ANNOTATIONS INCLUDE 179 N. C.

NORTH CAROLINA REPORTS

VOL. 115

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1894

REPORTED BY

ROBERT T. GRAY

---

2 ANNO. ED.

BY

WALTER CLARK

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7 " "	"	52	"
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SEPTEMBER TERM, 1893

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CASES REPORTED

CASES CITED

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPORTS

BY WALTER CLARK

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, chapter 309, and subsequent statutes, now C. S., 7671.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Edition. All the volumes have been reprinted with annotations, from 1 to 164, inclusive.

The first seven volumes of N. C. Reports were not official, but as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws 1871, ch. 112, and the duties were put on the Attorney-General, who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $2,000 and a Clerk at $600 per annum (C. S.).

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the amendments above referred to, being now C. S., 7671, was passed to author-

ize the Secretary of State to reprint the volumes already out of print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme Court, when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports, these statements of cases (until a very recent date) were always made by the Reporters, and not by the Judges, and the briefs were already omitted in our current volumes. At the request of the then Secretary of State and his successors, the writer undertook this work, and to make the volumes more salable, he was requested to annotate them, which was done for most of the time without any aid, as Shepard's Annotations were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no Index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse Index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 163 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these *Reprints* there was no Reporter to be paid, either by profits of sale as formerly, or by salary as now, the reprints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of the Reports then stored in Uzzell's Bindery, with the result that many additional volumes were required to be reprinted, and others that had already been annotated and reprinted, were reprinted a second time, the annotations, however, being brought down to date.

The current Reports were sold at $1.50, from which the commission of 12½ per cent for selling is deducted, *i.e.*, about 19 cents, making the net return to the State $1.31 per volume, but, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his

clerk. The next Legislature raised the price of the current Reports considerably. They are now $3.50.

In all the more recent volumes the statement of the cases has been made by the Judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation in the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix record which was often used instead of a statement and by the omission of the briefs. Even in using the original Reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports were very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdsworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English Judges were usually, if not always, delivered orally from the Bench and the Reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the Judges, under the guise, it is true, of "declaring the law," it has been often changed from what was announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the Judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the Courts allowed to be quoted as precedents. In France and all other countries, the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code applicable, without comment. In English-speaking countries, in which alone the Reports of decisions are allowed to be cited, the number of the volumes of the Reports in 1890 were 8,000. These have now increased to 30,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris."; A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the Courts of the present day are more likely to

be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary and the profession and the Courts must inevitably be submerged beneath the flood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require 3 volumes a year. If the briefs and redundant statements were still inserted as in the earlier Reports, it would require 10 volumes per year, taxing the shelf room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all Courts to reduce the size of current Reports by the Judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court.

Walter Clark

RALEIGH, N. C., 1 January, 1921.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1894

E. F. AYDLETT, ADMINISTRATOR, v. J. W. SMALL ET AL.

Will, Construction of—Undivided Interest in Another's Estate.

1. Inasmuch as a will speaks as of the time of testator's death, a devise by O. of her "undivided interest and property in the estate of the late G. C." passes no such part of the distributive share in such estate as has been collected and received by O., for, immediately upon its payment to O., it became her property and ceased to be a part of the estate of G. C.
2. It is otherwise as to such portion of the proceeds of the sale for partition of G. C.'s lands as had not been collected by the commissioner at the date of O.'s death, since the words "my undivided interest and property in G. C.'s estate" include whatever property her executor could lawfully demand, only because his testatrix was an heir or devisee of G. C.

PETITION by E. F. Aydlett, administrator *d. b. n., c. t. a.*, of Mary E. Overman, instituted in PASQUOTANK, for settlement of the estate of the testatrix, heard before *Armfield, J.*, at May Term, 1894, of said Court, upon exceptions to the report of the clerk.

Succinctly stated, the facts were as follows:

Mary E. Overman died 18 December, 1891, leaving a last will (2) and testament, dated 17 January, 1888. In the second, third, fourth and fifth items she used this language: "I give, devise and bequeath to . . . one-fourth of all my undivided interest and property in the estate of the late G. W. Charles."

The residuary clause (item sixth) is as follows: "All of the balance and residue of my estate, of every kind and description, real estate, notes, bonds, accounts, choses in action, personal property, household and kitchen furniture, I give, devise and bequeath unto my beloved

grandchildren, the said Penelope P. Burgess and George O. Burgess, and their heirs in fee simple forever."

A tract of land belonging to the estate of George W. Charles had been sold for partition among his heirs or devisees, and of the one-third of the purchase money collected by the commissioner, $943.95 had been paid to Mary E. Overman, the testatrix, on 16 December, 1891, as her share of the said one-third, and was deposited by her in bank. The balance of the purchase money was collected shortly after her death, and the share to which the testatrix was entitled ($1,898) was paid to her executor.

The court, holding that nothing appeared to the contrary by the will, construed the will to speak and take effect as if it had been executed immediately before the death of the testatrix (The Code, sec. 2141), and adjudged:

1. That, as there had been a sale of the property under order of the court, and as the commissioner had received the first payment on the purchase money, and paid over to the testatrix her share thereof, to wit, the $943.95, before her death, the amount so paid to her, although it could be traced and identified, had been divided before her death, when the will spoke and took effect, and did not, therefore, pass under the words "undivided interest and property."

(3) 2. That the defendants, other than the Burgess children, had no interest in the $943.95, under the will.

3. That the $943.95 belonged to the said Burgess children, under the residuary clause in the will.

4. That, as the balance of the purchase money had not been paid to the commissioner, and her share thereof, to wit, the $1,898, had not been paid over to the testatrix before her death, there had been no division before her death, when the will spoke and took effect, and the $1,898, which was paid to her executor after her death, passed to all of the defendants under the will, and the other defendants, as well as the Burgess children, had an interest therein, as per the provisions thereof.

The defendants, other than the Burgess children, excepted to this judgment, in that they were not also declared entitled to a share of the $943.95, as well as of the $1,898. The Burgess children also excepted, because they were not declared entitled to the whole of the $1,898.

Appeal by both classes of contesting defendants.

Grandy & Aydlett for defendants.
George and P. P. Burgess, J. H. Sawyer contra.

BURWELL, J. These appeals require us to construe the will of Mary E. Overman, which was written in 1888. She died in December, 1891.

It must be considered as speaking at the date of her death, when it took effect, there appearing in the will no reason why the words used by the testatrix should not be so interpreted. The Code, sec. 2141.

The words to be construed are these: "All my undivided interest and property in the estate of the late George W. Charles." The testatrix was one of the heirs at law and devisees of said Charles.

It does not seem to us that any property that she had actually received and appropriated from the estate can be said, with any propriety, to be a part of her "interest and property in the estate (4) of the late George W. Charles." Whenever an administrator pays to a distributee of the estate a part of his share, the distributee's "interest and property" in the estate is reduced *pro tanto*. When he has paid all the share, the distributee's "interest and property" in the estate is destroyed. Prior to the payments the right to demand and receive the distributive share belonged to the estate of the distributee. The money belonged to the estate of the intestate. As soon as the payment was made the money became *eo instanti* a part of the estate of the distributee, and ceased to be a part of the estate of the intestate. Hence, the sum of money ($943.95) which the testatrix had to her credit in bank at the time of her death, when, as stated above, her will speaks, constituted no part of her "interest and property in the estate of the late George W. Charles." It had been paid to her because she was one of the heirs and devisees of said Charles; but, when paid, it ceased to be, in any sense, a part of the Charles estate. This seems clear. And it seems even more evident that this sum, after it was received by her, constituted no part of her "*undivided* interest and property" in that estate. True, it is very evident that she got this particular money from the Charles estate; but the phrase under consideration cannot be held to include it.

We think, however, that those words do cover that portion of the proceeds of the sale of the Charles land which had not been collected by the commissioner at the time of her death, and which was thereafter paid to her executor. She had consented that the land might be sold for partition; that it might be sold and the proceeds divided among the heirs and devisees of George W. Charles. The sale had been made, but the division of the proceeds was not finished. Had she lived, she would have taken a share of the balance of the purchase money in her character as heir and devisee of George W. Charles.

Speaking at her death by her will, she declared her intention (5) as to all her "undivided interest and property in his estate." The words include whatever property her executor could lawfully demand only because his testatrix was one of the heirs or devisees of Charles.

His title to the money in the bank ($943.95) needed no other support than the fact that he was the executor of her will. His right to demand of the commissioner a share of the proceeds of the sale of the land rested necessarily on two facts: his executorship and the fact that she was an heir and devisee of Charles.

Affirmed in each appeal.

JOHN L. HINTON v. H. F. GREENLEAF ET AL.

Practice—Case on Appeal—Remand Instead of Dismissal.

When the judge below allowed amendments proposed by the appellee to a statement of the case on appeal served by the appellant, and ordered "that the case on appeal be as stated by the defendant, with said amendments incorporated therein," and the clerk sent up the appellant's statement, the appellee's exceptions and the judge's order sustaining the exceptions: *Held*, that, although in contemplation of law there is no "case settled on appeal," and a motion to dismiss might be allowed, it is preferable to remand the case, to be redrafted, according to the judge's order, so that the matter may be disposed of on its merits.

Appeal from *Brown, J.*, at Special Term, 1894, of PASQUOTANK. In this Court the plaintiff's counsel moved to dismiss the appeal for want of a "case."

It appears that the appellant served his statement of the case on appeal, the appellee filed exceptions thereto, the case was settled by the judge, allowing the amendments proposed by the appellee, and
(6) ordering "that the case on appeal be as stated by the defendant, with said five amendments incorporated therein." Thereupon, the clerk sent up the appellant's statement, the appellee's exceptions, and the judge's order sustaining the exceptions.

W. J. Griffin and Pruden & Vann for plaintiff.
Grandy & Aydlett for defendants.

MACRAE, J. There is, in contemplation of law, no "case settled on appeal." And we might dismiss the appeal for want of a case. *Mitchell v. Tedder,* 107 N. C., 358. We prefer, however, that the matter should be disposed of upon its merits, and will direct that it be remanded, in order that the case on appeal may be redrafted, according to the order of his Honor below. This is necessary, because the principal point before us was an objection to his Honor's charge upon the presumption

of law and burden of proof. In the statement of the case presented by the appellant the exception is stated to the charge of his Honor, setting out the language objected to. In the exceptions of appellee the whole of his Honor's charge is set out. This differs from that portion objected to by appellant. We are uncertain whether his Honor intended that the charge, as stated by appellant, was to be amended by the addition of that stated in appellee's exception as the judge's charge, or whether the amendment was to be inserted in place of that set out in the appellant's statement. What the presiding judge did instruct the jury upon the point in question will, of course, have an important bearing upon the determination of the question involved in the appeal.

Remanded.

Cited: McDaniel v. Scurlock, 115 N. C., 297; *S. v. King,* 119 N. C., 910; *Stevens v. Smathers,* 123 N. C., 499; *Gaither v. Carpenter,* 143 N. C., 241.

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(7)

JOHN L. HINTON v. W. P. WALSTON.

Mortgagor and Mortgagee—Mortgagor in Possession—Growing Crops—Agricultural Lien—Severance of Crops.

1. A mortgagee of land is not the owner of the crops growing thereon, and if the latter be severed before entry by the mortgagor he cannot recover them except by charging them in equity in a suit between the parties only, upon the insolvency of the mortgagor and the inadequacy of the land as security.
2. Where a mortgagor in possession has given a lien upon the crops for advances to aid in cultivating them, such lien is superior to that of the mortgagee of the land.
3. Where one in adverse possession of land severs the crops before recovery in an action by the owner of the land, the latter cannot assert any legal right to the crops, and an application for sequestration, in equity, of such crops will not be allowed to the prejudice of an agricultural lienor.

ACTION, tried at March Term, 1894, of CAMDEN, before *Armfield, J.,* and a jury, the object being the recovery of a certain lot of corn in the possession of the defendant Walston. The defendant C. Guirkin, trustee, was upon his own motion made a party defendant.

Upon the trial it appeared that one Temple had conveyed the land upon which the crops were grown to E. V. Hinton, trustee, to secure a debt due to the plaintiff, and had thereafter sold and conveyed the land

to the defendant Walston, who, to secure the purchase money, conveyed to W. J. Griffin, trustee. In August, 1891, E. V. Hinton, trustee, sold the land under the power of sale, and conveyed to the plaintiff. Prior to the advertisement of the sale under the deed of trust, and while Walston was in possession, the latter executed a chattel mortgage to the defendant Guirkin, trustee, to secure a debt due to Guirkin & Co., which was for money advanced for cultivation of the crops raised in the year 1891, which were included in the chattel mortgage. The plain-
(8) tiff was not a party to the chattel mortgage and had no notice thereof, except from its registration.

The corn claimed in this action was cutivated and raised upon the mortgaged land by Walston, and not by any tenant of his, and was growing at the time of the sale by Hinton, trustee. Plaintiff brought suit for the land to September Term, 1891, and pending the action the crops were severed and housed on the land. Judgment was rendered in favor of the plaintiff in such action in September, 1892. Immediately after the severance of the crops, and while the action for the recovery of the land was pending, the plaintiff brought this action of claim and delivery for the crops.

The following issues were submitted:

"1. Is the plaintiff the owner and entitled to the possession of the property described in the complaint?

"2. What is the value of the property?"

His Honor charged the jury that, upon the evidence, they should answer "No" to the issue, "Is the plaintiff the owner and entitled to the possession of the property described in the complaint?" To this charge the plaintiff excepted and, after verdict and judgment for the defendant, appealed.

W. J. Griffin and Pruden & Vann for plaintiff.
Grandy & Aydlett for defendant.

SHEPHERD, C. J. Conceding, for the purpose of the argument, that the relationship substantially of mortgagor and mortgagee still exists between the plaintiff and the defendant Walston, it is clear that the plaintiff as mortgagee cannot recover the crops which are the subject of this controversy. These crops were grown by the mortgagor while in possession, and were actually severed before the entry of the mortgagee. In *Killebrew v. Hines,* 104 N. C., 182, it was held that the mortgagee is not the owner of the growing crops of the mortgagor in possession, and that if they are severed before entry the mortgagee cannot
(9) recover them. It is true that it was suggested in the opinion that,

as between the parties, the crops, although severed, might, before removal, be charged in equity upon the insolvency of the mortgagor and the inadequacy of the land as security; but it is plain that equity would never extend such relief to the prejudice of third persons who have acquired interests in the crops, and especially as against one like the defendant Guirkin, who has not only, it seems, acquired the legal title by virtue of his chattel mortgage and actual severance of the crops, but also a superior standing in equity, by reason of his having supplied the means necessary for the production of the same.

So, even independent of the Act of 1889, ch. 476 (which it is argued applies only to formal agricultural liens), the plaintiff could not invoke equitable relief. *Carr v. Dail,* 114 N. C., 284. In this case, however, no equitable relief is asked, and even as against the mortgagor it could not be granted if prayed for, as there is nothing in the case to show the insolvency of the mortgagor or the inadequacy of the security.

The plaintiff, then, relying strictly upon his alleged legal rights, could not recover as against the mortgagor; *a fortiori,* he could not recover as against the defendant Guirkin.

On the other hand, if we treat the case as if the relationship of the mortgagor and mortgagee had ended, the plaintiff would be equally unfortunate, as it is well settled that when one in the adverse possession of land severs the crops before recovery, the owner of the land cannot assert any legal claim thereto. *Faulcon v. Johnston,* 102 N. C., 264. His remedy, pending an action of ejectment in case of insolvency, is by injunction or the appointment of a receiver, who collects the rents, in order that the right to the *mesne* profits may not be defeated. *Killebrew v. Hines, supra.* No such interlocutory relief was invoked by the plaintiff, and even if granted, it would not, for the reasons above given, have affected the rights of Guirkin.

This is a purely legal action, but even if equitable relief had (10) been prayed for, the plaintiff, as we have seen, could not have recovered. The conclusion of his Honor, therefore, in any point of view was correct.

Cited: Credle v. Ayers, 126 N. C., 14.

JACOB WOOL v. TOWN OF EDENTON.

Riparian Owner—Duty of Incorporated Towns to Locate Wharf Line—Demand by Riparian Owner—Mandamus.

1. Under sec. 2751 (1) of The Code, as amended by cc. 17 and 349 of Acts of 1893, it is not only the duty of the councilmen of an incorporated town to regulate the line on deep water for the purpose of locating entries, but also for the purpose of indicating the line along which wharves may be built; and it is also incumbent upon a riparian owner to demand the location of such line before proceeding to build his wharf.
2. A petition by a riparian owner to the councilmen of an incorporated town, in which he asks that they relocate the line of entry formerly fixed by them and that they make a general line on the deep water in front of the high land of the town, so designated that each of the owners of the high land may know the line so established, is a sufficient *demand*, and it is not essential that he should notify the board of his purpose to proceed immediately to erect a wharf.
3. A petition by a riparian owner for a *mandamus* to compel the councilmen of an incorporated town fronting navigable water to designate the wharf line, which alleges his right to have the councilmen to act and their refusal to discharge their duty in the premises, is sufficient, without an allegation that he had made an entry or without giving any reason for his demand other than that he was a riparian owner.
4. In such case, the petitioner having shown a clear legal right which he cannot exercise until the councilmen perform a duty imposed upon them by statute, and which they refuse to perform, *mandamus* will lie to compel performance of such duty.

(11) MANDAMUS, at Spring Term, 1894, of CHOWAN, before *Armfield, J.*, and a jury, it being an action to compel the defendant to lay and regulate the deep-water line on Edenton Bay, in front of the plaintiff's high land, the same being located in the incorporated town of Edenton. The action was formerly heard upon complaint and demurrer, the latter of which being overruled and the defendant answereing over, the cause is now heard upon the pleadings filed and herewith sent up.

The court is asked to compel the defendant to lay off and regulate the line of deep water on Edenton Bay, an arm of Albemarle Sound, in accordance with the prayer of the complaint and with the demand of the plaintiff made upon defendant, attached to the complaint and marked "Exhibit A," which demand and refusal of defendant is admitted. The said demand is in the following words:

To the Board of Councilmen of Edenton, N. C.

Your petitioner, Jacob Wool, asks of your body to relocate the line of entry fixed by this board at its meeting on 6 March, 1888, and locate

it on deep water in front of his high land on Blount Street, so that he can reach the deep water of Edenton Bay, or Albemarle Sound, in front of his land. He also asks that your board shall make a general line on deep water of said sound and bay in front of the high land of the town of Edenton, so designated that each of the owners of the high land may know the line so established.

his
JACOB X WOOL.
mark.

Witness: W. J. LEARY, SR.
This 7 March, 1893.

After the jury was impaneled and the pleadings read, counsel (12) for defendants moved the court to dismiss the action, for that the demand marked "A," above set out, was not in accordance with the statute (Laws 1893, ch. 17), the said demand not specially requesting the line "to which wharves may be built."

Plaintiff's counsel insisted—

1. That this demand was sufficient of itself, both under The Code, sec. 2751, subsec. 1, and under ch. 17, Laws 1893.

2. That if the said demand be insufficient in terms, it is cured by ch. 349, Laws 1893.

3. That, regardless of any notice or demand from the plaintiff, it is the duty of the defendant to regulate the line of deep water on Edenton Bay fronting the town of Edenton.

4. That this cause having been heard upon demurrer of the defendant, and the same being overruled, the trial is now upon the merits of the action to determine the facts at issue as to the just location of said water-line.

The court, after hearing arguments of counsel, intimated an opinion adverse to the plaintiff, whereupon the plaintiff submitted to a nonsuit and appealed.

C. M. Busbee and Grandy & Aydlett for plaintiff.
W. M. Bond and Pruden & Vann for defendant.

AVERY, J. The second paragraph of subsec. 1, Code, 2751, amended by cc. 17 and 349, Laws 1893, is as follows: "And when any such entry (of land in front of a riparian proprietor on navigable water and extending to the deep-water line) shall be made in front of the land in any incorporated town, the town corporation shall regulate the line on deep water to which wharves may be built: *Provided,* that this act shall not affect existing entries, existing rights, or pending (13)

suits." Prior to the passage of the two amendatory acts in 1893, it had been held that, until it appeared affirmatively that the authorities of an incorporated town situated upon navigable water had marked out the line of deep water, the Secretary of State might refuse to issue a grant, under the provisions of The Code, sec. 2751, to the riparian owner of the land covered by water and extending out to the channel on his front. *Wool v. Saunders,* 108 N. C., 729. Under the law now in force it is made the duty of the authorities of the incorporated town, "when any such entry is made," not in terms to fix the line of deep water to which entries may extend, but to "regulate the line of deep water to which wharves may be built."

The plaintiff Wool has, and had before he made an entry, a qualified property in the land covered by water and extending on his front out to the line where it became navigable. *Bond v. Wool,* 107 N. C., 139; *Zimmerman v. Robinson,* 114 N. C., 39. It was formerly the duty of the councilmen to regulate the line on deep water for the purpose of locating entries. The duty of locating still subsists, but it is now enjoined for the purpose of indicating the line along which wharves may be built. The Legislature has the power, through the authorities of a town as agents, to regulate in a reasonable manner the location of the navigable water, whether to mark the boundary of entries or the points for building wharves (*Bond v. Wool, supra*), and the plaintiff would have had the right to build a wharf on the deep water in his front if the Legislature had conferred no such power of regulation, or if his land had been situated outside of an incorporated town. *Bond v. Wool, supra.* The law as amended makes it now his duty to demand the location of the line on which he may build a wharf in front of the town of Edenton before proceeding to build, just as the provision of the section cited from The Code made the location of that line necessary, in order to subject the land to entry. The plaintiff, as a riparian owner, could not build a wharf and avail him-
(14) self of the benefit of his qualified property, except subject to the regulations prescribed by the Legislature, and therefore it became necessary that he should demand that the line be designated.

On 7 March, 1893, the plaintiff submitted this demand in the shape of a respectful petition, and alleges in his complaint that the town refused to act upon it. He likewise avers that it is the duty of defendants to regulate the line of deep water, and that they have attempted, but failed, to so locate it that he may be able "to enjoy the use of his riparian rights." He prays that defendants be compelled "to locate the line of deep water in front of his said property."

It is true that in the second paragraph of the complaint he alleges that he has the right to make entry of the land on his front; but he would

have been entitled to any relief that the facts warranted him in demanding, without making the formal prayer referred to. Having alleged his right to have the councilmen act, and their refusal to discharge the duty imposed by law, it was not material whether he incorporated in his complaint the fact that he had made an entry or gave no explicit reason therein for making the demand, other than that he was a riparian owner. The courts are presumed to know that the refusal to act deprived him of the use of his property for a most important purpose.

But it is insisted, in effect, that if the plaintiff has alleged in the complaint that he made the proper demand, the proof does not sustain the allegation. In his petition he asks for two things. First, that the board relocate the line of entry fixed by them on a former occasion; second, that the town shall "make a general line on the deep water of said sound and bay in front of the high land of the town of Edenton, so designated that each of the owners of the high land may know the line so established." It was not essential that he should notify the board of his purpose to proceed immediately to erect a wharf. They were (15) presumed to know that it was his right to build it, and their duty, on demand, to indicate to him where he should build.

When this case was before us at the Fall Term, 1893 (113 N. C., 33), we were not advertent to the fact that the law had been amended; but the amended act leaves the same duty incumbent on the defendants, though it declares that it shall be done to attain a different end, and since the plaintiff shows that they still owe that duty to him, and have refused, on demand, to discharge it, it is manifest that *mandamus* will lie to compel compliance with the statute by designating the deep-water line on which the plaintiff may build a wharf, just as under sec. 2751 the defendants could have been made to locate the outer line of an entry. 113 N. C., 35; *Koonce v. Commissioners,* 106 N. C., 192.

The plaintiff has a clear legal right which he cannot exercise until the defendants perform a positive duty imposed upon them by statute, and which they have refused to discharge. There being no other adequate remedy, *mandamus* lies. State v. Justices, 24 N. C., 430.

The judgment of nonsuit must be set aside and

New trial.

Cited: Wool v. Edenton, 117 N. C., 2; *S. v. Twiford,* 136 N. C., 607.

F. M. MULLEN v. NORFOLK AND NORTH CAROLINA CANAL COMPANY.

Petition to Rehear.

Where, upon a petition to rehear a case decided in this Court, it does not appear that the decision was hastily made or that any material point of fact or law or any direct authority was overlooked, the rehearing will be refused.

(16) PETITION to rehear the case between the same parties decided at February Term, 1894, and reported in 114 N. C., p. 8.

