its payment by a certain time, decreed that the same be sold to (347) satisfy the said lien.

These and other authorities that could be cited abundantly, sustain the intimation of *Chief Justice Ruffin,* to which we have referred, and we are therefore of the opinion that the money fraudulently

obtained of the plaintiff may be followed into the land described in the complaint, and that the judgment of his Honor should be so modified as to declare it to be a charge upon the same.

MODIFIED.

Cited: Bernard v. Hawks, ante, 339; *Williams v. Walker, post,* 612; *Summers v. Moore,* 113 N. C., 405; *Ross v. Davis,* 122 N. C., 267; *Pender v. Mallett,* 123 N. C., 62; *Fidelity Co. v. Jordan,* 134 N. C., 242; *Mfg. Co. v. Summers,* 143 N. C., 105; *Michael v. Moore,* 157 N. C., 466; *Massey v. Alston,* 173 N. C., 223, 224.

LUCRETIA LICTIE v. HORACE CHAPPELL ET AL.

Motion in the Cause—Petition to Make Assets—Practice.

1. A motion in the cause is the proper remedy to attack a final judgment when, in a proceeding to sell land for assets, begun in 1881, it appeared there had been a sale under order of the clerk pending an appeal to the judge upon a question affecting the validity of the order, which order was reversed upon such appeal, and when it further appeared that in 1885 the matter was ordered to be suspended, pending the finding of material facts by a referee, and that there was an order by the judge in 1886 affirming the order of sale, but not the confirmation thereof.

2. A motion in such case to vacate the order of sale and to allow the defendants, the intestate's heirs at law, to pay the debts of the estate, was allowed by the clerk and affirmed on appeal by the judge and remanded to the clerk for the purpose of notifying the purchaser to show cause why the sale should not be set aside, and after successive references was finally heard and allowed: *Held*, no error. The judge had power under Acts of 1887, ch. 276, to determine the whole matter in controversy.

SPECIAL PROCEEDING, begun before the clerk of the Superior (348) Court of PENDER, 17 January, 1881, by the plaintiff, as administratrix of Hinton Chappell, deceased, to sell certain lands in Pender County to raise assets to pay the debts of the estate, and finally heard before *Winston, J.*, at the March Term, 1892, of PENDER.

At September Term, 1890, the cause was referred to B. R. (351) Moore to find the facts and report his conclusions of law.

Referee Moore found, as a conclusion of law, that defendant's motion to be allowed to pay the debts of the estate, and that the lands thereof be not sold, was in apt time, and also found other facts. Plain-

tiff and E. Porter filed exceptions to referee's report, which were heard and overruled by *Winston, J.,* at March Term, 1892, of PENDER. Plaintiff and E. Porter appealed.

The other facts appear in the opinion.

No counsel for plaintiff.
John D. Bellamy, Jr., for defendant.

MACRAE, J. This case has become much confused and greatly protracted, but it seems at last to have reached its proper determination in the judgment which now comes to us upon appeal.

The contention of the purchaser is that there was a final judgment of confirmation of the sale made by the clerk and affirmed by the judgment of his Honor *Judge Clark,* and that the same cannot be attacked by motion in the cause, but if there is any ground for setting aside the sale, it must be made to appear to the Court by an independent action. But the record does not bear out this contention; it appears that on 14 March, 1881, the clerk granted license to the administratrix to sell the lands for assets; and that defendants appealed to the Superior Court, and while this appeal was pending before the judge, the administratrix proceeded to sell, and the clerk made another order confirming the sale and directing title to be made to the purchaser. This order the clerk had no right to make, as the case for the time being had passed beyond his jurisdiction. The order of his Honor *Judge Graves,* while not clear in its terms, was evidently a reversal of the order of the clerk
(352) granting license to sell the land, and referring the matter to a referee to ascertain and report the facts. To this order there was no exception, and we must take it as a waiver of the trial of issues of fact by a jury.

The next order, that made by his Honor *Judge McKoy,* passes upon the report of the referee; directs that the sale be suspended until further hearing, and refers the matter to the same referee. And to this order there was no exception.

The order made by *Gilmer, J.,* at March Term, 1886, simply institutes another referee, the clerk of the court, instead of the former referee.

The report of the referee is filed, and exceptions thereto, and the order of his Honor *Judge Clark,* at September Term, 1886, overrules the exceptions and affirms the order of sale, but not the order of confirmation. And no exception is made to this order.

Next follows the motion of defendants to be allowed to pay the debts owing by the estate of intestate, to vacate the order of sale, and the sale made pending the appeal. This motion was made before the clerk and allowed, and plaintiff appealed; and, while the dates are confusing, it appears that his Honor *Judge Connor,* at May Term, 1887, affirmed the

judgment of the clerk, and remanded the case to him for the purpose of giving notice to the purchaser to show cause why the sale should not be set aside.

The report of the clerk shows that notice to the purchaser was given, and that he appeared by counsel and filed his objections to setting aside the sale; and thereupon the clerk ordered that the sale and order of confirmation be set aside, and the purchaser appealed.

At May Term, 1888, it was referred by consent, by the order of his Honor *Judge Shepherd,* to a referee to find the facts, and by successive orders other referees were appointed, and finally his Honor *Judge Armfield,* at September Term, 1890, appointed B. R. Moore, Esq., referee, who filed his report of facts and findings of law, to which (353) the purchaser, E. Porter, filed numerous exceptions.

His Honor *Judge Winston,* at the hearing, March Term, 1892, overruled all the exceptions, affirmed the judgment of the clerk setting aside the sale and authorizing the defendants to pay the debts of the estate in exoneration of the lands. From this judgment the plaintiff and E. Porter appealed to this Court.

There are no specific exceptions to the final judgment, but we have examined the exceptions passed upon by his Honor, and concur with him in his conclusions.

Under Laws 1887, ch. 276 (Clark's Code, sec. 255), the judge now has final jurisdiction to determine the whole matter in controversy. The purchaser has had his day in court; it is nowhere suggested that he paid any purchase money for the land at the sale which has been set aside, or it might have been proper to order that the same be refunded. Indeed, there is no report of sale or of the price at which the land was bid off; the record, while full in some respects, is lacking in others. We have found no error.

AFFIRMED.

Cited: Ledbetter v. Pinner, 120 N. C., 458; *Faison v. Williams,* 121 N. C., 153; *Roseman v. Roseman,* 127 N. C., 497; *Love v. Love,* 139 N. C., 365; *Batts v. Pridgen,* 147 N. C., 135.

ROBERT D. FIELD ET AL. v. JAMES MOODY AND WIFE.

Action to Recover Land—Claim for Improvements—Arbitration—Consent Judgment.

In an action for the recovery of land the defendants set up a contract to convey *bona fide* improvements, which improvements the arbitrator, to whom this case was referred by consent, making his award the judgment

of the court, found to be $75 in excess of the rents and a lien on said land: *Held*, (1) that a writ of possession was not proper until the terms of the agreement were complied with, there being a stipulation in the consent judgment to that effect; (2) that the $75 excess and costs were a lien upon the land under said judgment, and under the stipulations thereof, the defendants could hold possession until it was discharged.

(354) ACTION to recover possession of land, heard before *Whitaker, J.*, at February Term, 1892, of CHATHAM, in which the defendants set up a parol agreement to convey, which is denied by the plaintiffs, who plead the statute of frauds.

The following judgment was consented to:

"This cause coming on to be heard before the court, now the parties being personally present, and represented by their counsel, it is by consent ordered and adjudged that this action is referred to the arbitrament and award of Charles E. McLean, whose award is to be a rule of court, and who shall have power to award costs, including a reasonable allowance to himself.

"It is further ordered and adjudged that the plaintiffs do recover of the defendants the possession of the lands described in the complaint, and that writ of possession is withheld and not permitted to issue until the determination of the matter submitted to the arbitrament and award of said McLean," who filed his award: "That the plaintiffs are indebted to the defendants $75, the amount of improvements made by defendants, in excess of the rental value of the land in controversy; and that the defendants recover of the plaintiffs said sum, and the costs of this action, including an allowance of $20 to Charles E. McLean, arbitrator."

The plaintiffs withdrew all exception to the award.

(356) The defendants tendered a judgment adjudging that the plaintiffs were indebted to the defendants for the excess of improvements upon the lands sued for over and above the rentals of the same in the sum of $75, and for the costs, including the allowance for the arbitrator, and that the said judgment was declared to be a lien upon the said lands.

The court declined to render the judgment as tendered by the defendants, and the defendants excepted.

The defendants then tendered a judgment, adjudging that the plaintiffs were indebted to the defendants for the excess of the improvements to the lands sued for over and above the rental of said lands in the sum of $75, and for the costs, including the allowance to the arbitrator, and that writ of possession should not issue until the defendants should have received the fruits of their recovery by the payment of said sums by the plaintiffs.

The court declined to render judgment so tendered by the (357) defendants, and the defendants excepted.

The court then rendered the judgment set out in the record, to which the defendants excepted for the following reasons:

1. For the failure of the court to adjudge said indebtedness and costs to be a lien upon the lands sued for.

2. For the failure of the court to adjudge that writ of possession should not issue until the payment of said sums by the plaintiffs to the defendants.

3. For that the court adjudged and directed that a writ of possession and execution should issue upon the said judgment.

From the said judgment the defendants appealed.

No counsel for plaintiffs.
T. B. Womack for defendants.

BURWELL, J. There was no exception taken by plaintiffs to the order made at Fall Term, 1891, by which the cause was referred back, for the purposes therein named, to the arbitrator whom the parties had selected, and it is stated in the "case on appeal" that the plaintiffs withdrew all exception to the award. The agreement of the parties to submit the matter in controversy to arbitration contains the stipulation that no writ of possession for the land described in the complaint should be issued "until the determination of the matters submitted to the arbitrament and award of the said McLean." That matter will not be *determined* till the plaintiffs have paid to the defendants the sum which the arbitrator found to be due them for improvements put upon the land while it was held under the parol contract, which the plaintiffs, as they may do, have repudiated. *Herman v. Watts,* 107 N. C., 646. Under the agreement of the parties and the award, as well as under the law as settled by the cases of *Hedgepeth v. Rose,* 95 N. C., 41, and *Pitt v. Moore,* 99 N. C., 85, the plaintiffs should not be allowed to take (358) the property which the defendants have improved, without compensation for the additional value which their improvements have conferred upon the property. The sum found by the arbitrator to be due for improvements, and also the costs of the action, including an allowance to the arbitrator, should be adjudged to be a lien on the land, and, according to the agreement of the parties, no writ of possession should be allowed to issue till these amounts are paid.

There was error. Let the cause be remanded, that proceedings may be had in accordance with this opinion.

REMANDED.

JOHN A. ERVIN ET AL. v. MARY C. BROOKS, ADMINISTRATRIX.

Bond—Statute of Limitations—Married Woman—Trustee—Time of Payment.

1. When no time is specified for the payment of a bond it is due at its execution, and the statute of limitations begins to run at once.
2. The fact that it was made payable to the husband when it ought to have been to the wife, does not arrest the running of the sattute; he was her trustee and not under disability.
3. His assignment of the note to her could not arrest the running of the statute; it had begun to run before assignment.

APPEAL at Spring Term, 1892, of ONSLOW, from *Winston, J.*

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

(359) SHEPHERD, C. J. This action was commenced on 16 June, 1890, and is founded upon a bond executed by the defendant's intestate on 25 November, 1872, and payable to John A. Ervin or order.

There being no time specified for the payment it was due at once, and the statute of limitations began to run from its date. *Caldwell v. Rodman,* 50 N. C., 139; *Little v. Dunlap,* 44 N. C., 40; Angell Stat. Lim., 114. This being so, and there being no partial payments, nor any written promise or acknowledgment, it is plain that the bond was barred by the statute, even before the death of the obligor in January, 1883.

It is insisted that the consideration of the bond was money arising from the sale of the land of the *feme* plaintiff, and it was alleged that the name of her husband was inserted as obligee by reason of a mistake of the parties. It is therefore argued that, as the *feme* plaintiff has been under the disability of coverture ever since the execution of the instrument, she cannot be barred by the lapse of time. His Honor very properly held that there was no evidence of such mistake, and it must necessarily follow that the plaintiff's contention in this respect must fail.

Treating the case, however, in the most favorable aspect for the *feme* plaintiff, and assuming that the husband held the bond as a trustee for her benefit, we are unable to see how she can recover. There is no suggestion of fraud in the case, and it appears that on the night succeeding the execution of the bond it was delivered to her by her husband with full knowledge of the facts. She made no objection to the insertion of her husband's name as payee, and has never taken any steps to have

him declared a trustee. Indeed, it was unnecessary that she should have done so, as the assignment by delivery was sufficient to vest in her the beneficial ownership.

The husband, then, being a trustee (certainly up to the time (360) of the assignment to the *feme* plaintiff), and the bond being due immediately upon its execution, it is clear that the statute commenced to run against him from its date, and it is a familiar principle of law, subject to but few exceptions (none of which apply to this case), that when the statute "once begins to run it never stops." *Chancey v. Powell,* 103 N. C., 159; Wood Stat. Lim., 8.

If it commenced to run against the husband (trustee), the subsequent transfer of the bond to the *feme* plaintiff did not have the effect of suspending its operation (*Chancey v. Powell, supra,* Clark's Code, sec. 169, and cases cited), and it is well settled that if the trustee is barred, the *cestui que trust* is barred also. *King v. Rhew,* 108 N. C., 696; *Wellborn v. Finley,* 52 N. C., 228; *Clayton v. Cagle,* 97 N. C., 300.

We have carefully examined the cases cited by the plaintiffs' counsel, and are of the opinion that they are not inconsistent with the conclusion we have reached.

AFFIRMED.

Cited: Causey v. Snow, 122 N. C., 329; *Sutton v. Jenkins,* 147 N. C., 17; *White v. Scott,* 178 N. C., 638.

WILLIAM C. ROUSE ET AL. v. JOHN C. BOWERS ET AL.

Assignment—Notice of Fraudulent Intent—Mortgage—Measure of Value.

In an action brought to charge a trustee in an assignment with certain disbursements thereunder, it appeared that, pursuant to an agreement with one of the assignors, and on the day preceding the execution of the assignment, the assignee made a deed to both the assignors instead of to one as agreed, and took a mortgage to secure the unpaid purchase money, $2,500, evidenced by notes, which showed they had been altered from $2,250, because, as was explained, the cash payment agreed upon was not paid, or only $25.00 of it. The jury found that the assignment was made with fraudulent intent on the part of the grantors: *Held,* (1) that upon these facts, the referee could have properly found that the assignee was not charged with notice of such intent; and such finding cannot be set aside as a matter of law; (2) that the acceptance of such trust, wherein was conveyed the assignor's stock of goods and was secured as

a first preferred debt the purchase money previously secured by said mortgage, was not a waiver of his rights under the mortgage; (3) that the mortgagee and trustee should not be charged with a greater value of the land than was found by the referee to be fair.

ACTION heard at March Term, 1892, of DURHAM, upon exceptions filed by the plaintiffs, before *Whitaker, J.*

The court overruled the exceptions, except such as appear in the judgment, and the plaintiffs appealed.

The referee made the following findings of fact:

1. That on 8 April, 1889, the defendants, John C. Bowers and B. J. Arendell, trading as Bowers & Arendell, made an assignment to B. W. Matthews of all their real and personal property for the benefit of their creditors, and that said Matthews accepted the said trusteeship conferred by said deed without knowledge of the fraudulent intent of the makers of said deed, and made the disbursements which he afterwards made, and with which he is credited, without knowledge of the fraudulent intent of the makers of said deed.

2. That at the time said deed in trust was executed, the said B. W. Matthews individually held a mortgage on the land conveyed in said deed of trust for twenty-five hundred dollars, and he did not, at the time of said execution, nor at any time thereafter, intend to give up his rights as mortgagee, nor that his mortgage should be merged in the deed of trust, but, on the other hand, refused to allot to said Bowers and Arendell a homestead in said land, but insisted on selling it under his said mortgage.

3. That when the one last to fall due of the bonds secured by said mortgage did fall due, the said B. W. Matthews, as mortgagee, af-
(362) ter due advertisement, sold the land mortgaged to him, and the land brought $2,500, which was a fair price for said land at that time, and all of which went to pay the bond secured by said mortgage.

4. That there went into the hands of said B. W. Matthews, trustee, for the benefit of creditors, property consisting of a stock of general merchandise, whose inventory cost price, including freight, was $4,321.75, besides open accounts of inconsiderable value.

5. That the said B. W. Matthews executed his office of trustee honestly, prudently and to the best interest of creditors, and from the sale of goods, the rental of the store, the collection of debts (including those which were solvent and with which he is charged), collected as said trustee the sum of $3,240.47, with which amount he is properly chargeable.

6. That the said B. W. Matthews, as trustee aforesaid, before he had any notice of the fraudulent intent of the makers of said deed of trust,

expended *bona fide* in the execution of said trust $2,007.72, which consisted of the items in the account hereto attached made a part of this findings of fact, and that each item marked "Allowed" in said account was a proper disbursement to be made by him as trustee aforesaid.

7. That at the bringing of this action the said B. W. Matthews, as trustee aforesaid, had in his hands for the benefit of the creditors of Bowers & Arendell, as shown by the two findings of fact next preceding, the sum of $1,232.75.

8. That the said B. W. Matthews deposited on an interest-bearing certificate the sum of $1,104.64 belonging to his trust, and this certificate accrued interest to the amount of $88.91, which certificate was turned in by him before the hearing of this reference to the clerk of this court, and by the clerk of this court paid, with the interest accrued, to the attorneys of plaintiffs. (363)

The following conclusions of law were submitted:

1. That the said B. W. Matthews did not have at the time of the execution of said deed of trust, nor at any time before the disbursements credited to him were made, notice of the fraudulent intent of the makers of the deed, nor had facts come to his knowledge sufficient to put him upon notice.

2. That the said B. W. Matthews did not, by his acceptance of his office as trustee, waive the right secured to him by his mortgage previously executed, nor was said mortgage merged in said deed of trust, nor was said Matthews estopped to claim his rights as mortgagee, but he became liable to the creditors of said Bowers & Arendell only for the amount that came into his hands over and above the amount of the mortgage lien on said land, which from said land was nothing.

The other facts appear in the opinion.

J. S. Manning and W. W. Fuller for plaintiffs.
J. W. Graham and J. Parker for defendants.

SHEPHERD, C. J. When this case was before us on a former appeal (108 N. C., 182), we held that there was error in charging the trustee Matthews with the amount paid out by him under the terms of the deed of trust before the commencement of the action to set it aside, or before he had knowledge of the fraudulent intent of the assignors. As his liability depends entirely upon whether he acted in good faith, the action cannot be deemed to have commenced as to him until he had actual notice thereof by the service of the summons or otherwise. It appears that he had no notice of the suit until the summons was served on 16 August, 1889, and as his last disbursement was made on the 12th of that month, it must follow that, in order to charge him personally,

it must be shown that he had actual knowledge of the fraudulent intent, as distinguished from the constructive knowledge arising out of the pendency of the suit. The referee reports that he had no such
(364) knowledge at the time of making the disbursements, and that he acted in good faith throughout the whole transaction. To this report there were many exceptions, all of which were overruled by his Honor, except one or two which need not be here considered.

We do not think it necessary to go into a particular examination of each exception. It is sufficient to say that the chief points presented for our consideration are whether the finding of the referee that the disbursements were made in good faith before notice of the fraudulent intent of the assignors is sustained by the testimony, and whether the assignee should not be charged with the proceeds of the sale of a certain lot which had been mortgaged to him by the said assignors prior to the execution of the deed of assignment. There were exceptions to the failure of the referee to find certain specific facts, but as these were involved in the main questions to be determined by him, and as there was no request for such specific findings, nor any motion to remand, it is clear, under the practice laid down in *Fertilizer Co. v. Reams,* 105 N. C., 283, that the said exceptions should be overruled. It is insisted, however, that there was no sufficient evidence to sustain the facts actually found by the referee, or rather, that, taking the testimony of Matthews to be true, the referee should, as a matter of *legal inference,* have found that the said assignee had knowledge of the fraudulent intent of the assignors.

The deed of assignment was filed for registration on 9 April, 1889, and upon a careful examination of that instrument, we can see nothing on its face that indicates a fraudulent intent on the part of the assignors. The assignors had a right to prefer creditors, *Barber v. Buffaloe, ante,* 206, and they also had a right to reserve their homesteads and personal property exemptions. *Bobbitt v. Rodwell,* 105 N. C., 236.

(365) The facts, then, from which the knowledge of the fraudulent intent is to be inferred must be looked for beyond the provisions of the said conveyance. As we understand it, the fraudulent intent insisted upon by the plaintiffs and found by the jury, consisted in the purchase upon credit of a lot of land in the town of Durham, and the securing of the payment of the purchase money in the deed of assignment with the view of obtaining a homestead for each of the assignors in said property to be paid for out of the personal assets. In other words, it is urged that the transaction was intended to cover the withdrawal of a large part of the personal assets from the creditors under the shield of the homestead. Matthews denies that he knew of any such

purpose, but it is contended that he is affected with implied or constructive knowledge by reason of his admission of certain circumstances sufficient to put him upon inquiry. The cases cited by counsel do but declare the general proposition as to implied or constructive notice, as stated by Mr. Pomeroy, 2 Eq. Jur., 607. He says that "whenever a party has information or knowledge of certain extraneous facts, which, of themselves, do not amount to nor tend to show an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a knowledge of the interest, claim or right which really exists, then the party is absolutely charged with constructive notice of such interest, claim or right." Conceding that this doctrine applies to a case where notice of a particular secret intent is sought to be fixed upon a party, we are unable to see how it can operate upon Matthews in the present case. It is to be observed that the circumstances relied upon tended to show actual notice, but the referee found, upon the whole testimony, that the assignee had, in fact, no notice, and acted in good faith. The inquiry, then, is whether those circumstances amounted to constructive notice (366) of the particular intent to which we have referred.

We do not think that such a result can follow from the transaction between the parties on the day preceding the assignment. It appears that the defendant Arendell had previously agreed to purchase the above mentioned lot of Matthews for the sum of twenty-five hundred dollars, and that two hundred dollars were to be paid in cash. On the day when the deed and mortgage were executed only twenty-five dollars were paid in cash, and the notes were altered from twenty-two hundred and fifty dollars to twenty-five hundred dollars. The alteration was made in consequence of the failure to make the cash payment as agreed upon, and the discrepancy of twenty-five or fifty dollars may also be accounted for on the ground that a new agreement was then made because of the failure of Arendell to make the said payment. Matthews testified that he had no knowledge at that time of the purpose of Arendell & Bowers to make an assignment and that he knew nothing of it until the next day, when they had the deed of assignment prepared, and insisted upon his acting as assignee. It is true that he stated that he thought Arendell had some motive in having the deed made both to himself and Bowers, the negotiations having been made with Arendell alone; but this motive he attributed to the fact that Arendell had been indicted in a number of cases. The foregoing circumstances, in our opinion, cannot have the effect of fixing Matthews with constructive notice of a particular intent on the part of Arendell & Bowers in making a general

assignment on the next day. Neither does the fact that he stated that he "did not like the way the papers (speaking of the assignment) were drawn"—reserving a homestead to the assignees in land which they had not paid for—raise a conclusive presumption that he knew of their fraudulent purpose. He consulted an attorney upon the subject, who correctly advised him that such a provision would make no
(367) difference if the assignment was made in good faith. These and other less significant circumstances, while affording evidence of knowledge or complicity, do not amount to constructive notice of a fraudulent intent on the part of the assignee. Granting that they were sufficient to put him upon inquiry, it is difficult to understand what *facts* he could have ascertained in addition to what he already knew. There was no fact to be discovered, but only the existence of a secert intent on the part of the assignees. Under the circumstances, the knowledge of this intent was a question to be passed upon by the referee, and as he has found that Matthews had no notice, and acted in good faith, and as there is sufficient evidence to sustain such finding, it cannot be set aside on the ground that, as a *matter of law,* he should have found otherwise. *Hodges v. Lassiter,* 96 N. C., 351; *Battle v. Mayo,* 102 N. C., 413.

The next question to be passed upon is whether, by accepting under the trust (in which the purchase money for the lot was secured), the said Matthews waived his rights under the mortgage previously executed to him. The referee finds, and the evidence fully sustains him, that he did not release, or intend to waive any of his rights under the said mortgage. It may be true that one cannot act as a trustee in a deed, and at the same time assert a right which conflicts therewith, but we do not see how there is necessarily any such conflict in this case. It is true that in the assignment it is provided that the assignees shall have their homestead exemption; but it is well settled that there may be a homestead in an equity of redemption. *Burton v. Spiers,* 87 N. C., 87. It is further to be remarked that a considerable amount of personal property was included in the assignment, out of which the mortgage (which was preferred) might have been fully discharged. As a matter of fact, the assignee never set apart the homesteads, but foreclosed his mortgage when it matured, and has never applied
(368) any part of the trust fund to the payment of his debt. The insertion of his debt in the deed of assignment was simply additional security, and we see nothing in the transaction which, in fact or in law, amounted to a waiver of his mortgage. "The taking of a second security of equal degree with the first for the same debt will not, by operation of law, extinguish the first. Acceptance of the second will only operate as an extinguishment of the first when it is shown that the

creditor accepted the second mortgage with the understanding that that should be its effect." *Hutchinson v. Smartweller,* 31 N. J. Equity, 206; *Gregory v. Thomas,* 20 Wend., 17. See also *Raiford v. Raiford,* 41 N. C., 490.

It is further contended that the jury found that the lot was worth three thousand dollars, and that as Matthews purchased it indirectly at his mortgage sale he should be charged with that amount. There is no specific finding by the jury that the lot was worth that amount; but admitting this to be the value at the date of the assignment, it does not follow that such was its value at the date of the mortgage sale. The referee finds that it sold for a fair price, and as the plaintiffs are not asking that the sale be set aside, but only that he be charged with the value of the land, we are of the opinion that he can only be charged with the value at the time of the sale, as fixed by the referee.

We have examined the entire record, and are of the opinion that all of the exceptions were properly disposed of by his Honor.

AFFIRMED.

(369)

STATE EX REL., ETC., R. A. FOARD v. F. R. HALL.

Quo Warranto—Offices—Cities—Towns—Code—Board of Aldermen.

1. In a *quo warranto* brought by a citizen, qualified voter and taxpayer of a municipal corporation, upon leave of the Attorney-General, to try the title of an officer, the chief of police of said corporation, it is not necessary to allege that the relator is entitled to the office or has any interest therein.
2. The board of aldermen of such corporation are not necessary parties defendants to such action.
3. Under the general statute, The Code, sec. 3796, only qualified voters of towns and cities are eligible to offices therein.
4. The office of chief of police is such an office that a *quo warranto* may be brought to try the title to it.

QUO WARRANTO heard upon complaint and demurrer at the August Term, 1892, of GUILFORD, before *Connor, J.*

The facts are set out in the opinion.

J. E. Boyd for plaintiff.
J. T. Morehead for defendant.

CLARK, J. This is a *quo warranto* brought by a citizen, who is also a qualified voter and taxpayer of the city of Greensboro, upon leave

granted by the Attorney-General, against the defendant, who is chief of police of that city.

The first ground of demurrer is that the relator does not allege that he is entitled to the office or has any interest in its emoluments, and therefore is not a proper relator. It is not necessary that the relator should have such interest. The Code, sec. 607, provides that the action may be brought by the Attorney-General in the name of the State, upon his own information, or upon the complaint of any (370) private party, against the parties offending in the following cases: (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise, within this State, or any office in a corporation created by the authority of the State, etc. Section 608 provides that when the Attorney-General grants leave for such action to be brought by a private relator he shall give indemnity for costs and expenses. There is nothing in the statute which indicates that the private relator must be a contestant for the office or have an interest in its emoluments. On the contrary, section 609 provides that the Attorney-General in his complaint *may* also set forth the name of the party entitled, and thereupon, by section 610, the right of such party, as well as that of the incumbent, shall be in issue. It would seem that this is a matter left to his discretion in actions brought by him. If such actions may be limited to merely ousting the illegal incumbent, there can be no reason why the Attorney-General may not grant leave to bring actions having no further object. In many instances, as in the present case, when an office is illegally held or usurped there is no one else who can claim a title thereto. In such cases, unless a voter or taxpayer (not a mere stranger) can bring the action by leave of the Attorney-General there would often be no remedy, for that officer would hardly *ex mero motu* subject the State to the costs and expense of litigation at a distant point when the office was, as here, that of a town, or some other office in which the State, or the public generally, had no interest. In *Saunders v. Gatling,* 81 N. C., 298 (301), in commenting on these sections, *Ashe, J.,* says: "It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the Legislature, by these provisions of The Code, seems to have considered paramount to that of the private rights of the persons aggrieved." In *Ellison v. Raleigh,* 89 N. C., 125 (133), the Court says these sections "seem to contemplate the (371) action as open upon the complaint of any private party" upon leave of the Attorney-General. In *Churchill v. Walker,* 68 Ga., 681, it is held that every citizen of a town has an interest in its municipal offices which will support a *quo warranto* proceeding to test the

right of incumbents thereto, upon the ground that each citizen has an interest in having its offices legally filled and honestly and impartially administered. These offices are created by law for the benefit and convenience of the citizens, and if any usurper should assume their duties, any citizen, whose rights are thus violated, may seek to have the usurper evicted, though he may not claim for himself a right to the office or its fees. To the same effect are *S. v. Jenkins,* 25 Mo., 484, and *S. v. Hamner,* 42 N. J., 435. Indeed, the recognized principle in Great Britain and this country (except in a very few states), is that the proceeding may be begun by leave of the Attorney-General upon the relation of any person possessed of such an interest as renders his interference not obtrusive, as, for instance, an inhabitant or taxpayer or voter of a city or town in a proceeding to test the right of one claiming to exercise the duties of an office thereof. 19 A. & E., 676, 677, and cases there cited; High on Extraordinary Rem., secs. 605, 608. Indeed, the right of private relators to bring such actions was not restricted in England by requiring leave of the crown officer till statute 9 Anne, ch. 20; *ibid.,* sec. 608.

As to the second ground of demurrer, no reason has been assigned, and we see none, why the board of aldermen should be made parties defendant. They have no interest in the action and no relief is sought against them.

As to the third ground of demurrer, in this case the act (Private Laws 1889, ch. 219, sec. 6) fixes the qualification of an elector of Greensboro as the same which is required for a voter in state and county elections by the Constitution, Art. VI, sec. 1. The act of incorporation does not fix the qualification required for the office of chief of (372) police. The general act as to towns and cities, therefore, governs, and it is therein provided (The Code, sec. 3796) that "no person shall be a mayor, commissioner, intendant of police, alderman or other chief officer of any city or town unless he shall be a qualified voter thereof." This embraces the office of chief of police. The complaint alleges that the defendant "is not a qualified voter in the city of Greensboro," nor of the State, nor has lived in the State or city long enough to entitle him to register or vote in either the State or city, and has never registered, or taken the oath or affirmation required for voters in said State and city. This ground of demurrer was therefore properly overruled, as was also the fourth ground of demurrer, which was that the office of chief of police of a municipal corporation is not an office for which a *quo warranto* may be brought. The Code, sec. 607, in enumerating the offices for the usurpation of which this proceeding will lie, mentions *inter alios* "any public office, . . . or any office in a corporation created by authority of this State."

This includes the offices of all municipal corporations which are named in section 3796 of The Code quoted above. It is held in *Eliason v. Coleman,* 86 N. C., 236, merely that this section did not authorize a *quo warranto* as to the office of chief engineer in a *quasi* private corporation—there, the Western North Carolina R. R. Co.

AFFIRMED.

Cited: *Hines v. Vann,* 118 N. C., 6; *Houghtaling v. Taylor,* 122 N. C., 145; *Barnhill v. Thompson, ib.,* 495; *Jones v. Riggs,* 154 N. C., 282; *Midgett v. Gray,* 158 N. C., 135.

A. F. BOYD, RECEIVER, v. THE ROYAL INSURANCE COMPANY.

Receiver—Parties—Insurance—Evidence—Damages—Judgment—Conflict of Laws—Lien.

1. A receiver, duly appointed and having power to collect the assets of the estate committed to him, can maintain an action upon a policy of insurance issued to the person whom he represents in his own name.
2. A consent order that B should collect assets and sell property until a future order of the court, and that a motion for the appointment of a receiver should be continued without prejudice, did not have the effect to constitute B a receiver or trustee of an express trust, and he could not maintain an action to recover assets in his own name.
3. An honest mistake in the proof of loss under a contract of insurance will not defeat the right of the insured to recover what is justly due him.
4. The true measure of damages under a policy of insurance is the cash market value of the destroyed property at the place of destruction.
5. Where it appeared that suits had been commenced, and the property of the insured in the contract of insurance had been duly attached in the court of another state prior to the commencement of an action in this State: It is *held,* that the foreign attaching creditors obtained the first lien, and that any judgment rendered in this State should take cognizance of that fact.

ACTION tried upon exception to referee's report, before *McIver, J.,* at August Term, 1892, of ROCKINGHAM. The defendant appealed.

Dillard & Johnson (by brief) for plaintiff.
John W. Hinsdale and George H. Snow for defendant.

BURWELL, J. This action was brought to recover of the defendant a sum of money alleged to be due from it on account of a policy of insur-

ance issued on 9 June, 1887, to the firm of H. Sampson & Co., the property covered by said policy having been destroyed by fire on 7 November, 1887, as alleged in the complaint.

In the first section of his complaint the plaintiff says that he is "receiver of H. Sampson & Co., composed of H. Sampson, E. E. Richardson and Cornelius Sampson, late partners doing business as such, under the name of H. Sampson & Co., and appointed such receiver by order of the Superior Court of Rockingham County in the case (374) of The First National Bank of Winston and others against the said firm of H. Sampson & Co., with power and authority to receive and reduce into possession by demand, suit or otherwise, all the assets, estate and choses in action of the said H. Sampson & Co."

Neither the firm of H. Sampson & Co., nor any of its members, are parties to this suit.

The defendant demurred to the complaint, alleging two grounds: (1) that plaintiff had not legal capacity to sue; (2) that there was a defect of parties plaintiff, "in the omission of H. Sampson, E. E. Richardson and Cornelius Sampson, late partners trading as H. Sampson & Co." This demurrer was overruled and the defendant excepted and filed an answer, in the first section of which it denied the allegation of the first section of the complaint.

So we are met at the outset by the question, Has the plaintiff the right to maintain this action in his own name, without joining with himself the firm of H. Sampson & Co., or any member thereof? We think there was no error in overruling the demurrer, for if the plaintiff was receiver of H. Sampson & Co., with all the powers alleged to belong to him in the first section of his complaint, he had capacity to sue, and H. Sampson & Co. in that event were not necessary parties. *Gray v. Lewis,* 94 N. C., 396. But when the defendant denied that the plaintiff was receiver of H. Sampson & Co., with the powers he claimed, it was incumbent upon him to prove his authority to maintain this action before he could recover of the defendant what might be due under the terms of the policy of insurance.

We have carefully examined the record to find under what authority he is acting, and can find none, except the following order: "First National Bank of Winston and others, plaintiffs, against Henry Sampson & Co. and others, defendants—at Chambers at the courthouse in Wilkesboro, this 10 March, 1888. In this action, brought to (375) the next term of the Superior Court of Rockingham County, by consent of the parties it is ordered by the court that Andrew J. Boyd, attorney at law, of Reidsville, N. C., do collect any insurance money due to the firm of H. Sampson & Co., as well as all notes, accounts and choses in action due to said firm; and also that he sell all property be-

longing to the firm, except the real estate, and that he keep and hold the entire proceeds from said sources until the future order of the court; and by like consent it is ordered that the question of the continuance of the temporary injunction and the appointment of a receiver be continued, without prejudice, to the next term of Rockingham Court, which will be in July next." (Approved by T. Ruffin, attorney for H. Sampson, and J. H. Dillard, attorney for E. E. Richardson; and signed by *Walter Clark,* judge presiding).

The plaintiff himself testified as follows in regard to this matter:

Question: "Please state whether or not the parties constituting the firm of H. Sampson & Co. had or had not constituted you receiver of all their assets before you were appointed by order of court, and to what end you were so appointed?"

Defendant asks: "Was the appointment in writing?" To which witness answers, "It was not." The defendant objects to question.

Answer: "During the month of February, as I recollect, 1888, the members of the firm differed among themselves as to what application should be made of the assets belonging to the firm, as their funds came in and no disposition was to be made of them without the concurrence of all the members; that arrangement was in force when the action, in which I was appointed receiver, was begun."

Q. "Were you, or not, constituted by the firm not only to receive, but also to collect the assets?"

(376) A. "I do not remember that anything was said about my making collections."

This testimony was excluded by the referee, and is cited now only to show that he must have considered the above order of *Judge Clark* as sufficient to empower the plaintiff to maintain suits in his own name for the collection of the choses in action of H. Sampson & Co. We do not think that such effect can properly be given to this order. By its express terms "the question of the appointment of a receiver" for the firm of H. Sampson & Co. was "continued till the next term of Rockingham Court." This seems clearly to imply that plaintiff was not by said order to be vested with the power of a receiver, but rather that plaintiff, who it seems was attorney for the firm, should continue, by consent of all the parties, to manage the affairs of the firm—the members having disagreed, and the creditors being willing to postpone their demand for a receiver. We assume that the motion for a receiver was not heard at the next term of Rockingham Court, or, if heard, the plaintiff was not then appointed, as we find no evidence of this in the record.

Nor can we hold that the agreement of the parties set out in this order (which seems to have been signed by his Honor at their request,

and merely because it provided for a continuance of the motion then pending) vested in the plaintiff the title to the choses in action of H. Sampson & Co., or constituted him the holder thereof as "trustee of an express trust."

So it follows that the plaintiff cannot maintain this action in his own name, because he is not a receiver of H. Sampson & Co., duly appointed and authorized to prosecute suits in that way, and is not "the real party in interest," nor "a trustee of an express trust." *Battle v. Davis,* 66 N. C., 252; *Gray v. Lewis, supra; Wynne v. Heck,* 92 N. C., 414; *Abrams v. Curcton,* 74 N. C., 523.

The members of the firm of H. Sampson & Co. seem to be necessary parties.

The exception of defendant (No. 4) "to the finding of fact (377) that A. J. Boyd has been duly appointed and is receiver of H. Sampson & Co., as unsupported by the evidence, and the referee ought to have found the contrary," should have been sustained.

One of the defenses set up in the answer was that there appeared fraud in the claim made for loss, and "false declaring in support thereof, in that the firm of H. Sampson & Co. was not the owner of certain tobacco which was included in the proof of loss. The referee found that this tobacco did not belong to the firm, but that the claim for its loss was honestly made—not corruptly or fraudulently, but under advice of counsel. Honest mistakes made in proofs of loss cannot defeat the right of the insured to recover what may be justly due him under the contract of insurance."

The referee found, in regard to the amounts, "that there was destroyed by fire 120,760 pounds of tobacco, excluding the tobacco in No. 10—3,818 pounds—and the unfinished boxes of tobacco, which were also burned.

That the market value (without deducting cost of selling) was	$28,722.44
The unfinished boxes (market value)	300.00
The value of material (licorice, etc.)	220.99
	$29,243.43
Deduct cost of selling, 7 per cent	2,047.04
Cash market value	$27,196.39
Three-fourths of which (see three-fourths clause in policy)	$20,397.30
Of which, if liable at all, the defendant is liable for 25-440	1,158.00"

(378) We think that the true measure of damages under the policy is the cash market value of the destroyed property at the place of its destruction, and this is what we understand the referee to have found. To give the insured the cash *market value* of his property is not bestowing on him a "profit or advantage of any kind," but merely substituting money for property, and thus carrying out in good faith the contract of indemnity. The cost of reproduction might be important evidence to establish the market value. The exception of defendant upon this finding was properly overruled.

In relation to the suits in the courts of the State of Virginia, mentioned in the answer, the referee found as follows: "That two suits in Chancery (set up as a defense in this action) were begun in proper court in Virginia against H. Sampson & Co. and the defendant company to attach in the hands of defendant any amount due from it to H. Sampson & Co., in which two suits, the amounts claimed by the plaintiffs therein to be due from H. Sampson & Co. to them exceed the amount due from the defendant to H. Sampson & Co.; that the summons in said Chancery suits was served personally upon the defendant company and by publication on H. Sampson & Co. The chancery suits were begun prior to the institution of this action in the proper court under Virginia law.

"That the plaintiff Boyd was appointed receiver after the chancery suits in Virginia were commenced; that said suits are now pending; that the law of Virginia is as stated in the first paragraph of the fourth defense of the answer, and that the other facts set out in the fourth defense of the answer are correctly stated, and facts."

In *Winfree v. Bagley,* 102 N. C., 515, this Court held that a chose in action is property which may be attached. The creditors of H. Sampson & Co. who have attached the debt alleged to be due from the defendant company to that firm in the courts of Virginia, as set out in the answer (the allegations of which, in this respect, are (379) found to be true), have acquired thereby a valid lien on the fund or debt here in controversy. *Embree v. Hanna,* 5 John, 101; *Bissell v. Briggs,* 9 Mass., 412; *Berry v. Davis,* 77 Tex., 191 (19 Am. St., 748); *R. R. v. Thompson,* 31 Kan., 180.

The lien on the debts due from the defendant company to H. Sampson & Co., thus acquired, is valid against said firm and against other creditors of the firm who have endeavored to subject this debt to their claims in the courts of this State subsequently to the date of this lien. As those suits are still pending in the courts of Virginia, and it may be that the defendant company will not be required to pay to those attaching creditors what it owes H. Sampson & Co., or may not be required to pay the entire amount in those actions, we need to say now

only that in any judgment that may be rendered against the defendant company in this cause, provision should be made to protect it from having to pay its liability, if there is any, twice—once under the judgment of a court in this State and again under a judgment of a court of Virginia.

The exception of the defendant to the ruling upon the question involved in the above finding should have been sustained. We find no error in the rulings in the other exceptions which were not pressed here. The cause is

REMANDED.

Cited: Strauss v. Ins. Co., 126 N. C., 231; *Goodwin v. Claytor,* 137 N. C., 235; *Hart v. R. R.,* 144 N. C., 92; *Chapman v. McLawhorn,* 150 N. C., 167; *Martin v. Mask,* 158 N. C., 442.

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(380)

W. T. WOODLEY AND WIFE v. T. D. HOLLEY ET AL., EXECUTORS.

Waiver—Married Woman—Consideration—Executors.

1. A paper-writing signed by a married woman, a residuary legatee, in consideration of one dollar, consenting to a certain construction of the will, to which also the husband consented in wriitng, is a valid waiver of the right to any other construction.

2. Where it appeared that the defendant exceutor kept the funds of the estate in a bank (which failed with the funds so deposited) needlessly for three years after his testator's death, and during that time he paid the indebtedness of the estate out of his own private funds, though his testator's fund was ample for such payment: *Held,* it was negligence, and he cannot be allowed credit for such gratuitous payment in settlement with the legatees.

APPEAL from *Brown, J.,* at February Term, 1888, of BERTIE.

This action was brought by the plaintiffs against the defendant executor for an account and settlement of his administration, and for the purpose of recovering to the *feme* plaintiff such sum, as upon such accounting might be found to be due her as the residuary legatee of the said testator. Said cause was referred thereafter to John W. Wood, Esq., as referee, to take an account of the defendant's administration.

Among other things the said referee found:

1. That the defendant was not chargeable with the value of the personal property on the Willow Branch farm at the date of the demise of said testator, and that the said defendant executor was released

from liability for said personalty by reason of the will of Augustus Holley, as well by reason of the execution and delivery to defendant executor by Mary I. Woodley and W. T. Woodley, her husband, of a certain paper-writing in words and figures following, to wit:

"In the several devises and bequests contained in the will of the late Augustus Holley, it appears that he intended for the personal
(381) property on each farm therein devised, and which was on that farm at his death, to go with it for its support, and being the residuary legatee I am willing and do hereby consent to such a construction to be placed upon the said will, and in consideration of one dollar to me paid by the other legatees do waive whatever claim or right I may have in such property.

MARY I. WOODLEY."

This June 2, 1882.

The above is executed with my consent.

W. T. WOODLEY.

2. That said defendant executor should be credited with the amount deposited by him in the Exchange National Bank of Norfolk, Va., and lost by reason of the failure of said bank.

The plaintiffs, having excepted to the findings of said referee, the said exceptions were heard by *Brown, J.*, at Spring Term, 1892, of said court, upon the following facts agreed upon, to wit:

"With respect to the personal property on Willow Branch farm, at the death of Augustus Holley, we agree that the following are the facts:

"Augustus Holley died in 1882, and the defendant qualified as executor of his will, which was duly proven. He left a large real and personal estate, and among other things, personal property on his Willow Branch farm consisting of mules, horses, hogs, cattle, meat, corn and other things, worth at that time $1,250. This personal property was placed upon the said Willow Branch farm by Augustus Holley in his lifetime, and used upon said farm by him. Shortly after the death of Augustus Holley, the plaintiffs executed the paper-writing found in the papers marked Exhibit 'B,' set forth in the first finding of the referee hereinbefore referred to. The defendant claims that this paper and the will of Augustus Holley relieved him from liability for
(382) the value of the personal property, and the plaintiff insisted that he was chargeable with the same.

"With respect to the liability of Holley, executor, for five hundred dollars of the money lost by the failure of the Exchange National Bank, set out in plaintiffs' exceptions, it is agreed that, on 5 April, 1885, and

for several months before, defendant had on deposit in the Exchange National Bank, Norfolk, Va., $2,457, subject to his draft. That shortly before that time Holley, Jr., obtained judgment against the estate of said Augustus Holley, deceased, for a debt due him by said deceased, in the sum of $500. That the defendant, in March, 1885, shortly before the failure of the said bank, to wit, ... March, 1885, paid the said judgment by his individual draft on J. W. Perry & Co., of Norfolk, which draft was presented and paid after the failure of said bank, to wit, ... April, 1885. That had the draft been made payable to Augustus Holley, and drawn on the Exchange National Bank, it would not have been presented for payment till after the failure of said bank. There was no need for the retention of the said sum of $2,457 in said bank.

"The plaintiffs claimed that the judgment in favor of A. Holley, Jr., ought to have been paid out of the funds of the estate in bank nistead of by draft on J. W. Perry & Co., and the deposit in bank reduced to that amount, and that the defendant ought to account to the estate for the amount of said five hundred dollar check of deposit in said bank at its failure. More than enough money was lost to the estate by the said bank to pay this amount of $500. The defendant was allowed by the referee for the amount of the judgment paid to Augustus Holley as a credit and not charged with the amount so lost."

The court sustained both of plaintiffs' exceptions and rendered the judgment set out in the record, for which defendant excepted, and assigns as error that the court erred in not sustaining the (383) referee in his findings, to wit:

1. That the defendant was not liable for the value of the personal property on the Willow Branch farm.

2. That the defendant was properly credited in his account with $500, the amount paid by him by draft on J. W. Perry & Co., in satisfaction of the judgment of A. Holley, Jr.

W. D. Pruden for plaintiffs.

A. W. Haywood for defendants.

CLARK, J. There was error in sustaining the plaintiffs' exception upon the first point. The paper-writing signed by the plaintiff and her husband is a valid waiver of any rights the plaintiff may have had to said property as residuary legatee. She had power to make the waiver; it recites a valuable consideration from the other legatees, and was made in their favor and to settle the construction to a doubtful clause in the will. This was doubtless to facilitate the speedy settlement of the estate, which was a consideration itself. This is a waiver, not

either a bond or executory contract, and it is sufficient that by reasonable intendment it should appear that the present defendant was to be released from responsibility in that respect. From the terms of the waiver, the defendant was authorized to act upon it in construing the will, and having done so, the plaintiff is now estopped to claim contrary to the agreement.

We concur with his Honor in his ruling upon the second exception. It was laches in the defendant to have kept so large a fund belonging to the estate in bank needlessly, and as late as three years after testator's death. Certainly nothing appears in evidence to rebut this presumption. It was the duty of the defendant to have settled the estate as rapidly as practicable. At any rate, the payment by the defendant of an indebtedness of the estate with his own funds, when at the time he had, and had so had for so long a period a much larger fund belonging to the estate, which he had left in a bank out of the State where (384) it was not immediately accessible, and which, it is found as a fact by the court below, there was no need of retaining in said bank, was negligence, and plaintiff cannot be allowed the gratuitous payment made out of his own funds.

MODIFIED.

C. M. HERNDON v. THE IMPERIAL FIRE INSURANCE COMPANY.

Petition to Rehear—Practice in the Supreme Court—Constitution—Code.

1. The Supreme Court, since the Constitution of 1868, is an organic branch of the State government, and not bound by acts of the Legislature undertaking to regulate its rules of practice.
2. Section 966 of The Code (enacted before the present Constitution), cannot be allowed to give the losing party an absolute right to a rehearing, and to have his petition considered by the whole Court contrary to its rule governing the practice in such cases.
3. Discussion of the practice in the Supreme Court and its powers under the old and new Constitution, by *Clark, J.*

MOTION by defendant to rehear this cause, argued before the Court *in banc,* upon the ground that Rule 53, which requires the indorsement of a member of the Court before a rehearing is granted, is contrary to law.

G. V. Strong and J. W. Hinsdale for defendant.
W. W. Fuller contra.

CLARK, J. The moving party contends that The Code, sec. (385) 966, gives the losing party an absolute right to file a petition to rehear, and that it must be considered by the whole Court. If it be conceded that this section is conclusive and bears the construction placed upon it, the mover is out of Court on his own showing, as this motion was not made in vacation, nor within the first twenty days of this term. But passing by that vital objection, if "filing" within the meaning of that statute is to be construed as meaning that every petition to rehear must perforce be considered by every member of the Court, it would virtually almost double the business of this Court. We pay counsel who appear here the compliment of believing their contention sound and just when they present a cause for our decision. If, when this Court comes to a different conclusion, the statute gives the losing party a right to file a petition to rehar, and to have that petition considered by the Court as a body, and the Court can in no way restrict such right, there would be few cases in which such petition would not be filed. Counsel in the argument generously conceded that though the entire Court must consider such petition, it would not necessarily be compelled to hear the argument. But we fail to see the logic of that concession, if the filing of a petition and the right to have it considered by the whole Court belongs by statutory right to everyone who loses a case in this Court.

Section 966 of The Code was enacted long prior to the Constitution of 1868, which made a vital change in the powers of this Court, as has been pointed out in several decisions of this Court, and reaffirmed recently in *Horton v. Green,* 104 N. C., 400. The Supreme Court was originally created in 1818 by legislative enactment, and remained till 1868, as to its powers, its duties, its rules, even as to its very existence, subject to control by the Legislature, which could abolish or modify it since it had created it. By the Constitution of 1868, Article IV, the Supreme Court was first established as an organic body (386) and its powers defined. In Article I, section 8, it is provided "the legislative, executive and *supreme judicial powers* of the government ought to be forever separate and distinct from each other." Article IV, section 12, of the Constitution, provides that the "General Assembly may regulate by law, if necessary, the methods of proceeding in the exercise of their powers of all the courts *below the Supreme Court,* so far as the same may be done without conflict with other provisions of this Constitution."

As was said by this Court in *Horton v. Green, supra,* when construing these sections, "to the judgment and experience of this Court alone

is delegated by the organic law the power of establishing rules to regulate its procedure and provide for the dispatch of business coming before it."

When the first Republican Constitution of North Carolina was framed at Halifax, in 1776, a large element viewed with distrust the then untried experiment of a government of the people by themselves. As a consequence, the whole government was vested in a legislature to whose supposed superior wisdom was confided the selection of the entire executive and judicial departments, and as a further check, one branch of the legislature was chosen, not by the people at large, but by those possessed of a certain amount of landed property.

With the progress of ideas, the Constitution of 1835 entrusted the election of the Governor to the people. A subsequent amendment gave the Senate to the popular vote. The Constitution of 1868 gave the direct election of the judiciary and also of the heads of the several executive departments to the people without the intermediary of a legislative selection, and made the three departments of the government coördinate, but independent of each other. Each of the three is now equally based upon the broad basis of the popular will.

(387) This brief review of the development of popular government in North Carolina is not inappropriate. The members of this Court receive, like the Legislature and the Executive, their mandate from the people. The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the Executive or of this Court, gives the same power over its own procedure to this Court, free from interference from either of the other coordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional prerogatives of this Court. But as the right to do so has been raised by the argument in this case, it is due to the dignity of the Court to pass upon the claim to legislative interference put forward by counsel.

Section 966 of The Code was originally adopted, as already stated, under the old Constitution, when the Legislature both created the Court and passed rules for its procedure. It was brought forward in The Code probably by inadvertence, since now the Court owes its existence to the Constitution, and its rules are prescribed by itself. But so unobjectionable was this section in itself, that the new Court, though not recognizing legislative power to enact it, adopted it *verbatim,* and it now stands as Rule 52 of the Court. That it has never borne the construction placed upon it by counsel is shown by the fact that, even under the old Constitution, the Court did restrict the right of rehearing almost from the very

beginning by refusing to reconsider any case unless the petition was concurred in by two other members of the bar of this Court who had no interest in the cause, and should certify that they had carefully examined the whole case, and that there was error in the opinion of the Court. As in those early days the bar of the Supreme Court consisted of a very few lawyers, most gentlemen of long experience, this served as a reasonable restriction. With the opening of railroads and the increase of the Supreme Court bar, it became less difficult to procure the (388) signatures of two additional counsel. The Court, in *Hicks v. Skinner,* 72 N. C., 1, referred to the readiness with which "two amiable and accommodating gentlemen" would certify that there was error in an opinion which had cost the five members of the Court hours of thought and conscientious labor to elaborate. But notwithstanding this, and many similar reminders, the tide of applications to rehear swelled so rapidly that in 92, N. C. 805 (February, 1885), years before any of the present members of the Court occupied a seat on this bench, it became necessary to adopt the rule now complained of, "that no petition to rehear shall be docketed until one of the justices of the Supreme Court shall have indorsed thereon that in his opinion the case is a proper one to be heard." This rule has since been modified very properly by requiring that the justice who makes such certificate shall be one of those who concurred in the opinion sought to be reheard, and giving the petitioner the right to direct the clerk to which justice to forward his application for a rehearing. Our attention was also called on the argument to the fact that the word "docketed" in Rule 53 now reads "filed," but construed with the context the meaning is the same.

Construing Rules 52 and 53 together, we understand that now, as always, anyone dissatisfied with a decision of this Court can, at the same term, or in vacation, or within the first twenty days of the next term, under Rule 52, *"file with the clerk"* a petition to rehear. Formerly, before that petition could be considered at all by the Court, the certificate of two disinterested counsel was required. That proving insufficient, in 1885, the present rule was adopted, requiring, in addition thereto, the certificate of one of the justices of the Court. When that is obtained, the case, under Rule 53, is *"filed for hearing"* or docketed. The restriction is a reasonable one, since, if the petitioner, making his own selection of the justice, cannot present a case which (389) will satisfy one member of the Court upon an *ex parte* brief that the case is a proper one, even to be reargued, he will hardly persuade the full bench, when there is opposing counsel, that there was error in the former opinion.

These restrictions upon an unlimited freedom of rehearing, have been proven by experience to be absolutely necessary. To five men is committed in the last resort the litigation of a State whose population already aggregates not far from two millions of people and whose numbers, whose wealth, and consequently whose volume of litigation, will steadily increase. If the losing party in this Court can, at his unrestricted will, command the consideration of his application for a second hearing by the entire bench, as is contended on the argument in this case, it will not be long before a first hearing in other cases equally deserving will become almost an impossibility. Other suitors are entitled to a prompt hearing, and in justice to them—and not for the ease and comfort of the Court—we must adhere to the rule conceived and adopted by the prudent, able and conservative judges—*Smith, Ashe, and Merrimon*—who composed this Court in 1885, that "no case can be filed (for rehearing) till indorsed by a justice of the Court as a suitable and fit one to be reheard." Errors are committed by all courts, but they are by no means so numerous and alarming as they must seem to counsel who lose their causes. They must reflect that they have against them the opinion of the opposite counsel and of the five disinterested lawyers who have heard the cause debated (or at least a majority of them). The Court cannot spend its time in winnowing "chopped over straw," when there is always a vast mass of new cases demanding prompt as well as careful consideration.

The Constitution guarantees a right of appeal, but that does not give a right to a second hearing, any more than it does the right to a third or a tenth hearing. The petitioner has had his day in Court. (390) He is entitled by constitutional right to no more. When the Court is satisfied by the certificate of two disinterested counsel, and by the further certificate of a member of the Court who concurred in the opinion, and who has been selected by the petitioner to examine into his application, that the cause is a fit one to be reargued, it will defer the argument of appeals which, as yet, have had no hearing, and give time and place again to the argument of one which has already been heard and determined. But it is only under such circumstances that this will be done. This is due to the party who has gained the cause, and who has a reasonable claim to rely upon the calm and deliberate judgment of a Court of last resort as a finality. It is due to the counsel and suitors in appeals yet unheard, who should not be postponed till other causes are argued again and again. And it is due also to the dignity of the Court that its decisions should not be lightly called in question by every loser of a case at its bar. To the calm, unbiased judgment of the Court must be left the determination of what restrictions justice to others and to the applicant requires should be

placed upon the grant of a rehearing. It knows none better now than the one in force in nearly, if not all, appellate courts of requiring the indorsement of the application by one of its own members.

PETITION DISMISSED.

Cited: *Solomon v. Bates,* 118 N. C., 322; *Blacknall v. Rowland, ibid.,* 421; *Bird v. Gilliam,* 125 N. C., 79; *S. v. Council,* 129 N. C., 512; *Calvert v. Carstarphen,* 133 N. C., 27; *Ex parte, McCown,* 139 N. C., 107; *West v. R. R.,* 140 N. C., 620; *Lee v. Baird,* 146 N. C., 364; *In re Brown,* 168 N. C., 420; *Teeter v. Express Co.,* 172 N. C., 621; *Moore v. Harkins,* 179 N. C., 528.

(391)

MARY J. FRENCH v. THE MUTUAL RESERVE FUND LIFE ASSOCIATION.

Insurance—Condition in the Policy—Contract—Receipt.

In renewal of a life insurance policy which had been allowed to lapse, the company accepted payment of back dues, upon the condition recited in the receipt that the applicant "was living, of temperate habits, in good health then and for twelve months past, and free from all disease, infirmity or weakness": *Held,* such condition did not include temporary illness not severe in its character, which did not impair his constitution, and of which he was then well.

MACRAE, J., dissents.

APPEAL at April Term, 1892, of NEW HANOVER, from *Winston, J.*

Duval French was insured in the defendant company for the benefit of his sister, the plaintiff. He had permitted his policy to lapse for nonpayment of dues, but subsequently he had paid them and had been reinstated by the defendant company, and at the time of his death he owed the defendant nothing. When reinstated by the company it gave him a receipt for the back dues, upon which was printed the following: "The conditions upon which the within payment (for which this receipt is given), is accepted are as follows: First. That said member is now living and of temperate habits, and is now, and has been during the past twelve months, in continuous good health and free from all disease, infirmity or weakness; otherwise said payment, and this receipt and said policy, shall be and is null and void, and the sum paid hereon shall be subject to the order of the within-named person. Second. The receipt and acceptance of the within sum by the associa-

tion shall not be held to waive forfeiture or expiration of membership, or to reinstate membership, or to create any liability on the part of the association under said policy, except upon fulfillment of the first condition of this receipt."

There was evidence tending to show that while the policy was (392) lapsed, and before this reinstatement receipt was given, the assured had been unwell. There was conflicting evidence as to the nature of this illness, the plaintiff contending that it was slight, temporary, and in no wise affected the permanent health of the assured. The defendant contended otherwise, that the illness was of a serious nature, and furthermore, that if this was not so, by the terms of the receipt, if the insured had been sick at all within the twelve months prior to the receipt, he had not been "in continuous good health," and the reinstatement was void. The assured was in good health when the receipt was given on 30 January, 1891, and died of typhoid fever on 13 July, 1891.

The court instructed the jury that "if within the time specified in the conditional receipt the only illness from which Duval French suffered was of a temporary nature, and not severe in its character, which did not render him uninsurable, and which indicated no vice in his constitution, and from which he had entirely recovered at the time of making the payments in January, 1891, then they should answer the second issue, Yes." To this the defendant excepted. There were several other exceptions, but they are all substantially embraced in this.

The second issue referred to was as follows: "Was Duval French in continuous good health and free from all disease, infirmity or weakness for twelve months prior to 30 January, 1891?"

The defendant appealed from the judgment rendered.

Thomas W. Strange for plaintiff.
John W. Hinsdale for defendant.

CLARK, J. We think the instruction of his Honor was correct. The reasonable construction to be put upon the agreement of the parties, as expressed in the conditions printed upon the reinstatement (393) receipt, was not that any illness, however slight or insignificant, within the preceding twelve months, should vitiate the reinstatement. It could mean no more than that, if there had been such illness or impairment of health that the insured would not have been received if he had been an original applicant for insurance, the reinstatement was void. The company could not have intended to put itself in a better condition, or the defendant in a worse one, than that. Had the policy been maintained in force, impairment of health would

not give the company a right to cancel it; as it had lapsed, the company, in effect, says to the assured that it will reinstate him upon payment of unpaid dues, provided he is in unimpaired health and would be insurable as a new risk. The language of the condition is, if the assured is of temperate habits, and is now and "has been during the past twelve months in continuous good health and free from all disease, infirmity or weakness." The issue presents the question if there had been a compliance with that condition. The court below told the jury that if the assured, during the twelve months prior to the reinstatement had suffered no illness, "except of a temporary nature and not severe in its characacter, which did not render him uninsurable, which indicated no vice in his constitution, and from which he had entirely recovered at the time of making the payment," this was a compliance with the condition of the receipt. The jury found the fact so to be. Upon such finding the plaintiff should be entitled to recover the amount due by the terms of the policy of insurance. The simple question is as to the construction to be placed upon the condition. No aid can be drawn from decisions in cases more or less similar in other states. Certainly a slight illness did not come within the terms quoted. The line must be drawn somewhere. We think that indicated in the charge a just one.

NO ERROR.

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(394)

WILEY NUNNERY ET AL. v. JOHN AVERITT.

Statute of Presumptions—Limitations—Administrators' Accounts.

1. In an action to surcharge and falsify and restate an account filed in 1865, the statute of presumptions, instead of the statute of limitations, is proper to be pleaded.

2. The running of this statute was suspended during the minority of plaintiffs unless represented by guardian.

3. Ten years seems to have been the limit prescribed by the statute of presumptions in such actions, and when this statute is pleaded it is incumbent upon the plaintiffs to show that their action was within the limit, and if not, to offer evidence in rebuttal of the presumption.

4. The relation of trustee and *cestui que trust* does not now exist between the plaintiffs and defendant, because the latter disavowed it by the filing of the final account.

5. The statute of limitations, by Laws 1893, chap. 113, will be applicable to all causes of action accrued before 1868 and brought after 1 January, 1893.

NUNNERY *v.* AVERITT.

ACTION to surcharge and falsify an account, begun before the clerk and heard before *Boykin, J.*, upon the pleadings and the facts found by the court, at May Term, 1892, of CUMBERLAND.

The court found that John Averitt, administrator of Wiley Nunnery, filed his final account, supported by proper vouchers, in the office of the clerk of the court in 1885 or 1886. John C. Callahan was clerk. The vouchers were left with the clerk. The administration was taken out before the clerk. None of Wiley Nunnery's children or heirs at law were present at the time of the filing the account, and no notice thereof was given them. One of his children was born after his death. The final account cannot be found on the records. There was a small balance due the administrator by the estate in said settlement.

(395) Wiley Nunnery died in April, 1865. His children were: Charlie, Martha Jane, Wiley, Charity and Dennis White. The last was born 19 October, 1865. The other children died without issue. Martha Jane and Charity were more than twenty-one years of age when they married. The writ issued 6 January, 1889.

The court ordered that an account be stated between the defendant and each of the plaintiffs. The defendant appealed.

N. W. Ray for plaintiffs.
J. W. Hinsdale for defendant.

CLARK, J. It is found as a fact that the defendant administrator "filed his final account, supported by proper vouchers, in the office of the clerk of the court in 1865 or 1866, and by this return there was a small balance due the administrator by the estate." This is, therefore, in effect, an action to surcharge, falsify and restate the account. The defendant pleads the six-years statute of limitations, and also the statute of presumptions. The cause of action accrued when the final account was filed, the running of the statute being suspended, as to those of the plaintiffs who were under age, until their majority, unless represented by a guardian. *Culp v. Lee,* 109 N. C., 675.

The final account was filed *ex parte,* and had it been done since 1868 the six-years statute of limitations would not have applied, and the reference to take the account would have been proper. *Woody v. Brooks,* 102 N. C., 334; The Code, sec. 158. Ten years would then have been the limitation applicable, and if pleaded it would have been incumbent upon the plaintiffs to show that their cause of action was not barred. *Hussey v. Kirkman,* 95 N. C., 63; *Hobbs v. Barefoot,* 104 N. C., 224; *Moore v. Garner,* 101 N. C., 374. This is not done as to any of the plaintiffs except Dennis Nunnery, either by allegation or finding of fact. It does not appear as to any of the others when

they became of age, or that ten years have not since elapsed (396) before this action began.

But here the cause of action accrued prior to 1868, and the statute of presumptions is sufficiently pleaded. There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been ten years, the same length of time which is now required by The Code, sec. 158, to bar such action. As already stated, after this plea was pleaded, it was incumbent upon the plaintiffs to show that their action was brought within the prescribed time, and if it was not, to offer evidence in rebuttal of the presumption. The judgment below will, therefore, be modified so as to direct the account to be stated between the defendant and Dennis Nunnery only.

This is not like *Busbee v. Surles,* 77 N. C., 62, where it is held, that prior to 1868 there was no statute of limitations or presumptions which would bar an action by distributees against an executor or administrator for their distributive shares. This was on the ground that the relation of trustee and *cestui que trust* existed. But here the defendant, by filing his final account showing a balance due himself, disavowed the trust. He put the plaintiffs on notice, and if for ten years after respectively coming of age they acquiesced, they are presumptively barred *Hodges v. Council,* 86 N. C., 181.

After 1 January, 1893, the same statutes of limitations will be applicable in all actions begun after that day, to causes of action accruing before 1868, as are now applicable to causes of action accruing since. Chapter 113, Laws 1891. This will avoid much confusion now incident to the application of the statutes of limitations and presumptions. The provisions of The Code in reference to the statute of limitations leave much to be desired. Many cases are left unprovided for, and in other instances the statute is confusing and ambiguous. The construction placed by the court upon some of its provisions are, (397) hence, not altogether reconcilable. It is desirable that the law-making power should enact, if possible, a simpler statute, and a more comprehensive one, which would leave less to discussion as to its purport.

MODIFIED.

Cited: Koonce v. Pelletier, 115 N. C., 235; *Alexander v. Gibbon,* 118 N. C., 803; *Smith, ex parte,* 134 N. C., 500; *Edwards v. Lemmonds,* 136 N. C., 331.

S. H. WILEY v. THE COMMISSIONERS OF SALISBURY.

Taxation of Corporations—Municipal Corporations—Constitution—Shares of Stock—Residence.

1. The shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein, are not subject to taxation by the town under its charter authorizing the taxation of real and personal property, moneys, bonds, stocks and other subjects, liable to taxation under the laws and Constitution of the State.

2. The property in such stock does not follow and is not fixed by the *situs* of the residence of its owner, but is fixed by the Legislature prescribing where and how it shall be listed and taxed, *i. e.*, at its principal place of business.

CONTROVERSY without action submitted upon a case agreed under section 567 of The Code, heard before *McIver, J.*, at chambers, at February Term, 1892, of ROWAN.

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

The following are the material facts:

1. The plaintiff is a resident of the town of Salisbury, and has been for many years, and is the owner of four hundred (400) shares of the capital stock of the Salisbury Cotton Mills, of the par value of one hundred dollars per share.

(398) 2. The said Salisbury Cotton Mills is a corporation duly created and organized by and under the laws of this State.

3. The defendant is a municipal corporation chartered by the laws of this State.

4. The said Salisbury Cotton Mills owns a mill and other property, all of which is situate outside of the corporate limits of the town of Salisbury; that the said Salisbury Cotton Mills owns no property, either real or personal, within the corporate limits of said town of Salisbury, and that its office is situate outside of said town.

5. In the year 1891, at the time required for listing property for taxation in said town, the plaintiff refused and failed to give in to the list-taker for said town, the defendant, said four hundred shares of the capital stock of said Salisbury Cotton Mills, claiming that they were not liable to taxation by said town.

6. By order of the board of commissioners of said town, said four hundred shares of capital stock in the said Salisbury Cotton Mills, owned by plaintiff, as aforesaid, were ordered to be placed by the list-taker for said town on the list for taxation and were assessed and valued at par, that being the valuation rendered by said Salisbury Cotton Mills to the list-takers and assessors for the State tax and adopted by them.

7. The assessed valuation of all the real and personal property of said corporation, the Salisbury Cotton Mills, as rendered to and adopted by the list-takers and assessors for State and county tax was one hundred and fifty thousand dollars, and the valuation of the fifteen hundred shares, in all, of the capital stock of said corporation, as rendered to and adopted by them, was a like amount of one hundred and fifty thousand dollars, and no remainder was listed by them as capital stock of said corporation.

8. The said board of commissioners, the defendant, at the regular meeting in 1891, levied a tax of three-fourths of one per cent, or seventy-five cents on one hundred dollars' worth of property, on all real and personal property, including solvent credits and stocks in (399) incorporated companies.

9. The tax-list for the year 1891 was placed in the hands of George Shaver, the tax collector of said town, who made demand upon plaintiff for the sum of three hundred dollars, being the amount of the tax so levied upon the four hundred shares of the said capital stock so owned by plaintiff, and placed upon the tax-list of said town, as aforesaid, and plaintiff, under protest, paid the same and holds therefor the receipt of the said tax collector for the said town.

10. The plaintiff has made demand in writing upon the defendant, the said board of commissioners of the town of Salisbury, and upon its said tax collector, for the return of said amount of three hundred dollars so paid as taxes under protest, and the defendant and its said tax collector refused, and still refuse, to pay the same over to plaintiff.

11. The charter of the town of Salisbury provides "that the board of commissioners may," etc. Chapter 34, Private Laws of North Carolina, 1885, entitled "An Act to amend the charter of the town of Salisbury," ratified 23 February, 1885, which is made a part of this case.

The question submitted is whether the shares of stock owned by plaintiff are subject to taxation by defendant, and liable to the levy so made by it.

Plaintiff demands judgment for three hundred dollars and for costs.

Defendant demands judgment for costs.

T. F. Kluttz for plaintiff.
Kerr Craige for defendant.

BURWELL, J. The Constitution (Article VII, sec. 9) provides that all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, and (Article V, sec. 3) that laws shall be passed taxing *by a uniform rule* all moneys, credits, investment in bonds, stocks, joint companies or otherwise, and also

(400) all real and personal property, according to its true value in money.

These provisions of the organic law have been often construed by this Court, and from the decisions the following principle of taxation in this State may be considered as now firmly established:

1. "It is the provision, and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person or interest, but that everything real and personal, possessing value as property and the subject of ownership, shall be taxed *equally, and by a uniform rule.* In this respect the present Constitution shows no favor and allows no discretion." *Kyle v. Commissioners,* 75 N. C., 445.

2. That all levies of taxes, whether by the State or by a county, city, town or township, must be laid by *one uniform rule,* to wit, the rule established by the legislative department of the State government in its revenue acts. *Kyle's case, supra; Redmond v. Commissioners,* 106 N. C., 122.

The Legislature, acting under these mandates of the Constitution, as interpreted by this Court, has established a system of taxation embraced in what are known as the "Revenue Act" and the "Machinery Act," and has determined where and by whom all the property, real and personal, within the State, shall be listed or returned, and how and by whom its taxable value shall be ascertained; and it has been held that the rules and regulations so fixed for the guidance of the officers charged with the listing and assessment of property for purposes of State taxation, govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. *R. R. v. Wilmington,* 72 N. C., 73; *Kyle's case, supra; Cobb v. Elizabeth City,* 75 N. C., 1; *Covington v. Rockingham,* 93 N. C., 134.

It seems to follow, from the cases above cited, that if the Legis-
(401) lature has established a "uniform rule" for the listing and assessment for taxation of stock in domestic manufacturing corporations, the tax of which the plaintiff complains is invalid if the board of commissioners of the town of Salisbury violated that "uniform rule" when they assessed that tax against the plaintiff and required him to pay it. The inquiry, then, is:

Has the Legislature established a uniform rule for the listing and assessment for taxation of stock in domestic manufacturing corporations?

And this inquiry seems especially pertinent in this case, for the charter of the defendant provides (Private Laws 1885, chap. 34, sec. 14) that the board of commissioners of said town shall have power to levy taxes on real and personal property, moneys, bonds, stocks and other

subjects "which may be liable to taxation according to the Constitution and the Laws." And section 18 of said charter is as follows: "The real and personal property assessed for town taxation shall be according to the valuation for State taxes; and the clerk of the board of commissioners for said town, or other suitable person, shall advertise and take the list of taxables in the town at the time and in the manner prescribed by law for the collection of State taxes."

It seems, therefore, that the Legislature, not content with the general law governing the action of municipal officers in matters of taxation, as above stated, emphatically declared in the charter of this town that its board of commissioners should list the taxables at the time and in the manner prescribed by law for State taxes.

In section 3 of the act to raise revenue, ratified 2 March, 1891, it is enacted that "there shall be levied and collected annually an *ad valorem* tax of twenty-five cents on every one hundred dollars value of real and personal property in this State, and moneys, credits, investments in bonds, stock, joint stock companies, or otherwise, *required to be listed* in 'An Act to provide for the assessment of property and (402) collection of taxes.'" From this provision it appears that the plaintiff's stock was not to be taxed unless the last named act (commonly called the Machinery Act) required it to be listed. We turn, therefore, to this last named act (Laws 1891, chap. 326) to ascertain if it is "required to be listed," and we find in section 15 the provisions: "Persons owning shares in incorporated companies, taxable by law, are *not* required to deliver to the list-taker a list thereof, but the president or other chief officer shall deliver to the list-taker a list of *all* the shares of stock held therein and the value thereof, except banks. The tax assessed on shares of stock embraced in said list shall be paid by the corporation respectively." "All personal property, except such shares of capital stock and other property as are directed to be listed otherwise in this act, shall be listed in the township in which the person so charged resides on the first day of June. The residence of a corporation, partnership or joint stock association, for the purposes of this act, shall be deemed to be in the township in which its principal office or place of business is situated." And section 41 of the act is as follows:

"Bridge, express, ferry, gas, manufacturing, mining, savings bank, stage, steamboat, street railroad, transportation and all other companies and associations incorporated under the laws of this State, except insurance companies, shall, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

"1. The name of the location of company or association.

"2. The amount of capital stock authorized and the number of shares into which such capital stock is divided.

"3. The amount of capital stock paid up.

"4. The market value, or if no market value, then the actual value of the shares of stock.

(403) "5. The assessed valuation of all its real and personal property (which real and personal property shall be listed and valued as other real and personal property is listed and assessed under this chapter).

"The aggregate amount of the fifth item shall be deducted from the aggregate value of its shares of stock as provided by the fourth item, and the remainder, if any, shall be listed by the list-taker in the name of such company or corporation as capital stock thereof."

Thus it is seen that the Legislature has established a "uniform rule" for the taxation of the property of all such manufacturing corporations as the Salisbury Cotton Mills, and under that rule the plaintiff was not required to list his stock in that corporation for State taxation; and because, as we have seen, this uniform rule binds the municipal officers or list-takers also, the plaintiff was not required to list it for taxation with them, and since this stock of the plaintiff was not required to be listed for town taxation, it cannot be taxed by the municipality.

But it may be said this stock is personal property; being such, it follows the person; it is therefore property within the town and must be taxed. *Redmond's case, supra.* The reply to this argument is that while it is true that such personal property, for general purposes, follows the person of the owner, the Legislature has power to fix the *situs* of all such taxables, and it has, in effect, by the enactments heretofore quoted, fixed the *situs* of stock in domestic, manufacturing and other named corporations at "the residence" of such corporation, which is defined to be where its principal office or other place of business is. The plaintiff's certificates of stock are merely evidences of his "right to a certain proportion of the capital stock" of the corporation, and for purposes of revenue the *situs* of that stock could be put by the Legislature at the principal place of the business of the company. *Redmond v.*

(404) *Commissioners,* 106 N. C., 122; *Buie v. Commissioners,* 79 N. C., 267.

We therefore conclude that the Legislature has adopted a uniform rule for the taxation of the shares of stock, such as the plaintiff's in the Salisbury Cotton Mills, and that under that rule the plaintiff was not required to list such stock either for State, county or town purposes.

We conclude, therefore, that the method for taxing domestic corporations prescribed in the Act of 1891, which is the same as the Act of 1887, is valid; and that by it the plaintiff was not required to list his

stock in the Salisbury Cotton Mills for town taxation, and that upon the facts agreed upon his Honor should have given judgment in his favor.

REVERSED.

Cited: Comrs. v. Tob. Co., 116 N. C., 447; *Pullen v. Corporation Comrs.,* 152 N. C., 554; *Guano Co. v. Biddle,* 158 N. C., 214; *Brown v. Jackson,* 179 N. C., 369.

GEORGE W. FOWLER ET AL. v. J. E. OSBORNE ET AL.

Action to Recover Land—Estoppel—Statute of Presumptions.

In an action for the possession of land, it appeared that in 1867 the defendants' ancestor had executed a bond to the ancestor of plaintiffs, and in 1868 had made deeds to her absolute upon their face, but intended as security for a debt due by said bond, but he, defendants' ancestor, had continued and remained in possession of the lands conveyed in said deed till the time of this action, in 1890; and that in a former action between the parties hereto, to which also the personal representatives of both their deceased ancestors were also parties, pleaded by defendants as an estoppel, it had been adjudged that the debt was satisfied and the land discharged of the lien of the trust raised by said deeds: *Held,* (1) that the plaintiffs were barred of their recovery; (2) a reconveyance of the land or abandonment of the claim to the lien was presumed; (3) the joinder of unnecessary parties did not impair the estoppel.

ACTION for possession of land, tried at May Term, 1892, of (405) IREDELL, before *McIver, J.*

The facts sufficiently appear in the opinion.

D. M. Furches and T. B. Bailey for plaintiffs.
Armfield & Turner (by brief) for defedants.

AVERY, J. The action is brought to recover possession of land conveyed by the ancestor of the defendants to the ancestor of the plaintiffs by two deeds absolute upon their face. If nothing more appeared, the plaintiffs would be entitled to an affirmative response to an issue involving the title. But the defendants pleaded as an estoppel the judgment in a former action between the same parties, with the personal representatives of the mother of plaintiffs and of the father of the defendants as additional parties plaintiff and defendant respectively. The former action (which came up on appeal, entitled *Morris v. Osborne,* 104 N. C.,

609) was founded upon the allegation that the very deeds now relied on as evidence of title were, in fact, a security for the payment of a note for $930, executed by Thomas A. Osborne, the father of defendants, on 17 December, 1866, and payable to Eliza H. Fowler, the mother of plaintiffs. In that action the plaintiffs, in the prayer for relief, asked (1) for judgment for the amount of the note with interest and cost; (2) that the defendant administrator Tomlinson be required to sell the land unless the judgment should be paid within a reasonable time; (3) for general relief; (4) for possession of the land. The defendants in their answer in the former action admitted that the note was given to secure indebtedness, but insisted that it was executed as security for an account instead of the note sued on, and that the note was paid, or presumed by law to have been paid, on account of the lapse of time.

The defendants might have raised an issue by denying that the (406) deeds were in fact mortgages, and their admission of the allegation in the complaint that the deed was executed as a mortgage, though to secure an account, was equivalent to a finding on an issue when there is a denial. The jury responded to an issue submitted in that case that the debt (the note for $930) had been paid, or that the presumption of payment had arisen by the lapse of time and had not been rebutted, which, in contemplation of law, was the same thing. The adjudication between all of the parties in interest that a debt has been paid, is the very highest evidence of a fact of payment, and the effect of such adjudication, whether founded upon direct proof or unrebutted presumption, is to discharge the lien and ordinarily to leave the mortgagee under a mortgage deed, or the grantee under an absolute deed, executed as a security for the debt, as the holder of the naked legal estate compellable, in a suit brought by the mortgagor or the grantor (or the heirs of either, as the case may be) to formally discharge the lien or reconvey the land. 1 Jones on Mortgages, secs. 972 and 973; 2 *ibid.*, sec. 1060. But the note sued on in the former action was executed by Thomas Osborne in 1867, and the deeds on which plaintiffs rely to show title in 1868, while this action was not brought till July, 1890.

In *Ray v. Pearce,* 84 N. C., 485, it was held that where presumption of payment of the debt secured by a mortgage deed arose by the lapse of ten years (under section 19, chapter 65, Rev. Code) from the date of the note or of some act, such as the last payment made upon it, shown in rebuttal of the presumption, the courts would presume also, as against the mortgagee or his assignee, that there had been a reconveyance, although the deed and bonds remained in the possession of such mortgagee or his assignee. In our case there had been a conclusive determination, at least of the controversy, as to the payment of the debt

and the character of the deed. If, with such data, a reconvey- (407) ance of the legal estate is presumed, the claim of the plaintiffs to recover on the deed would be settled, without entering upon the discussion of the question whether the issue as to title might have been adjudicated in the former action after the record then made by leave of court that the plaintiffs entered a *nol. pros.* as to the allegation of title and demand for possession set forth in their complaint. The lapse of more than twenty years, from 1 January, 1870, to July, 1890, during which time it seems to be admitted that the defendants were in possession of the land, would give rise to the presumption of an abandonment by the plaintiffs, if no other fact was considered as concluded by the former action except that the deed absolute upon its face was in reality a mortgage. The admission as to the character of the deed being equivalent to a finding of fact by the jury, and the debt having been paid before this action was brought, we would be giving a very narrow construction to the statute (Rev. Code, chap. 65, sec. 19), were we to hold that even in the absence of the plea or proof of continuous possession for twenty years or ten years by defendants, but in the face of a plea of estoppel, under which they show that the deed is a mortgage and the debt paid, that the plaintiffs could recover in a court where law and equity are administered upon a bare legal title which they, in contemplation of law, have either abandoned or hold subject to the demand of the defendants for a reconveyance. Supposing the former action to have been brought originally only for a foreclosure of the mortgage, without any allegation of the unlawful withholding of or prayer for possession; or that the entry of the *nol. pros.* brought about the same state of affairs, two questions were still involved in the controversy. The plaintiff could not demand his decree till he should establish the facts: first, that the debt was due and owing; second, that the deed was executed as a mortgage to secure its payment. The execution of the deeds was admitted, but the debt was shown to have been, in legal contemplation, satisfied. The court adjudged that the note sued on had been paid, and upon the pleadings and verdict, certainly with the additional admission made upon the trial and (408) recited in the decree that the defendants had been in possession since the execution of the deed, it was within the power of the court, and it was the duty of the judge, on motion of the defendants therein, to further adjudge and declare that the land was "discharged from the operation of any lien arising from said trust." This adjudication being binding upon the heirs at law of both of the parties to the original deed, it would follow, under the principle laid down in *Ray v. Pearce, supra,* that a reconveyance by Eliza H. Fowler, or her heirs, to Thomas

Osborne, or his heirs, would be presumed from the lapse of time, and the discharge of the lien to have been actually made.

The presence of the personal representatives of both parties to the deed, in addition to their respective heirs, did not destroy the conclusive effect of a judgment as to any issue actually involved upon the heirs at law of either. The joinder of an unnecessary party even would not relieve the heirs from the estoppel created by the judgment, nor would the presence of parties, made necessary by another phase of a former action, impair the force of an adjudication of any question that should afterwards arise between parties, all of whom were before the court when such adjudication was made.

We can thus dispose of this case without recourse to the well established principle that the parties to an action are, as a general rule, concluded, not only as to issues that were litigated, but as to matters that might have been determined therein. "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded." Sedgwick & Wait, etc., sec. 508.

(409) Where the plaintiffs in an action pray for general relief, or even in the absence of any prayer at all, it is the duty of the court to grant them such relief as the facts alleged in the complaint and proved or admitted entitle them to demand. *Harris v. Sneeden,* 104 N. C., 369; *Knight v. Houghtaling,* 85 N. C., 17.

Upon a careful scrutiny of the whole record, we think that there was No ERROR.

In re WILL OF ADA W. THOMAS.

Wills—Probate—Evidence—Estoppel

1. Under the statutes now in force, The Code, secs. 2136, 2148, regulating the manner in which wills shall be attested and admitted to probate, it is essential, not only that the document shall be *subscribed in the presence of the testator by at least two witnesses,* but that the evidence upon which the will is admitted to probate must show that fact.

2. The caveators, in a proceeding to prove the execution of a will, were not estopped to deny its validity by the record of a special proceeding for dower to the widow of testator, and to which they were not parties.

DEVISAVIT VEL NON tried at September Term, 1892, of DURHAM, before *Whitaker, J.*

(412) *John W. Graham and Junius Parker for caveators.*
W. W. Fuller for propounders.

AVERY, J., after stating the case, proceeded: The court so construed the Act of 1784 (Rev. Stat., chap. 122, secs. 1 and 6) as to allow wills disposing of real and personal estate to be proven in common form by one of the two necessary subscribing witnesses; but it (413) was declared essential to the sufficiency of the probate, in order to pass land, that the single witness examined should appear to have sworn that another subscribing witness, as well as himself, attested in the presence of the testator, or that some other witness should depose to the fact of signing in presence of the testator by the subscribing witness who was not sworn. *Blount v. Patton,* 9 N. C., 241; *Jenkins v. Jenkins,* 96 N. C., 254.

Where the probate court undertook to set out the proof *in extenso,* it was fatally defective if the fact of signing in presence of the testator by the subscribing witness who was not sworn was not made to appear, but it was held sufficient evidence of the probate of a will in common form where the clerk certified that "it was proved in open court by H. G., a subscribing witness, and recorded," upon the principle that all things were presumed to have been done properly, and therefore it would be taken for granted that the witness actually examined, testified that the other witness also signed in presence of the testator. *Harven v. Springs,* 32 N. C., 181; *Mayo v. Jones,* 78 N. C., 404. The right to thus set up the will in common form was said to be a temporary measure for the protection of estates (*Etheridge v. Corprew,* 48 N. C., 14), *Randolph v. Hughes,* 89 N. C., 428, as the next of kin could still demand, within a reasonable time thereafter, that such probate be recalled, and that the will be proved *per testes,* in solemn form, which involved necessarily the examination of all of the subscribing witnesses who were living and within the jurisdiction of the court, and that the handwriting of such as were dead or could not be brought before the court by its process should be proven. *Ralston v. Telfair,* 18 N. C., 482; *Bethell v. Moore,* 19 N. C., 311. Section 20, chapter 119, of Rev. Code, made it necessary to prove wills disposing of personalty as well as those devising real estate in same manner. *Osborne v. Leak,* 89 N. C., 433.

The Code, sec. 2136, in so far as it affects the sufficiency of the (414) probate in the case at bar, contains the same provision as to signing in the presence of the testator as the section of the Revised Statutes construed in those cases; but section 2148 provides that written wills with witnesses "must be admitted to probate only on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to said will are dead, or reside out of the State, or are insane, or otherwise incompetent to testify, then such proof may be taken of the handwriting both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of

such other circumstances as will satisfy the clerk of the Superior Court of the genuineness and the due execution of such will." The requirement that two witnesses should be examined was first enacted as a part of the Revised Code (chap. 119, sec. 15) and took effect on 1 January, 1856. *Jenkins v. Jenkins, supra.*

The will which gives rise to this contest purports to have been subscribed by two witnesses, both of whom had died before the filing of the caveat. The will also seems to have been lost or taken from the files of the clerk before this proceeding was instituted. When it was offered for probate, in common form, Sally F. Gooch, one of the subscribing witnesses, deposed, in so far as it is necessary for present purposes, to set forth the proof, "That she is a subscribing witness to the paper-writing now shown her, purporting to be the last will and testament of Ada W. Thomas, and that said Ada, in the presence of this deponent, subscribed her name at the end of said paper-writing, and which bears date 5 September, 1880; that said Ada did, at the time of subscribing her name, declare the said paper-writing subscribed by her to be her last will and testament, and this deponent did thereupon subscribe her name as an attesting witness thereto, and at the request and in the presence of the said testatrix; and this deponent further says
(415) that at said time, when the said testatrix subscribed her name as aforesaid, the said Ada W. Thomas was of sound mind and memory, of full age to execute a will and was not under any restraint, to the knowledge, information or belief of this deponent. Signed by the deponent and sworn to before the Superior Court clerk on 4 February, 1887."

S. J. Gooch, who was not a subscribing witness, deposed as follows: "That J. W. Thomas, one of the subscribing witnesses to the foregoing will, is dead; that this affiant was well acquainted with the handwriting of said J. W. Thomas, and he verily believes that said signature is in the handwriting of said J. W. Thomas." Signed, etc.

This will purported to have been executed on 5 September, 1880, by Ada W. Thomas, and to devise and bequeath to her husband, R. W. Thomas, her personal property and a lot of land lying in Durham. The names of Sally F. Gooch and J. W. Thomas purported to be subscribed as witnesses.

It is manifest, therefore, that the will was not proved as the law in force on 4 February, 1887, and which is still operative, prescribes that it shall be. It is true that J. W. Thomas died between the date of subscribing as a witness and the time when the paper was offered for probate, and the actual signing by the testatrix and the genuineness of the handwriting of J. W. Thomas were proved by the said S. J. Gooch, but section 2136 of The Code must be construed with section 2148, just

as the corresponding sections of the old law (Rev. Stat., chap. 122, secs. 1 and 6) were interpreted together. While the proof in common form by only one witness is not longer permitted by the amended law, the requirement that the will shall be subscribed in presence of the testator by both, still remains expressed in the very same words that were embodied in the Act of 1874 (Rev. Stats., chap. 122, sec. 1; Rev. Code, chap. 119, sec. 1; The Code, sec. 2136) and that were construed in *United States v. Bolunt*, 4 N. C., 181; *Blount v. Patton, supra*, and *Tarven v. Springs, supra*. In order that the proofs should be sufficient to justify the clerk in recording the paper in the book (416) of wills, and to make such record *prima facie* evidence of its due execution by the testator, it was essential not only that S. J. Gooch should have deposed to the genuineness of the signature of J. W. Thomas, but that he or Sally F. Gooch should have deposed that he "subscribed" in the presence of the testatrix. The probate being then insufficient to justify the entry of the paper on the will book for the temporary protection of the estate, till some interested party should demand proof in more solemn form, it must follow that what purported to be the proof and the will itself as entered on the book, were not competent as evidence for any purpose whatever, and the original depositions of Sally F. Gooch and S. J. Gooch, if they had been found, would not have been competent evidence for the propounders on the trial of the issue of *devisavit vel non*. The paper must be proved *de novo* in this proceeding in compliance with the provisions of the two sections already cited. The law requires that the clerk shall take in writing the prescribed proofs and examinations, and shall, after recording them with the will, file them in his office. The Code, sec. 2149. The propounders failed to produce any witness who had ever seen the signature of Ada W. Thomas to the original will, or the signature of either of the witnesses, and would testify to their genuineness. Indeed, the only testimony offered to show the loss of the original paper purporting to be a will was that of D. C. Mangum, who last saw it in the possession of the sole legatee and devisee, R. W. Thomas, who also was then dead. It did not appear that search had been made among the papers of R. W. Thomas for the original. *Non constat* but what by due diligence it might have been produced in court.

This is not a proceeding instituted under the statute (The Code, sec. 69) to establish the contents of the lost will, but an attempt to make probate in solemn form of a paper-writing which is (417) neither produced nor shown to have been lost. Whether it could have been restored and established by a proceeding under that section or not, and even if it is intended to be admitted that a paper in the form of that recorded in the book of wills was lost, it is certain that the

propounders have failed both on the trial and in the attempt to prove it in common form in 1887, to adduce such evidence of its execution by Ada W. Thomas as would meet the mandatory requirements of the law. The record of the special proceeding in which dower was allotted to Octavia Thomas, second wife of R. W. Thomas, and to which the caveators were parties and answered by their guardian *ad litem,* does not estop caveators from contesting the validity of this will. If it were conceded that they are estopped from denying her right to dower, that fact would not preclude them from contesting the execution of the will, both for the purpose of claiming the personal property, which passed into the possession of R. W. Thomas as legatee of Ada W. Thomas, and of disputing the title of the heirs or devisees of R. W. Thomas to the reversion after the life-estate, as they were not parties to the proceedings, nor entitled as privies to hold caveators bound by any admission or adjudications made therein.

The question whether the caveators, heirs at law of Ada W. Thomas, are estopped from denying the right of Octavia Thomas to dower may be raised hereafter in another action; but in this proceeding the will would not be admitted to probate on fatally defective proof, and made operative for all purposes, if it were conceded that the heirs would be estopped in an action for possession against the tenant of Octavia Thomas during her life.

As there was no competent testimony offered or evidence admitted to prove the due execution of the paper-writing, the court very properly instructed the jury to respond to the issue in the negative.

For the reasons given we think there was

NO ERROR.

Cited: Moody v. Johnson, 112 N. C., 800; *R. R. v. Mining Co.,* 113 N. C., 244; *In re Lloyd,* 161 N. C., 560; *Watson v. Hinson,* 162 N. C., 78.

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(418)

L. M. HOPPER AND WIFE v. DAVID JUSTICE.

Correction of Deeds—Code—Lost Records—Parol Evidence.

1. It is not proper to correct by parol testimony a certified copy of a deed as recorded by showing that the original, which was lost, had a different description.

2. The Code, sec. 1266, provides for the correction of errors in registration by petition, and proceedings wherein interested persons and adjoining landholders are made parties, and in such cases the statutory proceeding is exclusive.

3. The statutory method of restoring lost records (The Code, sec. 55, *et seq.*) does not exclude *parol* proof of their contents, which is then the best evidence the nature of the case affords.

4. Section 1251 of The Code, providing that the original and not a duly certified copy of a deed is the proper evidence when there is a rule of court suggesting material variance between the original and the registration, is not applicable to this case.

5. Without being allowed to correct, in the way proposed, the certified copy or the registration, the plaintiffs were entitled to establish and identify lines and boundaries which would correspond with the proposed correction.

ACTION to try title to land, tried before *Bynum, J.*, and a jury, at Spring Term, 1892, of CLEVELAND.

E. C. Smith for plaintiffs. (420)
M. H. Justice for defendant.

MACRAE, J. The proposition of plaintiffs was to prove that there is a mistake in the copy from the registration book which they offered in evidence as a link in their chain of title, by which, instead of 170 poles, as it was in the original, it is written 70 poles in the registration. And, to prove this error, they offered to show by a witness that he saw the original deed, and that it was written 170 poles. And they stated that they then expected to prove that the original deed was lost.

Section 1266 of The Code provides for the correction of errors in the registration of deeds, a procedure by petition before the clerk, the grantor and all persons claiming title to or having lands adjoining those mentioned in the petition to have notice of said petition.

It is contended that this statutory proceeding is not exclusive, and that the plaintiffs are entitled to proceed to have the mistake corrected by the means afforded them before the passage of the act in 1790, and, therefore, that upon the trial of this action they may show the mistake in the registration of their deed. But the plaintiffs acted under a misapprehension of their rights in the premises, independent of the procedure provided them in section 1266.

It is held in *Mobley v. Watts,* 98 N. C., 284, following a line of precedents, that parol evidence is admissible to prove the contents of lost or destroyed records, and that the statutory method of restoring such records (The Code, sec. 55, *et seq.*) does not have the effect to exclude such proof. But this was upon the principle that the (421) best evidence shall always be offered. Before the destruction of the record, the best evidence was the original or a certified copy; but the record having once existed and been lost, secondary evidence is permitted

to supply the loss. The record having been destroyed, the secondary becomes the best evidence; and, as the record itself would have been evidence if it were in existence, proof of it is evidence after it has been destroyed. The case before us is essentially different.

"Records may be identified by testimony, but their contents cannot be altered or meaning explained by parol." *Wade v. Odeneal,* 14 N. C., 423; *Davis v. McAlpin,* 26 N. C., 140; *Kerr v. Brandon,* 84 N. C., 128.

In this case the record is in existence, though the original deed is lost. It is proposed in this action for the recovery of land to alter the registration. This is not an action brought for that purpose; there are not proper parties here to such a proceeding. Section 1266 provides the appropriate means of obtaining relief in such cases. In regard to this action, it is said in *Oldham v. Bank,* 85 N. C., 240: "The statute provides a remedy for every person in the registration of whose deed a mistake may be made, and if, notwithstanding this, the plaintiffs submitted to loss and inconvenience without any effort to relieve themselves, the consequences of their failure cannot be thrown upon othres."

Section 1251 of The Code is not applicable to this case, that is to the effect that a duly certified copy of a deed may be given in evidence, "unless upon a rule or order of the court suggesting some material variance from the original in such registry or other sufficient ground, such party shall have been previously required to produce the original." In which case the copy from the registry is not permitted to be offered in evidence. The reception of the copy as evidence is an exception
(422) to the rule of the best evidence, and is only allowed in the absence of the suggestion provided for in section 1251.

His Honor properly informed plaintiffs that they might extend the line from 70 to 170 poles and change the course of the second call from east to west by establishing any corners or lines that would satisfy the jury, by a preponderance of evidence, that the proper location would be found by this extension of the line and changing of the course.

This would have been permissible even if there had been a mistake in the original deed, and arises from the only exception to the rule that the terms of a written instrument cannot be varied by parol evidence. In questions of boundary (no natural object called for) parol evidence, corroborated by natural evidence of trees marked at the time, although not called for, is allowed to correct or explain a mistake in the courses of a grant. *Graybeal v. Powers,* 76 N. C., 66.

NO ERROR. Affirmed.

Cited: Forbes v. Wiggins, 112 N. C., 125; *Williams v. Kerr,* 113 N. C., 310; *Jones v. Ballou,* 139 N. C., 527.

D. O. DAVIS v. J. K. DUVAL, ADMINISTRATOR.

Contract—Estoppel.

The evidence showed that the intestate of defendant was indebted to the plaintiff for labor and services performed, and had conveyed to him in consideration therefor a tract fo land; after intestate's death the heirs at law brought an action to set aside the deed, which was compromised, and a decree setting aside the deed was entered, but no adjudicattion in reference to the claim for compensation: *Held*, that the plaintiff was not estopped by the acceptance of the deed from setting up his demand, and that it was revived by the vacating of the deed.

ACTION to recover for work and labor done by plaintiff for (423) intestate of defendant, commenced before a justice of the peace of said county, and tried, on appeal, before *Hoke, J.*, at Spring Term, 1892, of MACON.

There was evidence tending to show that Abel Buckner and his wife, being enfeebled by age, requested plaintiff to come on his place and take care of himself and wife in their last years; that plaintiff did so.

The character of the work and services were proven in detail.

There was evidence that Buckner and his wife had made a deed to Davis during his lifetime, purporting to be for such services, and that Davis accepted such deed for same, and had the deed recorded after intestate's death, and proposed to hold land under said deed.

Plaintiff was admitted to prove, over the objection of defendant, that the children and heirs at law of Buckner, the intestate, instituted an action in the Superior Court of Macon County, after the death of said Buckner, against Davis and his wife, to set aside the said deed for undue influence, and other reasons; that defendant Duval and his wife, who was one of the children and heirs at law of said intestate, were two of plaintiffs in said suit, and Davis and wife, who was a daughter and also heir at law, were defendants; that before bringing this action, said suit was compromised and judgment entered setting aside said deed. There was also evidence that no compensation for services was allowed for or mentioned in said adjustment and compromise; that after said compromise, the defendant Duval qualified as administrator of the intestate, and is proceeding to administration of the estate.

The plaintiff was permitted to prove, over the objection of the defendant, that there were personal assets of estate to the amount of $500 or more, and that there were no debts of any consequence. (Defendand excepted.) This proof was offered with a view to render competent the declaration of some of the children and heirs and (424) distributees of Buckner that the plaintiff's claim was just. The declaration of the children and heirs was not given in evidence nor considered by the jury.

The defendant contended, and asked the court to charge, that the acceptance of the deed by the plaintiff from Buckner while living, which purported to be in satisfaction of plaintiff's services, would estop plaintiff from making demand by action as a creditor of the estate; (2) that services were not worth so much as claimed; (3) defendant further demanded as a counterclaim a note of plaintiff that defendant held as administrator of Buckner, the note being shown in evidence.

The court charged the jury that the institution of the action and judgment setting aside the deed, and the defect in the will, would revive claim of plaintiff for his services, and he would have a right to recover what the jury should decide they were worth; that the jury could not give more than the amount demanded in the summons, $200, and as much less as they might decide upon (defendant excepts); that the defendant was entitled to a claim against plaintiff to amount of note.

There was a verdict for plaintiff on issues submitted for $200 for services, and for defendant on counterclaim to the amount of note. Defendant moved for new trial:

1. For error in permitting evidence in compromised case above specified.

2. Error in admitting evidence on assets and condition of estate.

3. For error in charge.

Notice waived, and defendant excepts as above.

There was judgment on the verdict for plaintiff for difference of service over counterclaim, and defendant appealed.

J. F. Ray for plaintiff.

George A. Jones, for defendant.

CLARK, J. We have carefully considered the record in this case, as well as the authorities cited by defendant's counsel, and can find (425) no error in the rulings of his Honor. The admission of the evidence as to the personal assets and as to there being no debts of any consequence, for the purpose of rendering competent the declarations of the heirs, was harmless, as no such declarations were offered or received.

The services were rendered by the plaintiff, and it was competent to show by the compromise decree that they had not been paid for—the deed given in consideration of the same having been set aside. There seems to be no contention on the part of the administrator that there were not sufficient assets to pay the creditors as well as the plaintiff, and we can see no error of which the defendant can justly complain.

NO ERROR.

Cited: *S. c.*, 112 N. C., 834.

*W. D. SPRAGUE v. L. N. BOND ET AL.

Practice—Demurrer—Appeal—Interlocutory Motions.

1. A motion to strike out an answer and that the court declare a party unnecessary, and a demurrer because the answer does not state facts sufficient to constitute a defense to the action are interlocutory, and properly not appealable till final judgment.

2. A demurrer *ore tenus* in the Supreme Court for the same cause does not stand upon any better ground.

ACTION tried before *Graves, J.*, at Spring Term, 1892, of CALDWELL. The facts are stated in the opinion.

M. Silver and I. T Avery for plaintiff.
S. J. Ervin for defendants.

BURWELL, J. This cause was before the Court at February (426) Term, 1891 (108 N. C., 382), and was remanded to the Superior Court of CALDWELL, where at Fall Term, 1891, Mrs. Rebecca Bond Adams was "allowed to come into court and make herself a party defendant." This was done "on motion of defendant," and the plaintiff took no exception. Thereafter Mrs. Adams filed an answer, of which it is sufficient to say that the facts alleged therein, if found to be true, may possibly have the effect to divert the fund for which the plaintiff is contending, from him to her. The plaintiff moved the court to strike out this answer and to declare "that Mrs. Adams was not a proper or necessary party to this action." This motion was refused, and the plaintiff excepted. He then demurred to that answer; the demurrer was overruled and he excepted and appealed, and thus endeavored to bring to this Court for review all these rulings. They are all interlocutory and cannot be appealed from; but all these exceptions so noted, will be considered, if necessary, when a final judgment has been rendered. This Court will not, before the final determination of an action, entertain an appeal from an interlocutory order making additional parties. *Lane v. Richardson,* 101 N. C., 181. Nor will it, before such termination of the action, review the rulings of the Superior Court upon a motion to strike out the answer of a person who has been made a defendant, and to declare that such person is not a necessary party to the cause, unless the refusal to allow the motion prejudices a substantial right of the appellant. *Merrill v. Merrill,* 92 N. C., 657.

The plaintiff's attorneys demurred *ore tenus* in this Court to the answer of Mrs. Adams, and moved "to strike said answer from the

*AVERY, and CLARK, JJ., did not sit.

record, and that said defendant be dismissed as a party to this action." They state in writing the grounds for their demurrer, and say that "said answer does not state facts sufficient to constitute a defense
(427) or counterclaim to this action," and does not show any reason why Mrs. Adams should be a party. We cannot consider this demurrer or motion, as they only present in another form the questions disposed of above.

APPEAL DISMISSED.

Cited: *S. c.*, 113 N. C., 553; *S. c.*, 115 N. C., 530; *Shelby v. R. R.*, 147 N. C., 539; *Chambers v. R. R.*, 172 N. C., 558; *Williams v. Bailey*, 177 N. C., 40.

W. R. PENNIMAN ET AL. V. B. J. ALEXANDER.

Promissory Note—Collateral Agreement—Conditional Acceptance.

The maker of a promissory note, or other similar instrument, if sued by the payee may show as between them a collateral agreement putting the payment upon a contingency, and it is competent also for a defendant sued as *acceptor* of such insrtument to show in defense the conditions of his acceptance.

APPEAL at Spring Term, 1892, of BUNCOMBE, from *Hoke, J.*

The plaintiff complained upon and offered in evidence a paper-writing, of which the following is a copy:

13 October, 1890. First payment on second house	$132.25
Payment next week.	
Second payment on first house—payment in about twenty days	66.13
Second payment on second house—payment in about thirty days	66.12
	$264.50

I authorize B. J. Alexander to pay the above amount to Penniman & Co., as specified above. Asheville, N. C., 13 October, 1890. Tickets to be presented.

Jonathan Mooney. Accepted, B. J. Alexander.

(428) There was evidence by plaintiff that one W. R. Penniman, who was also made party plaintiff, did furnish Jonathan Mooney, the drawer, an amount of brick to the value specified, and that plaintiff

Penniman & Co., having claims to collect as agents for W. R. Penniman, were about to commence an action and claim, and attach the brick, when Jonathan Mooney, the debtor, drew the above paper for the amount due for the brick, $264.50, and same was accepted by defendant, B. J. Alexander, and suit was not then instituted; that no part of claim had been paid, and before bringing this suit plaintiff, as agent for W. R. Penniman, had demanded payment on said paper of the defendant, B. J. Alexander, which was refused. The terms, "Tickets to be presented," on face of paper was stated to signify that Jonathan Mooney had given tickets for the amount of brick as they were delivered, and that such tickets were to be surrendered when draft bill was paid.

Defendant offered himself as a witness, and proposed to show that his acceptance of paper was on condition that the drawer Mooney was building some houses for defendant where brick were used, and was building same by contract, payable in installments as work progressed; that said Mooney abandoned work and gave up contract before payments were due, and he never became indebted to said Mooney, and that he was only to pay bill on hand acceptance in case he became indebted to Mooney for said amounts. This evidence was ruled incompetent, and defendant excepted. Defendant further insisted that there was no consideration for said paper moving to defendant, and moved the court to instruct the jury that for this reason the plaintiff could not recover. This was denied, and defendant excepted. Verdict and judgment for plaintiff, and appeal by defendant.

Charles A. Moore for plaintiffs.
W. R. Whitson (by brief) for defendant.

BURWELL, J. It cannot be contended that the rights of the (429) plaintiffs against the defendant are stronger than if he had given them his promissory note for the sum named in the writing on which this action is brought, instead of accepting the order as he did. If he had done so, that is, had given to plaintiffs his promissory note for the amount of the order, it would have been competent for him, if sued on the note by the *payees,* to prove that there was a collateral agreement between him and them to the effect that he should not be required to pay except upon the happening of certain events, or that the note was without consideration. *Braswell v. Pope,* 82 N. C., 57; *Kerchner v. MacRae,* 80 N. C., 219. A *fortiori* was it admissible for the defendant to show that there was a collateral agreement between himself and plaintiffs when he wrote the word "accepted" on the order and signed his name thereto, for, if the writing be considered as a draft drawn by

Mooney on defendant in favor of plaintiffs, the legal relation of the parties when it had been accepted was that of indorser, maker or payee of a promissory note. Dan. Neg. Inst., sec. 29.

ERROR.

Cited: *Kelly v. Oliver,* 113 N. C., 444; *Penniman v. Alexander,* 115 N. C., 555; *Evans v. Freeman,* 142 N. C., 65; *Basnight v. Jobbing Co.,* 148 N. C., 357; *Woodson v. Beck,* 151 N. C., 149; *Kernodle v. Williams,* 153 N. C., 477; *Alexander v. Savings Bank,* 155 N. C., 127; *Anderson v. Corporation, ib.,* 134; *Bowser v. Tarry,* 156 N. C., 38; *Martin v. Mask,* 158 N. C., 444; *Garrison v. Machine Co.,* 159 N. C., 289; *Mercantile Co. v. Parker,* 163 N. C., 178; *Farrington v. McNeill,* 174 N. C., 421.

JOHN PARTON ET AL. V. M. S. ALLISON.

Assignment of Dower—Rights of Purchasers—Parties.

1. A widow who transferred her right of dower before the same was allotted was a necessary party in a proceeding to have the same set apart. Such a conveyance will be treated in equity as a contract to have it allotted to her and then to convey it to the purchasers.
2. The action of the assignees is primarily against the widow, but in the absence of an averment that the lands described were all of which she was entitled to be endowed, the heirs and devisees are properly made parties, so that the whole matter may be determined in one action.
3. The widow's right of dower not being yet denied, there was no need of an allegation setting out when the marriage took place.

(430) ACTION heard upon complaint and demurrer, before *Bynum, J.,* at the Fall Term, 1892, of HAYWOOD. The plaintiffs claimed the unallotted dower of a widow under a deed of conveyance from her. The defendant resisted, among other reasons, because the plaintiffs could not bring their action in their own name; the right of dower being only a thing in action the widow was a necessary party. The court overruled their demurrer, and they appealed.

T. F. Davidson for plaintiffs.
G. S. Ferguson (by brief) for defendant.

BURWELL, J. The plaintiffs once sought to obtain the relief which they pray for in their complaint by means of a special proceeding insti-

tuted before the clerk of the Superior Court of Haywood. That proceeding came before this Court, and the demurrer filed by the defendants to the petition was sustained (109 N. C., 674), and in the opinion then filed this language was used: "The sale by a widow of her right of dower, before dower was assigned to her according to law, was an equitable assignment of her right, to be enforced in a court of equity by a civil action, and not by a special proceeding."

1. Is the widow, plaintiffs' assignor, a necessary party to this action? We think she is. "Before the assignment of her dower a widow is not seized of any portion of the real estate of her husband, and cannot, therefore, convey any title at law to it. She can, however, make such a contract concerning it as equity can and will, under proper circumstances, enforce. This bill substantially is to compel the heirs to allot the dower, and then that the widow shall convey the land so allotted." *Potter v. Everitt,* 42 N. C., 152. Her conveyance of her right of dower, previous to an assignment, will be treated in a court (431) of equity as a contract on her part to have her dower assigned, and then to convey what is so assigned to her, and will be enforced against her. 2 Scribner Dower, sec. 37. Hence, the cause of action set out in the complaint is, according to these authorities, primarily against the widow, and she is of course, in that view of the matter, a necessary party.

2. Are the heirs at law or devisees of S. P. Owen, defendant's vendor, necessary parties? If it was alleged in the complaint that the lands described therein were all the land of which the widow was entitled to be endowed, we might be inclined to answer this question in the negative. But, in the absence of such averment, we must assume that there are other lands, and such being the case, the heirs at law must be brought in, in order that, by this one action, may be conclusively settled and determined all questions concerning the dower rights of the widow, and the plaintiffs' rights against her, by reason of her conveyance to them, treated as a contract to convey to them such portions of each tract as may be assigned to her under the orders made in this action. The Code, sec. 2112, declares that, in special proceedings for assignment of dower, "the heirs, devisees and other persons in possession of, or claiming estates in the lands, shall be parties"; and by section 189 it is enacted that "when a *complete* determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." When the widow and heirs at law or devisees are brought in, a complete determination of this matter may be had in this civil action, and all parties interested in the assignment of dower be concluded by the final judgment or decree which shall be made.

We do not think it was necessary to allege in the complaint when the marriage took place. Proof of that fact will be required if the widow's right of dower is denied. And we think it is sufficiently alleged in the complaint that defendants claim under S. P. Owen.

REVERSED.

Cited: *Drewry v. Bank,* 173 N. C., 667; *Thomas v. Carteret,* 182 N. C., 384, 385, 387.

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(432)

J. H. ROBERTS v. THE P. A. DEMING WOODWORKING COMPANY.

Corporation—Contract in Writing—Code—Quantum Meruit—Pleading —Amendment—Measures of Damages—Evidence.

1. The plaintiff sued a corporation for work and labor done; the contract was not "in writing under seal of the corporation or signed by some officer of the company duly authorized," as required by section 683 of The Code: *Held,* the plaintiff was entitled to recover for the work already done, but could not force the defendant to continue the contract as to the unexecuted part.

2. The complaint being broad enough to set out an action on the *quantum meruit,* the plaintiff will not be confined to the express contract, and if not broad enough, the court might have allowed amendment after verdict making it so.

3. The contract price, while not conclusive, is some evidence by which the value of plaintiff's services may be measured.

ACTION tried at August Term, 1892, of BUNCOMBE, before *Bynum, J.,* for the value of work and labor done for the defendant corporation.

The defendant denied the debt, and resisted payment upon the further ground that the contract was not in writing under seal of the corporation, nor signed by any authorized officer thereof, and therefore void under section 683 of The Code. When the plaintiff rested his case, the court intimated he could not recover on his own showing, the contract being above $100, was not according to the formalities prescribed by The Code, sec. 683. Whereupon the plaintiff submitted to a nonsuit and appealed.

H. B. Carter for plaintiff.

T. H. Cobb for defendant.

CLARK, J. The court ruled that the plaintiff could not recover in any aspect of the evidence, because the contract of the defendant (433) company was not "in writing and under seal of the corporation,

or signed by some officer of the company duly authorized," as required by The Code, sec. 683. That section and its purport was construed in *Curtis v. Piedmont Company,* 109 N. C., 401. It is there held that it applies to executory contracts and protects corporations from enforcement of such unless evidenced in the manner prescribed by the statute. But the Court adds that it does not apply to cases where the corporation has received and availed itself of property sold and actually delivered to it. In such cases, the company can be compelled to pay the fair value of such property. In the present case the claim is for work and labor done at a specified rate. The contract not being in writing and signed (or sealed), as required by the statute, the plaintiff cannot force the defendant to continue the contract as to the unexecuted part, but the plaintiff is entitled to recover a fair value for the labor already performed, and which the company has accepted, and of which it has enjoyed the benefits.

The defendant contends, however, that this action is brought upon the express contract, and that no recovery can be had upon a *quantum meruit,* and that if this is not so, still there was no evidence to justify a verdict for the value of the services. The complaint is sufficient to warrant a recovery, either upon express contract or for the value of the work and labor done. *Stokes v. Taylor,* 104 N. C., 394, and cases there cited; *Fulps v. Mock,* 108 N. C., 601. No amendment was necessary, but if desirable, the court, in accordance with the present system of procedure, which, without undue neglect of form favors a trial upon the merits, could and should have allowed an amendment of the complaint after a verdict in favor of the plaintiff, if successful. The Code, sec. 273. As to the second objection raised, the contract price agreed upon between the authorized agent of the company and the plaintiff, while not conclusive (since the express contract was perforce abandoned), was certainly some evidence sufficient to go to the (434) jury as to the value of the services.

The nonsuit must be set aside, and the case remanded for further proceedings in accordance with this opinion.

REVERSED.

Cited: Luttrell v. Martin, 112 N. C., 605; *Curtis v. Lumber Co.,* 114 N. C., 531; *Freidenwald v. Tobacco Works,* 117 N. C., 557; *Wilmington v. Bryan,* 141 N. C., 683.

JOHN J. GRIFFIN ET AL. v. THE ASHEVILLE LIGHT COMPANY.

Pleading—Verification of Agent or Attorney—Practice—Discretion of Judge.

1. The pleading of a nonresident may be verified by an agent or attorney: (1) when the action is upon a written instrument for the payment of money only, and the instrument is in the possession of such agent or attorney; (2) when all the material allegations are within the personal knowledge of such agent or attorney.

2. The averment of the possession of the note sued on is allegation of "knowledge or grounds of belief," for, nothing else appearing, such note when put in evidence, would entitle the plaintiff to judgment.

3. The object of the verification is, that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points.

4. It was error to refuse the plaintiffs judgment upon failure of defendants to put in a verified answer to such complaint, unless, for good cause shown, the defendants were entitled to an extension of time for answer.

5. Such refusal was the denial of a substantial right and at once appealable before final judgment.

6. Final judgment may be entered in this Court now; but since the case goes back it will be in the discretion of the judge to allow the answer to be verified.

(435) APPEAL at August Term, 1892, of BUNCOMBE, from *Bynum, J.*

The plaintiffs filed their complaint on 17 August, 1892, verified as appears in the record.

1. That the defendant, The Asheville Light and Power Company, is a corporation duly chartered and existing under and by virtue of the laws of the State of North Carolina.

2. That upon 15 December, 1891, the defendant, The Asheville Light and Power Company, made its promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiffs the sum of $271.50 two months after date.

3. That the defendant, J. G. Martin, indorsed said note when the same was delivered to the plaintiffs.

4. The said note at maturity was duly presented for payment and was not paid, and the same was then and there protested for non-payment, whereby the plaintiffs were put to the cost of $2.06 protest fees.

5. That no part of said note has ever been paid.

Wherefore, the plaintiffs demand judgment against the defendants for the sum of $271.50, with interest on the same from 15 February, 1892, together with $2.06 protest fees, and the costs of this action, to be taxed by the clerk of the court.

Duff Merrick, being first duly sworn, deposes and says: "That he is of counsel for the plaintiffs and makes this affidavit in their behalf for the reason that said plaintiffs reside in Philadelphia, Pa., and there is not now time for this complaint to be forwarded to them for verification and be returned in time to be filed within the first three days of this term, and for the further reason that this action is founded upon a written instrument, money only, which said written instrument is in affiant's possession; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except it be as to matters therein stated on information and be- (436) lief, and as to those matters he believes it to be true."

On the last day of the term, and as the court was about to adjourn, plaintiffs moved for a judgment for that the complaint was verified, and no answer had been filed. The defendant then filed the answer which is in the record. Plaintiffs still insisted that they were entitled to judgment in that the answer was not verified.

The court refused the motion in judgment for that, as held by the court, the complaint was not verified according to the statute. The plaintiffs objected to the holding of the court, and excepted thereto, and appealed.

Charles A. Moore for plaintiffs.
Theo. F. Davidson and Thomas A. Jones for defendant.

CLARK, J. Whenever the party is a nonresident of the county, the pleading may be verified by an agent or attorney in two cases, first, when the action is upon a written instrument for the payment of money only, and the instrument is in possession of the agent or attorney; second, when all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. The Code, sec. 258; *Hammerslaugh v. Farrior,* 95 N. C., 135.

The affidavit here could be made by the attorney, since the party he represented was a nonresident, and the action was upon a written instrument for the payment of money only, and was in the possession of the attorney. The only question remaining is whether the verification is in itself defective, though made, as we have seen, by one authorized to make it. It follows the statute in averring the complaint to be true of affiant's own knowledge, except as to matters stated on information and belief, and those he believes to be true, and also in setting out the nonresidence of the plaintiff, and that the action is on a written instrument for the payment of money and in his pos- (437) session, as reasons why the affidavit is not made by the party himself. But it is urged that the verification is defective in not stating,

as required by section 258 of The Code, "the knowledge or grounds of his belief on the subject," and that it was not a sufficient compliance with this requirement to set out that the written instrument sued on was in the possession of the attorney, since that, though sufficient to authorize the attorney to make the verification, does not show his "knowledge or ground of belief on the subject." It seems to us that the objection is hypercritical. The verification need not set out matters merely evidential. The object of the verification is that if the defendant does not deny the allegations of the complaint, the cause shall stand as if a jury had been empaneled and the allegations in the complaint had been put in proof without denial, or admitted. The purpose is to avoid the expense and delay of a jury trial when there is no controverted fact to be passed upon. With the jury empaneled and the note described in the complaint put in evidence, nothing else appearing, the plaintiff would be entitled to judgment. The averment, therefore, of the possession of the note sued on (no payments being indorsed thereon) is allegation of the "knowledge or ground of belief" of the matters in the complaint material to be shown by the plaintiff. It is true there is in the complaint a negative allegation that no part of said note has ever been paid. But if any payment has been made which is not credited on the note, that is a matter of defense. The averment of nonpayment of any part is only necessary to show the amount due on the instrument which is sued on. There is also an averment of the incorporation of the defendant company. But it has been held that this is an unnecessary averment, and, if disputed, it must be raised by answer or plea. *Stanly v. R. R.*, 89 N. C., 331; *Ramsey v. R. R.*, 91 N. C., 418; *S. v. Shaw*, 92 N. C., 768; *S. v. Grant*, 104 N. C., 908. Indeed, the
(438) signing of the note in affiant's possession is estoppel evidence of the allegation of its incorporation. *Ryan v. Martin*, 91 N. C., 464. The verification having been sufficient, it was error to refuse the plaintiff judgment because an unverified answer was filed. The Code, secs. 257 and 385; *Alspaugh v. Winstead*, 79 N. C., 526; *Alford v. McCormac*, 90 N. C., 151. It is true the court might in its discretion have extended the time for the defendant to file its answer so as to give opportunity, if desired, to verify it (The Code, sec. 274; *Banks v. Manufacturing Co.*, 108 N. C., 282), and the exercise of this discretion is not reviewable (*Austin v. Clarke*, 70 N. C., 458; *Gilchrist v. Kitchin*, 86 N. C., 20; *Mallard v. Patterson*, 108 N. C., 255), though such extension of time is a practice not to be encouraged. *Dempsey v. Rhodes*, 93 N. C., 120. But in the present case that discretion was not exercised. Why it was not asked does not appear, unless, as is probable, the defendant could not verify a denial of plaintiff's allegations in a plain action on a note in his possession.

The refusal of a judgment by default final upon a verified complaint for a sum certain, there being no extension of time to file answer, was a denial of a substantial right which the plaintiff might lose if the order is not reviewed before final judgment, and therefore an appeal lay. The Code, sec. 548. Indeed, final judgment might now be entered here, as was done in *Alspaugh v. Winstead, supra*; The Code, sec. 957.

Since, however, the case goes back, it will be in the discretion of the judge below to permit a verified answer to be filed. The Code, sec. 274. Whether he will permit this should largely depend upon whether the defendants can satisfy him that they have a meritorious defense, for it is unquestionably true that "a delay of justice is often a denial of justice."

REVERSED.

Cited: Curran v. Kerchner, 117 N. C., 265; *Kruger v. Bank,* 123 N. C., 17; *Cantwell v. Herring,* 127 N. C., 83; *Cook v. Bank,* 130 N. C., 183; *S. c.,* 131 N. C., 97; *Hall v. Hall, ib.,* 186; *Oil Co. v. Grocery Co.,* 136 N. C., 356; *Corporation Commission v. R. R.,* 137 N. C., 21; *Carraway v. Stancill, ib.,* 475; *Miller v. Curl,* 162 N. C., 3.

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(439)

B. W. BASS v. THE ROANOKE NAVIGATION AND WATERPOWER COMPANY.

Constitutional Law—Vested Rights—Obligation of Contracts—Corporation—Eminent Domain—Forfeiture—Grant, Presumption of—Easements—License—Reverter.

1. While the Legislature has no power to authorize the condemnation of private property for the use of purely private corporations, nevertheless, where corporations, otherwise private, are clothed with powers and charged with duties which are in their nature public, they become *quasi* public corporations, and may, with legislative permission, exercise the right of eminent domain.

2. The enactment of statutes regulating the manner in which corporations shall equitably discharge the claims of its creditors, or to subject all or a portion of its property to sale at the instance and for the benefit of creditors, is not in conflict with the constitutional provisions in respect to vested rights or the obligation of contracts.

3. A bare expectancy is not such a vested right as will be protected by the constitutional provisions in that respect.

4. The purchaser of the property of the Roanoke Navigation Company (incorporated under the Act of 1812), under the decree for sale made in pursuance of the Act of 1874-75, became vested with all the rights, estates and privileges belonging to said company, including the estate acquired either by purchase or proceedings to condemn land for the

purposes of the erection and maintenance of the canal contemplated in the act of incorporation; and none of these acquisitions were forfeited by the acceptance and exercise by the purchasers of the power conferred by the Act of 1885 to use the franchise for other purposes not inconsistent with those originally granted.

5. The Roanoke Navigation Company, having acquired the right of way through the plaintiff's land, permitted her, by parol license, to erect, in 1852, a private bridge over the canal and which she had continuously used ever since, until it was removed by the defendant, the purchaser and successor of the said company, in 1890, when engaged in improving the property: *Held*, (1) that such possession did not raise a presumption of a grant to the easement to maintain the bridge; (2) that the right to the fee in the condemned land did not revert to the original owner, or those claiming under him, upon the dissolution of the original corporation; (3) that the license could be revoked, and being revoked, the defendant had a right to remove it without paying compensation to the owner.

(440) APPEAL at May Term, 1892, of HALIFAX, from *Brown, J.*

(446) *R. O. Burton for plaintiff.*
T. N. Hill and W. H. Day for defendants.

AVERY, J. It is not necessary to the decision of the questions involved in this appeal to determine whether the English doctrine in reference to the grantor's right of reverter, when corporations are dissolved, prevailed in North Carolina in any case, or whether we would follow the equitable rule adopted by the courts of some of the states, in the absence of positive and constitutional legislation bearing upon a given state of facts. The authorities elsewhere are conflicting, and thus far the question has not in all of its bearings been definitely settled by this Court. 2 Waterman on Cor., sec. 435; Angell and Ames on Corp., sec. 779; *Mason v. Mining Co.*, 133 U. S., 50; 2 Morawitz Pr. Corp., secs. 1031 and 1032; *Bowen v. Robertson*, 11 How., 478; 2 Kent Com., pp. 307 309; *Von Glahn v. DeRosset*, 81 N. C., 467; *Fox v. Horah*, 36 N. C., 358; *Gooch v. McGee*, 83 N. C., 59; *S. v. Rives*, 27 N. C., 297; *Hughes v. Commissioners*, 107 N. C., 607.

Leaving out of view the learned discussion of this subject by *Chief Justice Smith* in *Von Glahn v. DeRosset* and *Gooch v. McGee, supra*, in which the suggestion was made that the older decisions presented the status of a corporation whose charter had been forfeited in a court of law as distiguished from a court of equity, we think that the controversy here may be made to depend upon the application of the provisions of our own statutes prescribing what disposition shall be made of property in case of dissolution.

The Roanoke Navigation Company, whose franchise and property are claimed by the defendant by virtue of a purchase at a sale under

judicial decree, made pursuant to previous legislation, to which (447) we will presently advert, was originally incorporated under the authority of the Act of 1812 (2 Rev. Stat., 236), which was amended by several subsequent acts, passed respectively in 1815, 1816, 1817, 1823 and 1832. Sections 8 and 12 of the Act of 1812 provided that the real estate, whether acquired at private sale or by condemnation, should be "vested in the said proprietors, their heirs and assigns forever, as tenants in common in proportion to their respective shares." So that the original owners, either voluntarily or by the exercise of the right of eminent domain, if they received the full price of the fee would lose nothing, if the land should never revert. In creating such a *quasi* public corporation for the purpose of opening a channel for commerce, the parties and juries who determined values of land acquired are deemed to have acted upon the idea then evidently controlling the Legislature, that a great public highway would be prepared for permanent use, and that in case one set of proprietors should forfeit their rights for misuser or nonuser, the law-making power of the State would see that the property necessary to subserve this important end should pass to another similar public agency or be subject to the control of the sovereign power which had authorized it to purchase and hold lands in fee for a particular purpose.

The Legislature could not have authorized the taking by a private corporation for purely private purposes, but such bodies politic, as companies organized to manage railway lines and canals for transportation of persons and property, though in other respects private corporations, are like counties and towns from their very nature, take and hold such property as is necessary for corporate purposes under a delegation of sovereignty by the State, and subject to the authority of the State "to provide specially how its indebtedness shall be paid, and to subject all or a portion of its property, to sale under execution, or in any other mode at the instance of a creditor." *Gooch v. McGee, supra; R. R. v. Caldwell,* 39 Pa., 337; *Hughes v. Comrs., supra.* (448)

The exercise of the power to provide how they shall fairly and equitably discharge the claims of creditors is not inhibited as disturbing vested rights, or impairing the obligation of contracts. Indeed, apart from such legislative control over it as inheres in its very creation to a public or *quasi* public corporation, the law-making power of the State has the unquestioned right to provide the means of enforcing existing contracts, as distinguished from the power of imposing a new obligation, divesting a right or destroying a remedy. Hare's Con. L., pp. 787 and 789; Cooley Const. Lim. (4 Ed.), p. 469; *Munn v. Illinois,* 95 U. S., 126, 130.

Even if the courts, in the exercise of equity jurisdiction, could not, before the passage of our statutes, take the property of a *quasi* public corporation in custody for the payment of its debts, the Legislature, according to all of our authorities, had ample power to provide what portion of the property necessary for corporate purposes shall be subject to sale, and when and how it shall be sold for that purpose. *Gooch v. McGee, supra.* The primary object in permitting the exercise of the sovereign power of eminent domain was to take the land for a public purpose, and the condition implied in the very creation of the corporation, was that the creator should supervise the artificial being, so far as to see that it, or another similar agency, should subserve the end for which it was brought into existence; the power of the State being subject only to the limitations imposed by the constitutions, State and Federal.

The power of the Legislature to pass substantive laws is limited only by the restrictions as to vested rights and contracts. We have seen that legislation providing adequate means for the enforcement of existing contracts is not within the constitutional inhibition as to impairing the obligation imposed by them. On the other hand, a bare expect-
(449) ancy, such as that of the heir presumptive under the canons of descent, the devisee named in a last will and testament executed by a person still living; the claim to rights by survivorship by a joint tenant, where a statute has made them tenants in common, the right to a forfeiture of interest reserved on a contract on account of usury, is not (as it has been held) protected as a vested right, but may be modified or destroyed at the will of the lawmakers by statute. Cooley Const. Lim. (4 Ed.), pp. 445 and 447; Ordronaux Con. Leg., p. 601; Tiedeman on Lim. of P. P., pp. 348 to 350; Lawson R. & R., sec. 3867, p. 6088, and note. *Parmolie v. Lawrence,* 44 Ill., 405; *Holbrook v. Finney,* 4 Mass., 567; *Westowell v. Gregg,* 12 N. Y., 208; *Loverer v. Lamprey,* 22 N. H., 434; 3 A. & E., 758, 759; *Minge v. Gilmour,* 2 N. C., 270. The law applicable in our case is, by its terms, retrospective, and we do not think that the Legislature transcended the limit of its powers in providing for the substitution of one public agency instead of another, and thereby postponing the possibility of reverter, if it existed at all. That such contingent claim to the reversion is, at best, where admitted to exist, only an expectancy defeasible at the will of the State, is made more apparent when we recall the admitted principle that it rests with the soverign to insist upon the forfeiture for failure on the part of the corporation to comply with its charter, and if, in our case, the State had not moved, and should never move, in the matter, there could be no dissolution. *R. R. v. Saunders,* 48 N. C., 126; *R. R. v. Johnston,* 70 N. C., 348; *Navigation Company v. Neal,* 10 N. C., 520.

A claim, contingent upon action by the Legislature, or by the Executive Department of the State, that may never be taken, would seem clearly so remote and uncertain as to fall under the denomination of an expectancy, subject to destruction by the power which alone could create the contingency, or could refrain from so doing at its pleasure. Supposing that the Act of 1831 did not apply to a strictly private corporation, whose charter had expired by its own limita- (450) tion, as declared in *Fox v. Horah,* 36 N. C., 358, or to a *quasi* public corporation, dissolved either for violation or by expiration of its charter, the Legislature had nevertheless the same power to pass the Acts of 1871 and 1872 (Bat. Rev., chap. 26, secs. 39 and 46), and Laws 1874-75, chap. 198, as to enact that which took effect twenty years before, but after the property of the Navigation Company had vested under its charter and the laws amendatory thereof. The validity of the last named act has been expressly acknowledged in *Gooch v. McGee, supra,* and inferentially in *Attorney-General v. Navigation Co.,* 86 N. C., 408, as well as by approval of the principle in *Fox v. Horah, supra.* It provides that before a judgment of dissolution, the court may appoint a receiver and make other orders, as prescribed in chapter 26, section 39, of Battle's Revisal, and that "such sale and conveyance shall pass to the purchaser or purchasers at the sale, not only the works and property of the company between the towns of Gaston and Weldon, and at Weldon, as aforesaid, as they were at the time of rendering the judgment of dissolution, but also all such franchises, rights and privileges as said company or corporation now have by law. . . . The corporation thus created by such sale and conveyance shall succeed to all the rights, franchises and privileges as are now had and enjoyed by the Roanoke Navigation Company between the towns of Gaston and Weldon, and at Weldon."

Under the decree of the Court, rendered in pursuance of the Act of 1874-75, R. T. Arrington, S. P. Arrington, William Mahone and J. D. Cameron became purchasers. They, under the corporate name of "The Roanoke Navigation and Water Power Company," were clothed by another statute (Private Laws 1885, chap. 57) with every right, etc., of the former company, "including the right to the use of the water of the Roanoke River, to be drawn through the canal for navigation, *manufacturing* or *other purposes,* and are vested with every right to own, use and enjoy the water power of said Roanoke Navigation Company, to rent or lease the same," etc. The State of Virginia, in the year 1816, passed an act giving to the Roanoke Navigation Com- (451) pany, organized under the law already referred to, the exclusive right to improve the navigation of so much of the Roanoke River and its branches as were situate in that state, permitting individuals and

banks to subscribe an additional sum of two hundred thousand dollars to be applied for that purpose, and providing for the condemnation of land necessary for right of way, etc. By its terms, this charter was to be accepted by the stockholders of the company in order to give it validity, as it afterwards was, and the General Assembly of North Carolina gave its formal assent by statute the next year. 2 Rev. Stat., p. 252.

If the act be considered as applicable, by virtue of the mere assent to the consolidation on the conditions prescribed by a sister state, to the portion of the canal lying in North Carolina, so far from construing section 5 as a restriction upon the rights of the old company, it seems rather to raise the implication that it had the exclusive right to use the canal for waterworks (which seems to be, sometimes at least, synonymous with milling or manufacturing purposes as used in these old statutes) erected upon its own right of way, and to prohibit the withdrawal of water from the canal by everyone owning an eligible situation for putting up machinery in the vicinity of its line, except with consent of the company, upon which the duty of entering into an agreement with the owner of the site on reasonable terms was required. The language is not at all clear, but taking the whole context into consideration, the only interpretation that seems to be reasonable and consistent with the general purpose to permit the use of the water of the canal for mills, in subordination to the main object of using it as an artery of commerce is first; that neither the company nor an individual can withdraw the water from the canal and convey it over the land of another land-
owner to reach an eligible site for utilizing it as a power without
(452) the consent of such owner, but may with such consent; and that
the duty is imposed upon the company, where it can be done without interfering with the primary business of navigation, of farming out at reasonable rates a sufficient supply of water to the "situation" owner. It will be observed that the company is empowered and directed, if it can be conveniently done, to make the "canal answer both the purposes of navigation and the waterworks aforesaid," and to agree with the "person possessing such situations" concerning the just proportion to be borne by each of the expense, not of cutting a single canal for boats, but making "canals or cuts" that would subserve the purposes both of navigation and such waterworks. The new company is now contending for the privilege of using the water itself and farming it out to be used for manufacturing, with due regard to the rights of others.

But the action taken by our Legislature was one of the early recognitions of the right of two distinct corporations organized under the laws of different states to become consolidated with the assent of such states, and with enlarged or restricted powers and privileges lodged in the new company. *Meyer v. Johnson,* 64 Ala., 656; 3 Wood R. F., p. 1680,

et seq. Though corporations are consolidated, they are still often left by the agreement and legislation so far separate that each remains subject to the laws of its own state. 1 Wood, *supra*, p. 32. In such cases each charter remains in force, though there may be conflicts in their provisions. 1 Wood, *supra*, p. 573, note 5. The two may be operated together with enlarged powers, or with restrictions imposed as a condition precedent to the exercise of the power to consolidate.

Unless the power is specially reserved when the charter is granted, or under the Constitution or general laws, the Legislature cannot, as a general rule, modify the charter so as to take away any power which would enure to the profit of, or prove a protection to, a company from loss, but there is no restriction upon the right of the sovereign to enlarge its powers or extend its privileges, except that, in doing so, it (453) must not infringe upon the vested rights of another. If there was no authority given to the old company, either in terms or by necessary implication, to erect manufacturing establishments and use the water for running them, and others owned by landowners in the vicinity, the Legislature unquestionably had the power to grant *de novo* all of the privileges enumerated in section 1, chapter 57, Laws 1885, if such action was in conflict with no right but only with the claim of the plaintiff as the devisee of one of the original grantors, to the possibility of reverter, which the Act of 1874-75 provided should not vest, if it otherwise would have done so on the dissolution under the act. The Legislature, in the exercise of its authority, and in order to make the corporation responsible to its creditors and to turn over any balance to the stockholders, interposed and destroyed any expectancy that the plaintiff or her grantor might have claimed. Having parted with his property, in the most favorable view of the law, in contemplation of the right to exercise such legislative power, the plaintiff has no just ground for complaint. The defendant bought on the invitation of the State in order to satisfy these just claims, and with the assurance of the sovereign that it would succeed to the franchises and powers of the old company, and have the right to ask for additional privileges.

We see no force in the argument that the defendant's right to the land, conveyed by the person through whom plaintiff claims, has been forfeited by accepting the new charter, which confers the power to erect and operate manufacturing establishments, and to lease water to run other mills, and, by nonuser, for navigation. In falling back upon this position, it is conceded, by implication, that the sale under the Act of 1874-75, when the intention to use the water exclusively as a water power was not as yet disclosed, was valid and passed the title to the property and franchise to the purchaser. But it is contended that the franchise has been again forfeited. The reply is, that (454)

only the sovereign state itself can demand the forfeiture and assert its right to dissolve the corporation. 3 Wood, *supra,* sec. 497; Waterman on Corp., sec. 42, p. 155.

It is, perhaps, unnecessary to say that our Legislature, in providing by statute (The Code, sec. 1849, *et seq.*) for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoys a prerogative franchise because of some powers or duties, which it is to perform for the public, and to that extent is *quasi public.* 1 Wood, *supra,* sec. 5. If the sale had been authorized by the Act of 1874-75 for the express purpose of creating a new company, clothed with the power to erect manufacturing establishments and lease water-rights to other mill-owners, it might be questionable whether the probable benefits to the coterminous landowner would not be greater than if the canal were still kept open for the passage of boats, which can no longer compete with the numerous railroads that traverse the country which the navigation company was organized to develop.