W. J. Griffin for petitioner.
Battle & Mordecai and W. D. Pruden for defendant.

PER CURIAM. This is a petition to rehear a case in which the opinion was filed last term, 114 N. C., 8. It does not appear that it was decided hastily, nor that any material point of fact or law, or any direct authority, was overlooked. The petition must, therefore, be dismissed. *Hudson v. Jordan,* 110 N. C., 250, and cases cited in Clark's Code (2 Ed.), 712.

Petition dismissed.

Cited: Weisel v. Cobb, 122 N. C., 70; *Hodgin v. Bank,* 125 N. C., 503, 511.

W. H. BRAY v. W. E. CARTER ET AL.

Agricultural Lien—Husband and Wife—Crops Made by Husband on Wife's Land not Subject to Mortgage by Husband Without His Wife's Knowledge or Consent.

Where a wife has not leased her land to her husband or given him any proprietary use or interest therein, a chattel mortgage conveying the crops grown on such land, given by the husband without the knowledge or consent of the wife, for supplies furnished the husband in cultivating the crops, gives the mortgagee no right to recover such crops.

ACTION tried at Spring Term, 1894, of CURRITUCK, before *Armfield, J.,* and a jury, begun before a justice of the peace for Currituck, to recover a lot of corn, claimed under a chattel mortgage executed by the husband alone.

Grandy & Aydlett for plaintiff. (18)
W. J. Griffin for defendants.

SHEPHERD, C. J. This is an action in the nature of replevin to recover a crop of corn cultivated on the land of the *feme* defendant. The plaintiff claims under a chattel mortgage executed by her husband, but there is no evidence tending to show that she knew of or assented to the execution of the said mortgage, or that she had leased her land to her husband, or had given him any proprietary use or interest in the same. The case is, therefore, clearly within the principles laid down in *Wells v. Batts,* 112 N. C., 283, and *Branch v. Ward,* 114 N. C., 148, and it was error in holding that the plaintiff was entitled to recover any part of the crop.

New trial.

Cited: Thompson v. Coats, 174 N. C., 198; *Guano v. Colwell,* 177 N. C., 220.

W. S. LOWE ET AL v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

Practice—Refusal of Motion to Dismiss Action not Appealable—Contract—Insurance Policy.

1. No appeal lies from the refusal of a motion to dismiss an action.
2. A stipulation in a policy of insurance that no suit to recover any sum thereunder should be maintained unless brought within one year from the time of the alleged loss is valid and enforcible, being a contract not in contravention of the statute prescribing the time within which actions may be brought.

APPEAL at Spring Term, 1894, of CHOWAN, from *Armfield, J.,* (19) for refusal of motion to dismiss.

The facts necessary to an understanding of the decision appear in the opinion of *Associate Justice Avery.*

Pruden & Vann for plaintiff.
J. S. Manning for defendant.

AVERY, J. It has been repeatedly held by this Court that while an appeal lies from an order dismissing an action, a refusal to dismiss does

not "determine the suit or prevent a judgment from which an appeal may be taken," and is not reviewable in the appellate court without further proceedings in the cause. *Plummons v. Improvement Co.,* 108 N. C., 614, and other cases cited in Clark's Code, pp. 559 and 560. But as we can see that the ends of justice may be subserved in this particular case by passing upon the main question involved in the controversy, we have concluded that it is proper to do so.

The stipulation in the policy which gave rise to the action in *Muse v. Insurance Co.,* 108 N. C., 240, was that "no suit or action against this corporation for the recovery of any claim by virtue of this policy shall be sustainable, etc., unless such suit or action be commenced within twelve months next after the loss shall occur." The condition of the policy sued on is that "no suit or proceeding in law or equity shall be brought or arbitration required to recover any sum, unless the same is commenced within one year from the time of the alleged accidental injury." In *Muse's case* it was held that the word month must be construed to mean a calendar month, and, therefore, that twelve months was the same as one year. It would follow that the stipulation in our case fixes precisely the same limit as was prescribed in *Muse's case,* and is not, therefore, an agreement in contravention of the statute. The fourth condition of the policy, the material portion of which we have
(20) quoted, being, as was declared in *Muse's case,* a contract, and not a statute of limitation, and if it is not illegal, because contrary to some principle of the statute or common law, it must be valid and enforcible. We see no force in the suggestion that the statute does not apply to a "person licensed to do" accident insurance business, as well as to issue policies upon lives or to cover losses by fire. Conceding that it applies to all persons engaged in taking risks of either kind, the terms of the policy sued upon prescribe the same limit as that fixed in the law, and is therefore, for the reason we have stated, valid. The "accidental injury" (the drowning of the insured) occurred 28 September, 1889, and the first action was instituted by issuing summons, dated 3 October, 1889. Judgment of nonsuit was entered on 20 April, 1892, at the Spring Term, 1892. This action began by summons issued 26 April, 1893, more than twelve months after the judgment of nonsuit, from which there was no appeal, was rendered, and more than three years from the time of the accidental injury, on 28 September, 1889. In the absence of any proof tending to show a waiver of the benefit of this stipulation on the part of the defendant company, we must hold that it is binding upon the plaintiffs, and operates to defeat the action, not as a statute of limitation, but as a reasonable agreement insisted on by the defendant, in order to avoid the danger incident to making defense after the lapse of a

long time intervening between the loss or injury and the institution of suit. The appeal is premature.

Appeal dismissed.

Cited: Whitaker v. Dunn, 122 N. C., 104; *Gerringer v. Ins. Co.,* 133 N. C., 414; *Modlin v. Ins. Co.,* 151 N. C., 45; *Heilig v. Ins. Co.,* 152 N. C., 360; *Holly v. Assurance Co.,* 170 N. C., 5; *Faulk v. Mystic Circle,* 171 N. C., 302; *Williams v. Bailey,* 177 N. C., 40.

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(21)

C. DELAFIELD ET AL. v. LEWIS MERCER CONSTRUCTION COMPANY.

Superior Court—Duration of Term—Term Ends When Judge Leaves the Bench.

1. The term of a Superior Court does not extend to the end of the period allotted to it by law, but only "until the business is disposed of."
2. There can be no session of a court without a judge; hence, when the judge leaves the bench for the term, although no notice is given of the final adjournment, or it is ordered to expire by limitation, the term ends and the judge cannot hear any matters out of the courthouse, except by consent, unless it is "chambers" business.
3. Sec. 22 of Art. IV of the Constitution, requiring the courts to be always open, must be construed in connection with sec. 11 of the same article, and does not apply to the *terms* of courts and matters connected therewith.
4. The time within which notice of appeal or case on appeal is to be served must be computed from the actual adjournment of the court, *i.e.*, the time when the judge leaves the bench, and not from the constructive expiration of the term.
5. When there is no case on appeal legally before this Court, the appellee is not entitled to dismiss the case, but the judgment below will be affirmed in the absence of error in the record proper.

APPEAL from *Graves, J.,* at Spring Term, 1894, of CRAVEN.

The appellees except here for that the appellants' statement of case on appeal was not served on them within the time required by law. The facts found by the court below are: "That at May Term of said court, at which judgment of confirmation of a sale of defendant's property was rendered, and from which the appeal was taken, on Friday, 8 June, 1894, about noon, all the business before said court having then been disposed of, the judge left the bench and stated to the sheriff that he need not formally adjourn the court, but let it expire by law, and the judge of said court signed the record of said term and left said county

(22) and the judicial district in which said county is situated, on said 8 June, 1894.

"That on 19 June, 1894, the appellants presented the case on appeal to the attorneys for appellees, who informed appellants' attorneys that the time of service thereof had expired the day before, and that attorneys for appellees indorsed thereon the following, as appears from the original: 'Service of this case on appeal accepted this 19 June, 1894, expressly reserving the right to except to the time of service thereof, our contention being that the same is not in time, as required by law.' "

O. H. Guion and W. W. Clark for plaintiffs.
W. D. McIver for Chattanooga Foundry and Pipe Works.
Iredell Meares and C. R. Thomas for other defendants.

CLARK, J. There was once, to some extent, an idea prevalent that the term of a court extended to the last Saturday of the one, two, or three weeks for which it might be held, although the judge might have left. This idea of a court in session without a judge is not warranted by law. Equally by The Code, sec. 910, and by the amendatory Act of 1885, ch. 180, it is provided that the court shall be held "and continue in session" for each county for one week or more (as is there specified), "unless the business is sooner disposed of." Thus the session or term is not for the week or weeks specified, but only "until the business is disposed of." While this makes it the judge's duty to continue the session the full time allotted, unless all the business is transacted, yet, when he leaves the session or term is at an end, for no more business can be "disposed of." He cannot hear matters of either a civil or criminal nature out of the courthouse, except by consent, unless it is "chambers" business and not "term" business. The Constitution, Art. IV,
(23) sec. 22, requiring the courts to be always open, must be construed in connection with sec. 11 of the same article, and does not apply to the terms of courts and matters connected therewith. *McAdoo v. Benbow,* 63 N. C., 461.

In *Foley v. Blank,* 92 N. C., 476, and *Branch v. Walker, ib.,* 87, this idea of a "constructive" term of the court till the end of the week, or two weeks, was negatived, and it was pointed out that the court was actually adjourned when the judge left for the term, and the evils were referred to which would result from recognizing as valid the filing of any pleading or anything else done after the judge left. In that case, as in this, his Honor had directed that the court "should remain open and expire by limitation," under the mistaken impression that the court could be constructively open after he had left. The judge, when he

leaves the bench for the term, should cause due notice to be given by the crier of the final adjournment. This is regular and orderly, and will give notice to any having undisposed business to be brought to the attention of the court. But should the judge omit to do this, or even mistakenly direct, as in above cases, that the court should remain open till "the term expire by limitation," still there is an actual adjournment when he leaves the bench for the term. There is no court when there is no judge to hold it, and there can be no constructive session after he has left. Hence, in all the cases since, as to the time within which notice of appeal or case on appeal is to be served, the time has been computed from the actual adjournment, meaning the time when the judge left the court, and not the constructive expiration of the term which had been negatived. *Turrentine v. Railroad,* 92 N. C., 642; *Walker v. Scott,* 104 N. C., 481.

In the latest case, *Rosenthal v. Roberson,* 114 N. C., 594, it is expressly held that "the time allowed, whether by statute or consent, for service of the case on appeal is to be counted not from the last day of the two weeks during which the court could have been (24) held, but is to be computed from the day of the actual adjournment." In the present case the judge left the county and district on 8 June, and the case on appeal was not served till 19 June. This was more than the statutory time of "ten days from entry of appeal taken," such appeal having been taken during the term. There must be some time prescribed and observed, a delay beyond which to serve the case on appeal will forfeit the right to do so. The Legislature has extended that time to ten days. The appellant not having served his case on appeal within that time, there is no case on appeal legally before us. This does not entitle the appellee to dismiss the case, but there being no errors in the record proper, we will affirm the judgment. *Cumming v. Huffman,* 113 N. C., 267.

It is not improper to add that if the "case" were properly before us, there are no merits in the appeal. The judge finds as a fact that the property sold for a full and fair price. As to the averments in affidavits of the interest of the commissioner in the purchase, the objection was overruled by the judge, and the appellant did not ask that the facts be found. *Milhiser v. Balsley,* 106 N. C., 433.

Affirmed.

Cited: Hinton v. Ins. Co., 116 N. C., 25; *Whitehead v. Hale,* 118 N. C., 604; *Ferrell v. Hales,* 119 N. C., 211; *Guano Co. v. Hicks,* 120 N. C., 29; *Barnes v. R. R.,* 121 N. C., 506; *Mecke v. Mineral Co.,* 122 N. C., 796; *McCown, ex parte,* 139 N. C., 124; *Barger v. Alley,* 167 N. C., 363; *May v. Ins. Co.,* 172 N. C., 796; *Cogburn v. Henson,* 179 N. C., 632.

ULMAN, BOYKIN & CO. v. U. S. MACE AND ELLA R. MACE.

Contract of Married Woman—Suit to Charge Separate Estate of Married Woman—Practice.

In a suit to charge the separate estate of a married woman with her contract it is necessary that the complaint shall specifically set out and describe the property sought to be charged.

(25) APPEAL from *Graves, J.*, Spring Term, 1894, of CRAVEN.

Judgment by default having already been entered against the defendant U. S. Mace, the action was heard as to the defendant Ella R. Mace only.

The plaintiffs, at the preceding term of court, having been allowed to amend their complaint as to the defendant Ella R. Mace, filed the following amendments to said complaint, which alone are material, and present the points involved in the demurrer:

"1. That, as the plaintiffs are advised, informed and believe, the contracts for the goods, wares and merchandise set out in articles 1 and 2 of the complaint and in the invoices or accounts attached to said complaint as a part thereof were made by the defendant Ella R. Mace, with the written consent of her husband, said defendant U. S. Mace; that said Ella R. Mace has a separate estate, real or personal, and said contracts inured to her benefit, and were for the benefit of said estate. That said U. S. Mace and Ella R. Mace are husband and wife, but that at the time said goods were sold and delivered to them, as the plaintiffs are informed, advised and believe, the said U. S. Mace and Ella R. Mace were trading and doing business in the city of New Bern, N. C., under the firm name and style of Mace & Co., and that said goods were sold to Mace & Co., and delivered to said Mace & Co., at said city, upon the written orders of said Mace & Co., signed by U. S. Mace for Mace & Co., in the firm name, as plaintiffs believe and allege, and that such written orders and letters for said goods constitute in law a valid contract, binding on the defendant Ella R. Mace, though a married woman, the same being made with the full consent of her said husband in writing, and inuring to the benefit of her separate estate, as aforesaid. That as plaintiffs are advised, informed and believe, the said written orders and letters for the said goods were written by and are in the handwriting of U. S. Mace, the husband of the said Ella R. Mace.

(26) "2. That, as plaintiffs are advised, informed and believe, U. S. Mace is insolvent, while Ella R. Mace is solvent, and that said Ella R. Mace was the solvent member of the firm of Mace & Co.

at the time the goods were purchased by said firm from plaintiffs, and plaintiffs relied upon her solvency, and look to all members of said firm as responsible for the indebtedness."

Wherefore, plaintiffs demand judgment that they do recover of said defendant Ella R. Mace the sum of $454.06 and their costs of suit, to be levied and collected of her separate estate, and for such other relief as they may be entitled to in law and equity.

Counsel for defendant Ella R. Mace demurred *ore tenus* to the complaint as amended, for that it did not state facts sufficient to constitute a cause of action, in that it failed to describe or set out with sufficient definiteness the separate estate of the *feme covert*. On motion of plaintiffs' counsel he was permitted to amend the complaint by striking out the words "real and," so that the same should read, "That the defendant Ella R. Mace has a separate personal estate." Defendant demurred *ore tenus* to the complaint as further amended, for the same cause as stated. Demurrer overruled. Defendant excepted.

Issues were submitted to the jury, and upon verdict for plaintiffs judgment was rendered "that the plaintiffs do recover of the defendant Ella R. Mace the sum of $113.50, with interest from (27) maturity, 1 August, 1891, until paid, and the costs of this action to be taxed by the clerk, to be levied and collected of the separate personal estate of the defendant Ella R. Mace, and that execution issue accordingly."

C. R. Thomas for plaintiffs.
O. H. Guion for defendant.

PER CURIAM: His Honor was probably unaware of the unreported case of *Jones v. Craigmiles,* 114 N. C., 613, in which it was held that the property should be described.

Reversed.

Cited: Bazemore v. Mountain, 126 N. C., 317.

(28)

HALE BROTHERS v. B. F. WHITEHEAD.

Appraisers of Homestead—Qualification as Jurors.

There is no requirement that appraisers to allot the homestead shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," *i.e.*, as ordinary or regular jurors. (Sec. 502 of The Code).

APPEAL from the return of appraisers who laid off the homestead of the defendant, heard before *Graves, J.*, and a jury, at March Term, 1894, of HALIFAX.

The following issues were submitted to the jury:

"1. Did appraisers allot to defendant, as his homestead, land of less value than one thousand dollars?

"2. Was the appraiser L. M. Alston a freeholder?

"3. Was the appraiser L. M. Alston excepted to before he was sworn?"

The jury answered the first issue "No," the second "No," and the third "Yes."

Thereupon the defendant asked judgment upon the verdict that the return of the appraisers be set aside because no proper homestead had been allotted him according to law, in this, that the appraiser L. M. Alston was not a freeholder and a proper person to act as such appraiser. The motion was refused and, after judgment for plaintiff, defendant appealed.

Thomas N. Hill for plaintiffs.
Day & Harrison for defendant.

CLARK, J. The appraisers to allot the homestead are required by The Code, sec. 502, to be discreet persons, "qualified to act as jurors." The plain import of this language is that they shall have the quali-
(29) fications of regular jurors. These are not required to be freeholders. Tales jurors are required by The Code, sec. 405, to be taken from bystanders qualified to serve as jurors, and by The Code, sec. 1733, such tales jurors are further required to be freeholders, and must not have served on the jury within that court within two years. This shows that these extraordinary jurors must not only be "qualified to serve as jurors," but must have the additional qualifications of being freeholders and of non-service in same capacity for two years. *State v. Whitley*, 88 N. C., 691. The reason of this was to prevent professional jurors who might be "qualified to act as jurors" from monopolizing the jury box. Neither the reason nor the letter of the law applies to ap-

praisers, who need not be summoned hastily, nor usually from a crowd of bystanders. There is no requirement that they shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," *i.e.*, as ordinary or regular jurors.

No error.

M. M. BARBER ET AL. v. E. WADSWORTH ET AL.

Mortgage Sale—Purchaser—Unrecorded Release by Mortgagee—Notice.

The purchasers of land at a sale made in pursuance of a mortgage, without notice of an unrecorded release of the timber rights in the land, obtained a good title, and the fact that one of the purchasers subsequently, before taking the deed, had notice of the unrecorded release, could not affect his rights acquired by virtue of the purchase at the mortgage sale.

ACTION, heard by consent of all parties, before *Bryan, J.*, at (30) chambers, in NEW BERN, N. C., on a case agreed as follows:

"1. That R. A. Russell was the owner of the land hereinafter described, and on 1 November, 1884, executed a mortgage deed thereon to Susan J. Dudley, which was on 7 November, 1884, duly recorded in the office of the Register of Deeds of Craven County, in Book No. 89, pages 42, 43 and 44, to which reference is hereby made for a full description of the land therein conveyed.

"2. That on 23 April, 1888, for value received, the said Susan J. Dudley, mortgagee, executed in writing, under seal, a full release of all the timber upon said land to the said R. A. Russell, mortgagor, this release never having been recorded.

"3. That on the said 23 April, 1888, R. A. Russell sold and conveyed the timber on said land to P. M. Barber, the testator of plaintiff, by deed, duly recorded on 5 May, 1888, in the office of the Register of Deeds of Craven County, in Book No. 98, page 110, to which reference is made for a full description of said conveyance and the timber therein conveyed. The purchase of said timber having been made by said Barber after the release referred to in the article 2 hereof had been executed and deliverd to him.

"4. That Susan J. Dudley, mortgagee, as above referred to, died on the ____ day of _____, 1892, leaving a last will and testament, under which W. G. Brinson was duly appointed executor, qualified and entered upon the discharge of his duties as such. And under a power of sale contained in the mortgage from said R. A. Russell to Susan J.

Dudley he sold the land and timber thereon, as described in said mortgage, at public auction, at the courthouse door in Craven County, as prescribed by the terms of said power, announcing at such sale
(31) that the land described in said mortgage was free of incumbrance, and the timber passed therewith, as he could find no release on record in the Register of Deeds' office of Craven County. At said sale the defendant Enoch Wadsworth became the purchaser, and thereafter procured the defendant J. W. Stewart to join him in said purchase, said W. G. Brinson, executor, executing the deed therefor to the defendants Wadsworth and Stewart on 5 April, 1894, said deed being recorded in the office of the Register of Deeds of Craven County, in Book No. 114, pages 118 and 119, to which reference is made for a full description of said land.

"5. That prior to the sale by the executor Brinson, the defendant Wadsworth, in contemplation of the purchase of said property, inquired of the mortgagor, R. A. Russell, if any release had been executed to him by the mortgagee of the timber on said lands, and was told by said mortgagor that he could not recollect whether a release had been executed or not; that the mortgagee had promised to release the timber at the time of his sale to P. M. Barber, but he did not know whether or not it had been actually executed.

"6. That shortly following said sale, and prior to the payment of the purchase money by the purchasers, the defendants, and before the execution of the deed therefor, an attorney of plaintiff, hearing of said sale, sought the defendant Wadsworth and notified him of the existence of the release aforementioned, and exhibited the same to him for his inspection. After which said Wadsworth and his co-grantee consummated said purchase, and caused the deed to be executed to them as aforesaid.

"7. That the defendant Stewart made no inquiry of the debtor or any other person as to the status or title of said property.

"8. That P. M. Barber is dead, leaving a last will and testament, under which the plaintiffs are the duly qualified executors, and in whom the title, if any, to the timber above described is vested.

(32) "If, upon the foregoing facts, the court is of the opinion that the title to the timber described did not pass to the defendants under the mortgage sale, as aforesaid, then shall judgment be rendered, declaring the plaintiffs the owners thereof; otherwise, for the defendants."

His Honor adjudged as follows:

"That the plaintiffs are the owners of the timber described in the case agreed, and that they recover the possession thereof from the defend-

ants. It is further ordered and adjudged that a writ of possession issue to put the plaintiffs in possession of said timber, and that the plaintiffs recover of the defendants the costs of this action, to be taxed by the clerk." Defendants appealed.

O. H. Guion for plaintiffs.
W. W. Clark for defendants.

CLARK, J. The mortgage to Susan J. Dudley having been recorded, the purchaser of the property or any part thereof from the mortgagor or his grantee took the same subject to the mortgage. Had the mortgage debt been paid, this would have discharged the mortgage by its terms; but there has been no payment in this case. The mortgage could, therefore, only have been released so as to affect purchasers at a sale under the mortgage by a cancellation on the margin of the registration thereof (The Code, sec. 1271), or by a reconveyance of the mortgaged property duly recorded. Neither was done. The defendants purchased at the sale under the mortgage, without notice of any unrecorded release of the timber right by the mortgagee, and, of course, got a good title. That one of the purchasers subsequently, before taking the deed, had notice of an unrecorded release, executed by the mortgagee, as to the timber right, could not affect his rights acquired by virtue of the purchase at the mortgage sale. Indeed, had both the defendants had notice of the unrecorded release, even before the mortgage sale and their purchase thereunder, no notice, however full, would have supplied (33) the failure to record the release. *Quinnerly v. Quinnerly,* 114 N. C., 145.

In the latter case the unregistered conveyance was not merely, as here, a release of a part interest in the property, but a first mortgage on the whole property, and it was held, citing the authorities, that the second mortgagee, who first recorded his mortgage, obtained priority, though he had the fullest notice of the unregistered first mortgage. And this is independent of ch. 147, Acts 1885, which, copying the identical words of The Code, sec. 1271, makes, by its very terms, the unrecorded release by the mortgagee of 23 April, 1888, of no validity as against the registered conveyance to the defendant purchasers under the mortgage sale. Upon the case agreed, judgment should have been entered in favor of the defendants.

Reversed.

Cited: Hooker v. Nichols, 116 N. C., 161; *Ford v. Green,* 121 N. C., 76; *Patterson v. Mills, ib.,* 267; *Blalock v. Strain,* 122 N. C., 286; *Piano Co. v. Spruill,* 150 N. C., 569.

W. A. JOHNSON v. PETER WILLIAMS

Justice of the Peace—Jurisdiction.

Where two actions were brought before a justice of the peace, not to enforce a contract by recovering judgment for an ascertained amount of indebtedness, but for the recovery in claim and delivery proceedings of the possession of distinct articles of property, to wit, corn of the value of $35 made upon certain lands in the first, and cotton and fodder raised thereon of the value of $15 in the second action, the court of the justice of the peace had jurisdiction, under the principle laid down in *Bell v. Howerton*, 111 N. C., 69, this not being a case of "splitting up" the items of indebtedness for the purpose of giving jurisdiction.

(34) ACTION, the consolidation of two suits brought by plaintiff against defendant on 8 November, 1892, before J. P. Leach, justice of the peace in Warren County, one demand having been made by the plaintiff upon the defendant for the property embraced in both suits; and upon the trial before said justice the defendant put in no defense, and the plaintiff recovered judgment in both suits for the property described in the summons in the suits. From these judgments the defendant appealed to the Superior Court of Warren County, and in the Superior Court the two actions as begun before the justice of the peace were, by consent of all parties, consolidated.

(35) From his Honor's ruling dismissing said action for want of jurisdiction in the justice of the peace the plaintiff appealed.

Thomas W. Hawkins for plaintiff.
Walter A. Montgomery for defendant.

AVERY, J. The two actions were brought before the justice of the peace, not to enforce a contract by recovering judgment for an ascertained amount of indebtedness, but for the recovery of the possession of distinct articles of property, to wit, corn of the value of $35 made upon certain land, in the first, and cotton and fodder raised thereon, of the value of $15, in the second action. The court of the justice unquestionably had jurisdiction, under the principle laid down in *Bell v. Howerton,* 111 N. C., 69. This is not one of the cases where an attempt has been made to give jurisdiction by "splitting up" the items of indebtedness due on a single contract so as to bring the amount demanded in each action within the constitutional limit. The ruling of the court below sustaining the conclusion of the referee that the magistrate's court had no jurisdiction is, therefore, reversed, and the cause will stand for hearing upon the report of the referee.

Reversed.

(36)

W. M. WATSON, RECEIVER, ETC., v. A. R. HOLTON ET AL.

Guardian, Investment by—Surety on Borrower's Bond.

1. The policy of sec. 1592 of The Code is to require an investment by a guardian to be secured by the bond or note of some person in addition to the borrower.
2. Where a guardian lent his ward's money to one member of a firm for the private purposes of the latter, taking his bond, with the borrower's partner as surety, both of whom were solvent at the time, but afterwards became insolvent, the guardian is not liable for the loss, for, "in addition to the borrower," there was a person responsible for the loan who might have remained solvent, despite the insolvency of his partner, the borrower.

APPEAL from *Graves, J.*, at the Spring Term, 1894, of CRAVEN, said action being heard upon the following facts agreed, which constitute the case on appeal:

"That the defendant, A. R. Holton, as guardian of said infants, at the time of the execution of the bond described in the complaint, executed by L. H. Spier and Samuel Quinnerly, had in his hands money belonging to said infants for investment, as required by law.

"That as such guardian he did lend to said L. H. Spier, for his own private purposes, the sum of $500, and for the same took the said bond executed by said L. H. Spier and Samuel Quinnerly as surety.

"That at the time he made said loan and took said bond the said L. H. Spier and Samuel Quinnerly, the surety on said bond, were both solvent and reputed to have a large amount of property, and were believed by said guardian and the community in which they lived to be men of large means and perfectly solvent.

"That said guardian, relying on the said reputation and stand- (37)
ing of said L. H. Spier and Samuel Quinnerly, and in good faith, made said loan, had said bond executed to him for same.

"That at the time of said loan and the execution of said bond as aforesaid the said L. H. Spier and Samuel Quinnerly were partners in trade, carrying on a merchandise business in Snow Hill, Greene County, N. C.

"That said L. H. Spier and Samuel Quinnerly had much and valuable property other than the property which they had as such co-partners, and which was their individual property at the time of making said loan and execution of said bond as aforesaid.

"That thereafter, and before the commencement of this action, the said Samuel Quinnerly and L. H. Spier became insolvent.

"That said guardian tried to collect the said bond, but has been unable to do so."

Upon the foregoing facts his Honor adjudged that the defendant go without day, etc., and plaintiff appealed.

O. H. Guion for plaintiff.
No counsel contra.

BURWELL, J. It is charged against the defendant that he loaned out his ward's money upon bond without sufficient security, contrary to the provisions of section 1592 of The Code. In *Boyette v. Hurst,* 54 N. C., 166, it is said that the policy of this statute "is to require the investment to be secured by the bond or note of some person *in addition to the borrower.*" Hence it was there decided that a note signed by a firm as a principal debtor, and one of the members of it as surety, did not fill the requirement of the law, for in such case the surety was one of the borrowers. No person "in addition to the borrower" had become responsible for the payment of the note. If the firm, the borrower, became insolvent, the pretended surety also became insolvent. This sound principle does not fit our case, for here there is a person "in ad-
(38) dition to the borrower" who has become responsible for the loan.

The borrower might become insolvent without involving the surety in his ruin.

Affirmed.

R. B. PEEBLES, TRUSTEE, v. B. S. GAY, EXECUTOR.

Principal and Surety—Subrogation—Assignment of Judgment for Benefit of One Surety.

1. A surety paying the debt of his *principal* is entitled to be subrogated to all the rights of the creditor, against a co-surety as well as against the principal, and this includes the right to have a judgment which he has paid assigned to a trustee for his benefit, so as to compel his co-surety to pay his *pro rata* part.
2. If a surety pays a judgment and has it entered "satisfied," without having it assigned to a trustee for his benefit, the remedy of subrogation is lost.
3. Where a surety who paid and had satisfaction entered as to one-half of a judgment against himself, his principal and a co-surety, and procured the judgment as to the other half to be assigned to a trustee for his benefit, it was in effect the same as if he had procured the whole judgment to be so assigned.

ACTION, tried at December Special Term, 1893, of NORTHAMPTON, before *Whitaker, J.* A jury trial was waived, and the following issues were submitted to his Honor:

"1. Is the defendant J. M. Grant, as trustee for William Grant, entitled to the fund in controversy?

"2. Is the defendant W. C. Hardy entitled to the fund in controversy?"

The plaintiff was trustee in two deeds of trust made to him by A. Capehart; the one to secure a debt of $8,000 due M. C. Cameron was registered 12 September, 1881; the other, to secure a debt of (39) about $18,000 due Hardy Bros., was registered 30 May, 1889.

A judgment was docketed in said county 4 April, 1887, in favor of W. E. Spivey, trustee, against William Grant and A. Capehart for $3,000, to be discharged upon payment of $940.41, with interest and costs. William Grant and A. Capehart were co-sureties on a bond given by A. Grant and J. M. Grant, and the aforesaid judgment was rendered against them on said account. *Alias* execution issued on said judgment and the following return was made thereon by the Sheriff: "Satisfied in full, 24 January, 1888."

On the judgment docket were the following entries: "One-half of the principal, interest and costs of this execution has been paid and settled by William Grant, and to that extent is satisfied. W. E. Spivey, trustee, by R. B. Peebles, his attorney, this 23 January, 1888."

"This 24 January, 1888, for value received of J. M. Grant, I hereby sell, transfer and assign to said J. M. Grant, in trust for the use and benefit of William Grant, his father, the balance due on the judgment mentioned within (it being one-half thereof) without recourse on me. W. E. Spivey, trustee, by R. B. Peebles, attorney."

J. M. Grant, trustee of William Grant, claimed out of the fund arising from the sale by the trustee the sum of $____ as still due upon the Spivey judgment. Defendant Hardy contended that the said judgment had been fully satisfied, and that he was entitled to all of the balance in the hands of the trustee after the satisfaction of the Cameron debt and expenses. The plaintiff brought this action to settle the rights of the parties, retaining in his hands a sufficient sum to pay the Spivey judgment should he be so directed. All further contentions are stated in the opinion.

W .W. Peebles & Son for defendants B. S. Gay, executor, and (40) *W. C. Hardy.*

R. B. Peebles, W. H. Day and T. W. Mason for defendants J. M. Grant, trustee, and William Grant.

No counsel for plaintiff.

MACRAE, J. On objection of defendants' counsel that the statement of the case on appeal was not properly in this Court, it not having been sent up with the transcript of the record, affidavit was made by plaintiff's

counsel and a *certiorari* issued, and the same treated as served and return made thereto, it being admitted that the case properly certified was now on file.

There is no merit in the objection of defendant that the exception to instructions given by the court, of itself, is too general and therefore ought not to be considered. It will be seen that there was but one question in the case, and that is fully presented in the second instruction of his Honor: "That if the jury believed that William Grant, one of the sureties, paid with his own money to Spivey, the plaintiff, with the understanding and agreement that Spivey should satisfy the judgment as to one-half and transfer it as to the balance to J. M. Grant, as trustee for the use and benefit of William Grant, with a view to keep the judgment alive as to one-half, and that Spivey did thus transfer it, still the jury should answer the first issue 'No,' and the second issue 'Yes,' for the reason that in the opinion of the court one surety could not thus keep alive half of a judgment as to his co-surety."

Upon general principles of equity a surety, paying the debt of his *principal,* was entitled to be substituted to all the rights of the creditor in the premises, as to collaterals, and could enforce the same in a court of equity. This is the doctrine of subrogation, and in it is included the right of the surety, on payment of the judgment, to have an assignment of the same to a trustee for his benefit. Indeed, it was early laid down by our Court that the only way for a surety to preserve the
(41) lien of the judgment against his principal in his own favor was, upon payment by him of the same, to have the judgment assigned to a trustee for his use. If he permitted the judgment to be satisfied without any assignment, the remedy of subrogation was lost. *Hodges v. Armstrong,* 14 N. C., 253; *Sherwood v. Collier, ib.,* 380; *Tiddy v. Harris,* 101 N. C., 589; *Liles v. Rogers,* 113 N. C., at page 200. The Act of 1777, sec. 2093 of The Code, provided him a summary method at law of obtaining judgment against his principal for the amount paid as his surety, but his equitable remedy still subsisted. *Calvert v. Peebles,* 82 N. C., 334. In some jurisdictions these equitable rights are administered without an actual assignment. 2 Brandt Suretyship, 309. Upon the same principle of equity and natural justice the right of one surety to compel contribution of another exists, and might have been enforced in a court of equity; as, also, might the right of one surety to the benefit of an indemnity given by his principal to another surety.

The Act of 1807 (sec. 2094 of The Code) provides that where one or more sureties have been compelled to satisfy the contract of their principal, they may sue their co-sureties for their ratable part of the debt paid for the principal. And it was held that a co-surety who pays the bond debt, for which the other surety is equally bound, shall be deemed

a bond creditor in the administration of the estate of the deceased co-surety. *Howell v. Reams,* 73 N. C., 391. And it is broadly stated in Brandt Suretyship, *supra,* that "A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal." This is founded in reason and justice, and up to the adoption of our present Constitution was enforced in the courts of equity. Art. IV, sec. 1, of the Constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. (42)

In *Rice v. Hearn,* 109 N. C., 150, where a co-surety, who paid the amount due upon a judgment against his principal, himself and the other surety, had the whole judgment assigned to a trustee for his benefit, in order the more easily to obtain contribution from his co-surety, this Court, through *Merrimon, C. J.,* pronounced this assignment a legitimate transaction; and when the trustee attempted to assign the judgment for value to a third party it was held that the surety for whose benefit it was assigned could compel a due observance of his equitable rights and have the judgment marked satisfied.

It would not have been improper for the defendant William Grant, in this case, to have the whole judgment assigned to the trustee for his benefit, as the same could only have been enforced in his favor as against his co-surety Capehart for his *pro rata* liability. The same end is accomplished by the satisfaction of one-half of the judgment and the assignment to a trustee of the other half for his benefit, as against his co-surety. This Court, exercising its equitable jurisdiction, will see that he retains no further security than would cover the *pro rata* part, for which he is entitled to contribution. Thus he is afforded now just the same relief as he would have had under the former system. Principles are preserved without the necessity of resorting to different courts.

Any question as to the effect of satisfaction of the judgment being entered of record is taken away by the action of the court at a subsequent term in amending the record by striking out the entry of satisfaction. This order has been certified from the court below and made part of the record here, without objection being made thereto, and, we presume, by the consent of all parties.

Error. New trial.

Cited: Browning v. Porter, 116 N. C., 64; *Holden v. Strickland, ib.,* 196; *Davison v. Gregory,* 132 N. C., 395; *Patton v. Cooper, ib.,* 794; *Bank v. Hotel Co.,* 147 N. C., 598; *Fowle v. McLean,* 168 N. C., 542.

(43)

ROBERT L. RICE v. JAMES P. RICE ET AL.

Legacy—Charge on Land—Personal Debt—Statute of Limitations.

A testator devised a tract of land to his son J., who, the will directed, "shall pay to his brothers, my sons, R. and W., each one-third of $1,300." J. qualified as executor of the will and took possession of the land on 5 February, 1869, and, as alleged by plaintiff R., made a payment to R. on account on 31 December, 1876. The plaintiff R. brought suit on 16 January, 1894, for the amount due him: *Held* (1) that J., by qualifying as executor and accepting the devise by taking possession of the land, became *personally* and *immediately* liable to each of his brothers for one-third of $1,300, each of whom could have maintained an action for the amount due him; (2) that the action is barred by the three-years limitation (sec. 155 (1) of The Code); (3) that, assuming the plaintiff's cause of action to be a right to enforce a lien or charge on the land, the action is barred by the ten-years limitation (sec. 158 of The Code), notwithstanding the alleged payment in 1876.

ACTION, tried before his Honor, *Jacob Battle,* and a jury, at May Term, 1894, of VANCE.

The will of Francis Rice contained the following provision: "It is my desire and intention that at the death of my wife my son John shall have the tract of land on which I now reside, and shall pay to his brothers, my sons, William and Robert, each one-third of $1,300." John Rice, the devisee named, was appointed executor of his father's will, and caused it to be admitted to probate, and qualified as executor thereof on 1 February, 1869. The wife of the testator died in 1861. Robert, one of the sons mentioned in this item, is the plaintiff. The defendants are the heirs at law of John Rice, and the executors of his will, he having died in the year 1892. This action was begun 16 January, 1894. Upon the probating of the will of his father, John Rice took possession of the tract of land and held it until his death.
(44) The defendants now hold it. The plaintiff alleges that on 5 February, 1869, he and his brother John purchased from their brother William all his "right, title and interest" in and to the real estate of their father Francis Rice, and that thus there became due to him under the item of the will set out above $650. He avers that John Rice made to him a payment on account of his said claim on 31 December, 1876.

The purpose of this action is the recovery of the sum named, $650, and interest, less the alleged credit of $100.

Along with other defenses, the defendants pleaded the statute of limitations. His Honor decided that the plaintiff's cause of action was barred, and gave judgment accordingly. Plaintiff appealed.

A. C. Zollicoffer and A. J. Field for plaintiff.
T. T. Hicks for defendants.

BURWELL, J. (after stating the facts). When John Rice signified, in 1869, his election to accept the devise of land made to him by his father by having the will probated and taking possession of the land thereunder, he became, by the terms of the will, *personally* liable to his brothers Robert and William each for one-third of $1,300. Immediately upon his taking the land he became debtor to each of his brothers. Each one of them might then have maintained an action against him personally for the sum due him. *Hines v. Hines,* 95 N. C., 482; *Aston v. Galloway,* 38 N. C., 126.

Whether by the terms of the will this personal liability assumed by the devisee became a charge or lien on the land or not is not important in the view we take of the matter. The case last cited, *Aston v. Galloway,* seems an authority to sustain the contention that it did become so. There was a devise in the will under consideration in that appeal to John Aston in fee, he paying to two nephews of the testator, as they arrived at the age of twenty-one years, the sum of one hun- (45) dred pounds each, with the proviso that if it should so happen that the nephews should be of age before the devisee should be in possession of the land he should not be bound to make the payments to them until two years after his taking possession. The Court said: "It seems to us that the hundred pounds was not intended by the testator to be a personal debt on the devisee only, but it was to arise out of the land after the devisee should get into the possession of the same, and he be able to make it out of the rents and profits; therefore it was a charge on the land." In a former part of the opinion it was said: "We think it was an equitable charge, that is, that in this Court the land is to be regarded as security for it."

In our case there is nothing whatever to indicate that the money that the devisee, by accepting the devise, assumed to pay his brothers Robert and William, was "to arise out of the land" or that he was "to make it out of the rents and profits." Hence there is not here the premise from which in *Aston v. Galloway* the conclusion was drawn, "therefore it was a charge on the land."

But however that may be, we have here a right of action against John Rice personally in favor of the plaintiff, accruing in 1869 and suit brought thereon in 1894. If we assume that a payment was made in 1876, and that time is to be reckoned from that date, the cause of action, considered as merely a personal debt of John Rice, is clearly barred, for his liability to pay grows out of a contract implied from his taking

the land, and the limitation of The Code, sec. 155 (1), three years, we think, applies to it. And if we consider the plaintiff's cause of action as not merely a personal claim against John Rice, but also a right to enforce a lien or charge on his land, the same conclusion must be arrived at, for more than ten years had elapsed between the date of the alleged payment and the bringing of this action, and that period
(46) is a bar to the enforcement of any charge on land such as this is claimed to be. The Code, sec. 158. We can see nothing in the relation of this debtor, John Rice, to this creditor, the plaintiff, to prevent the running of the statute.

We assume the facts to be as insisted upon by the plaintiff, and upon those facts we adjudge, as his Honor did, that his alleged cause of action is barred by the statute of limitations. Hence it is not necessary to consider the other exceptions taken on the trial.

No error.

Cited: Hunt v. Wheeler, 116 N. C., 424; *Allen v. Allen,* 121 N. C., 334; *Smith, ex parte,* 134 N. C., 499; *Newsome v. Harrell,* 168 N. C., 296; *Hunter v. West,* 172 N. C., 161.

M. A. JONES v. B. I. ALSBROOK, SHERIFF, ET AL.

Personal Property Exemption—Time of Valuation of Exemption—Levy and Sale under Execution—Resident of the State—Removal from State, Purpose of—Wrongful Sale by Sheriff—Measure of Damages.

1. It is only a resident of this State who is entitled to have his personal property to the value of $500 exempted from *sale* under execution.
2. So long as an execution is in the officer's hands and in force, the preliminary action of the appraisers is *in fieri* and capable of correction and amendment, and it is a right both of the debtor and the creditor that the exemption shall be ascertained up to and just before the process is executed by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appear at the sale that he is not entitled to the same: *Therefore,*
3. In the trial of an action against a sheriff for wrongfully selling property without setting apart plaintiff's personal property exemption, the defendant was entitled to have submitted to the jury an issue involving the question whether the plaintiff was, at the time of the sale, a resident of the State.

4. The residence of a person in this State entitling him to a personal property exemption must be *actual* and not constructive, and in case of his temporary removal it is necessary to ascertain the intent and purpose of his removal in order to determine whether he is a resident; hence, in the trial of an action against a sheriff for his failure to have set apart to plaintiff her personal property exemption and selling her property, it appeared that the property was seized while *in transitu* to another State to which she and her husband went a few months after the levy, and where they remained for some months, the defendant was entitled to ask plaintiff whether, at the time of the sale of the property, she had not abandoned her residence in this State and started to Virginia to engage in business.

5. When property has been wrongfully sold by a sheriff in disregard of the plaintiff's right of exemption, the measure of damage is the actual loss sustained thereby; not the value of the property at the time of the levy, and when the property has been regained by payment of judgment debt or other fixed sum that would be the measure, augmented by any further actual expense resulting from such wrongful sale.

ACTION for damages by plaintiff against B. I. Alsbrook, Sheriff (47) of Halifax, and his co-defendants, sureties upon his official bond, for failure and refusal to set apart her personal property exemption in the chattels described in the complaint, heard before *Graves, J.*, and a jury, at the March Term, 1894, of HALIFAX.

The plaintiff tendered these issues:

"1. Was the plaintiff a resident of North Carolina when the levy was made?

"2. What damage has plaintiff sustained?"

The defendants tendered this issue:

"Was the plaintiff a resident of North Carolina at time of sale?"

The court submitted issues tendered by plaintiff, and refused to submit issue tendered by the defendants, and the defendants excepted.

The plaintiff was introduced on her own behalf and testified (48) that the goods were her property, and gave the value of each article separately, all of which aggregated $368.50. That at time levy was made she was a resident of Edgecombe County, North Carolina; that she never went to Suffolk, Virginia, to live; that she and her husband did not go there at all until three or four weeks after the levy, and then stayed only eight months, and then returned to Edgecombe County, where they now reside. That goods were levied on in depot at Hobgood by sheriff to satisfy an execution against her in favor of R. C. Brown for $88.93, and they were in transit to Suffolk, Virginia. That she was a free trader.

The defendant's counsel, upon cross-examination, asked the witness if at time of the sale she had not abandoned her residence in Edgecombe County and started to Suffolk to engage in business. The plaintiff ob-

jected. Objection sustained as to so much of question as relates to purpose of plaintiff, and defendants excepted.

The plaintiff stated that she was present at time of sale of goods by sheriff, and upon cross-examination the defendants proposed to show that she came immediately into the possession of the goods after the sale for the purpose of showing that she became the purchaser, and what she paid for them.

Objection by plaintiff. Objection sustained, and defendants excepted.

R. C. Brown was introduced by defendants, and asked if Owen Jones, husband of plaintiff, had not said just before the levy that he had rented a house in Suffolk, and that he was going to leave this State? Plaintiff objected. Objection sustained, and defendants excepted.

The defendants in apt time asked the following instructions in due form:

"That if plaintiff had abandoned her residence in this State, and the goods were in transit to Suffolk, Virginia, she is not such a resident as is entitled to a personal property exemption." This charge (49) was refused, and defendants excepted.

"That the measure of damages in this case is the amount which plaintiff paid to recover the goods." This charge was refused, and defendants excepted.

The court charged the jury that if the evidence of both plaintiff and defendants was believed, the plaintiff was a resident at time of levy; that it made no difference whether she intended to remove to Virginia or not; that she was a resident of this State till she actually carried out such intention and left the State for the purpose of residence in Virginia, and instructed the jury to answer the first issue "Yes," if they believed the evidence. The defendants excepted to this charge.

The court charged the jury that the measure of the plaintiff's damages was the value of the property at the time of the levy, and that in ascertaining her damage it would make no difference whether she came immediately into the possession of the property at the price for which it was sold or not. The defendants excepted.

The court further charged the jury that if plaintiff was present at time of sale by sheriff, and assented to sale in manner it was made, and assented that goods should only bring $88.93, she cannot recover a greater sum, it appearing in evidence that the goods only brought that sum at sale.

The issues were found in favor of plaintiff, and her damages assessed at $250. Judgment for plaintiff, and appeal by defendants.

Thomas N. Hill for plaintiff.
Robert O. Burton for defendants.

MACRAE, J. It is a resident of this State who is entitled under Art. X, sec. 1, of the Constitution, to have his personal property, to the value of $500, exempted from *sale* under execution. To carry out this provision of the Constitution, sec. 507 of The Code was enacted, (50) under the provisions of which section, whenever the personal property of any resident of this State shall be levied upon, and the owner shall demand that the same, or any part thereof, "shall be exempt *from sale under such execution,*" appraisers are provided to lay off the exemption, "which articles shall be exempt from the said levy."

First, the levy; then the demand for the appraisement; next, the appraisement; and last, the exemption from the levy theretofore made, and consequently from sale under the execution of the property set apart.

In *Pate v. Harper,* 94 N. C., 23, it was said: "We think the debtor is entitled to have his exemption ascertained up to and just before the process is executed by a sale. While the process is in the officer's hands in full activity, the preliminary action of the appraisers is not conclusive, but remains *in fieri,* capable, at their instance, under the call of the officer, at least of correction and amendment. If property has been omitted which ought to have been put on the list, but was not known at the time to belong to the debtor, so that it could be done, the appraisers ought to have the power, and we think do have it, to enlarge the exemption, so that none which should be exempt shall be sold from him. The mandate of the statute is that the officer shall make his levy upon the entire personal estate subject to seizure under execution, *but before he sells,* to have so much of it set apart for the debtor, within the limited value, as he may select, and when insufficient, all being below the value, such selection is unnecessary."

Surely the reason of the opportunity given to the judgment debtor up to the last moment to have his exemption set apart will apply with equal force to the judgment creditor, so that, if it be made to appear at the sale that the debtor is entitled to no exemption, the same will not be allowed. It follows that the issue tendered by de- (51) fendant was the proper one, and should have been submitted, the duty of the sheriff *to levy* being plain, but the question being whether he should have taken the proper steps, on request of the defendant in execution, to have laid off to her the personal property exempt from sale by the laws of the State. It being ascertained, then, that the time at which the exemption operated was that of the sale, the next question was, whether the defendant in execution was at that time a resident of this State. She testified that, at the time of the *levy,* she was a resident of this State; that she never went to Suffolk, Virginia,

to live; that she and her husband did not go there at all until three or four months after the levy (it is not stated whether this was before or after the sale), and then stayed only eight months, and returned to Edgecombe County, in this State; where they now reside. The cross-examination was directed to the question, whether she had not abandoned her residence in North Carolina and started to Virginia to engage in business. On objection, his Honor would not require her to answer as to her purpose in going to Virginia.

In this exception is, to some extent, involved the meaning of the word *resident,* as used in the Constitution (*supra*), and at what time and under what circumstances one ceases to be. In *Munds v. Cassidey,* 98 N. C., 558, upon the question, whether H. C. Cassidey was entitled to a personal property exemption, he having been absent from the State for seven or eight years, employed upon a steamboat plying in the waters of Florida, expecting in the future to return to Wilmington, the Court said: "Our Constitution and statute do not extend to such a case. The person must be a resident, actual, and not constructive, to be entitled to the exemption."