What we have said disposes of the exception arising out of the second cause of action, in which the plaintiff claims possession of so much of the right of way, extending eighty feet on each side of the center of the canal, as lay originally within the limits of the land of her former husband, Daniel Mason, under whom she holds as his devisee for life. There was no error in refusing to charge that the land in controversy had reverted.

Having the right to clear out and enlarge the canal, the defendants could revoke any license given by its predecessor or its agents to erect a bridge such as interfered with the enjoyment of its franchise. *R. R. v. R. R.,* 104 N. C., 669. The husband of the plaintiff before his
(455) death, and the plaintiff since his death, had been using a bridge across the canal for about forty years, under a parol license from the Roanoke Navigation Company, given to him. There was no evidence that the bridge was used further back than 1852; certainly, no testimony to show that the crossing was erected on an old-established way existing when the canal was constructed. The question does not arise as to its obligation to keep up the bridge, under the statute now applying to railroad companies (The Code, sec. 1710; Rev. Code, chap. 60, sec. 30), which seems to have been first enacted in 1855. The bridge was placed directly across the stream from which the defendant had a right to remove any obstruction that interfered with widening the channel at that point. The occupation and use by the plaintiff and her husband for over forty years would raise no presumption of a grant—the condemnation of the land under the old charter being admitted. The Code, sec. 150; *R. R. v. McCaskill,* 94 N. C., 746. We think that

the defendant had the right to remove the bridge as a nuisance, and was under no legal duty to replace with another after widening the canal. Without specific mention, we have discussed the exceptions growing out of the refusal to give the proposed instructions, and have reached the conclusion that there was no error in such refusal, nor in the intimation as to the instruction that would be given.

With great respect for the learned counsel who pressed the exceptions as to issues, we do not deem it necessary to follow his argument in detail. In view of what we have already said, it seems manifest that the plaintiff was not deprived of the opportunity to present any view of the law arising out of evidence. If the issues tendered had been adopted, the instruction proposed to be given by his Honor would have been equivalent to telling the jury (and we think correctly) that in any view of the evidence they should respond to the first, second, fourth and fifth issues "No"; to the third "Nothing"; and to the sixth and seventh "Yes"; and notifying counsel that upon such verdict (456) he would give judgment for the defendant.

The plaintiff was not deprived of the opportunity to present any view of the law arising out of the testimony, and the exception is therefore untenable. *Denmark v. R. R.*, 107 N. C., 185; *Boyer v. Teague*, 106 N. C., 576; *Bonds v. Smith*, 106 N. C., 553; *Emry v. R. R.*, 102 N. C., 209.

Since the plaintiff was, in no view of the evidence, entitled to recover damage, it was not material whether his Honor stated the rule for assessing damage correctly or incorrectly in passing upon the testimony. The rejected evidence, if admitted, would not have given the plaintiff a better status in court, or entitled her to a hearing on any issue arising on any pleadings and evidence, and there was no error from which plaintiff sustained any injury, if, in fact, there was error at all.

If the defendant offered the deed for the tract of land adjoining the land in controversy to establish a boundary, it was probably competent for that purpose. But it was incumbent on plaintiff to show, in some way, how the error complained of operated to his injury, and as we cannot see how he was prejudiced by its admission, we conclude that, if an error, it too, was harmless.

NO ERROR.

Cited: Pipe Co. v. Howland, post, 632; 634; *Lowe v. Harris,* 112 N. C., 490; *Bank v. Comrs.,* 116 N. C., 380; *Logan v. R. R., ibid.,* 949; *Barcello v. Hapgood,* 118 N. C., 729; *Springs v. Scott,* 132 N. C., 561; *Hodges v. Lipscomb,* 133 N. C., 205; *Anderson v. Wilkins,* 142 N. C., 159; *R. R. v. Olive, ibid.,* 271; *Power Co. v. Nav. Co.,* 152 N. C., 492; *S. c.,* 159 N. C., 397; *Hurst v. R. R.,* 162 N. C., 379; *Torrence v. Charlotte,* 163 N. C., 565; *Cross v. R. R.,* 172 N. C., 123.

(457)

P. D. BROADWELL v. C. B. RAY.

Appeal—Certiorari.

The writ of *certiorari* will be granted directing the trial judge to amend a case on appeal settled by him, when the affidavit upon which the application is based shows merits and negatives laches.

MOTION by defendant in Supreme Court for *certiorari.*

S. G. Ryan for plaintiff.
W. H. Pace for defendant.

CLARK, J. The affidavit upon which the motion for a *certiorari* is based avers omission of material evidence in the case as settled by the judge and the affiant's belief that the judge will make the correction in that respect if given an opportunity to do so. The affiant gives as his reason for such belief that the judge has informed his counsel that he had the evidence as taken down at the trial, and that he would furnish the same if the case is again placed before him. The affidavit negatives laches and avers merits. *Peebles v. Braswell,* 107 N. C., 68. This complies with all the requirements of the precedents. *McDaniel v. King,* 89 N. C., 29; *Porter v. R. R.,* 97 N. C., 63; *Lowe v. Elliott,* 107 N. C., 718; Clark's Code (2 Ed.), pp. 549, 553. There was an exception below that there was no evidence sufficient to go to the jury, and a *certiorari* properly lies to bring up the omitted testimony. *S. v. Kennedy,* 89 N. C., 589.

Strictly, the rest of the record should have been filed, if obtainable, and the *certiorari* asked for to complete the record. *Pittman v. Kimberly,* 92 N. C., 562. But no objection is made on that account by the respondent, and the motion is made at the first term.

MOTION ALLOWED.

Cited: *S. c.,* 112 N. C., 192; *Allen v. McLendon,* 113 N. C., 320; *Cameron v. Power Co.,* 137 N. C., 102, 105; *Slocumb v. Construction Co.,* 142 N. C., 352.

(458)

ARTHUR A. GOVAN v. CHAUNCEY D. CUSHING ET AL.

Evidence—Burden of Proof—Factor—Commission Merchant—Negligence.

In an action by a commission merchant doing business in Glasgow, Scotland, against a consignor in North Carolina for balances alleged to be due upon advancements made upon consignments of lumber, the defendant denied the indebtedness, and further alleged that by the plaintiff's negligence and want of diligence the lumber was sold for less than its market value: *Held*: (1) the burden of proving the price for which the lumber was sold was on the plaintiff; (2) that while a factor is bound to act with utmost good faith, and exercise reasonable diligence and skill in the discharge of his duties to his consignor, the burden of showing that there was a lack of such skill and diligence and good faith was on the defendants, there being no circumstances in the case which raised a presumption of negligence.

APPEAL at August Term, 1891, of BUNCOMBE, from *Merrimon, J.*

The plaintiff is a commission merchant residing and doing business in the city of Glasgow, Scotland, and sued the defendants, lumber merchants, residing and doing business in the county of Buncombe, for balances alleged to be due upon advancements made upon consignments of lumber shipped at various dates between January and May, 1889.

The court charged the jury that, as the defendants alleged in their answer that the plaintiff, by his negligence, carelessness, mismanagement and inattention to business as a commission merchant, suffered the defendants' logs to be sold at a lower price than they should have brought, the burden was upon them to satisfy the jury that the plaintiff did, by his negligence or carelessness, or by his mismanagement or inattention to business as a commission merchant, suffer their logs to be sold for a lower price than they should have brought, and that they must satisfy the jury, by a preponderance of evidence. The (459) defendant excepted to this part of the charge, and insisted, that as it was peculiarly within the plaintiff's knowledge whether the logs were or were not sold at a lower price than they should have brought, the burden was upon them, and upon the further ground that plaintiff, being a commission merchant, it was for him to show that he used diligence in the sale of the logs. There was no other exception. There was evidence offered by both parties upon the second issue. *There was no exception to the charge of the court upon the fifth issue.* The defendant moved for a new trial upon the ground that the court erred as above stated. The motion was denied, and defendant appealed.

The other material facts are stated in the opinion of the Court.

Charles A. Moore for plaintiff.

Thomas A. Jones for defendants.

MACRAE, J. It will be observed that the exceptions are directed to the charge of his Honor upon the second issue. The issue was raised by the fourth defense in the answer and the reply thereto. The second to the ninth article of the complaint, inclusive, alleged the receipt upon consignment by plaintiff from defendants of numerous shipments of walnut logs to sell on commission, and the advancement by plaintiff's agent to defendants of specified sums of money on each consignment; the sale of said logs by plaintiff at the best price he could obtain; for sums which, after deducting freight and all proper commissions, charges and expenses, realized to the plaintiff specified sums, much less in each instance than the amounts alleged to have been advanced to defendants upon each consignment, and alleging an indebtedness from defendants to plaintiff for said sums with interest.

The corresponding articles of the answer admitted that the defendants were paid the sums as set out in the complaint, and the consignment of logs as alleged, but denied, for want of information sufficient to (460) form a belief, all other allegations in said paragraphs.

The eleventh article of the complaint alleged that no part of said amounts due by defendants to plaintiff has been paid, and the answer denied these allegations and averred that defendants owed plaintiff nothing.

The issues raised upon these allegations and denials were very properly comprehended in the one issue, No. 5: "Are defendants indebted to plaintiff; and if so, in what sum?" There seems to have been no objection to this issue, and as the charge upon it is not set out in the case and no exception stated to it, we must assume that upon this issue the plaintiff was required to take the burden of proof and offer the jury evidence in support thereof.

The third defense of the answer raises the third issue: "Were the logs of defendants obtained from them by the plaintiff by means of false, fraudulent and corrupt representation?" etc. There was no exception to the charge upon this issue.

The fourth defense raised the second issue: "Did the plaintiff, by his negligence, carelessness, mismanagement and inattention to business as a commission merchant, suffer defendants' logs to be sold at a lower price than they should have brought?"

The defendants contend that the burden was upon the plaintiff upon this issue to disprove the allegation of the answer upon two grounds: First. Because the matter was peculiarly within the plaintiff's knowledge whether the logs were or were not sold at a lower price than they should have brought.

The admitted general rule is, that the burden of proof lies on the party who substantially asserts the affirmative of the issue. An excep-

tion to this rule is, that where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his (461) favor. Bailey's *Onus Probandi,* note, page 2.

The sum for which the plaintiff sold the logs was peculiarly within his knowledge, but it was comprehended in the evidential facts upon which the response to the fifth issue hung. And upon this issue there can be no doubt that the burden was upon the plaintiff, and that he had assumed it.

But upon the second issue the question was not what were the logs sold for by the plaintiff, it was did he negligently suffer them to be sold at a lower price than they should have brought? Given the price at which the plaintiff is alleged to have sold them, was it peculiarly within his knowledge what they ought to have brought in the market at Glasgow? This was a matter susceptible of easy proof; there is nothing of information more open to general knowledge than market prices of commodities in the great commercial ports. The fact that it was at a distance from the defendants could not affect the question, because communication with Scotland and the means of obtaining proofs by deposition is attended with less trouble than they would be with many parts of the United States.

The second ground is that "the plaintiff, being a commission merchant, it was for him to show that he used diligence in the sale of the logs." It may be granted that upon the fifth issue the burden was upon him, upon the allegations of the complaint, to show that he sold the logs for the best price he could obtain, for he would not have been entitled to a verdict upon that issue if he had not satisfied the jury of the truth of his averment.

The rule is "that a factor is required to act with the utmost good faith toward his principal in the discharge of his duties." They must act with reasonable skill and diligence in the business entrusted to them. 3 A. & E. E. L., 330. A case very much like that which we are considering is reported in a note to page 331 of the same (462) book:

"Where an American merchant consigned goods to a London commission house which had a correspondent in America who was authorized to make advances upon such consignments by draft upon the London firm if he would be responsible for all overdrafts, and where this correspondent made advances by drafts upon this London firm to the merchant upon the latter's agreeing to refund all sums in excess of the net proceeds of his consignment of goods, and where the advancements were

so largely in excess, in a suit by the correspondent against the merchant to recover this excess, it was held that if the London firm performed their duties as factors with due care and skill, they have the right to be reimbursed to the full amount of their advances, and they may assert that right against their consignor, giving him credit for the proceeds of his consignment, or against their correspondent upon his undertaking of that liability. And the merchant may be compelled to refund to either of the two other parties, but he can be compelled to make but one satisfaction. If the London firm were guilty of negligence or misconduct by which their consignor sustained loss, their right, as well as the right of their correspondent to recover the excess of advances, is only a qualified one, for the *consignor may rely upon such negligence as a defense* to any claim that either of them could make on that ground."

It is true that "if the circumstances of the case raise a presumption that all has not been regularly performed, whether that presumption arise from positive or negative evidence, then it is incumbent to prove the due performance of the act required." 2 *ibid.*, 654, note. And "where instances of fiduciary relationship exist between plaintiff and defendant, the burden is frequently changed by these circumstances." And in case of an attorney retaining his connection with his client and contracting with him, the attorney is subject to the burden of
(463) proving that no advantage has been taken of the situation of the latter. *Ibid.* But there is no closer fiduciary relation than that between attorney and client. And there has been considerable difference of opinion as to whether a factor who retained the money of his principal was a fiduciary debtor within the meaning of the bankrupt act. See many cases cited on each side in 3 A. & E. E. L., 339. There are no circumstances in this case which make a *prima facie* case against plaintiff, and put upon him a presumption of negligence. The case relied upon by defendant's counsel from our own reports, *Lawton v. Giles,* 90 N. C., 380, was an action upon a tort for negligence in permitting sparks from the chimney of defendant's rice mill to burn plaintiff's house; the burning by sparks from defendant's chimney being proven, it was held that the burden of proving the use of proper care and diligence in exoneration devolved upon the defendants. There is no analogy between these two cases.

NO ERROR.

Cited: Mitchell v. R. R., 124 N. C., 242; *Hinkle v. R. R.,* 126 N. C., 938; *Parker v. R. R.,* 133 N. C., 340; *S. v. Falkner,* 182 N. C. 797.

THE ATLANTIC EXPRESS COMPANY v. THE WILMINGTON AND WELDON R. R. AND THE RICHMOND AND DANVILLE R. R.

Railroad Commission, Powers and Duties of, Under the Act to Regulate Freight and Passenger Rates—Constitution—General Assembly—Court of Record—Penalties—Procedure.

1. The General Assembly may, without delegating its law-making power, establish a commission with authority to fix reasonable rates and tariffs for railroads, prevent unjust discriminations and exercise a reasonable supervision and control in other matters subject to the right of appeal to the courts, and the act of Assembly creating the railroad commission is valid and constitutional.

2. Indictment and prosecution in the courts of ordinary jurisdiction is not the only remedy provided for the infraction of section 4 of the act establishing the commission; section 5 expressly confers upon the commission authority to make rules and regulations to prevent such infraction.

3. The General Assembly has power to confer judicial powers upon the commission under Article IV, section 2, of the Constitution, expressly authorizing the establishment of such courts inferior to the Supreme Court as the Legislature may deem proper, and under Article IV, section 12, it has power to "allot and distribute" the "jurisdiction" of such courts.

4. An act giving authority to the commission to prescribe rules and regulations for the government of railroads, and providing that, upon failure of any railroad company to make full and ample recompense for the violation of such rules and regulations, the commission should be entitled to proceed in the courts, after notice, to enforce the penalties to be prescribed therein, for such violation is valid without providing in detail the methods of procedure.

5. A railroad company is not compelled to furnish express facilities to another *to conduct an express busines over its road* the same as it provides for itself or affords to any other express company. Section 4 of the Commission Act, forbidding discrimination against any other corporation, etc., respecting any species of traffic, is merely declaratory of the common law, and does not enlarge its scope.

6. The refusal of the defendants to provide the plaintiff with the express facilities sought, is no violation of *Rule 8*, adopted by the commission: "No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper to be transported by the train for which it is offered."

7. Discussion by SHEPHERD, C. J., of the rights and duties of common carriers, and of the scope and purpose of the Commission Act, with some suggestions of defects.

THIS PROCEEDING was heard at April Term, 1892, of WAKE, before *Connor, J.*, upon an appeal from the Railroad Commission.

The court rendered the judgment, which appears in the record, and the plaintiff excepted to said judgment and appealed to the Supreme Court.

(465) The pleadings, facts found by commissioners, judgment of commissioners, judgment of court and plaintiff's exception constitute case on appeal.

The plaintiff complains and alleges:

1. That it is a corporation duly incorporated under and by virtue of the laws of the State of North Carolina, passed by the General Assembly at its Session of 1891, under the name of the Atlantic Express Company, by an act ratified March, 1891.

2. That the defendants are corporations respectively, carrying on and conducting a general railroad business for conveying freight and passengers within and beyond the boundaries of the State of North Carolina, duly incorporated respectively, under the names of the Wilmington and Weldon R. R. and the Richmond and Danville R. R.

3. That plaintiff, by its charter, is duly authorized and empowered to receive for carriage and delivery all goods, chattels, wares, merchandise, or things of value whatsoever, and make and enter into any contract for the purpose of procuring the transportation and delivery of the same in the State of North Carolina, or any other state or territory in the Unitd States, as may be allowed by the laws thereof, and to do a general express business.

4. That plaintiff is duly organized under the provisions of its charter, and duly informed defendants of such organization and incorporation, and in pursuance to the objects of its incorporation, and for the transportation of such packages and articles as might be received by it for such purpose, it duly communicated with (by written requests as well as by personal interviews of its agents) the defendants respectively, requesting said railroad companies to furnish it with a car or carriage over its line and rates of transportation, as well within as without the limits of the State, for the shipment of goods within the scope of its organization.

(466) 5. That in response to such requests and appeals, said defendants respectively, unjustly and unlawfully failed and refused to furnish this plaintiff with any car or other facility for transporting its said goods, as well as rates for such transportation, and as reasons for such neglect and refusal, defendants respectively inform this plaintiff: (1) that they have no car, carriage or facility which they could place at the disposal of plaintiff for the purpose named; (2) that they could make no rates for such transportation, for that they had respectively granted the exclusive privilege of such carriage to the Southern Ex-

press Company, and that they had entered into an exclusive contract with such company as to the rates thereof.

6. That said Southern Express Company is a corporation duly incorporated for the purposes of a general express business of like nature and kind in all respects, and of the same particular description of traffic as the plaintiff, as it is advised and believes.

7. That in the manner aforesaid, the defendants respectively have given undue and unreasonable preference and advantage to said Southern Express Company, in the granting of the exclusive privileges and rights as aforesaid, to the unreasonable prejudice of this plaintiff, whereby it is entirely excluded and prevented from effectuating and carrying out the objects and intents of its charter and organization.

Wherefore, it prays that this court will accord it such relief in the premises as in justice and equity it may be entitled to.

The defendant, the Richmond and Danville R. R., in answer to the complaint filed in this proceeding, says:

1. It admits allegation No. 1.

2. It admits allegation No. 2.

3. It denies, upon information and belief, the allegation in No. 3 that it has power "to do a general express business."

4. This defendant, in answer to allegation No. 4, admits that (467) it declined to "furnish a car or carriage over its line, and rates of transportation as well within as without the limits of North Carolina, for shipment of goods within the scope of its organization."

5. It admits that it did refuse to give to plaintiff a car or carriage: (1) because previous to the year 1890, and before the act of the Legislature of North Carolina, chap. 320, commonly known as the Railroad Commission Act, had been ratified, the defendant had entered into a contract with the Southern Express Company, whereby it gave said company "the exclusive right to the express business on its line," which contract, the defendant is advised and believes, it had the power to make, and that the same was not in contravention of any general law or statute of the State of North Carolina, or of any usage which might be recognized as having the force of law. This defendant is further advised and believes that the Legislature of North Carolina has not attempted or intended by any subsequent statute to impair the obligation of this solemn contract, and if it had so attempted, that such statue or law would be in violation of the Constitution of the United States; (2) because it had no express car suitable for the business of the plaintiff, and in the management and control of its business, which is vested, subject to law, in the defendant by its charter, it is advised and believes that it is not bound to incur the expense of purchasing said car.

6. In answer to allegation No. 6, this defendant says it has no knowledge nor sufficient information on which to form a belief so as to categorically answer the same, but is willing to admit that both are express companies with the usual powers appertaining to such companies.

7. This defendant denies allegation No. 7 of the complaint.

8. For further defense, this defendant says: (1) That it is advised and believes that "it performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no (468) duty to the public as to the particular agencies it shall select for that purpose. The public requires the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." Express Cases, 117 U. S. Reports, pp. 24-25. This defendant avers that through the Southern Express Company "reasonable accommodations" for the carriage of express freight over its lines is afforded to the public and individuals. (2) This defendant further avers, that if it were compelled to give express privileges, such as are demanded by plaintiff, to all express companies, it would greatly "interfere with the wants of its passengers" on its passenger trains, to which express cars must necessarily be attached. This defendant is advised that "the express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers." Express Cases, p. 24.

This defendant is further advised and believes, "that there is nothing in any statute of North Carolina which in *positive* terms requires a railroad company to carry *all* express companies in the way that under some circumstances they may be able to, without inconvenience to carry *one* company." Express Cases, p. 27.

That without this positive enactment the duty does not devolve on this defendant to grant transportation over its lines to *all* express companies.

9. This defendant is further advised that the demand of the plaintiff for "a car or carriage over the lines of this defendant, as well within as without the limits of the State," is a matter over which this honorable commission has no jurisdiction. That the State of North (469) Carolina has no jurisdiction, through its commission, to regulate interstate commerce, and has disclaimed such power in section 6 of the Railroad Commission Act.

10. This defendant is further advised and believes, that section 4 of the Railroad Commission Act does not forbid all "preference or advan-

tage," but only such as are "undue and unreasonable," and this defendant says that from the very nature of the plaintiff's demand it is not unreasonable to refuse it. Because, on the same grounds, any other express company might demand a similar "car" until the passenger trains would be loaded down with freight, and the train delayed. That after purchasing expensive cars for these companies, competition would become destructive to them, and the express cars would become idle, and the railroad company would be the loser to the value of the cars. That it would lead to an unseemly scramble among the various express agents at defendant's stations and cause delay to the trains and discord among the operatives and involve the railroad companies in numerous suits for delays and injuries. It would, in fact, compel the railroad companies to refuse to carry any express cars on its passenger trains, and thereby deprive the public of this valuable service.

The demand is impracticable, and its concession would defeat the very object for which express companies were chartered, and greatly inconvenience the public.

The whole question is so ably discussed in all its phases by the Chief Justice of the Supreme Court of the United States in the "Express Cases," that it seems a work of supererogation to enlarge further upon it.

The defendant, the Wilmington and Weldon R. R., answering the complaint filed herein, says:

1. It admits that the allegations contained in paragraph 1 of the complaint are true.

2. It admits that the allegations contained in paragraph 2 of (470) the complaint are true.

3. It is informed and believes that the allegations contained in paragraph 3 of the complaint are true as therein stated, except the allegation that the plaintiff, by its charter, is duly authorized and empowered "to do a general express business," and therefore denies the said allegation.

4. The allegation contained in paragraph 4 of the complaint may or may not be true, but this defendant is not advised as to the organization of said complainant company, and calls for proof thereof if this defendant is to be affected thereby, but this defendant denies that any request was ever made for a car or carriage over its line by said complainant, as stated in paragraph 4.

5. It denies the allegation contained in paragraph 5 of the complaint as therein stated. This defendant never refused to transport over its line any article offered by the complainant. On 22 May, 1891, the secretary of the complainant company wrote the following letter to the superintendent of this defendant:

"We respectfully ask you to give us rates over your roads for the Atlantic Express Company, with messenger service privileges."

To which this defendant, by its president, on 9 June, 1891, made the following reply:

"Your communication to the general superintendent of the Wilmington and Weldon R. R., and to the superintendent of the Petersburg R. R., requesting them to give your company rates over their respective roads, with messenger service privileges, have both been referrd to me. The car space that can be given to the express business on our passenger trains is, of course, limited, and it is now occupied to its full limit by the Southern Express Company."

Further answering the allegations of paragraph 5 of the complaint, this defendant says that prior to the passage of the act of the
(471) Legislature of North Carolina, chapter 20, Laws 1891, commonly known as the "Railroad Commission Act," to wit, in the year 1885, it had entered into a contract with the Southern Express Company, whereby it contracted that, for the promotion of mutual and public interests, all manner and character of freight business, which, in the judgment of this defendant, can with safety be transported on its passenger trains, shall have accommodation thereon, and be in the sole custody and direction of the said Southern Express Company, and that said contract is now in full force and effect, and has been ever since it was entered into in the year 1885. And this defendant is advised that said contract is lawful and of full force and effect, and not obnoxious or repugnant to the Constitution and laws of the State of North Caroline or of the United States.

6. It admits that the Southern Express Company is a corporation duly incorporated for the purpose of a general express business.

7. It denies the allegation contained in paragraph 7 of the complaint.

Wherefore, it prays to be hence dismissed with its reasonable costs, etc.

This cause, coming on upon the pleadings, the judgment of the Railroad Commission of North Carolina, and the defendants' exceptions thereto, and the court being of opinion that the defendants were not required under the common law, or under the requirements of The Code, secs. 1963 and 1964, or under the provisions of a law establishing a railroad commission, or under the rules and regulations of the commission, to furnish to the plaintiff company the facilities demanded in the complaint. (The other questions arising upon the pleadings and exceptions not being considered by the court).

Hereupon it is ordered and decreed that the action be dismissed, and that the defendants recover of the plaintiffs their costs and disbursements, to be taxed by the clerk.

A copy of this order must be certified to the Railroad Com- (472) mission. Notice of appeal by plaintiff accepted. Bond fixed at fifty dollars. Pleadings, judgment and exceptions constitute case on appeal. Time given plaintiff to file bond.

O. H. Guion and W. W. Clark for plaintiff.

A. W. Haywood and F. H. Busbee for defendants.

SHEPHERD, C. J. Although we are of the opinion, for the reasons hereinafter stated, that the particular relief asked for in this proceeding is not authorized by the provisions of what is known as the "Railroad Commission Act," still we do not feel at liberty to ignore the important question of jurisdiction suggested in the answers of the defendants and the arguments of counsel. The question is a serious one, and involves in a great measure the efficiency of the legislation designed for the "supervision" of railroad companies, and other common carriers, in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations and preferences, and the regulations of other matters pertaining to transportation within the State in which the public is deeply interested. That the Legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes is too well settled to admit of discussion (*R. R. v. R. R.*, 104 N. C., 673; *R. R. v. Iowa*, 94 U. S., 155; *R. R. v. Richmond*, 19 Wall., 584), and it is equally well settled that in delegating such authority to a commission it does not transcend its constitutional powers. *Stone v. Trust Co.*, 116 U. S., 307; 19 A. & E. Laws, 686, and the numerous authorities cited in the notes. "The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great, and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst (473) the latter would not. *R. R. v. Smith*, 9 A. & E. R. R. Cases, 385.

A careful scrutiny of the Act of Assembly constituting a "Railroad Commission" (Laws 1891, chap. 320), fails to disclose a purpose to confer upon that body anything in the nature of legislative power. The act, among other things, denounces excessive charges, unjust discriminations and preferences as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing" the same—the reasonableness and legality of such rules and regulations being reviewable by the courts. This power, as we have just seen, may be delegated to a commission, and any objection on that ground is therefore untenable.

It is insisted, however, that the commission has no jurisdiction to entertain and pass upon complaints made in respect to the violation of the provisions of section 4, and perhaps other sections of said act. That section declares that all unjust discriminations and preferences shall be unlawful, and it is urged that the only remedy provided against its infraction is by indictment, to be prosecuted in a court of competent jurisdiction. It is very plain to us that the contention is without foundation, as in section 5 the authority of the commission to make rules and regulations for the prevention of these very acts is expressly conferred. The subjects embraced in section 4 are perhaps the most important that are confided to the regulation of the commission, and without reference to the plain language of the act, it is hardly to be supposed that the Legislature intended to insert therein a merely penal provision entirely independent of and unconnected with the duties imposed upon that body.

(474) Neither is there any force in the argument that the Legislature cannot confer judicial powers upon the commission, as the Constitution (Art. IV, sec. 2) expressly authorizes the establishment of such courts inferior to the Supreme Court as the Legislature may deem proper; and it is to be observed that the commission has been "created and constituted a court of record" with all the "powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating" the same. Acts 1891, chap. 498.

Whether a court, having no power to enforce its judgments, fulfills the definition of a court of record and of general jurisdiction, is unnecessary to be considered. It is sufficient to say that the Legislature has the authority to establish courts inferior to the Supreme Court, and to "allot and distribute" its jurisdiction "as it may deem proper." Const., Art. IV, sec. 12. The question, then, is simply whether the power to hear and determine complaints of this character has been conferred, and this is easily solved by a perusal of section 10 of the said act, which is as follows: "That if any railroad company doing business in this State by its agent or employees shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ... ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than fifty dollars nor more than five thousand dollars, to be fixed by the judge of the court in which such action shall be tried. An action for the recovery of such penalties shall lie in any county of the State where such violation has occurred or wrong has been perpetrated, and shall

be in the name of the State of North Carolina. The commissioners shall institute such action through the Attorney-General or Solicitor of the Judicial District in which the violation has occurred," etc.

It must be noted that the present proceeding is not an action instituted by the commissioners for the enforcement of penalties; nor is it, as suggested, an ordinary civil action for the recovery of damages as is provided in section 11 of the act. It is brought for (475) the purpose of seeking *"ample and full recompense"* for the alleged *"wrong and injury"* done the complainant. The act looks beyond the mere infliction of a penalty for the violation of a rule or regulation, and evidently provides for specific redress in the premises. This redress is to be *"directed by said commissioners" upon due notice* to the party complained of, and it is difficult to understand how the proper measure of relief can be ascertained except by examination of testimony. The necessary conclusion, therefore, must be that the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred.

No summons was issued in the present proceeding as in civil actions, but upon a complaint being filed the defendants were notified to "satisfy the complaint or answer the same" within thirty days. After hearing the testimony, the commission declared in effect that the rule and regulation made pursuant to the law had been violated, and that "ample and full recompense" should be made by providing the complainant with the facilities mentioned in the order. It is insisted that as no procedure is provided, the commission has no authority to make an order of this character. It is true that no particular rules of practice are prescribed, but the power to rehear and determine upon notice is, as we have seen, expressly given, and all necessary means are provided for the conducting of any inquiry which it is the duty of the commission to make. Provision is made for the service of notices, the attendance of witnesses, and the punishment of contempts, and the rules of evidence are declared to be the same as in civil actions. It is also provided that there may be an appeal, "as in other cases of appeal," from "all *decisions or determinations* arising under the operation or en- (476) forcement" of the act. We cannot hold that with all of these facilities provided by law a power expressly granted to hear and determine is to be denied because the particular form of the complaint, or the manner in which the proceeding is to be entitled, or some other immaterial matter of detail, is not particularly prescribed. Besides, such details may well be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon them. 4 A. & E., 450, and the cases cited.

It must be admitted, however, that in many respects the act is singularly obscure and confused. It bears the impress of hasty legislation, and seems to be composed of parts of other acts of a similar character, united with but little regard to order or perspicuity. Its amendment, in many particulars, may well be considered by the law-makers. Among its defects we find the strange omission of any provision in section 10 as to the effect to be given to the determination of the commissioners, in an action brought in the Superior Court for the enforcement of the penalties prescribed. Whether, in the absence of an appeal, such a determination is conclusive, or whether it simply amounts to a *prima facie* case, are questions left in very great doubt. This, however, cannot affect the right to hear and determine what recompense shall be made to an injured party. The power is expressly conferred, and it is the duty of the commission in all proper cases to exercise it. The effect of such a determination, when brought before the courts, is quite another thing. We are, therefore, of the opinion that the commission has ample authority to entertain and pass upon complaints for a violation of any rule or regulation respecting the matters embraced within section 4 of the said act.

Having disposed of the question of jurisdiction, we will now inquire whether the present complainant is entitled to the particular re-
(477) lief which it seeks in this proceeding. It must be borne in mind, in considering this case, that there is no complaint that the public, that is, the demands of persons who desire to ship express freight, are not fully met and supplied. The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. That this is a proper statement of the question is apparent from the application of the complainant and the findings of the commission. It distinctly appears that the complainant made no actual tender of any article of freight to be transported by the defendants, but that it demanded "rates and facilities for *conducting* an express business over their roads in this State," and that each of the defendants "should furnish it with a car or carriage over its respective lines, and rates of transportation as well within as without the limits of the State, for the shipment of goods within the scope of its organi-

zation." It is not insisted that the defendants have ever held themselves out as common carriers of express companies, "that is to say, as common carriers of common carriers" (Express Cases, 117 U. S., 1), and the chief point to be determined is whether, in the absence of such a usage, the law imposes a duty of that character upon them. It is contended that such a duty is imposed by the following provision of section 4 of the act constituting the commission: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or (478) advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

We are of the opinion that the foregoing provision does not change or enlarge the common law duty which the defendants owe the complainant. That constitutional provisions, in almost the same language, have been construed but as declaratory of the common law, is shown by various authorities.

The constitution of Colorado declares "that all individuals, associations, etc., shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State."

The constitution of Kansas provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, and no railroad company shall make any discrimination or preference in furnishing cars or motive power."

The constitution of Arkansas provides "that all individuals and corporations shall have equal rights to have persons and property transported over railroads, . . . and no undue or unreasonable discrimination shall be made in charges or facilities in transportatoin."

The constitution of Missouri provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either by abatement, drawback or otherwise, and no railroad company . . shall make any preference in furnishing cars or motive power."

In speaking of these constitutional provisions, *Waite, C. J.,* (479) says: "These provisions impose no greater obligations than the common law would have imposed without them." *R. R. v. Devon,* 110 U. S., 667. This high authority settles the question that our Railroad Commission Act does not extend the common law duty; and it therefore

becomes material to inquire whether, at common law, the defendants owed the complainant the duty sought to be imposed in this proceeding.

The Supreme Court of the United States, in the Express Company cases (*supra*), has answered the question. It declares that "in the absence of some special statute, there is no law which requires railroads to furnish express facilities to all express companies which may demand them." It must be noted that these cases came from the states of Colorado, Kansas, Arkansas and Missouri; and it is in the light of the constitutional provisions above quoted that this and the following language of the chief justice is used: "The railroad companies perform their whole duty to the public at large and to each individual when it affords the public all reasonable express accommodation. If this is done, the railroad company owes no duty to the public, as to the particular agencies it shall select for that purpose. The public requires the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." . . . "The Constitution and laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which, in positive terms, requires a railroad company to carry all the express companies in the way that, under some circumstances, they may be able, without inconvenience, to carry one company. . . . In some of the states statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish
(480) equal facilities to all express companies (as in Maine and New Hampshire), but these are of comparative recent origin, and thus far seem not to have been generally followed."

In view of the foregoing authorities we are of the opinion that so much of the order of the commission as determines that "the refusal of the defendants to grant to the plaintiff facilities for conducting an express business was a violation of the terms of said act," is not warranted by the statute under consideration.

The judgment of the commission, however, also declares that the defendants have violated Rule 8 of the "regulations concerning freight rates." The rule is as follows:

"No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper for transportation by the train for which it is offered."

We are unable to see, that in view of the facts found, there has been any violation of this rule. No duty is imposed by the rule upon any railroad company, but it merely prohibits the refusal to perform a duty

by reason of any contract with an express or other company. We have seen that the defendants did not owe any duty to act as a "common carrier of express companies." Had they owed such a duty we are very sure that they could not have avoided its performance because of their having made an exclusive contract with the Southern Express Company. We do not think, however, that the rule applies to this case. The defendants have not refused to act as a common carrier, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying on an express business upon their roads, and this we have seen they had a right to do. In this refusal they were not guilty of making any discrimination or preference within the Act of the Legislature. As we have seen, the Supreme Court of the United States has said that they are under no obligation to carry another company, and the mere fact that they are carrying another com- (481) pany does not amount to an unjust or unreasonable preference.

It is the duty of the defendants to carry express matter, but they may carry it themselves or employ competent agencies for that purpose. Express Co. Cases, 29 A. & E. R. R. Cases, and the authorities cited in the notes. The Supreme Court of the United States, in deciding the cases just referred to, stated that "Railroad companies are, by law, carriers of both persons and property. Passenger trains have, from the beginning, been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness, dispatch and comfort to the passengers. The express business on passenger trains is, in a degree, subordinate to the passenger business, and it is, consequently, the duty of a railroad company, in arranging for the express, to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the condition on which it will be occupied. The space that can be given to the express business on a passenger train is, to a certain extent, limited. . . . If the general public were complaining that the railroad companies refused to carry express matter themselves on their passenger trains, or allow it to be carried by others, different questions would be presented." The same remark is applicable if the agencies adopted by the railroads (in this case the Southern Express Company), are not affording the public sufficient facilities. It is further to be observed that the power to fix rates and tariffs for such agencies is conferred upon the commission by section 13 of the Act. We will also observe that if the defendants had held themselves out as common carriers of express companies, they would have been guilty, in this case, of discrimination, or the giving of a preference, and, therefore, subject to the regulation of the commission, had that body declared such

(482) discrimination or preference, under the circumstances, to have been "unjust" or "unreasonable."

In view of the facts found by the commission, and of the high authority we have cited, we are of the opinion that the defendants have violated no duty imposed by the law. If other duties are to be imposed, it must be by further legislation, and not by the courts. "To what extent it must come, if it comes at all from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract, or by statute, the Court cannot be called upon to give it effect." Waite, C. J., 117 U. S., 1 to 34.

The judgment below is

AFFIRMED.

Cited: Mayo v. Tel. Co., 112 N. C., 345; *Comrs. v. Tel. Co.,* 113 N. C., 220; *Leavell v. Tel. Co.,* 116 N. C., 220; *Caldwell v. Wilson,* 121 N. C., 472, 474; *Pate v. R. R.,* 122 N. C., 880; *Hendon v. R. R.,* 125 N. C., 128; *Corporation Commission v. R. R.,* 127 N. C., 288; *Henderson v. Traction Co.,* 132 N. C., 787; *Corporation Commission v. R. R.,* 137 N. C., 15; *Industrial Siding Case,* 140 N. C., 240; *S. v. R. R.,* 141 N. C., 852; *Corporation Commission v. R. R.,* 170 N. C., 569; *Public Service Co. v. Power Co.,* 179 N. C., 40; *S. v. Dudley,* 182 N. C., 825.

J. C. MASON v. THE RICHMOND AND DANVILLE R. R.

Railroads—Negligence—Injury to Employees—Fellow-Servants—Waiver of Injury—Waiver of Regulations.

1. A rule of a railroad company agreed to by the plaintiff (an employee), may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order.
2. The conductor is not a fellow-servant of a person employed in coupling cars.
3. When acting under the order of the conductor, but contrary to a rule of the railroad company to which he had assented, the plaintiff was injured in coupling defective cars, of which defect he had no notice until it was

too late to escape: *Held*, that the court erred in withdrawing the case from the jury on the ground that plaintiff, upon such facts, could not recover.

4. Discussion by AVERY, J., of the law of negligence in injuring employees, and of injury by fellow-servants.

SHEPHERD, C. J., concurring; BURWELL, J., dissenting.

ACTION brought by plaintiff against the defendant for damages, as is alleged in the complaint, for personal injuries done him while in the employment of defendant as a brakeman, and heard before *Boykin, J.*, at February Term, 1891, of GUILFORD.

J. A. Barringer for plaintiff. (486)
D. Schenck for defendant.

AVERY, J. The court below held that, upon the whole evi- (487) dence, the plaintiff had failed to make out a *prima facie* case. The burden was upon the servant suing his employers to show, (1) that the machinery was defective; (2) that the defects were the proximate cause of the injury; (3) that the master had knowledge, or might, by the exercise of ordinary care, have had knowledge of such defects. *Hudson v. R. R.*, 104 N. C., 491. The question presented by the appeal, therefore, is whether, in any aspect of the evidence, the plaintiff has relieved himself of the *onus probandi* imposed upon him by law.

The first point to be considered is whether the defendant company was negligent in failing to provide what is known as the Janney, or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another. The general rule is that it is not the duty of railway companies to furnish machinery of the very best varieties or to attach appliances of the latest and safest kinds, but that it is culpable to use cars or engines of any particular pattern which, on ordinary inspection, would show to be defective. In view of the changes incident to new inventions and discoveries, facts which would not have shown negligence a few years since, may now, or in the near future, be declared in law ample evidence of culpable dereliction in duty, such as involves liability for damages. 1 Shearman and R. Neg., sec. 12. *Blackwell v. R. R., ante*, 151. We think that the time has arrived when railroad companies should be required to attach such couplers, and perhaps air brakes or appliances equally safe and effective for checking the speed of moving trains on all passenger cars, since, as a rule, each corporation uses for carrying passengers none but its own conveyances, and the new couplers have now become so cheap, as compared to the value of

the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for
(488) any damage which might have been obviated by their use. But, while doubtless the day will soon come when they can be attached at comparatively small cost to all freight cars, it might seriously embarrass our commerce, involving an interchange for the purpose of expeditious transportation of vehicles between all the roads from Canada to Mexico, were every carrier required not only to incur the expense of buying the right and readjusting all of its own cars for the use of the improved fastening, but also to choose between refusing to receive a car of another company without incurring contingent liability for using it, since the liability of the corporation for such defects in those received from other companies is the same as for defects in its own. Patterson R. R. Acc. Law, 312; *Miller v. R. R.*, 99 N. Y., 657; *Jones v. R. R.*, 92 N. Y., 628.

It appears from the evdience, that the plaintiff was suddenly called upon a very dark night to couple to the train two box cars, standing upon the siding at Durham, one of which belonged to the defendant and another to a different company, and that when the train backed towards the train on the siding, he saw that the pin which he had adjusted with a stick in the drawhead of the car standing on the track would not go down into the link of the drawhead in the moving car, which he had also arranged with his stick, unless he should use his hand to push it down, and in this emergency he rushed in between the cars, as the conductor had ordered him to do whenever he failed in the effort to couple with a stick. After geting between the standing and the moving car he discovered for the first time that there were no bumpers on either car. Bumpers are blocks of wood fastened to the end of a box car, above and below, and on either side of the drawhead, and usually protrude about eight or ten inches, so that they serve the double purpose of preventing drawheads from being broken by
(489) a collision, and of protecting brakemen who may be between the cars. Drawheads have springs in them and give way when they come into collision with each other, so that they cannot serve the purpose, like bumpers, of holding the cars apart.

In *Gotlieb v. R. R.*, 100 N. Y., 467 (where the facts were that a brakeman was injured in coupling two cars belonging to another company, the bumpers being only three inches long), the Court said: "The defendant was under obligation to its employees to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars and machinery for the discharge of their duties. . . . The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the *grossest negligence* to put such

cars into any train and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies and came to it loaded, and it was drawing them over its road. . . . It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. . . . When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employees. The employees can no more be said to assume the risk of such defects in foreign cars than in cars belonging to the company. . . . The defect here complained of was obvious, easily discoverable by the most ordinary inspection, and it seems it could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars, so as to give the bumpers sufficient width to afford the protection needed and intended."

The case being exactly in point, it seems not inappropriate to (490) reproduce the language of *Judge Earl* from this elaborate opinion, instead of discussing the same question at greater length for ourselves. The general rule is, that when freight cars are obviously so defectively made, whether by a failure to attach bumpers at all or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects. *R. R. v. Fredericks,* 71 Ill., 294; *R. R. v. Jackson,* 55 Ill., 492; *Wedgewood v. R. R.,* 51 Wis., 478.

In *Gotlieb's case, supra,* it will be observed that stress was laid upon the fact that the want of a bumper would have been discovered by an ordinary inspection, and in our case, as well as in that, the brakeman was suddenly called upon to pass between two cars, of the condition of which he could not have previously informed himself. Before daylight on a dark morning the duty devolved upon him of attaching a car, which, it may be, was never south of Wilmington until brought by some freight train with which plaintiff had no connection on the day before to the station where he found it.

In *Johnson v. R. R.,* 81 N. C., 453, where the injury to the plaintiff was caused by a defective rod which he had no reasonable opportunity to inspect, *Chief Justice Smith,* speaking for the Court said: "Had the proper examination been made by the defendant, and the rod repaired and strengthened, the accident would not have occurred, and hence it must be ascribed to the defendant's own dereliction of duty.

The fault lies with the company and it must bear the consequences." The defendant ought to have examined its own car, and, upon discovering its condition, bumpers could have been placed upon it at comparatively trivial cost, and the same duty of inspection devolved
(491) upon it when the other car was tendered to it, but upon examination it had the option, as will appear from the authorities already cited, of refusing to receive it at all, or of repairing it, so as to make it safe, after it was received.

So, apart from the special contract which is pleaded as a defense, the defendant is *prima facie* liable to answer in damages because of its negligence, when its officers ought to have known of the defect and to have remedied it, and it has not relieved itself of this apparent liability by showing that the plaintiff knew or had opportunity to know the condition of the particular cars on the siding; but, on the contrary, the only testimony on the subject is that of plaintiff, to the effect that he did not see the cars till he had put himself in danger, and then in the imperfect light discovered that there was no bumper on either of those between which he was already caught. *Crutchfield v. R. R.*, 76 N. C., 322; *Pleasants v. R. R.*, 95 N. C., 195; Shearman & R., secs. 92, 94, 95; Cooley on Torts, 561. Leaving the agreement, designated as Exhibit "A," out of view, if there is any testimony tending to show contributory negligence, there was certainly no admitted state of facts which justified the court in withdrawing the case from the jury, and holding that, in any aspect of the evidence, the injury was caused by the fault of the plaintiff. In *Crutchfield's case, supra,* it was expressly declared, that though the servant assumed the risks of accident, incident to his service, he did not contract to excuse the negligence of the company, unless he knew of the danger to which he was exposed by its want of care, or might by reasonable diligence have known of it, and failed to give notice to his employer so that the defect might be remedied.

The case at bar is not one in which the plaintiff was injured by the fault of a fellow-servant, but by the negligence of the master in carelessly retaining on the line and receiving from other carriers
(492) palpably defective conveyances, the master being presumed to know of the danger, which could have been discovered by ordinary inspection, while the servant had no opportunity to know until it was too late to avoid it. The dangerous condition of the car was not, as in *Pleasant's case, supra,* known to both employer and employee, but only to the former. Where the rolling stock or machinery of a company is so defective in its construction, that by an ordinary inspection the company could discover its condition, unless it appear that notwithstanding such want of care on its part the supervening negligence of the servant was the proximate cause of the injury complained of, the com-

pany is liable. *Wedgewood v. R. R., supra; Hudson v. R. R., supra; R. R. v. Valenous,* 56 Ind., 511; *Gotlieb's case, supra.* Another case precisely in point is *King v. R. R.,* 8 A. & E. R. R. Cases, 119, in which *Judge Gresham,* of the Circuit Court, held that a brakeman, in coupling cars, had a right to assume that they are in good and safe condition, and is not negligent in running between cars without stopping to examine and see whether the drawheads are properly adjusted or not. No more is it his duty to examine bumpers on a dark night before essaying to couple cars.

The cars being palpably defective, and it appearing plainly that the company might, by ordinary care in inspecting them, have known their condition, the defendant still insists that, though the plaintiff may not have been negligent in knowingly incurring risk that he might have avoided, still he was violating a rule of the company of which he had express notice when he passed between the cars to adjust the coupling, and his want of care was therefore the cause of the injury. The authorities which we have cited fully sustain the position that, in the absence of such an agreement, the company would be deemed negligent and the plaintiff would be held free from blame. In addition to those authorities, we can fortify our position more strongly still by recurring to the principle that, notwithstanding any real or supposed negligence of an injured plaintiff, a railway company is liable in (493) damages if, but for its own want of care, the injury could have been avoided. *Deans v. R. R.,* 107 N. C., 686; *Clark v. R. R.,* 109 N. C., 430. If, therefore, we were to concede that the plaintiff was culpable in exposing himself to danger, the carelessness of the defendant would nevertheless be deemed in law the proximate cause of the injury.

Mr. Beach, citing with approval 71 Ill., 294, *supra,* says: "But when the cars are so constructed, the bumpers being of different heights, or being, in any respect, so made that the slightest indiscretion of the operative will prove fatal to him, it has been held that when the injury results from such causes the company is liable." But the case of *Cowles v. R. R.,* 84 N. C., 309, it would seem, is so strikingly analagous as upon principle to be decisive of that at bar. If, then, the company was held to be wanting in ordinary care because the cars provided did not so fit each other that the bumpers would keep them apart and prevent collisions, it would seem, where the failure to place any bumpers at all on cars is the proximate cause of a collision in which a brakeman is injured, there would be still more palpable proof of negligence. *Justice Ruffin* stated the fact to be, as appeared from the plaintiff's testimony on the trial, "that the brakeman was under the immediate direction and order of one Garrison, who was the engineer and conductor of the defendant's freight train," and that while executing the order of the

conductor, as in our case, the brakeman "was injured in the manner complained of, by a collision of two cars, which collision resulted from the fact that the cars were so constructed that their bumpers did not correspond or fit one another, as they should have done in order to prevent the cars coming in too close contact, which defect was unknown to plaintiff, and but for which he would not have been injured." This Court held that the defects in the cars were such as to establish negligence on the part of the defendant because the defect was so
(494) obvious as to be seen on inspection, and to make it incumbent on the company to show that some subsequent carelessness of the plaintiff was the proximate cause of the injury. The statement as to the relations of the conductor and brakeman was much more meagre, it is true, than in *Patton v. R. R.*, 96 N. C., 455, since there the superior, discharging himself the double duties of conductor and engineer, was expressly shown to have the power to employ and discharge the laborers subject to his orders.

The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakemen on his train, is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher official than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior, as it is a matter of universal knowledge is the true state of facts on all railroads, is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to couple cars in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency and discharged from the service of the company? If the servant acts upon a well grounded fear of losing his place, the reason of the rule would be met, and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to manifest peril, or chose to subject himself to danger, when another safe mode of discharging his duty was open to him, as in *Chambers v. R. R.*, 91 N. C., 475.
(495) The elaborate opinion of *Justice Field* in *R. R. v. Ross*, 112 U. S., 377, in which he reviews the question, Who are servants engaged in a common employment?—in the light of all the previous decisions in America and England—contains the clearest and most philosophical discussion of the subject to be found in any authority to which we have had access. He announces the conclusion of that Court as fol-

lows: "A conductor, having the entire control and management of a railway train, occupies a very different position from the *brakemen,* the porters and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders. . . . We know from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned."

"The true view," says Wharton (Law of Negligence, sec. 232) "is, that as corporations can only act through superintending officers, the negligence of those officers, with respect to other servants, are the negligences of the corporation." The command of the conductor to the brakeman to go between the cars when he could not couple them otherwise, was one to which unhesitating obedience was expected and demanded. The giving of such an order by the conductor ought, upon the plainest principles of right and justice, to be declared a waiver of the regulation by an officer who is the representative of the corporation. That a brakeman feels impelled to obey the orders of the conductor, no observant person can deny; and since we can take judicial notice of a relation so common and well understood, it would be a voluntary (496) preference of fiction to fact were we to adhere to an arbitrary rule founded in a supposed reason that we know does not exist. A brakeman does not contract to incur the risk of serving under a conductor who will order him to disobey the regulations of the company and leave him to choose on the instant between observing the rules and obeying his superior.

The Supreme Court of Georgia, in *R. R. v. Delroy,* 71 Ga., 406, held that while neither a conductor nor any other officer had a right to order an employee to get on or off a moving train, and the employee was not bound to obey it, yet where the conductor did give the order and the brakeman obeyed it, the act of the conductor was the act of the corporation, and the corporation could not escape responsibility for its own wrong. The Court held in that case that it was immaterial what the rules of the company were, and so, in our case, where the brakeman was ordered to jump between cars instead of from the top of the car, the same principle should prevail.

The Supreme Court of South Carolina held, in *Boatwright v. R. R.,* 25 S. C., 129, that "the conductor of a train is the representative of

the company and not a fellow-servant with other employees operating the same train under his orders." That case was exactly in point, as the conductor had ordered the brakeman to go between cars because of uneven couplers on freight cars. The same principle is decided in *Coleman v. R. R.*, 25 S. C., 446. It has been repeatedly held that an engineer in charge of a train (discharging the duties usually devolving on a conductor in addition to managing the engine) is not a fellow-servant of a brakeman. *R. R. v. Brooks,* 83 Ky., 129. The American rule, as distinguished from the English, is that a servant entrusted with the general management of the master's business, or of employees in a particular department, or on detached service in charge of the train
(497) or body of laborers is not a fellow-servant of those who are employed under him and subject to his orders. *Augusta Factory v. Barnes,* 72 Ga., 217; *Dowling v. Allen,* 74 Mo., 13; *Chicago v. May,* 108 Ill., 288; *Chicago v. Lundstron,* 16 Neb., 254; *R. R. v. Crockett,* 16 N. W. Rep., 921; Shearman & Red. Neg., sec. 226.

It will be conceded that though the owner and manager of a manufacturing establishment should make a rule and cause every employee to sign it, to the effect that the employee would not pass between certain machines, go into an engine-room, or expose himself to any specified danger connected with the machinery of the mill, and would hold the owner discharged in advance for any liability growing out of such exposure, yet if the manager should, in the face of the rule, order the servant who signed it to disobey it, and his obedience to orders should expose him to a danger caused by defects in the machinery that on an ordinary inspection would have been obvious to the master, though not so readily discoverable to the servant acting instantly on the order, it would scarcely be contended that the superior who had made the regulation would not thus waive its observance. A corporation is usually governed by its directors, but they may shift its responsible management by such a variety of orders, by-laws and regulations as to make it impossible to discover a real tangible directing head. If, as authority and reason clearly dictate, we consider a conductor in charge of a train as representing the intangible head of the company, then his order is as much a waiver of the regulation as that of the owner or head of a mill.

But speaking for a minority of the Court only, it seems that there should be but little difficulty in arriving at the same conclusion by the solution of another question, to wit, whether, in consideration of receiving employment, a brakeman can by written agreement "waive the liability" of the company incurred by furnishing cars without bumpers and which cannot be coupled with a stick, in the event
(498) that he shall be injured in the attempt to fasten the couplings

of such cars, under the command of the conductor in charge of the train, with his hands instead of using his stick, as the rule of the company requires, and when the injury is due to the negligence of the company. It is settled as the almost universal rule in America, that though a common carrier of freight by contract upon consideration may relieve itself of the full measure of responsibility as an insurer, no limitation can in that way be placed upon its liability for its own negligence. *Smith v. R. R.*, 64 N. C., 235; 4 Lawson on R. R., sec. 1840; Lawson on Contracts of Carriers, secs. 29 to 67. The same rule applies to agreements made by common carriers of passengers purporting to restrict their liability for injuries caused by their own negligence. Such contracts are void as against the public policy of the law. 4 Lawson, *supra,* sec. 1913. This stringent rule of liability is said to rest upon the duty of the government to give unrestricted protection to the lives and limbs of its citizens. Lawson on Contracts, *supra,* secs. 212-220. It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence even when it causes death, and it has been so held, as far as our investigations have extended, in all of the courts except the Supreme Court of Georgia. *R. R. v. Sprague,* 44 Ohio St., 471; *R. R. v. Peary,* 29 Kan., 169; *R. R. v. Eubanks,* 48 Ark., 460; *R. R. v. Jones,* 2 Head., 517; *Roesner v. Hearman,* 10 Miss., 486; 1 Lawson on R. R., sec. 318. It is difficult to draw a distinction between contracts affecting only the safety of goods or animals, or those affecting the lives and limbs of passangers, and those which vitally concern another large class of human beings. If public policy prohibits the recognition of the validity of a contract limiting liability for a paying passenger, or, as most authorities in this country maintain, even one riding on a free pass, upon what principle can the courts refuse to extend the same protection to a class of people who are much more exposed to danger, and much more liable to be influenced (499) to sign such agreement?

For the reasons given, we think that the court below erred in holding that the plaintiff could not recover. This case should have been left to the jury, and the judgment of nonsuit will be set aside and a new trial granted.

REVERSED.

BURWELL, J., dissents.

SHEPHERD, C. J., concurring. I concur in the conclusion reached by the Court, but not on the ground that the regulation in question was an

unreasonable one. It was not a stipulation against negligence, in the ordinary sense of the term, and as long as it remained in force the defendant did not owe to the plaintiff the duty of providing bumpers for its cars. The essential element of negligence is a breach of duty, but, in order to recover, it is not enough for the plaintiff to show a simple breach of duty, but he must also show that the *defendant owes the duty to him.* 1 Shear. & Red. Neg., sec. 8; Beach on Cont. Neg., sec. 6; *Emry v. Navigation Co., ante,* 94.

In the decisions cited, where a recovery was had for negligence in not furnishing bumpers, there was either no regulation like that in present case, or such regulation had been waived. I cannot understand how it was the duty of the defendant to provide against an accident which could not possibly have happened but for a violation of its reasonable regulations. However negligent, then, as to others, the defendant may have been in not seeing that the cars were provided with bumpers, such negligence was not actionable by this plaintiff if his injuries were caused by his disobedience of an existing regulation (known and agreed to by him) *forbidding him from going between the cars under any* (500) *circumstances for the purpose of coupling, etc.* The evidence, however, tended to show that there was a waiver of the regulation by the conductor in charge of the train, and, in view of the authorities cited, and the convincing reasons given in the opinion, I think that such a waiver was, for the purposes of this action, binding on the defendant. It is upon this ground that I concur in the disposition made of the appeal.

MACRAE, J., concurring in the opinion of the Chief Justice.

Cited: S. c., 114 N. C., 721; *Russell v. Monroe,* 116 N. C., 728; *Shadd v. R. R., ib.,* 970; *Chesson v. Lumber Co.,* 118 N. C., 66; *Turner v. Lumber Co.,* 119 N. C., 397; *Purcell v. R. R., ib.,* 737; *Williams v. R. R., ib.,* 749; *Whitsett v. R. R.,* 120 N. C., 560, 562; *Pleasants v. R. R.,* 121 N. C., 496; *Greenlee v. R. R.,* 122 N. C., 978; *Troxler v. R. R.,* 124 N. C., 191; *Leak v. R. R., ib.,* 457; *Means v. R. R.,* 126 N. C., 429; *Ward v. Odell, ib.,* 954, 955; *Bryan v. R. R.,* 128 N. C., 390; *Elmore v. R. R.,* 131 N. C., 579; *Fleming v. R. R.,* 132 N. C., 719; *Elmore v. R. R., ib.,* 878; *Lamb v. Litman, ib.,* 980; *Hicks v. Mfg. Co.,* 138 N. C., 335; *Liles v. Lumber Co.,* 142 N. C., 42; *Whitfield v. R. R.,* 147 N. C., 240; *Dermid v. R. R.,* 148 N. C., 194; *Beal v. Fiber Co.,* 154 N. C., 155; *Rogers v. Mfg. Co.,* 157 N. C., 486; *Fry v. R. R.,* 159 N. C., 361, 364; *Hollifield v. Tel. Co.,* 172 N. C., 724.

ROAN MOUNTAIN IRON AND STEEL COMPANY v. O. B. D. EDWARDS.

MOTION heard at Spring Term, 1892, of MITCHELL, by *Bynum, J.*

The plaintiff moved for judgment against the defendant; motion refused, the court being of opinion that the judgment of the Supreme Court directed a new trial. To this ruling of the court the plaintiff excepted. The plaintiff moved to try. Defendant said he was not ready. The plaintiff insisted that a trial only can be had on the facts already agreed. The defendant insisted that he was entitled to an additional finding as to the location of the land in controversy, and the court being of opinion that that course was intimated by the Supreme Court, continued the cause that there might be a new trial in regard to that matter, and refused to give judgment, from which plaintiff appealed.

W. H. Malone for plaintiff.
No counsel contra.

PER CURIAM: When this case was before us on a former occa- (501) sion (110 N. C., 353), we held in effect that, upon the case agreed, the plaintiff was entitled to recover; but at the conclusion of the opinion it was stated that there should be a new trial. His Honor therefore was well warranted in ruling as he did.

Upon further consideration, we think that a new trial should not have been ordered, but that this Court should have directed that a judgment be entered for the plaintiff in the court below.

REVERSED.

J. B. HOUSER v. P. C. BEAM.

Trial—Argument of Counsel—Evidence.

1. Irregularity in the manner of the introduction of testimony will not warrant a new trial, unless it appears that the appellant was prejudiced thereby.

2. It is the duty of the court to stop counsel in comments which are not warranted by the evidence.

ACTION to recover back the sum of $500, which the plaintiff alleged he had paid over to one Humphreys for the benefit of defendant Beam, tried at Spring Term, 1892, of GASTON, by *Bynum, J.*

The plaintiff was at the time acting as agent of the express company at Cherryville, North Carolina, and claimed that he delivered a package of said amount to Beam for Humphreys; and this was denied (504) by defendant.

Houser, the plaintiff, swore that he was not in the employ of McGuinas when these packages were lost. That he heard of the packages being lost, but at the time of the loss he was not in any way connected with McGuinas.

Counsel for defendant Beam, in the course of his arguments to the jury, adverted to the loss of those packages, and used this language: "It is not surprising that the $500 package alleged to have been given to Beam was lost. It is exactly what would have been expected in an office so loosely managed as this, under the control of Houser, as we have positive evidence that two packages were lost while he was the agent of McGuinas, with which two packages Beam had nothing to do." Counsel for plaintiff here objected to this comment. There was no evidence that Houser was in the employ of McGuinas when the other packages were misplaced. Objection sustained, and counsel for Beam excepted.

There was a verdict for the plaintiff. Judgment for plaintiff and appeal by defendant.

G. F. Bason and C. W. Tillett for plaintiff.
John Devereux, Jr., for defendants.

(505) PER CURIAM: We have carefully examined the record in this case, and, while it appears that there was some irregularity in the introduction of testimony, we fail to see how the defendant was in the least prejudiced thereby. The evidence did not warrant the comment of counsel, and there was no error on the part of the court in stopping the same.

NO ERROR.

PETER EPLEY ET AL. v. JOHN EPLEY ET AL.

Will—Partition—Executors—Tenants in Common—Possession—Pleadings.

1. A will by which land is devised to C. for life, and after her death it is to be divided among children, does not authorize a sale by the executors.

2. When a petition of tenants in common for sale of land fails to allege possession, objection made for the first time in the Supreme Court will be disregarded.

EPLEY *v.* EPLEY.

SPECIAL PROCEEDING for partition of land, heard on appeal from clerk before *Armfield, J.*, at Fall Term, 1892, of BURKE.

This action was brought by plaintiffs as heirs at law and devisees of Peter Epley for a partition of the lands known as the Catharine Epley tract.

That Peter Epley, Willis Epley, James Epley and Fannie Morrison (wife of John Morrison), the plaintiffs above-named, and John Epley, Jacob Epley and Mary Parker are tenants in common in fee of the tract of land hereinafter described, each owning an undivided one-seventh interest therein in fee.

The defendants' executors answer, and allege:

1. That the clerk has no jurisdiction in this action, for the reason that the same involves a construction of the will of their testator, Peter Epley.

2. That the will of their said testator (see record, pp. 23 to 29, (506) inclusive) authorized and empowers them to make sale of said lands, which they are proceeding to do under said will, and the plaintiffs are therefore not entitled to partition in this proceeding.

His Honor being of opinion that the clerk had jurisdiction, and that the will of Peter Epley did not authorize a sale of said land by said executors, gave judgment accordingly, to which judgment and rulings defendant excepted, and appealed to the Supreme Court.

8. That the petition is insufficient and fails to show any right to partition by plaintiff, in that it does not allege that any or either of them are in the possession of the land which they seek to divide.

S. J. Ervin for plaintiffs.
Isaac T. Avery for defendants.

SHEPHERD, C. J. We think it very clear that the will did not authorize a sale of the land by the executors. The land devised is not to be sold to pay debts, legacies, costs or charges of administration, nor is it to be sold with personal property, nor are the proceeds of sale mixed with the personal estate. It was devised to Catharine for her life, and upon her death it was to be sold and the proceeds equally divided among the children then living. There is no express authority given the executors, and none can be implied from the provisions of the will. *Bentham v. Weltshire,* 4 Mass., 44; *Foster v. Craige,* 22 N. C., 209; *Council v. Averett,* 95 N. C., 131; *Vaughan v. Farmer,* 90 N. C., 607. It is true that the petition does not allege that the petitioners are entitled to the immediate possession, but it alleges that they are tenants in common in fee. This, at most, is but a defective statement of a cause of action, and

in the case on appeal, signed by counsel, it does not appear that the point was insisetd upon in the court below. The motion to dis-
(507) miss in this Court is therefore disallowed.

Besides, it is not like the case of *Alsbrook v. Reid,* 89 N. C., 151, cited by defendant, in which it affirmatively appeared that the petitioners were not entitled to the possession until after the determination of an existing estate for life.

AFFIRMED.

Cited: Alexander v. Gibbons, 118 N. C., 804; *Graves v. Barrett,* 126 N. C., 270; *Broadhurst v. Mewborn,* 171 N. C., 402.

P. J. SINCLAIR ET AL. V. THE WESTERN NORTH CAROLINA R. R.

Amendment—Pleadings—Retraxit—Appeal—The Code, Section 273.

1. In an action by two tenants in common to have the value of lands required in construction of defendant's right of way assessed, and after the action had been pending for several years one of the plaintiffs entered a retraxit, and the court allowed the other to amend his description of land so as to embrace his part still the subject of suit: *Held,* no error.

2. An order of amendment is not appealable.

MOTION to amend pleadings, heard before *Graves, J.,* at the Spring Term, 1892, of MCDOWELL.

Defendant objected to court allowing amendment and appealed.

P. J. Sinclair and W. H. Malone for plaintiff.

D. Schenck and F. H. Busbee (by brief), and G. F. Bason for defendant.

CLARK, J. It appears that both complaint and answer had been withdrawn at previous terms and amended complaint and answer filed without exception. Those matters are therefore not before us. Upon such amended complaint and answer (as the pleadings had stood since 1883), this was an action by two tenants in common praying
(508) the appointment of commissioners to assess and value the lands required by the defendant for the right of way. At Spring Term, 1892, one of the plaintiffs entered, without exception, a retraxit which specified that it was in no way to affect the rights of the other plaintiff. Thereupon the court permitted the remaining plaintiff to amend by letting the suit stand in the name of such plaintiff alone, also by reducing

the description of the land (which it seems had been divided between the two original plaintiffs) to the land claimed by the remaining plaintiff, and omitting some recitals as to prior proceedings, which the motion alleged had been inserted in the complaint by mistake, as such prior proceedings had no reference to this tract. After hearing argument, the court allowed the amendment upon payment of costs by the plaintiff. The defendant excepted and appealed.

The amendment restricting the description of the land to that claimed by the plaintiff remaining in the action, was eminently proper after the retraxit of the other plaintiff. The entry of the retraxit was of itself an amendment as to parties, and had not been excepted to. The omission of the reference in the complaint to other proceedings at another time before the court, could not prejudice the defendant. These amendments did not change the nature of the action, and hence were within the discretion of the trial court, and not reviewable. The Code, sec. 273, and the numerous cases cited under that section in Clark's Code.

Besides, the leave to amend, if it had been reviewable, "neither terminated the action nor deprived the appellant of any substantial right which he might lose if the order was not reviewed before final judgment. Hence he should have had his exception noted in the record, that it might be reviewed on an appeal from the final (509) judgment." *Clement v. Foster,* 99 N. C., 255; *Welch v. Kinsland,* 93 N. C., 281; *Hailey v. Gray, ibid.,* 195; *Sneeden v. Harris,* 107 N. C., 311.

APPEAL DISMISSED.

Cited: Mullen v. Canal Co., 112 N. C., 111; *Faison v. Williams,* 121 N. C., 153.

FLORA C. McQUEEN v. THE PEOPLES NATIONAL BANK OF FAYETTEVILLE.

Pleadings—Admissions—Evidence—Trial by Jury—Practice—Continuance.

1. When a debt is established by admissions in the answer, the matter pleaded in avoidance should be established affirmatively by evidence.

2. The defendant bank admitted the plaintiff had deposited with it a sum of money, and set up facts in its answer tending to show that the balance not drawn out had been assigned to it, but failed to offer any *evidence* in support of it: *Held,* the plaintiff was entitled to recover upon the pleadings.

3. Such ruling is not in contravention of right to have a jury pass upon the issues raised by the pleadings.

4. This Court will not review the ruling of the trial judge refusing to grant a continuance, where it appeared that the defendants had not had their witnesses subpœnaed, having had ample opportunity so to do.

ACTION heard at May Term, 1892, of CUMBERLAND, before *Boykin, J.*

(514) *N. W. Ray for plaintiff.*
T. H. Sutton for defendant.

AVERY, J. Commenting upon the assignment as error of the ruling of a trial judge refusing to grant a continuance, the Court said, in *Johnson v. Maxwell,* 87 N. C., 20, "We refer to this exception, not pressed here as a reviewable error, only to say that in the light of repeated decisions, and with the law well settled, we are unable (515) to understand why it should be the subject matter of appeal."

The ancient mode of trial by jury, which is declared sacred (Const., Art. I, sec. 19), is that which comes to us as an inheritance from the mother country. The Constitution confers the right to demand the intervention of a jury, not absolutely and unqualifiedly in all controversies arising in the courts, but only in cases involving issues of fact. *R. R. v. Davis,* 19 N. C., 465. It is the office of the Legislature to provide for securing the benefit of this constitutional guarantee by declaring how such issues shall be raised. This duty has been performed by prescribing certain rules governing practice and pleading. *Armfield v. Brown,* 70 N. C., 27; The Code, sec. 391. The province of the jury is restricted to passing upon issues of fact raised by the pleadings in the light of the testimony offered. When no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings and the determination of the controverted questions of law. *Armfield v. Brown, supra.* The defendant admitted the allegation of the complaint that the plaintiff deposited the sum mentioned in her own name, and drew subsequently $2,088.16, leaving a balance of $3,387.62, the payment of which was refused when the check was presented on 24 December, 1889. Nothing more appearing, the plaintiff was entitled to recover, upon the admissions, the balance of the deposit, which she demanded, since such admissions were equivalent to a finding of a jury. *Bonham v. Craig,* 80 N. C., 224; *Stephenson v. Felton,* 106 N. C., 114; *Harris v. Sneeden,* 104 N. C., 369; *Oates v. Gray,* 66 N. C., 442. The new matter set up in the answer, and relied upon by the defendant, if admitted to constitute a

valid defense, was deemed in law to have been denied. The Code, sec. 268; *Fitzgerald v. Shelton,* 95 N. C., 519; *Price v. Eccles,* 73 N. C., 162. The *onus* being upon the defendant, as an actor, to show that the plaintiff authorized the application of the money de- (516) posited to the payment of the debt of her deceased husband, when he failed to offer any testimony to establish his defense, the case stood upon the complaints and admissions just as though the new matter had never been pleaded, and it was not error in the judge, therefore, to direct the jury to return a verdict for the unpaid balance of the money deposited, with interest from date of demand and refusal. *Wallace v. Moore,* 86 N. C., 85.

The defense being in the nature of a plea by way of confession and avoidance, on failure to offer testimony the confession, as far as it went, was equivalent to the verdict of a jury while the matter in avoidance, in the absence of proof offered to sustain it, could no more be considered than if it had never been pleaded. There was

NO ERROR.

Cited: McBrayer v. Haynes, 132 N. C., 611; *Bank v. Thompson,* 174 N. C., 350.

W. G. LEDUC, RECEIVER, v. JAMES I. MOORE ET AL.

Banks—Discount—Agency—Evidence—Presumption—Assignment of Notes.

J. executed his promissory note to M., who, for value and before maturity, indorsed it, for his own benefit, to a bank of which he was president, and, together with the cashier, constituted the discount committee. and as such committee, M. participated in discounting the note: *Held,* that the bank took the note subject to all the equities by which M. was bound, the presumption being that his knowledge was the knowledge of the bank. (*Bank v. Burgwyn,* 110 N. C., 267, distinguished.)

APPEAL at April Term, 1892, of FRANKLIN, from *Bryan, J.* (517) The case is stated in the opinion. The defendant appealed.

T. H. Sutton for plaintiff.
N. Y. Gulley for defendants.

SHEPHERD, J. James I. Moore executed a promissory note to E. F. Moore, who, for value, and before maturity, indorsed it, for his own

benefit, to the plaintiff bank. The said E. F. Moore was the president of the bank, and he, together with the cashier, by the custom of the bank, alone constituted its discount committee. The said Moore actually participated as a member of such commitee in the discounting of said note. The question presented is whether the bank is affected with notice of any defense existing in favor of the maker as against the payee at the time or before notice of the indorsement.

In *Bank v. Burgwyn,* 110 N. C., 267, it was held that a bank was not affected with constructive notice by reason of the actual knowledge of its president, when the latter was dealing with it in his individual capacity, and not acting officially for the bank in any manner concerning the particular transaction. In the opinion of the Court it was stated that the principle upon which rests the doctrine of constructive notice in such cases is that agents are presumed to communicate all such information as they may acquire in the line of their duty to their principals, because it is their duty to do so; but that no such presumption can exist where the agent is dealing with the principal in his own behalf. "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." *Barnes v. Gas Light Company,* 27 N. J., Eq., 33.

(518) Whether the bank would have been affected with constructive notice had the president acted in his official capacity in discounting the paper in which he was known to be interested, is a point we did not undertake to determine, though upon a cursory examination it seemed to us that the authorities were in favor of the proposition. A more careful investigation, however, of the subject, discloses much conflict of judicial decision with many very respectable authorities sustaining the opposite view. Upon so important a question, involving the rights of other possible litigants, who have had no opportunity of being heard, we forbear the expression of an opinion at this time—for, even admitting that, under ordinary circumstances, the latter doctrine is the correct one, and the bank would not be affected with notice, the reason of the principle would forbid its application to the facts of the present case. The principle is based upon the presumption that a majority of the members of the discount committee, being aware of the adverse interest of their associate, were in no way influenced by him in their action, and as he was treated as a stranger to the bank in the particular transaction, it would be unfair to assume that he imparted his knowledge to its officials. In other words, the theory is that he cannot be considered, in such a case, as having acted influentially as an officer of the bank. Our case is quite different, as here the discount committee consisted of Moore and the cashier alone, and it required the active offi-

cial participation of the former in order to discount the paper. Here, then, we have as undisputed facts the active and essential participation of the president as a director, and also his actual knowledge. This leaves no room for the operation of any presumption, and the bank cannot escape its liability for the misconduct of one whom it has placed in such a highly responsible position. If loss must ensue by reason of the bad faith of Moore, it would seem clear that it should be borne by the bank, which, by reason of its selection of an improper agent, has caused a loss "which would not have resulted if the instrument (519) employed by it had come up to the standard of good faith, which it is one of the great objects of the law to secure in commercial dealings." Morse on Banks, 110.

There must be a new trial.

ERROR.

Cited: Brite v. Penny, 157 N. C., 114; *Phillips v. Hensley,* 175 N. C., 25.

HARDY BROS. v. J. B. GALLOWAY.

Deed, Limitations and Conditions—Alienation—Contracts in Restraint of.

In a deed conveying land, the vendors "retained for themselves and their heirs and assigns the right to repurchase said land when sold," and it was further stipulated that if the vendee undertook to alien the land without giving the vendors the privilege of repurchasing, the deed was to be void: *Held*, that the reservation and condition were void, inasmuch as they, uncertain as to time and manner of performance, were repugnant to the grant and in contravention of the principle of public policy which forbids restrictions of the right of alienation.

APPEAL from *Connor, J.*, at December (special) Term, 1891, of PITT.

The parties waived trial by jury and consented for the court to find the facts and declare the law arising thereupon.

The court found the following facts:

1. That the defendant, J. T. Evans, on 13 June, 1887, executed and delivered to the plaintiff his bond under seal, whereby he obliged himself to pay to the plaintiff on 1 February, 1888, $325, with interest at 8 per cent from the said 13 June, 1887. (520)

2. That on said 13 June, 1887, the said J. T. Evans executed and delivered unto the said plaintiff a mortgage deed, whereby he conveyed to him, for the purpose of securing the payment of said bond, "one tract of land adjoining the lands of Frank Mills, John Carroll,

Alfred Weathington and others, and containing fifty acres, more or less; also the lot containing one acre on which my storehouse now stands, and all improvements on said lot." That said mortgage, after being admitted to probate, was duly recorded in the office of the register of deeds of Pitt County.

3. That the "one-acre" lot referred to in said deed was intended and understood by the parties to said mortgage to include the lot purchased by said Evans from the defendant, J. B. Galloway, and was the only lot owned by said Evans in the county of Pitt upon which the storehouse of said Evans stood.

4. That no part of said bond has been paid.

5. That the defendant, J. B. Galloway, and his wife, on 22 October, 1884, conveyed the said one-acre or storehouse lot to said J. T. Evans for and in consideration of the sum of twenty-five dollars. That in the deed conveying said lot is the following clause: "The said J. B. Galloway and wife, Alice L. Galloway, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the said Jefferson Evans conveying a title for said land either by deed or mortgage to any person without first giving J. B. Galloway and wife and their heirs and assigns the privilege of repurchasing the same, renders this deed null and void, otherwise to remain in full force." That said deed is duly recorded in Book M 4, page 374, in the office of the register of deeds in Pitt County. The court finds the foregoing facts in respect to said deed from the admissions in the answer of the defendants. The defendants insisted that the plaintiff should be required to introduce the said deed, and that the ruling of the court that the admission in the answer relieved the plaintiff of the necessity (521) of doing so. The defendant, J. B. Galloway, duly excepted.

That the defendant, J. T. Evans, did not, prior to the execution of said mortgage to plaintiff, notify the defendant, J. B. Galloway, or his wife, of his purpose to execute the same. That said defendant, J. B. Galloway, upon learning of the execution of said mortgage, entered upon the possessino of the said lot for the alleged breach of the condition in the aforesaid deed, and is now in the possession thereof, claiming the same by reason of the said alleged breach. That neither at the time of making said entry, nor at any time since, has he paid or tendered, either to the plaintiff or the said J. T. Evans, the sum of twenty-five dollars or any other sum in payment for said lot. That after the purchase of the said lot from said Galloway the said Evans built a storehouse thereon at a cost of three or four hundred dollars. The defendant insisted that the description of the said "one-acre" lot in the mortgage from defendant Evans to the plaintiff was fatally defective for uncertainty.

The court held that the description was calpable of being rendered sufficiently definite by relevant testimony, and that the admission in the answer and the testimony in the cause was sufficient to enable the court to find the facts hereinbefore set forth. Defendant excepted.

The defendant, J. B. Galloway, insisted that the plaintiff, having shown no deed from him to defendant Evans, was not entitled to recover as against him.

The court held that by the admission in the answer, title was shown to be out of defendant Galloway, unless it was revested by reason of the execution of the aforesaid mortgage, and the facts hereinbefore set forth in respect thereto.

Defendant Galloway excepted.

The defendant Galloway insisted that the defendant Evans, by the execution of the mortgage to the plaintiff without giving to him the notice required in said deed forfeited his title, estate and interest in said one-acre lot, and that plaintiff took his mortgage with notice of the provisions in the said deed and subject to his, Gal- (522) loway's, rights in respect thereto.

The court held that the provision in said deed, whereby the said Galloway retained the right to repurchase the said lot, was:

1. An undue restraint upon said Evans' right of alienation, and therefore void.

2. That treating it either as a condition annexed to the estate, or as a covenant of Evans to reconvey to said Galloway, it was void for uncertainty; (a) no time being fixed within which it was to be performed; (b) no price being fixed at which the lot was to be reconveyed.

3. That treating the reservation in the deed as a right to repurchase the said lot by said Galloway when sold within a reasonable time and at the improved value of the lot, the execution of the mortgage to plaintiff was not inconsistent therewith, and that the clause declaring a forfeiture if the said Evans should convey either by deed or mortgage will not be specifically enforced by the court, especially when said Galloway has not tendered the purchase money.

Defendant Galloway excepted.

The court rendered the judgment, from which defendant appealed.

J. B. Yellowley for plaintiffs.
No counsel contra.

SHEPHERD, J. Considered either as a conditional sale or a contract to reconvey, his Honor was entirely correct in holding as void for uncertainty the provision in the deed respecting the right of the grantor

to repurchase the land when sold. No time is fixed for performance, nor is there any stipulation whatever as to the price to be paid.
(523) The provision, not being a limitation, can therefore only take effect, if at all, as a condition subsequent, and viewed in this light we cannot hesitate in deciding that the restriction upon alienation attempted to be imposed after the grant of the fee, is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. Ever since the statute of *Quia Emptores,* the right of alienation has been considered as an inseparable incident to an estate in fee (Coke on Lit., 436; Williams on R. P., 61, 62; 1 Washburn R. P., 79), and, except in some cases where the restriction is only partial, the law does not recognize or enforce any condition which would directly or indirectly limit or destroy such a privilege—*iniquum est ingenuis hominibus non esse rerum suarum alienationem.* Accordingly, it has been held by this Court that a condition that a devisee in fee shall not sell or encumber his land before attaining the age of thirty-five is void, "because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies." *Twitty v. Camp,* 62 N. C., 61. To the same effect has it been ruled as to a condition that a devisee in fee shall make oath "that he will not make any change during his life" in the testator's will respecting his property (*Taylor v. Mason,* 9 Wheat., 350), or that he shall not offer to mortgage or suffer a fine or recovery (*Ware v. Cann,* 10 Barn. and Cres., 433), or that he shall contract in writing not to alienate before the proceeds of certain realty are paid to him (*Mandlebaum v. McDonnell,* 29 Mich., 78), or that land devised to a number of persons shall not be divided. *Smith v. Clark,* 10 Md., 186.

Such conditions are not sustained where they "infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience." 4 Kent. Com., 131; Bacon's Abr., title, Conditions; Shep. Touchstone, 131.

(524) "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor anything implied, which is of its nature incident and inseparable from the thing granted." *Starkie v. Butler,* Hob., 170.

While unable to find any decision exactly in point, we feel assured that our case falls within the principle stated and illustrated by the foregoing authorities. The restriction is certainly inconsistent with the ownership of the fee as well, it would seem, as against public policy, The right to repurchase is of indefinite extent as to time (it being reserved to the grantors, their heirs or assigns), and may be exercised whenever the property is sold, although no amount is fixed upon as

purchase-money. In other words, we have an estate in fee without the power to dispose of or encumber it, unless first offering it for no definite price to the grantors, their heirs or assigns. The condition is repugnant to the grant, and therefore void. Even if the right to repurchase could be sustained, the defendant has no cause of complaint, inasmuch as the court in decreeing foreclosure has ordered that thirty days' notice of the sale shall be personally served on him.

The exception to the insufficiency of the description in the mortgage from Evans to the plaintiff is plainly untenable. *Henley v. Wilson,* 81 N. C., 405; *Euliss v. McAdams,* 108 N. C., 507, and the cases cited.

Neither is there any merit in the other exception as to the refusal of the court (considering the admissions in the answer) to require the plaintiff to introduce the deed from Galloway to Evans. The judgment must be

AFFIRMED.

Cited: Pritchard v. Bailey, 113 N. C., 525; *Lattimer v. Waddell,* 119 N. C., 378; *Ricks v. Pope,* 129 N. C., 55; *Wool v. Fleetwood,* 136 N. C., 465; *Christmas v. Winston,* 152 N. C., 49; *Schwren v. Falls,* 170 N. C., 251; *Lee v. Oates,* 171 N. C., 722; *Brooks v. Griffin,* 177 N. C., 8; *Norwood v. Crowder, ib.,* 471; *Stokes v. Dixon,* 182 N. C., 325.

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(525)

STEPHEN SHELTON v. H. H. REYNOLDS.

Contract—Consideration—Evidence—Comment of Counsel—Pleadings.

1. A guarantee against loss on an investment in consideration of five per cent on the profits to be realized at a sale, is a sufficient consideration to support such a contract.
2. The *fact* that plaintiff showed defendant a certificate of purchase was admissible in evidence, but not the contents of the certificate, except by the writing itself.
3. There was no error in refusing to allow the jury to inspect the original writing, "evidence should be offered to their ears, not to their eyes."
4. Counsel should not be allowed to comment upon any aspect of the evidence not covered by his complaint.

APPEAL from *Armfield, J.,* at July Special Term of FORSYTH.

R. B. Glenn for plaintiff. (527)
Jones & Kerner (by brief) for defendant.

BURWELL, J. The contract between the parties was as follows:

WINSTON, N. C., 14 October, 1890.

I hereby guarantee S. Shelton against all loss in his investment, in West End Land Co., in lot No. 190, which cost him $1,250, said Shelton to exercise right as to when said lot shall be sold, which shall not exceed two years from 1 November, 1890, on a condition that said S. Shelton will give me five per cent of the profits realized on the sale of said lot.

H. H. REYNOLDS.

The stipulation that the defendant should have five per cent of the profits, if any should be realized from the investment, was a sufficient consideration to support the agreement of the defendant. It is such a contract as the courts will enforce. But the objection of the defendant was to its admission as evidence in the case. It was proper that this objection should be overruled. The contract could not be construed till it was put in evidence.

There was no error in allowing plaintiff to testify that he showed defendant a paper called a certificate of purchase before he signed the contract. The contents of this writing were properly excluded on the direct examination, it not having been produced.

His Honor did not err when he refused to allow the jury to inspect the original contract, as the defendant's counsel wished them to do.

The circumstances called for the application of the rule that
(528) there must be allegation as well as proof, and that other rule, stated by his Honor, "that evidence should be offered to the ears of the jury, and not to their eyes." We find no other exceptions in the case. The judgment must therefore be affirmed.

NO ERROR.

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*S. B. LUTTRELL v. J. L. MARTIN ET AL.

Appeal—Interlocutory Orders.

Appeal does not lie from a refusal to dismiss an action, nor from an order adjudging that defendants have been duly served with process, and are properly before the court.

MOTION heard before *Graves, J.*, at the Spring Term, 1892, of BURKE.

S. J. Ervin for plaintiff.

M. Silver and Isaac T. Avery, for defendants.

*AVERY, J., did not sit.

BURWELL, J. It is settled that no appeal lies from a refusal to dismiss an action. *Plemmons v. Improvement Co.,* 108 N. C., 614. Nor does an appeal lie from an interlocutory order adjudging that the defendants have been duly served with process and are properly before the court. *Guilford v. Georgia Company,* 109 N. C., 310.

The appeal in this case is premature, and must be dismissed.

APPEAL DISMISSED.

Cited: Williams v. Bailey, 177 N. C., 40.

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(529)

*JOSEPH BRITTAIN, ADMINISTRATOR, v. JOHN A. DIXON ET AL.

Administration—Creditors—Parties—Petition to Make Assets.

An administrator *d. b. n.* cannot be compelled by the creditors of an estate to proceed with a petition to make assets begun by the former administrator, deceased.

APPEAL at Fall Term, 1892, of BURKE, from *Armfield, J.*

Isaac T. Avery for plaintiff.
S. J. Ervin for defendants.

BURWELL, J. This cause was before the Court at September Term, 1889, upon an appeal of the defendants, heirs at law of John A. Dickson, and was remanded in order that further action might be taken, in accordance with the opinion of *Chief Justice Merrimon,* 104 N. C., 547.

The proceeding was begun in January, 1887, before the clerk of the Superior Court of Burke, the sole petitioner being Joseph Brittain, administrator *de bonis non* of John A. Dickson, and the defendants being the heirs at law of said Dickson, and the relief sought was that certain lands that had descended to the defendants from John A. Dickson should be sold to make assets to pay the indebtedness of his estate. The answer of the defendant heirs raised issues of fact, and it was transferred to the court in term, according to the provisions of The Code, sec. 256.

After the cause was remanded to the Superior Court of Burke from this Court, as stated above, it was referred to find additional facts, and, after report had been made, Joseph Brittain, the plaintiff, died in January, 1891, and in April of that year L. A. Crawley was appointed to be the administrator of the estate of John A. (530)

*AVERY, J., did not sit.

Dickson in the place of Joseph Brittain. The death of Brittain had been suggested to the court at Spring (March) Term, 1891, by the counsel who had represented him in this proceeding. At Fall Term, 1891, the counsel of record for Joseph Brittain gave notice to L. A. Crawley and to the defendants that they would move to make him a party to the proceeding. The case on appeal states that this "notice was not answered, but defendants' counsel moved the court that the action abate. Both motions were continued. At Spring Term, 1892, T. G. Walton, executor, and S. M. Roderick, executor, judgment creditors of John A. Dickson's estate, filed a petition and moved the court that they be allowed to make themselves parties plaintiff, and that L. A. Crawley be made party plaintiff or, on his refusal, defendant, and this motion was continued because not reached on the docket."

"At Fall Term, 1892, his Honor (*Armfield, J.,*) declined to grant defendants' motion that the action had abated, or to abate it, and the defendants excepted. L. A. Crawley appeared and objected to being made a party plaintiff, and the court ordered that T. G. Walton, executor, and S. M. Roderick, executor, judgment creditors, be made parties plaintiff, as prayed in the petition, and that L. A. Crawley, administrator *d. b. n.*, be made party defendant, to both of which rulings defendants excepted."

His Honor then proceeded to hear the cause upon the exception to the report, and having overruled all the exceptions gave judgment that the land described in the petition should be sold to make assets to pay debts, to which the defendant heirs excepted and appealed to this Court.

It seems, therefore, that this proceeding, originally instituted before the clerk by the administrator of John A. Dickson against his heirs to have land sold to make assets, has become a suit of two of the creditors of John A. Dickson against his heirs and administrator
(531) *d. b. n.* When Joseph Brittain died, this proceeding could have been continued only by "his representative or successor in interest" (The Code, sec. 188), and his successor was L. A. Crawley, the new administrator. And if he, for reasons that he considered valid, declined to ask the privilege of carrying on the pending litigation, or, having been served with the notice provided for by section 188 of The Code (amendment of 1887, as set out in Clark's Code, p. 102), refused to appear and prosecute the action or proceeding, no person or persons can be made plaintiffs in his stead, as was done here, for that would work an entire and radical change in the nature of the action. This proceeding was begun by the administrator Brittain before the clerk to have land sold to make assets, according to the provision of The Code, sec. 1436; it cannot be converted into a creditor's bill, such as is approved in *Wadsworth v. Davis,* 63 N. C., 251.

The judgment in this cause at Fall Term, 1892, of the Superior Court of Burke was error.

If after notice as provided in chapter 389, Laws 1887 (Clark's Code, p. 102), the administrator persists in his determination not to prosecute this proceeding, the creditors of John A. Dickson's estate, if there are any, must proceed against him and the heirs, as they may be advised.

REVERSED.

Cited: *S. c.*, 112 N. C., 604.

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(532)

J. G. WARLICK v. SARAH LOWMAN.

Petition for Public Highway—County Commissioners—Res Judicata.

A board of county commissioners denied and dismissed a petition for a public road, and at a subsequent meeting dismissed a similar petition for the same road without going into the merits of the case, and then, at a later meeting, upon petition by and against the same party as the first, allowed the public highway to be constructed: *Held*, the former judgments and proceedings of the commissioners were not *res judicata* so as to prevent the establishment of such highway.

PROCEEDING commenced on 6 October, 1890, before the board of commissioners of BURKE, to lay out and establish a public road in said county, and heard on appeal from said board of commissioners before *Armfield, J.*, at Fall Term, 1892, on the petition and answer, and facts agreed to by the parties.

J. T. Perkins and S. J. Ervin for plaintiff. (534)
Isaac T. Avery for defendant.

BURWELL, J. The board of commissioners of Burke, at a meeting held 1 April, 1891, and after hearing evidence, determined that the road for which J. G. Warlick and others then petitioned was necessary to the public, and directed that it should be laid off according to law. And the defendant, Sarah Lowman, insists that this necessary public road should not be now established, because the board of commissioners in February, 1890, "denied" a petition of said Warlick and others for the same road, and in June, 1890, dismissed a like petition "without going into the merits of the case."

If it was true that all three of these petitions were identical, both as to the names of the petitioners and the description of the road petitioned

for, we cannot see how it can be proper that the public, including the petitioners, shall be deprived of a necessary highway, because (535) heretofore, and perhaps under very different circumstances, the board once denied the petition, and at another time dismissed it without going into the merits of the case. We must assume that the board of commissioners had good and sufficient reasons for refusing to grant the petition when it first came before them, and we must likewise assume that they had good and sufficient reasons for granting it when it was last presented to them. Certainly, it must be allowed to the commissioners to "change their minds" with the changing circumstances of the community, and when new and more convincing testimony as to the necessity for the road is brought before them. There might be some ground for the contention of the defendant if it appeared that the petitions were identical, and that the evidence to prove the necessity for the road was the same. But these facts do not appear from the record.

AFFIRMED.

NANCY KIDD v. JOSHUA VENABLE.

Submission to the Court—Probate—Privy Examination—Deeds of Minors—Exceptions.

1. When the court to whom was submitted the case by the parties found as a fact that a probate sought to be impeached was sufficient in form, and there was no exception, he is precluded from having the point considered in this Court.

2. The probate being found sufficient in form, it will be presumed to have been taken by a justice of the peace duly authorized by statute, though this fact does not distinctly appear on the probate; and it only appeared that two *persons* were appointed by the court for the purpose of taking it, and that upon their report the instrument was ordered to be recorded.

3. A deed admitted to probate in 1835 was executed according to the statute of 1751, and the wife, who was a minor, could make a valid conveyance.

4. The probate then had the effect of a fine and recovery; but the statute has been since amended.

(536) ACTION to recover land, tried at Spring Term, 1892, of SURRY, before *Armfield, J.*

A jury trial was waived, and the court found the following facts: On ..... day of May, 1835, the plaintiff was the owner of the land in controversy, and was at the time a *feme covert* and a minor, being eighteen years of age. On ..... day of May, 1835, the plaintiff, with

her husband, executed to John Venable, under whom the defendant claims, a deed to the land, which was regular in form. The deed was offered for probate in the following form.

"May Term of Surry Superior Court. Ordered by the court that H. P. Poindexter and R. C. Puryear be appointed to take the private examination of Nancy Kidd in relation to a deed made to John Venable.

B. VESTAL,
Chairman County Court.

Agreeable to the above order we have taken the private examination of Nancy Kidd, relative to her signature to a deed made by her to John Venable, who acknowledged the same of her own free will without control of her husband.

H. P. POINDEXTER,
R. C. PURYEAR.

Surry County, May Term, 1835. The execution of the within deed as to Allen Kidd was duly acknowledged in open court and ordered to be registered.

T. K. ARMSTRONG, *Clerk.*"

His Honor held that said probate was sufficient in form, to which the plaintiff did not except. The court further found that at the time of the execution and probate of said deed the plaintiff was an infant eighteen years of age, and remained under coverture until within two years from the commencement of this action in 1880.

His Honor held that the probate as aforesaid was not conclu- (537) sive and could be collaterally attacked, and that the plaintiff could avoid her deed on account of her infancy at the time of the execution and probate thereof, and thereupon gave judgment for the plaintiff. The defendant excepted and appealed.

C. B. Watson for plaintiff.
R. B. Glenn for defendant.

MACRAE, J. It appears from the statement of the case on appeal, that no exception was taken to the ruling of his Honor that the probate of the deed was sufficient in form. We would be precluded from entertaining an exception here which was not made below, except upon a question of jurisdiction or because the complaint does not state a cause of action. Rule 27, and cases cited thereunder; Clark's Code, page 696. As it was earnestly argued before us, however, by the learned counsel

for the appellee, that the certificate of probate was insufficient to authorize the registration of the deed, because it does not appear therein that the persons who took the privy examination were members of the court, as required by the Act of 1751, the statute then in force, and therefore that the probate and registration are void, we will say that the probate being sufficient in form, the maxim *presumunter rite esse acta* will support the inference that they were members of the court.

Etheridge v. Ashbee, 31 N. C., 353, relied on by the appellee, we think is not in point; for there it was not certified by the justice appointed for the purpose that the *feme covert* grantor was privately examined by him, but simply that she, in open court, acknowledged, etc.; and the order of the court, based on the certificates, was inconsistent with the same in several respects.

(538) In the case before us it appears that two persons were appointed by the court to take the private examination of the wife; that they reported that they had taken such private examination, and that she acknowledged the same of her own free will, without control of her husband; the acknowledgment of the husband was made in open court, and the deed was ordered to be registered—the whole proceeding being one continuous transaction.

It was held in *Beckwith v. Lamb,* 35 N. C., 400, that the fact that the acknowledgment was made upon the private examination which he was appointed to take was not necessary to be set forth with "certainty to a certain intent in every particular, so as to exclude any inference to the contrary, which might by possibility be imagined, but that the fact that he acted in the presence of the court, reported the acknowledgment, and the court acted upon it and ordered the deed to be registerd, afforded an inference of the regularity of the proceeding irresistible, unless we adopt the conclusion that the county courts are wholly unfit for the business which by law is confided to them."

In *Etheridge v. Ferebee,* 31 N. C., 312, it is said: "A deed is acknowledged by husband and wife in open court, two justices of the peace thereupon take the privy examination and report to the court, and the court acts upon the report; the inference is that the two justices were members of the court appointed for that purpose." In the same case, the objection that it did not appear that, upon such private examination, she doth voluntarily assent thereto, is also disposed of.

It must be remembered that at the time of the execution of the deed we are now considering, the act of Assembly gave no form in which the certificate of the report of the privy examination is to be made, as it does now by section 1246 of The Code.

The inference, then, is that the persons appointed to conduct the (539) privy examination were members of the court as required by stat-

ute, for the court appoints them, receives their report, acts upon it and orders the deed to be registered. It was further said in the case last cited, and we adopt it as applicable hereto, that "this Court has every disposition, by fair construction, to sustain the deeds of *femes covert,* and does not feel it to be a duty to become astute in detecting informalities or irregularities whereby to avoid such deeds and throw the loss on innocent purchasers." See, also, *Robbins v. Harris,* 96 N. C., 557. The case of *McGlennery v. Miller,* 90 N. C., 215, and those of *Burgess v. Wilson,* 13 N. C., 306, and *Malloy v. Bruden,* 88 N. C., 305, were, upon a construction of the 10th and 11th sections of chapter 37 of the Revised Statutes, where the wife could not come into court, and by expressions in the opinions in those cases which would indicate a greater strictness in the construction of section 9 of the same act, are controlled by the direct interpretation placed upon said section, in the cases we have cited in support of our conclusions.

This brings us to the second point: Whether the plaintiff can avoid this deed upon the ground that she was an infant at the time of its execution?

The deed was executed and admitted to probate in May, 1835. The statute then in force was the Act of 1751 (1 Potter's Revisal, 185, afterwards amended and brought forward into the Revised Statutes, chap. 37, sec. 9), which prescribes the manner of execution of deed, probate and privy examination of the wife, and registration, and that when so executed, etc., according to law, they "shall be as valid in law to convey all the estate and title which such wife may or shall have in any lands, tenements or hereditaments so conveyed . . . as if done by *fine and recovery,* or any other ways and means whatsoever."

The same question has been fully discussed by *Mr. Justice* (540) *Bynum* in *Wright v. Player,* 72 N. C., 94, in which he explains the force and effect of a fine and recovery, and reaches the conclusion that "it seems clear that if this conveyance had been by fine and recovery at common law, it could not have been reversed except by writ of error, and *that* during the minority of the infant. This being so, the only difficulty is removed, for the statute here steps in and enacts that all deeds executed, as this was, shall have the force and effect of a fine and recovery."

The statute, now section 1256 of The Code, as did section 8 of chapter 37 of the Revised Code, omits the words "as if done by fine and recovery," etc. And the deed and privy examination of a *feme covert,* made and taken since the enactment of the Revised Code, have no longer the effect of an assurance of record, like a fine, but may be collaterally impeached on the ground of infancy or other disability.

His Honor evidently did not advert to the fact that this deed and privy examination were while the Act of 1751 was still in force.

There is error. Judgment reversed, and judgment should be entered in the court below for the defendant.

REVERSED.

Cited: Williams v. Kerr, 113 N. C., 310; *Ladd v. Ladd,* 121 N. C., 120; *Brown v. Hutchinson,* 155 N. C., 210.

CHARLES E. BRAME ET AL. V. W. Y. SWAIN.

Contract—Mortgage—Vendor and Vendee.

In the absence of a stipulation to the contrary, a mortgage cannot be foreclosed until the maturity of all the notes or bonds which it secures; and the same rule applies to contracts for sale of land where the purchase money is to be paid in instalments, and the purchaser has been let into possession. In such case, a decree for specific performance will not be given until all the money is due, but the vendee will be entitled to personal judgment upon each of the payments as they may become due.

(541) APPEAL from *Bryan, J.,* at Spring Term, 1892, of VANCE.

(542) *T. T. Hicks (by brief) for plaintiffs.*
H. T. Watkins for defendant.

SHEPHERD, J. Where a contract is made for the sale of land, the purchase money to be paid in annual instalments, and the vendee is let into possession, the vendor cannot maintain an action for specific
(543) performance until the last payment is due. The relation between such parties is substantially that subsisting between mortgagee and mortgagor, and governed by the same general rules (*Jones v. Boyd,* 80 N. C., 258); and in the absence of a stipulation to that effect, a mortgage cannot be foreclosed until the maturity of all the notes which it is given to secure. *Harshaw v. McKesson,* 66 N. C., 266. These authorities fully sustain his Honor in declining to decree a sale of any part of the land. We think, however, there was error in refusing the plaintiffs a personal judgment on the notes actually due at the commencement of the action. There is nothing in the contract of sale which either expressly or by implication amounts to an agreement to suspend the personal remedy, and in *Harshaw's case, supra,* in which a foreclosure was denied, the Court explicitly declared that "the plaintiffs, if they had

seen proper, might have proceeded in an action at law to recover the instalments as they became due, but they could not have a foreclosure until the day of redemption was passed." See, also, *Allen v. Taylor,* 96 N. C., 37. The principle stated in *Harshaw v. McKesson,* 65 N. C., 688, that where a mortgage is executed to secure a note previously given, there is an implied promise to suspend the personal remedy, has no application to the facts of this case.

MODIFIED.

Cited: Barbee v. Scoggins, 121 N. C., 142; *Hinton v. Jones,* 136 N. C., 56.

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*S. B. TALBERT ET AL. V. SIMON BECTON ET AL.

Party—Pleading—Equitable Defense.

1. In an action to recover land, a purchaser, after the commencement of the action, may be substituted as party.
2. An equitable defense must be set up by proper pleading to be available.

APPEAL from *Boykin, J.,* at May Term, 1892, of CUMBERLAND. (544)

G. M. Rose for plaintiff. (546)
T. H. Sutton and N. W. Ray for defendant.

PER CURIAM: Moore, the original plaintiff, conveyed to Mrs. Talbert after the action was brought. The court had a right to substitute her as a party plaintiff. The Code, section 188. The action was based on the legal title alone, the plaintiff alleging ownership and the defendant simply denying it. The refusal of the court to consider the equitable defense, in the absence of any pleading setting it up, was proper. There must be *allegata* as well as *probata.* Neither was there error in the refusal to allow an amendment of the pleadings. This was a (547) matter addressed to the discretion of the court. The defendant, however, can in no event be prejudiced, as his right to assert his equities is expressly saved by the judgment.

We think there was no error in the charge as to damages.

MODIFIED.

Cited: Alley v. Howell, 141 N. C., 115; *Burnett v. Lyman, ib.,* 502.

*MACRAE, J., did not sit.

JESSE A. GWALTNEY v. THE SCOTTISH CAROLINA TIMBER AND LAND COMPANY.

Action for Damages—Floatable Streams — Practice—Evidence—Floating Logs—Navigable River—Riparian Rights.

1. When, upon any aspect of his case, viewed in the most favorable light for him, the plaintiff is entitled to recover, the issues should be submitted to the jury.
2. In an action for damages to a dam, shown to have been done by defendant's floating logs in an unnavigable river, there was conflicting evidence as to whether it was a floatable stream: *Held*, that the burden of showing its character as such was on the defendant.
3. A river, the character of which was not definitely or unquestionably shown, in which logs are not shown to have been floated in the parts in controversy until recently, and then only by the defendant, though they had been usually floated in other parts of the river above the parts used by the defendant, is not shown to be a floatable stream.
4. *Quaere*, as to whether in floatable streams the right to float logs should not be exercised with reference to the rights of riparian proprietors.

MACRAE and BURWELL, JJ., concurring.
CLARK and AVERY, JJ., dissenting.

APPEAL at December Term, 1890, of BUNCOMBE, from *Philips, J.*

(551) *Theo. F. Davidson and Thomas A. Jones for plaintiff.*
Charles A. Moore for defendant.

SHEPHERD, C. J. At the close of the testimony, his Honor intimated an opinion "that, assuming the facts testified to be true, the plaintiff was not entitled to recover," and thereupon the plaintiff submitted to nonsuit and appealed. The question in issue was whether the French Broad River, from Asheville down to the plaintiff's dam, was a floatable stream. There was testimony relating to the character of the river *above* Asheville, and also variant if not conflicting testimony as to its floatable capacity below that city. It would be difficult, therefore, to ascertain upon what facts his Honor based his ruling, unless we consider that he meant that in *no aspect* of the testimony could the plaintiff maintain his action. This, of course, is the view which we must take, and it is our duty to base our judgment upon that testimony which is most favorable to the plaintiff. We are not permitted to attempt a reconciliation of the testimony so as to make out a case for the defendant, but we should examine it with the opposite view of ascertaining
(552) whether there is *any* evidence which tends to sustain the plain-

tiff's action. Gould on Pleading, chap. 9, sec. 65; *Knight v. R. R., ante,* 80; *Bond v. Wool,* 107 N. C., 146.

Now the plaintiff's dam, having been injured by the logs of the defendant, as stated by the witnesses, it was incumbent on the latter to show that the river was a floatable stream at the point where the injury was inflicted, and, if it has failed to do this, the plaintiff was entitled to recover. It is said that "it is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage; but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the season, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down." Accepting this as a correct proposition of law, we are unable to see how the defendant has brought itself within its terms. It appears from the testimony of R. B. Justice that the water "above Asheville is stiller and deeper," and while it is stated by the witness Wilkerson that the river has been used for floating logs for fifteen or twenty years, he expressly testifies, upon further examination, that the statement was made in reference to the river above Asheville.

It is apparent from the testimony of the witness Wilkerson that all of his floating was done above Asheville, and it does not show that there has been any floating of logs below that place except what has been done by the defendant, and as to this he does not state how long the defendant has been so using the river, or its condition when the floating was done. It is perfectly consistent, therefore, with the testimony of the witness Zachary, who says that he and his brother, between 1 December, 1887, and 1 May, 1888, put logs in the river for the defendant, to go to its mill in Knoxville, Tenn. The witness Garrett testifies that prior to the organization of the defendant no logs were (553) floated down the river from Asheville. So, taking all of the testimony, we have nothing which expressly shows that the river below Asheville was ever used by anyone for floating logs except during the six months mentioned by Zachary, and, for aught that appears, the floating may have been done in time of extraordinary freshets. Neither is there any definite testimony as to the character of the river below Asheville, as it is by no means certain whether Zachary's testimony on this subject does not refer to some point above that place, where he seems to have resided, and where he worked, as testified, for the defendant. When we add that it is stated by one of the witnesses that the river *"is not capable of floating logs unless there is a freshet,"* it would seem that the defendant has failed to bring itself within the principles above mentioned. How can it be said, upon such testimony, that "business men

may calculate that, with tolerable regularity as to the season," the water below Asheville can be profitably used for the floatage of logs? An ingenious advocate might possibly induce a jury to come to such a conclusion, but it is very certain that this Court has no right to do so; and especially is this true when we consider that it is our duty, not to determine whether there is any evidence to sustain the defense, but whether there is *any possible view* of the testimony upon which the plaintiff may recover. As we have indicated, it must be assumed that the plaintiff has suffered injury at the hands of the defendant, and, the river not being a navigable stream, it is incumbent upon the defendant to establish that it is floatable within the legal meaning of that term. This being so, we cannot see how the case could have been taken from the jury. It is true that the plaintiff cannot contradict his own witnesses, but as we have seen that, taking all that they testify to be true, it is doubtful wheher it makes out a case for the defendant, and it is very certain that, if we take the view most favorable to the plaintiff, he is entitled to re-
(554) cover. There being some testimony tending to sustain the action, we think that we should simply grant a new trial without attempting to pass upon the very important questions discussed by counsel.

Conceding that this is a floatable stream (and we think there is testimony tending to show that it is), another serious question to be determined is whether the right to float logs must not be exercised with reference to the rights of riparian proprietors. To sustain the nonsuit in this case would, we fear, be construed as an indication that the right of floatage is paramount to all other interests, and we are not prepared to assent to such a proposition. However this may be, we think the facts should either be ascertained, or that there should be instructions clearly presenting the questions to be determined. Until this is done, we should refuse to decide questions involving such grave consequences to a large number of citizens owning property on the said river.

REVERSED.

BURWELL, J. I concur in the opinion of the Chief Justice.

MACRAE, J., concurring. His Honor held that, assuming the truth of the facts testified to, the plaintiff was not entitled to recover; whereupon, the plaintiff submitted to a nonsuit and appealed. This makes it necessary for us to consider the evidence in the most favorable light to the plaintiff, and determine whether he had entirely failed to make out his case, or was there sufficient evidence to have been submitted to the jury upon proper issues before the judgment of the court could be pronounced. No issues seem to have been framed, but several interesting questions must have been presented to the jury, if, in the opinion of the presiding judge, the evidence had called for their consideration. Upon

the main issue, whether the plaintiff's dam and fishery had been destroyed by the negligence of the defendant, as alleged in the complaint, there arose questions which might have been framed into other issues, or comprehended in that which has been indicated as the principal one arising upon the pleadings. (555)

After having ascertained from the evidence whether the plaintiff, as he alleged, was the owner of land upon the banks of the French Broad River, and in the possession of valuable erections in the stream used by him as a fishery, it would have been necessary for the jury to have ascertained the character of the stream—whether the same is such a stream as is capable of being used for floating rafts, boats and logs, and is in this sense a navigable stream and subject to the public use as a public highway and easement, as alleged in the answer. It is purely a question of fact dependent upon the capacity of the stream, the products of the country, and the profitableness or unprofitableness of its use in that manner. Wood on Nuisance, sec. 464, 2 Ed.

The leading case on the subject of the law of water courses in North Carolina is *S. v. Glenn,* 52 N. C., 321, in which the late *Judge Battle,* in a very able opinion, discussed the rights of the public, and of the riparian owners, and of the owners of the beds of these streams. He divides them into three classes:

"1. All bays and inlets on the coast where the tide ebbs and flows, and all other waters which can be navigated by sea-vessels, are navigable waters, *publici juris*—not confining them to the criterion of ebb and flow which obtains in England.

"2. All the rivers, creeks and other water courses not embraced in the above description, but which are in fact sufficiently wide and deep to be navigable by boats, flats and rafts, are technically styled unnavigable, and are open to be appropriated by individuals by grants from the State under the entry laws. When the bed of the water course is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled, as an incidental easement, to go to the (556) middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public have in the stream for water communication between different points on it."

In the third class he places all the rivulets, brooks and other streams which from any cause cannot be used for intercommunication by inland navigation, and these, he says, are entirely the subject of private ownership.

While it will be noticed that the second class is by his definition confined to such as are sufficiently wide and deep to be navigable by "boats, flats and rafts," no mention is made of logs. The timber interests had

not then assumed the proportions which they have at this day in North Carolina, but it is interesting to note that during the same year, and some months before the opinion was delivered, the General Assembly had passed an act amending chapter 100 of the Revised Code, concerning rivers and creeks, and giving the commissioners power to "lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary," etc. Thus it will be seen that the Legislature at that time recognized the necessity of keeping open the streams for the passage of timber, then as now an important article of commerce, and it may well be that logs would have been included in the list with boats, flats and rafts, if the attention of the learned judge had been called to it. It will not be necessary to cite the many cases in our Court, before and since that to which I have specially referred. But in the case of *McLaughlin v. Manufacturing Co.*, 103 N. C., 100, for the first time I see an allusion to another class of streams called floatable—a term now in general use, especially in those states where there
(557) are great timber interests, as in the Northeastern states and upon the Great Lakes.

Floatable streams are said to be "capable of valuable use in bearing the products of mines, forest and tillage of the country it traverses to mills and markets."

I am inclined to admit (and I suppose his Honor was of this opinion) that from the testimony in this case it was proved that the French Broad River, at the piont of inquiry and above and below, is a floatable stream, but if from this assumption he was led to the conclusion that therefore the defendant might place his timber in the river to be carried by the rising waters without a guide or driver, and without regard to the safety of the property of riparian owners and their erections in and upon the stream, and if for this reason he intimated his opinion that upon his own evidence the plaintiff was not entitled to recover, I have grave doubts as to the correctness of the conclusion. Clearly, under our authority, from the earliest case cited in *S. v. Glenn* to *McLaughlin v. Manufacturing Co.*, it is held that the owners of the adjacent lands had the right to use the water to the thread of the stream in the water courses styled technically unnavigable, even where the bed of the stream had not been granted, so as not to obstruct the public or its right of floatage.

The authorities upon the subject of water courses and the rights of navigators and riparian proprietors are abundant, and ever increasing in number in many of the states and in Canada, and it would serve no good purpose to quote more than is sufficient to give weight to our proposition.

In the case of *Gaston v. Mace,* 33 W. Va., 14, navigable streams are divided into (1) tidal streams; (2) those nontidal, but navigable for boats or lighters, and (3) floatable, to which last class are given the definition we have quoted, *supra,* and in relation thereto a quotation is used from *Lancy v. Clifford,* 54 Me., 487.

"A stream, which, in its natural condition, is capable of being (558) used for floating logs, lumber and rafts, is subject to the public use as a highway, though it be private property and not strictly navigable. This right of the public, however, must be exercised in a reasonable manner. . . . The various purposes for which such a highway is used by the public, whether for transporting merchandise, rafting, driving or booming logs, or securing them at the mill afterwards, if necessary, requires so much space as temporarily to obstruct the way, but if parties so conduct themselves in this business as to discommode others as little as is reasonably practicable, the law holds them harmless." Speaking of the conflict of interest between the navigators and the riparian owners, "the common law . . . furnishes a solution of this difficulty by allowing the owner of the soil, over which a floatable stream which is not technically navigable passes, to build a dam across it and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passage-way for the public by or through his erection. In this way both these rights may be exercised without substantial prejudice or inconvenience."

I might well adopt this language in regard to the rights of *floaters* upon streams of the character indicated, where the bed of the stream has not been granted, and where the riparian owners have the right to use the waters to the thread of the stream.

I may take a passage from section 110 of Gould on Waters: "The rights of the public are not superior to private rights in streams which are merely floatable, to the same extent as in rivers which are capable of more extended navigation. . . . But the right of floatage is not exclusive of the use of the water for machinery, and the rights of the public and those of the riparian owners are both to be enjoyed with a proper regard to the existence and preservation of the other.

"If dams are so constructed as to limit the public passage to (559) a small portion of the stream, and sufficient provision is made for the passage of logs, the public cannot complain, while those who exercise the right of floatage are liable to the riparian owners for such exercise of the common right as causes them an injury."

We conclude that the plaintiff was at any rate entitled to have the jury pass upon the question whether he was damaged by the negligent manner in which the logs were driven down the stream, under proper instructions.

In *Lewis v. Keeling,* 46 N. C., 299, where, in Chowan River, a navigable stream, the steamer ran over the seine and injured it, the right of navigation was undoubtedly paramount to that of fishing; it was clearly intimated that while the steamer had the right to run over the seine in the *bona fide* prosecution of its business, it could not do so wantonly or unnecessarily. The brief of the late *Judge Barnes* in this case has abundant authority to show that if the defendant negligently destroyed plaintiff's property, even if it were a nuisance, he is liable for its value. And this might apply to our present case, even though it were clear that plaintiff's erection overpassed the thread of the stream.

If the intimation of his Honor and consequent nonsuit of the plaintiff would have the effect to declare that the river in question is what is now called a floatable stream, the principle involved might affect many rivers in North Carolina with varied riparian rights and valuable interests. Great care should be exercised in the settlement of the law in North Carolina between important and sometimes conflicting interests. The decisions in other states on kindred subjects, in many cases, depend upon local usage or special legislation. We must look, in a great measure, to our own statutes and to the common law as interpreted by our own Court.

I desire to make no intimation with regard to streams where the bed has been granted by the State. As far as the evidence in this case shows, the lands of the plaintiff and of those through whom he
(560) derives title out of the State, are bounded by the river, giving them, as I have said, the right to the use of the stream to its thread.

Without pursuing our inquiries further, it seems to me that his Honor ought to have permitted the case to go to the jury with instructions as to the law bearing upon suitable issues.

CLARK, J., dissenting.

AVERY, J., dissenting. While the criterion by which the navigability of waters was determined in England has not been adopted as a test in America, the rule established in both countries is founded upon the same substantial reason, that where a particular water course can be relied upon with tolerable regularity as a highway for transporting valuable products of an extensive section of country to market, those who are engaged in conducting such commerce have an easement superior to the right of the owner of the soil, or the riparian proprietor. *Thunder Bay Co. v. Speechly,* 31 Mich., 336; *Moore v. Scanborn,* 2 Mich., 519 (59 Am. Dec., p. 20); *Walker v. Allen,* 72 Ala., 456; *R. R. v. Brooks,* 39 Ark., 403; *The Montello,* 20 Wall., 441; *Broadnax v. Baker,* 94 N. C., 681; *Brown v. Chadbourn,* 31 Me., 9; 6 Lawson R. & Rem., sec. 2928;

Wood on Nuisances, sec. 588; *Davis v. Winslow,* 51 Me., 264, and note 81 Am., sec. 582; Angell on Highways, sec. 55; Angell on Water Courses, sec. 537; *The Daniel Ball,* 10 Wall., 563; *Hikok v. Hine,* 13 Am. Rep., 255; *S. v. Club,* 100 N. C., 477.

In England the streams above tide-water were seldom, if ever, made to subserve such useful purposes; but in many portions of America there are rivers that afford an outlet (and frequently the only one) for most valuable ores and timber. It has been well said that "in the most approved modern sense of the term in this country, navigable waters include all those which afford a channel for useful commerce. Such waters are public highways of common right." 10 A. & E., (561) p. 236.

This Court distinctly recognized the principle that the right of a riparian proprietor of both banks was servient to the easement of the public in the water for the purpose of carrying to market whatever of the products of the country could be transported upon it in *S. v. Glenn,* 52 N. C., 321; using the language afterwards quoted in *S. v. Narrows Island Club, supra.* "As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, *subject to an easement to the public for the purpose of transportation of lime, flour and other articles in flats and canoes.*" It was in evidence in that case, that flat-boats could be used and had been employed in carrying the articles mentioned on the Yadkin River. It was in evidence, and not disputed, that the French Broad River had been used for transporting logs for fifteen or twenty years, as high up as twenty-six or twenty-eight miles above the plaintiff's fish-traps; that it was probably susceptible to such use to a point further up the main stream, and that within the section actually used three tributaries, Swannanoa, Little River and Mud Creek, emptied into it. Without considering the additional facilities that may have been afforded by the smaller streams for bringing timber to the French Broad, we must conclude that its use as an artery of commerce, though confined to the transportation of logs, will not only prove valuable to those engaged in manufacturing lumber, but will furnish a channel by which the timber in a large area of territory extending out from both banks of the river may find an outlet to market. As none but the most valuable hardwood logs will bear transportation by railway from points remote from the coast, as a rule the value of immense forests is often left to depend upon local demand until the cheaper water highways are utilized. Hence, public policy, as well as reason, upon which the recognition of the easement in water courses is founded, have inclined the courts to sustain the right of the owners of large forests or extensive mining districts to enjoy the privilege, when shown to be very valuable to them, at the (562)

comparatively insignificant sacrifice on the part of a riparian proprietor of using his property in subordination to it. It was upon such consideration that the courts of those states where the fresh-water streams were first found useful in the development of mineral or well timbered lands, declared that the reason of the English rule extended, under the widely different circumstances often existing in this country, not only to navigable tidal streams and fresh-water streams large enough for boats and lighters, but to such as subserved the purpose of bearing the products of the mines, forests and tillage of the country traversed by them to mills or market. Wood L. Nuis., sec. 586; 16 A. & E., 242; *Moore v. Sanborn,* 2 Mich., 526; *Brown v. Chadbourne, supra; Lewis v. Coffee,* 77 Ala., 190; *Treat v. Lord,* 42 Me., 552; *Canfield v. Erie,* 1 Mich., 105; *Grand Rapids v. Jarvis,* 30 Mich., 308; *McLaughlin v. Mining Co.,* 103 N. C., 100; *S. v. Corporation, post,* 661.

The best criterion of the navigability of a water course, therefore, is unquestionably its adaptability for the purposes of useful commerce, and, bearing this controlling principle in mind, we see no sufficient reason for the arbitrary distinction which counsel contended should be drawn between transporting logs in rafts and allowing each log to drift or float with the current of the stream. The object being to develop vast forests of virgin trees, that are located remote from the centers of trade, by utilizing the natural force of the flowing water as a means of cheap transportation, the reasons offered for sustaining the right to the easement, in a sluggish stream, where the logs can be floated in rafts, and denying its existence in a water course of much greater
(563) volume and equal depth, because it is studded with immense rocks, and the fall is so great and the current so strong that rafts cannot be handled with safety, seem to me very unsatisfactory. The recognition of the distinction would prohibit the development of the mountain section, where there are generally strong currents and sudden falls, though Nature had furnished the means of reaching the object in view more certainly and expeditiously by using the swift rather than the sluggish current. If logs were attached to each other so as to form large rafts, they might be so steered as to avoid nets, dams and other obstructions placed in water that moves slowly; but, even though no large stones protruded above the surface of a swift stream, it would be impossible without the aid of a steam tug to protect dams built across them from the consequences of collision, involving much more danger of destroying them than would the lodging of logs, one at a time, against them. In this view we are sustained by abundant authority in those states where the floating of logs to market has become an extensive and profitable industry. *Brown v. Chadbourne, supra; Field v. Log Co.,*

67 Wis., 569; *Buchanan v. Grand River Co.*, 48 Mich., 364; *Muse v. Smith*, 3 Oregon, 621; *Grand Rapids v. Jarvis, supra; Treat v. Lord, supra.*

It is true, that in one or two of the states where the forests are not extensive or the timber trees very valuable, the rule has been adopted that a due regard for the rights of owners of dams requires that the logs should either be transported in rafts in charge of some persons who can steer them, or that during the season when they are being floated men should be posted at intervals along the banks of streams to prevent a collection of logs at any one point. But in states where timber has become an important article of commerce, the better rule prevails that when we even concede a stream to be a public highway, all private rights in it must be as completely subordinated as in a (564) public road passing through land of private indivdiuals.

The Legislature unquestionably has, on the one hand, the power to make any obstruction of a highway indictable, or, on the other, to permit the original owner of the land in the exercise of his servient right ot erect a gate across the highway upon certain conditions which will protect the public from great inconvenience in using it. In the same way the Legislature has, by statute (The Code, sec. 1849), provided that the owner of land on one bank of a stream may, under certain circumstances, cause a mill-site to be condemned. On the other hand, The Code, sec. 3706, *et seq.*, clearly recognizes the doctrine that all streams that are susceptible of use for commerce, are public highways which may be taken in charge by the county commissioners and cleared out and improved at the expense of the county, and placed in charge of overseers with certain designated hands subject to their orders just as is done in reference to public roads. And the Legislature has, in the most explicit terms, recognized also the principle that streams susceptible of use for floating logs are public highways in which the public have a right superior to even that of the mill-owner, who has the fee simple in the whole bed of the stream. In section 3712 of The Code, commissioners, who may be appointed by the county authorities "to examine and lay off rivers and creeks in their county" (section 3710), are empowered "to lay off gates with slopes attached thereto, upon any milldam built upon such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber."

If the riparian proprietor or owner of the bed of the stream had a right superior to that of the public, it would be necessary before requiring him to open a passway in his dam to condemn and pay for such way under the right of eminent domain. But it is because all streams useful for commerce are natural highways, over which the

(565) sovereign state is at liberty to assert the right of control for public use absolutely or only to a limited extent, as it may elect, that the owner cannot object to having it declared subject to public use without condemnation and compensation. *Barnard v. Hinkley,* 10 Mich., 459; 16 A. & E., page 263, note 3.

The statute provides for laying off a way for the convenient passage of *floating logs,* not rafts, thus showing the legislative intent to protect as fully the right of a man who has but a single log, to mark it and let it float along a highway in this State to the waters of the Tennessee, as that of a company that has capital to buy immense forests, construct rafts, and to so enlarge their business as to justify them in posting a line of sentinels to watch and steer from Asheville to Paint Rock. If the public has an easement or right in a river as a highway, it is the office of the Legislature to restrict the use of it so as to protect mills, fish-dams and bridges, if they think best. The courts have no authority by their judgments to remedy evils for which it is within the province of the law-making power alone to furnish the means of redress. Much less has the court a right arbitrarily to declare that though a stream useful for commerce is by common law a public highway, it can be used only by persons who fasten logs together and float them as rafts. It seems to me that a court might as well declare that one who drives an ox or pair of oxen shall not have the right to use the public road, because the ox is less manageable and more apt to bring a conveyance into collision with other passing vehicles than horses or mules. I am free to concede that there has been some conflict of authority on this subject, and, as we are at liberty now to align this Court with those maintaining either view, it is well for us to remember that there are sixteen mountain counties lying west of the Blue Ridge in North Carolina, in all of which will be found timber of great value that can (566) never find its way to market except by the swift mountain streams, that are for the most part utterly incapable of floating rafts, but many of which will transport logs by the thousands and ultimately deliver them at the market towns, where various railroads cross the Tennessee River. Nature has provided this outlet where the character of the country is such that railways can be built only at immense cost. The Legislature has already defined the respective rights of mill-owners and log-floaters, where the timber interest assumes such magnitude in the low country as to challenge the attention of the county commissioners.

It may not be amiss to call attention to the fact that the Legislature has also asserted its right to have all fish-dams on the French Broad River from Paint Rock to Brevard opened for the free passage of fish. The Code, sec. 3410, provides that no person shall place or allow to re-

main in the French Broad River, from the State line to Brevard, any dam for mill or factory purposes, unless the owner thereof shall construct thereon, at his own expense, a sluice-way for the free passage of fish, of a width of not less than three feet nor more than ten feet. It may be well to remember that the Legislature has thus declared a passway of not more than ten feet sufficient for all purposes between Asheville and Brevard, where the river is admitted to be a floatable stream, and yet a raft must ordinarily be much wider.

In section 3412 it is provided that no other obstruction to the passage of fish shall exist or be built between the designated points in the streams hereinbefore mentioned, unless an opening of not less than twenty-five feet and not more than seventy-five feet, embracing *the main channel* of said streams, shall be made by the owner of such obstructions within twenty days after notice from the Board of Agriculture to make such opening, under penalty of fifty dollars per day for each day such obstruction shall remain unopened.

I think that the statute giving the county commissioners the (567) power to take charge of floatable streams is, and was intended, to be merely in affirmance of the common law right to use a stream capable of floating logs to market with reasonable regularity for a portion of each year, and a grant of authority to the counties for the public benefit to keep such streams unobstructed, just as a public road is kept in good condition. Since it was intimated in *Glenn's case,* and has since been distinctly declared, that there is such a thing as a stream navigable for logs, it is too late to attempt to distinguish between the dominant right of the public for that purpose and the superior right of a steamer to the channel of a stream large enough to permit its passage. *McLaughlin v. Mining Co., supra; S. v. Corporation, post,* 661. A statute which attempts to confer on mill-owners the right to obstruct the passage of fish is unconstitutional. He maintains his obstruction subject to the right of the Legislature to require, in the interest of other riparian owners, that a sufficient passway for fish be opened in it. 8 A. & E., p. 35.

It is not necessary, in order to establish the easement in a river, to show that it is susceptible of use continuously during the whole year for the purpose of floatage, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to the season, the water will rise to and remain at such a height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down. When prudent business men regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country. *Walker v. Allen, supra; Little Rock v. Brooks, supra; Felzer v. Robinson,* 3 Oregon;

Thunder Bay Co. v. Speeksly, supra; Morgan v. King, 35 N. Y., 454. This is one of many instances illustrating how, looking always to the reason upon which the common law was founded, its principles may be expanded so as to meet the exigencies arising in the development
(568) of a new country under conditions that did not exist in England.

There was evidence introduced by the plaintiff, and undisputed, tending to show that the river had been utilized for floatage for fifteen years for a distance of twenty-five miles, at least, above the trap, thus offering a channel for shipment to a large territory and numerous persons, and that one person had cut four million feet of lumber into it in one month. While a short stream or arm of a bay might not be declared a highway for the convenience of a few persons interested in a small territory, the right to the easement may always be asserted when there is "a capacity for valuable and extensive floatage." *Moore v. Sanbourne, supra; Wadsworth v. Smith,* 26 Am. Dec., 525; *Rhodes v. Otis,* 73 Am. Dec., 439. The witness Zachary testified that he had lived on the French Broad River since the year 1869, and there had been a great deal of high water every winter since that date, except the two last winters, but during those two it had been high enough to float logs.

I believe that the majority of the Court concur only in the view that the testimony left the question whether the French Broad River below Asheville was shown to be capable of floating logs to market during the winter season in dispute, and that the jury should have been allowed to pass upon it. As I interpret the testimony, no witness stated that logs could not be floated during every winter. It is probable that all would have testified that it was impracticable to float rafts either above or below Asheville, or in any stream west of the Yadkin.

If the streams are only open as a highway for logs in that shape, the enforcement of the rule would prove an embargo upon that species of commerce on every stream where rocks and shoals abound, and render it necessary to condemn the beds of such streams and blast out
(569) the rocks before they can be utilized as public highways. *Pierreport v. Loveless,* 72 N. Y., 212; *Walker v. Board of Public Works,* 16 Ohio, 540.

But it seems to me that if the river above Asheville had been profitably used for fifteen years for floating logs to mills located there, it would be presumed that, according to the laws of Nature, the stream, which was growing larger and more powerful below, would be, for the same period, capable of profitable use in floating single logs. The immense rocks below might burst rafts asunder, but while a stream which had been cleared out for navigation above Asheville, might be too rough for steamers, but, according to all observation and experience, it could

not have been so small or so rugged that it could not be relied on for transporting logs.

It appearing from the testimony that a large number of logs had been floated by the defendant, its agents and others, from points above the dam, and had reached their destination below without stopping, the fact that a number may have been washed ashore or drifted against rocks or other obstructions in the river and remained until started from their places of lodgment in nowise affects its navigability. Wood, *supra,* sec. 588; *Wood v. Chadbourne, supra.*

The Tar River, between Tarboro and Greenville, in our own State, is usually too low for several months in each year for navigation by the steamers that ply between the two points, and the rains that raise the river do not recur at fixed periods any year, yet they come with such regularity that the riparian planter may calculate on transportation by water for his cotton crop with absolute certainty during the winter months. No one would contend that Tar River is not navigable by small steamers. Though logs might drift ashore when the waters are subsiding, there would, of course, be no room for dispute as to its capacity to float logs also.

The plaintiff rests his claim to damages upon the fact, which the testimony tends to prove, that more than one hundred and fifty logs belonging to the defendant lodged against his dam on the evening before the fish-trap was swept away. Granting this to be true, (570) and conceding, as we have shown, that the French Broad is a floatable stream or highway, the defendant, in common with all other citizens, had an easement with the rights incidental to its exercise, while the company, or its agents, were pursuing the usual plan in trusting its logs to the current, and were not wantonly and purposely trusting them upon any dam, where the natural tendency of the stream was to carry them around it, they could incur no liability to answer in damages to any riparian proprietor, especially to one whose interest in the soil extended only *ad filum aquae,* while, according to his own testimony, he had left but little over one-third of the stream open. *McNamee v. Alexander,* 109 N. C., 242; *S. v. Glenn, supra; Watts v. Boom Co.,* 52 Mich., 203; *Union Mills Co. v. Sheno,* 66 Wis., 476; *McPheeters v. L. D. & Co.,* 78 Miss., 329. The defendant, having the dominant right of navigation for the purpose of transporting logs, was under no greater legal obligation to look after the safety of a dam attached to a fish-trap, by conducting the logs around it, than the commander of a steamer would have been in passing through a navigable sound to steer around a fish-net that had been set across the channel. *Hettrick v. Page,* 82 N. C., 65; *S. v. Glenn, supra; S. v. Club,* 100 N. C., 477; Angell on

Water Courses, secs. 350, 558, 659; 3 Lawson Rem., sec. 2936; *Davis v. Winslow,* 81 Am. Dec., 580.

If the plaintiff had the right to construct a dam as far as the center of the stream, his outer boundary, still the defendant had the superior right to enjoy the easement in the whole stream; and if in floating his logs in the usual way they came in contact with the dam, the company incurred no liability for loss from consequent injury to the fish-trap. *Davis v. Winslow, supra;* 26 Am. Dec., 530; *Walker v. Shepardson,* 4 Wis., 495; *Yeates v. Judd,* 18 *ibid.,* 118.

(571) We think that, according to the testimony, in any aspect of it, the injury to the dam was caused by the drifting of logs, that were being transported in a lawful manner, against it. If we concede, for the sake of argument, that the riparian proprietor had the right to construct the dam and that the defendant's agents were not authorized to treat it as a public nuisance and purposely tear it down in order to open a channel for the passage of its logs, still the plaintiff, upon the principle stated, and according to the authorities cited, could not recover for the failure of the defendant to keep the logs off the dam or trap. *Hettrick v. Page, supra.* In the exercise of a subordinate right it was incumbent on the plaintiff himself, in the most favorable view of the law for him, to guard against possible injury from such cause, either by leaving an opening in the dam where the current would naturally carry the logs, or by steering them as they approached around the western end of it. *Brown v. Chadbourne, supra; Lancey v. Clifford,* 92 Am. Dec., 561; *Gorman v. Benson,* 77 Am. Dec., 435; *Grand Rapids v. Powers,* Albany Law Journal, 13 February, 1892, p. 148.

If section 1123 of The Code can be construed to affect the merits of our case at all, it at most gives the sanction of the law to the erection of a dam for two-thirds of the distance across a stream in which the public have an easement for transporting logs, but in subordination to the superior right to the use of the highway for that purpose.

While I understand that a majority of the Court thus far have concurred only in the view that there was error in refusing to submit the case to the jury, I have submitted my views, in dissenting, upon every aspect of the case, and at length, because I am firmly persuaded that the future development of all Western North Carolina, and especially of that section located on the waters of the Mississippi, depends more upon the ultimate decision of the points involved in this case than upon any or all other contingencies.

Cited: *Morris v. Herndon,* 113 N. C., 239; *Gwaltney v. Timber Co.,* 115 N. C., 581; *Comrs. v. Lumber Co., ib.,* 595; *S. c.,* 116 N. C., 734, 742, 746; *Warren v. Lumber Co.,* 154 N. C., 37.

(572)

PHILIP BUCKNER v. LOUIS ANDERSON.

Action to Recover Land—Description—Evidence—Charge.

1. The different descriptions of a boundary line should be, if possible, reconciled to give effect to the grantor's intent.
2. When, in the original survey, a natural object or well known line of another tract is called for, such call will control a description of courses and distances inconsistent therewith.
3. Where there is a call in a deed "thence with that line to a stake on the west bank of the branch," and to reach such "branch" which is well known, the "line" must be extended some seventeen or eighteen poles: *Held*, it is proper to follow the line so extended to the branch.
4. The charge of the court to the jury that the line must be determined by following the line to the "branch," was not error, though there was some evidence that there was a nearer tributary of this branch. What branch was meant, was a question for the jury.
5. The parties were not estopped by a subsequent verbal agreement fixing the line to such tributary of the branch from disputing such line.

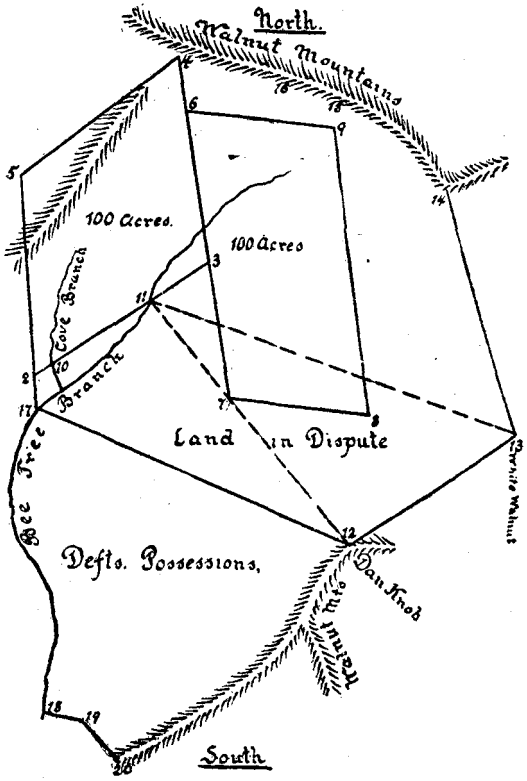
ACTION to recover possession of land, tried at November Term, 1891, of BUNCOMBE, before *Merrimon, J.*

The controversy grew out of the question whether the plaintiff's line should be run from a point designated as figure 1 on the plat to 2, and thence to 12 and to 11 (so as to include the disputed territory included within the lines 2, 12, 11, 2), or whether it should be located from 1 to 2 and thence north to 11, and thence to 12, as contended by the defendant, so as to cover no part of the defendant's possession. The call which gave rise to this dispute was thence (from figure 1) with the line of said tract (admitted to be the mountain field tract, 1, 2, 3, 4, 5, 1) to a stake on the west bank of the branch. In the beginning of the descriptive clause in plaintiff's deed, the lands are described as lying on the head of Meadow's Branch, on the Bee Tree of Bull's Creek. (573) The location of Bee Tree Branch is shown on the plot attached, and which was agreed upon by the parties to be used in the statement; but the location of figure 11 will be fixed further south, as indicated by a cross mark on the line 10 to 11. The other material facts are stated in the opinion of the Court.