In *Fulton v. Roberts,* 113 N. C., 421, in relation to the laying off a homestead, the definition by the trial judge of the word "resident" having been disapproved, as confounding residence with domicile, the Court said: "We must conclude that the right of exemption
(52) ceases here when, by reason of a change of residence, it begins in another State, or when a similar occupancy of a place of residence by one coming from a sister State to this State would entitle such person to the benefit of sec. 2, Art. X, of our Constitution."

It will not be necessary to trouble ourselves with the distinction, sometimes very plain and at others most shadowy, if, indeed, there be any, between residence and domicile. It is well understood that a domicile is in its strict legal sense one's true, fixed and permanent home, to which, whenever he is absent, he has the intention of returning. *Horne v. Horne,* 31 N. C., 99. And the word "residence," while often a word of not so restricted a meaning, in some instances in no respect differs from domicile. There may be an actual and a constructive residence. In *Lee v. Moseley,* 101 N. C., 311, the word "resident," as employed in Art. X, sec. 2, of the Constitution, is restricted to the former class, and simply means one who has his permanent home in this State. The same term is used in the first section as well as the second of Art. X to designate the persons entitled to homestead and to personal property exemptions.

In order to determine whether one is a resident of this State in this sense, it is necessary, in some instances, to ascertain the intent of the

party. When one has been such a resident, a removal from its limits, with intent not to return, will at once deprive him of the privileges incident to his residence here; but the absence may be intended to be of such a temporary nature as to avoid the consequence above—it is for the jury to determine. In which case it may be important to learn the purpose of the party and the circumstances of the removal. Was it for the purpose of engaging in business? the kind of business? did he take with him all of his property? These may be circumstances which the jury should consider. In this view, the question whether this plaintiff did not intend to engage in business in Suffolk was pertinent to the inquiry, whether at the time of the sale, if she (53) were then actually in Virginia, or were on her way there with all her property, she had then abandoned her residence in North Carolina.

As it is evident that there must be a new trial, we will not consider the other exceptions, only as to the instructions given by his Honor upon the measure of damages.

If on another trial it should be found that the plaintiff was a resident of this State, having here her home at the time of the sale of her personal goods in disregard of her rights of exemption, it will be necessary to consider the measure of the damage to which she will be entitled under the law.

This would be full compensation for the loss sustained by her as the result of this disregard of her rights and the sale of her property, which, according to the evidence, was of less value than $500, not the value of the property at the time of the levy, but the actual loss sustained by her. If she regained the property upon the payment by her of the amount of the judgment debt, or any other fixed sum, this would be the measure, and it might be augmented by any further actual expense to which she might have been subjected by the sale of her property.

In *Winburne v. Bryan,* 73 N. C., 47, where the sheriff, having an execution in his hands against A., sold the land of A., without serving upon him the written notice as required by law before the sale of land under execution, the judge below held that plaintiff, suing the sheriff, was only entitled to nominal damages, unless he proved that the property sold for less than it would have sold for if the notice had been given. "The execution was for only about $20; the land was worth $300 in cash. The plaintiff, a short time after the sale, gave the purchaser $100 for his bid, that is, paid up the execution cost and $100 over and above. The plaintiff is out of pocket $100 over and above the amount of the execution by reason of the default of the de-

(54) fendant; and why he should not be indemnified to that extent we are unable to conceive. Indeed, we incline to the opinion that the jury might have been justified in going further and making some allowance for the inconvenience of being compelled to raise $100 extra, when, had the defendant done his duty, $20 would have answered." The decision goes further and intimates some reasons for punitive damages in that case, which do not apply to the present.

"If the owner has recovered property taken from him by the wrongdoer, that fact will reduce the damages; but the owner is allowed compensation for his expenditures in recovering the property. Thus, where the property was seized and sold by the defendant, a sheriff, and was repurchased by the plaintiff from the one who bought it at the sheriff's sale, it was held that the measure of damages was the amount paid to repurchase the property." 1 Sedgwick on Damages, sec. 58.

Cited: Gardner v. McConnaughey, 157 N. C., 482.

G. W. TRUITT v. C. W. GRANDY ET AL.

Registration—Unrecorded Deed—Constructive Notice—Chain of Title—Possession

1. A purchaser of land is not chargeable with notice of anything contained in instruments lying outside of the chain of title.
2. B. conveyed land to H. & S. in January, 1878, by deed, which was not recorded until February, 1889, and afterwards, in 1886, conveyed the same land in trust to P. to secure a debt due to T., who purchased at a foreclosure sale by the trustee, P. having no actual notice of the unregistered deed. In January, 1878, H. &. S. conveyed the land to J. by deed, recorded in October, 1878, in trust to secure a debt due to G., who bought at a sale under the latter trust deed. Upon the trial of an action by T. against G. for recovery of the land there was evidence tending to show that at the date of B.'s deed in trust to P. the land was in possession of a tenant of B. and not of H. & S., as defendant claimed: *Held* (1), that neither P. nor his vendee, T., was affected with constructive notice of the unregistered deed by the recitals in the deed of trust of H. & S. to J.; (2) that if the person in possession of the land was tenant of B. it was not incumbent upon P. (or T.) to inquire further, in the absence of other circumstances, and such possession of the tenant alone would not be constructive notice of the deed under which G. claims.

TRUITT *v.* GRANDY.

ACTION, for the recovery of land, tried before *Armfield, J.,* (55) and a jury, at Spring Term, 1894, of HERTFORD.

There was a judgment for the defendant upon a verdict rendered in accordance with the instructions of his Honor, and the plaintiff appealed.

The facts are stated in the opinion of *Chief Justice Shepherd.*

L. L. Smith for plaintiff.
Pruden & Vann for defendant.

SHEPHERD, C. J. The plaintiff claims under a deed executed to him by R. R. Prentiss, trustee, in a deed of trust executed to said Prentiss by J. D. Brett and wife on 16 January, 1886, and duly registered on 26 February, 1887. The defendants, the Grandys, claim under a deed executed to them by T. R. Jernigan, trustee, in a deed executed to said Jernigan by Harrell & Sharpe, dated 1 January, 1878, and duly registered on 17 October, 1878. The defendants also introduced a deed to the said Harrell & Sharpe executed by J. D. Brett and wife on 1 January, 1878, which deed was not registered until 11 October, 1889.

As there is no contention that Prentiss had actual notice at the time of the execution of the deed to him, the question upon which the case is to be determined is whether he had constructive notice of the conveyances above mentioned. It is plain that he did not have constructive notice by registration, as there is nothing in the (56) record to show that the trustor, Brett, had conveyed the property to Harrell & Sharpe. All that Prentiss was required to do was to "follow up the chain of title as it appeared of record," and if it was unbroken, and he found no registration of a deed from Brett, or those under whom he claimed, he was not compelled to look over the whole record for the deed of trust from Harrell & Sharpe to Jernigan, when the registry would not have disclosed any connection of the said parties with the line of Brett's title. *Maddox v. Arp,* 114 N. C., 585.

Having no notice by registration, the next point to be examined is whether Prentiss, under the proviso of sec. 1, ch. 147, Laws 1885 (the act relating to the registration of deeds), had constructive notice of the said unregistered conveyance by reason of the possession of Harrell & Sharpe, or of those claiming under them, at the time of its execution, on 16 January, 1886. There was testimony tending to show that Harrell & Sharpe were not then in possession, but that the land had been leased by an agent of Brett to one Mebane Norvell. If the jury should find that Norvell was the tenant of Brett, it must be assumed that if Prentiss had made inquiry of him he would have been so informed. The information thus obtained would have been entirely consistent

with the record title of Brett, and in the absence of other circumstances there would have been no duty on the part of Prentiss to make further inquiry. Such possession alone would not therefore be constructive notice of the deeds under which the defendants claim.

This view of the case was not submitted to the jury, but upon the whole evidence the court held that the plaintiff was not entitled to recover. This ruling, in our opinion, was erroneous, and there must be a New trial.

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(57)

IN RE WILLIAM SULTAN.

Habeas Corpus—Fugitive from Justice—Extradition—Discretion of Governor.

1. Departure from a jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice, within the meaning of the law: *Therefore,*
2. One who, while in another State, procured by false representations goods to be thence shipped to him in this State, to which he returned after making the false representations, but before the goods were shipped, is a fugitive from the justice of such other State.
3. The Governor is invested by the law with a discretion to issue a warrant for the arrest of a fugitive from justice of another State upon the requisition of the Executive thereof, and to revoke it if in his opinion the warrant is sought for ulterior purposes; and, although the courts may review and control his action in regard to points of law involved in extradition proceedings, yet they will not inquire into the motive and purpose of such proceedings or interfere with any matter connected therewith which lies within the discretion of the Governor.

PETITION for writ of *habeas corpus,* heard before *Hoke, J.,* at NEW BERN, N. C., on 9 June, 1894.

The prisoner was discharged, and the relator thereafter obtained a writ of *certiorari* to have the action of his Honor reviewed in this Court.

C. R. Thomas and P. H. Pelletier for relator.
W. W. Clark and O. H. Guion, contra.

BURWELL, J. The record shows that the Governor of the State of Pennsylvania made a requisition on the Governor of this State for the arrest of the petitioner William Sultan, who had been indicted in the former State for obtaining goods under false pretenses from the firm

of Morris Newberger & Son, of the city of Philadelphia. His Excellency, the Governor, upon an examination of the requisition and the accompanying papers, issued his warrant in due form for (58) the arrest of the alleged fugitive and his delivery to the agent of the State of Pennsylvania.

Thereupon a writ of *habeas corpus* was sued out in his behalf, and upon hearing the matter his Honor discharged the petitioner from custody, assigning two causes for his action: First, his finding as a fact that the petitioner was not a fugitive from justice; and second, that the process was instituted and procured for the purpose of enforcing and collecting a debt due to Morris Newberger & Son.

The indictment found against the petitioner in the city and county of Philadelphia charges the petitioner with having obtained from Morris Newberger & Son, on 17 September, 1892, certain goods by certain false and fraudulent pretenses. It is in proper form, and it is duly certified that the offense therein charged is a crime under the laws of the State of Pennsylvania.

The guilt or innocence of the petitioner cannot be inquired of in this proceeding. It is not pretended that the petitioner was not in the city of Philadelphia on 17 September, 1892, the date when it is charged in the indictment that he made the false pretense and thereby obtained the goods. If, therefore, we consider only the allegation of the indictment, and the fact that the person therein charged with a crime against the laws of Pennsylvania is now in this State, we must conclude that, being within this jurisdiction, he is here to be considered a fugitive from justice. This seems to be conceded.

But it appears from the affidavit of Morris Newberger, which constitutes a part of the document upon which the Governor issued his warrant, and from the affidavit of the petitioner, that the goods, which in the indictment are said to have been obtained by the petitioner on 17 September, 1892, the date of the alleged false representation, were not in fact delivered to him on that day, but were, on 6 October, 1892, delivered by Morris Newberger & Son to a common carrier (59) in the city of Philadelphia, consigned to the petitioner at New Bern in this State, where the petitioner resided, and whither he had gone after making a contract on 17 September for the shipment of the goods to him at his home in this State.

Assuming, therefore, that the petitioner, being in the city of Philadelphia on 17 September, 1892, made then and there to citizens of Pennsylvania false and fraudulent pretenses, contriving and intending by means thereof to induce them to deliver on 6 October, 1892, certain goods to a common carrier in said city for shipment to him in this

State, and thereafter, but prior to 6 October, left that State and returned to his home here, we think he is a "fugitive from justice." As we have said, the truth or falsity of the charge that he made the false pretenses cannot be inquired into. If the delivery to the common carrier be considered a delivery to him (and we see no reason why it should not be so considered), the whole crime, if there was one, was committed within the jurisdiction of the court where the indictment has been found.

But it does not seem to us to be essential that we should hold the delivery to the carrier equivalent to a delivery to the petitioner before we can adjudge that the crime charged was committed within the jurisdiction of the Pennsylvania court. For, if the false pretense was used in that State by the petitioner, there present, to induce a citizen of that State to part with his property, by sending it to the petitioner in this State, and the petitioner then fraudulently obtained *here* the possession of the goods, the court of that State has jurisdiction of the offense, and the court of this State has jurisdiction also. It is said: "Where a false pretense is uttered in A., and the money obtained in B., the *venue* may be laid either in A. or B. This, in England, is finally settled by statute, which, however, is in this respect affirmatory of
(60) the common law. In several instances it has been held that the forum that first takes cognizance of the offense, whether it be the forum of the uttering of the pretense or that of the forwarding of the goods, attaches to itself jurisdiction." Wharton Cr. Law, sec. 1206. This is quoted with approval in 2 Moore Extradition, p. 942, and that author adds: "This rule does not apply to false pretenses only, but obtains in regard to various other kinds to the commission of which several facts, which may occur at different times and places, are essential. In such a case, it may be held that a man may be regarded as a fugitive from the justice of the State where, being corporally present, he commits any of the criminal acts that respectively give jurisdiction to punish the offense. . . . As the law does not separate the elements so as to destroy jurisdiction of the offense, we should not divide them so as to defeat the recovery of jurisdiction over the offender."

It seems that if a person, being beyond the limits of the State, by means of a false pretense communicated in some way—as by letter—to a person in this State, obtains goods from that person, he may be indicted here, though he has never actually come within the State, and, if afterwards found within the jurisdiction of our courts, may be arrested and tried. 1 Bishop Cr. Law, 7 Ed., sec. 109; *S. v. Hall,* 114 N. C., 909. It may be that he could not be brought by extradition proceedings into the State, for, in such case, he might not be considered "a fugitive from justice"; but if he voluntarily comes within the juris-

diction he may be punished. As is said in *People v. Adams,* 3 Denio, 190: "Impotent, indeed, must our laws be, if the contriver of the mischief, by whose efforts alone the cheat was effected, can escape punishment on the ground that he was out of the State when his fraudulent machinations were concocted, and when they took effect within it." *A fortiori* should be punishable here, if he was actually present in the State when he concocted his fraudulent machinations, and (61) only retired from the State after he had put them in operation.

If, therefore, the petitioner did go to Philadelphia, and there make to Morris Newberger & Son false and fraudulent pretenses, and thereby induced them to sell him goods to be shipped to him at his home in this State, and the goods were so sent, he is amenable to the laws of Pennsylvania.

He was actually in that State when the crime charged against him was begun. Now, when he is sought by extradition process, the crime is completed. After beginning the perpetration of the crime he left that State. The purpose he had in view in leaving the State is immaterial. *Com. Kingsbury,* 106 Mass., 223; *Roberts v. Reily,* 116 U. S., 80. He is found here, and must be deemed a fugitive from the justice of that State within whose borders he, being actually present, put in operation an offense against her laws. *In re Cook,* 49 Fed., 833.

Upon this subject, in the last cited case, *Jenkins, J.,* said: "The purpose of the constitutional provision was that criminals should find no asylum within any State of the Union; that 'the law might everywhere and in all cases be vindicated.' It will not do to refine too curiously upon such enactments, so that the very design of the law shall prove abortive, so that that shall become a shield and a protection which was designed as a weapon of offense. Can it be that one may not be regarded as a fugitive from justice who within a State hires another to kill and murder, but before the killing departs the jurisdiction to avoid the consequences of the murder he has designed? Can it be that if one that is within a State makes false representations to procure the goods of another, and departs that State before the other actually parts with his property on the faith of these representations, he may not be deemed a fugitive from justice? Or, to use the forcible illustration of counsel at the argument, if one places a dynamite bomb with clock attachment on the premises of another (62) that will explode only after the lapse of a certain time, and death results, so that the act is murder, but departs the State before the explosion to avoid the consequences of his act, is he not to be regarded as a fugitive from justice? To put the question is to answer it. The subsequent event was the consequence of the act, naturally resulting from it. The subsequent event was designed to happen from and by

reason of the act done. The event, when it occurs as the consequence of the act, gives quality to the act, rendering it criminal. The result was the foreseen and designed consequence of the act, stamping it as a crime. It is immaterial whether the agency employed be an inanimate object or a sentient being. The result was designed by and naturally flowed from his original act, which, by reason of the result and the foreseen and intended result, is criminal. Departure from the jurisdiction after the commission of the act, in furtherance of the crime subsequently consummated, is a flight from justice within the meaning of the law."

We think that his Honor also erred when he undertook to inquire into the motive and purpose of this extradition proceeding. In such matters the judiciary may review and control the action of the Governor in regard to points of law, but cannot interfere with such action in regard to any matter within the discretion of the Governor. *S. v. Hughes,* 61 N. C., 57. The executive and judicial are coördinate departments of the government. The judiciary will control and correct the acts of the executive officers only when they are acting contrary to law or without its sanction. In this matter, as we have said, the Governor was authorized by the law, upon the document laid before him, to issue his warrant for the arrest and delivery of the petitioner. The law which clothes him with the power to issue that warrant invests him with
(63) a discretion not to issue it, or, if he has issued it, to revoke it, if in his opinion his warrant is sought, not to aid in bringing the alleged criminal to trial for his offense, but for some other ulterior purpose. It has been well said: "In our polity the judiciary have a power and are clothed with a duty unique in the history of the governments, viz., the power and duty to declare legislative enactments and executive acts which are in conflict with our written constitutions to be for that reason void and of no effect. In this America has taught the world the greatest lesson in government and law it has ever learned, namely, that law is not binding alone upon the subject, and that the conception of law never reaches the full development until it attains complete supremacy in the form of written constitutions, which are the supreme law of the land, since their provisions are obligatory both upon the State and upon those subjected to its rule, and equally enforcible against both, and, therefore, *law* in the strictest sense of the term."

As in the performance of its "unique duty" the judiciary will declare no enactment of the legislative department void, because unconstitutional, unless it is plainly so; likewise, it will, with equal solicitude, abstain from encroachment on the province of the executive department, and will never declare the acts of its officers illegal unless

clearly so and not within the scope of that discretion with which the *law* itself has clothed them. The judiciary cannot review or control the executive in its exercise of that discretion.

Reversed.

Cited: S. v. Hall, post, 817; *S. v. Patterson,* 134 N. C., 617.

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(64)

McCADDEN & McELWEE ET AL. v. DAVID PENDER ET AL.

Pleading—Misjoinder of Parties and Cause of Action—Complaint—Cause of Action.

Upon the allegations of the complaint as set out in the record: *Held,* that there is no misjoinder of action and that a cause of action is stated in the complaint.

ACTION, heard on complaint and demurrer, before *Graves, J.,* at Spring Term, 1894, of EDGECOMBE.

The complaint was as follows:

"1. That on 17 November, 1891, judgments were rendered before R. A. Watson, a justice of the peace in and for the State and county aforesaid, against the defendant D. Pender, trading as D. Pender & Co., for goods, wares and merchandise sold and delivered, and in favor of the plaintiffs, as follows: In favor of the plaintiffs McCadden & McElwee for the sum of $42.90, and $1.15 costs; J. W. Old & Co. for $77.05, and $1.15 costs; M. L. Strauss & Sons for $50.70, and $1.15 costs; Foster, Knight & Co., two judgments, one for $138.65 and for $83, and $1.15 costs in each case; that each of said judgments were thereafter duly docketed in the Superior Court of said county, and executions issued thereon to the sheriff of said county, by whom the same were returned wholly unsatisfied.

"2. That the plaintiffs E. Austen Jenkins and Robert H. Jenkins, partners, trading as Edward Jenkins & Son, sold and delivered to the defendant D. Pender, trading as D. Pender & Co., goods, wares and merchandise, during the fall of 1891, of the value of $119.36, for which he promised to pay.

"3. That on 21 September, 1891, the defendant D. Pender, trading as D. Pender & Co., made conditional sale of his stock of goods, wares and merchandise at Old Sparta, N. C., and in the purchase of which the above debts were contracted, to one W. R. Ricks in con-

(65) sideration of $2,300 due the said Ricks by the firm of Pender & Cotten, to go as a cash payment on said purchase, and three notes for $500 each, and one note for $200 to be accepted for the balance of said purchase price, the title to the said stock of goods to be retained to the said D. Pender & Co. until said notes were fully paid.

"4. That thereafter the said three notes for $500 each were assigned to the defendants Ida L. Bryan, Zilphia Killebrew and Henry Pender, and the note for $200 to Henry Pender, in each instance as collateral security for debts claimed to be due said parties by the firm of Pender & Cotten. That the sum of $250 has been paid by the said Ricks upon the note held by the said Ida L. Bryan, but the balance due upon the note aforesaid, and the whole of the other of said notes, as plaintiffs are informed, remain unpaid.

"5. That, as plaintiffs are informed and believe, and so allege, the defendant D. Pender, trading as D. Pender & Co., during the year 1891 removed several thousand dollars worth of his stock of goods from his store at Old Sparta to the town of Tarboro and into the store then occupied by Pender, Hargrove & Cotten, and during the year sold the same and applied the proceeds of said sales to the payment of debts due by Pender & Cotten.

"6. That A. J. Cotten, who with the defendant D. Pender composed the firm of Pender & Cotten, died in July, 1890, and the defendant M. E. Cotten was duly qualified as the administratrix of his estate; that the defendant D. Pender has since then continued as surviving partner of said firm in the management and closing up of its affairs.

"7. That on ____ day of November, 1891, the defendant D. Pender, as surviving partner of Pender & Cotten, and as a member of the firm of Pender, Hargrove & Cotten, executed an assignment to the defendants J. L. Bridgers and Fred Philips, conveying his interest in

(66) both firms to secure certain debts therein mentioned, among them being the debts due Henry Pender, Zilphia Killebrew and Ida L. Bryan, as aforesaid. That said trustees have taken possession of the property so conveyed and have paid off certain of the debts mentioned in said trusts, but whether they have paid off the particular debts referred to above, or whether the trust property will be sufficient for that purpose, the plaintiffs are unable to say, but ask that the said trustees be required to answer fully in respect thereto.

"8. That the said W. R. Ricks is rapidly disposing of the stock of goods sold him as aforesaid; he has failed to pay off the notes due by him as aforesaid, although the same are due and payment thereof has been demanded. That he is insolvent, and the said stock of goods, as plaintiffs are informed and believe, is now worth less than the balance due on them as aforesaid.

"9. That D. Pender is wholly insolvent, but the firm of Pender & Cotten is abundantly solvent and able to pay its indebtedness."

Wherefore, the plaintiffs Edward Jenkins & Son pray judgment for the sum of $119.36 and interest against D. Pender & Co.; and all the plaintiffs pray judgment—

"1. That W. R. Ricks be restrained from paying to Ida L. Bryan, Zilphia Killebrew and Henry Pender the amounts due upon the above described notes.

"2. That a receiver be appointed of said notes and stock of goods sold to Ricks, to take charge of the goods, sell the same and hold the proceeds until the further order of this court.

"3. That as to the sum of $300 paid to Ricks, and the sum of $250 paid to Ida L. Bryan, as above set forth, and as to the amount of the goods of D. Pender & Co. appropriated to the payment of the debts of Pender & Cotten, and as to the amount of the several notes due by Ricks, in the event they are paid to the parties now holding them, these plaintiffs pray to be subrogated to the rights of said (67) creditors of Pender & Cotten against the said firm, that they receive from Bridgers and Philips, trustees, whatever may be coming to them under said trust, and that they have judgment against M. E. Cotten, administratrix, for any deficiency.

"4. That this cause be referred to some competent person to state such accounts as may be necessary.

"5. For general relief and costs."

The defendants' demurrer was as follows:

"For a first cause of demurrer, that there is misjoinder, in that the plaintiffs have separate and distinct interests, and sue upon distinct claims, which should not be united in the same action.

"For a second cause of demurrer, that the complaint does not state facts sufficient to constitute a cause of action."

His Honor overruled the demurrer, and defendants appealed.

Don. Gilliam for plaintiffs.
John L. Bridgers for defendants.

PER CURIAM. We are of the opinion that there is no misjoinder, and that a cause of action is stated in the complaint.

We think it best to defer the discussion of the questions argued by counsel until the case shall be tried and the facts more fully developed.

Affirmed.

(68)

E. A. ROLLINS v. W. KEEL ET AL.

Will, Construction of—Intention of Testator—"Lawful Heir," When Construed to Mean Issue.

1. In the interpretation of a will it is the duty of the court to ascertain and give effect to the intention of the testator; and the meaning attributed by him to words and phrases, if it appears from the will or the circumstances surrounding him, must prevail, although it differs from that ordinarily attaching to such words and phrases as used in other wills or other written instruments.
2. A testator provided in his will as follows: "I lend to my wife all my lands until my son Joseph shall have attained the age of eighteen years, and then I give said lands to him, the said Joseph, him, his heirs and assigns, forever: *Provided, however*, that if the said Joseph shall die without leaving any lawful heir, then the same, after the expiration of the widowhood of my wife, shall enure to my brother Reuben, his heirs," etc. Joseph was the only child and heir at law of the testator, and died without issue a few years after the death of the latter. The widow of the testator remarried after the death of Joseph. In an action by the heirs of Reuben to recover the lands: *Held*, that the words "any lawful heir," as used in the will, should be construed to mean "issue," since it was the evident intention of the testator that his wife should have the land only during her widowhood, in case Joseph died without issue, which intention would be defeated by taking the words "lawful heir" in their technical sense; for upon Joseph's death without issue or brother or sister, or the issue of such, his mother would take as his heir.

ACTION, for the recovery of a tract of land, tried before *Bynum, J.*, at April Term, 1894, of PITT, on the following case agreed:

"1. On 6 October, 1881, Rufus C. Rollins duly made and executed his last will and testament, with all the forms and solemnities required by law, and sufficient in form to pass both real and personal estate.

"2. That very shortly thereafter, to wit, on 9 December, 1881, the said Rufus C. Rollins died, resident and domiciled in the county of Pitt, and his last will and testament was, on 15 December,
(69) 1881, duly admitted to probate and recorded in said county.

"3. That the said last will and testament is in the following words and figures, to wit:

"STATE OF NORTH CAROLINA—Pitt County.

"I, Rufus C. Rollins, being of sound mind and memory, do, on this the 6th day of October, 1881, make and declare this my last will and testament, in the name of God: Amen.

"Item 1. I lend to my beloved wife Lorenda all of my lands until my son Joseph E. Rollins shall have attained the age of eighteen years,

and then I give said lands to him, the said Joseph E. Rollins, him, his heirs and assigns, forever: *Provided, however*, that if the said Joseph E. Rollins shall die without leaving any lawful heir, then the same, after the expiration of the widowhood of my wife, shall enure to my brother Reuben A. Rollins, his heirs and assigns, forever; and I do hereby appoint my brother John R. Rollins my lawful executor to this my last will and testament, to all intents and purposes.

"4. That the said Rufus C. Rollins died seized and possessed of a certain tract of land in the county of Pitt, lying on the public road leading from the lands of John Page to the Greenville and Bethel roads, and adjoining the lands of W. W. Hunter, John Page and others, containing about fifty-six acres, of which thirteen acres are cleared.

"5. That the said Joseph E. Rollins mentioned in the said last will and testament was the only child and heir at law of the said Rufus C. Rollins.

"6. That the said Joseph E. Rollins died on 14 September, 1887, at about the age of six years, without issue and without brother or sister, or the issue of such.

"7. That the said Reuben A. Rollins mentioned in the said last will and testament died in October, 1889. (70)

"8. That the plaintiff Ernest A. Rollins is the only child and only heir-at-law of the said Reuben A. Rollins.

"9. That in February, 1890, the widow of the said testator, Rufus C. Rollins, and one of the defendants in this action, intermarried with the other defendant, William Keel.

"10. That the defendants are in possession of the said land, and have refused, upon demand, to deliver possession.

"11. That the annual rental value of said land is $20."

Under the above case agreed, judgment was rendered in favor of the defendants and against the plaintiff, who appealed.

Larry I. Moore and Latham & Skinner for plaintiff.
No counsel contra.

SHEPHERD, C. J. "In interpreting wills it is the duty of the court to ascertain and give effect to the intention of the testator. Technical rules of construction and decided cases serve only as aids rather than as binding rules in the discharge of such duties. The meaning of every will, and its several parts, depends largely upon the circumstances of the testator as these appear from the will itself. The meaning attributed by him to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such

words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator, whose will may be under consideration, intended." Applying these principles of interpretation to the will of Rufus Rollins, we experience no difficulty in reaching the conclusion that the words "any lawful heirs" should be construed to mean *issue*. In other words the limita-
(71) tion should read "that if the said Joseph shall die without *issue*, then the same (the lands devised), after the expiration of the widowhood of my wife, shall enure to my brother Reuben A. Rollins, his heirs and assigns forever." It is plain that the devisor intended that his widow should have the land until Joseph attained the age of eighteen years, and that if he should die without issue she should have it only during her widowhood. If the words "lawful heirs" are to be taken in their technical sense, the widow would, in the event of Joseph's dying without issue, or brother or sister, or the issue of such (and this was the case), take the fee as heir of her son. This would defeat the intention of the devisor, as it is clear that he did not intend that she should have any interest in the land in the event of her marrying again. This view is well sustained by the reasoning of the court in *Patrick v. Morehead*, 85 N. C., 62.

Joseph having died without issue, and the widow having married, the limitation over to Reuben must take effect, and his heir, the plaintiff, is entitled to recover. Reversed.

Cited: Franks v. Whitaker, 116 N. C., 520; *Bird v. Gilliam*, 121 N. C., 327; *Sain v. Baker*, 128 N. C., 258; *May v. Lewis*, 132 N. C., 118; *Wool v. Fleetwood*, 136 N. C., 471; *Pitchford v. Limer*, 139 N. C., 15; *Faison v. Odom*, 144 N. C., 109; *Harrell v. Hagan*, 147 N. C., 115; *Puckett v. Morgan*, 158 N. C., 347; *Faison v. Moore*, 160 N. C., 149; *Jones v. Whichard*, 163 N. C., 245; *Pugh v. Allen*, 179 N. C., 309.

J. L. TUCKER, EXR. OF NANCY C. TUCKER ET AL. v. C. MOYE ET AL.

Will, Construction of—Intent of Testator.

1. The purpose of the testator, as gathered from the will, is always to be carried out by the court, especially when it is in consonance with justice and natural affection.
2. A testatrix bequeathed to each of her four children (or their representatives) one-fourth of her estate, consisting of notes aggregating $4,000, of

which one for $2,000 was owing by the plaintiff and one for $1,000 by each of two of the children. S., to whom one-fourth was also given, owed nothing. The bequest to plaintiff was as follows: "I give and bequeath to my son J. L. T. one-fourth of my estate, deducting from his part $2,000, with interest, advanced to him, for which I hold his note." The bequests to the two children owing $1,000 each were counterbalanced by their respective notes: *Held* (1), that the apparent purpose of the testatrix was that the estate should be distributed equally among the children: (2) that plaintiff is not entitled to hold the whole of his note as a gift, but in a settlement with S. for his share the plaintiff must account for the note owing by him.

ACTION commenced at the April Term, 1894, of PITT, asking (72) a construction of the will of Nancy C. Tucker, deceased, and submitted to *Bynum, J.*, upon the following agreed facts:

1. That in the year 1891 Nancy C. Tucker died domiciled in the county of Pitt, having first executed a last will and testament, which, after providing for the payment of debts, etc., was as follows:

"Item 2. My will and desire is that, after my just debts and burial expenses are paid, the balance of my estate shall be divided as follows:

"Item 3. I give and bequeath to my son Joshua L. Tucker one-fourth of my estate, deducting from his part $2,000, with interest, advanced to him, for which I hold his note.

"Item 4. I give and bequeath to my daughter Catharine B. Moye one-fourth of my estate, deducting from her part $1,000, with interest, advanced to her husband, W. B. Moye, for which I hold his note.

"Item 5. I give and bequeath to my son-in-law Stephen S. Quinerly one-fourth of my estate.

"Item 6. I give and bequeath to the heirs of Sarah P. Quinerly, former wife of Samuel Quinerly, to wit, Robert, Joseph and Rosa Quinerly, one-fourth of my estate, deducting from their part $1,000, and interest, advanced to their father Samuel Quinerly, for which I hold his note.

"Item 7. I hereby constitute and appoint my beloved son Joshua L. Tucker as my executor (without bond) to this my last will and testament, to carry out and execute the same according to the (73) true meaning and intent thereof."

2. That the said Nancy C. Tucker left no real estate, and her entire personal estate consisted of a small amount of personal property, which has since been sold for $30, of $50 in money, and of two notes, one for $2,000, executed by the plaintiff Joshua L. Tucker, dated 1 August, 1885, and bearing interest at the rate of 8 per cent, and one executed by Samuel Quinerly for $1,000, dated 13 August, 1885, and

bearing interest at same rate, and a note against Mary E. Harper for $65, which has been collected.

3. That at the date of the execution of her will the said Nancy C. Tucker was possessed of one other note executed by W. B. Moye, for the sum of $1,000, dated ____ day of August, 1885, with interest at 8 per cent, but the said Nancy C. Tucker, after the date of her said will, and before her death, delivered the said note to the defendant Catharine B. Moye in full of her share of the said Nancy's estate.

4. That the said Samuel Quinerly died insolvent, and not more than 25 per cent of the note due from him to the said Nancy is collectible.

5. That there have gone into plaintiff's hands, exclusive of the note against himself and Samuel Quinerly, the sum of $145, and he has paid out in the payment of debts and charges of administration the sum of $249.70, exclusive of the amount he may be liable for as counsel and attorney's fees.

6. That said Catharine B. Moye and Joseph, Robert and Rosa Quinerly, and the guardian of Joseph and Rosa, make no demand upon the executors.

Upon these facts the defendant S. S. Quinerly contends that as it was the intention of the testatrix to give him one-fourth of her estate, he is entitled to one-half of the note executed by the said Joshua L.
(74) Tucker, or one-half thereof after deducting the amount paid out by him as executor.

The plaintiff contends that inasmuch as the only assets in his hands is the $2,000 note executed by himself, he is entitled to the whole of the same as a gift from the testatrix, and that the defendant S. S. Quinerly is entitled to nothing.

Judgment was rendered according to the contention of the plaintiff, and defendant S. S. Quinerly appealed therefrom.

James E. Moore for defendant.
No counsel contra.

BURWELL, J. In *Lassiter v. Wood,* 63 N. C., 360, *Mr. Justice Reade* said of the will then being interpreted: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator, as gathered from the will, is always to be carried out by the court, and minor considerations, when they come in the way, must yield. Especially is this so when the purpose is in consonance with justice and natural affection."

Of the will we have under consideration here, it may be said, we think, that it is apparent that the leading purpose of the testatrix seems to have been to divide her estate equally between certain persons named

therein. She gave to the appellant one-fourth of her estate, and to the plaintiff one-fourth. Her estate consisted of three promissory notes amounting to $4,000 principal money, and "a small amount of personal property which has since been sold for $30."

This general purpose of the testatrix, that her estate should be divided into four equal parts, of which the appellant should have one, must be carried out, and minor considerations must yield to it. The words used by the testatrix in the third item of her will must be so construed as to make them harmonize with this general purpose, if such a construction can be reasonably put upon them.

It seems to us that this can be done, for we have only to declare (75) that when the testatrix said that from the plaintiff's one-fourth of her estate he should deduct $2,000, with interest, advanced to him, for which she held his note, she meant only that that note should be used as might be necessary in settlement of plaintiff's share of the estate. And if it is said this construction does violence to the words used in said item, it may be replied that the construction contended for by the plaintiff and adopted by his Honor seems to us to do violence to the whole will and to thwart its apparent general purpose, which is in consonance with justice and natural affection. This is more reasonable, we think, than a construction that will bring us to the conclusion that the testatrix meant that one of her legatees, to whom she gave one-fourth of her estate, should get nothing, while another legatee, to whom she likewise gave one-fourth of her estate, should get what was worth more than $2,000. The construction contended for by the plaintiff would bring about that result, it seems, if adopted, and that, too, while, so far as appears, the condition of her estate was not changed between the date of her will and her death.

Our conclusion is that, in a settlement with the appellant for his one-fourth part of the estate of the testatrix, the plaintiff must account for the note mentioned in the third item of the will.

Reversed.

Cited: *Bowden v. Lynch,* 173 N. C., 206.

(76)

W. S. BARNES v. W. T. CRAWFORD.

Action for Slander—Slanderous Words—Forgery, What Constitutes—Practice—Amendment of Complaint After Demurrer Sustained—Discretion of Judge.

1. To constitute actionable slander the words must impute the commission of an infamous offense; but when it appears from all that was said at the time the words were spoken that they had relation to a transaction that was not criminal, and that they must have been so understood by the hearers, the action cannot be sustained.
2. Forgery is the signing by one without authority, and falsely and with the intent to defraud, the name of another to an instrument which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.
3. The false signing of the name of a candidate for Congress to a favorable response to a "demand" by certain electors, whereby he is placed in the attitude of agreeing to favor certain proposed legislation, is not indictable forgery, since he could not be made liable to any legal proceeding for a breach of the same if his signature were genuine. Hence a charge that the one so signing such instrument was a "forger" is not actionable slander.
4. It is solely within the discretion of the judge below to allow an amendment to a complaint after a demurrer thereto has been sustained.

ACTION for damages caused by the use of alleged slanderous words, heard on complaint and demurrer by *Hoke, J.*, at February Term, 1894, of WAKE.

The plaintiff appealed from the judgment sustaining the demurrer and refusing an amendment to the complaint.

W. J. Peele and W. A. Montgomery for plaintiff.
F. H. Busbee for defendant.

MACRAE, J. The slanderous words alleged to have been spoken by defendant are: "I did not sign the demand numbered six on the
(77) said card. My name has been forged to it by Barnes" (meaning the plaintiff). "Otho Wilson and others got it (meaning the card) up, and they are forgers, frauds and liars. They (meaning the plaintiff and others) have forged my name to the card."

We give this sentence with the punctuation as appears in the record. It might in some cases be necessary to send down for the original, but we do not deem it to be so here.

Without entering into a consideration of the nice distinctions which have been made as to the grade of the offense at common law and by statute, we take it that to call a man a forger in this State is an action-

able slander. *McKee v. Wilson*, 87 N. C., 300, and cases there cited. But if these words were so coupled with others in explanation that they must of necessity apply only to a further charge of some specific act, it would be necessary to pursue the inquiry as to whether the act so charged to constitute him a forger would, if true, amount to such offense.

"An action of slander cannot be maintained for words which impute a crime, where, from all that was said at the time the words were spoken, it appears that the words had relation to a transaction that was not criminal, and that they must have been so understood by the hearers." *Brown v. Myers,* 40 Ohio St., 99; 13 A. & E., 387. To constitute actionable slander the words must impute the commission of an infamous offense. It is true that this offense need not be punishable in this State, as was held in *Shipp v. McCraw,* 7 N. C., 463. By reference to the opinion of *Chief Justice Taylor* in that case it will be found that every instance cited by him was that of the charge of an infamous crime, punishable where it was alleged to have been committed. *Judge Henderson* said in his concurring opinion: "The gravamen in an action of slander is social degradation—the risk of punishment—and the rule to test the question whether the words be or be not actionable, to wit, Does the charge impute an infamous crime? (78) is resorted to to ascertain the fact whether it be a social degradation, and not whether the risk of punishment be incurred. And this rule is the test of that, for those who are punished for infamous crimes are degraded from their rank as citizens; they lose their privileges as freemen, their *liberam legem,* and are no longer *boni et legales homines.* No other degradation will give an action," etc.

Is it then an infamous offense under the law of North Carolina to falsely sign the name of another to the paper known as the sixth demand, which reads as follows?

"6. That Congress issue a sufficient amount of fractional paper currency to facilitate exchange through the medium of the United States mail.

"I approve of the above demand, and, if elected, will endeavor to have it enacted into a law. I also approve of the purpose of the bill introduced into the United States Senate by Senator Vance, and known as the Sub-treasury Bill; and if it is not shown to be unconstitutional, I will vote for it and advocate its passage, and in the event it is shown to be unconstitutional, then I will introduce and advocate a bill to abolish bond warehouses for whiskey, etc., and also a bill to abolish the national banks, in accordance with the first demand on this card.

"Witness:_____ (Signed)_____"

Forgery is defined to be the signing by one without authority, and falsely, and with intent to defraud, the name of another to an instrument which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. 3 Rice Ev., 487.

An instrument in writing of which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibil-
(79) ity, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. 3 Greenleaf Ev., 103.

But to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false: it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has *no legal tendency to defraud.* 2 Bishop Cr. Law, sec. 533.

So, whether the word "instrument," or "document," or "writing," be used, it will always be found coupled, as in Newell Def., p. 141, with the *intent to defraud.*

Now we all know that it is impossible to give an exact definition of the word fraud or defraud, but Webster gives as good a definition of fraud, as understood *in law,* as can be found: "An intentional perversion of truth for the purpose of obtaining some valuable thing or promise from another." The controlling idea always being that the instrument, if true, would be the foundation of some legal liability.

We are of the opinion that the false signing of this paper would not be forgery, because the defendant could not be made liable to any legal proceeding for the breach of the same, if his signature had been genuine.

After the demurrer was sustained and judgment rendered, the plaintiff moved to be allowed to amend his complaint, so as to allege injury to him in his office by the words spoken as set out in "Exhibit A." Motion overruled, and the plaintiff excepted.

This was a matter within the discretion of the judge below, and with which we are not permitted to interfere. Section 272 of The Code has been often construed to give to the defendant, after a demurrer interposed by him in good faith has been overruled, the right to answer over, but it has never been extended to the plaintiff as a right to amend his complaint. See Clark's Code, and cases there cited under this section.

(80) In *Netherton v. Candler,* 78 N. C., 88, his Honor overruled the defendant's demurrer and allowed the plaintiff to amend his complaint. The Court held it error, and said he ought to have sus-

tained the demurrer and required the plaintiff to pay the costs; and then, instead of dismissing the case, he might, *in his discretion,* have allowed the plaintiff to amend. "Any pleading may be once amended, of course, without cost and without prejudice to the proceeding already had, *at any time before the period for answering it expires.*" The Code, sec. 272.

"The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default." The Code, sec. 207. The summons was returnable to October Term, 1893, at which term the defendant's time to answer was extended thirty days, within which extended time he demurred instead of filing an answer.

The amendment, of course, of the complaint, could have been made of right at any time before the expiration of the thirty days. An amendment could not have been made after that time without prejudice to the proceedings already had, for the defendant had a right to have his demurrer heard, and, as we have said, it was entirely within the discretion of the presiding judge to permit an amendment to the complaint after the demurrer was sustained.

Affirmed.

Cited: Crawford v. Barnes, 118 N. C., 915.

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(81)

W. S. STARKE v. R. R. COTTEN.

Jurisdiction—Justice of the Peace—Action Containing Divers Causes of Action—Amendment.

1. Where, in an action before a justice of the peace, there are two causes of action, of only one of which he has jurisdiction, he may proceed to try that, treating the other as surplusage.
2. The Superior Court has, on appeal, power, under sec. 908 of The Code, to amend any warrant, process, pleading or proceeding "had before a justice of the peace," in form and substance, "and at any time," "before or after judgment." Hence, on the trial of an appeal from a judgment of the justice of the peace, of an action that sought to recover for a breach of contract, and also to enforce an equity, the trial judge properly allowed an amendment discarding the equitable proceeding.

APPEAL from a justice's court, tried at May Term, 1894, of VANCE, before *Battle, J.,* and a jury.

Judgment in favor of plaintiff, and appeal by the defendant
(83) Cotten.

T. T. Hicks for plaintiff.
T. M. Pittman for defendant.

CLARK, J. It has been repeatedly held that if in an action before a justice of the peace there are two causes of action, of one of which the justice has jurisdiction and of the other he has not, the jus-
(84) tice can proceed to try the first, treating the latter as surplusage. *Manufacturing Co. v. Barrett,* 95 N. C., 36. The jurisdiction as to such valid cause of action is not ousted because further relief is asked which the justice has no power to grant. *Deloatch v. Coman,* 90 N. C., 186; *Ashe v. Gray,* 88 N. C., 190; *Morris v. O'Briant,* 94 N. C., 72. In the latter case it is held that the question of jurisdiction is to be determined by the summons rather than the complaint, as it depends upon the "sum demanded," citing *Noville v. Dew,* 94 N. C., 43, to same effect. The Code, sec. 832. In the present case there was no written complaint. The summons stated the cause of action to be for "non-payment of the sum of $70.80, with interest on same from 1 January, 1893, due by account and contract, and demanded by said plaintiff." This is clearly a cause of action of which the justice of the peace had jurisdiction. The justice of the peace in making his "return to the appeal" states the verbal contention before him, from which it appears that the plaintiff claimed $70.80 due him by the defendant Cotten for damages for breach of contract in not delivering certain tobacco bought of said Cotten, and to subject that sum out of the proceeds of the tobacco in the hands of defendant Cooper, to whom Cotten had sold it. Of this last the justice had no jurisdiction; but this did not oust the jurisdiction as to the cause of action stated in the summons against Cotten. The Code, sec. 908, gives the Superior Court the fullest power on appeal "to amend any warrant, process, pleading or proceeding" had before a justice of the peace "either in form or substance," and "at any time either before or after judgment," and "whether in a civil or criminal action." This has been always favored, and the only limitation recognized by the courts has been that the amendment shall not entirely change the character of the action. *State v. Norman,* 110 N. C., 484. His Honor, therefore, properly allowed an amendment discarding the attempted equitable proceeding against Cooper, and submitting as the only issue: (1) Was there a breach
(85) of the contract by defendant Cotten? (2) If so, what damage has plaintiff sustained? These the jury found in favor of the plaintiff, and assessed the damages at $70.80. These damages the de-

fendant Cotten had never offered to pay, but, on the trial before the justice, admitting the contract, he contended that he was relieved from breach of it by non-performance of plaintiff's part of it, and further insisted, and as to this last properly, that plaintiff could not subject the tobacco, or its proceeds in Cooper's hands, for such damages.

The defendant Cooper was not adjudged by the justice to pay any costs or judgment to the plaintiff. The judgment of the Superior Court is only against the defendant Cotten for $70.80 and costs, and should be affirmed. A nonsuit seems to have been taken as to Cooper.

Affirmed.

Cited: McPhail v. Johnson, post, 302; *Hargrove v. Harris,* 116 N. C., 420; *Patterson v. Freeman,* 132 N. C., 359.

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(86)

PATSY ANN GASKINS v. HENRY C. DAVIS.

Pleading—Counterclaim—Action of Trespass—Wrongful Cutting and Carrying Away Timber—Measure of Damages—Recaption.

1. A counterclaim, defectively stated, may (if it can be maintained at all) be cured by a reply which contains the allegations omitted therefrom.
2. In an action for trespass in an entry upon land after being forbidden, and cutting, carrying away and converting timber growing thereon, the injured party is entitled to recover the value of the timber, when it was first severed from the land and became a chattel, together with adequate damage for any injury done to the land in removing it therefrom.
3. So long as timber so taken is not changed into a different species, as by sawing it into planks or boards, the owner of the land retains the right of property therein as fully as when by severance it became a chattel instead of a part of the realty, and may regain possession of it by recaption or other legal remedy, notwithstanding additional value may have been imparted to it by transportation to a better market, or by any improvement in its condition short of an actual alteration of species.
4. One who, in the honest belief that he is on his own land, cuts logs from the land of another, cannot, when they are recaptured by the lawful owner, set up a claim for their increase in value by reason of his having transported them to a better market, nor can he, in an action by the lawful owner for damages for cutting other logs, recoup by way of counterclaim for the additional value imparted by him to the logs so recaptured.

ACTION, tried before *Bynum, J.,* at Fall Term, 1893, of CRAVEN. The plaintiff sought to recover damages for the entry upon her land

by the defendant, after being forbidden, and the cutting and carrying away a large amount of valuable timber therefrom.

(88) Verdict and judgment for the defendant, and appeal by plaintiff.

W. W. Clark for plaintiff.
F. M. Simmons and P. M. Pearsall for defendant.

AVERY, J. The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away and converting to his own use valuable timber that was growing thereon, to her damage $500. The logs after being severed were transported to New Bern in two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of $112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff; and though the counterclaim may be a defective statement of the defendant's cause of action, in that it fails to aver an unlawful taking, the defect is cured, if the counterclaim can be maintained at all, by the reply, which, by way of aider, raises the question of the rightfulness of the seizure.

The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land, and became a chattel (*Bennett v. Thompson,* 35 N. C., 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing

(89) into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel instead of a part of the realty belonging to her. *Potter v. Madre,* 74 N. C., 36. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or wilfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article in its altered state cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith and under an honest belief that the title was in him."