W. H. Malone for plaintiff.
T. F. Davidson for defendant.

AVERY, J. The controversy hinges upon the location of a boundary line, and the facts are so far ascertained and admitted as to narrow it down to the legal question, what is the true line of the deed from

(574) Ramsey and others, executors, to Stephen Ammons? Beginning at figure 14 on the plat, it is agreed that the line runs along a ridge to 14 and 16, and with the ridge to a Spanish oak opposite to Stephen Ammon's own corner of his mountain field tract, and thence to said corner at 4. From 4 the call of the deed is thence *"with that line"* (admitted to be the line of the mountain field tract), 127 poles to



a stake, which both parties agree is at 5; and from 5 the call is *"thence with that line* to the beginning corner," which is conceded to be located at figure 1. The main question grows out of the location of the next line, and depends for its solution, in view of the undisputed facts, upon the construction which the court will give to the language of the next call, "thence with that line to a stake on the west bank of the branch." The land was described in the deed as "lying on the head of Meadow's Branch, on the Bee Tree of Bull's Creek." The nearest point of Bee Tree Creek is at 17, which is eighteen poles from 2, where the corner

of the mountain field tract is located, and on a prolongation of the line 5, 1, 2; but the next succeeding line of the mountain field tract (from 2 to 3) crosses Bee Tree Branch at 11 and, according to the testimony of some of the witnesses, Cove Branch, one of its tributaries, at 10. The point next called for being on the Dan Knob, at 12, the plaintiff contends that the proper location of the call, which gives rise to the controversy, runs from figure 1, with the line of the mountain field tract to 2 (where it diverges to the north), thence to the nearest point on the west bank of Bee Tree at 17, so as to include the disputed territory, where the defendant's possession lies (within the boundaries 2, 12, 11, 2). The defendant insists that the disputed line is to be so located as to run with the boundaries of the mountain field tract till they reach the west bank of Bee Tree Branch at 11, and thus reconcile and fullfil the two descriptions by following the lines of the tract called for to the west bank of the branch. The general rule which must be always observed, if possible, is that different descriptions of a (575) boundary line should be reconciled so as to give effect to every expression of the grantor's intent. *Proctor v. Pool,* 15 N. C., 370; *Shaffer v. Hahn, ante,* 1; *Shultz v. Young,* 25 N. C., 385.

It is settled that where there is direct proof of the actual running of a line at the time of the original survey or the location of a corner called for, as the line of another tract, or on the bank of a creek, the party claiming under the deed holds to such line or corner, notwithstanding the fact that some mistaken description may be inconsistent with such a location. *Cherry v. Slade,* 7 N. C., 82. It is equally true that where a point on the bank of a stream, or in a given boundary, is described in such a way as, with the aid of extrinsic proof to fix its actual location, such description will prevail over and control a conflicting call for following the line of another tract. If the call here had been for a natural object, such as a certain rock on the creek, or a stake corner of another tract, the location of which could be determined by running the boundaries of such tract, the line must have been run direct to such natural object, disregarding the call for following the line of another tract if inconsistent with the more certain description. *Cherry v. Slade, supra.* In a conflict of descriptions, that one must always be adopted which is the more certain, and a known objective point, or one that can be made certain by proof, is, under that rule, to be preferred to one that can be fixed at a point on an extended line or surface only by groping along another line or lines to reach it. But no particular point on Bee Tree Branch, known or ascertainable otherwise than by use of the chain and compass, is designated as the terminus of the call. Indeed, the corner is, by the terms of the description, at an imaginary point—a stake. What did the grantor mean by the words "thence with that line?"

(576) Did he mean the boundary line generally, or a particular line of the mountain field tract? The lines of the plaintiff's deed, starting from the beginning corner at 14, first intersected with the 100-acre tract at 4, and the next line, which is described as running "thence with that line 127 poles to a stake," it is admitted extends from 4 to 5. In running the call from 5 the language, "thence with that line to the beginning corner of said mountain field (100-acre) tract," is by common consent interpreted to mean, not the line which immediately preceded it in the deed, or a prolongation of it, but the next line of the same tract, running eastwardly at a right angle. That particular line of the mountain field tract terminates at 1; but the next call continues in the same direction to 2, falling short seventeen poles of reaching the west bank of the creek by a direct line. It is evident that the description "with that line" was properly construed by the parties in running up to figure 1 as meaning "with the boundaries of the mountain field tract," though it became necessary to change the course from that just previously pursued in order to conform to and follow its different lines. By continuing to place the same construction upon the identical language previously used, after passing the beginning corner at 1, the two descriptions are met and reconciled. The boundary line of the mountain field tract is followed up to the very point fixed by its intersection with Bee Tree Branch. Had it been impracticable to reach the west bank of Bee Tree Branch by following, regardless of course, the boundaries of the other tract, both descriptions might have been met by diverging at 2 and running to the nearest point on the west bank of the branch. *Campbell v. Branch,* 49 N. C., 313. If a known point had been called for on the branch, course and distance as determined by the compass or by known lines, might have been disregarded in order to reach it. *Redmon v. Stepp,* 100 N. C., 213.

The second line of defense contended for by the plaintiff, in case he should fail in holding his first position, was that, conceding the correctness of the principle that both descriptions must be reconciled by
(577) following the lines, the first and nearest intersection with the waters of Bee Tree Branch was at the west bank of Cove Creek (a tributary of Bee Tree) at figure 10, and by locating the corner at that point and running thence to Dan Knob at 12, a part of the defendant's possession would still be covered by plaintiff's deed. The evidence was conflicting as to whether there was in fact any stream as Cove Branch crossing the line at 10, and considering the language of the deed the plaintiff had no ground to complain when the court told the jury that the boundary line of the mountain field tract must be followed to *the branch,* and it was for the jury to determine what branch was intended by the makers of the deed.

It was in evidence that the plaintiff and defendant had agreed by parol that the true boundary ran from 1 to 2, from 2 to 10, and thence to 12, and that they accordingly marked it. The judge very properly refused to charge the jury that by such a verbal agreement, made after the boundaries were fixed, at the execution of the deed, they could be altered and the parties estopped from disputing the new location so agreed upon. *Shaffer v. Hahn, supra; Caraway v. Chancy*, 51 N. C., 361. If the court below erred, it was in allowing the jury to take such running and marking into consideration at all, as tending to show the location of the branch called for, since the whole controversy depended upon ascertaining the point of intersection of the line with it, and neither an agreement subsequent to the execution of the deed, nor running in accordance with it, was evidence tending to locate the lines run and marked contemporaneously with the execution of the original conveyance. *Caraway v. Chancy, supra.*

We think that there was no error in the ruling or charge of the court of which the plaintiff had just ground to complain.

NO ERROR.

Cited: Norwood v. Crawford, 114 N. C., 522; *Cox v. McGowan*, 116 N. C., 133, 134; *Brown v. House, ib.*, 869; *Shaffer v. Gaynor*, 117 N. C., 23, 25; *Brown v. House*, 118 N. C., 880; *Deaver v. Jones*, 119 N. C., 599; *Presnell v. Garrison*, 121 N. C., 368; *Drake v. Howell*, 133 N. C., 165; *Haddock v. Leary*, 148 N. C., 380; *Boddie v. Bond*, 158 N. C., 206.

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(578)

BOARD OF EDUCATION OF BLADEN COUNTY v. BOARD OF COMMISSIONERS OF BLADEN COUNTY.

Public Schools—Limitation of Taxes—Constitution—Board of Education—Board of County Commissioners.

1. The Constitution, Article IX, sec. 3, requiring public schools to be open four months every year, does not authorize the county commissioners to levy a tax beyond the limitation imposed by Article V, sec. 1; and section 23, chapter 174, Laws of 1885, authorizing tax beyond this limitation is void. This case is governed by *Barksdale v. Commissioners*, 93 N. C., 472.

2. Unless it be made to appear that there was palpable error or mistake, this Court will stand by former decisions.

3. The Constitution, Article V, fixes the limitation for ordinary purposes—State and county—to two dollars on three hundred dollars worth of property, and two dollars on the poll; and by Article V, sec. 6, the counties cannot exceed the double of the State tax, except for special purpose and with the special approval of the General Assembly.

4. *Quaere,* if the General Assembly are so fettered by the limitation of Article V, sec. 1, that they cannot provide for the maintenance of public schools, as required by Article IX, sec. 3, in the same way as they may provide for a casual deficit, or the payment of the public debt, or interest on the same, or for the suppression of invasion and insurrection.

AVERY, J., dissenting.

ACTION heard before *Winston, J.,* at Fall Term, 1892, of BLADEN, upon complaint and answer.

The object of this action, brought by the County Board of Education, was by mandamus to compel the Board of County Commissioners of Bladen County to levy a tax beyond the constitutional limitation of Article V, sec. 1, in order to keep the public schools open for four months, as prescribed by Article IX, sec. 3, of the Constitution. The court upon this point gave judgment against the Board of Education, and they appealed to the Supreme Court.

(579) *Theo. F. Davidson, Attorney-General, and J. B. Batchelor for plaintiff.*

No counsel contra.

MACRAE, J. The questions presented for our consideration are precisely the same as those which are determined in the case of *Barksdale v. Commissioners,* 93 N. C., 472, wherein it was held that while it is the duty of the county commissioners, under Article IX, sec. 3, of the Constitution of North Carolina, to keep the public schools open for at least four months every year, yet, in discharging this duty, they cannot disregard the limitations imposed by Article V, sec. 1, as to the amount of tax to be levied; and that section 23, chapter 174, Laws of 1885, which requires the commissioners, if the tax levied by the State for this purpose shall be insufficient to carry it into effect, to levy annually a special tax to supply the deficiency, is unconstitutional, because it is not such a special tax for county purposes as is provided for by Article V, sec. 6, of the Constitution.

The subject has been so recently and thoroughly discussed in the opinion delivered by *Chief Justice Smith* for the Court, and in the dissenting opinion of the then *Associate Justice Merrimon,* with all the authorities on both sides, that we deem it unnecessary to recite the reasons upon which a conclusion was then reached by a majority of the Court.

We have been induced to give the questions a careful reconsideration, and have listened with interest to the able argument of counsel who have sought to induce us to put a different construction upon the Constitution than was announced in the decision above referred, and to hold

that it is the duty of the county commissioners to obey the mandate of the Act of 1885, and levy the additional tax sufficient to make up the deficiency, caused by the failure of the General Assembly to provide funds to maintain the schools for at least four months in the year. But we are constrained by the principle involved in the maxim *stare decisis,* in which is bound up the stability of judicial decision, on (580) which depends not only respect for law, but knowledge of law, so necessary to be possessed by those whose duty and business it is to advise the people on all matters concerning their interest, to abide by the decisions of the Court, unless it be made to appear that there was palpable error or mistake. When there is room for construction, and reasons may be adduced on both sides of a matter in controversy, the certainty of a rule is of more importance often than the reason of it.

In saying this, we do not wish it to be understood that, were the question before us an open one, we should reach a different conclusion upon it than has been declared by the Court.

The subject of taxation, general and special, by State and counties, has been considered in a long line of judicial decisions, beginning almost immediately upon the adoption of the Constitution of 1868. It is well settled that, for the ordinary expenses of government, both State and county, the first section of Article V of the Constitution places the limit of taxation and preserves the equation between the capitation and the property tax—the capitation tax never to exceed two dollars, and the tax upon property valued at three hundred dollars to be confined within the same limit. It is also settled in the same manner that by Article V, sec. 6, the counties may not exceed the double of the State tax, within the equation, except for a special purpose and with the special approval of the General Assembly. It appears from an examination of the authorities that no case has ever come before the courts involving the exercise of this special power of taxation by the counties, except upon special or private acts for local objects, until the Act of 1885 was brought to our attention, wherein, in a public act ("An Act to amend the public school law, chapter 15 of The Code"), it is sought by section 23 to require a special tax in the county to supply the de- (581) ficiency in the sum raised by general taxation and appropriation for public school purposes, under the requirements of Article IX of the Constitution, in section 2 of which "the General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of public schools wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years."

It was held in *Barksdale's case, supra,* which we are now asked to review, that this section 23 of the Act of 1885 was not warranted by section 6 of Article V of the Constitution, because it was not such a

special tax for local objects as was contemplated in the last named section. We see no reason to doubt the correctness of the decision of the Court upon this question, if it were now open to us for revision. The reasons are given and cases cited in the opinion of the Chief Justice in the case referred to, and it would be but cumbering the books for us to reproduce them here.

Were the question presented to us of the power of the General Assembly to deal with the matter and provide adequate means for the necessary expenses incident to the maintenance of the public schools under the requirement of Article IX, by general taxation, unfettered by any limitation of Article V, sec. 1, in the same manner as they may provide for a casual deficit, or for the payment of the public debt or interest on the same, or for the suppression of insurrection or invasion, we might possibly find a solution of the apparent difficulty which has resulted in a failure in some counties to maintain the schools for at least four months in every year. But, as the question may never arise, we will not discuss it.

We are content to abide by the decision of the Court in *Barksdale's case,* and declare that, the judgment of his Honor below, following that decision, is

AFFIRMED.

(582) AVERY, J., dissenting. Entertaining the most profound respect for the views of my brethren, I feel, nevertheless, constrained to give expression to the reasons that have impelled me to the conclusion that a most important provision of the organic law has been misconstrued, and the will of the people, as embodied therein, has been thwarted by restricting the right of the Legislature to delegate to the counties the power to levy tax for the maintenance of public schools. If the Court has fallen into error, it is a misconception that vitally concerns the public welfare. In the face of this constitutional inhibition the Legislature is no longer left free to enact and enforce uniform and liberal laws for sustaining our schools and elevating and educating the ignorant classes of our people. Experience and observation have shown that education and morality advances hand in hand, while ignorance and vice are, as a rule, as constant companions. Acting upon the enlightened and philanthropic idea that crime could be best combatted, and happiness promoted by the refining influences of religion, morality and learning, the framers of our fundamental law dug deep and made mandatory public education as one of the bedstones upon which the Constitution rests. The provisions which apply specifically to this subject are sections 1, 2 and 3 of Article IX, the material portions of which are as follows:

"1. Religion, morality and *knowledge being necessary to good government* and the happiness of mankind, schools and the means of education shall forever be encouraged.

"2. The General Assembly, at its first session under this Constitution, *shall provide, by taxation* and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State.

"3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section they shall be liable to indictment." (583)

This, like many other expressions of the sovereign will embodied in the Constitution, is not only addressed to and obligatory upon the Legislature, but likewise appeals to and deals directly with its agencies for local government, the counties, and arms the courts with power to stimulate the commissioners to diligence. Starting out with the announcement, as solemn and binding and as clear and comprehensible as any fundamental principle transplanted from Magna Charta into our Declaration of Rights, that knowledge, as the handmaiden of religion and morality, is essential to the perpetuity of good government, two conventions of the people have deliberately and solemnly ordained that the system which "shall be maintained" must meet this necessity by compliance, on the part of the Legislature, with certain requirements of the instrument, and that the aid of the criminal law also be invoked if necessary to insure the enforcement of the constitutional mandate.

1. It was made the duty of the Legislature, without delay, at its first session, both after the ratification of the Constitution in 1868 and in its amended form in 1876, to provide for a "general and uniform system" by taxation or otherwise.

2. The county commissioners were required to fix the bounds of the districts in which one or more schools were to be maintained four months, etc.

3. The county commissioners are declared liable to indictment for an offense created by the Constitution, to wit, the failure to comply with this section, not only by neglecting or refusing to lay off the limits of the districts, but by omitting to keep up the schools.

How could the law-making power provide a general and uniform system of schools, so that the counties, as public agencies, should have the power, which they were liable to punishment for not exercising, of keeping up public schools for four months in the year in (584) localities designated by them? Section 5, Article IX, appropriates to the school fund of the counties the clear proceeds of penalties

and forfeitures collected, and all fines for breaches of penal or military law, paid within their respective borders. The State system must be uniform, "but the funds necessary for the support of the public schools are not derived exclusively from the State," said the late *Chief Justice Merrimon* in *Greensboro v. Hodgin,* 106 N. C., 187. "The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such fund." In a subsequent portion of the same opinion, in construing section 4, Article IX, the Court says "It is likewise required that the fund supplied by the counties shall supplement that of the State and be distributed in the counties supplying the same, as pointed out above," viz., so as to insure the maintenance of a school for four months in the several districts. Obviously, it is impracticable for the Legislature to so adjust the State taxation and distribution of the fund arising from it, that the same per centum of tax, with fines, forfeitures and penalties superadded, shall provide anything like uniformity in the duration or character of the schools. The division of the fund, raised by State taxation, according to the number of children within the school age under the general law providing for its distribution, has been declared uniform and constitutional. *Greensboro v. Hodgin, supra.* But it is manifest that unless the local authorities of the several counties may exercise the power delegated to them by the Legislature to make a sufficient supplement, the share of one county may maintain schools for ten months, while that allotted to another, where school children are not numerous and are scattered over a sparsely settled region, and where the amount paid in the shape of penalties is insignificant, may not prove
(585) sufficient to keep the schools open for one month in the whole year. The only criminal offense created and defined by the Constitution itself, is that mentioned in section 3. It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers of the Constitution that the officers held subject to this unusual liability should have power coëxtensive with their accountability. The Legislature, in enacting the law under which the tax was levied, manifestly placed this interpretation upon the sections which we have quoted, and in the construction of laws great respect should be shown to the opinion of the law-making power, and statutes solemnly enacted by the Legislature should be declared unconstitutional only when they are plainly repugnant to the provisions of the organic law.

Counties and towns are created by the Legislature for public convenience, and may be destroyed at any moment by the authority that gave them existence. *Lilly v. Taylor,* 88 N. C., 489; 10 Myers Fed. Dig., secs. 2224, 2425, 2026. The only limit upon the law-power is to be found

in the restrictive clauses of the Federal and State constitutions. 1 Dillon Mun. Corp. (3 Ed.), secs. 65-68, *et seq.; Barrington v. Ferry Co.*, 69 N. C., 165. Duties and burdens may be devolved upon the governing officers of counties against their will, and in the absence of a restraining provision in the organic law, counties may be even compelled to assume the liabilities of towns lying within their borders. Cooley Const. Lim. (4 Ed.), 295, 296, star page 241; 1 Dillon, *supra*, secs. 60 (35) to 65 (38); *Comrs. v. Ballard*, 69 N. C., 18; *Comrs. v. Comrs.*, 79 N. C., 565, and 95 N. C., 189. The Legislature may devote the streets, or other property of a town, to a public purpose, or, if such action does not violate the rights of creditors, it may modify or repeal a tax levy already laid by its authorities, or modify its action in any other respect. 1 Dillon, *supra*, sec. 70 (40) to sec. 77; *Bridge Co. v. Comrs.*, 81 N. C., 491; *Carrow v. Tollbridge Co.*, 61 N. C., 118. The statute which has been pronounced invalid (section 23, chapter 174, Laws 1885) is (586) amendatory of The Code, sec. 2590, and requires the county commissioners, where the tax levied by the State proves insufficient to maintain one or more schools in each school district for four months in the year, to levy annually "a special tax to supply the deficiency for the support and maintenance of said schools for said period of four months, or more." It is obvious that if there were no constitutional restriction upon the power of the Legislature, it was authorized and expressly required to pass just such a law as that enacted. Was its power exceeded in passing it? The Constitution of 1868, Article VII, sec. 2, provided that it should be the "duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and finances of said county as may be prescribed by law." The amendment of 1875, which took effect 1 January, 1877 (Article VII, sec. 14), provided that "the General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9, and 13." The Act of 1876-77, chap. 141, was passed in the exercise of the power given under section 14, Article VII, and, after providing for the election of county commissioners, and the levying of taxes with the assent of the justices of the peace, declares, in section 6, that they "shall have and exercise the jurisdiction and powers vested in the board of commissioners *now existing*, and also those vested in and exercised by the board of trustees, etc., except as may be hereafter provided by law."

Construing the Constitution of 1868 together with the Amendment of 1875 and the Act of 1876-77, it is manifest that before 1875 there was this further recognition of the right and duty of the county commissioners to overlook the schools as a part of the ordinary and necessary

county government, and that the Act of 1876-77, passed in pursuance of the Amendment of 1875, left this power and obligation still
(587) intact.

But despite all of these constitutional and statutory grants of power and injunctions of duty, it is contended that section 1, Article V, of the Constitution, limits the levy for ordinary purposes to not more than two dollars on the poll or sixty-six and two-thirds cents on every hundred dollars in value of land, that the education of the people of a county is not a county purpose, and the Act of 1876-77 does not provide for levying a "special tax," though the Legislature expressly so denominated the tax to be levied in every instance when there should be a deficiency in the appropriation by the State. Is education a county purpose? No one has ever contended that a tax providing for the support of the penal and charitable institutions of a county, or for building bridges across streams at the public crossings in its limits, is not a county purpose; or, if such a position has ever been assumed, it will no longer be insisted on in view of the decisions of this Court and the constant practice of the Legislature. *Barrington v. Ferry Co., supra.* When we find the word "schools" sandwiched between charitable institutions and roads in the constitutional definition of the duties of commissioners who are the embodiment of the municipal corporation, it would seem unreasonable to insist that an answer to an alternative mandamus, which stated that a levy of twenty cents on the hundred for support of prisoners in the jail and the poor, ten cents to make up the deficiency in school appropriation, and five cents for payment of damages assessed for public roads opened by order of the commissioners, raised the tax in the aggregate, with that levied by the State, to the constitutional limit, would not be deemed sufficient to relieve the commissioners from attachment for contempt. *Fry v. Comrs.*, 82 N. C., 304. The distinction between taxes levied under a power which associated schools with
(588) roads and bridges, and between those devoted to one purpose or other, seems to me to be clearly arbitrary and unreasonable. When the Constitution declares that knowledge is "necessary to good government," and that particular agents of the State, the county commissioners shall be indicted for failure to provide means of acquiring it, I cannot yield my assent to the proposition that it is a part of the appropriate public duty of those officers to protect the health of the people of the county by levying a tax for the purpose of constructing hospitals, if need be, or for opening new roads, or erecting bridges, while the Legislature cannot even clothe them with authority by a special act applicable to all of the counties in the State to levy and collect any sum for the intellectual

betterment of the people of the county. It seems to me that the framers of the Constitution not only intended that the commissioners should be empowered and required, as a part of their regular duty, to open roads and provide for the payment of the expense of punishing criminals, but that above all these other functions should be that of furnishing the means and facilities for acquiring knowledge.

If the maintenance of schools is a county purpose, then the remaining question is whether it is competent for the Legislature to pass an act providing for the levy, under certain specified circumstances, of a "special tax" by any county in the State, or whether it is essential, in order to authorize the levy for the very same purpose, to pass a separate act specifically applicable to each county. I do not think that the organic law requires any such vain and useless proceeding. I believe that the Legislature construed the Constitution properly in enacting that all counties, under certain clearly specified circumstances, should have the power delegated to them to lay a special tax for the particular purpose of making up a deficiency in the appropriation for the maintenance of schools for four months of the year, and incidentally of relieving themselves of their liability to indictment for failure to provide (589) such schools for the requisite period.

A careful scrutiny of the cases cited by the Court in *Barksdale v. Comrs.*, 93 N. C., 476, will show that the Court had never, prior to the announcement of the doctrine in that case, held that the taxation provided for in section 6, Article V, should be so far local as well as special as to deprive the Legislature of the power to pass a special statute applicable to all counties alike under certain specified circumstances. The Court in the case at bar have advanced a step further than did *Chief Justice Smith* in *Barksdale's case,* in declaring that the maintenance of schools is not a county purpose. Assuming that I have shown that the Constitution so characterizes it, it is difficult to conceive of a plausible reason for so limiting the power of the Legislature that it could not pass a special act applicable to a class of counties, where a certain state of affairs already existed or might arise in the future, instead of declaring in the case of each individual county, by a separate act, that if the appropriation of the next year should not be sufficient to accomplish a certain end, the commissioners should be authorized to make a levy to supplement it.

But it would seem to have been intended, in framing the Constitution, to place the maintenance of public schools, like the payment of debts of the State, far above constitutional restrictions applicable to ordinary expenditures for State or county purposes. If the simple declaration of broad generalities in reference to preserving the public credit is sufficient to override the constitutional limit of taxation in

order to meet the obligations of the State whenever created, and if the commissioners are required, without any special statutory warrant for their conduct, to levy a tax in excess of the limit also to meet a debt of the county created before the limit was imposed (in 1868) it would seems to me altogether more reasonable to hold that the provision (590) of the Constitution which subjected the commissioners to indictment for failure to keep the schools open for four months, gave them by implication, without the aid of an express statute, the power to disregard the restriction whenever it became essential to do so in order to meet the express requirement of section 3, Article IX. It is true, that in so far as section 1, Article V, impaired the remedy of a preëxisting creditor it was void, because it was repugnant to the Federal Constitution. But, in *University v. Holden,* 63 N. C., 410, all of the justices concurred in the opinion that the Legislature had the power, in order to meet the interest on the public debt, whenever created, or to repel invasion, or in any great emergency, to disregard the limit. *Justice Settle* pointed out expressly the sections of Article IX which we have quoted as enjoining the duty and giving the power to provide for public education without regard to the per centum of tax on property or the rate on the poll. There was a consensus of opinion in that case as to the principle that the General Assembly had the power to determine whether there is a necessity for transcending the restriction applicable only in ordinary cases. It seems clear to me that the Legislature not only has the power to determine when there is a necessity for exceeding the limit imposed upon the tax levy for ordinary expenditures in order to furnish the necessary school facilities, but whether the end can be attained by a general legislative levy only, or by empowering the counties to supplement the State appropriation, should it become manifestly necessary to do so. This view finds support in the fact, to which I have already alluded, that it is impossible for the Legislature to calculate what per capita rate and corresponding per centum on property will raise the sum necessary, when distributed according to the number of children and added to the local yield from fines and penalties, to maintain schools, some of which cost forty and some ten dollars per month for the prescribed period. In view of all these uncertain (591) elements entering into the estimate, which we must suppose were in contemplation of the delegates who ordained the provisions of the Constitution in reference to education, it seems to me impossible to give effect to all of the provisions of the organic law without granting to all county commissioners power commensurate with their allotted duty and their liability for failure to discharge it. It is not practicable in any other way to devise a system that will operate uniformly, and at the same time furnish the requisite educational advantages; and it is

essential to a compliance with all of the sections that it should so accomplish the end. *People v. Coleman,* 4 Cal., 46. Uniform laws are not necessarily universal in their operation, but a special law may affect alike all persons who may become in any way subject to it. *People v. Judge,* 17 Cal., 548; *McAurich v. R. R.,* 20 Iowa, 338. The question of uniformity in this case bears a striking analogy to that raised under the bankrupt law by reason of the inequality of exemptions in the different states, all of which were allowed by an amendment to the Federal law, yet it was expressly declared a uniform law. Bump., sec. 14, p. 375. The uniformity contemplated in framing Article IX, sec. 2, was in the minimum duration of schools, and that can be accomplished only by the intervention of the counties in their governmental capacities.

The doctrine of *stare decisis* can be invoked and insisted on only where, by acquiescence in a decision for a long time, it has become a rule of property, but inadvertent decisions, which can be corrected without disturbing titles, should be overruled at the earliest possible moment. Sedgwick on Stat. and Const. Law, 254; *Long v. Walker,* 105 N. C., 90; *Gaskill v. King,* 34 N. C., 223. Not a single title or vested right in the State depends upon our adherence to the decision in *Barksdale's case.*

Upon reviewing the dissenting opinion of the late *Chief Justice Merrimon* in *Barksdale's case, supra,* I have been so greatly impressed with the strength and force of the argument that it seems almost useless to have done more than refer to it as an embodiment of my (592) reasons for differing with my brethren. This was indeed the *magnum opus* of a grand tribune of the people, whose heart responded to the sentiment which imbedded in the Constitution the obligation to educate the youth of the land, and lend a helping hand to those whose lot might be cast in the humble walks of poverty, but whose worth and talent might warrant them in aspiring to the highest positions.

Cited: Bd. Education v. Comrs., 113 N. C., 385; *Hornthall v. Comrs.,* 126 N. C., 32; *Collie v. Comrs.,* 145 N. C., 171, 175; *R. R. v. Comrs.,* 148 N. C., 236; *Moore v. Comrs.,* 172 N. C., 427; *R. R. v. Cherokee,* 177 N. C., 90; *R. R. v. Comrs.,* 178 N. C., 452.

J. S. BASNIGHT v. THE ATLANTIC AND NORTH CAROLINA R. R.

Negligence—Damages—Common Carrier—Liability as an Insurer—Warehouseman—Gratuitous Bailee.

1. In an action against a railroad company for damages for negligence in allowing the burning of some timber on a car intended for shipment, it appeared that the plaintiff loaded the car on defendant's track, but did not notify the agent that it was ready for shipment, nor of the name of the consignee; the car was moved by defendant's agent to another track (erected for shipper's convenience) very close to a dry-kiln, from which it took fire; the court found by consent that the timber had been left with defendant, awaiting orders for shipment, and, as a conclusion of law, that defendant was not an insurer, but a simple warehouseman: *Held*, defendant's liability was that of a warehouseman, and not that of a common carrier, and the fire being accidental, no such negligence was shown as entitled the plaintiff to recover.
2. A common carrier is responsible only when goods are delivered and accepted by him in the usual course of business for immediate transportation.
3. The defendant's liability as warehouseman in this case was only that of a gratuitous bailee.

AVERY, J., dissenting.

(593) APPEAL from *Winston, J.*, at Spring Term, 1892, of CRAVEN.

"The plaintiff contends that the Atlantic and North Carolina R. R. received from him a car load of lumber for transportation; that the lumber was destroyed by fire and was not delivered by the said railroad company through their negligence; that the railroad company is a common carrier, and is liable as insurer to the plaintiff in the sum of damage to $159.99. The defendant denied all of the allegations of the plaintiff."

The foregoing constitutes the pleadings in the justice's court, from which the case was brought by appeal into the Superior Court (595) and there tried.

It was agreed that the evidence introduced by the plaintiff should be accepted as the facts in the case. Upon these facts his Honor should base his conclusions of law, and thereupon the court rendered the following judgment:

"This cause, coming on to be heard, and having been heard, the plaintiff having offered all the testimony, and the defendant declining to introduce any evidence, the court adjudges that the defendant company were not common carriers of the lumber, to recover damages for the burning of which this action is brought.

The court, by consent, finds that said lumber had been left with the defendant awaiting orders to forward the same, and, as a conclusion of law, that the defendant was not an insurer of said lumber, but was a simple warehouseman.

The fire by which the same was destroyed being accidental, the court holds that the defendant is not liable; that it exercised that degree of care which a reasonably prudent man would take of his own property under similar circumstances, and was not negligent; wherefore, the court considers and adjudges that it go hence without day and recover its costs."

From which judgment the plaintiff appeals, and assigns as error that the facts in evidence do not warrant in law the conclusions of his Honor.

J. W. Waters for plaintiff.
W. W. Clark for defendant.

MACRAE, J. We may consider this as a demurrer to the evidence, the defendant admitting the facts to be as testified to by plaintiff's witnesses, and contending that upon the facts found the plaintiff is not entitled to recover.

We concur entirely with his Honor below in his conclusion that defendant's liability was not that of a common carrier. Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load with lumber to go to Philadel- (596) phia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of 24 December, but did not notify defendant's agent that the car was ready for shipment nor of the name of the consignee.

Treating the loading of the car upon defendant's track as a delivery to defendant and an acceptance, it was not yet ready for transportation, for the defendant had not been notified of its readiness nor to whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. *O'Neal v. R. R.*, 60 N. Y., 138; *Wells v. R. R.*, 51 N. C., 47; Angell on Carriers, sec. 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation. 2 A. & E. of Law, 808.

As to defendant's liability as warehouseman, if the complaint may be construed to set up a claim on this account, by the testimony in the case, which is admitted to be true, the defendant was a gratuitous bailee,

and the facts do not establish such negligence as would entitle the plaintiff to recover. Schouler, B. & C., 390; *McCombs v. R. R.*, 67 N. C., 193. "A negligence followed by liability to others is defined as the judicial cause of an injury when it consists of such an act or omission on the part of a responsible person, as in ordinary natural sequence immediately results in such injury." Wharton Neg., sec. 73. It must be the natural and proximate consequence of the act complained of. 2 Greenleaf Ev., 256; *Chalk v. R. R.*, 85 N. C., 423. There is no error, and the judgment is

AFFIRMED.

Cited: *Malloy v. Fayetteville*, 122 N. C., 485; *Fuller v. R. R.*, 140 N. C., 484; *Brown v. Payne*, 181 N. C., 382.

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(597)

SARAH CAWFIELD v. THE ASHEVILLE STREET R. R.

Negligence—Contributory Negligence—Comments of Counsel—Burden of Proof—Street Cars.

1. The matter of controlling comments of counsel in their speeches is ordinarily left to the sound discretion of the trial judge; and where there was evidence making the character of witnesses consistent with opprobrious epithets applid by counsel, there was no ground of complaint.
2. Where it is shown that the plaintiff was injured by the negligence of the defendant in starting his street car just as she was about to alight therefrom, he cannot exculpate himself by showing that she was so encumbered with baggage that she could not avail herself fully of his means provided for alighting, or that she waited two minutes before getting up from her seat, the car having gone beyond the place where she was to get off.
3. If the conductor might have seen her and prevented her fall, the company is liable even though she was also negligent, as described in her manner of alighting from the car.
4. The burden of proof is on the defendant to show contributory negligence.

CLARK, J., and SHEPHERD, C. J., dissenting.

ACTION tried at December Term, 1891, of BUNCOMBE, before *Merrimon, J.*

The plaintiff brought her action to recover damages for an injury caused by the sudden and negligent moving of the defendant's street car when she was in the act of alighting from it. The material facts are stated in the opinion.

The defendant appealed from the judgment rendered.

Julius C. Martin and H. B. Carter for plaintiff.
Thomas A. Jones, F. A. Sondley and T. F. Davidson for defendant.

AVERY, J. In *Goodman v. Sapp,* 102 N. C., 483, the Court (598) say that a number of cases cited and "numerous other authorities settle the general principle that the extent to which counsel may comment upon witnesses and parties must be left ordinarily to the sound discretion of the judge who tries the case, and this Court will not review his discretion unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury." The plaintiff had introduced depositions of a dozen witnesses examined at the place of her former residence in Kentucky, all of whom testified to her good character. Subsequently, the depositions of four witnesses living in the same locality were introduced for the defendant. One of these did not know her general character, another was offered to identify certain records of indictment against her and her husband when keeping a bar-room in Kentucky. But the witness whose deposition was first offered testified to a long discussion between a bevy of women had at his dinner-table in his presence, and without objection from him, in which the question was whether a baby to which the plaintiff had recently given birth resembled one Joel Jackson. The other witness testified in substance that when he was about twenty-two years old the plaintiff's character was bad for virtue and for the house she kept, but yet he worked with the husband, presumably at his own house—where she conducted the disreputable oyster saloon and bar-room, with a ball-room for rent to any who would pay the charges, of any color or condition, on the second floor. It was when counsel for the plaintiff applied the epithet "whore-house pimps" to these two witnesses that he was interrupted, and an appeal was made to the court to stop him. Instead of ordering counsel to desist, the judge told him to proceed, and did not allude to the remark in his charge to the jury, or make any comment upon it in their presence, though the counsel made no reflection on the witnesses after he was interrupted. The court was not asked to give any special instruction to the jury in response to the (599) matter.

We think that, under all the circumstances, the comments made upon these two witnesses (and they could have been applied by the jury to no others, as they only testified directly that plaintiff's character was bad) did not constitute so gross an abuse of privilege as to take the question of the propriety of checking counsel or cautioning the jury out of the discretion of the trial judge. One of them had been the employee of the husband, according to his own account, at a house known by him to have a bad reputation; the other had drawn a picture of the racy

dinner-table talk in his own household that invited, if it did not demand, criticism from a faithful attorney whose client's character was at stake, and was impeached only by witnesses who had exposed places so weak in their own harness. It was also within the sound discretion of the learned judge who presided to reprove counsel and cause him to desist from further comment if he considered the language used so coarse as to be disrespectful to the court. *Nissen v. Cramer,* 104 N. C., 579.

The defendant requested the court, in each of two aspects, to instruct the jury that the plaintiff would be guilty of contributory negligence if their findings should correspond with these particular phases of evidence. The court complied with both of these requests, coupled in each instance with the qualification that if, notwithstanding the negligence of the plaintiff, the defendant, by the exercise of ordinary care and watchfulness, could have prevented the injury, they would find that it was not attributable to want of care on her part. Conceding that she was negligent if she failed to avail herself of such appliances as were provided to support her in alighting from the car, or if she attempted to get off without asking assistance, and when her hands were so full of bundles that it was impossible for her to catch hold of any part of the car in order to avoid falling, still the car was an open one with seats extending across it, so that when a passenger started off the con-
(600) ductor could at a glance take in the situation, and it was negligence on his part if he ordered or permitted the car to be moved when the plaintiff was in the act of alighting from the step at the end of the seat occupied by her. *Nance v. R. R.,* 94 N. C., 619; *Deans v. R. R.,* 107 N. C., 686; *Hinkle v. R. R.,* 109 N. C., 472; *Clark v. R. R., ibid.,* 430.

We find that a very learned and careful text-writer has adopted the view (citing authority to sustain it) that where a street car is standing at a regular stopping place, it is negligence in the conductor to order the car to be moved when a passenger is alighting, though the passenger has made no special request to be allowed to get off at that point, because by looking before giving the signal or order he could comprehend the situation and avoid the danger. The structure of these cars is such as to always make it possible by proper precaution to see in a moment the position of the passengers, and whether anyone would be endangered by a sudden start.

It is not material whether the conductor said "slack ahead," or gave two taps on the bell, as Waddell the motorman, testified that he never moved without such signal, if in fact he communicated his wishes in some way to Waddell and the car was suddenly moved while the plaintiff was in the act of getting off the step. Sudderth, the conductor, also testified that his motorman never moved the car without a signal from

him, that he had no recollection of seeing the plaintiff on the night when she said that she was injured, and that he heard of no injury to any passenger on that night. The plaintiff's testimony, corroborated in the main points by Charles Bailey, is to the effect that she was on the first step and in the act of placing her foot on the second, when the car suddenly moved, as far as she heard, without a signal and she was thrown violently upon a brick pavement, sustaining in the fall the painful and permanent injuries which she described. The (601) witness Bailey thought the conductor said "slack ahead," which the latter denies; but he says that the plaintiff was thrown with violence to the ground, was helped to her feet by him, and then complained of serious injuries. If she was thrown from the step by the sudden moving of the car when she was on the steps, and could have been seen by the conductor if he had looked before giving orders to move it, then he might, by proper watchfulness and care, have saved her harmless, notwithstanding her own negligence. If she was thrown from the step he might have seen and prevented it, and if he did not see her and prevent it, he was careless.

Neither the conductor nor the motorman saw the plaintiff fall at all, and therefore their testimony as to the circumstances was based upon the general rules that govern their conduct. If she was thrown from the step, as she and Bailey both swear, and was injured, as others testify that she was, the employees of the company had no actual knowledge of the occurrence. Their testimony is to the effect that it could not have happened, as stated by plaintiff, because if it had so occurred and they had observed their custom, they would have seen it, and that it could not have happened, as narrated, because the account of it, if true, involved a departure from rules to which they always adhered. We concur with his Honor in the opinion that the evidence as to whether the accident occurred at all, on the one side, was positive, and was entitled to greater weight than that adduced by the other. There was no error in reading, as he did, from *Henderson v. Crouse,* 52 N. C., 624, especially as the Court said in that case that "the amount of difference was a question for the jury," and the jury doubtless gave due consideration to the contradictory testimony offered by the defendant.

The burden was on the defendant to show contributory negligence on the part of the plaintiff, as set up in the answer. The judge submitted the question, raised by the amended answer, whether the plaintiff's negligence in getting out without availing herself of the (602) supports within her reach and without asking assistance when her hands were full of bundles, was the direct cause of her injury, because these questions were fairly raised by the testimony on behalf of the plaintiff. We do not think that there was testimony in support of

the defense relied on, that on the particular occasion referred to any notice was given to the plaintiff to remain in her seat, and if there was testimony that she remained in her seat two minutes after the car stopped, before moving, she having been carried beyond the point where the conductor had been directed and had agreed to put her out, we do not think that there was such evidence of negligence in stepping out late or in disregard of a notice to keep her seat, as made it the duty of the court to submit to the jury, as requested, the questions whether she was negligent in remaining in her seat two minutes, or moving contrary to the warning of the conductor. The judge was not bound to give instructions founded upon mere conjecture arising out of negative testimony in support of a plea which the law required the defendant to sustain by a preponderance of proof. The negative testimony was available for the purpose of contradiction; but it could not positively establish or tend to prove, the circumstances attending the fall of the plaintiff, because, if it was true, she did not fall at all.

We have adverted to those exceptions which seem to have been pressed with any degree of confidence. The others, if it were necessary to discuss them in detail, are, we think, manifestly untenable. There is

NO ERROR.

(603) CLARK, J., dissenting. The language used by counsel in characterizing the witnesses was not supported by anything in the evidence. It was calculated to destroy any credit which otherwise might have been given to their testimony. When appealed to by counsel, the judge merely remarked, "Proceed," and neither then, nor in his charge, cautioned the jury. This might well mislead the jury into understanding the judge to hold that the language was unobjectionable. It went to the jury with the impress of his assent, if not, indeed, of his approbation. When the evidence justifies it, counsel have the right to criticise in strong terms the testimony, charater or bearing of witnesses within legal limits. But it is due to the witnesses themselves, as well as to the party who calls them, that they should not be assailed in abusive terms and gross epithets when the evidence does not justify the language used in regard to them. In such cases the judge should *ex mero motu,* even if not appealed to, intervene to protect the witness and the party whose cause is damaged when the credit of his witness is thus shaken without evidence. It is true the party cannot assign as error the abuse of privilege by counsel unless he object at the time and give the judge an opportunity to correct the matter. *S. v. Suggs,* 89 N. C., 527; *Hudson v. Jordan,* 108 N. C., 10, and cases cited; Clark's Code (2 Ed.), 363. But here the matter was instantly brought to the attention of the judge, who not only did not intervene, but told the counsel to proceed. Courts

are held for the orderly, impartial investigation of controversies, and witnesses should feel that they are entitled there, as elsewhere, to respectful consideration. They are under the protection of the court, which should not permit them to be unwarrantably assailed in language calculated to wound either their reputations or their feelings. While in such matters much is properly left to the discretion of the presiding judge, the language here used was of such a nature that the refusal of the judge to interfere, when appealed to, was calculated to prejudice the defendant (*S. v. Noland,* 85 N. C., 576; *Holly v. Holly,* 94 N. C., 96), and should entitle it to a new trial. *S. v. Underwood,* (604) 77 N. C., 502. I do not concur as to other exceptions. Especially the instruction, in effect, that there was no evidence of contributory negligence seems to me clearly erroneous.

SHEPHERD, C. J., concurs in the dissenting opinion.

Cited: *Pickett v. R. R.,* 117 N. C., 631; *Morrison v. R. R.,* 123 N. C., 418; *S. v. Tyson,* 133 N. C., 696; *S. v. Murray,* 139 N. C., 542.

W. W. WILLIAMS, TRUSTEE, v. A. B. WALKER ET AL.

Married Women—Free Trader—Fraud—Mortgage—Privy Examination.

1. When the only evidence offered in a trial upon the issue as to whether a married woman was a free trader was a mortgage reciting that she was such, and the testimony of witnesses that they thought they had seen "the free trade papers" in office of the register of deeds: It was *Held,* that the court properly instructed the jury to find she was not a free trader.

2. The mortgages executed by her without privy examination are void as to her, though duly proved by the oath of a subscribing witness and recorded.

3. There is no equity to subject her interest in the lands so attempted to be conveyed in such mortgages to a lien in favor of the mortgagee, because he was induced by her false and fraudulent representation that she was a free trader to loan her the money secured by such mortgages; he can, however, follow and recover the money itself so obtained, in her hands, or the property into which such money has been converted, and he can subject to his lien any interest the husband had in the said lands.

CLARK and MACRAE, JJ., dissenting.

APPEAL at January Term, 1892, of CUMBERLAND, from *Boy-* (605) *kin, J.* The facts are stated in the opinion.

H. McD. Robinson and T. H. Sutton for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

BURWELL, J. This cause was before this Court at September Term, 1890, upon an appeal by Mrs. Elizabeth Walker, which appeal was dismissed because the order appealed from was interlocutory. 107 N. C., 334. Since that dismissal of her appeal Mrs. Elizabeth Walker has died, and the administrator of her estate and her heir at law have been made parties defendant in her stead.

The reference which was directed by the interlocutory order from which Mrs. Walker appealed, as above stated, was had, exceptions to the referee's report were filed and considered, and a final judgment was rendered at January Term, 1892, of the Superior Court of Cumberland, from which judgment both the plaintiff and defendant appealed to this Court.

The records filed in these appeals were voluminous, and many exceptions were taken by the parties during the long progress of the cause, but the decision of two questions which are presented in each of the "cases" seems sufficient to dispose of the matter now before us.

1. The plaintiffs contended that Elizabeth Walker, who was the wife of A. B. Walker, was "a free trader" at the time she executed the mortgages, the foreclosure of which is the relief demanded in the complaint. They admit that no such certificate as is provided for in section 1827 of The Code was ever registered in the office of the register of deeds for Cumberland County, where she resided. But they insist that she was a "free trader" at that time because the mortgages set out in the complaint recited that she was a free trader, and these mortgages
(606) were signed by her and her husband, and were duly proved by the subscribing witnesses and registered. And on the trial they introduced other mortgages, executed, probated and registered in like manner, and containing the same recital, to wit, that she was a "free trader."

They further contend, as we understand the record, that inasmuch as they had produced two witnesses (McIlvary and Campbell) who testified, the defendant objecting, that they were very firmly impressed with the belief that Mrs. Walker was a free trader, and they thought they had seen her "free trade papers" in the register's office (at what date they could not tell), but had searched the register's books and could find no such paper registered, the jury should have been allowed to pass upon the issue whether or not she was a free trader.

The Code, sec. 1827, provides that "a married woman, in order to become a free trader, shall sign, with her husband, a writing in the following, or some equivalent form: 'A. B., of the age of twenty-one years or upwards, wife of C. D., of ..... County, with his consent, testified by

his signature hereto, enters herself as a free trader from the date of the registration hereof. Signed, A. B.; C. D.; Witness, E. F. Registered this ..... day of ..... 18.....' The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business." And section 1828 is as follows: "From the time of the *registration* of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a *feme sole.*"

It seems plain that the execution of deeds by a married woman and her husband, in which is recited the statement that she is a free trader, cannot have the effect to make her such. That would be a compliance with the terms of the statute. The protection which (607) coverture affords to a married woman, so carefully provided by the laws of the State, as interpreted by this Court, should not be taken away from her, nor should she be allowed to lay it aside except upon strict compliance with the statutes enacted for her safety. If the deed or mortgage of a married woman which recites that she is a "free trader," when in fact she is not, is to be effectual to convey her real estate, provided her husband joins in the execution of the instrument and it is registered, though there is no privy examination of the wife, upon the theory that the registration of such a paper is a sufficient compliance with law, both to make her a free trader and to convey her land, there would be broken down all the protection now afforded to *femes covert* by the requirement that their deeds shall divest them of their real estate only when they have executed such deeds in the manner prescribed, and under privy examination by one of the officers designated for that purpose.

No "free trade papers" of Mrs. Walker were ever registered. So the witnesses said. They testified that they *thought* they had seen such papers—had a firm impression that they had seen them. Such uncertain statements should not have been received as evidence that such papers ever existed.

We therefore conclude that Mrs. Elizabeth Walker was not a free trader at the time of the execution of the mortgage set out in the complaint, or at any other time, so far as the record in this cause shows. There was, therefore, no error in his Honor's instruction to the jury that they should say, by their answer to the second issue, that Mrs. Walker was not a free trader at the time the mortgages were executed.

2. The question next to be considered is one of much more importance.

The jury found, in response to the fifth and sixth issues, that the plaintiff, John D. Williams, was induced to become indorser for the defendants by reason of the false and fraudulent representation of
(608) Mrs. Elizabeth Walker, and that, both to said Williams and to the public generally, she represented herself to be a free trader at the time of the execution of the mortgages which the plaintiffs are endeavoring to enforce. Upon these facts the plaintiffs contend that the plaintiff, John D. Williams, was entitled to have a lien declared in his favor on the land of Elizabeth Walker, described in the mortgages, to the extent of the sums he had been compelled to pay out as her indorser on the notes set out in those mortgages.

A *feme covert* not a free trader can be divested of her title to her real estate, under the laws of this State, only by the deed of her husband and herself executed in proper form, she being privily examined separate and apart from her husband, according to the terms of the statute. Repeated decisions of this Court are to that effect. It is sufficient to cite the recent case of *Farthing v. Shields,* 106 N. C., 389. In that case it was said: "Whatever may be the rulings in other states (and they are admitted to be in hopeless conflict), we prefer to adhere to the principle, so often declared by this Court, that a married woman, as to her statutory separate property, is to be deemed *feme sole* only to the extent of the power conferred by the Constitution and laws creating the same. Holding, as we do, that her power to charge such separate estate by an engagement in the nature of a contract is measured and limited by her power to dispose of the same, it must follow that if the wife, with the written consent of her husband, had expressly charged her statutory separate real estate, it would have been of no avail without privy examination."

In order to overcome, if possible, this obstacle in the way of their recovery against the land of Mrs. Walker, the plaintiffs strenuously insist that, by reason of the fraudulent and false representations made by her as found by the jury, she was estopped to deny the plain-
(609) tiffs' right to a lien on the land for the purposes set out in the mortgages.

In *Scott v. Battle,* 85 N. C., 184, *Ruffin, J.,* says: "There can grow no fraud out of the contract of a married woman. It stands upon its own strength, both in law and equity. If perfect, then well and good; if imperfect, it is an absolute nullity, no matter upon what consideration, and as is said in *Towles v. Fisher,* 77 N. C., 438, no one can reasonably rely upon the contract of a married woman, or on representation as to her intention, which, at best, is in the nature of a contract, and by which he must be presumed to know that she is not legally

bound, and it is only in the case of a pure *tort,* altogether disconnected with a contract, that any estoppel against her can operate."

It is to be noted that the plaintiffs are not endeavoring by this action to compel the *feme* defendant, a married woman, to surrender property that she has acquired by fraud, nor to follow a fund which she has obtained by fraudulent representations, and to subject property in which she has invested the fund so acquired to the payment of the debt which she contracted when she obtained it; but their contention is that her false and fraudulent representation as to her *capacity* to make the contract estops her from asserting her *incapacity* to contract in that form. The law, for good reason, has fixed limits to her capacity to contract, especially as to her statutory separate real estate, and no representations on her part, however false and fraudulent, can have the effect of enabling her to evade these limitations. To hold otherwise would be to introduce into our law an entirely new system of the conveyances of the real estate of *femes covert. Drury v. Foster,* 2 Wallace, 24; Bishop Law Married Women, sec. 489. It is true, as is said in *Hart v. Hart,* 109 N. C., 368, that "the law abhors fraud and will not help any person to take advantage of and have benefit of it," and this principle was in that case applied to a *feme covert.* But neither that case, nor any of the cases cited (*Burns v. McGregor,* 90 N. C., 222; *Walker* (610) *v. Brooks,* 99 N. C., 207; *Loftin v. Crossland,* 94 N. C., 76; *Boyd v. Turpin, ibid.,* 137), sustain the position that the false and fraudulent representations of a married woman as to her capacity to contract estops her from asserting her legal incapacity so to do. "If a married woman executes a conveyance of land in her maiden name, and dates it back to a time before the marriage, this transaction, however fraudulently intended, does not pass the land by estoppel." Bishop Law Married Women, sec. 489. "If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity will have only a moral bond or force, which is absurd." *Keen v. Coleman,* 3 Wright (Pa.), 299, cited by Mr. Bishop in sec. 489. "So if a *feme covert,* reciting by her deed that she is a *feme sole,* grant an annuity, this is a void grant, and she shall not be concluded by this recital." *Brinegar v. Chaffin,* 14 N. C., 108.

"The true rule seems to be this: The contract of a person under disability cannot be made good by estoppel. Thus, if a married woman entered into an agreement (which, being made by a married woman, is void) for the sale of real estate, the circumstance that the purchaser went into possession under the contract and made valuable improvements with the consent and encouragement of the *feme,* would not operate to estop the latter, because, as no remedy could possibly be had upon the void contract, it would be against the policy of the law to allow the same

result to be reached through the indirect medium of an estoppel. Nor would the case of the purchaser be made any better if the woman had represented herself to be *sole*. Such a representation could amount to no more than a covenant that she was *sole*, and her coverture would render such a covenant, as well as all others, void." Bispham's Principle of Equity (4 Ed.), sec. 293.

"A married woman could not do by acts *in pais* what she
(611) could not do by deed. She could not by her own act enlarge her legal capacity to convey an estate." Bigelow on Estoppel (3 Ed.), p. 510.

These principles, announced by these high authorities, are not in conflict with that other principle so tersely stated by *Chief Justice Smith* in *Walker v. Brooks,* 99 N. C., 207: "It (coverture) affords no shelter or protection for fraud"; and by *Chief Justice Merrimon* in *Burns v. McGregor,* 90 N. C., 222: "The Constitution and the statute wisely extend large and careful protection and safeguards to married women in respect to their rights and property, but it is no part of their purpose to permit, much less help, one of them to perpetrate a fraud, if by possibility, under some sinister influence, she should attempt to do so. It would be a reproach upon the law if such a thing could happen." The sterling honesty of these great jurists was outspoken in their emphatic rejection of the proposition that the law they so much loved would allow anyone, *feme covert* or not, to retain property acquired by fraud, or to hold the title to property while repudiating the obligation to pay the purchase money; and his accurate knowledge of the decisions of this Court, and appreciation of the fact that it was his duty, as it is ours, not to be governed by what to our peculiar senses may seem equitable and right in the particular case before us, but to adhere to the established rules of law, induced the latter in the same case (page 225) to say: "If, however, one under a contract not binding on her, sell property to a married woman, that shall be consumed or disposed of in some way, so that he cannot reach it if she chooses to disaffirm her contract and not pay the purchase money, the creditor must pay the penalty of his folly in the loss of his debt."

In *Thurber v. LaRoque,* 105 N. C., 301, it is said: "The wife cannot subject her separate real estate or any interest therein to any
(612) lien, except by deed in which the husband joins, with privy examination as prescribed by law, and she will not be allowed to do indirectly what the law prohibits her from doing directly."

If the money acquired by Mrs. Walker, by reason of her fraud, is in the hands of her administrator, or if there is in his possession or in the possession of her heirs, any property purchased by her with this money, in whole or in part, the law, in its abhorrence of fraud, will speedily

correct the wrong that has been done. *Edwards v. Culberson, ante,* 342. But if that money has been consumed, the plaintiffs are remediless.

We therefore conclude, (1) that there was no evidence that Mrs. Elizabeth Walker was a free trader at the time of the execution of the mortgages set out in the complaint; (2) that those mortgages as to her are void and of no effect; (3) that the plaintiff, John D. Williams, is not entitled to have an equitable lien on the land of Mrs. Elizabeth Walker, described in said mortgages, for the sums paid out by him as her surety or indorser.

From these conclusions it follows that all exceptions of the plaintiffs to his Honor's charge, so far as it related to the second issue, are overruled. There was no error in the charge as to that issue.

The fifth and sixth issues should not have been submitted to the jury, as their findings on these issues can have no effect upon the rights of the parties. The judgment should have declared that the plaintiffs neither had, nor were entitled to have, any lien on the land of Elizabeth Walker, and that as to her administrator and heirs at law the action be dismissed.

As it appears that the plaintiffs contend that some of the tracts of land conveyed in the mortgages were the property of the defendant, A. B. Walker, and if so, the plaintiffs have a lien thereon which may be enforced in this action, the cause is remanded that proceedings may be had against the defendant, A. B. Walker, as plaintiffs may be advised. (613)

In plaintiffs' appeal, NO ERROR.

In defendants' appeal, ERROR.

CLARK, J., dissenting. I cannot concur with the majority. The Constitution and the present statutes as to the rights of married women were certainly intended to emancipate them, not to assimilate them farther in the condition of infants in law, and incompetents. The constitutional provision was an enabling, not a disabling act. It surely was never intended by the lawmakers that a married woman could make false and fraudulent representations, as the jury find that the *feme covert* did in this case, and having procured money thereby upon a mortgage executed with the concurrence of her husband, should be able to plead her disability against liability for the fraud. No fiction can be more transparent than that a married woman who has committed such fraud as is set out in the record, is an incompetent being who is not civilly liable for her conduct when she would be held liable criminally for the same act. Besides, as the consideration enured to the benefit of her separate estate, she will not be permitted to repudiate the obligation incurred. *Bridgers v. Bridgers,* 101 N. C., 71. The Constitution does not require

the privy examination except in one case, in the conveyance of the husband's homestead, and that is a restriction on the husband, not upon the wife. It is true that by statute a married woman, unless a free trader, cannot yet convey her land except by deed with privy examination, but when, as in this case, she executed a deed, without privy examination, to indemnify one who, without any benefit or consideration to himself, was induced to sign as her surety upon representations which the jury find were falsely and fraudulently made, that she was a free trader, such representations being made, too, with the assent of the husband and recited in the deed, this should serve every purpose of the privy examination. It was clearly the voluntary act and deed of the *feme*
(614) defendant, since it is found as a fact that it was executed with a false and fraudulent purpose to deceive. There was, too, the assent and participation of the husband. He joined in the mortgage which recited that his wife was a free trader. This might well be, and I think was, a virtual compliance with section 1827, and of itself made her a free trader, especially as he had joined in several prior deeds and mortgages, duly registered, which contained the same recital. But if it was not, the *feme* defendant is not entitled to the protection of the law against the valid claim for reimbursement of the person she deceived by the conveyance executed by her, and by whose money thus procured she has been benefited. Before she can invoke the aid of the court to invalidate the deed, or be heard to deny that she was a free trader as both verbally and in the deed itself, with the concurrence of her husband, she asserted herself to be, she should be compelled to refund the money obtained upon the faith of such fraudulent conveyance. Suppose she had fraudulently and falsely represented herself as a single woman with the joinder in the mortgage, reciting that statement, of the man who was in fact her husband. Would they be allowed to hold the land, discharged of the incumbrance? Coverture should be no shelter for intentional and willful fraud. *Walker v. Brooks,* 99 N. C., 207. Rights of third parties not having intervened, if the conveyance is defective the *feme covert,* if living, should now be decreed, upon the findings of fact by the jury, to reëxecute the mortgage with privy examination, unless the plaintiff is reimbursed, and in default thereof a decree of sale. Being dead, a decree of sale should be made as to those claiming the land as her heirs at law, unless the sum secured by such fraudulent mortgage is paid.

MACRAE, J., concurs in this dissent.

Cited: Draper v. Allen, 114 N. C., 52; *In re Freeman,* 116 N. C., 200; *B. & L. Assn. v. Black,* 119 N. C., 328; *McCaskill v. McKinnon,* 121 N. C., 224; *Smith v. Ingram,* 132 N. C., 964, 967; *Ball v. Paquin,* 140 N. C., 92; *Council v. Pridgen,* 153 N. C., 451.

(615)

McNEAL PIPE AND FOUNDRY COMPANY v. A. H. HOWLAND AND THE DURHAM WATER COMPANY.

Lien for Materials Furnished—Corporation—Notice—Waterworks—Public Policy—Contract—Assignment.

1. The property of a corporation chartered for the purpose of supplying water to a city is subject to the lien for materials furnished provided by The Code.

2. Where a company, F., agreed with one H. to supply him with piping, etc. (to be used in establishing his waterworks plant), and, pursuant to such agreement, F. supplied such material, but before he had finished making such supplies, H. assigned, without notice to F., his contract with the city for which the waterworks were intended, to a company chartered for the purpose of supplying it with water, etc., which assumed, also, his liabilities, and he continued in the work as the subcontractor of such corporation; and thereafter F. filed, in due form of law, in the clerk's office, the notice of his lien for material furnished, and on the day of filing, the corporation had, for the first time, actual notice of such liability and lien: *Held*, (1) that F. was entitled to enforce his lien against the corporation for supplies furnished both before and after the assignment; (2) the lien related back from the time of the filing to the time of the beginning of supplies; (3) that the real estate, the plant assigned to the corporation, and for the improvement of which the materials were furnished, was liable; and (4) for reasons of public policy it should be sold, together with the franchise of the corporation.

AVERY, J., dissenting.

APPEAL at March Term, 1891, of DURHAM, from *Boykin, J.*

In June, 1886, the defendant Howland contracted in writing with the defendant town of Durham to construct a system of waterworks for said town to supply water for public and domestic purposes. On 3 November, 1886, the plaintiff contracted to sell to Howland the necessary materials, and the same were supplied and used for constructing said waterworks, and the delivery thereof, which was included in the contract, began on 4 December, 1886, and was completed on (616) 7 May, 1887.

In the latter part of 1886 the Durham Water Company was incorporated, and on 1 January, 1887, Howland assigned his contract with the town to the said Durham Water Company, and the company assumed the duties, liabilities and obligations of Howland to said town under the contract aforesaid.

On 19 July, 1887, Howland having failed to pay plaintiff a large part of his indebtedness for materials furnished, the plaintiff filed its claim for the same in the office of the clerk of the Superior Court of Durham, in order to secure a lien as allowed by The Code, secs. 1782-

1808. It was admitted that this claim was sufficient in form and comprehensiveness, but it was contended that it was not sufficient to create the lien as claimed by plaintiff. On the day the claim was filed, the plaintiff gave the defendants notice of Howland's indebtedness to it and the filing of its claim and its alleged lien, and demanded of said defendant company that it retain out of the amount due, or to become due from it to the said Howland, on account of the said waterworks, so much as was necessary to pay plaintiff's claim.

The court below adjudged that the lien filed by plaintiff was of no force and effect, and that the same be vacated and set aside, and it was further adjudged that the Durham Water Company recover its costs of plaintiff, and also that plaintiff pay all the cost connected with the filing of the lien. And it was further adjudged that plaintiff recover of the defendant Howland the sum of $16,975.73, with interest, etc. Both parties appealed.

John W. Hinsdale and W. A. Guthrie for plaintiff.
Boone & Parker and W. W. Fuller for defendant.

(617) MACRAE, J. We adopt the following opinion, prepared by the late *Chief Justice Merrimon,* in this case, with such additions thereto as in our judgment are necessary to a full determination of the questions presented to us on appeal. That opinion is as follows:

"The statute (The Code, secs. 1781 to 1808) entitled 'Liens,' is remedial, and its clear purpose is to give contractors', subcontractors' and laborers' liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or materials supplied on or about the same. To that end its language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions in it, and, in the absence of them, exceptions and limitations affecting such liens cannot be allowed unless by necessary implication. The object is to give a lien on particular property deriving particular benefit in favor of classes of persons whose claims are supposed to have particular merit. All this is made the more manifest by the amendatory statute (Laws 1887, chap. 67). Moreover, numerous decisions of this Court, interpreting this statute, and the amendments thereto, fully sustain the view here expressed. *Chadbourn v. Williams,* 71 N. C., 444; *Wooten v. Hill,* 98 N. C., 48; *Burr v. Maultsby,* 99 N. C., 263.

"Adverting now to provisions of the statute pertinent to the present case, section 1781 thereof provides, among other things, that 'every lot, farm, or vessel, or any other kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or *material furnished.*' It is

further provided that 'the lien for work on crops or farms, or materials given by this chapter, shall be preferred to every other lien or incumbrance which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished.' The Code, sec. 1782. It is further provided that 'all subcontractors and laborers who are employed to furnish or do furnish material (618) for the building, repairing or altering of any house, or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien, now provided by law, when the notice thereof shall be given as hereinafter provided, provided that the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice.' The Code, sec. 1801. In this connection section 1802 provides that 'any subcontractor, laborer or material man who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee shall refuse or neglect to retain out of the amount due the said contractor under the contract as much as shall be due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer or material man may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on or discharge of the lien herein provided.' It is further provided in section 1789 that 'notice of the lien shall be filed as hereinbefore provided at any time within twelve months after the completion of the labor, or the final furnishing of the materials, or the gathering of the crops, provided that in cases of liens on real estate or any interest therein, given by this chapter, the notice shall be filed in the office of the Superior Court clerk within *twelve months* after the completion of the labor or the final furnishing of the materials.' When the claim is so filed within twelve months, the lien relates back to the time at which the work was commenced or the materials were furnished, and is preferred to all liens or incumbrances created to that time. The Code, section 1782; *Burr v. Maultsby, supra,* and cases there cited. And this is so, although the subsequent incumbrancer had no notice of the lien thus relating back.

"The clause of the statute (The Code, sec. 1781) first above (619) recited, declares that 'every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or *materials furnished.*' This phraseology and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to *any* real property, whether it be denominated 'a lot or farm,' or a

storehouse site, a mill site, a water reservoir site, or the like. The lien arises in favor of and to secure the payment of any and 'all debts contracted for work done on the same, or materials furnished.' By the term 'material furnished,' is meant something furnished to be appropriated, used and pertinently applied on the land, devoted to some purpose, no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for materials furnished on or about or connected with the land in connection with the purpose to which it is devoted, in whole or in part. The debt so contracted becomes a lien, a charge upon the land, and *that land* may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by and constituting the ground of the lien. It makes no difference as to the ownership of the land if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the cost of the benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures or any 'material furnished' for such purpose. This is a just and reasonable interpretation of the clause of the statute recited. Indeed, it would be difficult to suggest any other fair meaning.

(620) "In the present case the defendant Howland contracted with the town of Durham to supply it with water for public and domestic purposes, and with that view and to that end he acquired certain land situate four or five miles from the town for the purpose of constructing a water reservoir and the right of way for pipes under ground through which to convey the water to the town. In connection were necessary. He contracted with the plaintiff to supply him with with this water reservoir much machinery, pipes and other material a large quantity of suitable pipe and other things to be used on and about the land for the purpose of this reservoir and to effectuate the end contemplated by it. The contract did not recite in terms that the pipe and other things, so supplied by the plaintiff, were to be used for the express purpose of the reservoir and water supply; but it appears that the plaintiff knew of it, and it savors of trifling to suggest that it was not well and distinctly understood and intended by the parties that the goods were furnished for such purpose. The contract and the goods supplied suggested the purpose, and it was not necessary to recite or declare it in terms. It was sufficient that it certainly appeared. *Lanier v. Bell,* 81 N. C., 337, is not inconsistent with what is here said, as seems to be supposed.

"The plaintiff furnished the pipes and other things to the defendant for the purposes of the reservoir and water supply to be made by and through means of it. The defendant Howland failed to pay a large part of the debt he contracted to pay the plaintiff for the materials so furnished by it. In view of the facts, at once upon supplying such materials not paid for, a lien upon the land mentioned, and the property connected with it permanently for the purposes to which it was devoted, arose in favor of the plaintiff. Its debt at once became a *charge upon the land,* to be perfected by filing its claim in that respect in the office of the Superior Court clerks, as above pointed out. And this filing might be done at any time within twelve months next after (621) furnishing the materials above mentioned. It was done within that time. This lien, so perfected, related back to the time when the materials began to be furnished. The statute so provides. The Code, secs. 1781, 1789; *Burr v. Maultsby, supra.* The enterprise of supplying the town with water was that of the defendant Howland; the *property was his;* it did not in any sense belong to the town; it had not taken on any quality or been placed in any condition that rendered it exempt from lien as contemplated by the statute. It belonged to a private individual.

"The statute (The Code, secs. 1890, 1891) prescribes how the plaintiff might enforce his lien. Upon his judgment he is entitled to have execution against the property, which shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant. The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's debt, and hence it must be sold before his other property may be resorted to for the like purpose.

"It appears that the defendant, the Durham Water Company, was incorporated in the fall of 1886, and invested with appropriate corporate powers for the purpose of supplying the said town with water, and that the defendant Howland, on 1 January, 1887, sold and assigned his contract with the said town to it, and likewise sold to it all the property he had acquired for the purpose of making such water supply, and this property embraced that to which the plaintiff's lien attached. It is earnestly contended that therefore the plaintiff acquired no lien, first, because the defendant water company (a *quasi* public corporation) acquired title, by its purchase, to the said property, and the latter is devoted to public purposes, and hence is not the subject of such lien; and, second, because the plaintiff's lien, if indeed he ever had any, was secret—notice of it and the plaintiff's debt and claim had not

(622) been filed in the office of the Superior Court clerk until 19 July, 1887, after the said company purchased the property.

"As appears from what has been said above, the plaintiff did have a lien for its debt upon the property (the land and fixtures made part of it) which the defendant company purchased from its codefendant Howland; that although the plaintiff's claim was not filed until 19 July, 1887, the lien related back to the time when the plaintiff began to supply the materials, which time antedated the purchase of the defendant company. If it be granted that the defendant company was, in a sense, a public corporation, and its property was devoted to a proper public purpose, it did not and could not buy the property it did buy from its codefendant discharged of the plaintiff's lien without its assent. It did not assent, and hence the company took the property charged with and subject to the lien. No public corporation—not the State itself—could purchase property for public purposes charged with a lien in favor of the plaintiff, and thereby discharge such lien, unless with the plaintiff's assent, or by proper condemnation of the property, and compensation to him to the extent of his interest. The lien was a lawful and valuable incident to and security for the plaintiff's debt, and it could no more be deprived of it, as contended, than it could be of the debt itself. It was the misfortune or folly of the company that it purchased property for public purposes subject to a lien. It ought to have been more cautious and better advised.

"It is said the *lien* was a secret one, and the company could not know of it. The answer is, that in the present state of the law it should have made diligent inquiry before purchasing the property as to laborers' and material men's liens upon it. Private persons must do so; they fail to do so at their peril. And corporations, public or private,

(623) are upon no better footing. There is neither statute, nor precedent, nor any principle of justice that places them on a footing different from natural persons. The Legislature has provided by statute (The Code, sec. 1789) that notice of the plaintiff's claim may be filed at any time within twelve months after the completion of the labor or the final furnishing of the materials. This provision has been repeatedly held to be valid. *Burr v. Maultsby, supra,* and cases there cited."