In *Potter v. Madre, supra, Rodman, J.,* delivering the opinion of the Court, says: "The principle of equity (applied in that case) is supported by the analogy of the rule established in this State by the de-

cisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. *Albea v. Griffin,* 22 N. C., 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz., by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass, the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. *Potter v. Madre, supra;* 5 A. & E., 36; *Ross v. Scott,* 15 Lea (Tenn.), 479. The character of the logs had not been changed by cutting (90) and transporting to New Bern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed and without abatement for the cost of severance. *Coal Co. v. McMillan,* 49 Md., 549. But if he prefers to follow and claim the timber removed, he is entitled to do so as long as the species remains unchanged. The plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled by way of recoupment to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks and used to construct a boat, the plaintiff would not have been entitled to recover the boat or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any done, to his land in removing it therefrom; but the present plaintiff would have been entitled to deduct, by way of counterclaim, the value of the timber which was manufactured into the boat just after it was felled and converted into a chattel. *Potter v. Madre, supra.* It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of betterments, for additional value imparted to the property after its conversion into a chattel and before it is changed into

a different species? The judge below in allowing the defendant
(91) by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the New Bern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In *Ross v. Scott, supra,* where it appeared that the defendant had entered upon land to mine for coal, and under the honest but erroneous belief that he was the owner had built houses thereon, it was held that the plaintiff might recover the cost of the coal *in situ,* subject to reduction by an allowance for permanent improvements put upon the lands. See, also, *In re United, etc., Co.,* 15 L. R., ch. 46; *Hilton v. Ward,* 34 *Ib.,* 432; *Forsyth v. Wells,* 41 Pa. St., 291. The weight of authority, it must be conceded, sustains the rule that where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. *Tilden v. Johnson,* 52 Vt., 628 (36 Am. Rep., 769, and note 770); *Hendre v. Young,* 55 Pa. St., 176; *Hill v. Canfield,* 56 *Ib.,* 434; *Moody v. Whitney,* 38 Me., 174; *Cushing v. Longfellow,* 26 Me., 306; *Galler v. Fett,* 30 Col., 462; *Foote v. Merrill,* 54 N. H., 496; *Railway Co. v. Hutchings,* 32 Ohio St., 571. In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament or as shade trees.

It being settled in this State that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further,
though it may sometimes subject a mistaken trespasser to hard-
(92) ship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market or by any improvements in its condition short of an actual alteration of species. In *Wymouth v. R. R.,* 17 Wis., 550, the Court says: "In determining the question of recaption, the law must either allow the owner to retake the property or it must hold that he has lost his right by the wrongful act of another. If retaken at all it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law therefore being obliged to say either that the wrong-doer shall lose his labor or the owner shall lose the right to take

the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrong-doer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrong-doer shall lose." 26 Am. Rep., 529, note. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right, given her by law, to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant for which an action would lie. (93)

It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff. The defendant could not recover therefore either in a distinct action for the taking of the logs or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot, the property in them in their altered state and at the new *situs* revested in her with the absolute *jus disponendi*, as in the case of her other personal property. Nothing remained to be adjusted in the courts except her claim for damages for the taking of the other lot and the injury to the land, if any, incident to the removal of both lots. It was error, therefore, to instruct the jury that the enhanced value imparted by removal to the one lot of logs might be allowed the defendant as a counterclaim, so as to set off the damages assessed for injury to the land and for the value at the stump of the other lot, and the plaintiff is entitled to a

New trial.

Cited: Davis v. Wall, 142 N. C., 451; *Whitfield v. Lumber Co.,* 152 N. C., 214; *Williams v. Lumber Co.,* 154 N. C., 310; *Wall v. Holloman,* 156 N. C., 276.

(94)

EDWARD T. CLARK v. W. R. COX ET AL.

Limitations of Trust—Executory Interests in Land—Vested and Contingent Remainder—Shifting Use—Descent and Purchase.

1. Unless the creator of a trust clearly intends otherwise, its limitations must be construed according to the rules applicable to limitations of a strictly legal character.
2. The distinction between a contingent and vested remainder is, that if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is *contingent;* but if after the gift of a vested interest a clause is added divesting it, the remainder is *vested.*
3. Where the person who is to take is certain, but the event is uncertain, a contingent remainder, conditional limitation or executory devise is transmissible by descent.
4. A deed conveyed land in trust for the use and behoof of L. for life, then for the use of any child of L. living at her death, and in case no such child should be living, then for the use of L. C., A. N., O. N. and R. N., their heirs and assigns; and if one or more of the latter should die before such contingency should take place without leaving any child or children then living, then to the use of the survivor or survivors of them, the said L. C. and A. N., O. N. and R. N., their heirs and assigns, forever. L. died without having had issue; A. N. and R. N. predeceased L., leaving no issue. L. C. and O. N. also predeceased L., but left issue. In an action for partition of the lands: *Held,* that the limitation to L. C. and the others was a contingent defeasible fee with an inheritable quality, which, upon the death of L. without issue, descended to the heirs of L. N. and O. N. (the interests of A. N. and R. N. having shifted simultaneously with their death to L. N. and O. N.), and as the heirs of L. N. and O. N. take by descent, and not as purchasers, the division must be *per stirpes* and not *per capita.*

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

PROCEEDING FOR PARTITION, tried before *Bynum, J.,* at HALIFAX, and the facts were as follows:

On 13 January, 1807, James Smith executed a deed in trust to David Clark containing the following provision: "To have and to hold the said tract or parcel of land and all and singular the premises above mentioned to the said David Clark and his heirs for the uses and purposes hereinafter mentioned, that is to say, in trust for the use and behoof of the said Lucy S. Norfleet during her life, then for the use and behoof of such child or children as she, the said Lucy S. Norfleet may have living at the time of her death; and in case the said Lucy S. Norfleet should die without leaving any child or children living at the
(95) time of her death, then in trust for the use, benefit and behoof of Louisa Clark, Ann S. Norfleet, Olivia Norfleet and Rebecca Norfleet, their heirs and assigns; and if one or more of them, the said

Louisa Clark, Ann S. Norfleet, Olivia Norfleet and Rebecca Norfleet, should die before such contingency shall take place without leaving any child or children then living at the time of her or their death, then to the use and benefit of the surviving or survivors of them, the said Louisa Clark, Ann S. Norfleet, Olivia Norfleet and Rebecca Norfleet, their heirs and assigns forever." Lucy S. Norfleet intermarried with Weldon N. Edwards, and died 2 May, 1892, without having had any issue. Ann S. Norfleet and Rebecca Norfleet died during the lifetime of Lucy S. Edwards, *née* Norfleet, without leaving any child or descendant. Louisa Clark died during the lifetime of Lucy S. Edwards, and her grandchildren and great-grandchildren are the plaintiffs. Olivia Norfleet intermarried with Thomas Cox, and died during the lifetime of Lucy S. Edwards, and her children and grandchildren are the defendants. A petition was filed by the plaintiffs against the defendants for a sale of the land conveyed upon trust by James Smith, for partition, and the land sold. Judgment was rendered decreeing the division of the fund among the plaintiffs and defendants *per stirpes,* and from this judgment the plaintiffs appealed.

R. O. Burton and E. T. Clark for plaintiffs.
Thomas N. Hill for defendants.

SHEPHERD, C. J. It is contended on the part of the plaintiffs that Louisa Clark and Olivia Cox, *née* Norfleet, who died during the lifetime of Lucy S. Edwards, *née* Norfleet, took no interest under the deed in trust that could be transmitted by descent; that their heirs, who are plaintiffs and defendants, took as purchasers individually as if they had been named in the said deed, and that the (96) fund should therefore be divided *per capita* and not *per stirpes.*

A perusal of the deed very clearly shows that it was not made *in ops consilii,* and the language used by the draftsman had such a definite and legal significance that but little difficulty is experienced in arriving at the intention of the donor. It may also be observed that in limitations of a trust "the construction of limitations ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary." Fearne Cont. Rem., 125; *Starnes v. Hill,* 112 N. C., 1. As there is nothing in the deed from which we can infer that the terms therein employed were to be understood in any other than their technical sense, we must determine the limitations under consideration according to the rules of common law applicable to limitations of a strictly legal character. Conceding the authority of *Holmes v. Holmes,* 86 N. C., 205, commented upon in *Fulbright v. Yoder,* 113 N. C., 456, and treat-

ing that case as the single exception to the rule above mentioned, we have in this case a limitation to Lucy S. Norfleet for life, and a remainder in fee to such of her children as might be living at her death. As she had no children at the time of the execution of the deed, the remainder to them was contingent, and as, in the event of her dying without children, a remainder was limited to Louisa Clark, Ann S. Norfleet, Olivia Norfleet and Rebecca Norfleet, and their heirs, there was a limitation of two concurrent fees by way of remainder as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and this limitation is called "a limitation by way of remainder on a contingency with a double aspect." *Watson v. Smith,* 110 N. C., 6. It must be noted that the limitation to Louisa Clark and her sisters above named was a limitation to them and their heirs, and not to those who should survive; and had there been no limita-
(97) tion to the children of Lucy S. Norfleet, the life-tenant, these sisters would have taken a vested remainder, subject to be divested as to those who should die without children before the death of the said Lucy, their shares going by way of shifting use to the surviving sister or sisters in fee. "Thus on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A., his share to go to those who survive, the share of each child is said to be vested subject to be divested by its death. But on a devise to such of his children as survive him, the remainder is contingent. The distinction is that if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is contingent; but, if, after the word giving a vested interest, a clause is added divesting it, the remainder is vested." Gray Perpetuities, 108; *Starnes v. Hill, supra.* So where a devise was to "A. for life, with a devise over of all property that might be left at A's death to the testator's four children, by name, with a provision that if any of the four children died before A. the property should be equally divided among the survivors, 'except they should leave issue,' and in that case to go to the issue, it was held to be a vested remainder in the four children. If it had been construed to be a devise to such of them as survived A., it would have been a contingent remainder. It was held, moreover, to be a devise in fee, subject to be divested upon the happening of a condition subsequent with a limitation over upon the happening of that contingency." 2 Wash. R. P., 3 Ed., 510.

The foregoing authorities are referred to for the purpose of showing that, in contemplation of law, there was no uncertainty as to the persons who were to take upon the happening of the contingency, that is, the death of the life-tenant, Lucy S. Norfleet, without leaving children. This being so, it follows that each of these sisters took such a contingent

interest as was transmissible by descent, as it is well settled that "executory interests in real property, which are not contingent (98) on account of the person, descend to the heir of persons to whom they are limited, . . . where they die before the contingency happens upon which they are to vest." 2 Fearne, *supra,* 434.

"All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent." 4 Kent Com., 262. "Where the person is ascertained who is to take the remainder if it becomes vested, and he dies, it will pass to his heirs." 2 Wash., *supra,* 264; *Noden v. Griffiths,* 1 W. Black, 606; 1 Preston Est., 76. This principle is fully adopted in this State, and in *Hackney v. Griffith,* 59 N. C., 348, the Court said: "It is settled that where the person is known, but the event is uncertain, a contingent remainder, conditional limitation, or executory devise, is transmissible by descent." Having seen that there was, legally speaking, no uncertainty as to the persons in whom the estate was to vest in case the life-tenant should presently die without children, it must follow that Louisa Clark and her said sisters took under the deed an interest that could be inherited. This interest, as we have indicated, was a fee simple, contingent alone upon the death of the life-tenant without children; but the fee was subject to be divested by condition subsequent as to those who should die without leaving children before the happening of the said contingency. This contingent defeasible fee, possessing an inheritable quality, descended to the heirs of Louisa Clark and her sisters upon their death before the happening of the contingency; but as Ann and Rebecca died without children, their interest simultaneously with their death shifted by virtue of the condition to Louisa and Olivia or their heirs.

The case does not disclose whether Louisa and Olivia died before or after the other two sisters; but this would, under the view we have taken, be immaterial, since, as we have observed, the interests of all the sisters were of a descendible character. The contingent (99) interest in fee of Ann and Rebecca having shifted to Louisa and Olivia, or, if then dead, to their heirs, it must follow that upon the death of Lucy S. Norfleet, the life-tenant, without children, the entire inheritance vested in the heirs of Louisa and Olivia, these latter having died before the life-tenant and having left children.

The contention of counsel is based upon the idea that the plaintiffs and defendants take as purchasers. But it is difficult to understand how this can be so, inasmuch as there is no limitation whatever to them as the children of Louisa and Olivia. The estate was limited to the *sisters and their heirs,* subject to be divested only upon the death of any of them without children. The reference to children was simply a part of

a condition upon which the interests in fee were to shift from one or more sisters to another or others, and has not the slightest efficacy by way of conveying an interest to any one.

Having defined these limitations, it must be apparent that there is no way in which these parties can derive any interest except through their ancestors by descent. They take as heirs of their respective mothers, and of course must take *per stirpes*.

The principle is "that if the *heir* is to take anything which might have vested in the ancestor, the heir shall be in by descent. And in cases where an estate is to arise to the ancestor and his heirs on a condition precedent, the performance of it after the ancestor's decease (in whom no estate at all theretofore vested) will entitle his heirs as by descent. To which we may add the rule respecting the transmissible quality of *contingent* remainders or executory devises to the representatives of the ancestor dying before the estate vests." 1 Fearne, *supra*, 33.

If, as the plaintiffs contend, the contingent interests were not descendible, it would be perplexing to discover how they can set
(100) up any claim to the proceeds of the sale for partition. The learned brief of counsel seems to be predicated upon the idea that there was a limitation of some kind to the plaintiffs and defendants as purchasers, but as we have seen that there was no such limitation, it is unnecessary to review the authorities cited. These are generally decisions turning upon the construction of wills, or where, as in *Williams v. Beasley*, 60 N. C., 102, there was in effect a limitation to *children* (a word of purchase) after a preceding estate.

For the reasons above given, we are of the opinion that the judgment must be

Affirmed.

Cited: Whitesides v. Cooper, post, 574; *Bowen v. Hackney*, 136 N. C., 191; *Malloy v. Acheson*, 179 N. C., 97, 98.

W. T. STAINBACK, ADMINISTRATOR OF J. L. KITTRELL, v. G. I. HARRIS ET AL.

Sale of Land for Assets—Defenses—Issues—Debts Due by Decedent—Judgment Against Administrator.

1. The fact that an administrator made no defense to an action in which a judgment was rendered against him is no defense to a proceeding by the administrator against the heirs to sell the lands of the decedent to make assets to pay such judgment and other debts.

2. In a proceeding for the sale of decedent's lands for assets to pay debts it was error to refuse to submit an issue raised by the answer as to the sufficiency of the personal property to pay the debts.
3. In a proceeding by an administrator to sell land for assets to pay debts, the heirs cannot, by a mere general denial of title in the ancestor and without alleging independent title in themselves, put the administrator to proof of the decedent's title.

APPEAL from *Battle, J.*, on appeal from the clerk of the Superior Court of VANCE, on petition for license to sell lands for assets.

The petition, after setting out the death of the intestate James L. Kittrell, and the names of the heirs at law who were made (101) parties defendant, alleged—

"3. That the amount of the debts still outstanding against said estate, in so far as they have been brought to plaintiff's notice, is a judgment in favor of James H. Lassiter & Son against plaintiff as such administrator, for $409.77, with 8 per cent interest on $231.83 from 5 October, 1891, and $5.70 costs, and the further sum of $------, costs and charges of administration.

"4. That the personal estate of said James L. Kittrell was absorbed in the allowance to his widow for her year's support and that of her two infant children.

"5. Plaintiff alleges, upon information and belief, that said intestate was, at the time of his death, seized of a tract of land situate on the shorter road from Henderson, in Vance County, to Oxford, in Granville County, near Health Seat, in Vance, adjoining the lands of the late David Stone, owned now by his heirs, J. W. Kittrell, Mrs. Eliza Glover and others, containing 137 acres, of the value of about $1,200."

The defendants answered as follows:

"3. They admit that James H. Lassiter & Son procured a judgment to be rendered in their favor against the plaintiff as administrator of the said intestate at October Term, 1891, of the Superior Court of said county for the sum of $409.77 and interest and costs, but they aver that plaintiff, at the time of his qualification as administrator as aforesaid, and of the procurement of said judgment as aforesaid, was, and still is a confidential clerk of said James H. Lassiter & Son; and they aver that said administrator made no defense whatever to said James H. Lassiter & Son's action against him, but permitted said James H. Lassiter & Son to take judgment against him for said sum of $409.77, and interest and costs as aforesaid, for want of an answer to said complaint.

"4. Whether or not the personal estate of the said intestate 'was all absorbed in the allowance to his widow for her year's support and that of her two children,' as is alleged in the fourth para- (102) graph of plaintiff's complaint, these defendants have no knowl-

edge or information thereof sufficient to enable them to form a belief, and, therefore, they demand proof thereof.

"5. They deny that said 'intestate was, at the time of his death, seized of the tract of land' described in the fifth paragraph of the complaint."

Wherefore, these defendants demand judgment that they go hence, etc.

Upon the filing of the answer, the clerk transferred the proceeding for trial to the Superior Court at term, upon issues certified as follows:

"1. Was J. L. Kittrell, at the time of his death, seized of the tract of land described in the petition?

"2. What amount of the personal estate of the said J. L. Kittrell came, or ought to have come, to the hands of the administrator?"

The plaintiff, by counsel, objected, and excepted to the order of the clerk and moved the court to grant an order for the sale of said property, on the ground that no material issue was raised by the answer.

The cause was heard at the February Term, 1894, of Vance Superior Court, before *Bynum, J.* When called for trial the plaintiff moved for judgment, upon the ground that the issues certified by the clerk were not material.

The defendant's counsel present suggested the propriety of an issue as to the *bona fides* of the judgment alleged in the plaintiff's petition in favor of James H. Lassiter & Son, but upon the record in that case being exhibited to him in open court, and it appearing, upon examination, that the judgment was upon a sealed bond attached to the record and a verified complaint, the issue was not insisted upon, and the court held that the plaintiff was entitled to the judgment prayed.

The defendants urged that the case be remanded to the clerk,
(103) suggesting as a reason therefor that other creditors of the deceased would wish to assert claims against the estate.

His Honor stated that he would defer signing the judgment, that the fact might be made to appear to him, by affidavit, that the interest of any party required the proceeding to be remanded. The cause was held open for several days and no such affidavit was tendered. But at the end of that time one of the counsel for the defendants, who was not present at the trial, appeared and insisted upon a trial of the issues certified by the clerk, and tendered in addition thereto the following issues:

"1. Was the judgment in favor of James H. Lassiter & Son against plaintiff as administrator of J. L. Kittrell *bona fide?*

"2. Was the personal estate of the late James L. Kittrell absorbed in the allowance to his widow for her year's support for herself and her two children?

"3. Was the plaintiff's intestate James L. Kittrell seized, at the time of his death, in fee, of the lands described in the plaintiff's complaint or petition?"

His Honor refused to submit any issue to the jury. The defendants excepted, and from the judgment in favor of the plaintiff, appealed.

T. T. Hicks and T. M. Pittman for plaintiff.
J. B. Batchelor for defendant.

SHEPHERD, C. J. We do not think that under the particular circumstances of this case the counsel was precluded from insisting that the issues raised upon the pleadings should be submitted to the jury. The question to be determined, therefore, is whether the issues certified by the clerk were material.

1. As to the first issue, we agree with his Honor that it should not have been submitted. There is not the slightest suggestion that the debt upon which the judgment was taken against the admin- (104) istrator was not due by his intestate, and the mere fact that the administrator made no defense to such a claim cannot invalidate the judgment.

2. In refusing to submit the second issue, or to order the taking of an account, we think there was error. Before descended lands can be subjected to the payment of the indebtedness of the ancestor, it must be shown that the personal assets are insufficient or have been exhausted in due course of administration (Womack's Digest, 4885), and as the answer denied this, an issue was raised which should have been tried before making a decree of sale.

3. As to the third issue, we very much doubt whether in a proceeding of this kind the heirs, without alleging any independent title in themselves, can by a mere general denial put the administrator upon proof of the ancestor's title. To permit this would result in much unnecessary expense, inconvenience and delay in the settlement of estates. In this case no prejudice can possibly be done the heirs, as the decree purports to operate only upon "the interest and estate" of their ancestor. If he has any interest or estate, they are of course bound by the decree; if he has none, or if the heirs have any interest or estate independent of their ancestor, they are clearly not estopped by the form of this decree. When the decree is to be so framed, we are inclined to the opinion that such a general denial by the heirs should not be considered. *Egerton v. Jones,* 107 N. C., 284, and other decisions, do not present this point. The objection there is taken by parties claiming the land or some interest therein, and when it is shown that the decedent has parted with his title the jurisdiction is defeated. In the cases like the present it

would seem that the heir should not be permitted to show by mere general denial that his ancestor had no title, and the jurisdictional question in such an instance would therefore not arise.

New trial.

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(105)

JAMES M. YOUNG, TRUSTEE, v. JAMES R. YOUNG.

Rent Accruing on Devised Land—Rent in Arrears at Time of Conveyance, to Whom Due—Contract—Evidence.

1. Rent accruing on devised land, after the payment of testator's debts and legacies, belongs to the devisee.
2. Rent in arrears at time of conveyance of land does not pass by the deed.
3. In the compromise and settlement of differences between the beneficiaries under a will, in pursuance of which certain real estate belonging to one of the parties as residuary legatee was conveyed by such legatee to another beneficiary, the fact that the latter, in a paper-writing signed by her (or her agent) alone, agreed that past-due rents of lands other than of the land so conveyed should belong to the grantor, is not in itself evidence of an assignment to the grantee of such past-due rents of the lands so conveyed, but a paper-writing so signed was competent evidence to be submitted to the jury in connection with other testimony tending to show that it was a part of the settlement between the parties.

APPEAL from a justice's court, tried at May Term, 1894, of VANCE, before *Battle, J.*, and a jury.

The plaintiffs warranted the defendant for $188.15, with interest from 18 October, 1892, for money had and received by the defendant to plaintiff's use, upon the following allegations:

That R. E. Young died 14 March, 1892, leaving a will. That at the time of his death he owned a storehouse and lot, tenanted by Barnes, Stainback & Co., who were paying $27.50 per month, from 27 February, 1892, and who furnished about the burial of said R. E. Young, and other disbursements to his use, $23.50, which should be applied as a credit upon said rent. That plaintiff Ann Eliza Young is sister and next of kin named in R. E. Young's will, and James M. Young her son,

(106) is trustee of her property for her. That the debts of R. E. Young and the legacies under his will had been paid, and his executrix filed her final account on 19 October, 1892. And said Barnes, Stainback & Co.'s storehouse ceased to be a part of R. E. Young's estate on 18 October, 1892, the executrix never having received or accounted to the residuary legatee for the rent.

That the defendant, claiming to be agent or manager for said executrix, collected $75 or more of the said rent in the summer of the year 1892, and that Barnes, Stainback & Co. made an assignment to A. C. Zollicoffer in December, 1892, preferring the defendant for the balance of the said rent up to 18 October, 1892, and that said Zollicoffer paid the same to the defendant in April, 1893. That plaintiffs, by their agent, demanded the said money of the defendant about 1 November, 1893, and again 15 March, 1894, and that he refused to pay the same.

The defendant denied the alleged indebtedness and that he had received the money as alleged; and he denied that the plaintiffs were or are entitled to recover or collect the said rent at all, and also claimed that in the settlement of the estate of R. E. Young the plaintiffs surrendered and abondoned all claim to said rent.

The plaintiffs, in support of their contention, offered evidence as follows:

It was admitted that demand had been made upon defendant for the amount of rent alleged to be due, and the demand was not complied with. It was admitted also that Mrs. Ann E. Young, the plaintiff, had conveyed all her property in trust to her son and co-plaintiff James M. Young.

Mr. T. T. Hicks was then introduced as a witness for plaintiffs, and testified as follows:

"On 18 October, 1892, Mrs. W. W. Young and her then husband, Dr. Young, raised the money and paid off the legacies under the will of R. E. Young, and also his debts, except some small debts personally paid by his executrix and embraced in account that day filed. Two-thirds of the legacy in favor of the executrix, Pattie F. (107) Young, was paid in land, including the Barnes, Stainback & Co. storehouse at $3,750. Up to that time the *feme* plaintiff, neither she nor her husband, had exercised any control over the real estate of R. E. Young. At once after the settlement Mrs. Pattie Young, through her agent, J. R. Young, turned over to me as attorney for Mrs. Ann Eliza Young a large pocket-book containing a number of evidences of debt, notes, bonds, chattel mortgages, etc. There was a judgment of record against W. T. Cheatham, Jr., which it was then stated would be assigned of record to the *feme* plaintiff. That settlement was made in my office October, 1892, the day Judge Furches spoke here. This storehouse was a part of R. E. Young's estate, owned by his estate up to that time, when it became the property of his wife. She made a will next day and devised it to J. R. Young, subject to certain provisions in the will, and died about a week later. Very soon after, 21 December, 1892, when Barnes, Stainback & Co. assigned, at the instance of Dr. Young I called on the defendant for this rent. He did not then deny

that he had received the rent nor affirm that he had. Again, in March, 1894, I made written demand on him in behalf of the plaintiffs for that rent."