In addition to what was said by the late Chief Justice, we proceed further: It is found by the jury that the contract was made between the plaintiff and the defendant Howland, as alleged in the complaint, and that material was furnished by plaintiff to said defendant under said contract to the amount and value, as ascertained by the verdict. This contract, being a single one, covering all the material furnished, we hold that the lien attaches for all the said material delivered, up to

and including the last item, notwithstanding the fact that, pending the execution of the contract, and before the delivery of all the material, the defendant Howland assigned his interest in the said contract and became a subcontractor under his assignee, and this without notice to the plaintiff, who continued to deliver the material to Howland, who, as subcontractor, used it in the completion of the waterworks for Durham. The Code, sec. 1782; *Burr v. Maultsby,* 99 N. C., 263, and cases there cited. Under any view of the law than that taken by us, how easy it would be to evade the provisions of this act, passed for the benefit of mechanics and material men, and avoid the lien upon the property. The defendant Howland, a private person, makes his contract with the city of Durham to supply it with water; he purchases land and makes contracts for the purchase of other lands; he secures rights of way and other easements; he purchases pipes and other material for carrying out his contract, property which he uses in the construction of the waterworks, and on which a lien attaches by virtue of the statute.

Can it be possible that by the formation of a corporation and (624) the assignment to it of his contract he may divest the lien which had already attached, and without notice to the plaintiffs of his assignment, continue to receive material, and use the same for the completion of the work, free from all lien in favor of the material man, who, in ignorance of the transfer, was relying upon the laws providing him a lien, and furnishing the material without further security?

It was manifestly the business of the assignee to inform itself in the matter. It had assumed the liabilities of its assignor under his contract with the town of Durham. It received the benefit of the material which he was receiving from plaintiff; it was put upon notice as to his liabilities for labor and material by the lien laws of the State. If the Durham Water Company is such a corporation as is authorized to receive fare or tolls the way is plain to the plaintiff, under The Code, sec. 671, to sell the franchise of the defendant company with all its rights and privileges, so far as relates to the receiving of fare and tolls, and all of its property, under execution or other appropriate means of carrying the judgment into effect.

The word toll in the sense used in the statute is a tax paid for some use or privilege or other reasonable consideration (Century Dictionary), and the definitions in all the books are substantially the same. Fare is a rate of charge for the carriage of passengers. A water-rate, that which the defendant company may charge, is a tax or compensation for the furnishing of a supply of water.

The plain purpose and intent of The Code, sec. 671, the Act of 1820, as amended after the decision in the case of *S. v. Rives,* 27 N. C., 297, was to afford a remedy against that class of *quasi* public corporations

where the franchise ought not to be separated from the plant or property for reasons of public policy. The words originally used in the Act of 1820 were, "if the judgment or decree be *against a railroad* (625) or other corporation authorized to receive fare or tolls." As brought forward in The Code, the words are "against any corporation authorized to receive fare or tolls." It would be a strained construction of the words used in the statute, even in a statute in derogation of the common law, to hold that they must be strictly confined to cases where these words are technically used, and there alone. It would do violence to the evident spirit and meaning of the law, and, in cases like the present, frustrate its purpose.

The franchise of the Water Company is inseparable from its plant or property. The public necessity requires that they should be sold together, for, in this case, the purchaser will take *cum onere* and the public be protected. *Foundry Company v. Water Company,* 52 Fed., 43, and cases there cited.

It may not be inappropriate for us to suggest that to avoid all possible risk of temporary suspension of the operation of this important work, it would be proper, in this case, to appoint a receiver under section 379, subsection 2, of The Code, to carry the judgment into effect.

There is error. So much of the judgment appealed from as declares the plaintiff's lien void and denies its right to enforce the same must be reversed and an appropriate judgment entered giving it effect. To that end let this opinion be certified to the Superior Court.

AVERY, J., dissenting. The plaintiffs' appeal is from the refusal of the court below to adjudge that, to secure the payment of the amount recovered from the defendant Howland, the plaintiffs have a lien "upon all the property, rights of property, privileges and franchises of every nature whatsoever belonging to said Howland, under and by virtue of his aforesaid contract with the town of Durham, or which, by his aforesaid assignment, was transferred to the Durham Water Company, and also upon all lands, buildings, reservoirs, ma- (626) chinery, engines, boilers, fixtures, easements, rights of way, appurtenances and privileges belonging to and connected with and constituting the said Durham Waterworks, situated in and near the town of Durham," and to appoint commissioners to sell the property to which the lien attached, unless the balance due plaintiff should be paid by a given day. If the plaintiff company has failed to establish its right to a lien against the separate pieces of property that were being used for public purposes, and as well to show that any lien attached to the franchise of the defendant company for pipes furnished to its subcontractor, it would seem that the plaintiffs are entitled to

nothing more than was conceded to them, without question a judgment against Howland for the balance due for piping.

Entertaining the highest respect for the views of my brethren, I think, nevertheless, that they have fallen into error. My own views of the points involved in the controversy may be summarized in the following propositions:

1. The plaintiff company sustained the relation to the defendant Howland and his assignee, the Durham Water Company, of material man, and while, as between the original contracting parties (the plaintiff and Howland) the debt for material furnished for a private building might, within twelve months, be made a lien, relating back as contended, the lien in favor of a subcontractor under the statute (The Code, sec. 1802) attaches only from the time of giving notice to the contractor, and only as to any unpaid balance due to the subcontractor when the notice is given. Section 1781 applies to controversies between the owner of the land and the builder or contractor, and provides for subjecting the land to liability for work done or material furnished by such builder or contractor and in his favor, provided notice is filed within twelve months from the completion of the labor or the "final furnishing of the material." The Code, secs. 1782 and 1789.

2. If the lien laws of 1868-69, 1869-70 and 1872-73 (The Code, (627) secs. 1781 to 1800) apply to subcontractors, or the class of material men who are provided for under the Act of 1880, chap. 44 (The Code, secs. 1801 and 1802), and give the lien relation back when it is filed within twelve months from the time of furnishing the last material, as between individuals, I do not think that the lien laws were intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the sovereign State or any public or *quasi* public corporation in the exercise of its delegated sovereign powers.

3. The plaintiff could look in any event only to Howland, to whom it sold the material, and could not sell the franchise or sequester the profits of the defendant company for the satisfaction of Howland's debt, which was not a lien upon land, pipes, etc., used for the purpose of furnishing water, and the statute cannot be construed as creating a lien upon a franchise if none attaches to the property.

After passing laws for the protection of laborers, mechanics and material men at successive sessions from 1868 to 1873, the Legislature made no further additions to or alterations in the statutes bearing upon this subject till the enactment of chapter 44, Laws 1880. If the claims of subcontractors and material men furnishing them were superior to those of the original contractors before 1880 (under the Code, secs. 1781 to 1800), why was the Legislature of 1880 guilty of the folly of

providing that it should be preferred to "the mechanic's lien now provided by law?" If the enactment of that statute was necessary (as the Legislature seemed to think) in order to give such material men, as well as subcontractor, adequate protection against the mechanic to whom he furnished material, then we must look to its provisions alone for the adjustment of the rights previously unprotected, and proceeding upon that obviously fair construction of the law, we find in support of it the explicit proviso to section 1801 that "the sum total of
(628) all liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given." Such notice is to be given by the material man "at any time before settlement with the contractor," and "after such notice is given no payment to the contractor shall be a credit on or discharge of the lien herein provided." In the same way the subsequent Act of 1881 (The Code, secs. 1804 and 1805) protected subcontractors and laborers against contractors and stevedores only after notice given to the master, agent or owner of a vessel, thus showing a purpose to secure still another class of laborers not previously provided for.

Howland transferred the benefits and burdens of the original contract to his codefendant company, and from and after 1 January, 1887, became subcontractor, but still leaving his individual arrangement with the plaintiff intact, finished the work and received payment in negotiable bonds of the Waterworks Company, which were payable to bearer and were secured by a mortgage on the franchise and property of said company. Up to the time when the plaintiff filed a lien on the reservoir of the company with the acre of land on which it was located, the line of piping, passing three feet under ground through the lands of various persons who cultivated the soil above the pipe-ditch and through seven miles of public street, under the said contract with the town of Durham, and also on the franchise of the defendant company, the company had no notice that plaintiff was furnishing Howland pipe and castings, and no information from whom he was purchasing it. When the notice was at last given, on 19 July, 1887, the jury find that the defendant Durham Waterworks Company had paid to the plaintiff in discharge of its indebtedness, under the agreement of 1 January, 1887, fifty thousand dollars of its first mortgage bonds, transferable by delivery. When the notice was given, therefore, the contractor stood in the same re-
(629) lation to the material man as though it had previously paid the subcontractor in money every farthing due under the contract. We cannot assume that such bonds remained in the hands of Howland any more than money or a bill of exchange. How, then, can the courts, without resorting to judicial legislation, make the lien of the plaintiff, as material man, exceed the "sum total" of "the amount due

the original contractor (or the assignee who, in law, stood in his shoes) on 19 July, 1887, when the plaintiff gave notice?" The Code, sec. 1801. And when the notice was required to be given "before the settlement with the contractor" (The Code, sec. 1802), how could the plaintiff claim a lien if the debt had been discharged before the defendant company had learned who was furnishing the pipe?

As against Howland, if he had contracted directly with the plaintiff to furnish pipe to be placed in a private house on his own land it is admitted that the sale of his land to a third person, before notice of the lien filed, would not have defeated the lien or prevented its relation back under sections 1781 to 1800. This is the only point settled in *Burr v. Maultsby,* 99 N. C., 263, which is cited to sustain the opinion of the Court. Neither in that case, nor in any other heretofore decided by this Court, has it been held that the responsibility of a contractor for material furnished a subcontractor extended beyond his indebtedness when he received notice of the claim of the material man or attached at all to his property, when notice was given after settlement with the subcontractor.

Secret liens have never been favored by the law, and nothing but the clearest expression of the legislative purpose should be construed to extend their operation in derogation of common law and common right. Jones on Liens, secs. 170, 1854, 1856. It is conceded that the intent of the Legislature to give mechanics, as original contractors, a lien which may have relation back and affect the rights of subsequent purchasers, is clearly expressed in the statute, and that material men dealing with owners of land, on which improvements are (630) made, come within its provisions. But in the face of the express provision of the statute that the subcontractor's lien shall not relate back behind the notice, I do not concede the authority of the courts to create another lien not contemplated by the Legislature. The general, almost universal, construction of similar statutes elsewhere has been that a subcontractor has no lien until "service of notice," and then only to the extent of the unpaid balance due to the contractor, and that upon service of notice the lien of a subcontractor does not relate back so as to defeat intervening rights growing out of conveyances of land by the owner, or attachment of the debt due the original contractor. 15 A. & E., 95, 97, note 5; *Cohoon v. Levy,* 6 Cal., 295; *Brown v. Marsh,* 10 Cal., 435; *Schneider v. Hobrin,* 41 How. Pr. (N. Y.), 236; *Pipe Co. v. Bullock,* 38 Fed., 585. Under the provisions of our statute (The Code, secs. 1801 and 1802), the material man who deals with the original contractor is treated for all purposes as a subcontractor, and in express terms is given the same remedy. Before the lien was filed or any notice given to it, the Water Company, in

ignorance of the existence of the contract between plaintiffs and Howland, indeed not knowing from whom he had bought the pipe and castings, delivered to him, in discharge of their liability to him, negotiable bonds of the company secured by a mortgage on its franchise, property and rights to the full amount of his debt. Howland held $5,000 in these negotiable bonds when the lien was filed, but they had passed beyond the control of the Water Company. The manifest meaning of the statute (sec. 1801) is that the contractor shall be answerable at his peril to the material man for every dollar paid the subcontractor after notice of the lien; but the effect of a payment in negotiable bonds is the same as a payment in money, in that the bonds cannot be re-
(631) called. The debt is no longer one growing directly out of the contract to finish the reservoir and ditches; but it is founded upon a distinct agreement to pay interest on these bonds for a given number of years, and the principal at maturity is secured by the conveyance of the franchise, etc., to a trust company in New York. Whether the plaintiffs could have reached these bonds and subjected them as property of Howland when the lien was filed, it is not necessary to determine. For present purposes it is only necessary to say that the notice came too late for the Water Company to protect the plaintiffs by withholding a payment still due, as was contemplated by the statute. I conclude, therefore, that the lien could not relate back prior to 19 July, 1887, when notice was served.

But I maintain further, that if it be admitted that, ordinarily, where the rights of individuals only are involved, the Legislature intended to create a secret lien in favor of subcontractors or material men who deal directly with them, still, unless the Legislature has explicitly so declared, property devoted to the use of the State, or conveyed for corporate purposes to a public corporation, such as a town, or a company organized to furnish water to a town, is not subject to such secret lien. We will search in vain in our statute law for any such expression of such legislative intent.

"In the absence of special statutory provision on the subject, it would seem," says *Judge Dillon* (2 Mun. Corp., 576 [446]), "to be a sound view to hold that the right to contract and the power to be sued gives the creditors a right to recover judgments, that the judgments should be enforcible by execution against the strictly private property of the corporation, but not against any property owned *or used* by the corporation for public purposes, such as public buildings, hospitals and cemeteries, fire engines and apparatus, *waterworks* and the like, and that the *judgments should not be deemed liens upon real property except when it may be taken in execution.*" Freeman, in
(632) his work on Executions (sec. 126), also sustains the view that

property *held or used for the public or governmental purposes of a municipal corporation is not subject to execution.* Both Freeman and Dillon agree that "*buildings* which cannot be sold under an execution cannot be sold on foreclosure of a mechanic's lien," and that "it is only such property as can be sold under judicial process that is subject to such lien." 2 Dillon, sec. 577; 1 Freeman on Ex., sec. 126; *Bass v. Navigation Company, ante,* 439. In the case of *Foster v. Fowler,* 60 Pa. St., 27, which is cited with approval both by Dillon and Freeman, the Court held that a water company, formed for the purpose of supplying a town with water, was a public corporation, and its buildings necessary for carrying on its operations were not subject to a mechanic's lien, and the doctrine finds support in many other *decisions,* and is approved by discriminating text-writers. 2 Jones Liens, sec. 1378, note 2; Phillips Mechanic's Liens, sec. 1804, note 1; *Commissioners v. Torney,* 115 U. S., 122. The trend of our own decisions has been in the same direction in recognizing the principle upon which the authorities cited rest. *Hughes v. Commissioners,* 107 N. C., 602; *Gooch v. McGee,* 83 N. C., 64. A direct authority, in which it seems the same plaintiff brought an action under a similar statute of the State of Alabama, is to be found in *Pipe Co. v. Bullock, supra,* in which the Circuit Court of Alabama held that pipes furnished by contractors in constructing city waterworks for a water company, did not constitute a lien upon its property, and that the plaintiff could not recover anything beyond the amount due from the contractor to the subcontractor when notice was given of the lien.

The town of Durham, though not a party to this action, cannot afford to be an indifferent observer, if the plaintiff should succeed in making good some of its demands. But whether the municipality is before the Court or not, we must take notice of the admitted facts that the reservoir and land upon which it is situate, together with (633) ditches, pipes and castings, were being used for supplying water for public purposes in the town, and that the property cannot be sold without interfering with the conveniences of the municipality, and embarrassing it in the exercise of its governmental duties. The fact that this property is used for the town is sufficient to exempt it from sale under execution, except as incident to a franchise, under which a purchaser might step into the shoes of a corporation and discharge its functions, when he could not accomplish that end as the individual owner of the reservoir, or of the easement in the ditches or of the pipes. 2 Dillon, *supra;* Freeman, *supra;* 115 U. S., *supra.* Leaving the town out of view, the Waterworks Company is a public corporation, and in the language cited by *Chief Justice Smith* in *Gooch v. McGee, supra,* "as to land which has been appropriated to its corporate objects and is

necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or the exercise of the delegated power of eminent domain, the company holds it entirely exempt from levy and sale, and this on the ground of prerogative or corporative immunity; for the company can no more alien or transfer such land by their own act than a creditor by legal process, but the exemption rests on the public interests involved in the corporation." *Gooch v. McGee, supra; R. R. v. Caldwell,* 39 Pa., 337; *Gore v. Tidewater Company,* 24 Howard U. S., 263; Jones, *supra,* sec. 180. It is clear that the current of authorities is in favor of the doctrine that in the absence of statutory provision, neither the property nor the franchise of a public corporation is subject to sale under execution upon the same principle that exempts a public square on which a courthouse is built. For a review of cases, see discussion by Freeman in Note 15, Am. Dec., 595. It was this consensus of opinion which led the Court, in *Gooch v. McGee, supra,* to question the soundness of the principle laid down (634) in *S. v. Rives,* 27 N. C., 297, and to declare, in effect, that but for the enactment of our statute (The Code, secs. 671 to 678) neither the property nor the franchise of a public corporation could be sold. *Bass v. Navigation Company, supra.*

The first contention of the plaintiff is that though the defendant company could sell nothing but the franchise, an individual, where he has induced a city to give an easement in its streets and other privileges by agreeing to devote a reservoir and land on which it is constructed, with the pipes laid in ditches, to the purpose of supplying the town with water, could subsequently subject said land and piping, as distinct property, to a lien filed after the works were in operation by a manufacturer who furnished the pipe. No matter, therefore, what expense a municipality might incur in procuring water, if it deal with an individual instead of a corporate contractor, the public would be left dependent upon the solvency or honesty of the contractor, because separate sales of the land on which the reservoir is located, and the other property, would necessitate new arrangements for a water supply. Is it possible for a city to provide for the wants of its citizens and the protection of the public against fire, without organizing a corporation as a contractor or incurring the risk of failure and disappointment? It appears as a fact in this case that the plaintiff had notice of the purpose for which the pipes and castings were to be used. Plaintiff knew that the land bought for the reservoir was held and used for the purposes of a public corporation acting for the people in its governmental capacity under an agreement with Howland. They should therefore have looked more closely to their security, certainly when the contractor made default in paying monthly according to his agreement,

though it is not incumbent on the courts to point out how the debt could have been secured. This case presents a widely different state of facts, as already intimated, and questions of law easily distinguishable from those passed upon in *Burr v. Maultsby,* 99 N. C., (635) 263, and the class of cases to which it belongs. The contesting parties in those cases were individuals, between whom the original lien law (The Code, secs. 1781 to 1800) was intended to operate and to relate back to the time of beginning the work or furnishing the material. But a city, when it engages in the work of supplying its inhabitants with water and furnishes it for the purpose of protecting public buildings, such as the courthouse and jail, as well as private houses, as was provided in the contract in this case, is an authorized agent of the sovereign State, clothed with authority to aid in the discharge of this governmental duty to the people. *United States v. R. R.,* 17 Wall, 328; *Hughes v. Commissioners, supra; Kluin v. New Orleans,* 99 U. S., 149; Cooley Const. Lim., 655, 656.

At the time when the plaintiff agreed to furnish Howland the piping, they knew that it was to be used in fulfilling the contract with the municipal corporation, and they knew that the land on which the reservoir is located was to be used for the purpose to which it was devoted. If the State of North Carolina had authorized the Governor to contract with a person or corporate body for a supply of water for the protection of public buildings in Raleigh, and incidentally for the use and protection of the people of the whole city, would it be contended that the piece of land covered in part by the ponded water, and on which the reservoir and the pumps for throwing water into it are located, would be at all times subject to be sold separately from the privileges, to satisfy judgments for debts of the individual contractor, when, if the contractor had been a body corporate, the principle announced in *Gooch v. McGee, supra,* would have protected it from every species of liens upon its land or other property, except as incident to a lien upon the franchise? It would not be contended that Burke Square, upon which the Governor's Mansion was completed less than three years ago, could be sold to satisfy the lien of one who furnished material for the Mansion to a contractor who was working upon (636) it—such, for instance, as the pipe furnished by the manufacturer to the plumber for conducting gas or water through the building. Yet the protection extended to corporations, acting for the State in the exercise of delegated power, is founded upon the idea that they are agents, like attorneys in fact, entitled to all the rights that the law gives to the principal.

If the lien did not attach to the reservoir, or land, or piping, or right to lay it in the ditches, as separate and distinct pieces of property be-

longing to Howland, so as to subject each to sale separately, it is clear that it could not attach to the franchise of the Water Company. So soon as that company bought from Howland and he assigned his contract with the city to it, on 1 January, 1887, he entered into an agreement with the purchasing company to finish the work, and, as to all labor done and material furnished subsequently, was a subcontractor. I cannot, for the reasons given, concur in the position maintained by the late Chief Justice, and adopted by the Court, that the land acquired by Howland for a reservoir and the right of way for piping over the land of private persons is subject to the lien and liable to be sold to satisfy the plaintiff's judgment. I see no difference in principle between allowing the lien on the right of way in the streets of the town and on the connecting piping and reservoir outside of its limits, on which the people are dependent for their supply of water.

But while giving its sanction to the argument of the late Chief Justice, that a piece of land bought by a private individual and used for a site for a reservoir to furnish a supply of water to the State capital under a contract with the State, would be subject to the lien of a material man dealing with such individual, and liable to be sold to satisfy his claim, I understand that the Court now add the suggestion that a better, but not an exclusive remedy, would be the sale of the franchise under section 671 of The Code, or the appointment of
(637) a receiver to take charge and devote the net earnings of the corporation to the satisfaction of the claim.

Admitting that the Waterworks Company could sell its franchise privately, and that as a company receiving tolls and fares its franchise is subject to sale under execution in accordance with the provisions of the statute, I still maintain that no lien was created on the franchise held by the defendant company by the service of notice by the plaintiff as a material man, after the claim of the subcontractor had been paid in full, and that the defendant company owes no debt for which its earnings can be taken by a receiver, for the reasons already given.

If a lien was created at all, then, by the express terms of the statute, it attached not to the franchise, but to the "house and real estate" on which the material was used. How, then, can this Court, in order to give adequate redress for the plaintiff, attach the lien, in derogation of common right, to the company's franchise for the security of Howland's debt?

Cited: Fulp v. Power Co., 157 N. C., 156; *McAdams v. Trust Co.*, 167 N. C., 497.

STATE v. DANIEL SHOULDERS.

Appeal in Forma Pauperis.

If the affidavit for an appeal *in forma pauperis* fails to allege that it is taken in good faith, the appeal will be dismissed.

APPEAL from Spring Term, 1892, of BERTIE.
Motion of the Attorney-General to dismiss.

No counsel appeared for defendant.

CLARK, J. 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. The motion of the Attorney-General must, therefore, be allowed. *S. v. Wylde,* 110 N. C., 500, and numerous cases there cited.

APPEAL DISMISSED.

Cited: *S. v. Bramble,* 121 N. C., 603; *S. v. Smith,* 152 N. C., 842.

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(638)

THE STATE v. GEORGE BEST.

Evidence—Expert—Poison—Trial—Verdict, How Impeached—Jury, Polling.

1. Upon the trial of an indictment for homicide, charged to have been produced by poison, it was in evidence that the deceased exhibited, before and after death, symptoms of arsenical poison; that flour, bread and dough, from which she had eaten had been taken on the day of her death, from her house and given to the coroner who, with another physician—both being medical experts—made an analysis and testified that they discovered the presence of arsenic. The coroner testified that he carried the substance given him to his private office; that it was possible for some one to have entered his office and put in the poison, but barely probable: *Held,* not error to admit the evidence of existence of arsenic, especially as the court instructed the jury that before they could consider that fact they must be satisfied beyond a reasonable doubt that the flour and dough analyzed were the same of which deceased ate.
2. When a motion for a new trial is based upon affidavits, the Supreme Court will not look into them; the court below must find the facts and spread them upon the record.
3. It is not competent to impeach the verdict of a jury for misconduct by evidence proceeding from the members of the body.

4. Where several jurors made affidavit that they were induced to join in the verdict of guilty in the belief that the recommendation of mercy accompanying their verdict would prevent the death penalty, and the court permitted the affidavit to be filed, but, in the exercise of its discretion, declined to grant a new trial: *Held*, not to be error.

5. It is the privilege of one on trial for crime to have the jury polled when rendering the verdict; but it is not error to receive the verdict without polling unless the defendant requests it in apt time.

INDICTMENT for murder, tried at Spring Term, 1892, of CRAVEN, before *Winston, J.*

There was but one exception to evidence. The testimony offered by the State (there was none on the part of the prisoner) tended to (639) prove, by circumstantial evidence, that the deceased, who was the wife of the prisoner, came to her death from the effects of arsenical poison placed in the flour which was used by her in the preparation of dinner for herself and other members of her family; that the poison used was an article called "Rough on Rats," and was placed in said flour by the prisoner with felonious purpose.

One Emperor Rouse testified that he went to the house of the prisoner the day after the death of the deceased, and there he found bread and flour; the flour had been mixed with water. Witness got it, put it in a paper sack and gave it to Dr. Primrose, the coroner, who came on Thursday, two days after the death of deceased, to hold an inquest. Witness found something soft in the sifter which looked like wheat bran, but was not. Witness gave it all (the bread, the dough and the soft stuff) to Dr. Primrose, the coroner, next day after he found it.

Dr. Primrose, who was admitted to be an expert, testified, among other things not necessary to be stated in order to point the exception, that the bread, the dough and the flour were given him the same day he went up there by Emperor Rouse. Witness took the bread, put it in his hand satchel and carried it to his office, and then to the drug store and examined and tested it; it was the same bread, dough and flour, and was in the same condition as when witness first got it. No change in it. "Objection by the defendant as to the things found in the bread, etc., and exception."

The witness then testified that the bread contained arsenic, a poison that would produce death, but he could not say how much arsenic was in it; that the bowels and intestines of deceased were both inflamed; that indicates an irritant of some kind. Arsenic would produce such an effect; also a spot in the stomach that indicated deeper inflammation, indicated irritant poison of some kind. "Rough on Rats" is an arsenical poison. The witness testified at length on cross-examination as to the manner of his analysis of the bread and dough and his finding

arsenic therein, also in the stomach; and of his application of (640) his test to "Rough on Rats" with the same result as his test of the bread and dough. He testified that the bread and dough were kept in his private office; that it was possible for some one to have gone into his office and put arsenic in the bread, but it is barely probable. Witness testified further, that he made a second test of the bread and dough just before the term of the court, "that the second test produced better results than the first—he accounted for this because the bread and dough had been in solution since the first test, and the arsenic had more time to dissolve."

Dr. Francis Duffy, a witness for the State, testified, after he was admitted to be an expert, that he examined the bread and dough in Dr. Primrose's possession; he explained the tests applied by him; that the test made in February did not produce results fully satisfactory, "but in our last tests they were decidedly plainer; this came about because of the insolubility of the arsenic in the water, and the second time we got more arsenic in a given quantity of water."

The only exception to the admission or rejection of evidence was that the court admitted the testimony of the medical experts as to the poison found in the bread and dough.

It was a case of circumstantial evidence, this circumstance of the bread and dough being found at the house where the prisoner and deceased had lived, on the day after the alleged homicide, the application of the tests by experts and the finding of the poison, was relied upon by the State as one of the material facts necessary to be proved in its evidence.

Attorney-General for the State.
Caho & Lee (by brief) for defendant.

MACRAE, J., after stating the case, proceeded: We can see no error in the admission of the testimony objected to, especially when taken in connection with the charge of his Honor to the jury, for he (641) instructed them that before they could consider the testimony of the experts as to the analysis of the bread, flour and dough at all they must be satisfied beyond a reasonable doubt, that the bread, flour and dough analyzed were parts of the same of which deceased ate, and that caused her sickness and death, the same that Emperor Rouse gave to Dr. Primrose, and that it had not been tampered with in any respect, nor any poison placed in or upon it after it came into the hands of the witnesses and before the same was analyzed; and the jury may consider, and it is their duty to consider, that the bread, etc., was not sealed up, but was placed in the hand-satchel and there remained some time before it was analyzed."

In other parts of his charge the presiding judge had fully left to the jury to pass upon the truth of all the evidence of the witnesses, and there was no exception taken to the charge.

The prisoner's counsel presented the following prayer for instruction, which was declined, and the prisoner excepted:

"1. That in that there is no evidence to show where Susan Croom procured the flour and bread which Emperor Rouse testified that he delivered to Dr. R. S. Primrose, the jury shall not consider the evidence admitted on this point."

By a careful perusal of the testimony as set out in the "case" we are unable to find anything to indicate that Susan Croom, another witness, had any connection with the finding of the flour, bread, etc., by Emperor Rouse, as testified to by said Rouse, and therefore we must conclude that the presiding judge was warranted in declining to give the instruction asked.

The day after the jury had returned the verdict set out in the record, which was in the presence of the prisoner and his counsel, the prisoner's counsel moved the court to set the verdict aside, and stated that
(642) they proposed to offer the affidavits of some of the jurors who tried the case, as a ground for such motion.

To this the court remarked that the uniform custom with the courts of our State was not to hear a juror attack or explain the reasons for his action while serving as a juror, and that the action of the court upon said motion was purely discretionary. To this ruling the defendant excepted. Thereupon the defendant asked leave to file, and did file, an affidavit of five of the jurors that the State had failed to prove that the defendant had put the poison in the bread that deceased had eaten, and that they were not satisfied of his guilt; that they agreed to the verdict of "guilty" of murder on condition that the prisoner be recommended to the mercy of the court, and that they thought such recommendation would save the prisoner from the death penalty; that they were led to such belief from the fact that several days before, a jury, in a case in which a defendant was convicted of carrying a concealed weapon, was informed by the judge that when they recommended the defendant to the mercy of the court, that such recommendation would be considered; that the jury remained out all night, the room in which they were was small, and that these facts hastened their verdict.

The solicitor filed the counter-affidavits of five other members of the jury, which is not necessary to be here set out.

"The court, in its discretion, declined to interfere with the verdict, being fully satisfied that the defendant had had a fair and impartial trial at the hands of the jury, defended as he was by three able, zealous attorneys of this court." The prisoner excepted.

We may consider together the two preceding exceptions, based upon the refusal of the presiding judge to set the verdict aside upon the motion of prisoner's counsel, and the affidavit offered in support of the motion.

It was said in *S. v. McLeod,* 8 N. C., 344, that "As to the mis- (643) conduct of the jury it has been long settled, and very properly, that evidence impeaching their verdict must not come from the jury, but must be shown by other testimony." This has been followed by an unbroken line of decisions in both criminal and civil actions, down to *Hinson v. Powell,* 109 N. C., 534, to the same effect; notably in the case of *S. v. Smallwood,* 78 N. C., 560, where it is said by *Bynum, J.:*

"1. When a motion is made in the court below to set aside a verdict upon the ground of improper conduct in the jurors, and the motion is founded on affidavits, the Supreme Court will not look into the affidavits. They can only decide upon the record presented to them, and, therefore, if such motion is designed to be submitted to their revision, the facts must be ascertained by the court below and spread upon the record. That has not been done in this case. *S. v. Godwin,* 27 N. C., 401; *Love v. Moody,* 68 N. C., 200; *Rineheardt v. Potts,* 29 N. C., 403.

"If the motion for a new trial is based, not upon the misconduct, but upon the mistake of the jury in the court below, the Supreme Court cannot take notice of such mistake, whether they find against the facts or the law, because the jurisdiction of this Court is confined to matters of law adjudged by the court below; and to ascertain what matters of law were so adjudged, we look to the case stated. This Court corrects errors of law committed by the judge below, and not those committed by the jury. For errors of the latter kind the remedy is for the court below to grant a new trial. *S. v. Gallimore,* 29 N. C., 147; *Long v. Gantley,* 20 N. C., 457; *Goodman v. Smith,* 15 N. C., 459; *Reed v. Moore,* 25 N. C., 313.

"2. Misconduct on the part of the jury, to impeach their verdict, must be shown by other testimony than their own. This has been long settled for the most convincing reasons, which will readily suggest themselves to all minds at all familiar with the administration of justice through the medium of trial by jury. *S. v. McLeod,* (644) 8 N. C., 344."

To meet the earnest contention of the prisoner's counsel that the presiding judge, having permitted the affidavits to be filed, ought to have found the facts and spread them upon the record, it appears that the affidavit offered alleges, or was intended to allege, that the affiants had agreed to the verdict of guilty through mistake in their understanding of the effect of the verdict. In this event, as has been said above, the Supreme Court cannot correct errors committed by a jury;

this is the province of the judge below, and therefore it was unnecessary for his Honor to find the facts upon the affidavits. But it might well be held that the affidavit, if we were at liberty to consider it, alleges misconduct upon the part of the five jurors making it, for if they were not satisfied by the evidence of the guilt of the prisoner, it was a gross wrong in them, for any consideration of personal inconvenience, to compromise with the other members of the jury and agree to a verdict of guilty, with a recommendation to mercy, in the hope that the life of the prisoner would be spared at the cost of a long imprisonment. If they were not satisfied of the prisoner's guilt, the only verdict they could conscientiously render would have been one of not guilty. And if the ground of the motion was the misconduct of the jurors, it should, as we have seen, have been based upon other testimony than the affidavits of the jurors who alleged their own misconduct, for they cannot be heard, and no facts could be found by the judge below upon their affidavit.

The prisoner's counsel excepted because the jury were not polled upon the rendition of their verdict, and further, because the jury were not asked to explain their verdict. It appears, by the case stated, that the prisoner and his counsel were present at the rendition of the
(645) verdict, and did not ask that the jury be polled, nor did they ask the court to interrogate the jury concerning the verdict.

It was not essential to the validity of the verdict that the jury should be polled; it was the privilege of the prisoner to have it done if he desired. *S. v. Jones,* 91 N. C., 654; *S. v. Toole,* 106 N. C., 736. And it would not have been proper for the judge below, even if requested to do so, to have questioned the jury upon their verdict.

The verdict was guilty. The recommendation to mercy was not a part of the verdict; but an expression of sympathy for the prisoner and of a desire on the part of the jury that his punishment might be mitigated from the extreme penalty of the law. Such recommendations, even in capital cases, are not unusual, and in this case it was not, in our opinion, calculated to put the presiding judge upon inquiry whether the verdict was unanimous. In the able and earnest argument of the counsel for the prisoner the precedent is admitted, but we are exhorted to vary from it in this instance and establish a new one for our future guidance. The opinion to which we are referred in support of this plea for a new precedent, in *S. v. Holt,* 90 N. C., 753, upon examination, will be found to be a manly assertion of the right of trial by jury without impairment by novel refinements, and an admonition to stand upon the ancient ways lest we should establish precedents, the result of which may "in some emergency overturn principle and subvert the rights of many people."

We find ourselves concluded by the authority of an established and long-settled rule based upon the wisest reasons of public policy, that a juror should not be permitted to impeach his own conduct in the rendition of a verdict. The result of a departure from the old rule would unsettle other important principles, protract litigation, and weaken the public regard for the ancient and well-tried methods of trial by jury.

We cannot assent to the suggestion that the verdict of the jury was not in accord with the spirit of the Constitution (Article I, sec. 13) that "No person shall be convicted of any crime but by the (646) unanimous verdict of a jury." The verdict was unanimous; it was rendered after long consideration; it was warranted by the evidence, and whole public policy forbids that it shall be attacked in the manner proposed, the all-sufficiency of the law most wisely provides relief in worthy cases, where, by reason of human imperfection, there has been a miscarriage of justice to anyone's prejudice, by the exercise of executive clemency.

Appreciating the gravity of the consequences of our conclusions in this matter, we have given it the most serious consideration, and having carefully examined the record we are constrained to say there is

NO ERROR.

Cited: *S. v. DeGraff,* 113 N. C., 696; *S. v. Fuller,* 114 N. C., 892; *Pharr v. R. R.,* 132 N. C., 423; *Smith v. Paul,* 133 N. C., 67; *S. v. Hall,* 181 N. C., 529.

STATE v. JOHN GREEN.

INDICTMENT for an assault with intent to commit rape, tried at Spring Term, 1892, of CRAVEN, before *Winston, J.*

The statement of the case is as follows: . . . "The jury rendered a verdict of guilty, and thereupon the court proceeded to judgment, to wit, that the defendant be confined in the State penitentiary for a term of fifteen years at hard labor. From this judgment the defendant appealed, and it was allowed him, upon filing an affidavit according to law as made and provided in such cases, to appeal *in forma pauperis.*"

Since the adjournment of the court, the said appeal has not been perfected.

The Attorney-General for the State.

No counsel for defendant.

(647) AVERY, J. It appears from the statement of the judge below, that no exception was taken to the ruling of the court and no error assigned. Where no grounds for an appeal are set forth, the judgment must be affirmed if the record is perfect. We find no error in the record, and the judgment must be affirmed. *S. v. Foster*, 110 N. C., 510.

AFFIRMED.

THE STATE v. JAMES RHODES.

Arson—Barn Burning—Evidence.

1. Upon the trial of an indictment for burning a barn, it was not error to permit the State to show that the defendant had made threats, previous to the burning, that he would do some injury to the son of the prosecutor.
2. Evidence of facts, which in themselves are slight, should, in cases where the State relies upon circumstantial testimony, be admitted if they, with other facts proved, bear upon the crime charged.
3. Upon the trial of an indictment for burning a barn, there was evidence of threats by defendant to do injury to the property of the prosecutor; that on the night of the burning some one was seen going from the direction of the barn toward the home of the defendant, and that a short while before he had been heard to inquire about a direct way from his house to the vicinity of the building burned, but there was no other evidence to connect him with the crime: *Held*, that there was not evidence sufficient to go to the jury.

INDICTMENT for burning a barn, tried at April Term, 1892, of FRANKLIN, before *Bryan, J.*

The following is the testimony set out in the case: T. J. King testified that the burning of the barn occurred on the first Saturday night in November, 1891; that defendant is married and wanted him to force his wife to live with him, and the witness persuaded her to do so; she lived on the land of Mrs. M. H. King, whose barn was alleged to have been burned.

Andrew Young stated that he knew the defendant, and that defendant and his wife separated about a month before the fire; that defendant had said that King was keeping his wife away from him and had (648) to pay for it. Defendant excepted. King is the son of Mrs. King, the prosecutrix, who was in possession of the land, and was her agent and manager.

Ella Dunstan testified that defendant said that King was making him see trouble about his wife, but he was going to keep easy until his

"peace bond was up" (defendant had previously given a bond before a justice of the peace), and then defendant was going to King and tell him to get his wife away from there, and if he didn't, he would hurt them; his wife put him under bond; the witness stated to defendant that he must mean something like murdering, and he said he could do it. Defendant excepted—the State promising to connect this with the burning.

J. R. Wheeler testified that he heard defendant make threats against King (of the character above mentioned), but did not give King any notice of the threats, as the witness had not seen King or any of his family; these threats were made about three weeks before the burning; defendant talked to witness about his wife living on King's land, and said he was going to see King about it, and said he would damage King; that it would cost him $200 if King did not move his wife off the land; this was about eleven days before the burning; the witness did not tell the Kings about this before the fire. There was also evidence of threats against Mrs. King.

Charles Jones testified that in April the defendant said he could do King a private injury and the law couldn't hurt him; defendant was talking about his wife and complaining because King let her live on his land. Other witnesses testified substantially to the (649) same effect.

Upon redirect examination it was shown in evidence that the defendant was arrested Sunday evening.

Calvin Stallings testified that he knew when the barn was burned, and that some one passed in the direction in which the defendant and others lived, about 4 o'clock a. m. on said Saturday night.

W. B. Hunter testified that he saw the defendant on the day he was arrested, and that defendant said he was up until about midnight the night before about killing a beef. The State here rested its case.

The defendant objected to the testimony of the witness as to the threats against T. J. King, when the indictment charges the defendant with burning the barn of Mrs. Mary H. King, and excepted to its admission.

Joseph Jones testified that the defendant lived about a mile and a half from where his wife lived, and that there was a road from his house to his wife's, which road crossed a creek; that an air-line run across the creek at a different point from where the road crossed it would be a shorter distance to Mrs. King's house; on Friday evening, before the burning, the defendant asked if he could cross the creek (objected to by defendant); that it was a straight line to Mrs. King's; but one could not cross without getting muddy, but could cross on a fence; there was a pond above and one below the straight line, and to have gone by either

pond would have put him a mile out of the way; that on the creek between the ponds there was a path to Mrs. King's; that defendant went in the direction witness had described.

The defendant asked his Honor to instruct the jury that there was no evidence to go to the jury warranting them to convict defendant, and excepted to his Honor's refusal so to charge. There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

(650) *Attorney-General for the State.*
W. M. Person for defendant.

MACRAE, J., after stating the case as above, proceeded: In the first exception we can see no force. Where the State relies upon facts and circumstances tending to prove the guilt of the defendant, such evidence, though slight in each separate instance, is competent if it, with other facts offered in evidence, bears upon the charge in the bill of indictment. *S. v. Thompson,* 97 N. C., 496.

As to the second exception, upon a careful examination of the testimony, we find abundant evidence of threats made by defendant against T. J. King, and once against Mrs. King. These threats seem to have been made because of the fact that defendant's wife was separated from him and living upon the land of Mrs. King, and defendant complained that T. J. King, or Mrs. King, would not send her off Mrs. King's land. In addition to the testimony as to the threats, there is testimony of one witness that on Friday evening before the burning occurred on Saturday night, the defendant inquired if he could cross a creek at a point where there was said to be a path leading by a short way to Mrs. King's. Whether this path would have carried defendant by a shorter way to the house where his wife lived we cannot determine from the testimony. The other testimony is that defendant was arrested on Sunday, and said he was up until about midnight the night before killing a beef.

The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the judge should say so, and, in a criminal case, direct an acquital. *S. v. Vinson,* 63 N. C., 335. The evidence offered did not tend to prove the fact of the burning by defendant, but it was for the purpose of proving other facts
(651) which, if true, would compel the inference by the jury of defendant's guilt. To quote further from the same case: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. Where there is evi-

dence to go to the jury, they must pass upon its weight, but if the evidence, taken as a whole, will not warrant a verdict of guilty, there is no evidence sufficient to be left to the jury, and the court should so declare. *S. v. Powell,* 94 N. C., 965. If we apply the principles laid down in the above cases, and elaborated in the case of *S. v. Brackville,* 106 N. C., 701, and *S. v. Goodson,* 107 N. C., 798, to the one before us, we will come to the conclusion that there was not evidence sufficient to go to the jury.

Eliminating the threats, there is nothing left. We seriously apprehend that injustice has been done his Honor who tried this case, but who did not make out the statement on appeal. What purports to be his notes of the testimony is copied into the case. These are evidently rough notes or memoranda from which, aided by memory, a true statement of the evidence could have been made, but we must take it for all the testimony in the case, and upon this testimony we are constrained to hold that there is error, and award a *venire de novo.*

ERROR.

Cited: *S. c.,* 112 N. C., 858; *S. v. Lytle,* 117 N. C., 802, 803; *S. v. Beal,* 119 N. C., 811; *S. v. Shines,* 125 N. C., 732; *S. v. Battle,* 126 N. C., 1041, 1047; *S. v. Freeman,* 131 N. C., 725; *S. v. Harrison,* 145 N. C., 411, 416, *S. v. Matthews,* 162 N. C., 548.

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(652)

THE STATE v. J. A. NORRIS ET AL.

County Commissioners—Salaries and Fees—Mileage—Officer, Criminal Liability.

1. Members of the board of county commissioners are only entitled to mileage for the distance by the usual route traveled to attend such *meetings* of the board as the statute has prescribed, and returning from such meeting; they cannot charge mileage for each day, although they may actually return to their homes at the close of each day of a meeting.

2. Where a board of county commissioners audited accounts in favor of its members for mileage, to which they were not entitled, and it was found as a fact that they did so under advice and without any corrupt or fraudulent motive: *Held,* that the members of the board were not indictable, either under the statute—The Code, secs. 711, 1090—or at common law.

INDICTMENT which was contended by the State could be sustained against the defendants, county commissioners, either under section 711 or section 1090 of The Code, or at common law, for charging for mile-

age contrary to law, and causing their accounts to be audited and paid, tried at September Term, 1892, of the Superior Court of WAKE, before *Bryan, J.*

The jury returned a special verdict as follows:

"It is admitted that the defendants ordered the clerk of the board of county commissioners to issue an order to Langdon Dowd, the defendant above named, as one of the members of the board, for the sum of two dollars per day and for ten cents per mile for each day upon which he attended the meeting of the said board, that is, five cents a mile coming and five cents a mile returning home, whenever the said defendant actually traveled the number of miles charged for.

"It is further admitted that S. J. Allen, a member of the board of commissioners of Wake County, just prior to the term of office of the defendants, informed defendants that it was the usage and custom
(653) of the board to charge the same mileage actually traveled that was charged by defendants and the same that defendants ordered the said clerk to give an order upon the county treasurer for.

"It is admitted that sometimes the said board held sessions commencing on the first Monday in the month and extending through Tuesday and Wednesday, and that some of these meetings (extending over Tuesday and Wednesday) were in months other than June and December. That from these continuous meetings the said commissioners would return home at night, and that mileage was charged for the distance traveled.

"It is further admitted that the said board attended once in three months the poorhouse of the county and workhouse for auditing the accounts of the superintendent of the poor and workhouse of the county, and that the day they attended is one of the days mentioned above.

"It is admitted that to some of the meetings of the board three mileages were charged against the county and paid by the county for attendance for three successive days, the members of the board going home each night.

"It is further admitted that the chairman of the board, J. A. Norris, one of the defendants named, was advised, when the defendants came into office, by the solicitor for the State at that time in this Judicial District, that the board, under the law, were entitled to the mileage charged by them, and that since that they ordered the clerk of the board to pay the defendant Langdon Dowd, which was imparted to the board. And thereafter A. D. Jones, a reputable attorney of this court, then duly elected attorney of the board, advised that the defendants are entitled, under the law, to the said mileage. Upon this statement of facts, if the court declares that the defendants are guilty, then the jury so find, but if the court adjudge that the defendants are not guilty, the jury so find."

The following admission was entered by the solicitor before the (654) special verdict was recorded:

"Upon the trial of this case, and before the special verdict was recorded, it was stated in open court by the solicitor for the State that there was no contention on the part of the State that the defendants took the mileage mentioned in the bill of indictment with any corrupt or fraudulent motive. This is admitted on the part of the State, and the clerk is authorized to include the same in the case on appeal."

Whereupon, the court adjudged that the defendants were guilty, and entered judgment accordingly.

Defendants appealed.

Attorney-General for the State.
Armistead Jones for defendants.

AVERY, J. The statute (The Code, sec. 3747) provides that, in addition to their per diem, jurors shall receive "not exceeding five cents," etc., "per mile of travel going to and returning from court." Substantially the same provisions, in so far as the language fixes the amount of mileage, were embodied in previous laws (Rev. Code, chap. 28, sec. 15; Rev. Stats., chap. 28, sec. 21), and had been construed uniformly to allow compensation for the distance traveled by the usual route from a juror's home to reach the courthouse on the first day of the term. Each commissioner, according to the statute (The Code, sec. 709), is to "receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile." Section 706 was evidently drawn with the purpose of limiting the length of the sessions (655) of the board, so that at the special meetings held on the first Monday of months other than June and December, they shall not continue in session longer than two days, and of incidentally restricting the right of the board to incur expense. There is a similarity of expression in the statutes regulating the compensation of jurors and commissioners that naturally leads to the conclusion that it was the purpose of the Legislature to limit the allowance for mileage to the distance traveled by the usual route to reach the place of meeting on the first Monday of each month, and the same distance added when the monthly meeting should end, whether on the evening of the first day or after the lapse of two or more days.

It remains to determine whether in auditing accounts for and receiving a greater amount of mileage than was due to them the individual members of the board have made themselves amenable to this criminal

prosecution. The verdict and admissions would fall short of establishing the guilt of the defendants, if the indictment were admitted to be so drawn as to charge with sufficient certainty either or both of the offenses created by section 1090 of The Code. The proof fails to sustain the charge of willful neglect or omission to discharge a duty, since its sole tendency is to show the commission of an offense consisting in the act of causing or directing an order to be issued to the county treasurer to pay a greater sum as per diem and mileage than was due. *S. v. Snuggs,* 85 N. C., 541; *S. v. Hawkins,* 77 N. C., 494.

It is equally insufficient to justify a verdict of guilty under the last clause of that section, since it is found as a fact that the defendants did not take the money received by them as mileage "with any corrupt or fraudulent motive," whereas it is essential, in order to sustain that charge, "to aver in the indictment and prove upon the trial a corrupt intent." *S. v. Pritchard,* 107 N. C., 921.

(656) The essence of the offense created by section 711 of The Code is the "neglect to perform and duty required by law," and an indictment drawn under it cannot be sustained by proof of the act of willfully taking a greater sum as mileage than was due. To support the charge of the common law offense of taking illegal fees, it is also necessary to prove "a corrupt motive" (2 Wharton Cr. Law, 7 Ed., sec. 2521), while the evidence falls as far short of proving the common law offense of neglecting to discharge a duty enjoined by law as it does of showing neglect, as distinguished from overt acts in violation of the provisions of section 711 and 1020, *supra.*

For the reasons given, we are of opinion that while the defendants were not entitled to the mileage charged, there was error, nevertheless, in declaring them guilty upon the return of the special verdict, and a new trial must therefore be granted.

NEW TRIAL.

THE STATE v. WILLIS H. BROGDEN.

Special Venire—Dying Declarations.

1. It is in the discretion of the trial judge to order a special *venire* in capital cases and determine its number, which he may likewise change by another order.
2. The practice of drawing the *venire* from the box is commended.
3. The dying declarations are admissible in evidence.

INDICTMENT for murder, tried at the September Term, 1892, of WAYNE, before *Bryan, J.*

The defendant pleaded not guilty, and the court ordered a (657) special *venire* of two hundred to be drawn from the jury box. This order was made on motion of the solicitor for a *venire* of one hundred and fifty.

Box No. 1 was exhausted when one hundred and thirty-five were drawn out, and on motion of the solicitor, the order was amended so as to call for only that number. A jury was obtained before the prisoner exhausted his special challenges. The court found, upon sufficient evidence, that the deceased's dying declarations were made under apprehension of impending dissolution and were admissible. Defendant excepted and appealed.

Attorney-General for the State.
No counsel for defendant.

CLARK, J. It rests in the discretion of the trial judge to order a special *venire* in capital cases, and likewise determine its number. The Code, sec. 1738. It is equally in his discretion subsequently to amend the order so as to increase or decrease the number of such *venire*. In this case certainly the prisoner had no cause to complain, as the jury was obtained from the regular panel and the reduced *venire* without exhausting the prisoner's peremptory challenges. *S. v. Hensley,* 94 N. C., 1021; *S. v. Pritchett,* 106 N. C., 667. But had the *venire* proved insufficient, the statute (The Code, sec. 1739) provides that the judge, in his discretion, could have ordered a further *venire* to be drawn from the box, or summoned by the sheriff.

The practice of drawing the special *venire* from the box is one to be commended and is favored by the courts. It is a wise and safe course which trial courts will usually do well to observe. The act authorizing it (The Code, sec. 1739) was passed by the Legislature to remove the occasion for scandals which, at times, had crept into the administration of justice in trials for capital offenses. There may be instances in which, in the exercise of a wise discretion, the court (658) need not observe it; hence, the act was not made mandatory.

We see no ground for the objection to the admission of the dying declarations of the deceased. The ruling of the judge was fully justified by the evidence. *S. v. Williams,* 67 N. C., 12; *S. v. Mills,* 91 N. C., 581.

NO ERROR.

Cited: S. v. Whitson, post, 697; *S. v. Whitt,* 113 N. C., 717; *S. v. Stanton,* 118 N. C., 1184; *S. v. Smarr,* 121 N. C., 674; *S. v. Register,* 133 N. C., 750; *Ives v. R. R.,* 142 N. C., 137; *S. v. Laughter,* 159 N. C., 490; *S. v. Carroll,* 176 N. C., 731; *S. v. Lewis,* 177 N. C., 558.

STATE v. THE DURHAM FERTILIZER COMPANY.

Motion to Quash Indictment—Challenge—Taxes—Code—Commissioners.

1. A motion to quash an indictment made before defendant entered his plea, on the ground that three of the grand jurors had failed to pay their taxes for the preceding year, was properly sustained.

2. It is not a sufficient ground to quash an indictment that the commissioners failed to comply with section 1722 of The Code, as amended by Acts of 1887, in that they *selected* for jurors some who had not paid their taxes. The statute is directory, and a challenge to grand jurors on this account, unless some actual corruption is shown, will not be sustained.

INDICTMENT heard on motion to quash, at Spring Term, 1892, of ORANGE, before *Whitaker, J.*

The statement of case is as follows: "This case being now called for the first time, and the defendant, before pleading or answering the indictment, having filed a motion to quash, supported by affidavits, and there being no evidence offered by the State, the court finds the facts to be as follows, to wit: The bill of indictment was found at November Term, 1891, which began on the second Monday of November, 1891; that the town commissioners drew the jury for said term, on 5
(659) October, 1891, which was the first Monday in said month of October; that among the jurors so drawn were Jones Sparrow, James Miller and George W. Smith, all of whom were drawn as grand jurors and served as such during the whole session of said grand jury at said term; that none of said jurors had paid their taxes for the year 1890, when he was drawn as a juror for said term, though said Miller paid his taxes thereafter on October 31, 1891, and said Sparrow had not paid his taxes for 1890 when he served on said grand jury and has not yet paid them."

The defendant's motion to quash the indictment was thereupon allowed by the court and judgment entered discharging the defendant, and the solicitor for the State appealed, assigning error in law, in that the court allowed the motion to quash upon the facts found.

Attorney-General for the State.
John W. Graham and W. W. Fuller for defendant.

AVERY, J. The motion to quash having been made before the defendant entered his plea to the indictment, was in apt time, and it being admitted that three of the grand jurors had failed to pay their taxes for the year 1890, which was the year preceding that in which the jurors

were drawn in September, 1891, there was no error in granting it. *S. v. Gardner,* 104 N. C., 739; *Sellers v. Sellers,* 98 N. C., 17; *S. v. Carland,* 90 N. C., 668; *S. v. Haywood,* 94 N. C., 847. But it was suggested on the argument that the jury were not drawn in accordance with the provisions of section 1722, as amended by Laws 1887, chap. 559. The requirement of the statute in its amended form is that "the commissioners for the several counties, at their regular meeting on the first Monday of September in the year 1892, and every four years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which they shall select the names of such persons only as have paid tax for the preceding year and are of (660) good moral character and of sufficient intelligence." The statutory regulation of the manner of making up the list from which the several juries are to be taken, or drawing the juries, has always been held in this State to be not mandatory, but directory merely, and in the absence of any proof of bad faith or corruption on the part of the officers charged with the duty, their action, though not in strict compliance with the statute in this respect, has been declared valid. *S. v. Griffice,* 74 N. C., 319; *S. v. Haywood,* 73 N. C., 437; *S. v. Martin,* 82 N. C., 672; *S. v. Wilcox,* 104 N. C., 852. In the cases cited, and in others, the distinction is clearly drawn between the objections that the grand jury as a whole was not drawn and constituted in the regular mode, and those directed to the competency of the individual grand jurors after the body is organized. *S. v. Griffice, supra; Lee v. Lee,* 71 N. C., 139. At different periods of the history of the State, the properly constituted authorities of the counties have been required to revise the jury lists at longer or shorter intervals and at different seasons of any given year. It is proper that every public officer should obey the law prescribing his official duties, but it would seriously impede and embarrass the administration of justice if every person charged with a criminal offense could impeach the action of the grand jury and avoid arraignment upon an indictment upon no higher ground than that it had been found by a grand jury not drawn at a given season of a given year, or at certain recurring intervals fixed by statute. Such an interpretation of the law would lead to inconvenience so serious as to preclude the idea that the requirement as to the time of drawing should be construed more strictly than that prescribing the manner of selecting. When it appears to the court that there were, or might have been, corrupt practices growing out of or connected with a departure from the law, a different rule very properly prevails with regard to petit, if not in reference to grand juries. *Boyer v. Teague,* 106 N. C., 620.

We conclude, that as the law enjoined the duty of revising the (661) list in 1892, and every fourth year thereafter, but did not, in

terms, prohibit the yearly revision between the time of the passage of the act in 1889 and September, 1892, a challenge to a grand jury drawn in the intervening years, or at a time other than that prescribed by statute, should not be sustained, certainly where it was not made to appear that the departure from the literal requirements of the law actually led or would naturally have given rise to corrupt practices in their selection.

NO ERROR.

Cited: *S. v. Smarr,* 121 N. C., 670; *S. v. Perry,* 122 N. C., 1021; *Moore v. Guano Co.,* 130 N. C., 232.

THE STATE v. WHITE OAK RIVER CORPORATION.

Indictment for Felling Timber—Verdict—New Trial—Code.

When the jury found that defendant had felled trees in White Oak River and allowed them to remain more than five days: *Held.* that the offense came within the inhibition of the statute, Acts 1887, chapter 72, section 1, but their additional finding that the act was not "willfully done, but in the interest of their mill," was inconsistent, and should have been set aside and new trial granted.

INDICTMENT under Laws 1887, chap. 72, sec. 1, for felling timber into White Oak River and allowing it to remain more than five days, tried at Spring Term, 1892, of ONSLOW, before *Winston, J.*

The jury found a special verdict, as follows: "That defendant did fell trees, and within two years prior to the finding of the indictment, in White Oak River, in Onslow County, between Barker's Bridge and the head of said river, which trees they carried down the river in (662) rafts to their mill to be sawed into timber. This felling was not willfully done, but in the interest of their mill, and the river was used for floating the rafts down the same. The branches of the trees were cleared from the river; some of the logs, as is usual in such cases, fell out of the rafts and sunk; many were got up again, but some were not. These rafts and logs were in the river more than five days, and a tree on one occasion remained in the river before being cut into logs more than five days, but was cut and removed as soon as practicable by defendant. The river, at the point where the trees were felled, is thirty or forty feet wide, and is in the summer too shallow to float logs, and is not navigable there. And the jury say that they are unable to find upon said facts whether the defendant be guilty or not guilty, and

thereupon ask the instruction of the court." Whereupon, the court instructed the jury that the defendant was not guilty and a verdict was rendered accordingly, and from the judgment thereon the solicitor for the State appealed.

Attorney-General for the State.
No counsel for defendant.

AVERY, J. The statute (Laws 1887, chap. 72, sec. 1) provides "that it shall be unlawful for any person to fell any timber, brush or other obstruction in the White Oak River, from Barker's Bridge to the head of White Oak River, in the counties of Onslow and Jones, and allow the same to remain in said river for five days." The charge in the indictment is that the defendant "on 1 January, 1890, in Onslow County, unlawfully and willfully did fell timber and logs in the White Oak River, etc., and did allow the same to remain in said river for five days," etc. The jury find, as a part of the special verdict, that the defendant felled trees into said river, between the points mentioned in the statute and in the indictment, during 1889 (within two years before the finding of the indictment), and that on one occasion one of the trees so felled remained in the river more than five days before it was (663) removed.

It would seem that the testimony brings the defendant very clearly within the letter of the law, and is sufficient to sustain the charge in the indictment. We find no intimation in the record of the grounds on which the learned judge who tried the case below rested his ruling that upon the special verdict the defendant was not guilty, and we have therefore examined the facts found with great care, in order to ascertain whether there is any matter of avoidance set forth in the findings which, in law, excuses the apparently criminal conduct of the defendant. It is true that the facts found would seem to warrant the conclusion that the stream was capable of being used at all seasons, except in summer, for the purpose of transporting logs to points where they could be sawed into plank or boards, and was therefore a floatable stream, or water-highway of the third class, affording a channel for useful commerce. *McLaughlin v. Mfg. Co.*, 103 N. C., 108; Wood on Nuisances, sec. 575, *et seq.;* Gould on Waters, sec. 107, and note; Angell on W. C., sec. 537, and note 1, p. 695; *ibid.*, 547, note 2; *Thunder Bay Co. v. Speechly*, 31 Mich., 336.

There can be no question, however, as to the power of the State to prevent nuisances in such a highway by making indictable any act amounting to an obstruction of them. Were the stream one of second class, navigable, in fact, for boats and lighters, the same principle would

prevail, and the Legislature of North Carolina would still have the same authority. *Weber v. Comrs.,* 18 Wal., 57; *Pollard v. Hogan,* 3 How., 212; *Martin v. Waddell,* 16 Peters, 367; *Spooner v. Alexander,* 1 McLean, 337; *Bowman v. Watkins,* 2 McLean, 376. Indeed, the sovereign power of the State is often extended to the enactment of police regulations affecting land covered by the ebb and flow of the tide. Such
(664) territory is not beyond the jurisdiction of the State, whose authority in preventing nuisances within its bounds only ceases when it is brought into conflict with the Federal government acting within the purview of its powers.

But the only remaining question is whether the criminal intent is established by the verdict. The jury find that the defendant felled a tree into the stream and allowed it to remain as an impediment to navigation for five days. The intent not being of the essence of the offense, the law presumes that the defendant intended the natural consequences of its own act, and if nothing more appeared the defendants would be guilty. *S. v. Barnard,* 88 N. C., 661; *S. v. King,* 86 N. C., 603; *S. v. Kittelle,* 110 N. C., 560. The jury say, however, in another portion of their verdict, that the act was not done willfully, but in the interest of their mills. This finding being irreconcilable with the principle that in felling the tree and allowing it to remain five days, when they could have removed it or refrained from cutting it down, the verdict should have been set aside and a new trial awarded. *Morrison v. Watson,* 95 N. C., 479; *Mitchell v. Brown,* 88 N. C., 156; *Allen v. Sallinger,* 105 N. C., 333; *S. v. Oakley,* 103 N. C., 408; *S. v. Crump,* 104 N. C., 763; *S. v. Bray,* 89 N. C., 480. The rule is the same where the finding of a jury is not sufficiently full to warrant the court in proceeding to judgment, as where there are contradictory findings upon essential questions; a new trial must be awarded in both cases.

VENIRE DE NOVO.

Cited: Gwaltney v. Land Co., ante, 562; *S. v. Finlayson,* 113 N. C., 631; *Comrs. v. Lumber Co.,* 116 N. C., 733; *S. v. Bradley,* 132 N. C., 1061; *Warren v. Lumber Co.,* 154 N. C., 37; *S. v. Fisher,* 162 N. C., 565.

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(665)

THE STATE v. MINGO MACRAE.

Larceny—Felonious Intent—Possession—Bailee—Agent.

1. While it is ordinarily true that a person is not guilty of larceny who converts property in his own possession, yet if he gained such possession by any trick or fraud, with intent at the time to convert, he may be found guilty of larceny.

2. The ownership of the property is properly laid in the bailee if it appears that the defendant, when he took possession of the property as agent for the owners, used such agency as a means to get possession to carry out his felonious intent.

INDICTMENT for larceny, tried at March Term, 1892, of NEW HANOVER Criminal Court, before *Meares, J.*

The facts are stated in the opinion.

Attorney-General for the State.
T. W. Strange for defendant.

CLARK, J. The defendant asked the court to charge: "If the jury believe that the cotton was placed in the hands of the defendant by its owner, and the defendant, so having charge of it, took some of it or otherwise disposed of it to his own use, he would not be guilty of larceny." In lieu thereof the court charged "that while it was a general rule of law that the agent or employee, or other person to whose possession the owner of personal property had entrusted it, could not commit larceny, because such person had come into possession of the property legally, still there are exceptions to the rule, as when the accused had resorted to trickery, fraud or deception in order to get the possession; that if in this case the defendant had taken advantage of the liberties allowed him as a cotton sampler, it being necessary that he should take a small portion of cotton from each bale in order to sample it, and had the guilty intent to appropriate some of the (666) cotton to his own use after he had taken it from the bale, this would be larceny, although he had the permission of the owners to take the cotton from each bale." The prayer was substantially given, though not in the very words asked. The addition made thereto by the court is sustained by ample authority. *S. v. England,* 53 N. C., 399; *S. v. Jarvis,* 63 N. C., 557. There was evidence tending to show that the defendant had the guilty intent to appropriate the cotton to his own use when he took it—especially the evidence that the appropriation and sale of such cotton by the defendant had been going on for some time. This intent was a question for the jury. 2 Bishop Cr. Law, sec. 818. There was very far more evidence of such intent here than in *S. v. Scott,* 64 N. C., 586.

The ownership would have been properly laid either in the owner or in the bailee. *S. v. Allen,* 103 N. C., 433, and cases there cited. It is contended, however, that the defendant took the property lawfully from the bailee as agent of the owners, and therefore the larceny was subsequent and was from the owner, and the property should have been laid in such owner and not in the bailee. But this overlooks the evidence

and the charge alike. If, at the time of taking the samples, the defendant had the felonious intent to appropriate them to his own use, there was no taking possession for the owner. The larceny was, then, when he took the samples into his possession with the felonious intent to appropriate them. Such taking was from the possession of the bailee. There was no time when such cotton or samples were held by him for the owner if he took them with such intent. Instead of taking the samples to the owners it appears, if the evidence is to be believed, the defendant, under the guise of taking samples, took cotton out of bales in possession of the bailee with the felonious intent, at the time, to appropriate them to his own use, and did so appropriate them. This was larceny, and the property was rightly laid in the bailee. The authority of the owner to take samples for him was not acted on, but was simply
(667) used as a trick or deception by which to feloniously take and carry away cotton in the possession of the bailee. A case exactly in point is *S. v. England, supra,* though the Court there explained that on the special verdict it had to hold the defendant not guilty, because it was not found that he had the intent to appropriate the carpet-bag to his own use at the time he received it by authority of the owner and for him. Here the intent to misappropriate at the time of taking the cotton was left to the jury. Besides, there was evidence sufficient to go to the jury that the cotton appropriated by the defendant from the warehouse of the bailee far exceeded in quantity the samples which could have been taken from the number of bales stored therein by the only party for whom there was any evidence that the defendant was authorized to act as sampler. If he took more than samples, or from other bales than those he was authorized to sample, he was, of course, guilty of larceny from the bailee.

NO ERROR.

Cited: *S. v. Ruffin,* 164 N. C., 417; *S. v. Lyerly,* 169 N. C., 378.

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*STATE v. E. F. MOORE.

False Pretense—Charge.

1. A statement upon which money is obtained, to come within the meaning of false pretense, must be false within the knowledge of the party making it, calculated and intended to deceive, and which did deceive, the person from whom the money was taken, and upon which such person reasonably relied at the time of the taking.

*MACRAE, J., did not sit.

2. It is not sufficient that such statement was made after the money was obtained.

3. If the prosecutor, knowing his note is in other hands than the payee's, pays him the money due thereon and trusts him to make the application, he is not induced to part with it by any false pretense.

Discussion by AVERY, J., of the essential qualities of a false pretense.

INDICTMENT for obtaining money by false pretenses, tried at (668) the May Term, 1892, of CUMBERLAND, before *Boykin, J.*

John T. Ritter, the prosecutor, testified that he executed a note to defendant in January, 1888, for $500, and afterwards learned that defendant had put it in bank. Witness got a notice from the cashier of the bank that this note, endorsed by E. F. Moore, was due. Witness came to town and went to see defendant about it. Defendant gave witness a blank note to sign, and told witness to go home, and said he would attend to it; that was about the first of April, 1888. It was a blank note, neither names nor amount were in it. Witness has paid defendant about $475 on witness' account in defendant's store; witness don't know what he did with it. Witness gave defendant a note for $500 in January, 1888, to secure him for goods witness was to get from him. Defendant gave witness credit on his books for that note, and charged him up with the goods he got. Witness paid most of it in money near Christmas, 1888; witness sold a lot of rosin and defendant got the proceeds; witness had very little conversation with defendant about it; witness was paying him along as he could, and defendant was giving him credit for it on his books. The day witness paid defendant all but $24.75, witness asked him for the note; told him to get it and witness would give him a new note for the balance, as witness was going into business in Richmond County and wanted to run the balance a while longer. Defendant said witness need not bother about it then, that he would run it on till witness got started in his new business in Richmond County. In the summer of 1889, witness told defendant witness would be in some day and pay that note; the next week witness told defendant witness would be in soon to pay that note. He said, "Very well." The next week witness was in and told defendant he was ready to pay it. He said he would go and get it, and went out; witness waited till near train time and could not wait any longer and left. It was (669) between 2 and 3 o'clock when witness went to see defendant, and the train left about 3 o'clock. Afterwards, in the fall of 1889, witness inquired of him again about it. He said witness need not bother about it, that he would get the note and they would fix it up; again he went off and did not return; witness did not see him again until after he had made an assignment. He never told witness that the note was not his,

or that he had transferred it; witness made the payment in the fall of 1888, and by the last of the year had paid it all to defendant but the $24.75; witness did not know that he was not the owner of the note until after the bank failed; witness saw the note afterwards, and don't think there are any credits on it.