Cross-examined, he says: "This rent was not discussed; never discussed by me with any one prior to settlement of October, 1892—this past-due rent. No other matter except this was kept open, but I don't think the pocket-book was delivered till a day or two later, but agreed on that day to be delivered. All that was agreed on has been done. I wrote the paper marked 'A.' When I made demand on James R. Young he said all that had been settled, 'that matter has all been settled'; and I understood he insisted the rent belonged to Mrs. Pattie Young, because she had bought the house. The date of the first demand was about 1 March, 1893; it was before 11 March, date of Dr. Young's death; 15 March, 1894, was the date of the next de-
(108) mand. There was a violent lawsuit going on over the will of Mrs. Pattie Young, which will was established in February, 1894, by withdrawal of appeal."

Here the paper marked "A" was shown the witness for identification. The paper is in handwriting of Mr. T. T. Hicks and signed by J. R. Young, agent, and the paper was at this time offered in evidence by defendant. Plaintiffs objected to the introduction of the paper because of its incompetency and irrelevancy as testimony, and because it was, plaintiffs claimed, a declaration of defendant in his behalf.

Objection overruled, and the plaintiffs excepted.

This paper-writing ("A") was as follows:

The tenants of the lands of D. E. Young, I. J. Young and R. E. Young, lately in charge of R. E. Young, and also the store and town property, are to account to and deal with Dr. W. W. Young and wife for past-due rents, and from and after this date one-half the rents of the Harris 607 acres for this year to go to W. W. Young—Barnes, Stainback & Co.'s store excepted.

PATTIE F. YOUNG,
18 October, 1892. By J. R. YOUNG, *Agent.*

The plaintiffs objected to the introduction of this document by the defendant at all, and insisted—

1. That it was nothing more than a declaration in defendant's favor made by defendant.

2. That it did not appear to have been brought to the knowledge or attention of the *feme* plaintiff or her husband.

3. That no evidence was offered to show that the attorney, in whose handwriting the paper is, had any authority to make it, or to yield

to the defendant, impliedly, by accepting it, the then past-due rents in the Barnes, Stainback & Co. store.

4. That it had no bearing on the issue, the Barnes, Stainback (109) & Co. store being expressly excepted from the operation of the paper.

5. That there was no consideration shown for the alleged release of such past-due rents.

These contentions were all urged again after the close of the evidence, and the judge was requested by the plaintiffs to direct the jury to disregard said paper entirely. And again, after the verdict, the same contentions in regard to this paper were insisted upon by the plaintiffs when they were asking for a new trial. In each and every instance the decision of the court being against the plaintiffs, they duly excepted.

The judge intimated no opinion whatever as to what weight should be given to the paper-writing by the jury, but laid before them fully the contentions and explanations of the parties in regard to the same.

Mr. Hicks testified further in regard to the paper:

"After we finished the settlement of 18 October, and after Mr. Zollicoffer and Dr. Young had gone, I think I said to Mr. Young that, as he and Mrs. Pattie Young had been collecting the rents, and as they were to be collected thereafter by Dr. Young and wife, we ought to have a paper to show tenants, and J. R. Young suggested that I write such a paper, and I did so. Of the 607-acre tract, Mrs. Pattie Young owned one-half, and the other half her husband, and that half she took for $1,500. As rent for that was then due, it was expressed in the paper. After the paper was written Mr. J. R. Young suggested that the store still belonged to Mrs. Pattie Young and should be excepted, and it was. Nothing was said about giving past-due rents on Barnes, Stainback & Co.'s store to Mrs. Pattie Young, and there was no consideration for it. Dr. Young had never collected any rent on the store."

James R. Young, a witness for the defendant, testified as fol- (110) lows:

"After the death of R. E. Young I was agent of his wife, who was his executrix. I took charge of his affairs 3 June, 1892. I received from Barnes, Stainback & Co. $80.36, and an account of $52.20 against the estate, making $132.50 on the rent. Some time in the summer I received a note, due in sixty or ninety days, for $75 on rent, which was not paid at maturity, but renewed. This $80.30 was accounted for by me as agent for Mrs. Pattie Young."

This last statement as to $80.30 was objected to by plaintiffs, on the ground that the account as filed by executrix is made out by this witness, and he is estopped to deny his own act. Objection overruled, and plaintiffs excepted.

"It was not put in the final account, because under the agreement of 18 October Mrs. Young was to have this rent. In my settlement with A. C. Zollicoffer, as trustee of Barnes, Stainback & Co., taking up what was due to me and to me as agent of Mrs. Young, I received all the preferred debt except $35 or $36. The rent for January, February and March was at $27.50 per month; the rent for balance of time was at $25. I reduced the rent at demand of parties. I was acting as Mrs. Young's agent. In the settlement of the estate of R. E. Young there arose a controversy between Mrs. Pattie F. Young and W. W. Young and wife. It was settled by an agreement in writing. Part of it was reduced to writing. Dr. Young and wife insisted on her taking her legacy of $10,000 in real estate. In discussing this matter, Mr. Hicks said he was willing for Mrs. Pattie Young to receive rents on real estate in lieu of interest, if she would do this. It was agreed that she would take two-thirds of her legacy in real estate, and the deeds were executed accordingly. The parties met at Mr. Hicks' office 18 October, 1892, and the final account was presented and examined by Mr. Hicks, attorney for Dr. W. W. Young and wife, and he said (111) it was satisfactory, and that account does not contain any entry of rent received from Barnes, Stainback & Co.'s store. At this meeting, 18 October, 1892, in his office, Mr. Hicks stated that he ought to have a paper in reference to the rents. I told him I thought so too; to draw it up and I would sign it. Before this it had been agreed that the pocket-book should be handed over, and the Cheatham judgment should be assigned, and everything settled except the rents, and Mr. Hicks said he ought to have the paper. We had already that evening discussed the matter of rents. He wrote the paper marked 'A,' all except last line, and handed it to me. I told him he ought to put in there that the Barnes, Stainback & Co. store was excepted, and he did so, and I signed it as agent for Mrs. Young. I agreed in the discussion to pay over the rent on the 607-acre tract; that was put in the paper; and I insisted on the last line being put in. I wanted the whole thing to be settled then and there. Dr. Young had never collected any rent on that store. Deeds were signed and delivered on that day. I thought everything settled, and heard nothing further of it until February or March, 1893, when Mr. Hicks made demand on me for this rent. I told him it was not owing, that it was included in the settlement, and that Mrs. Young was to have the rent. The rent I actually got and not accounted for to Mrs. R. E. Young amounts to $112.50. I never collected any of this rent in my individual capacity."

On cross-examination he stated: "Mrs. Pattie Young made her will, and died within ten days after this settlement. I was her principal

legatee and devisee. Eighty dollars and thirty cents collected 3 June, 1892, and paid to her 19 October in a settlement I had that day. I paid it to her, as the receipted account shows." Defendant closes.

Mr. T. T. Hicks further testified for plaintiff: "I had no authority to agree to allow Mrs. Pattie Young rents in lieu of interest on her legacy. I insisted all through the discussion that the legacy would not bear interest till after a year from R. E. Young's (112) death. Two legacies in the will of $1,000 did not begin to bear interest till 18 October, 1892. Willie Harris' legacy paid that day; no interest on it. I did not agree that Pattie Young should have rent on any property in place of interest on her legacy."

On cross-examination he said: "I was attorney for Dr. Young and wife in making the settlement. Dr. Young was also present most of the time. There was no formal meeting for doing anything without his presence. The question of interest was discussed. Mrs. Pattie Young brought suit on legacy. It was settled that interest should only count from 18 October, 1892." Plaintiffs close.

The judge then charged the jury, fully and distinctly explaining the contentions of plaintiffs and defendant, and charged the jury further that it having been shown that the defendant received the rent, the burden of proof shifted to the defendant, and he must satisfy the jury by the predominance of the testimony that he had paid it to the plaintiffs, or that in some legal way the plaintiffs had waived or parted with their right to receive it. No special instructions were asked by either plaintiffs or defendant, in writing, nor before the case was given to the jury. After the jury had taken the case, and being out some minutes, they requested to be allowed to see the paper of 18 October, 1892, marked "A," and the agreement of 30 September, 1891. The judge asked if there was any objection by plaintiffs or defendants, and both parties consenting, the request was allowed by the court.

There was a verdict for the defendant. Plaintiffs moved the court to set aside the verdict and grant a new trial for error of his Honor in refusing to charge the jury as requested by plaintiffs, and for other alleged errors as above set forth. Motion refused, and plaintiffs excepted. Plaintiffs moved for judgment upon the admission of the defendant, notwithstanding the verdict for $194, less the $80.32 paid by defendant to Pattie H. Young. Motion refused. Plain- (113) tiffs excepted.

Judgment was rendered for the defendant, and plaintiffs, having excepted to the several rulings and judgment, appealed.

T. T. Hicks for plaintiffs.

Walter A. Montgomery for defendant.

MACRAE, J. There is no dispute about the fact that the *feme* plaintiff was the residuary legatee and devisee of the estate of R. E. Young, deceased, and it is made to appear that all of the debts and legacies have been paid, or secured, to the parties entitled, and the estate settled. Now these past-due rents, accrued after the death of the testator, had ceased to be *rents,* or in anywise incident to the land, and had become a debt due from Barnes, Stainback & Co., personally, to the owner of the said store. *Jolly v. Bryan,* 86 N. C., 457. The owner of the store was the residuary devisee, the *feme* plaintiff. By deed dated 14 October, 1891, but, by the testimony, not delivered until the 18th of said month, the *feme* plaintiff conveyed said land in fee to Mrs. Pattie Young, and the rent in arrears did not pass by said deed.

The only question raised by the exceptions is whether, by the final settlement and compromise of differences between the beneficiaries under the will of R. E. Young, it was agreed that these sums past due for rent of the said store should belong to Mrs. Pattie Young, and whether by the said settlement they were so assigned. This paper-writing alone, signed by Mrs. Pattie Young, through her agent the defendant, in which she agreed that certain other rents were to be paid to the *feme* plaintiff, could not by force of the exception amount to an as-
(114) signment to herself of money then due and owing to the *feme* plaintiff.

But there was evidence tending to show that the deed of compromise and settlement executed 30 September, 1892, was supplemented by a further and independent agreement on 18 October, when the arrangement was concluded and the deed from the *feme* plaintiff and her husband was delivered to Mrs. Pattie Young. The testimony tends to prove that Mr. Hicks on the one side as attorney for the *feme* plaintiff, and the defendant on the other side as agent for Mrs. Pattie Young, were authorized to and did make the settlement. Whether in that final settlement there was an agreement that Mrs. Pattie Young was to have these past-due rents, which otherwise belonged to the *feme* plaintiff, was the principal question. His Honor submitted but one issue to the jury: "Is the defendant indebted to the plaintiff; if so, in what sum?" And under this issue all matters in controversy could be easily presented.

The defendant contended that, by the agreement between the parties through their attorney and agent, these past-due rents were to be paid to Mrs. Pattie Young.

The testimony was conflicting as to whether the paper in question was signed before the final settlement was concluded or soon afterwards. It was not in itself, as we have said, an assignment of said past-due rents, even when accepted by the *feme* plaintiff; but in connection with

all of the other testimony we think it was competent evidence to be submitted to the jury, if the jury were satisfied that said paper was a part of the settlement. His Honor placed the burden where it belonged, on the defendant, to show that the *feme* plaintiff had parted with or waived her right to the money in controversy. He explained the contention of the parties, and submitted the same with all the evidence to the jury; there were no prayers in writing for special instructions; and the exception to the admission of the paper-writing, and that to the testimony of the defendant as to his disposition of the rents collected by him, were both based upon the theory that (115) there was no evidence proper to be submitted to the jury to satisfy them that the *feme* plaintiff had given up her right to the said past-due rents.

No error.

J. A. BURGWYN, ADMINISTRATOR D. B. N. OF J. M. ROGERS v. W. E. DANIEL, ADMINISTRATOR OF J. W. GRANT.

Administration—Annual and Final Account—Statute of Limitations.

1. An account filed by an administrator, entitled "Annual Account" on its face and so styled by the clerk in approving and filing it, and recorded in the "record of accounts" and not in the record of "final settlements," and, moreover, showing a balance struck and in the hands of the administrator for the exigencies of the estate and not as due the distributees, is not a "final account" to which the six-years statute of limitation is applicable.
2. Where such an account is filed by a public administrator, the trust is not ended and the statute does not begin to run until his resignation and the appointment of an administrator *de bonis non.*
3. In such case the sureties on the bond of the first administrator will be protected by the lapse of three years from the taking out of letters of administration *de bonis non.*

ACTION, tried before *Whitaker, J.*, and a jury, at December Term, 1893, of NORTHAMPTON.

The complaint alleged the death, in 1879, of Joseph M. Rogers; the taking out of letters of administration on his estate by J. W. Grant (the intestate of the defendant Daniel), who was public administrator of Northampton County, and on whose bond as such the other defendants (or their intestates) were sureties; the resignation of the office of public administrator by the said Grant in November, 1887; the negligence of the said Grant in failing to collect assets of the (116) estate, etc. The said Grant having died intestate in February, 1892, the defendant Daniel was appointed his administrator shortly

thereafter. In April, 1892, the relator of the plaintiff took out letters of administration *de bonis non* on the estate of J. M. Rogers. The prayer is for an account, etc., and judgment against the defendant Daniel, as administrator of Grant, and the sureties on the said bond.

The answer denied the allegations of the complaint as to the negligence of Grant, as administrator, etc., and averred that on 4 March, 1884, Grant filed his final account as administrator of Rogers, which, as alleged, was audited and approved by the clerk and duly recorded. The defendant also pleaded the statutes of limitation of ten, six, and three years.

The material issues submitted, and the answers thereto, are as follows:

"1. Is the plaintiff's first cause of action on the first bond mentioned in the complaint barred by the ten-years statute of limitation? Answer: No.

"2. Is the plaintiff's second cause of action on the first bond mentioned in the complaint barred by the ten-years statute of limitation? Answer: No.

"3. Is the plaintiff's first cause of action on the first bond mentioned in the complaint barred by the six-years statute of limitation? Answer: No.

"4. Is the plaintiff's second cause of action on the first bond mentioned in the complaint barred by the six-years statute of limitation? Answer: No.

"5. Is the plaintiff's first cause of action on the first bond mentioned in the complaint barred by the three-years statute of limitation, as to the sureties on said bond? Answer: No.

"6. Is the plaintiff's second cause of action on the first bond mentioned in the complaint barred by the three years statute of limitation, as to the sureties on said bond? Answer: No."

(117) The plaintiff introduced inventory of J. W. Grant as administrator of J. M. Rogers, returned 22 July, 1879, showing that personal property and choses in action belonging to the estate of said Rogers then went into the said Grant's hands as such administrator.

It was admitted that Grant resigned his office of public administrator on 15 November, 1887, and that W. F. Grubbs was appointed in his stead, but never took out letters of administration on the estate of J. M. Rogers; that Grant died 15 February, 1892; that this action commenced 13 May, 1892; that J. A. Burgwyn qualified as administrator *de bonis non* on the estate of J. M. Rogers on 23 April, 1892. Defendants introduced account of James W. Grant as administrator of J. M. Rogers, recorded in book marked on back "Record of Accounts."

J. T. Flythe, the present clerk, was examined by plaintiff, and

stated that the annual accounts of administrators are filed in a book entitled "Record of Accounts," and their final accounts are recorded in a book entitled "Final Settlements." Witness stated he had examined his books marked "Record of Accounts" and "Final Settlements," and he could find no other account returned by James W. Grant as administrator of J. M. Rogers, except the one before mentioned marked "Exhibit A"; that he had searched his office for final account of J. W. Grant as administrator of J. M. Rogers, and found none.

Plaintiff testified for himself that Walter E. Daniel, administrator of J. W. Grant, turned over to him some notes belonging to the estate of J. M. Rogers.

His Honor charged the jury:

"1. That the account marked 'A,' and before mentioned, was not a final account, and the six-years bar of the statute of limitations had no application to this case, and that if the jury believed the evidence they should answer Issues 3 and 4 'No.'"

To this instruction the defendants excepted.

"2. That the statute of limitations did not begin to run in favor of any of the defendants as to the ten-years bar until the (118) resignation of J. W. Grant, public administrator, on 15 November, 1887, and as ten years had not elapsed from that time to the commencement of this action, the jury should, if they believed the evidence, answer the first and second issues 'No.'"

To this instruction the defendants excepted.

"3. That the statute of limitations did not begin to run in favor of any of the defendants as to the three-years bar until the resignation of said Grant as public administrator on 15 November, 1887, and inasmuch as there was no administration on J. M. Rogers' estate from that time till the qualification of the plaintiff on 23 April, 1892, in passing on the three-years bar the time from the said resignation of Grant as public administrator to the qualification of said Burgwyn should not be counted, and hence, if the jury believed the evidence they should answer 'No' to the fifth and sixth issues."

To this instruction the defendants excepted.

The jury answered "No" to all the issues.

In addition to the above exceptions appellants excepted to the ruling of the court that the account put in evidence was not a final account so as to put the statute of limitations to running.

There was judgment directing a reference under the Code to state an account, etc., and defendants appealed.

W. W. Peele & Son for plaintiff.

W. H. Day and R. B. Peebles for defendants.

CLARK, J. The account is entitled on its face an annual account; it is so styled by the clerk in approving and filing it, and it is recorded by him in his "Record of Accounts" and not in the book entitled
(119) "Final Settlements." The court properly instructed the jury that it was not a final account, and that the six-years statute of limitations did not apply. In *Vaughan v. Hines,* 87 N. C., 445, the account held to be a final account showed that all the debts and expenses of the estate had been paid, and that there was a net balance which had been found "due the heirs" at a date more than a year previous. The present account merely shows a balance struck and in the hands of the administrator for the exigencies of the estate. The court also correctly told the jury that, there being no final account, the trust was not ended, and the statute did not begin to run till the resignation of the administrator. In *Glenn v. Kimbrough,* 58 N. C., 173, it was held that the lapse of thirty-four years did not bar an action by the administrator *de bonis non* against the representatives of the first administrator when there was no administrator *de bonis non* during that period. Whether the ten-years limitation in sec. 158 of The Code now applies in such cases, it is not necessary to decide in this case, as that period has not elapsed. The defendant cannot complain that the judge held that ten years would have been a bar. The sureties would have been protected by the lapse of three years from the taking out of letters of administration *de bonis non.* *Brawley v. Brawley,* 109 N. C., 524. It may be noted that that case has been sometimes misunderstood. It does not change the construction placed upon sec. 164 of The Code, that an action must be brought by a representative of a creditor within one year after his death, and against the representative of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. *Benson v. Bennett,* 112 N. C., 505; *Coppersmith v. Wilson,* 107 N. C., 31.

Brawley v. Brawley held that the statute of limitations did not run to bar an action by an administrator *de bonis non* against the representative and bondsmen of a deceased administrator while there was
(120) no administrator *de bonis non*—no one *in esse* who could bring such action. This would not apply to an action brought by the creditor, or a distributee, or legatee, directly against the representative of the deceased executor, administrator or guardian and their sureties for breach of the bond. Of course, after the death of the first administrator, an action to establish a disputed debt could be brought only against the administrator *be bonis non.*

Affirmed.

Cited: Winslow v. Benton, 130 N. C., 60.

CHARLES W. PETIT v. L. WOODLIEF.

Payment in Part in Discharge of the Whole of a Debt—Acceptance of Money as Payment in Full.

1. Under sec. 575 of The Code, the offer of a part in satisfaction of the whole, if accepted, discharges a debt as fully and effectually as if the entire sum originally due is paid in full, and this is so whether the amount due is certain or contingent and unliquidated.
2. When a draft for part of an indebtedness was sent by letter, both draft and letter stating that the amount was to be in full settlement of the debt, the creditor, by collecting the draft and retaining the money, will be held to have elected to accept the compromise proposed.

ACTION, commenced 29 August, 1893, before a justice of the peace, and on appeal to the Superior Court of WAKE, heard before *Hoke, J.*, and a jury, at February Term, 1894.

Plaintiff sought to recover a balance of $170.65, claimed to be due on a contract for repairs on a boiler. Defendant denied his liability and claimed there had been a compromise and settlement. In June, 1890, defendant contracted with plaintiff for certain repairs to a boiler. Defendant contended that the cost of such repairs under the contract was not to exceed $250. Plaintiff admitted such was the (121) original contract. Plaintiff did the work and rendered an account against the defendant, after the boiler was returned, amounting to $478.65. Defendant refused to pay this amount, and insisted that by contract he did not owe over $250, and demanded a correct statement. There was correspondence between the parties, plaintiff contending the contract for $250 was abandoned and the repairs fully worth what was charged. Defendant demanded a correct statement and insisted on the original contract.

On 8 October, 1890, defendant wrote plaintiff as follows:

8 October, 1890.

Mr. Chas. W. Petit, Norfolk, Va.

DEAR SIR:—I have been waiting for some time for you to send me a correct statement of your account v. me for the work that you have done for me, but have not received it yet. Enclosed find draft for $300 to settle with you in full to date; please acknowledge receipt of the same. Also please let me know what you will give me for my old scrap-iron with you. Yours truly, L. WOODLIEF.

P. S.—$300 is more than you charged to do my work, though rather than to have hard feelings I pay you that amount, as another party charged that amount for the job.

It was proved that in 1890, on 9 October, the firm of Royster & Strudwick paid a bill of exchange drawn on them by L. Woodlief in favor of Charles W. Petit for $300, and said bill of exchange had been destroyed by fire.

L. Woodlief testified that the bill of exchange or draft, referred to in his letter to plaintiff of 8 October, 1890, was drawn on Royster
(122) & Strudwick, Norfolk, Va., was enclosed in said letter, was payable to Charles W. Petit or order, and on the face of said bill of exchange was written the words, "To settle in full to date," or "Settlement in full to date"; that he intended said amount of $300 as an offer of compromise and settlement in full, and for no other purpose; that M. Woodlief was present when the letter and bill of exchange were written and mailed, and witness, at the time, declared his purpose in sending plaintiff $300 to be a settlement in full; that he regarded the matter as settled when the bill of exchange was endorsed and collected, hence had not written to plaintiff or seen him since; I paid the freight on boiler.

M. Woodlief testified that he was present when L. Woodlief wrote and mailed the letter and bill of exchange; that he read both, and in both it was stated the $300 was a settlement in full to date; that L. Woodlief declared at the time his purpose in sending the $300 to Petit was to settle in full with him, and if he accepted the draft or bill of exchange it would be a settlement in full; we both so regarded it.

Charles A. McLean, witness for plaintiff, testified: I am business manager for plaintiff; the letter of 8 October, 1890, enclosing draft on Royster & Strudwick, was received by Charles W. Petit on 9 October, 1890; Mr. Petit took the draft, endorsed it, collected the money and used it, and plaintiff alleged the only purpose of the draft was to extort a settlement; the draft was payable to his order; he has never refunded or offered to refund the money; Petit is perfectly solvent, and so is Woodlief; I wrote defendant on the same day, by next mail, as follows:

NORFOLK, VA., 9 October, 1890.

L. Woodlief, Esq., Youngsville, N. C.

DEAR SIR:—Yours of the 8th is to hand, enclosing, as you stated, your draft on Messrs. Royster & Strudwick, of this city, for three hundred
($300) dollars on account of statement rendered, for which I
(123) thank you. I note with regret that you still persist in claiming that I overcharged you in the matter of the boiler repair. As stated in my former letter to you, the price agreed on between you and the writer was for doing certain repairs to your boiler. The repairs consisted simply and solely in furnishing and putting in a new furnace. After the boiler arrived, and you were here, you decided to do addi-

tional work to it. Now, you know, Mr. Woodlief, if it is worth so much money to put in a new furnace, it is certainly worth more to put in the new furnace-cover, back-band, etc., and grate, not to mention the gear-wheels nor the expense of carrying the boiler to Portsmouth. My only aim in this matter is to please you and thereby retain your trade. This is what I want to do, and hope I shall be successful yet. Weigh this matter carefully and let me know what you will do in this matter. If it is not too much of a deduction I will take it and pocket my loss rather than lose your trade.

I am yours truly,

CHAS. W. PETIT,
McLean.

To this letter defendant made no reply. Plaintiff wrote defendant several letters after this, insisting on the payment of the balance claimed by him, to which defendant made no reply. Defendant has never demanded and plaintiff has never offered to refund the $300.

The court submitted the following issues, viz.:

"1. Was the contract between the parties that the entire work and repairs on the boiler should not exceed $250?

"2. What was the work done and material furnished by plaintiff to defendant actually worth?

"3. Has there been an accord and satisfaction?"

Defendant's counsel objected to the third issue being submitted to the jury, insisting the court should decide the question as a matter of law.

Objection overruled. Exception by defendant.

The jury answered the first and third issues "No," and the (124) second issue "$400."