Cross-examined.—Witness said that he began business with defendant in 1886, and opened an account with him then, and gave him a note for $150; thinks it was a bank note. The condition of the $500 note was supplies to be advanced during the year; witness got goods from him from time to time, and delivered to him spirits and turpentine and got credit for it. Witness had a notice from the bank that the note was due. The $500 note was a printed Peoples Bank note. The blank note witness signed was to renew the $500 note in bank; witness supposed the note was in the bank; afterwards he signed the other blank note; it was about ninety days after April. The note dated July, 1888, was signed to enable Moore to renew the $500 note; defendant had possession of it; defendant went to the bank after it when witness called for it; witness knew the note was in the bank at that time; witness never had any business with defendant at the bank, but did all his business with him at his store; Mr. Robinson was his bookkeeper. At the end of each month witness was charged on the books with the interest on the note; witness told Robinson he (witness) knew the note was in bank; witness (670) knew this when he was making payments on the note. The train left Fayetteville about 3 o'clock and it was between 2 and 3 when witness called to see defendant about the note and witness went for it; defendant never told witness the note was not in the bank; he did tell witness that the second note was to renew the note in bank. Witness did not come to him after defendant's failure, but came after he heard of the bank failure. Witness did not tell Duncan McLean or John McDuffie that he knew the note belonged to the bank; witness cannot tell the difference between a note being *in bank* and belonging to the bank. Witness did much more than a $500 business with defendant; it amounted to $2,000 or $3,000, but witness never owed defendant more than $500 at a time, and witness examined his account on defendant's book from time to time, and saw the charges and credits. The note dated .... July, 1888, was read in evidence.

Re-direct.—The witness understood the credits were to be placed on the note. Witness had had all his transactions with defendant at his store, and signed all the notes there.

John B. Broadfoot testified for the State, that he was assistant cashier or teller of the Peoples Bank; that the bank held the note for $500, signed by Ritter and payable to defendant. It was assigned the bank by the defendant on 5 January, 1888. The January note was paid by

the renewal note of April; the January note was regularly discounted in the Peoples Bank by defendant. The credits on the April note were interest payments made by defendant, and amount to about $96, and run from 5 July, 1888, to 16 November, 1890. The bank suspended 31 December, 1890.

Cross-examined.—Witness said that E. F. Moore, Jr., was clerk of the bank in April, and about that time, 1888. It is the general custom for those parties to whom notes are given to attend to the renewals thereof.

J. T. Ritter, recalled, testified that he has never seen the January note after it was given, nor the April or July note. The notice witness got from the bank was that the $500 note indorsed (671) by Moore was due. It was about 1 April, 1888.

The State closed.

The note given in July was as follows:

"$500. FAYETTEVILLE, ... July, 1888.

"Ninety days after date I promise to pay to E. F. Moore, or order, five hundred dollars for value received, negotiable and payable at the Peoples National Bank of Fayetteville, N. C., with interest after maturity at the rate of eight per cent per annum until paid, for money loaned to renew $500. Due ....., 188..... JOHN T. RITTER."

Among other prayers for instructions, the following were submitted by the defendant:

1. The bill of indictment charges the obtaining of money by defendant from J. T. Ritter by representing that a certain note for $500, made by J. T. Riter to E. F. Moore, was his (Moore's), and that he (Moore) had a right to collect the same. By the testimony of the prosecutor Ritter, it appears that he knew that the said note was the property of the Peoples National Bank, and therefore the State has failed to make out its case, and the jury should find a verdict of not guilty.

2. That it is incumbent upon the State to prove that the defendant Moore stated to the prosecutor that he was the owner of the note and had a right to collect the same, and that the prosecutor made the payment to him on the faith of that statement, and if the State has failed to make such proof, the verdict should be not guilty.

3. That if, upon all the testimony, the jury shall believe that the prosecutor Ritter knew that the $500 note of January, 1888, had been assigned and transferred to the Peoples National Bank by the defendant when the prosecutor made the payment to the defend- (672) ant, that the said payments were not made in consequence of any false representations of defendant, and the jury should find a verdict of not guilty.

To the refusal to instruct the jury as requested, the defendant excepted and appealed from the judgment.

Attorney-General for the State.
G. M. Rose, C. M. Cooke and W. W. Fuller for defendant.

AVERY, J. It was essential to the successful prosecution of the indictment to show that the prosecuting witness Ritter was induced by a reasonable reliance upon false representations made by the defendant to pay the latter money to be applied to the gradual extinction of his note theretofore executed. The question that confronts us at the threshold of our investigation is whether the testimony of Ritter tended to prove that any false statement was made by Moore in reference to the ownership of the note which was calculated to deceive or did deceive him, and influence him to pay the money to the defendant. As well in civil actions, brought to recover of another for losses incurred by false representations, as in criminal prosecutions founded upon the same species of fraud, the burden is on the actor or prosecutor to show, not only the false representation, but that a reasonable reliance upon its truth induced the plaintiff or prosecutor to part with his money or property, the only difference being as to the *quantum* of proof. *S. v. Phifer,* 65 N. C., 321; *Walsh v. Hall,* 66 N. C., 233. Hence it is that both indictments (relied upon as separate counts of one indictment) charged that the fraud was accomplished and the money paid over to the defendant because of his fraudulent representation that he owned the note, to the discharge of which the prosecutor proposed to have the payments applied. By collating the facts bearing upon the main questions that were elicited both by the direct and cross-examination
(673) of the prosecuting witness, we learn that after purchasing supplies from the defendant for the two previous years, and delivering to him, in 1886, on opening an account at his store, a note which he thought was a bank note, Ritter, on 1 January, 1888, executed the first of a series of notes for $500, which was payable to the defendant. Before the expiration of ninety days from 1 January, 1888, the prosecutor states that in consequence of notice from the bank that his note, indorsed by defendant, was due, he came to Fayetteville, saw the defendant Moore about it, and signed a printed Peoples Bank note, in blank, in order to renew that in bank, which he had notice would fall due. Again, in July, 1888, the prosecutor admits that he signed a third note for $500 in order to enable Moore to renew the bank note. The note last mentioned was in evidence, and proved to have been a promise to pay to E. F. Moore, or order, negotiable and payable at The Peoples National Bank at Fayetteville. No payment seems to have been made on any of this series of

notes till near Christmas, 1888, when the prosecutor sold a lot of rosin and turpentine, the proceeds of which passed into Moore's hands and were sufficient to pay all of the amount due on the note except the sum of $24.75; but the amount so received was not, in fact, applied by Moore in discharge of said note—no credit having ever been entered upon it. On the same day that the last and largest payment was made, the prosecuting witness, for the first time, asked to see the note. It does not appear that he asked for it before paying the money, and that anything that was said by Moore in reference to his ability to get the note influenced the prosecutor to pay the money. The more natural inference from his testimony is that he asked Moore to get it for him, and take a new note for the balance, after paying all but $24.75 of the sum due. It is possible that the defendant would have gotten the note and settled on the proposed basis had Ritter remained long enough at the store; but even if Moore told a falsehood or deceived him after (674) all the money had been paid, the misleading inference that he naturally drew from the defendant's language or conduct, after such payments were made, were not, in contemplation of law, the means by which he was deceived or defrauded. As the prosecutor, neither on his own showing nor by other testimony, proved any false representation made by the defendant, or any misleading conduct before the money was paid, which could have induced him to pay when he would not have done so but for such language or conduct, we think that the judge should have given the instruction embodied in the three first prayers submitted by the defendant, and which would have amounted practically to telling the jury to return a verdict of not guilty. The defendant knew, at every stage of the transaction, that his note was in bank, and had every reason to believe it was controlled by the bank, except in so far as Moore's personal influence might induce its officers to entrust it to him. According to his own testimony it is manifest that he trusted Moore, without question, to see to the application of the money paid him in liquidation of the note, which he knew was in the bank and subject to the control of its officers. If Ritter was so ignorant of the law and custom among brokers as not to understand what was implied by the repeated invitations to renew ninety-day notes, Moore cannot be held a criminal for failure to enlighten him and fully explain the situation. Ritter testifies that Moore never, at any time, told him that the note was not in bank, but he did tell him that the second note was a renewal of the first note. The third note, the prosecutor must have understood, was substituted for the second note, which he knew was a bank note, and though he signed it at Moore's store, as he had signed the other notes, he says that Moore never, at any time, told him that his

note was not in bank. If, then, there is no testimony tending to show a purpose on Moore's part to mislead, or that he did deceive Rit-
(675) ter, till after the payments were made, the evidence was totally insufficient to go to the jury in support of the charge that Moore had obtained the prosecutor's money for false representations as to the ownership of the note.

We have not deemed it necessary to discuss or decide the interesting question whether any misrepresentation made by Moore was calculated to deceive, under the rule laid down by this Court, as we have not noticed numerous other points raised by the exceptions.

In refusing the instructions asked, there was error.

NEW TRIAL.

Cited: *S. v. Davis,* 150 N. C., 853; *S. v. McFarland,* 180 N. C., 729.

THE STATE v. J. M. MONGER.

Indictment—Retailing—Inconsistent Acts of Assembly—Corporate Towns—Jurisdiction.

When two acts of the General Assembly are inconsistent and irreconcilable, the last enacted will prevail, though there is no repealing clause. A., who had a license from the county authorities, was indicted for selling liquor in the corporate limits of the town of S. without a license from the town authorities. The Act of 1887 prescribed a penalty of twenty-five dollars for this offense. Chapter 164, Laws 1889, ratified 9 March, amendatory of the first, extended the limits of exclusion without such license to two miles from the said corporate limits, and increased the penalty to the extent of a magistrate's jurisdiction. Chapter 262, Laws 1887, ratified 11 March, forbids the sale of liquor within two miles of a church in the corporate limits of S., and makes the punishment of the offense at the discretion of the Superior Court: *Held,* (1) the last act, of 11 March, repeals the other, of 9 March; (2) it is unlawful to sell in two miles of the said church; (3) the town authorities of S. have no power to grant license; (4) the Superior Court has exclusive jurisdiction of the offense, and the indictment before the Mayor of S. should have been dismissed.

(676) INDICTMENT for selling liquor without license, tried before *Boykin, J.,* at the March Term, 1892, of MOORE.

The facts are set out in the opinion.

Attorney-General for the State.

Black & Adams (by brief) for defendant.

MACRAE, J. The defendant was tried and convicted before the mayor of Sanford for violation of a town ordinance. From the judgment rendered against him he appealed to the Superior Court of Moore, where, at March Term, 1892, before *Boykin, J.*, and a jury, he was adjudged guilty upon a special verdict and fined. He appealed to this Court.

The special verdict was as follows:

"That the defendant, on 1 June, 1889, within the corporate limits of the town of Sanford, and within a quarter of a mile of the Methodist church in said town, did sell to J. W. Scott, Jr., spirituous liquors in a measure less than a quart, to wit, by the pint, as charged in the warrant; that at said time the defendant had in his possession a license from the sheriff of Moore County, issued pursuant to an order of the board of county commissioners, under the general law of the State, permitting him to sell liquors in a measure less than a quart at his storehouse in Sanford, where said sale was made; that defendant had no license from the town of Sanford to retail liquors within the corporate limits; that the town of Sanford is incorporated under the general laws of the State; that the ordinance, which the defendant is charged with violating, was passed in 1887, and is as follows:

" 'Section 1. If any person shall, within the corporate limits of the town of Sanford, sell spirituous, vinous or malt liquors in any quantity without first having obtained from the board of commissioners a license so to do, such person shall, upon conviction before the mayor, pay a fine of twenty-five dollars.'

"If, upon the foregoing state of facts, the court shall be of opinion that the defendant is guilty, then the jury find him guilty; otherwise, the jury find him not guilty."

The court adjudged that the defendant was guilty, and he (677) appealed.

By chapter 161, Private Laws 1889, being "An act to amend an act to incorporate the town of Sanford in Moore County," is provided:

"Sec. 2. That it shall be unlawful for any person or persons to sell any spirituous, vinous, malt or intoxicating liquors within the corporate limits of said town, or within two miles of the same; and if any person shall violate this provision of this act he shall be deemed guilty of a misedemeanor, and on conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: *Provided,* the provisions of this section shall not apply to the corporate limits of the town of Jonesboro: *And provided further,* that it shall not apply to persons licensed under section 3 of this act.

"Sec. 3. That every person, company or firm wishing to sell spirituous, vinous, malt or intoxicating liquors in any quantity shall apply to the mayor and commissioners for a license, stating the place where it is

proposed to conduct the business. The mayor and commissioners shall, upon satisfactory evidence of good moral character of the applicant, issue the license, to be signed by the mayor, upon the payment of a quarterly tax of sixty-two and fifty one-hundredths dollars.

"Sec. 4. That the commissioners shall have power to make any ordinance respecting the sale of spirituous liquors, and to impose penalties for violation of the same. And if any person licensed to sell shall be convicted in the Superior Court of violating any such ordinances, the commissioners shall have power to declare his license void, and he shall forfeit to the town all moneys paid for the same."

Ratified 9 March, 1889.

(678) By chapter 362, Laws 1889, entitled "An act to prohibit the sale of spirituous liquors within certain localities," it is provided:

"Section 1. That it shall be unlawful for any person to sell, or otherwise dispose of with a view to remuneration, any spirituous liquors, wines or medicated bitters, or any other liquors or substance, by whatsoever name it may be called, which produces or may produce intoxication, within two miles of the following places: (Among others) Sanford M. E. Church, in Moore County.

. . . . . .

"Sec. 7. That any person, etc., violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court."

And this act was ratified 11 March, 1889.

So we have two acts concerning the sale of liquor in Sanford, passed at the same session of the General Assembly; the one forbidding the sale of spirituous liquors within two miles of Sanford or within its corporate limits, without a license from the mayor, and excluded from its prohibition the corporate limits of the town of Jonesboro, which we must assume to be within two miles of Sanford; the other, passed two days later, prohibiting the sale of liquor within two miles of Sanford M. E. Church.

If the first named act was still in force at the time of the alleged commission of the offense charged, the mayor of Sanford had jurisdiction, for it was competent under its provisions for the mayor and commissioners of Sanford to have passed an ordinance respecting such sale, and to have imposed penalties for violation of the same. If, however, the former act was repealed by the latter, it was unlawful by the general laws of the State for anyone to sell spirituous liquors within two miles of Sanford M. E. Church; the criminal offense was indictable in the Superior Court, and a town ordinance making the same an offense

(679) against the town was void. *Washington v. Hammond,* 77 N. C., 33, and cases there cited.

It may be added that there is no repealing clause in the latter act, and that "the law does not favor a repeal by implication." A later act is never construed to repeal a prior act unless there be a contrariety or repugnance in them; or at least some notice taken of the former act so as to indicate an intention in the lawgiver to repeal it. Potter's Dwarris, 156; *Jones v. Ins. Co.*, 88 N. C., 499.

Applying these tests, are the two acts so repugnant to each other that they cannot be construed?

Section 2 of the former act gives jurisdiction to a justice of the peace: "And on conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days." The proviso excludes the corporate limits of the town of Jonesboro, and that the mayor and commissioners shall grant licenses upon the applicant complying with the terms prescribed, and it will be observed, if we follow the letter, that the licenses need not be confined to the town of Sanford. In other words, the former statute, as far as Sanford and two miles around it is concerned, emasculates and repeals the latter. It is plain that in case of repugnance between the statutes, the last expression of the legislative will must prevail. *Bunting v. Stancill*, 79 N. C., 180.

There are other difficulties in the construction of the two statutes; there are three different punishments provided for the commission of the offense; the former act, in the first place, gave final jurisdiction to the mayor or justice of the peace by section 2, "if any person shall violate, etc., he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days." The commissioners shall have power to make ordinances, etc., and to impose penalties for violation of the same. And the commissioners have made their ordinances and fixed the punishment at a fine of twenty-five dollars. (680)

And by the latter act the punishment fixed after conviction gives jurisdiction to the Superior Court, for he shall be fined or imprisoned, or both, in the discretion of the court.

We conclude, therefore, that the two acts are repugnant; that the latter prevails; that it is unlawful to sell spirituous liquors, etc., within two miles of Sanford M. E. Church; that the commissioners of Sanford have no power to grant license; that the Superior Court has exclusive jurisdiction to try persons for violation of this law, and it follows that the mayor had no final jurisdiction. There is error, and the warrant should have been dismissed.

ERROR.

THE STATE v. JOHN TAYLOR and SAMUEL MONROE.

Games of Chance—Indictment—Betting Money.

1. An indictment for betting money on a game of chance which states that the defendants did, with force and arms, etc., unlawfully and willfully play at a game of cards at which money was bet, sufficiently describes a game of chance.

2. It is a matter of common knowledge that a game of cards is a game of chance.

INDICTMENT for betting money on a game of chance, tried at June Term, 1892, of RICHMOND, before *Boykin, J.*

The jurors for the State upon their oaths present that John Taylor and Samuel Monroe, etc., with force and arms, etc., did unlawfully and willfully play at a game of chance, to wit, cards, at which money was bet, against the form of the statute, etc.

(681) The defendants were found guilty, and appealed from the judgment pronounced against them.

Attorney-General for the State.
Burwell & Walker and W. A. Guthrie (by briefs) for defendant.

AVERY, J. The courts take judicial notice of all matters occurring within their jurisdiction, which are of such general and public notoriety that every person of ordinary intelligence may be fairly presumed to know them. *Brown v. Piper,* 91 U. S., 37; 1 Greenleaf Ev., 6a; 12 A. & E., 151; *Deans v. R. R.,* 107 N. C., 686. It is matter of universal knowledge that "a game of chance, to wit, cards," means one that is played with an ordinary deck of cards, and no citizen of North Carolina arraigned upon an indictment containing such a designation of the offense, would fail to understand from reading it that he was charged with hazarding money upon the result of a game played with such cards, as the instruments, and from which neither skill nor intelligence could entirely eliminate the risk. If the indictment is defective at all, it is because it fails upon its face to give the accused such specific notice of the nature of the charge as will enable him to prepare his defense. Any man of ordinary intelligence would feel that it was a reflection upon him, if not an insult, were he gravely told that he did not know what is the universal interpretation given to the expression "playing a game of chance with cards." It would be absurd to require the prosecuting officer, when he can make himself understood by persons accused without doing so, to take a course of training from experts, so that he could elucidate the generally accepted rule for playing every game of

cards, from "baccarat" to "five up." It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of (682) such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertaintly as to the results. When volumes are written, as is universally known, to acquaint persons, who may desire such information, with the nature of all games played with cards and to advise them of the principles upon which skillful players can diminish the hazard, there is no longer any reason for apprehending that the description of an offense, in the language of the indictment in this case, will not be sufficiently understood.

The testimony for the State tended to show that one of the defendants came into a wagon lot in the town of Rockingham, and said he could "beat any man a game of five up for twenty-five cents," and thereupon the two defendants began to shuffle and deal cards and to bet twenty-five cents on the game and to pass money from one to the other, until defendant Taylor rose from the ground where they were playing and walked off, when the other defendant said, "I have strapped him." It is not material that there was contradictory testimony, since the question submitted for our decision is whether the defendants were guilty, not in every, but in any, aspect of the evidence. Our case is easily distinguishable from those cited and relied on by the defendants. *S. v. Bishop,* 30 N. C., 266; *S. v. Gupton, ibid.,* 271. The result of a game of ten-pins is as manifestly dependent upon the skill of the roller, as that of a wrestling match is dependent upon the strength, agility, training and endurance of the wrestler. On the other hand, where the public generally do not know the nature of a game, and the jury find that it is a game dependent upon skill, the court cannot take judicial knowledge of its nature and correct the finding of the jury. We think that it was not error to refuse to instruct the jury that there was no (683) evidence that the game played was a game of chance, or to sustain the motion in arrest of judgment because of defects in the indictment.

NO ERROR.

STATE v. WILLIAM McKINNEY.

Homicide—Evidence—Charge—Exception—Prayer for Instruction.

1. In an indictment for homicide, where it appeared that a pistol was loaned to the prisoner, it was not competent for him to show that he could not hear of anyone having loaned him a pistol.
2. The State was properly allowed to corroborate its witnesses by showing that he made the same statement soon after the trial.
3. The court is not bound to charge upon an aspect of the case not presented in the evidence.
4. This Court will not consider objections to the judge's charge unless upon exception properly made and set out in the case on appeal.
5. A failure to charge on a particular aspect of the evidence is not error unless there was a request.

INDICTMENT for murder, tried at the May Term, 1892, of ROBESON, before *Boykin, J.*

The prisoner offered to prove by a witness that he had made diligent inquiry of persons at the place of shooting and could find no one who had loaned him a pistol. Excluded. Defendant excepted.

The State was allowed, after exception, to corroborate two witnesses by howing the statements they made shortly after the homicide, and the other facts appear in the opinion.

Attorney-General for the State.
William Black and T. A. McNeill for defendant.

CLARK, J. The first exception is without merit. The excluded evidence was neither competent nor relevant. It might be called, possibly, "negative hearsay," for lack of a better word—that is, the offer
(684) was to show that the prisoner could find no hearsay evidence that anyone had loaned the prisoner a pistol. It would not have been competent to show that there was or was not such a report. It was competent for the State to show that a pistol was loaned the prisoner by a certain person just before the homicide, as it did, and it was competent for the prisoner to negative that fact, but not to show that he could not hear of anyone having loaned him a pistol. Besides, the prisoner admitted in his own testimony that he had a pistold on that occasion.

The second exception is that the State was allowed to corroborate two of its witnesses by showing that soon after the homicide they made the same statement of the occurrence as they had testified to in the trial. This has often been held competent. *Roberts v. Roberts,* 82 N. C., 29; *Gregg v. Mallett, ante.*

Nor, after a most careful examination of the testimony, is there any ground to support the exception to the charge. The testimony for the State, if believed, proved the prisoner guilty of murder. The testimony for the prisoner made a clear case of self-defense. There was no part of the testimony on either side which tended to show manslaughter. The charge of the court that "there was no element of manslaughter in the case; that the defendant was guilty of murder or not guilty of anything at all, as the jury should find the facts," was strictly in accordance with the testimony and numerous precedents. *S. v. Byers,* 100 N. C., 512; *S. v. Cox,* 110 N. C., 503; *S. v. Jones,* 93 N. C., 611.

The counsel for the prisoner argued in this Court that the charge was objectionable because the judge did not charge the jury as to the difference between corroborative and substantive testimony. The contention cannot be considered for several reasons. There is no (685) exception to the charge on that ground, so that the judge might have set out his charge fully and accurately on that point. An exception to the charge need not be made at the trial (unlike exceptions to all other matters occurring then), but there is ten days in which counsel may consider and enter his exceptions. If not set out in his case tendered on appeal, they cannot be made here. *Lowe v. Elliott,* 107 N. C., 718; *Pollock v. Warwick,* 104 N. C., 638; *Taylor v. Plummer,* 105 N. C., 56; *Smith v. Smith,* 108 N. C., 365. Besides, it does not appear that in fact the judge did not charge on the point. And lastly, an omission to charge on a particular aspect of the case is not error unless there was an instruction asked. See the numerous cases cited in Clark's Code (2 Ed.), p. 382.

Upon an examination of the entire record and case on appeal we find

No ERROR.

Cited: Burnett v. R. R., 120 N. C., 518; *S. v. Maultsby,* 130 N. C., 665; *S. v. Wiseman,* 178 N. C., 796.

THE STATE v. R. A. SOWERS.

Indictment—Sale of Spirituous Liquors—Special Verdict.

When the jury found that the defendant sold spirituous liquors within two miles of a certain schoolhouse, and the act under which defendant was indicted forbid any person from erecting any stand or place of business for the purpose of offering for sale spirituous liquors: *Held,* not guilty.

STATE *v.* SOWERS.

INDICTMENT for selling spirituous liquors within two miles of a public schoolhouse in Davidson County, tried before *McIver, J.*, at the March Term, 1892, of DAVIDSON.

The facts are sufficiently stated in the opinion.

(686) *The Attorney-General for the State.*
No counsel for defendant.

BURWELL, J. This is an indictment against the defendant for selling spirituous liquor within two miles of a public schoolhouse in Davidson County, contrary to the provisions of chapter 415, Laws 1891.

The jury found a special verdict, as follows: "The jury find as a fact that Robert A. Sowers, Sr., since 1 April, 1891, and prior to the finding of this bill, sold spirituous and intoxicating liquors by the quantity less than a gallon, to wit, by the half-gallon, to J. A. Leonard, within the distance of two miles of Leonard's schoolhouse in Lexington Township, Davidson County, the same being a public schoolhouse where public schools are taught in said county."

. . . . . .

Upon the facts found in the special verdict, the defendant was adjudged to be guilty. There was judgment against him, and he appealed.

The act referred to (Laws 1891, chap. 415, sec. 2), provides that it shall be unlawful for any person to erect any stand or place of business for the purpose of selling or offering for sale any spirituous liquors within two miles of any church in this State; and by a proviso contained in section 4, it is declared that the act "shall only apply to churches" in the certain counties named, and "to public schoolhouses and other institutions of learning in Davidson County." It is unnecessary to consider what effect should be given to this proviso, for the special verdict does not find that the defendant has committed the act made unlawful by section 2, to wit, erecting a stand or place of business for the purpose of selling or offering for sale spirituous liquor; and it follows that, upon the verdict, the defendant should have been adjudged not guilty. There is

ERROR.

(687)

STATE v. JOHN A. TYSON.

Indictment for Violating Town Ordinance—The Code—Penalty—Cotton Weigher.

A town ordinance providing that the commissioners shall elect a cotton weigher, who shall receive eight cents compensation for every bale weighed by him, one-half to be paid by the buyer and the other by the seller, and prescribing a penalty for buying or selling in the corporate limits without having it weighed by such cotton weigher, is a valid and reasonable regulation.

INDICTMENT for violating a town ordinance, tried at the Spring Term, 1892, of STANLY, before *McIver, J.*

The facts are stated in the opinion.

Attorney-General for the State.
Brown & Jerome (by brief) for defendant.

BURWELL, J. The defendant has appealed to this Court from the judgment of the Superior Court of Stanly, which declared that he was guilty of the violation of an ordinance of the town of Norwood, in said county.

This criminal action was begun before the Mayor of the town of Norwood, and was carried, by appeal of defendant, to the Superior Court. The ordinance, with the violation of which the defendant is charged, provides that the commissioners of the town shall elect annually a cotton weigher, and that he shall receive, as compensation for each bale of cotton weighed, eight cents, "one-half to be paid by the seller and one-half by the buyer," and that "any person who shall buy or sell any bale of cotton within the corporate limits of the town of Norwood shall have the same weighed by the cotton weigher." The ordinance (688) provides penalties for its violation.

The counsel for the defendant contend that the ordinance is void, the commissioners of the town of Norwood having no power to adopt or enforce such a regulation, and upon this contention alone they put their argument for a new trial.

We think this ordinance a valid one. By chapter 217, Laws 1891, the town of Norwood, which had been incorporated by chapter 18, Private Laws 1881, was "invested with all the power, duties and obligations and authority conferred in chapter 62 of The Code," while, by section 6 of the act of incorporation mentioned above, the commissioners were given power "to pass by-laws, rules and regulations for the good government of the town not inconsistent with the laws of the State."

The Code, sec. 3801, enacts that towns "may establish and regulate their markets, and prescribe at what place within the corporation shall be sold marketable things."

Under the authority conferred upon them by these acts, the commissioners had the power to adopt the ordinance in question, and to require that all baled cotton, a marketable thing, should be sold and bought within the corporate limits only when weighed by an agent of the town, elected or appointed for that purpose. Such a regulation would not, in any sense, tend to the restraining of trade in this particular marketable thing, but rather to the encouragement of it, by thus providing for the buyer and seller of this article, a weigher selected by the officers of the town, subject to their order, and always acting under the authority of citizens interested in promoting the trade of the town.

Nor does the provision of the ordinance requiring a fee of eight cents for each bale of cotton weighed by him to be paid to the weigher, one-half by the seller and one-half by the buyer, render it void. This exaction is in no sense a tax, but is a market fee, and a reasonable one, which the commissioners were authorized to impose. This is a (689) proper mode of providing for the compensation of the weigher, and the payment of any expense incidental to this regulating of the market. *S. v. Bean,* 91 N. C., 554. The judgment therefore is

AFFIRMED.

Cited: Brooks v. Tripp, 135 N. C., 161; *S. v. Vanhook,* 182 N. C., 834.

STATE v. FIELDS ANDERSON.

Escape of Prisoner Convicted of a Capital Felony Pending His Appeal.

When, pending an appeal of a prisoner who has been convicted of a capital felony, he makes his escape, the Supreme Court has power in its discretion to dismiss the appeal, or hear or continue it.

INDICTMENT for murder, tried at Spring Term, 1891, of ALLEGHANY, before *Bynum, J.*

The prisoner was found guilty of murder and there was judgment accordingly, from which he appealed. Pending the appeal the defendant made his escape and is now at large. The Attorney-General moves to dismiss the appeal.

The Attorney-General for the State.
No counsel for defendant.

AVERY, J. It was settled in *S. v. Jacobs,* 107 N. C., 772, that where a prisoner who has been convicted of a capital felony escapes from custody and is at large when his appeal is called for trial, this Court may, in the exercise of a sound discretion, either dismiss the appeal or hear and determine the assignments of error or continue to await the recapture of the fugitive. In the exercise of this power, on motion of the Attorney-General

APPEAL DISMISSED.

Cited: *S. v. Cody,* 119 N. C., 908; *S. v. Dixon,* 131 N. C., 813; *S. v. Keebler,* 145 N. C., 560, 562; *S. v. DeVane,* 166 N. C., 282.

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(690)

THE STATE v. LEONIDAS MCKNIGHT.

Burglary—Time of Night—Charge—Evidence—Code—Larceny.

1. When a prisoner indicted for burglary admitted the breaking with felonious intent, and upon the question of whether it was nighttime, there was evidence that it was "after daylight down," and was "dark. except the light of the moon": *Held,* there was sufficient evidence to warrant the finding of the jury that the offense was committed in the night-time.
2. There was no error in refusing to charge that the jury might convict for a lesser offense than that charged, as provided in section 996 of The Code.
3. There was no error in the charge that if the jury were not satisfied beyond a reasonable doubt that the offense was done in the night they should return a verdict of larceny.
4. It was not error in the court to remark, in response to comments of counsel, "the trial of one T. (an accomplice hitherto convicted) had nothing to do with this case."

INDICTMENT for burglary in the first degree, tried at August Term, 1892, of SURRY, before *McIver, J.*

The defendant was found guilty, and appealed from the judgment pronounced.

The Attorney-General for the State.
No counsel for defendant.

SHEPHERD, C. J. The prisoner was indicted for burglary "in the first degree," and on his trial admitted the breaking and entry with the felonious intent as charged in the bill. The propriety of the admission

is demonstrated by the decision of this Court in *S. v. Fleming,* 107 N. C., 905, in which the question as to what constitutes a sufficient breaking is fully discussed and illustrated by many authorities.

(691) The prisoner, however, very seriously insists that the State has failed to adduce sufficient evidence to warrant the jury in finding that the breaking and entry was done in the nighttime, and it will therefore be necessary to recapitulate so much of the testimony as bears upon this point.

Mrs. S. H. Taylor testified that she had an early supper on the night in question, but not earlier than was her custom; that sometime after supper her husband and the other members of the family left the house and went up into the town to be present at an oyster supper at Moore's hotel; that when they left "it was dark, except what light was given by the moon; that it was after daylight had disappeared," and that the lamps in the house had been lighted sometime before. On cross-examination she stated that it was her habit to have supper "generally about sundown; that it was no earlier that evening than usual; that at that time of the year the moon was up early in the evening, and as the sun descended the moon became brighter; that she did not know what time it was; it was after night; was after daylight down, though early in the night."

Mrs. Galloway, a daughter of Mrs. Taylor, testified that she went with the other members of the family to the oyster supper, but that they did not start for sometime after they had taken supper at home; that when they started the lamps in the house had been lighted, and "it was dark, except the light from the moon; it was after daylight down."

Sir William Blackstone (4 Com., 224) says that "anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglars would go unpunished." "In the law of burglary there must not be daylight enough to discern a man's face." Ander-

(692) son's Law Dic., 709; *Comr. v. Chevalier,* 7 Dana, Abridgment, 134; *S. v. Bancroft,* 10 N. H., 105; *People v. Griffin,* 19 Cal., 578.

It will not avail the prisoner, however, "if there was light enough from the moon, street lamps and buildings, aided by snow, to discern the features of another person." *S. v. Morris,* 47 Conn., 179. Doctor Wharton says (2 Cr. Law, 1594): "But there are moonlight nights in which the countenance can be discerned far more accurately than on some foggy days; and besides this, what such light is depends upon the vision of the witness. The jury must determine the question independently of this capricious test." Some authorities declare "that by

nighttime is meant that period between the termination of daylight and the earliest dawn in the morning."

Applying either of the tests above mentioned, we are entirely satisfied that there was sufficient testimony to warrant the finding of the jury that the offense was committed in the nighttime. The exception is therefore without merit.

We see no error in the refusal of the court to charge the jury "that they might convict for a lesser offense than that charged in the bill of indictment, as provided in section 996 of The Code." This being an inhabited dwelling house, and the prisoner having admitted the breaking and entering, as well as the actual taking of the money, the only question to be determined was whether it was done in the nighttime. If done in the nighttime, it was burglary in the first degree, and if not done in the nighttime, the prisoner would have been guilty of larceny, and not of a substantive offense under the section of The Code referred to. His Honor told the jury that if they were not satisfied beyond a reasonable doubt that the offense was committed in the nighttime, they should return a verdict of larceny. This was all that the prisoner was entitled to, as the law does not require the court to charge the jury without reference to the admissions or the evidence. *S. v. Fleming, supra.* (693)

The prisoner's counsel, in addressing the jury, commented upon the trial of Harry Taylor (an accomplice who had been previously tried), and his sentence to the State's prison for twenty years. Upon objection being made, his Honor remarked "that the trial of Harry Taylor had nothing to do with this case." In this we see no error, and the exception in this respect must be overruled.

Although the alleged errors in the charge are not specifically assigned, and the exception is to "the charge as given" (*McKinnon v. Morrison,* 104 N. C., 354), and ought not to be considered, we have nevertheless examined into the whole record, and, after a careful scrutiny, have been unable to discover any error which entitles the prisoner to a new trial.

No ERROR.

Cited: *S. v. Gadberry,* 117 N. C., 823, 831; *S. v. Covington, ib.,* 864; *S. v. Locklear,* 118 N. C., 1159; *S. v. Freeman,* 122 N. C., 1017.

STATE v. NICK BRYANT.

Indictment for Destroying Line Trees—Description of the Offense—Negative Averment—Bill of Particulars.

1. An indictment charging that one A. B., with force and arms, etc., willfully and unlawfully did alter, deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense.

2. When the defendant makes it appear that he is at a disadvantage by reason of insufficient description of his offense, the court will, in its discretion, order a bill of particulars to be furnished him.

INDICTMENT under The Code, section 1063, for removing, altering and defacing a landmark, tried at Fall Term, 1892, of MITCHELL, before *Armfield, J.*

(694) The indictment is substantially as follows:

The jurors, etc., present that Nick Bryant, etc., with force and arms, etc., willfully and unlawfully did alter, deface and remove a certain landmark, to wit, a corner tree, the property of, etc., against the form of the statute, etc.

From the judgment of the court quashing the indictment, the solicitor for the State appealed.

Attorney-General for the State.
No counsel for defendant.

AVERY, J. There is nothing in the record from which we can gather the reasons that led the court below to quash the indictment, and we have, therefore, critically examined it, with the aid of the suggestions made by the Attorney-General, in order to discover, if possible, a fatal defect of any kind.

Though the general rule is, that a proviso contained in the same section of the law (The Code, sec. 1063) in which the defence is defined, must be negatived, yet where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to such negative averment, there is no reason for adhering to the rule, and such a case constitutes an exception to it. It would have been manifestly absurd to require the prosecuting officer, after the charge that the defendant "willfully and unlawfully did alter, deface and remove a certain landmark, to wit, a corner tree," etc., to add, in blind obedience to supposed precedent, the words "the said corner not being then and there a creek or other small stream, which the interest of agriculture might require to be altered or turned from their channels." It goes without saying, that a corner tree is neither a creek nor a small stream.

It is usually safe to follow the words of the statute, as the draughtsman has done in this case. *S. v. George,* 93 N. C., 567; *S. v. Wilson,* 94 N. C., 1015. But had it been made to appear to the court, in apt time, that the defendant was at a disadvantage in the prepa- (695) ration of his defense for want of a more specific statement of the charge, the court could, in its discretion, and doubtless would have ordered the prosecuting officer to furnish a bill of particulars. *S. v. Brady,* 107 N. C., 826. If the objection was to coupling the operative words of the statute, "alter, deface and remove" in the conjunctive, it was clearly untenable, since, in this respect, the indictment seems to be drawn in accordance with approved precedents. *S. v. VanDoran,* 109 N. C., 864. Since the statute creates, by the use of the disjunctive, the two distinct offenses of willfully removing, etc., and fraudulently removing, altering or defacing, the indictment must be sustained, if, as in this case, the charge drawn under the first clause is that the defendant did the act willfully and unlawfully. There was error. The judgment of the court below is reversed, and a

NEW TRIAL.

Cited: Townsend v. Williams, 117 N. C., 337; *S. v. VanPelt,* 136 N. C., 669; *S. v. Dewey,* 139 N. C., 558.; *S. v. Long,* 143 N. C., 676; *S. v. Carpenter,* 173 N. C., 771.

STATE v. WILLIAM WHITSON ET AL.

Murder—Verdict—Jury—Charge—Prayer for Instruction—Practice—Evidence—Dying Declaration—Res Gestæ—Reasonable Doubt.

1. When, in a trial for murder, the foreman responded "Guilty of murder in the second degree," it was proper to instruct the jury that such verdict could not be rendered under our laws; and where, upon further instruction as to what constituted the law of manslaughter, the jury could not agree up to the time the term was about to expire: *Held,* the order of mistrial was not error.

2. The practice of drawing a jury from the box is favored by the Court, but this law is not mandatory.

3. The dying declarations of the deceased, written down and sworn to at the time they were spoken, are to be used solely to refresh a witness's memory.

4. The fact that one of the prisoners went, several hours after the shooting, to the house of the dying man, and offered to wait on him, is no part of the *res gestæ,* and was properly excluded.

5. It is competent to show the prisoners were living under assumed names at the time of arrest.

6. Where several persons are attempting to kill another, or aiding and abetting, and one does the killing, all may be found equally guilty.

7. The charge that the dying declaration should be received "cautiously, not superstitiously," is a sufficient response to the prayer that they should be received with much caution.

8. No set formula is required in defining "reasonable doubt." It means fully satisfied, or satisfied to a moral certainty.

9. Where killing with a deadly weapon is shown, the law presumes malice, and the burden of showing matter of excuse or mitigation is upon the prisoner, not beyond a reasonable doubt, but to the satisfaction of the jury.

INDICTMENT for murder, tried at the Spring Term, 1892, of MITCHELL, before *Graves, J.*

The facts may be gathered from the opinion.

Attorney-General for the State.
W. H. Bower and W. H. Malone for defendant.

CLARK, J. The pleas of former conviction, of former acquittal and of former jeopardy were properly overruled. When the foreman responded, "guilty of murder in the second degree," the judge very properly told the jury that such was not a verdict which could be rendered under our laws, and instructed them again as to what would constitute murder and what constitutes manslaughter. The foreman then expressed himself in favor of a verdict of manslaughter, but four of the jurors dissented. The jury were kept together from Tuesday until Saturday night, when the term of court would expire, and being polled by the court, each juror responded that he did not think the jury could
(697) agree. The court thereupon found the fact that the jury could not agree, and the prisoners themselves assenting, ordered a mistrial. In this there was no verdict of either acquittal or conviction. The jury neither said, nor intended to say, that the defendants were not guilty. They refused to assent to a verdict of manslaughter. They did not agree upon any verdict which was responsive to the issues. When they offered an insensible verdict the court properly refused to receive it, and instructed the jury as to the verdicts which they could render. *S. v. Arrington,* 7 N. C., 571; *S. v. Hudson,* 74 N. C., 246; *S. v. Whitaker,* 89 N. C., 472; *S. v. Shelly,* 98 N. C., 673. Upon the facts found, the court was justified in directing a mistrial after such lapse of time and effort to agree upon a verdict. *S. v. Honeycutt,* 74 N. C., 391.

Besides, the prisoners cannot be heard now to object on that ground, as they assented to the mistrial. *S. v. Davis,* 80 N. C., 384.

The drawing of the jury from the box was authorized by the statute, The Code, sec. 1739, and is favored by the courts, though the requirement of the statute is not mandatory. *S. v. Brogden, ante,* 656. This section provides that the jurors so drawn should be freeholders. The mode adopted by the judge to ascertain that fact was unobjectionable. It could not prejudice the prisoners, who had no right to have any but freeholders upon the special *venire.* Though if the judge had drawn the names from the box without this precaution, it would not have been error, since either the State or defendant could at the trial, when any juror was presented, have challenged him for the lack of any legal qualification. But the course pursued by the judge was commendable.

The dying declarations of the deceased were given in evidence by several witnesses. One witness, a justice of the peac, stated that he wrote them down at the time and swore the deceased to the truth of the statement. This written statement the witness used to refresh (698) his memory, and he repeated it *verbatim* to the jury, so the case on appeal states. The solicitor offered to permit the witness to read the writing to the jury. The prisoners excepted upon the ground that the written statement was the best and primary evidence. This contention is unfounded. The declarations made by the deceased were verbal. That the witness wrote them down at the time gave the writing no higher dignity. Their sole use was to refresh the witness' memory. Nor does it add to their value that the deceased was sworn to the statement. The statement was not signed by the deceased, but, had it been signed, as well as sworn to, it would have made no difference. If the deceased spoke under belief of impending death, his declaration has all the validity of a statement under oath, and swearing him to it or signing it could not add to its validity, nor would the fact that the witness wrote it down have other effect than a memorandum to refresh his memory. Certainly the prisoners cannot object, since the solicitor offered that the witness should read the paper to the jury, which was declined.

It was not error to reject the offer to show that several hours after the shooting, one of the prisoners went to the house of the dying man and offered to wait upon him. This was no part of the *res gestæ,* and a party cannot be allowed thus to make evidence for himself after the event.

The defendants fled the State, and had been absent many years when arrested and brought back. We fail to see the force of the objection to showing that when so arrested they were both living under assumed names. Such evidence is competent for the same reason that evidence of the flight itself was admissible.

The uncontradicted evidence was that the deceased was shot while endeavoring to escape, and there was evidence tending to show that the two defendants and another brother (since dead) were all three
(699) shooting at the deceased while running from them, and that one of these shots killed him. The charge is carefully worded so as to make the guilt or innocence of each prisoner depend upon his own conduct. It was not error to refuse to tell the jury that if they found that one of the parties named in the indictment slew the deceased, the others would not be guilty, unless there was a conspiracy or common design to take the life of the deceased, and the court properly charged that if the jury found that one of the defendants slew the deceased under circumstances which would make him guilty of murder or manslaughter, any one of the other defendants who was then and there present aiding, encouraging and abetting the killing, would be guilty of the same degree of crime as the man who fired the fatal shot. The court properly told the jury, upon the evidence there was nothing to support the plea that the killing was done in self-defense; and the second prayer for instruction was properly refused. *S. v. Scott,* 26 N. C., 410; *S. v. Hill,* 20 N. C., 491.

The charge of the court that dying declarations should be received "carefully, but not superstitiously," was not erroneous, especially with the full explanation of the nature of such evidence, and the charge that, there being no cross-examination, the jury should receive it with care. It was not error to fail to charge in the identical words asked, that they must be received "with much caution." This was substantially done. Nor was it error not to define reasonable doubt in the words the defendants asked. As this Court has said, no set formula is required, and the court did its duty in saying, "what is reasonable doubt is very difficult to explain more fully than the words imply; the court says it means fully satisfied, or satisfied to a moral certainty."

It was not error to charge that when the killing with a deadly weapon is shown, the law presumes malice, and the burden of proving matter of excuse or mitigation is upon the prisoner—not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Gooch,* 94 N. C., 637. *S. v. Smith,* 77 N. C., 488.

(700) The tenth assignment of error cannot be sustained. *S. v. Howell,* 31 N. C., 485; *S. v. Boon,* 82 N. C., 637.

The other exceptions to the charge are without merit. The charge is a well-considered one, and the rights of the prisoners were fully guarded. Upon a consideration of the whole case and all of the exceptions, we do not discover that there has been any error of which the appellants can complain.

NO ERROR.

Cited: *S. v. Clark,* 134 N. C., 714; *S. v. Teachey,* 138 N. C., 597; *S. v. Dixon,* 149 N. C., 463; *S. v. Dry,* 152 N. C., 815; *S. v. Mostella,* 159 N. C., 461; *S. v. Lane,* 166 N. C., 340; *S. v. Robertson, ib.,* 362; *S. v. Powell,* 168 N. C., 138; *S. v. Kennedy,* 169 N. C., 332; *Grove v. Baker,* 174 N. C., 748; *S. v. Lewis,* 177 N. C., 558; *S. v. Alexander,* 179 N. C., 764; *S. v. Lemons,* 182 N. C., 831.

STATE v. RUFUS SANDERS.

Taxing Costs for Malicious Prosecution—Court—Practice—Prosecutor.

1. While the trial judge is the proper court to find the facts and adjudge the costs in cases of frivolous prosecution, yet, upon motion and notice to show cause, this may be done at a subsequent term, and by another judge; and this course is proper where, on account of absence of the prosecutor or other sufficient cause, he cannot be brought before court at the trial term.

2. The practice in such cases pointed out by CLARK, J.

MOTION to mark Robert and Rebecca Epley as prosecutors and tax them with the costs, heard at Fall Term, 1892, of BURKE, before *Armfield, J.*

At Fall Term, 1889, of said court, a true bill was found against the defendant, Rufus Sanders, for a forcible trespass, and at Fall Term, 1890, the said defendant was tried and acquitted, and rule was obtained and notice issued to said Robert and Rebecca Epley to show cause at the next term why they should not be marked as prosecutors and taxed with the costs of said action. The said notice having been (701) returned and purporting to have been served on 5 January, 1891, it was adjudged at Fall Term, 1891, that said prosecution was groundless and not required by the public interest, and that the said Robert and Rebecca Epley be taxed with the costs of said action.

And thereupon, during the same term, upon motion of counsel for the said respondents, Robert and Rebecca Epley, on account of defective service of notice, the said judgment taxing them with said costs was stricken out, and said respondents allowed to answer. And said cause having been continued till Fall Term, 1892, and his Honor, *Armfield, J.,* being of opinion that only the judge who tried the cause could tax respondents with the costs, ordered that the rule be discharged, to which order the State and board of commissioners excepted and appealed.

Attorney-General for the State.
Isaac T. Avery for defendant.

CLARK, J. When the prosecutor is marked as such before indictment found, or even during the trial term (if present when the order is made, *S. v. Spencer,* 81 N. C., 519), the trial judge, upon the failure of the prosecution, should pass upon the facts which would justify the taxing of the costs against the prosecutor. He is the proper officer to do this, since, having heard the investigation of the case upon the trial, he is prepared to pass upon the questions of fact requisite to be decided in determining the motion to tax the costs. *S. v. Hamilton,* 106 N. C., 660; *S. v. Roberts, ibid.,* 662. But even in such cases there may possibly happen instances in which a continuance of the motion to the next term may become necessary in the interest of justice. When, however, the motion to mark a prosecutor is made after the trial, or during the
(702) trial, when the party sought to be marked as prosecutor is not present, a notice to show cause must be served. *S. v. Hamilton, supra.* If possible, such notice should be served at once and the motion passed upon by the trial judge, he being already cognizant of the facts. But not unfrequently notice cannot be served in time for that term, but must perforce be made returnable to next term. This is inconvenient, as the judge at the next term is often not the one who presided at the trial. But there is nothing in the statute (The Code, secs. 737, 738 and 1204) which forbids this course. Indeed, it is a common practice, and is necessary to protect the public against costs in improper cases. The party promoting the action cannot be allowed to avoid responsibility by simply stepping out of the way when he apprehends that a motion will be made to place upon him the costs incurred by his false clamor. In *S. v. Roberts, supra* (in which the facts are very similar to those in this case), the Court held that where the taxation of costs could not be sustained because of a failure to find the prerequisite facts, a new motion could be made, although it was then several terms after the one at which the cause had been tried.

The expression in section 738, that the prosecutor may be imprisoned for nonpayment of costs "when the judge, court or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious," means simply that the trial judge or justice, or the court in which the trial was had, shall pass upon these facts. The use of the word "court" after the word "judge" shows that there was no intention to restrict the duty of protecting the public from payment of improper costs to the individual judge who tried the cause. The power is left in "the court" by whomsoever presided over. This is also clear from the phraseology of sections 737 and 1204, which are to be construed *in pari materia.* Section 737 authorizes every judge, court or justice, before or after trial, to find the facts, and section 1204 sim-

ply places authority in "the court," which, indeed, is the more accurate expression and avoids redundancy.

S. v. Owens, 87 N. C., 565, relied upon by the prosecutor, does (703) not sustain his contention. That case simply holds that the judge at the next term properly refused to set aside a judgment taxing the prosecutor with costs, when the prosecutor had been present at the trial, though absent at the time the order to mark him as prosecutor and tax him with the costs was made. The court, then, imposes a *quaere* if the next court could consider and correct the finding of the judge who tried the action, and who had found the facts. Indeed, we think he could not, except in cases of excusable neglect, etc. *S. v. Bennett,* 93 N. C., 503. If, however, the query could be construed as leaving open the question whether the next judge had power to pass upon the facts, when the trial court, for any reason, had failed to determine a motion to mark and tax anyone as prosecutor with the costs, it has since been settled, as we have seen, that a judge holding a subsequent term of the court has that power. *S. v. Roberts, supra.*

REVERSED.

Cited: *S. v. Kinsauls,* 126 N. C., 1097; *S. v. Butts,* 134 N. C., 608; *S. v. Cole,* 180 N. C., 684.

THE STATE v. J. W. PRICE ET AL.

Assault and Battery—Indictment—Former Acquittal—Charge.

1. The words "assault and strike" in a warrant are sufficient to charge a simple assault, and such a warrant will support a plea of former acquittal.
2. It is not necessary that a warrant for assault should charge that it was issued upon a sworn complaint.
3. An instruction to the jury in an indictment for assault, that if J. M. P., one of the defendants, started toward A., the prosecutor, with a nail-puller in his hand, and A. saw him and was thereby put in fear, then J. M. P. is guilty, is error, there being evidence that J. M. P. did not attempt to take any part in the fight.

INDICTMENT for assault and battery, tried at the February (704) Term, 1892, of UNION, before *Bynum, J.*

The facts are stated in the opinion.

Attorney-General for the State.
R. H. Battle for defendant.

CLARK, J. The court instructed the jury that the plea of "former acquittal" could not be sustained, because the warrant issued by the justice of the peace contained no charge. The words used therein that the defendants did "assault and strike" the prosecutor are sufficient. We learn, however, that the ruling was made upon the ground that the warrant did not recite that it was issued upon a "sworn" complaint.

In *S. v. Bryson,* 84 N. C., 780, it is held: "An appellate court, in reviewing the judgment of a justice's court in a criminal action, can only look at the warrant, which is the complaint, and if that sufficiently sets out a criminal offense within its jurisdiction, it must be sustained. It cannot look behind the warrant for objections lying in the defects or irregularities of the preliminary evidence." The same principle applies when the sufficiency of the judgment is brought in question by a plea of former acquittal or conviction. The Code, sec. 1133, provides that the justice shall examine the complainant on oath, but section 1134 does not require that the warrant shall recite that the complaint was made on oath. *S. v. Bryson* was cited with approval in *S. v. Peters,* 107 N. C., 876, and it is said: "The jurisdiction depends, not upon the affidavit preliminary to issuing the warrant, but on the nature of the offense charged in the warrant." The indictment charges the use of a deadly weapon, but on the trial the court found that the stick used was not a deadly weapon. Hence the justice had final jurisdiction and (705) the plea should have been sustained. This differs, of course, from cases tried in the Superior Court in the first instance, where, if a deadly weapon or serious injury is sufficiently charged in the indictment, the court retains jurisdiction, although on the trial only a simple assault may be shown. *S. v. Ray,* 89 N. C., 587; *S. v. Fesperman,* 108 N. C., 770.

The court also erred in charging that "if J. M. Price, the other defendant, started towards Austin with the nail-puller in his hands, and Austin saw him and was thereby put in fear, then J. M. Price was guilty," for this withdraws from the jury J. M. Price's testimony that he took no part in the fight, but when he saw his father and Austin engaged he started towards them to separate them and with no purpose to take any part in the difficulty; that he did not draw the nail-puller in a striking attitude, and neither threw it nor attempted to do so, and was not conscious of having it in his hand until his attention was called to it, when he immediately dropped it. Though J. M. Price started toward Austin with the nail-puller in his hands, if he neither assaulted with it nor attempted to do so, he would not be guilty, even though the prosecutor may have been put in fear by the sight of the nail-puller which the defendant unconsciously had in his hands without any inten-

tion of using it. The defendant's guilt depends upon what he did, and not upon an erroneous impression of the prosecutor as to what his intentions were.

ERROR.

Cited: *S. v. Albertson,* 113 N. C., 634; *S. v. Lucas,* 139 N. C., 573.

(706

STATE v. PHILLIP CARPENTER.

Jurisdiction—Case on Appeal—Indictment.

1. When there is no case on appeal, and no error on the face of the record in a criminal proceeding, the judgment will be affirmed.
2. Where a justice of the peace has original jurisdiction, the burden is on the defendant to show that the indictment was found in less than twelve months after the offense was committed; certainly there can be no cause of complaint on this ground when it appears from the record that there was a period of twelve months between the presentment and indictment.

INDICTMENT for carrying a concealed weapon, tried at the Special (May) Term, 1892, of LINCOLN, before *Bynum, J.*

Attorney-General for the State.
No counsel for defendant.

CLARK, J. This was an indictment for carrying concealed weapons.

There is no case on appeal, and we find no error on the face of the record proper. The judgment, therefore, must be affirmed. *S. v. Foster,* 110 N. C., 510.

It is true that there appears in the record a motion to quash the indictment, which was overruled and an exception entered. As the indictment is in the usual form, we are at a loss to conjecture on what ground the motion to quash was made, unless upon the ground of want of jurisdiction. But it has been often held that the Superior Court being a court of general jurisdiction, the burden is on the defendant, in cases like this of which a justice of the peace has original jurisdiction, to show that the indictment was found within less than twelve months after the offense was committed. *S. v. Kerby,* 110 N. C., 558.

Besides, it appears in the record that there was an interval of (707) twelve months after the presentment before indictment found.

The twelve months is counted prior to the indictment found, not prior to the presentment. *S. v. Cooper,* 104 N. C., 890. Hence, in fact, it affirmatively appears in the record here that the Superior Court had acquired jurisdiction.

AFFIRMED.

THE STATE v. JOHN HAMBRIGHT.

Homicide—Mortal Wound—Evidence—Excuse—Charge.

1. In defense against an indictment for murder, it is no excuse to show that had proper caution and attention been given a recovery might have been effected. Neglect or maltreatment will not excuse, except in cases of doubt as to the character of the wound.
2. But if the deceased, while languishing of a mortal wound, is killed by a second assailant, the first is not guilty of murder.
3. If the wound is mortal—sufficient to produce death—and death follows, it will be attributed to the wound, even though death was facilitated by some act of the deceased.
4. There being no evidence of any intervening cause of death, it was not error to refuse instructions upon it.

INDICTMENT for murder, tried before *Bynum, J.*, and a jury, at Spring Term, 1892, of CLEVELAND.

The State proved that on the night of 6 January, 1891, Jenks Macobson, colored, was shot in the right thigh with a load from a shotgun in the yard of Laura Bridges, also colored, in the town of Shelby. Shortly after the deceased was shot he was carried by colored men into the house of the said Laura Bridges, where he lay upon the flood until the arrival of a physician, about an hour afterwards. He was given medical treatment, and, at his own request, about noon the next day, was carried from the house in which he had lain to the railroad train, where he was placed in the baggage car and carried to Blacksburg,
(708) South Carolina, fifteen miles away. It was in evidence that about four hours after his arrival he was given medical attention, and died during the night of 8 January.

The State introduced Dr. D. S. Ramseur, who testified as follows: "I was called to see Jenks Macobson at Blacksburg the day after he was carried from here. He was suffering from a gunshot wound in the thigh. I examined and treated him. He lived through the next day and died sometime during the next night. He died from the wound. I think it was a mortal wound. I probed around after his death and found some small mixed shot, and noticed one of the larger shot flattened. I took out of his thigh about a half-dozen shot and gave them to the sheriff."

On cross-examination the witness testified: "I think that Macobson died from shock. There was no hemorrhage in Blacksburg, and I saw no evidence of any previously. I could not tell whether there had ever been any reaction from the primary shock. I mean by shock an injury to the vital parts reflected on the nerve centers, depressing the whole

system and reducing the action of the heart. If a man suffering from a severe gunshot wound were carried from a house to a train, transported fifteen miles in a baggage car, and taken thence to a house some distance from the station, the transportation might have increased the shock."

In answer to the question whether such transportation would not necessarily have reduced the condition of a severely wounded patient, the witness said, "Yes; if the scales of life and death were evenly balanced, such transportation would have killed the patient. If the patient had bridged the shock, he might have died from gangrene or blood-poisoning; but he would not have died from direct injury as a man dies who is shot through the heart or brain. I found no (709) shot that had entered a vital part. The femoral artery was in the region of the wound, but, if it had been severed, the man would have died very soon after the wound. There was not time for gangrene or blood-poisoning. The man's pulse was weak. I did not think, until the second day I saw him, that he would die. The thigh-bone appeared shattered. I did not think the time opportune for a resection."

Dr. T. E. McBrayer, admitted to be an expert, was introduced by the State, and testified as follows: "I was called to see Jenks Macobson on the night of 6 January. He was in the house of Laura Bridges lying on some old quilts, and suffering intense pain. I gave him spirits and injected morphine. I found him shot in the lower portion of the upper third of the thigh. About four inches of the bone seemed shattered and riddled with shot. I told him that there was no chance for him except amputation or resectioning. He said he did not want it done, but wanted to go to Blacksburg. I saw him next morning and found him cheerful. He said he had had a good night's rest. His pulse was better. His bladder would not act, appearing somewhat paralyzed from shock. I drew his water and sent him to Blacksburg. If an operation had been performed, the day after he was shot was the time to do it; I do not know that it could have been successfully done the night he was shot. His pulse and condition were better next day. A gunshot wound like that would likely produce death. I cannot say certainly that the wound was mortal. I do not think the moving him necessarily produced death, though it would have had some effect. I cannot say that it was advisable to move him. It would have caused worry and weariness and made the shock worse."

The State introduced testimony tending to show that the defendant was the person who fired the shot at the deceased on 6 January, 1892. Such evidence tended to show that the defendant did not take the gun for the purpose of assaulting the deceased, and did not know that the deceased was at the house of Laura Bridges until the (710)

defendant arrived there. The State also introduced confessions of the defendant, in which he admitted that he shot the deceased, but did not intend to kill him. The defendant offered no evidence.

Counsel for defendant asked his Honor to charge the jury as follows:

"1. If the defendant inflicted a wound upon Jenks Macobson that was not necessarily mortal, but Macobson's death was immediately caused by his being carried from Shelby to Blacksburg at his own request, the defendant is not guilty of murder, but of assault, with or without intent to murder, as the jury may find.

"2. If the defendant did inflict a mortal wound upon Jenks Macobson, but the immediate cause of Macobson's death was his transportation, at his own request, from Shelby to Blacksburg, the defendant is not guilty of murder, but of assault, with or without intent to kill, as the jury may find."

The judge charged the jury as follows:

"1. Murder is where a person of sound mind and discretion unlawfully killeth any reasonable creature in being and under the peace of the State with malice aforethought, either expressed or implied.

"2. By sound mind and discretion is meant that the one doing the killing must have a will, a legal discretion.

"3. There must be an actual killing, not that death should be caused by direct violence. It is sufficient if the acts done endanger life and prove fatal.

"4. Malice is of two kinds, express and implied by law, and malice is a wicked intention to do an injury. Express malice is where a party evinces an intention to commit a crime. Implied malice is where a person commits an act unaccompanied with any circumstances justi-
(711) fying its commission. The law presumes that he acted advisedly and intended the consequences produced by his act.

"5. The defendant is presumed to be innocent until the contrary is proved beyond a reasonable doubt; so that your inquiry is, first, is Jenks Macobson dead? Second, if so, was his death produced by the unlawful act of the defendant?

"6. Has the State satisfied you that Jenks Macobson is dead? For this the State relies upon the evidence of Dr. Ramseur.

"7. Did defendant on night of 6 January shoot Macobson, as alleged, with powder and shot, wounding him in the thigh, and did that wound, so inflicted, cause the death of Macobson? If so, nothing else appearing, he would be guilty of murder.

"8. Defendant denies the shooting. Has the State satisfied you, beyond a reasonable doubt, that he did do it? If it has not, it will be your duty to acquit. To establish this fact, the State relies upon some circumstantial evidence and some confessions, or rather statements, made by defendant.

"9. Circumstantial evidence is inherently not as strong as direct or positive. Still, if it excludes from the mind of the jury every reasonable hypothesis consistent with innocence, it is your duty to be governed by it.

"10. Did the defendant that night go to the house of Bridges, where Macobson was, stand outside with a loaded gun, and when Macobson came out did he shoot him in the thigh, inflicting the wound as testified to by Dr. Ramseur and Dr. McBrayer, and from that wound did Macobson die? If so, the defendant is guilty of murder, and it will be your duty to convict.

"11. Has the State satisfied you that the deceased came to his death from a gunshot wound at the hands of defendant? If so, the law presumes the malice and the defendant is guilty of murder. If Jenks Macobson did not die of the wound, but of something else, then the defendant is not guilty of murder. In such case, you can find him guilty of secret assault or of assault with a deadly weapon. (712) If the defendant secretly lay in wait for the deceased and shot him, but the decreased did not die of the wound, the defendant is guilty of secret assault. If the defendant fired at the decreased without malice, express or implied, and the deceased did not die of the wound, the defendant is guilty of a simple assault with a deadly weapon."

The jury was out about three hours, returned, saying they had not agreed, and asked for further instructions. His Honor charged the jury that "if the defendant lay in wait for the deceased and shot him and the deceased died of the wound, the defendant is guilty of murder. If the defendant simply fired at Jenks Macobson and Macobson did not die, defendant is guilty only of simple assault. If he died, the defendant is guilty of murder."

The defendant excepts to the fact that the judge declined to charge the jury as requested by the defendant in his prayers for instructions, and also because, in the supplementary instructions to the jury, he failed to charge them specifically that if another cause than the wound intervened and produced the death of the deceased, the defendant would not be guilty of murder.

Verdict of guilty; motion for a new trial overruled, and appeal by defendant.

Attorney-General for the State.
George A. Frick (by brief) for defendant.

BURWELL, J. We have carefully considered the record in this case, with the assistance of the argument and brief of the prisoner's counsel, and find no error.

In *S. v. Baker,* 46 N. C., 267, it is decided that, when the wound is adequate and calculated to produce death, it will be no excuse (713) to show that had proper caution and attention been given, a recovery might have been effected. Neglect or maltreatment will not excuse, except in cases in which doubt exists as to the character of the wound.

In that case the testimony of the physician was that the wound was a mortal one, and that the deceased died from its effects. "He could not say whether or not, under skillful treatment, he would have recovered; worse cases are reported as having been cured by treatment." Hence it was not, according to the physician's statement in that case, a wound *necessarily* mortal, but one "calculated and adequate to produce death," and in that sense a mortal wound, of which the deceased died.

The testimony in the case before us is that the wound inflicted on the deceased by the prisoner, as the jury have found, was "calculated and adequate to produce death." One physcian (Dr. D. S. Ramseur) testified that it was a mortal wound, and that deceased died of it. The other physician stated that when he first saw the deceased, soon after the wounding, he told him "that there was no chance for him except amputation or resectioning." He further stated that "a gunshot wound like that would likely produce death," and added that he could not say certainly that the wound was mortal.

It appears, therefore, that all the testimony on the trial was to the effect that the wound of the deceased was "adequate and calculated to produce death."

The theory of the defense was that the death of the deceased was caused immediately by his being carried to Blacksburg, while suffering from the shock of the wound; and it was insisted that if this removal to Blacksburg, which was the voluntary act of the deceased, so aggravated the effect of the wound as to cause it to produce death, while if no such removal had occurred, and proper treatment had been bestowed, he would have recovered, this defendant would not be guilty, for the law would attribute the death, as it was contended, not to the remote act of (714) the defendant, but to that which was the more immediate cause, to wit, his voluntary exposure of himself to fatigue and worry while still under the first effects of the wound.

It is true that if one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, the first cannot be said to have killed. *S. v. Scates,* 50 N. C., 420, cited by defendant's counsel.

It is also true, that if injuries are inflicted on a person which are not sufficient of themselves to cause death, and the injured person voluntarily, and of his own accord, so expose himself as to produce death, the

one who inflicted the injuries is not guilty of the killing, even if the infliction of the injuries was the motive for the voluntary exposure. *S. v. Preslar,* 48 N. C., 421, cited by defendant's counsel. But it is not true that if a wound be inflicted which is "adequate and calculated to produce death," and death ensues as the result of the wound, the person who inflicted the wound can exonerate himself by showing that some conduct of the wounded man, or his attendants, lessened the chances of his surviving his injuries, and thus caused the death. *Baker's case, supra.*

Hence, if it be conceded that the removal of the deceased from Shelby to Blacksburg, at his own request (a harmless act in istelf), caused the wound—a dangerous one—to produce death, the dying is by the law attributed to the wound, and the guilt is imputed to him who inflicted it.

His Honor, therefore, properly refused the instructions asked for by defendant's counsel. There was no evidence of any intervening cause to which the death could be attributed under the rules of law as laid down in *Baker's case, supra.*

The charge given to the jury by his Honor was not excepted to. It was certainly a fair exposition of the law applicable to the facts of the case.

The exception of the defendant that his Honor failed "in (715) the supplementary instructions" to charge the jury "that if another cause than the wound intervened and produced the death of the deceased, the defendant would not be guilty of murder," is untenable, for the reason that, as above stated, there was no evidence of any intervening agency which the law would recognize as the cause of the death.

NO ERROR.

Cited: *S. v. Medlin,* 126 N. C., 1130.

THE STATE v. ELIZABETH YOUNG.

Charge in Writing.

At the request of counsel, made in apt time, the court must put its entire charge to the jury in writing, and it is error to charge them orally upon any point when they return into court for instruction.

INDICTMENT for homicide, tried at the Fall Term, 1892, of UNION, before *Graves, J.*

There was a verdict of guilty, and defendant appealed upon the grounds set out in the opinion.

Attorney-General for the State.
R. H. Battle for defendant.

BURWELL, J. The prisoner's counsel, in apt time, requested his Honor to put his "entire charge" in writing, and pursuant to this request the charge in chief was written out and read to the jury and they withdrew. The "case on appeal," which we must accept as an exact account of the proceedings on trial, states that after the jury had been out for some time, they "returned into court and asked for fur-
(716) ther instruction as to the difference between manslaughter and murder, and his Honor proceeded to comply with their request, but failed to reduce his charge to the jury to writing, as he had been requested to do, to which the defendant excepted."

In *Drake v. Connelly,* 107 N. C., 463, it was decided that the refusal to put the charge in writing and read it to the jury, if the request that this should be done was made in apt time, entitled a party in a civil suit to a new trial, for the reason that such refusal would be plainly a violation of The Code, sec. 414.

If this is true in a civil suit, much more is it true in a criminal action where life and liberty are involved. The question, then, is did his Honor fail or refuse to comply with this request.

We think a reasonable construction of this section of The Code requires that we should hold that a request that his Honor would reduce "his *entire* charge" to writing proffered to him at the close of the evidence, as was done in this case, was notice to him that the prisoner's counsel desired that all that he purposed saying to the jury *on the law as applicable to the facts,* both his original charge and any further instruction he might feel called upon to give the jury, should be written out and read to them. We do not think it was incumbent on the counsel to repeat his request when the jury came back into court and asked for further instructions. He had reason to suppose, as we think, that if his Honor thought that the charge he had read to the jury covered the matter about which they seemed in doubt, he would content himself with re-reading that portion of his written charge which was applicable. And we think counsel was justified in presuming that if the request for additional instructions made him conclude that the charge which he had made was defective, or could be amplified so as the better to aid the jury, his Honor would make written amendments, so that then, if counsel thought best, the whole charge might be given

to the jury, as provided in chapter 137, Laws 1885 (Clark's (717) Code, page 390).

The case made out by the prisoner's counsel, and duly served on the representative of the State in this prosecution, and not excepted to, states that the prisoner's counsel entered an exception when this oral supplemental charge was so given. Whatever may be the facts, we must consider the case as it is presented to us in the record, and are not at liberty to assume that no such exception was *then* made, because we may feel sure that the learned judge would certainly have put his supplemental instruction in writing if his attention had been called to the matter by an exception entered at the time.

We find that this view of the matter is sustained by the authorities. Mr. Thompson, in his work on Trials, secs. 2375, 2376, and 2377, says: "Statutes exist in several of the states requiring the judge to deliver his instructions to the jury in writing. These statutes are mandatory, and where they exist the giving of an oral instruction is error, for which a judgment will be reversed. They mean that the whole charge must be in writing, and that it should be delivered to the jury literally as it is written. . . . In short, all the cases agree that statutes of this kind, in criminal cases, where the accused is not presumed to waive any of his legal rights, must be strictly complied with. The judge must, both in civil and criminal cases, deliver his charge to the *jury as it has been written,* and not write it out afterwards as he delivered it. Under such a statute it is not allowable for the judge to give the chief instructions in writing, and then to add orally supplementary instructions asked for by the parties. Nor may he give written instructions to the jury and then explain or modify them orally. In like manner, under a statute requiring the judge to charge the jury in writing, "if required by either party," it is error, where counsel have properly signified their desire that the charge should be in writing, for the judge to give (718) a verbal charge, or to give a written charge, accompanied with verbal explanations or modifications. The charge, and every modification of it, must be in writing if required."

And in *Currie v. Clark,* 90 N. C., 355, it is said "that what he (the judge) may tell the jury in matters of law for their information and guidance must be written and read, so he is not permitted to add to, take from, modify or explain what he delivered as his charge, for this would be to change, perhaps, the meaning which would otherwise be ascribed to the writing, and produce the very mischief intended to be remedied."

In *Wheatley v. West,* 61 Ga., 401, it is said of the provisions of the statute of that State, which are similar to ours, that "they entitle the

counsel to have the written word instead of oral tradition. They provide for preserving and handing down the word as a sure and enduring memorial of what was actually delivered."

We think the prisoner is entitled to a

NEW TRIAL.

Cited: *S. v. Adams,* 115 N. C., 783; *S. v. Crowell,* 116 N. C., 1057; *S. v. Dewey,* 139 N. C., 566; *S. v. Black,* 162 N. C., 638.

STATE v. ANN VOSBURG.

Indictment Under Section 1070 of The Code—Larceny at Common Law.

Section 1070 of The Code, prescribing a penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of *money;* it means such property as was not, at common law, subject to larceny.

(719) INDICTMENT at Fall Term, 1892, of GASTON, before *Graves, J.* The first count of the bill of indictment is as follows:

The jurors, etc., present that Ann Vosburg, etc., "with force and arms, at and in said county, unlawfully and willfully did enter upon the lands of one R. V. Cannon, she, the said Ann Vosburg, not being then and there the owner or *bona fide* claimant of said lands, and then and there feloniously, unlawfully and willfully, with a felonious intent, did carry off one hundred dollars of money, of the value of one hundred dollars, of the goods and chattels of the said R. V. Cannon, said money being then and there on said lands, contrary to the form of the statute," etc. The second count was for larceny at common law.

There was a verdict of not guilty of larceny, and not guilty of the felony charged in the first count, but guilty of a misdemeanor under the first count.

The defendant then moved to set aside the verdict, and moved for a new trial on grounds not necessary to be stated here. Motion refused and defendant excepted. The defendant then moved in arrest of judgment for that:

1. The bill of indictment was drawn under section 1070 of The Code for the taking of money, whereas the taking of money was not contemplated by this section.

2. Sections 1070 and 1120 of The Code are, taken together, the old Act of 1866, chap. 60, and the State must charge in the bill of indict-

ment and prove that the defendant had been, before the taking, forbidden to enter the lands. Motion refused; defendant excepted and appealed from the judgment pronounced.

Attorney-General for the State.
George F. Bason for the defendant.

MACRAE, J. Section 1070 of The Code, under which the bill (720) of indictment is framed, is in these words: "If any person, not being the present owner or *bona fide* claimant thereof, shall willfully and unlawfully enter upon the lands of another and carry off, or be engaged in carrying off, any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny and punished as for that offense. And if not done with such intent shall be guilty of a misdemeanor." There was a verdict of not guilty of larceny, and this disposes of the second count of the bill. The motion in arrest of judgment is directed to the first count upon which the defendant was found guilty of a misdemeanor, and not guilty of the felony charged therein.

The first ground upon which the motion in arrest is based, is: "The bill of indictment was drawn under section 1070 of The Code for the taking of money, whereas the taking of money was not contemplated by this section." This statute is part of Laws 1866, chap. 60, entitled "An Act to prevent willful trespasses on land and stealing any kind of property therefrom." It was originally inserted in the middle of said act, which is now section 1120 of The Code, the caption of which is, "Trespass on land without a license, after being forbidden, a misdemeanor." It was properly placed as an independent section (1070) in The Code. We refer to the captions of these acts, not as parts of the acts, but as proper to be considered in reaching the true intent and meaning of the statute where the same is not clear and certain.

No latitude of construction is permitted in the interpretation of a penal statute; it must be construed strictly "to carry out the obvious intention of the Legislature and be confined to that." The obvious intent of the act was to prevent the willful and unlawful entry upon land of another, and the taking and carrying away of such articles as were not, at common law, or by previous statute, the subject of larceny.

The Act of 1811 (Section 1069 of The Code) had made the (721) stealing of growing crops and vegetables, or other products cultivated for food or market, larceny. There were other things which were attached to the land, as wood in growing trees, plants, shrubs and flowers growing, minerals and metals, fences and other erections not growing,

but being on the land and in contemplation of the common law part of the land, and not subjects of larceny.

The general rule in the interpretation of statutes is that "when there are general words following particular and specific words, the former must be confined to things of the same kind." Sutherland on St. Con., sec. 268. When particular words of a statute are followed by general, as, if after the enumeration of classes of persons or things, it is added, "and all others," the general words are restricted in meaning to objects of like kind with those specified.

To apply the rule to our present inquiry, while the words "or other kind of property whatsoever" are very wide in their scope, the interpretation of a criminal statute requires us to restrict their meaning to property of like character with that mentioned by name, the character being that of chattels real, connected in some way with the land, or which once had been so connected and were now severed therefrom; but by no rule of construction could money be considered to be included in the general words of the statute. It follows, then, that the judgment must be arrested, and we are relieved from the necessity of considering the other exceptions.

It may be as well to say that the instruction asked and refused, assuming some assent of the wife of the prosecutor to the taking, was not warranted in the evidence as reported in the case on appeal, and that, while there was no evidence of an unlawful or willful entry, the defendant seems not to have asked any instruction to the jury on that point, and not to have mentioned it until after the verdict of guilty.

JUDGMENT ARRESTED.

Cited: *S. v. Beck,* 141 N. C., 830.

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(722)

STATE v. T. M. FRIZELL.

Bill of Indictment—Witnesses—Evidence—Practice—Solicitor—Grand Jury—Charge—Exception.

1. When there are two defendants, and the bill of indictment shows they were "sworn and examined," and the grand jury ignored the bill as to one and found a true bill as to the other, there is no presumption of law that the latter defendant was examined against himself, and a motion to quash and to arrest judgment on this account were both properly refused.

2. The practice of sending codefendants to the grand jury to testify against each other, while allowable, is not commended. They may be compelled to so testify unless their evidence tends to criminate themselves.

3. It is not necessary that it should appear that the State's witnesses were sent before the grand jury by the solicitor.

4. A general exception or "broadside challenge" to the charge of the court is ineffectual.

5. As a matter of practice, the Supreme Court will not hereafter send down a *certiorari* to supply defects in the record unless sufficient excuse therefor is made to appear, but will, on motion of the Attorney-General or adverse party, dismiss the appeal.

INDICTMENT for an affray, tried before *Bynum, J.*, at Fall Term, 1892, of JACKSON.

The facts are stated in the opinion.

Attorney-General for the State.
No counsel for defendant.

CLARK, J. The indictment was drawn for an affray against the defendant and one Jones. On the back of the bill the names of four witnesses are marked as sworn and examined. Two of these were the defendant and said Jones. Presumably, they were sent to be examined as witnesses against each other, as is not unusual on a trial before the petit jury. The grand jury returned a true bill as to the defendant, but ignored the bill as to Jones. The defendant thereupon (723) moved to quash, because "the back of the bill showed that the defendant was a witness against himself before the grand jury." This motion being denied, a motion on the same ground was renewed in arrest of judgment.

There was no error in refusing these motions. There being two defendants in the bill, there was no presumption that the defendant was examined against himself. If there was ground for such allegation, it was competent to have summoned the foreman or any other member of the grand jury to show the fact, and the bill should of course have been quashed if this had been true. There is no presumption, either of law or fact, that the grand jury were so ignorant as to examine a defendant as a witness against himself, or that the defendant would answer such question. The grand jurors were doubtless men of fair intelligence, many of whom had often seen trials for affrays before the petit jury, and who were aware that one defendant could be examined against the other, though not against himself. The defendant could have proved it by his own testimony, as well as by that of a member of the grand jury, if he had in truth been examined against himself. He did not do this, and it certainly does not appear "by the back of the bill" that he was so examined.

The practice of sending defendants in indictments for affrays before

the grand jury as witnesses against each other, is not to be commended, since the parties have not counsel present to prevent their testifying against themselves. Yet there is nothing which renders incompetent as evidence before that body any evidence which is permissible before the petit jury. We can do no more than recommend caution in its use. The defendant relies upon a dictum in *S. v. Krider,* 78 N. C., 481, questioning this practice under the Act of 1866. But that act has since been changed and modified in many particulars. *Ashe, J.,* in *S. v. Smith,* 86 N. C., 705, has reviewed that act with the several amendments thereto, and holds that one defendant is competent and compellable to testify for or against a codefendant, provided his testi-
(724) mony does not criminate himself. The burden was on the defendant here, in support of his motion, to show that he gave evidence to criminate himself. This, as we have said, he has not done.

There is also alleged, as ground for the motion, that it does not appear that the witness was sent before the grand jury by the solicitor. It is not necessary that it should so appear. Even the express requirement that the foreman shall mark on the indictment the names of the witnesses sworn and sent is held merely *directory,* and the omission to observe is not ground to quash the indictment. *S. v. Hines,* 84 N. C., 810. The "broadside" challenge to the charge has been held ineffective in *McKinnon v. Morrison,* 104 N. C.,.354, and in the dozens of cases before and since. If an exception to the charge is worth taking at all, it is worth the while of counsel making it to take enough thought to point out the alleged error for the benefit of the opposite party and of the appellate court. Especially, as ten days are allowed in which to consider the charge and assign errors therein. *Lowe v. Elliott,* 107 N. C., 718, and other cases cited in Clark's Code (2 Ed., 383). A review of the charge in this case shows, however, in fact that there is no error.

This is a proper case in which again to call the attention of appellants to the want of care which is often displayed in making up transcripts for this Court, especially in criminal cases. An appellant does not do his duty by simply taking an appeal and leaving it to the clerk to send up what he may deem necessary. *Wilson v. Seagle,* 84 N. C., 110; *Broadfoot v. McKeithan,* 92 N. C., 561. It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted. The requisites of the transcript on appeal are stated in *S. v. Butts,* 91 N. C.,
524, which is now again called to the attention of clerks and
(725) appellants. In the present case, this Court *ex mero motu* corrected the defect by a *certiorari.* Hereafter the Court will dismiss the appeal or affirm the judgment, as the case may be, when the record is defective in any material particular, in all cases in which the Attorney-General, or the opposite party (in civil cases) sees proper to

make such motion, unless sufficient excuse for the apparent laches is shown. A party is not entitled, by his own gross carelessness, to obtain a delay of six months.

NO ERROR.

Cited: Hemphill v. Morrison, 112 N. C., 757; *S. v. Jackson, ib.,* 850; *S. v. McDraughon,* 168 N. C., 132.

STATE v. MARTHA CODY.

Fornication and Adultery—Criminal Intent—Indictment—Special Verdict.

1. In an indictment for fornication and adultery, the State is not required to prove criminal intent. The intent is inferred from the facts proved of habitual sexual intercourse between persons unmarried; and any extenuating circumstances must be shown by the defendant.
2. When in such indictment the jury returned a special verdict, finding that the defendant was married to one G., who had living at that time another wife, but that they did not know whether she knew of this fact or not: *Held,* that there should have been a verdict of guilty, since it was incumbent on the defendant to show that she did not know of it.

INDICTMENT for fornication and adultery, tried at the Fall Term, 1892, of GRAHAM, before *Bynum, J.*

The jury returned a special verdict, finding, among other things, that the defendant Martha Cody was married to one Joseph Green, he at that time being the husband of another woman, and that they did not know whether Martha Cody knew of the existence of such former marriage or not. Upon this verdict the court adjudged the defendant not guilty, and the solicitor appealed. (726)

Attorney-General for the State.
No counsel for defendant.

CLARK, J. In *S. v. Cutshall,* 109 N. C., 764, it is said "the fact is not to be lost sight of that in an indictment for fornication and adultery, the State is not called on to prove a criminal intent. The case is made out when it is shown that a man and a woman, not being married to each other, habitually engaged in sexual intercourse. That this is 'lewd and lascivious' is not required to be shown, but it is an inference of law from the facts proved, as with 'malice' in indictments for

homicide, even though in the latter case an intent must be charged. As to this offense (fornication and adultery) no intent is required to be charged or proved." In the case quoted, as in the one now before us, the male defendant had gone through a form of marriage with the female defendant which was a nullity, because his lawful wife was living. The Court goes on in *Cutshall's case, supra,* to say: "Either party may avoid such legal conclusions by showing that he (or she) was insane, idiotic, or ignorant of the facts. But such want of intent cannot enure to the benefit of the other party who had the intent."

In the present instance, it is found by the special verdict that the *feme* defendant was living for months in illicit sexual intercourse with another woman's husband. The State has proven all that was incumbent on it to show the defendant's guilt. She has not withdrawn herself from liability for such conduct either by showing that she was insane, idiotic, or that, without fault on her part, she was ignorant that the man was married to another. The jury say that they are left in ignorance on that point. There is, therefore, nothing shown (727) which withdraws the woman from the criminal responsibility which arises from the finding that she lived for several months in sexual intercourse with a man to whom she was not legally married.

Upon the special facts found, a verdict of guilty should have been entered. The case will be remanded that it may be so entered by the court below.

When this action was tried below, we presume that his Honor did not have *"S. v. Cutshall"* before him.

REVERSED.

Cited: S. v. Robinson, 116 N. C., 1048.

THE STATE v. W. M. HAYES.

Indictment for Larceny—Charge—Intent—Possession.

1. In a trial on an indictment for larceny of an ox, the court charged that if defendant got possession under a contract of purchase he was not guilty: *Held,* to be no proper response to the prayer of defendant that if he came into possession lawfully, and afterwards made up his mind to convert them to his own use, he would not be guilty. This view of the case the defendant was entitled to have presented to the jury, as it was a construction warranted by the facts.

2. A charge which makes the defendant's guilt depend upon his intention at the time of getting possession, without further finding he afterwards executed that intention, is erroneous.

STATE *v.* HAYES.

INDICTMENT for the larceny of an ox, tried before *Bynum, J.*, at the Fall Term, 1892, of SWAIN.

The facts are sufficiently stated in the opinion of the Court.

Attorney-General for the State.
Fry and Newby (by brief) for defendant.

CLARK, J. The defendant asked the court to instruct the jury (728) "That if the defendant came into possession of the oxen, charged to have been stolen, lawfully, and after getting possession of them, he then made up his mind to convert them to his own use, he would not be guilty." Instead of this the court charged, "If the defendant and Arthur had made a contract of purchase and sale, and in accordance with this contract Arthur delivered the cattle to the defendant, then the jury should return a verdict of not guilty." The court further charged the jury, that "if the defendant applied to Arthur for work, representing to him that he had money and spoke of buying the cattle, that he did this for the purpose of inducing Arthur to let him have possession of the cattle for the express purpose of hauling lumber, and the defendant had it in his mind at that time to get possession of the cattle, not for the purpose of hauling lumber, but with the intention, if he did get them under that pretense, to appropriate them to his own use, it would be the duty of the jury to return a verdict of guilty."

The defendant was entitled to the first prayer for instruction. The court failed to give it. His Honor, in effect, charged: (1) If defendant bought the oxen he was not guilty; (2) if the defendat got possession of the cattle for the avowed purpose of hauling lumber, but with the intent at the time of not so using them, but to convert them to his own use, he was guilty.

These instructions leave out of view the third state of facts upon which the prayer for instruction was based, and which could be drawn from the evidence, that is, if the defendant procured the oxen lawfully, *i. e.*, for the purpose of hauling lumber, and did not at that time have the intent of converting them to his own use, but afterwards conceived and executed such purpose, he would not be guilty of this charge. The charge of the court was, merely, that if the defendant bought the oxen, he was not guilty. (729)

The second branch of the instruction given is also erroneous, in making the defendant's guilt depend upon an intention at the time of the receiving to convert the oxen, without the further finding that the defendant did, in fact, afterwards convert them to his own use.

ERROR.

STATE v. F. M. DAVIS, JR.

Retail of Spirituous Liquors—Town Ordinances—Warrant—Affidavit—Amendment.

1. An affidavit, upon which was issued a warrant for retailing spirituous liquors, issued and heard by the mayor of an incorporated town, charged the defendant with unlawfully and willfully violating a town ordinance at a time and place named, and setting forth the facts of his being a druggist and selling liquor, not as medicine, was amended so as to show the person to whom the liquor was sold, and was, upon appeal to the Superior Court, amended so as to charge an offense under section 4, chapter 215, Laws 1887, forbidding druggists to sell liquors except for medicine and upon prescription of a physician: *Held*, no error.

2. The affidavit and warrant in contemplation of law are one, if one is referred to by the other.

3. The officer arresting could not refuse to act because an offense was charged informally or defectively, and another offense intended, which, in contemplation of the law, did not exist.

4. The prisoner having been arrested and being before the court, and it appearing that an offense had been committed, though imperfectly charged, the court had the discretion to amend and proceed to try him, or to commit him to await his trial upon indictment found.

INDICTMENT tried on appeal from the Mayor of Clyde, at Spring Term, 1892, of HAYWOOD, before *Hoke, J.*

(730) The original affidavit and warrant charged the defendant and others with violating a town ordinance forbidding the sale of spirituous liquors in the town of Clyde, which ordinance prescribed that a penalty of $25 should be paid for such sales. On appeal the judge held that the affidavit in its original form showed that a criminal offense, created by a statute embodied in the charter—the substance of which is quoted in the opinion—had been committed, and in the exercise of his discretion, allowed the affidavit and warrant to be amended so as to charge that offense instead of the violation of the town ordinance. The statute referred to (Chapter 187, Laws 1889) provided that the punishment should not exceed a fine of $50 or imprisonment for thirty days.

The original affidavit was as follows:

Before J. W. Morgan, Mayor:

D. C. Clark, being duly sworn, complains and says, that at and in said county, and in the town of Clyde, on or about 12 January, 1892, Francis M. Davis and A. J. Davis did unlawfully and willfully violate an ordinance of the town of Clyde, to wit, Ordinance No. 79, Article

section 79, by unlawfully and willfully selling spirituous liquors to one J. J. Bowers, as affiant is informed and believes, the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists, contrary to the said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said town and State. D. C. CLARK.

Sworn to and subscribed before me this 28 January, 1892.

J. W. MORGAN, *Mayor.*

The warrant was as follows:

To any Constable or other lawful officer of the Town of Clyde— (731) *Greeting:*

D. C. Clark having made and subscribed before me the foregoing affidavit, you are hereby commanded forthwith to arrest the said Francis M. Davis and A. J. Davis and safely them keep so that you have them before me without delay at my office in Clyde, to answer the above charge and to be dealt with as the law directs.

Given under my hand and seal this 28 January, 1892.

J. W. MORGAN, [SEAL.]
Mayor of Clyde.

The amended affidavit was as follows:

D. C. Clark, being duly sworn, complains and says, that at and in said county, and in the town of Clyde, in the county of Haywood, on or about 12 January, 1892, Francis M. Davis and A. J. Davis did unlawfully and willfully sell spirituous liquors in the town of Clyde to one J. J. Bowers, as affiant is informed and believes, the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists, said liquors not being sold by druggists strictly for medical purposes and not on a *bona fide* prescription by a legal practicing physician, contrary to the form of the statute in such case made and provided. D. C. CLARK.

Attorney-General for the State.
G. S. Ferguson (by brief) for defendant.

AVERY, J. Upon affidavit setting forth that the defendants had been guilty at and in the town of Clyde, in the county of Haywood, on or about 12 January, 1892, of "unlawfully and willfully selling spirituous liquors to one J. J. Bowers, the said spirituous liquors not being sold as a medicine, and the said defendants being then and there druggists," the defendant had been arrested and tried before the (732) Mayor of Clyde on a charge embodied in said affidavit of violating a town ordinance, which declared it unlawful to sell spirituous

liquors in said town. It is not material whether the charge of which a justice of the peace has final jurisdiction is contained in the affidavit or warrant, if the affidavit referred to the warrant, and thereby make the two instruments in contemplation of law but one. *S. v. Sykes,* 104 N. C., 694. Treating as surplusage so much of the affidavit as charges the violation of an ordinance of the town forbidding the sale of spirituous liquors within the corporate limits, it still sufficiently appeared from the affidavit that the defendant had committed a criminal offense created by a public local statute (Laws 1889, chap. 189, sec. 8), which made it "unlawful for any person to sell any spirituous, vinous or malt liquors within the corporate limits of the said town (Clyde), except by druggists strictly for medical purposes, and then only on *bona fide* prescription by some legal practicing physician," etc. It appearing from the affidavit that the defendants had been guilty of criminal conduct prohibited by the statute, the officer to whom the warrant was entrusted could not refuse to execute because the charge founded upon the information was informal or defective, but could justify such refusal only upon the ground that it was apparent upon the face of the process that the mayor had no authority to issue it. The arrest having been lawfully made, it is too late, in the face of repeated adjudications of this Court, to question the power of the judge below to amend generally in his discretion both the warrant and affidavit. *S. v. Vaughan,* 91 N. C., 532; *S. v. Crook, ibid.,* 536; *S. v. Smith,* 103 N. C., 410; *S. v. Sykes, supra.* There is no necessity, where the affidavit is amended, that it should be verified in its amended form. *S. v. Norman,* 110 N. C., 484. The solemn formality of filing an affidavit and charging that the criminal law has been violated, was an essential prerequisite to the issuing, or lawful execution of the warrant, but (733) the arrest being already a fact accomplished in accordance with the prescribed constitutional method, neither the Constitution, nor the laws enacted in pursuance of it, made it incumbent on the judge to dismiss the warrant because the ordinance was void, and discharge the defendant instead of holding him and amending the affidavit and warrant so as to charge another offense, of which it plainly appeared from the warrant that the defendants had been guilty, if the proof should sustain the affiant's information. Upon the original affidavit the judge presiding could, in the exercise of a sound discretion, have dismissed the appeal, because the ordinance upon which the charge was founded was void, or he had the power to amend the affidavit and warrant so as to charge an offense growing out of the facts appearing from the affidavit and within the original jurisdiction of the mayor, as he did, or he might have held the defendant in custody or under bail to await indictment upon the charge of violating section 3, chapter 215,

Laws 1887, which provides that any druggist who shall sell any spirituous, vinous or malt liquors, except for *bona fide* medical purposes, and upon the prescription of a practicing physician, shall be fined and imprisoned at the discretion of the court. *S. v. Farmer,* 104 N. C., 887. True, had he adopted the third course, some question as to the costs previously incurred might have arisen, and we mention the general statute to show the sufficiency of the original affidavit to warrant the detention of the defendant in custody.

The defendant could not collaterally impeach the election of the officers of the town in order to bring in question the authority of the mayor, who issued a criminal warrant and tried one accused of an offense within the jurisdiction of a justice of the peace. *S. v. Cooper,* 101 N. C., 684. The acting mayor, whose judicial authority and official character were recognized by the court to which the record was certified, and by the constable and people of the town, was at (734) least a *de facto* officer, and as such might lawfully take cognizance of any offense committed within the corporate limits, and which was within the jurisdiction of a justice of the peace. *S. v. Powell,* 97 N. C., 417; *S. v. Lewis,* 107 N. C., 967. It was not necessary, therefore, to have proved that the mayor was elected in May last; it was sufficient to show that he was acting in that capacity, and that his official acts were acquiesced in. It would be presumed, nothing else appearing, that the provisions of the statute incorporating the town and the amendatory laws (Acts of 1889, chap. 189, and Acts of 1891, chap. 241) had been observed in so far as they provided the time and manner of holding elections for town officers.

We think that the judge had the power to amend, and that there was no error in any of the rulings complained of.

NO ERROR.

Cited: *S. v. Sharp,* 125 N. C., 635; *S. v. Yoder,* 132 N. C., 1113; *S. v. Yellowday,* 152 N. C., 796; *S. v. Gupton,* 166 N. C., 262; *S. v. Poythress,* 174 N. C., 811; *S. v. Price,* 175 N. C., 806.

APPENDIX A

IN MEMORIAM, AUGUSTUS SUMMERFIELD MERRIMON

Attorney-General DAVIDSON, in presenting the proceedings (hereinafter reported) to the Court, said:

May it please your Honors: I present to the Court the proceedings of a meeting of the Bar of North Carolina, held in Raleigh on 23 November, 1892. The purpose of that meeting was to give appropriate expression to the deep consciousness of individual and general grief produced by the recent death of the late Chief Justice of this Court, and to perpetuate upon the records of this high tribunal—in which he had been so conspicuous and useful—the unanimous testimony of his professional brethren and official colleagues of his virtuous life and honorable career.

Fortunate is he who has so lived that when the end of his life is reached his name and deeds shall find a page reserved for him in your records! Among the long list of names which precedes his in the "Book of the Dead," none will be held in greater esteem. This is not a proper occasion to indulge in an extensive discussion of his character or review of his life; that has been fittingly done by the Memoir prepared by a committee of the Bar, adopted by the meeting to which I have referred, and in the addresses made at that time, and which are contained in the report of that meeting now before me. Nevertheless, I trust I will be pardoned if I make one or two observations which seem to me to be not inappropriate.

Perhaps my acquaintance with him extended over a longer period than that of any of the gentlemen who participated in the meeting. He was a native and long resident of the county of my home; he was my personal friend when I was a boy; when I was a law student; when I was admitted to the bar; and all the way along my life it has been my fortune to be the recipient of his friendly interest and priceless encouragement. I recall distinctly the deep impression he made upon my boyish mind the first time I ever saw him—now more than a third of a century ago. I was struck then by his extraordinary energy, his dignified presence, his affable manner, and that air of high purpose and honorable methods which always distinguished him. He was then beginning to attract the notice of the public and his brethren of the western bar—a bar at that time unusually strong. That impression deepened as I watched his rapid career to the front rank of the legal profession in this State, to a seat in the highest legislative body in the nation—the equal in power and dignity of any in the world—and finally to the exalted position of Chief Justice of the Supreme Court of North Carolina—a place so reverenced by all our people because of the wisdom and patriotism and fame of those who have occupied it.

Frequently it was my privilege to be closely associated with him in the discussion and conduct of grave matters, public and private.

It was early my opinion, confirmed by subsequent observation, that his most dominant qualities, and to which his success was chiefly due, were an exalted conception of duty and a superb courage to support it. He was not indifferent to the approbation or criticism of his fellow-men, but they were powerless to control his conduct when his conscience pointed the pathway of duty. I doubt if he ever counted the element of temporal rewards in determining his action in respect to any public or official question. His whole being revolted

at, and his entire life was a noble protest against, the arts and intrigues by which in these days so many men in high places seek popular applause. The bare suggestion of any scheme on his part, or with his knowledge, to employ the opportunities of his official position to advance his fortunes would be grotesque to those who knew him. With quiet scorn he left to those who needed them the detestable devices of the time-server.

His ability as a lawyer was universally conceded. The conditions of his early life denied him the advantages of thorough scholastic training, and the demands of his fellow-citizens after he reached manhood upon his time and services made it impossible for him to acquire that vast and critical knowledge of legal science that is necessary to constitute the profoundly learned lawyer. But his industry, energy, integrity, mental vigor and familiarity with the decisions of our courts soon placed him in the front rank of the profession in the State and enabled him to easily maintain it.

But it was as a *judge* he excelled. It has been said that the most dangerous man on the bench is he who is most versed in the lore of the books. If this be an exaggeration, it may nevertheless be true that the judge who keeps his eyes fixed upon and his thoughts immersed in the pages of the law books alone, will sooner or later become lost in the speculations and refinements of past generations. The *great* judge looks out upon the currents of life flowing around him; he utilizes the past, comprehends the present, and forecasts the future; he understands the genius of the people whose laws he is to interpret, and sympathizes in the spirit of the civilization which inspires those laws.

Chief Justice MERRIMON in these great qualities had no superior, and perhaps few equals, among the eminent men who preceded him on the bench. Thoroughly imbued with the eternal principles of justice, to which he gave an almost passionate devotion, his highest aspiration was to apply those principles to the wants and necessities of society as it existed. He had an intuitive, as well as acquired, knowledge of the principles of right and wrong, which, aided by a vigorous and courageous mental constitution, enabled him to leap the chasms and press through the labyrinths of technical obstacles and go straight to a just judgment. He was a great judge. I move your Honors that these proceedings be recorded in this Court.

Chief Justice SHEPHERD said: The Court hears with profound sensibility the resolutions in memory of the late Chief Justice. He occupied a warm place in our affections, and kind words spoken of him fall on the ear as if spoken of one who sits with us at the same hearthstone. His honored name is our heritage, and we shall be unworthy guardians of his memory unless we are faithful, as he was faithful, in the service which the State has commissioned us to perform.

Chief Justice MERRIMON was an able, conscientious and courageous judge, and a most laborious worker. Those of us who were associated with him on the bench and in the conference room will never cease to remember the patience and toleration with which he listened to opposing views. His toilsome way as he came heroically up the ascent of life, unaided by fortune, made him wholly self-reliant, and yet, like most of those who have to struggle upward, he was very careful of the ground that lay before him.

He was a diligent and painstaking seeker after the truth, and was devoted to the important duties of his position.

The noise from without did not disturb his labors; he was insensible to clamor, as he was to every slavish impulse, and when he reached a conclusion, he, like every great judge, announced it without fear, favor or affection. He was a most manly man, and the very light of candor, of truth, of true man-

hood shone from his eyes and illuminated his countenance. The results of his judicial labors in this Court are to be found in his opinions, which bear the impress of rare intellectual power and the inspiration of a brave heart. We who worked by his side feel too keenly our recent loss to compare him with those in whose chair he sat with honor; but we do believe that they, seeing him with clearer vision than ours, will welcome him as one worthy to be called their brother.

He was by nature kind and considerate. In counsel he was courteous and forbearing, and we shall cherish his memory, not only as our chief adviser, but as our friend and companion.

After a life of labor and usefulness, having attained eminence as a statesman and jurist, enjoying the confidence of the people in its fullest measure, he passed away, sustained and comforted by a beautiful and childlike faith in our Christian religion.

The resolutions of the Bar in memory of our late Chief Justice will be spread upon the records of the Court, where they will remain as a lasting and well-deserved testimonial of the esteem and admiration of his professional brethren.

IN MEMORY OF THE LATE CHIEF JUSTICE MERRIMON

At a meeting of the Bar (at which were present the Chief Justice and Associate Justices of the Supreme Court), held in the Supreme Court room on Saturday, 19 November, 1892, on motion, Hon. J. B. Batchelor was elected chairman, and R. T. Gray secretary.

On motion of Judge Fuller, the chair appointed a committee of five to prepare a memorial sketch of the late Chief Justice MERRIMON, with appropriate resolutions, to be submitted at an adjourned meeting to be held on Wednesday, 23d inst. The committee consisted of Hon. T. C. Fuller, Messrs. F. H. Busbee, G. H. Snow, Armistead Jones and E. C. Smith.

On motion, the meeting adjourned until Wednesday, the 23d inst., at 12:30 o'clock.

ADJOURNED MEETING

23 November, 1892.

Mr. F. H. Busbee, for the committee, submitted the following:

The committee respectfully submit the following brief sketch of the late Chief Justice, and recommend the adoption of the accompanying resolutions:

AUGUSTUS SUMMERFIELD MERRIMON, late Chief Justice of the Supreme Court of North Carolina, was born 15 September, 1830, at Cherryfield, now in the county of Transylvania, but then in the county of Buncombe, North Carolina. His father was the Rev. Branch H. Merrimon, of the Methodist Episcopal Church, and his mother was Mary E. Merrimon, whose maiden name was Paxton. He was a descendant of that distinguished hero of the Revolution, Charles McDowell, of Burke County.

Soon after his marriage, his father moved to Mills River, at that time also part of Buncombe County, and added to his ministerial labors the avocations of farmer and merchant. His father's circumstances denied the aspiring boy the advantages of the higher schools, and a life of daily toil restricted his efforts at self-improvement. But his youthful ambition could not easily be restrained, and his thirst for knowledge was so great that he prepared himself to enter the high school at Asheville, and after eight months spent there as a scholar, and six months as assistant teacher in the English

branches, he commenced the study of law. In twelve months he was prepared for and obtained his license to practice in the county courts, and within a year thereafter obtained his Superior Court license. In a very short time he had a fair practice, for his studiousness, his careful preparation of his cases, and his fidelity soon received the consideration they deserved.

He entered early in the great political controversies which were convulsing North Carolina just prior to the war, and in 1860 was elected to the House of Commons from the county of Buncombe. The session of the General Assembly of 1860-61 was a stormy one, and was shaken to its center by the discussions concerning the great question of secession. Mr. MERRIMON was a Union Whig, and did valiant and able service for his cause; but when, by the irresistible march of events, the war came on, he at once volunteered as a private in the army of the Confederate States, and during his short service as private and as captain, did his full duty as a soldier.

In 1861 he was appointed Solicitor of the Buncombe circuit, and subsequently by election, held that office, at that time one of danger and responsibility, until the war closed.

At the session of the General Assembly in 1865-66 he was elected judge of the Superior Court, which office he resigned in 1866. In the perilous unsettled days immediately after the war he rode the mountain circuit, and displayed the greatest heroism in the discharge of his duty amid the most dangerous surroundings.

In the fall of 1866 Judge MERRIMON was riding the Wake Circuit, and while holding court in Johnston County he received an order from the officer in command of the military department of North and South Carolina to suspend proceedings on an indictment which had been found against a large number of men charged with riot. He refused to obey the order, but as the case was continued, there was then no open conflict of authority. Shortly afterwards, while holding court in another county, a similar order was issued to him. He determined not to obey it, but finding that he was, as a judge, unable to resist the overwhelming power of the army of the United States, he at once tendered his resignation to the Governor (the estimable Jonathan Worth). Governor Worth, however, persuaded him to withhold it until after he tried the great "Johnston will case," then set for triral before him in Chowan County. This trial lasted four weeks, and resulted in the establishment of the will, and also placed upon a firmer foundation Judge MERRIMON'S reputation as a great lawyer and an impartial judge. Immediately upon the close of that trial, his resignation was accepted and he resumed the practice of the law.

He removed from Asheville to Raleigh and formed a partnership with Mr. Samuel F. Phillips, under the firm name of Phillips & Merrimon.

Subsequently, Mr. Phillips having been appointed Solicitor-General of the United States, he became associated with Mr. Thomas C. Fuller and Mr. Samuel A. Ashe, under the style of Merrimon, Fuller & Ashe. Later Mr. Ashe went into journalism, and the firm became Merrimon & Fuller.

In 1872 Judge MERRIMON was the Democratic candidate for Governor and made a laborious and brilliant canvass of the State, but by a narrow majority failed of an election. In the winter of 1872-73 he was elected United States Senator by the General Assembly, and his service for six years in the Senate was honorable to himself, to his party, his State and the country. His term as Senator expired 4 March, 1879, and thereupon he returned to his law practice in Raleigh.

In 1883, upon the resignation of THOMAS RUFFIN, Associate Justice of the Supreme Court, Judge MERRIMON was appointed by Governor Jarvis to fill that vacancy, which appointment was ratified by the people at the next election. This position he held until the death of Chief Justice SMITH, 14 November, 1889, when he was appointed by Governor Fowle to be Chief Justice of the Supreme Court, and having subsequently been elected by the people, he held that position until his death, on 14 November, 1892. As Associate, and as Chief Justice of the Supreme Court, Judge MERRIMON displayed, in an eminent degree, the qualities that had always characterized his life and had brought him eminence in his profession and in the Senate. His mind was honestly logical, and went to its legitimate conclusion in every case without regard to any preconceived opinion. His style was strong, sometimes rugged, always interesting. His name will live among those of the great lawyers who adorn the annals of North Carolina jurisprudence.

Thus honored in life, with the reverence of all the people of his native State, at his home in Raleigh, surrounded by wife, children and friends, peacefully passed away one of the most useful and honored men of North Carolina: therefore, be it

Resolved, That in the death of Chief Justice MERRIMON the Bar has lost one of its bightest ornaments, and the State one of its truest citizens.

Resolved, That the Attorney-General present this memorial and these resolutions to the Supreme Court, with a request that the same may be spread upon the minutes and published in the Reports.

Resolved, That the secretary of this meeting transmit a copy of these proceedings to the family of the deceased.

REMARKS OF MR. R. H. BATTLE.

Mr. Chairman:—It may not be inappropriate that, as one of the few living members of the Raleigh Bar resident here when Judge MERRIMON came from his native mountains, twenty-five years ago, to dwell among us, I should second the resolutions of the committee, and briefly give my impressions of him, who, for all this intervening time, and for some years before, has filled so large a place in the public eye.

My acquaintance with him dates back to 1863, when, as Private Secretary to our great war Governor, my attention was attracted to a correspondence between the Executive Department and Mr. MERRIMON, the solicitor of the mountain circuit. In Madison, and some of the adjacent counties of that district, there was a condition of lawlessness and bloodshed, growing out of the war—the prosecution of which was violently opposed by many whose homes were in the mountain fastnesses—that required great courage and firmness, as well as prudence and ability, in those charged with the duty of upholding the law. Both judges and solicitors performed the functions of their office with full knowldege that their lives were in danger while so doing. I was much impressed with the firm determination expressed in the letters of the solicitor to ferret out the offenders and punish the ringleaders, be the consequences to him what they might, and with a like determination, expressed in the replies of the Governor, to support him in the execution of his resolve with all the power of his office, and, on both sides, there was a suggestion, too, to temper justice with mercy, as far as it might be consistent with the peace and dignity of the State to do so. One could not but feel that the best interests of our commonwealth were safe in the hands of those young but wise and prudent statesmen. Soon after this correspondence, and after order had been in a measure restored in the more turbulent counties of the West,

Solicitor MERRIMON had occasion to visit Raleigh, and the impression made upon me by his official letters was heightened by his presence, when I then met him for the first time. In the prime of young manhood, he was as fine a specimen of physical and mental vigor as one could wish to see. Indeed, then, and for several years thereafter, the energy apparent in his walk and every movement was as conspicuous as in any man I have ever known, and his countenance and conversation indicated alike intellectual activity.

My next acquaintenance with our friend was when he came to hold the courts of this district, or *circuit*. as it was then called, in the fall of 1866, as Superior Court Judge. He came a stranger to the Bar and people of Wake, but he left us, at the end of the term, with the unstinted admiration of all. He had many and important cases to try—among them an indictment for murder against two young men (brothers) of good social position, and nearly related to the then Attorney-General—and ably and well did he try them all that were not continued for good cause. Punctual at the hour appointed for opening the court, and requiring like punctuality from attorneys, clients, court officers, jurors, and witnesses; punctilious in the observance of such formality in the proceedings of the court in the trial of causes as seemed calculated to make the administration of the law impressive; thoroughly acquainted wiht the rules of evidence, and prompt in deciding what was competent and what inadmissible; clear in his rulings, fair in stating all exceptions, and eminently just in his judgments, he administered the law with the courtesy, promptness, impartiality, fairness and ability that marked the model judge. I doubt whether in the history of our Superior Court Bench for the century past, the State can boast of a judge who possessed more, or to a greater degree, the varied qualities required to make the typical *nisi prius* judge than AUGUSTUS S. MERRIMON. It has occurred to me, as a matter for lasting regret, that owing to the conflict of military rule with the civil law, as he saw it to be his duty to administer the law. he was compelled to leave the Bench before he had the opportunity to hold one or more courts in every county in the State. An earlier and fuller revival of the old-time respect for the law and its administration, that had become in a measure impaired by the war, would have been the result.

I need not speak of the events of Judge MERRIMON's life since he removed to Raleigh, soon after his retirement from the Superior Court Bench; of his triumphs at the Bar in our State and Federal Courts, won fairly and by careful preparation in his many important causes; of his never failing courtesy to his brethren and the Court; of the candor and sincerity with which he dealt with both the law and the facts in his practice; of his service to the State and the country by his able discussion on the hustings of the great questions of constitutional government and political economy, whereby he strove to educate the people to a fuller appreciation of their blessings as American citizens; of his instructive addresses before our schools and colleges on the subject of education, in which he felt such great and patriotic interest—the greater, because he had not enjoyed its full advantages himself in early life; of the honor he reflected upon the State by his industry, ability and faithfulness in the United States Senate during his term of service in that great arena; of the eminent qualities he displayed as an Associate Justice, and as the Chief Justice of our Supreme Court; of the great value of his precept and example to this community, and to our people elsewhere; of his fine social qualities and the refinement and instructiveness of his conversation, the natural result of a wide and varied observation and experience and a very retentive memory; of his detestation of what was

wrong and his reverence for the right and for our holy religion, in which he recognized the source of all that was best in humanity. Of these things the report of the committee makes record, and they are known to us all. Such a life and character as his are well epitomized in those oft-quoted lines of the master poet of our language:

"His life was gentle, and the elements
So mixed in him, that nature might stand up
And say to all the world, 'this was a man.'"

To me, personally, he was ever courteous and kind, whether he was on the Bench and I pleading before him, or when at the Bar we strove together or on opposing sides for the verdict of juries or favorable rulings from the court; and in private life, as we met almost daily as neighbors, his manner was ever friendly, I might say, *affectionate*. I value the thought of this now, and will always value it—because at one time I feared an interruption of our friendly intercourse. When he was a candidate for re-election to the United States Senate, I thought it a duty I owed to party discipline and to his opponent, who had been a benefactor as well as friend to me, to oppose his election to the best of my ability, through the press and otherwise; but after the contest was over and he defeated, to my gratification his manner toward me was as cordial as ever. He recognized my motive and bore not the slightest malice. His friendship for me seemed not to have suffered any diminution, while my regard for him was increased by witnessing such evidence of his magnanimity; and so it continued to the end.

Would that it were in my power to furnish a flower more worthy the garland we wear today in memory of our friend and brother—now forever enshrined as one of North Carolina's most patriotic and distinguished dead.

REMARKS OF MR. JUSTICE CLARK.

Mr. Chairman:—It was said by one of old that the "friendship of a good man is a gift from the gods." For years I had known Judge MERRIMON at the Bar, and later as a judge of this Court. But for the last three years it was my fortune to know him most intimately. Side by side at the hearing of causes and in the consultation chamber, and, as our homes lay in the same direction, almost daily in our walks to and from this place, I came to know him well. Not in the language of eulogy and admiration, but in the sober words of truth and justice, he was one of the best and truest and noblest men I have ever known. He bore malice to none. Of injuries to himself he retained no recollections. To those who knew him well there was a singular lovableness in the simplicity of his character. He was broad and catholic in his views of men and things. At all times he possessed the courage of his convictions, and more than once or twice with him "the path of duty proved the way to glory."

He loved his fellow-men. He was essentially a man of the people. He earnestly desired their best good. Instinctively the masses understood him. Few men have ever lived in this State who have so completely commanded their respect and their entire confidence. And none have more deserved it. "To the last he kept the whiteness of his soul, and so men mourn over him." He first saw the light in Transyylvania, in the midst of that glorious land of peak and valley,

"Where the great heart of nature
Beats strong amid her hills."

There, as Burns said of the Poetic Genius of Scotland, the guardian Fate of his native State "Found him at the plow and threw her inspiring mantle over him." From that moment to the scene which was his latest, he was always found in the path of duty and of honor. From the hour he entered public life his State heaped her honors upon him, refraining not from the very highest and rarest in her gift, nor until, with the slow moving feet of those who bear the dead, and with the voice of them that wept, from this chamber where they lay in state, the mortal remains of the seventh Chief Justice of this Court were borne in honor to their last resting-place. Though not an old man, barely turned of three score, he has departed full of honors, while the friends who began the march of life with him have been scattered like leaves in wintry weather.

North Carolina has long since made up her verdict upon the character and services of this, her son. No blemish in the course of a long and splendid public career ever attached to his name.

In the Senate of the United States he so bore himself that none could doubt that he had no other end in view than to serve the best interests of his State and country. After he had retired from the Senate, one Governor, with universal public applause, placed him on this Court, and another gave him its chief place. Both appointments were unanimously indorsed by the conventions of the Democratic party, to which he belonged, and were ratified by overwhelming majorities at the polls.

The report of the committee has so completely outlined the leading events of his career that it would be repetition to refer to them, nor shall I allude to that record of his industry and talents which is to be found in twenty-two volumes of the Reports of this Court.

We cannot but be struck with the rapid changes which have succeeded one another on the Bench where he sat. In the last quarter of a century there has been a vacancy, on an average, every year and a half. In the last three years, three of its five members have been removed by death—SMITH, MERRIMON, DAVIS. In some respects the public lives of all three bore a resemblance. Each of the three, before coming upon this Bench, had represented his State in the National Councils at Washington, and each had come from that ordeal with fame untarnished and without so much as the smell of fire on his garments. With Judge DAVIS his relations had been especially close. Together for years at Washington, where one sat in the Senate, while the other was in the House, they were later reunited on the Bench of this Court, where they sat side by side for many years, and almost together they went down into the tomb. "Lovely and pleasant in their lives, in death they were not divided."

A few weeks since some of us have stood with the Chief Justice amid the thronging crowd when, upon the lonely hillside amid the sighing pines, the body of Judge DAVIS, his friend and ours, was laid to rest. And now, he too, has passed beyond our gaze. Thus we are again brought face to face with the great Mystery. They whom so lately we met in these walls, and with whom we talked as man to man, will return no more. In which of yon wheeling worlds now move those deathless souls, those inextinguishable spirits which yesterday knew as little of the future as ourselves, but which now in wider intelligence survey the vast orbit of creation. Or is it in some more distant world far removed from mortal sight, that they await the final trump of the resurrection? In vain, we ask these questions—but again and again as the portal swings wide open and with never-ceasing tramp, brother

after brother passes down and out into the illimitable beyond, humanity asks the ever-repeated, never-answered question—whither?

"We know not where His islands lift
Their fronded palms in air—
We only know, we cannot drift
Beyond His love and care."

Beyond reproach and above suspicion, they were both an honor to their profession, which, foremost at all times in contests for civil liberty, can in reply to its calumniators always point with pride to such as they, in full rebuke to those who would assail the high standard of its integrity. If pure-hearted, honest men are "the noblest work of God," North Carolina has had no nobler sons. We believe them now

"Something far advanced in State."

They went not hence suddenly and without warning. Life's duty done, their life-work crowned, laying aside the troubles and sorrows which infest this pitiful life of ours while the full orb of their being was slowly sinking to its setting, calmly under the lengthening shadows of the sunset, their spirits lingered by the shore; but

"When the gorgeous sun illumed the eastern skies
They passed through glory's morning gate
And walked in paradise."

The poet of paganism who lives amid the blaze of the now expiring nineteenth century, tells us—

"Pale beyond porch and portal,
Crowned with calm leaves, she stands
Who gathers all things mortal
In cold immortal hands."

But death is not immortal. There was a time when it was not, and hence there must come a day when it shall surely cease to be. Yet, were it true that there is no future for the soul, there would still be an immortality for the good deeds whose influence, perpetuated by one generation acting upon the next, shall live in ever widening circles as "the great world spins forever down the ever ringing grooves of change." Our brethren are not dead to us. For us they still live, move and breathe in the example and the influence of noble lives, and these things can never die.

"Were a star quenched on high
For ages would its light,
Still traveling downward from the sky,
Bless our mortal sight:

"So when a good man dies,
For years beyond our ken,
The light he leaves behind him lies
Upon the paths of men."

As I repeat these lines, Mr. Chairman, I know that there comes back to you those well remembered words of Tacitus, in speaking of one who in his

day also deserved to be remembered well of his countrymen. Said he in the sonorous tongue of old Rome:

"*Quidquid ex eo amavimus, quidquid admirati sumus, manet, mansurumque est in eternitate temporum et fama rerum*"—

"Whatsoever of him we have loved, whatsoever of him we have admired, remains and will remain in the eternity of time, and in the fame of his deeds."

Judge MERRIMON was long an anxious and earnest seeker after the eternal truth. It was a subject on which he loved to discourse. Of him it might have been said in those enduring lines:

> "I pray thee, then, he said,
> Write me as one that loves his fellow-men—
> The angel wrote and vanished. The next night
> It came again with a great awakening light,
> And showed the names whom love of God had blessed,
> And lo! his name led all the rest."

In his last illness the longing of his heart was gratified, and he found that peace which passeth all understanding. The star of his life went not down behind the darkened west, but it set like the morning star, which melts in the brightness of the coming day.

These are not idle ceremonies. The lives of good men are not lived in vain. A State does well to arouse the emulation of the rising generation by the example of those who have served the people faithfully and well. Rome and Greece filled their temples and porticos with busts and paintings of their illustrious dead. We can at least place before the living the simple but truthful story of those who, in the hours of danger and threatened disaster, by their eloquence and their moral courage, upheld the wavering cause of civil liberty, and who, spurning every temptation, found their reward in the gratitude of an admiring people, and reached the highest honors of the republic.

Here below our deceased friend is henceforth only a recollection, and if, unlike wealthier commonwealths, we cannot turn his features into living bronze or monumental marble, let his memory and the memory of such as he be copied in the lives and deeds of those who shall come after us. Then when hereafter shall come days of danger and disaster, then when shall come, as some they must, days of evil, there shall be still men like unto him in the land, and our people shall not need to cry out in vain and hopeless agony, as so many nations have done, "Oh! for the touch of a vanished hand, and the sound of a voice that is still."

Remarks were also made by Mr. George H. Snow and Mr. F. H. Busbee.

APPENDIX B

IN MEMORY OF JOSEPH J. DAVIS, ASSOCIATE JUSTICE

Attorney-General DAVIDSON said:

May it please your Honors:—I present the resolutions adopted yesterday at a meeting of the Bar of North Carolina, in respect to the memory of JOSEPH J. DAVIS, late an Associate Justice of this Court. These resolves, eloquent by reason of their simple and earnest words, are peculiarly appropriate to the character of the person to whom they refer; they disclose the outlines of a life unusually full of virtuous actions, and the record of a professional career which will long remain a source of pride to the Bar of North Carolina. Even were the annals of the State and Republic silent, there remain among the people who knew him so many evidences of Judge DAVIS' exalted character as a private citizen and public servant, that his fame would be projected by tradition far into the future. Happily for his memory, and for us, and for those who shall come after us, the record is complete; in church and State, on the Bench and in the legislative halls, in the great movements of the people, and in the quieter but more important relations of civic and domestic life, his life is written and his memory will be preserved.

I move, your Honors, that these proceedings be entered upon the records of this Court.

Chief Justice SHEPHERD, speaking on behalf of the members of the Court said: We unite with the members of the Bar in the expression of their sorrow at the loss of our late associate. For a long period he was prominently before the people of North Carolina, and in every public station he was called upon to fill, he came up to the full measure of his duty. He served his State with constant faithfulness in war and in peace. He was a soldier who never faltered; a statesman who never bent; a judge who never compromised. He was a man beloved by all; a Christian who never wavered in his faith; and he was always a modest, unobtrusive gentleman. In times of prosperity he never boasted; in times of adversity he stood "four-square to all the winds that blew."

His services on this Bench are known and appreciated. He was an upright judge with a keen sense of justice and an impartial mind. His views upon any question always had great weight in the consultations of the Court, and his opinions appearing in our Reports are clear, concise and logical. Those of us who were associated with him here mourn his death with feelings of peculiar sadness.

The proceedings of the Bar will be duly entered upon the records of this Court, and will be properly reported by the Attorney-General.

MEETING OF THE BAR

A meeting of the Bar was held in the Supreme Court room on the afternoon of Thursday, 27 October, 1892, to take suitable steps in honor of the memory of the late Honorable JOSEPH J. DAVIS, Associate Justice of the Supreme Court.

On motion, Justice AVERY was called to the chair, and Thomas S. Kenan appointed Secretary.

On motion of Judge Fuller, a committee of five was appointed to prepare a suitable memorial sketch of the life and character of the late Judge DAVIS, and report to an adjourned meeting to be held here on Wednesday, 16 November, 1892, at 11 o'clock a. m.

The chair appointed Messrs. Thomas C. Fuller, John Manning, R. H. Battle, John W. Graham and J. B. Batchelor to constitute the committee.

ADJOURNED MEETING

Justice AVERY said: 16 November, 1892.

Gentlemen of the Bar:—In calling this meeting to order, I feel constrained, before asking for the report of the committee heretofore appointed, to pay a short tribute to the memory of our deceased associate.

JOSEPH J. DAVIS will take rank in the history of the State and nation far above the average man who is called to fill even such eminent positions as he occupied. In a life of more than three-score years no man who knew him would believe that, in the most trivial matter, he ever overstepped the bounds which his delicate sense of propriety and his high standard of honor had fixed for his official conduct. Nearly twenty-six years ago I first met him as a member of the House of Representatives from Franklin County. Modest and unassuming, as he was, his presence instantly impressed me with the idea that he was made in no common mould. Whenever and wherever he has spoken as a public man he has commanded attention and respect, not only on account of the intrinsic force of his argument and the aptness of his diction, but because those who have heard and those who have read his utterances have felt that they were born of firm and honest convictions.

This is not a fitting time or place for entering upon a discussion of his political life. It is to be regretted that such men as he should have felt bound by the custom that has recently prevailed in North Carolina to retire to private life, when a career of the greatest usefulness seemed to be marked out for him. The grandest eulogy upon him as a federal representative, is embodied in that appellation, by which his constituents loved to refer to him, of "Honest Joe Davis." It would be a fitting expression and memorial of the confidence of the masses in him to record this popular designation upon his monument.

As a judge he had clear, well-defined and fixed convictions as to most of the important questions that arose in the Court. During his first year of service upon the Bench, his best friends and most ardent admirers were surprised to find how readily he fell into the habit of crystalizing the law in terse and lucid language.

If in the discharge of his judicial duties he was ever tempted to swerve from what he believed to be the law, it was when he encountered a quicksand, where the letter and spirit of the law failed to conform to his sense of right and justice. If he would have departed a hair's breadth from the line prescribed, it would have been to prevent the triumph of fraud or oppression. No man was ever endowed with a higher sense of right, honor and justice.

His character as a soldier will be and has been preserved in the archives from which the still unwritten history of our achievements as North Carolinians must be learned. No son of the State felt more pride in our soldiery, and none did more to correct the errors of the popular historians of the day. But while to meet Justice DAVIS in the social circle and in public life was to honor and to respect him, to know him intimately as friend and associate

was to love him. Brave as a lion in battle, firm as a rock in the national councils, or on the Supreme Bench, to his friend he was as gentle, as sympathetic and as tender as a woman, at his family altar, before his God, he was as humble as a little child.

Among all the gallant and commendable acts of his life, I remember none with more profound pleasure and admiration than his manly and correct testimony when occasion called for an expression of his views as to the truth and efficacy of the Christian religion. Among all of her honored sons, the State has never produced a more worthy exemplar, as public servant and private citizen, than JOSEPH J. DAVIS.

REPORT OF COMMITTEE.

The Committee of the Bar, appointed at a meeting held in the Supreme Court room 27 October, 1892, to prepare and present to this adjourned meeting resolutions commemorative of the life and character of the late Justice DAVIS, respectfully report:

JOSEPH JONATHAN DAVIS, the youngest but one of eleven children of Jonathan and Mary Butler Davis, was born in Franklin County, North Carolina, 13 April, 1828. He was reared by worthy and pious parents on a farm, until old enough to be sent from home to receive a scholastic education, when he was entered as a pupil of John B. Bobbitt, a teacher of deserved repute at Louisburg. Finishing the course at the Academy there, he was a student for one year at Wake Forest College, whence he went to the University in 1847 to take a partial course and study law under the late Judge Battle and Mr. S. F. Phillips, afterwards Solicitor-General of the United States. Completing his law studies, and being admitted to the Bar in June, 1850, he began the practice in Oxford, N. C., but in less than three years returned to his native county and settled in Louisburg, where he lived the rest of his life. He had not long to wait for business, for his character, habits and attainments were such that he soon obtained the confidence and respect of the people of his county, and commanded a fine practice, which he ever retained while he continued at the Bar.

Though earnestly opposed to secession, after the late war began he assisted in raising a company of soldiers, and was made its Captain, in the Forty-seventh Regiment of North Carolina State Troops, and was a most gallant soldier in the campaigns of 1862 and 1863, until the third day of July, when he was captured in Pettigrew's famous charge at Gettysburg. Thereafter, and until near the end of hostilities, he was a prisoner of war successively at Fort Delaware and at Johnson's Island, in Ohio.

On his return home he resumed the practice of law. In 1866 he was elected and served as a member of the Lower House of our State Legislature. In 1874 he was nominated by the Democratic party and elected a member of the House of Representatives of the United States Congress, in which he served by successive elections for six years with great acceptability to the people of his district and State and credit to himself. He was appointed a Justice of the Supreme Court by the late Governor Scales, to fill the vacancy occasioned by the death of Judge ASHE in February, 1887, and in 1888 he was elected to that office by the people. His health began to fail a year or two before his death, and during the February Term, 1892, of the Court, he was afflicted with a partial stroke of paralysis, from which he never entirely rallied. He was taken to the seashore at Beaufort in June, but not regaining his strength, toward the last of July he returned to his home, where he quietly passed away on 7 August, 1892.

Judge DAVIS was twice happily married—in 1852 to Miss Catharine, daughter of the late Robert Shaw, of Louisburg, and she having died in 1881, to Miss Louisa, daughter of the late Benjamin Kittrell, of Granville, in 1883; she survives him. By the former wife he left four children. He was for several years a Trustee of the University, and in 1887 it conferred upon him the degree of LL.D.

He was, from his youth, a moral man, and in the latter part of his life he was strictly religious, and a most devout communicant of the Protestant Episcopal Church. As a citizen he was public-spirited and patriotic; as a lawyer he was punctiliously cautious and liberal in his practice, and at the same time zealous and devoted to the interest of his client, and very successful in his practice; as a speaker, whether at the Bar, on the hustings, or in the legislative halls, his earnestness approached to eloquence, and he ever impressed upon his hearers the conviction that he was perfectly sincere in all that he uttered; as a legislator and statesman, he was constant in his intelligent efforts to promote, in every legitimate way, the welfare of his constituents, his State and his country; as a soldier, he was without fear and without reproach, and a fatherly kindness marked his conduct to those subject to his command; as a judge, he was learned, able, painstaking and eminently just; as a neighbor, he was the beneficient friend to all about him; as son, brother, father and husband, he was all that man could be—in a word, in all the relations of life he was true; therefore,

Resolved, That in the death of the Honorable JOSEPH J. DAVIS, the Bar and the Bench have lost one of their brightest ornaments, the State one of its noblest and most useful citizens, and the community one of the purest and best of men.

Resolved, That a copy of this report be presented to the Supreme Court by the Attorney-General with the request that it be spread upon the minutes.

Resolved, That a copy of the same be furnished the family of the deceased by the secretary of this meeting.

Respectfully submitted,

THOMAS C. FULLER,
J. B. BATCHELOR,
JOHN MANNING,
JOHN W. GRAHAM,
R. H. BATTLE.

REMARKS OF JUDGE FULLER.

Mr. Chairman:—It is not my purpose to pronounce a studied panegyric upon either the life or public services of the man, to the memory of whose virtues we would now pay a becoming tribute of respect. I rise simply to express my heartfelt admiration and high appreciation of that manliness and true noblity of soul exhibited by the illustrious deceased during the many years of our truest intimate friendship.

Judge DAVIS was a good man in all the relations of life, as husband, parent and master he was faithful, kindly affectionate and humane; he was a sincere man, always leaning to the side of the weak and friendless, laboring faithfully and earnestly for everything that tended to elevate the character and better the condition of his fellow-men. He instinctively scorned a mean action, and the man is not living or dead whom he ever intentionally wronged. Judge DAVIS was also a great man—he was great in real, solid qualities, in honest purpose, in sagacity, in practical knowledge and common sense. He was, therefore, ever powerful in the advocacy of

right and truth, and never shrank from the public advocacy of his views, whatever might be the effect upon his fortunes.

In his public and private life, Judge DAVIS was a conscientious man, and he died the Christian's death. His character for honesty and integrity could never be questioned; his public career, though long and eventful, was particularly free from anything that was impure or suspicious.

His example is one that is, in every particular, worthy of imitation, for like the counsellor Joseph of Arimathea, "he was a good man and a just."

REMARKS OF MR. R. H. BATTLE.

Mr. Chairman:—A native of the same county as our deceased brother, an admiring acquaintance since my boyhood and his young manhood when he was a student of the law at Chapel Hill, and an intimate friend since the courts were opend to us after the war, I but obey the dictates of an affectionate regard in submitting a few remarks in favor of the resolutions of the committee.

Seldom has a community, or a State, to mourn the death of such a man as Judge DAVIS. In him were combined as many virtues, as many noble qualities as man could well possess. Bold and modest, brave and gentle, candid and sincere, generous, charitable in deed, word and thought, patriotic, pious and pure, he passed through life, attracting and commanding each day he lived the admiration of all who were privileged to know him. His virtues were *positive* virtues, and his influence was a *positive* influence. His nature was too honest for him to witness dishonesty or meanness without denouncing it. Therefore, he was ever a positive blessing to his profession, in his own and the adjoining counties. A pettifogger could not associate with or be comfortable in the presence of such a man. He would be afraid of exposure and stern denunciation. For many years our friend was the senior member of the Franklin Bar, and to his juniors he was a brother indeed. He recognized it as his privilege, as well as his duty, to settle disputes and not to foment them, and his younger brethren have admired his example and followed it. And what his brethren saw the people saw, and directly and through them the people of his county have been elevated above the plane on which litigants contend in many sections. He was the personal friend of nearly every good man in his county. With his kind and generous nature he made the troubles of his neighbors his own, and in trying to help them he often suffered losses that proved of great and lasting inconvenience to him. But he bore the burden without complaint. He never lost a friend, for whom he was surety, as well as his money. In the army and in prison he seemed to care for his comrades more than himself. To those of them who were sick or wounded, he was like a loving brother. The devotion of his men to Captain DAVIS was intense, and every member of his company was his life-long friend, and so with each and all of his comrades in the service. After they returned home they ever looked to him as their leader. In their business he must advise them, and in their troubles defend and protect them, whether with or without fee. In return it was their great desire, and that of their friends, to promote him to a place of trust and honor, and their delight when he was elected to Congress was as great as if the honor were conferred on each of them. They knew he would do them, himself and his State much credit. That their confidence was not misplaced is matter of history. No district, no State, could boast a member with an eye more single to the best interests of his constituents and the people generally. Those who knew his characteristics were not surprised

at the industry and zeal with which he performed all the duties incident to the position, and the fearlessness with which he exposed and denounced the wrong in high places. The ability with which he discussed some of the economic and political questions which agitated the country during his three years of service was recognized by his associates in Congress, and some of his speeches were widely distributed for the information of the people of this and other States. Not even his political opponents could deny that he worthily represented the dignity and true manhood of his State and the South in repelling, on all occasions, the charges or insinuations of those who for party ends strove to excite or continue sectional animosity. He commanded their respect, while his constituents and others he so nobly defended were proud of their champion.

Had he wished it, Judge DAVIS might have gone on the Superior Court Bench soon after he returned from Congress, but he preferred the practice of his profession and the society of his family to judicial honors to be enjoyed at the expense of the pleasures of home for more than half the time; and so, for a few years, he filled no public station. This continued until the spring of 1887. The late Governor Scales, the late Judge Thomas S. Ashe and Judge DAVIS, a noble band of brothers, had been intimate friends in Congress, and on the death of Judge Ashe in February, 1887, Governor Scales was delighted that many leading members of the Bar presented the name of Mr. DAVIS for the vacancy on the Supreme Bench, and he promptly conferred on him the appointment. This met very general approval, and at the next State Convention of the Democratic party Justice DAVIS was unanimously nominated to be his own successor, and the nomination was ratified by the voters of the State at the snsuing election. Justice DAVIS came on the Bench with many of the highest qualifications for the place—legal learning, a thorough acquaintance with the practice of law, a strong mind, an intuitive sense of justice, a never failing courtesy, the universal confidence of the people, and a respect from his brethren of the Bar that bordered on affection. His opinions, to be found in Vols. 96 to 110, inclusive, of our Reports, are clear and sound, and have generally received the indorsement of a critical profession. In estimating these opinions, too, it should be remembered that he suffered from frequent attacks of sickness since he came to the Bench, and was often in his seat and busy at his work while so weak that if his sense of duty had not been so strong he would have been in bed; and one cannot but wonder that he did so much.

But after all, and with high appreciation of his services as a statesman and a jurist, I like best to think of our friend as I saw him in his private relations with members of his family and his intimate associates. He was ever instructive and interesting in conversation, and his purity, gentleness, candor, sincerity and rare unselfishness drew his intimates to him as with hooks of steel. I had always regarded him as a strictly moral man, but until, as a member of the Bench, he began to spend most of his time in Raleigh, I was not aware that he was a very religious and sincerely pious man, a devout Christian. To do deeds of charity and mercy was a great pleasure to him; and, like the Master he served, there was a large place in his heart for little children. I think now, with mournful pleasure—I will be pardoned for the personal allusion—of his insisting that I should not omit to pay him a visit every Sunday afternoon during the last year or two of his service here, and his letting me know that I would be doubly welcome when I brought my little daughter with me. I always found that he had been careful beforehand to provide something to please the child, and it

was hard to tell whether he or she derived the most pleasure from the visits. I was so fortunate as to see much of him in Beaufort, whither he had been carried in the hope of benefit from the sea breezes, for a few days, a month before his death; and though his mind was then somewhat enfeebled, and his articulation was indistinct, he recurred sometimes to his attachment to the church in which he was accustomed to worship when in Raleigh, and insisted upon sending to its treasurer what he calculated to be his dues to the end of the current month. Well might the Rector of that church, when called to Louisburg to bury what was mortal of our dead friend, depart from his custom to use only the Episcopal service without a sermon, and deliver a funeral discourse to the crowded congregation of his mourning friends, from the text, "Behold an Israelite indeed, in whom is no guile."

After a very intimate acquaintance with him for so many years, I believe I can say, with perfect sincerity, that, all in all, I have never known a better, nobler man than JOSEPH J. DAVIS.

"His youth was innocent, his riper age
Marked with some act of goodness every day;
And watched by eyes that loved him, calm and sage
Faded his last declining years away,
Cheerful he gave his being up—and went
To share the holy rest that waits a life well spent."

INDEX

CERTIORARI.

1. The writ of *certiorari* will be grnated, directing the trial judge to amend a case on appeal settled by him, when the affidavits upon which the application is based shows merits and negatives laches. *Broadwell v. Ray*, 457.

2. As a matter of practice, the Supreme Court will not hereafter send down a *certiorari* to supply defects in the record, unless sufficient excuse therefor is made to appear, but will, on motion of the Attorney-General or adverse party, dismiss the appeal. *S. v. Frizell*, 722.

CLERKS.

1. A clerk is not incompetent to take the *acknowledgment* of the execution of a deed because he is a subscribing witness to the document. *Trenwith v. Smallwood*, 132.

2. Clerks of the Superior Court will not incur the penalty prescribed in section 470 of The Code for failure to issue execution within sixty days, unless the plaintiff pays or tenders him his fees for that service. (*Williamson v. Kerr*, 88 N. C., 10, distinguished.) *Bank v. Boblitt*, 194.

CODE, THE.

RAILROAD.

1. Where a railroad company, in the construction of its road, erected an embankment leading to a bridge over a stream, whereby the natural channel of the stream was considerably contracted, and plaintiff's lands became liable to frequent overflows, but were not made entirely useless for agricultural purposes, being cultivated with varying results each year, and the damages such as could have been apportioned from time to time: *Held*, (1) that it was the duty of the railroad to so construct its road that a sufficient space should be left for the discharge of the water through its accustomed channel, whether artificial or natural, and this duty is a continuing one; (2) it was not contributory negligence on the part of the plaintiff to continue planting crops on the lands so subject to overflow (*Emry v. R. R.*, 109 N. C., 598, distinguished); (3) the delay of the plaintiff for a period less than twenty years to notify the company of his injuries, could not estop him or give the company a prescriptive right to maintain the embankment without liability for damages. *Knight v. R. R.*, 80.

2. While excavating by blasting is a legitimate means of construction of railways, and its prudent use is deemed to have been in contemplation in the assessment of damages for the right of way, nevertheless, where damage results therefrom to the lands of an owner adjacent to those condemned, because of the unskillful or careless method in which it is employed, or if the material adopted as an explosive is unnecessarily powerful, the corporation, or other person so employing such agency, will be liable for any damages produced thereby. *Blackwell v. R. R.*, 151.

3. The acquisition by a railway corporation of the right of way does not carry with it the privilege of throwing stones, or other material, by blasting, to a distance of two hundred yards or more on the lands of an adjacent proprietor, whereby the family of the latter is exposed to danger while engaged in their domestic duties. *Ibid.*

4. Where those engaged in the construction or operation of railways have been accustomed to give warning of approaching danger, and thereby induce the public to act upon the presumption that the usual signal will be given, and it is not given, whereby one who relied upon it was injured, the latter is entitled to recover damages. *Ibid.*

5. Where those engaged in the construction of a railway employ a powerful explosive in blasting—with the effects of which they will be presumed to have knowledge—it is their duty to cover the blast, or otherwise restrict the effect of the explosion, so as to prevent danger to others, and if this be impracticable, they should give timely warning of the explosion to all persons who may be in danger from it. *Ibid.*

6. Where the body of the plaintiff's intestate was found, just after defendant's freight train had passed, lying about 71½ yards north of the bridge of the defendant railway company, over which there was a plank crossing used by persons as a footway leading to a house to which he had just before declared his purpose to go, with the head resting against the end of a cross-tie, a fracture in the skull and bruises upon the hip and shoulders, but no other wounds: It was