Defendant's counsel asked, in writing, the following special instruction, viz.:

"If defendant sent the plaintiff a draft or bill of exchange expressing on its face it was to be a settlement in full, and wrote in the letter making the remittance, 'Enclosed find draft for $300 to settle with you to date,' the amount due being in dispute, and the plaintiff collected the draft and had never refunded or offered to refund the amount, it was an acceptance of the condition on which the draft was sent, a compromise and settlement, and plaintiff could not recover. If the defendant offered the draft for $300 as a settlement in full, so expressed in his letter and on the face of the draft, and plaintiff endorsed and collected the same and kept the money, it was a settlement in full. Defendant had the right to so regard it, and the plaintiff could not recover."

These instructions were not given, but his Honor charged the jury on the third issue as follows, viz.:

"It is a question of agreement. If defendant, intending his remittance to be in full settlement of plaintiff's claim, sent the same by draft expressed on its face to be in full settlement, and enclosed such draft in a letter expressing the same intent, and intended such remittance should be retained only on condition that it should be a full settlement, and the plaintiff, knowing and having good reason to believe that the draft was sent for such purpose and to be retained on that condition, obtained and used that money so remitted, he could not maintain his action without returning or offering to return the money, and the jury should answer the third issue 'Yes.' If, however, the draft was only sent, not on condition but expressed to be in full, in the hope that it would extort a settlement and be considered a payment on the account if not so accepted, or plaintiff, not agreeing so to accept it, entered the amount as a credit on the account, immediately notifying the defendant of his ac-
(125) tion, and defendant acquiesced in such application, there was no accord and satisfaction, and the third issue should be answered 'No.'"

Defendant excepted to the charge as given, and for refusal to give the charge asked, defendant moved to set aside the finding of the jury and for judgment *non obstante veredicto.* Motions overruled, and defendant excepted. There was judgment for plaintiff, and defendant appealed.

Strong & Strong for plaintiff.
T. R. Purnell for defendant.

AVERY, J. The defendant enclosed in a letter a draft to the plaintiff for $300, setting forth upon its face that it was to operate as a payment in full of a claim for repairing an engine. The defendant contended that only $250 was in fact due, but stated in his letter that he had concluded to send $300. The letter and draft construed together constituted a proposal of compromise, and even though in reality a larger sum was due, as the jury found, if the offer was accepted, either expressly or by implication arising from the defendant's conduct, there was not simply a valid executory agreement, but an executed contract, as in that event the payment operated to discharge the whole claim.

The defendant Woodlief not only stated in his letter that the draft for $300 was enclosed "to settle with you (plaintiff) in full to date," but, according to the undisputed testimony, the same words, or the equivalent expression, "settlement in full to date," were incorporated in the draft itself, which was drawn on Royster & Strudwick, and was afterwards destroyed by fire. When the plaintiff endorsed this draft and collected the money, with the proposal staring him in the face that

it should, if received, operate to discharge the whole debt, instead of returning it to the drawer and declining the offer, we think that his conduct amounted to an acceptance of it, and the debt was (126) therefore discharged in full. Our statute (The Code, sec. 575) having been declared constitutional, the offer of a part in satisfaction of the whole, if accepted, discharges a debt as fully and effectually as if the entire sum originally due is paid in full. When the amount is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. *Preston v. Grant,* 34 Vt., 201; *Townslee v. Healee,* 39 Vt., 522; *Boston Rubber Co. v. Peerless Co.,* 58 Vt., 553. Under the construction placed upon our statute the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. We cannot rely as authority, therefore, upon the earlier cases decided by the Court, or upon the authorities in other States, where the principle still prevails that an agreement to accept a payment of a part of an unconditional claim for a sum certain in satisfaction of the whole is, unless there is an actual release, but a *nudum pactum.* We must, therefore, be governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under our statute. The plaintiff knew, from the face of the draft, that the defendant intended it to be accepted upon condition that it should discharge the debt, and that the draft itself should be in the nature of a receipt or voucher for the full payment. With that knowledge he chose to use the draft and take his chances to collect more. We think the question of intent was no more an open one for the jury to determine upon the testimony than would be the question of acceptance where the drawee writes the word "Accepted" on the back of a bill of exchange and signs his name under it. There (127) is no difference in principle between the case at bar and that of *Boykin v. Buie,* 107 N. C., 501. There the creditor agreed by letter to accept an offer from the debtor of a part in discharge of his whole debt, but when the latter forwarded a check in compliance with the agreement entered the amount paid as a credit. In our case the defendant sent a draft and a letter, both expressing the condition upon which the draft was to be accepted. The terms of the proposition being unmistakable, we think that the acceptance of the money was an implied assent to the proposal, the legal effect of which was to discharge the whole debt.

We are of opinion, therefore, that in the refusal to give the instruction that the claim was satisfied, there was error, for which we must grant a

New trial.

Cited: Kerr v. Sanders, 122 N. C., 638; *Ramsey v. Browder,* 136 N. C., 253; *Armstrong v. Lonon,* 149 N. C., 435; *Drewry v. Davis,* 151 N. C., 297; *Aydlett v. Brown,* 153 N. C., 366; *Woods v. Finley,* 153 N. C., 499; *Lumber Co. v. Lumber Co.,* 164 N. C., 362; *Rosser v. Bynum,* 168 N. C., 342.

COLGATE & CO. v. LATTA & MYATT.

Contract—Ambiguity—Parol Evidence, When Admitted to Explain—Written Contract—Trial.

1. Whenever there is no uncertainty in the written words of a contract, their meaning is to be determined as a matter of law by the court, and the legal consequences of the execution are to be adjudged as soon as the execution is admitted or proved; but when there is uncertainty in the written words, either because of ambiguity or incompleteness, it is for the jury to determine what was the agreement of the parties, and in the trial of that issue parol or extrinsic evidence is proper and necessary.
2. When, on the trial of an action on a written contract, a material question was whether defendants had agreed to purchase as large a quantity of goods as plaintiff claimed, the plaintiff introduced extrinsic evidence to support his demand and to show that he had shipped to defendant a certain quantity of goods because the latter had orally agreed to purchase that quantity, plaintiff thereby opened the way for extrinsic evidence as to the meaning of the written contract.

CLARK, J., dissents.

(128) ACTION, brought before a justice of the peace, and on appeal of plaintiffs, to the Superior Court of WAKE, tried *de novo* before *Hoke, J.,* and a jury, at February Term, 1894.

Before the magistrate "the plaintiffs complained that the defendants are indebted to them in the sum of $170 and interest on same from 1 January, 1892, balance of account for goods sold and delivered under a contract entered into on 18 November, 1891." The defendants denied owing the account.

When the case came on for trial in the Superior Court, a jury was impaneled and plaintiffs offered and read in evidence the depositions of B. F. Bogard and Bowles Colgate, the material parts of which were as follows:

B. F. Bogart, a salesman for the plaintiffs, testified: I went in to sell Latta & Myatt 100 boxes of Octagon soap, and the member of the firm that I saw told me 100 boxes was too much for him to handle; that he would take 50 boxes; but I could not give it to him at the 100-boxes price. Then he suggested to me to go to Norris & Bro., another wholesale grocery firm, and to say to them that if they would take half of the lot (50 boxes), he would let them have it at these terms. I returned to Latta & Myatt and told them what Norris had said, and he said: "All right; they are good"; and then he placed the order for 100 boxes in his own name. I sold the order to him only, not recognizing Norris in the sale, as it is against the rule of the house to take two parties into a deal. I sold Latta & Myatt the 100 boxes. Latta & Myatt wanted to buy 50 boxes at first at $3.60 per box, less 20 cents per box, 2 per cent cash, being the amount for which we offered to sell 100 (129) boxes to them; but I told them that we could not sell less than 100 boxes on those terms, and it was then that he suggested that I go and see Norris & Bro. about taking 50 boxes off their hands.

Q. Is this (showing witness paper) the order that was signed by Latta & Myatt for the 100 boxes of Octagon soap? A. That is the original order.

Q. Is that their signature on this order? A. That is.

Q. Was that signed in your presence? A. Yes.

Q. Is the other signature above theirs your signature? A. Yes.

Plaintiff's counsel offer in evidence the original order, dated 18 November, 1891, signed by Latta & Myatt, and B. F. Bogart as salesman for Colgate & Co., marked "Plaintiffs' Exhibit A."

Q. Have you authority to sell to any one customer less than 100 boxes of Octagon soap at a discount of 20 cents on a box? A. No.

Q. Had you ever done so? A. No; and, in fact, would not dare to.

Q. You swear positively that the sale of 100 boxes of Octagon soap was made to Latta & Myatt only? A. Yes.

Q. And that no sale whatsoever was made by you, representing Colgate & Co., to Norris & Bro.? A. No.

Q. Did you ever guarantee the credit of Norris & Bro. that they would pay for 50 boxes of the soap? A. No; Latta & Myatt said they were good, and that is all I know about it.

Q. What is the meaning of the word "Octagon," as used in this trade and business? A. That is the name of the soap.

Bowles Colgate, a member of the firm of Colgate & Co., being called, testified as follows:

Q. Did your firm, in November, 1891, ship Latta & Myatt, at Raleigh, N. C., 100 boxes of Octagon soap in accordance with "Exhibit A" herewith shown you? (Paper shown witness.) A. Yes. (130)

Q. What was the value of the soap which you say you sold and shipped to Latta & Myatt? A. The value of the Octagon soap was $340.

Q. And has any part of that been paid? A. One-half of the bill, or $170, has been paid on account.

Q. And there is a balance due of how much? A. $170.

Q. Are these figures the reasonable value for the goods so sold and delivered? A. They are an especially low price.

Q. What is the meaning of the expression "less 2 per cent" in "Exhibit A"? A. It refers to an allowance of 2 per cent for cash if remitted within ten days from the date of the bill.

Q. And the figures 3.60 in the margin of the contract of "Exhibit A" mean what? A. It represents the regular price of the soap, $3.60 per box.

Q. What is the meaning of "less 20 cents," as contained in "Exhibit A"? A. This was a special allowance of 20 cents per box we were at the time making on single lots of 100 boxes bought by and shipped to one customer.

Q. And this 20 cents was only allowed in the event of the customer purchasing 100 boxes? A. Not less than 100 boxes.

Q. Who is Mr. Benjamin F. Bogart? A. Salesman in our employ.

Q. Did Mr. Bogart ever have any authority from you or your firm to sell less than 100 boxes of Octagon soap to any one customer at a discount of 20 cents a box? A. He had not.

Q. Did Latta & Myatt ever make complaint to you, by letter or otherwise, of the fact that they had only purchased 50 boxes; that they were to be charged with 50 boxes? A. Not until they wrote us on 19 January, 1892.

Q. Do you know Norris & Bro., of Raleigh, N. C., or did you ever have any dealings with them? A. We have had dealings with (131) them.

Q. In connection with this sale of goods to Latta & Myatt? A. We knew nothing at all of any connection of theirs with this transaction, and never heard of their being interested in the matter in any way until we were so notified by letter from Latta & Myatt.

Q. If you had had any notice of the claim which Latta & Myatt subsequently made on you would you have sold them any of the goods? A. We would not have filled the order if we had supposed the purchase would be divided with any other party.

"Exhibit A" was as follows:

Order No. ------ 11-18, 1891.
COLGATE & Co., *New York.*
Ship to LATTA & MYATT,
Raleigh, N. C.
Through direct.
Time, 30 days.

No. Boxes.	*Description.*	*Size.*	*Price.*
100	Octagon ----------	-------	3.60
	Less 20c. box; less 2 per cent.		
1	Gro. Turkish Bath----------	-------	Full
1	" W. Castile, 4 oz.----------	-------	Discount.

Large glass sign. O K

No other condition of sale.

Purchaser ----------
Salesman, B. F. BOGART.
Accepted: LATTA & MYATT.

Plaintiffs then rested their case.

W. A. Myatt, one of the defendants, was offered as a witness on behalf of the defendants. He stated that he made the contract on behalf of defendants with regard to the soap in controversy with B. F. Bogart, plaintiff's agent. That he signed the paper "Exhibit A," referred to in the deposition of B. F. Bogart. (132)

Defendants' counsel then asked the witness, "State whether or not the whole contract between plaintiffs and defendants covering the soap in controversy was reduced to writing, or intended so to be."

Witness answered that it was not.

Defendants then asked witness, "State what was the contract between plaintiffs and defendants on 18 November, 1891, concerning the soap in controversy."

Plaintiffs insisted that "Exhibit A" was the contract between the parties, and objected to any oral evidence which might tend to contradict the written paper, "Exhibit A."

Defendants' counsel then stated that defendants expected to show by this witness that the original contract between plaintiffs and defendants concerning the soap in controversy was oral and entire; that only a part of it was reduced to writing, or intended to be put in writing.

After hearing the argument of counsel on plaintiffs' objection, his Honor overruled plaintiffs' objection and permitted witness to testify, in substance, as follows:

"That the contract between plaintiffs and defendants was entire and oral, and the writing, 'Exhibit A,' expresses part of said contract; that

defendants purchased only 50 boxes Octagon soap from plaintiffs; that plaintiffs' agent tried to sell defendants 100 boxes of said soap in the morning of 18 November, 1891, on the terms stated in 'Exhibit A,' and defendants declined to purchase it, but offered to take 50 boxes on the said terms; that plaintiffs' agent did not accept the offer then, and left defendants' store; that later in the day said agent returned, and said to defendants that he had sold to M. T. Norris & Bro., merchants doing business in Raleigh, 50 boxes of said soap, and if defendants would take the 50 boxes spoken of in the morning, plaintiffs would sell it to them at the price offered; that thereupon defendants purchased the 50
(133) boxes; that plaintiffs' agent wrote out the order, 'Exhibit A,' signed it and handed it to witness for the signature of defendants; that witness at first declined to sign it because it was for 100 boxes of Octagon soap; that plaintiffs' agent assured witness that made no difference, that signing the order would be a convenience to the plaintiffs, and save plaintiffs freight charges in shipping the goods; that by the terms of sale plaintiffs were to pay the freight on the soap; that the plaintiffs' agent also told witness that M. T. Norris & Bro. had bought 50 boxes of the Octagon soap referred to in the order, and that he would guarantee that defendants should be put to no trouble by signing the order for the whole 100 boxes."

To so much of the above testimony as tended to contradict the paper-writing above referred to, marked "A," the plaintiffs, in proper time, objected. Objection overruled, and plaintiffs excepted.

It was admitted by plaintiffs that defendants had paid plaintiffs for all the goods mentioned in "Exhibit A," except for 50 boxes of the 100 boxes of Octagon soap mentioned in said paper, leaving in controversy, without prejudice to plaintiffs, the price of the 50 boxes which defendants contended had been sold by plaintiffs to M. T. Norris & Bro., and not to defendants.

Defendants then introduced W. C. Norris, of the firm of M. T. Norris & Bro., as a witness, who testified that the salesman of Colgate & Co., to wit, B. F. Bogart, sold M. T. Norris & Bro., on 18 November, 1891, 50 boxes of Octagon soap; that witness did not know Latta & Myatt in the transaction until the soap came to Latta & Myatt and they turned over to Norris & Bro. the 50 boxes of said soap that they had bought from plaintiffs.

The plaintiffs, in proper time, objected to such of the above testimony of W. C. Norris as tended to contradict said paper-writing, "Exhibit A." Objection overruled, and plaintiffs excepted.

(134) Plaintiffs, in proper time, offered the following written prayer for special instructions: "In no event could the jury find that Latta & Myatt ordered a less number of boxes of Octagon soap than was specified in the contract."

This instruction was refused, and plaintiffs excepted. This was the only exception to the judge's charge.

There was a verdict for the defendants. Plaintiffs moved for a new trial upon the ground of errors committed, as they contended, in the rulings of the judge on the matters above set out in this case on appeal. Motion overruled, and plaintiffs excepted and appealed from the judgment thereon.

Strong & Strong for plaintiffs.
Battle & Mordecai for defendants.

BURWELL, J. In *Cumming v. Barber,* 99 N. C., 332, it is said that "if it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement of the parties, and, in such case, what was meant is for the jury under proper instructions from the court."

Mr. Abbott in his work on Trial Evidence, p. 294, says: "In the present state of the law, the rule excluding parol to vary a writing in its application to commercial sales amounts to little more than this principle, viz., that where the parties, or their agents, have embodied the terms of their agreement in writing, neither can, in an action between themselves (unless impeaching the instrument), give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that meant something inconsistent therewith. In more detail, the rule and its established exception may be stated thus: A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude oral evidence tending to show the actual transaction in the following cases: (5) Where the (135) language of the instrument leaves its meaning doubtful, or extrinsic facts in evidence raised a doubt as to its application; (6) where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in a matter as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect."

The plaintiffs insist that there was a contract between them and the defendants by which the latter agreed to purchase from them 100 boxes of soap at $3.40 per box, and the plaintiffs agreed to sell to them such a lot of soap at that price.

They contend that the writing, "Exhibit A," contains the entire agreement between the parties here, and that its meaning is free from doubt

and ambiguity, and that the only evidence needed to maintain this action was proof that the defendants signed their names on said writing after the word "Accepted," and that the plaintiffs thereafter shipped to them 100 boxes of Octagon soap.

There is not about this instrument that absolute certitude of meaning which is required to enable a court to declare exactly what the agreement of the parties actually was by a bare inspection of the writing. It is, of course, true that it is of the utmost importance that where contracts have been thus evidenced the parties should be held bound by their written statement of what their agreement was. This principle has always been considered "one of the greatest barriers against fraud and perjury," and its abrogation or impairment would produce very great evils. It should not be construed away or the exceptions to it multiplied to avoid the seeming hardship of particular cases.

But, while this is true, it must also be conceded that the writing to which such importance is to be attached must be explicit and
(136) complete. Wherever there is no uncertainty in the written words, their meaning is to be determined, as a matter of law, by the court, and the legal consequence of the execution of the writing is to be adjudged as soon as the execution of it is admitted or proved. Wherever there is uncertainty in the written words, either because of ambiguity or incompleteness, it is for the jury to determine what was the agreement of the parties, and, in the trial of that issue, extrinsic evidence is proper, and, indeed, necessary.

The writing upon which the plaintiffs rely in this action (Exhibit A) seems to us ambiguous and uncertain. We do not here have reference to the terms in which the price of the soap is expressed, which, the plaintiffs themselves seem to grant, clearly require explanation, but to the fact that in it there is no explicit statement either that the plaintiffs have sold to the defendants 100 boxes of soap, or that the defendants have bought from the plaintiffs that quantity of goods. In it their salesman directs Colgate & Co. to ship to Latta & Myatt certain goods. There is in the order a place for the name of the purchaser, which is left blank. At the bottom of the order is the word, "Accepted," followed by the signature of the defendant firm. As soon as this document is attentively examined, there arises a doubt as to its meaning. The fact that such a doubt arises is an assurance that an explanation of it is necessary, that requires the introduction of extrinsic evidence, and makes an issue for the jury to decide.

While parties, by reducing their commercial contracts to writing, may make their obligations so binding that the law, upon mere proof of the execution of the instrument, will adjudge the rights of those who are thus careful to fix the memorials of their agreements, they must use skill in

the composition of such writings, and must carefully avoid all uncertainty of expression, for, as we have said, such ambiguity in the writing necessarily lets in parol, or, to speak accurately, extrinsic (137) evidence to explain away the ambiguity, and by this means the good purpose of the writing is defeated, not by the fault of the law, but by the unskillfulness or carelessness of the parties themselves. Because of this ambiguity in this writing we think it was proper to admit extrinsic evidence to show that the plaintiffs did not agree, by their agent, to sell to the defendants 100 boxes of soap, and that the defendants did not agree to purchase that quantity, but that, as the writing itself discloses, that number of boxes was to be *shipped* to the defendants, for some purpose not set out in that instrument, but which the extrinsic evidence shows, and the jury have found, was that they should turn over one-half of the lot to Norris & Bro., this last-named firm and the defendants being the real purchasers under this contract, each buying one-half of the soap.

The extrinsic evidence which his Honor admitted over the objection of the plaintiffs did not, in our opinion, tend to contradict the writing, and was competent. This ruling disposes of all the exceptions.

The record shows that when the plaintiffs opened their case they themselves deemed it necessary to introduce evidence extrinsic to the written memorandum in order to support their demand against the defendants and to show that they had shipped the goods (100 boxes soap) to defendants, because they had agreed orally to purchase that number of boxes. Having thus opened the way for such evidence, they should not be allowed to object to the defendants being permitted to meet that extrinsic evidence with evidence of like kind. However, we do not think the plaintiffs' able counsel committed an error on the trial of the case before the jury, but rather that the view they seem then to have taken of this writing was a correct one.

No error.

CLARK, J., dissenting: The paper, on its face, is an order by (138) the agent on his principals, Colgate & Co., to ship to the defendants 100 boxes of soap at $3.60, less two per cent discount. This was agreed to by defendants, who wrote their acceptance below the above specification of quantity and price. This made a contract. It was forwarded to Colgate & Co., who shipped to the defendants the 100 boxes at the agreed price. That evidence was introduced to explain that the price was $3.60 per box, and not per 100 boxes, does not authorize any evidence to contradict that the quantity was 100 boxes, which is unmistakably set out in the contract. Still less does the fact that evidence was necessarily admitted to show the shipment of the goods under the contract authorize oral testimony to contradict the written agreement "accepting"

an order to ship 100 boxes. There are cases where the contract is partly in writing and partly oral. In such cases the additional oral agreement is admissible, provided it does not contradict or alter the part of the contract which is reduced to writing. *Nissen v. Manufacturing Co.*, 104 N. C., 309. But here the written agreement being to "accept" 100 boxes to be shipped at $3.60, less two per cent, a contemporaneous verbal agreement to take and pay for only 50 boxes is a palpable contradiction of the plain, unequivocal written terms of the contract, and was inadmissible.

Cited: Log Co. v. Coffin, 130 N. C., 435; *Ivey v. Cotton Mills*, 143 N. C., 194; *Brown v. Hobbs*, 147 N. C., 76; *Buie v. Kennedy*, 164 N. C., 298; *Palmer v. Lowder*, 167 N. C., 333; *Farrington v. McNeill*, 174 N. C., 421.

ELVADA BUNN v. M. G. TODD, ADMINISTRATOR OF JAMES TODD.

Sale of Land of Decedent by Heir After Two Years from Qualification of Administrator—Liability for Debt of Decedent.

1. The purchaser of land from an heir or devisee more than two years after the issuing of letters testamentary, etc., if *bona fide* and without notice, gets a good title against the creditors of the devisor or ancestor, but the devisee or heir holds the price received for the land in lieu thereof, and subject to the claims of such creditors, just as the land would have been held if not so sold.
2. Where the heir, being also administrator of the decedent and having notice of a claim against his ancestor, sold land descended to him more than two years after the death of such ancestor and took a note for the purchase money payable to himself as guardian for wards to whom he was personally indebted by note, and neither the purchaser nor the wards had notice of the claim of a creditor of decedent, and the heir's note to the wards had not been canceled and the guardian bond was solvent: *Held*, that the proceeds of the sale of the land are applicable to the payment of the debts of the intestate.

(139) ACTION to subject the proceeds of a sale of land to the payment of the debts of a decedent, heard before *Hoke, J.*, at February Term, 1894, of WAKE, upon the following agreed statement of facts:

At October Term, 1889, of the Superior Court of WAKE, Elvada Bunn brought an action against M. G. Todd, administrator of James Todd, and the heirs at law of James Todd, to recover the sum of $500 which James Todd in his lifetime held as trustee of Elvada Bunn. At April

Term, 1892, a judgment was rendered in favor of the plaintiff for $922, and in the said judgment it was declared that the lands of James Todd in the hands of heirs at law, and those holding under them with notice of said claim, should be subjected to the payment of said judgment. This judgment is referred to and made a part of this agreement of facts. That in pursuance of said judgment lots Nos. 3 and 4 of the lands of James Todd in the hands of his heirs at law were sold for $400, and the proceeds, less the cost of sale, were applied to the payment of said judgment, which leaves a balance of $_____, with interest of $____ from the ____ day of _____.

That the defendant M. G. Todd, who is one of the heirs at law of James Todd, was appointed guardian of the Nowell children before said action was brought, and gave his bond as guardian, which is now solvent, one of the sureties to which was Dr. J. E. Todd. That before this action was brought, and before J. E. Todd had any notice of the claim of Elvada Bunn, but after M. G. Todd had such notice, and before this suit was brought, M. G. Todd was indebted to his wards in the sum of (140) $400. That M. G. Todd sold to James E. Todd the tract of land which he held as heir at law of James Todd, being lot No. 6 referred to and described in the complaint in said action, which is referred to for a description of said land, for the sum of $364. That said M. G. Todd, guardian of the Nowell children, advanced to J. E. Todd $36 and took a bond from said J. E. Todd payable to said M. G. Todd, guardian of the Nowell children, for $400, which was the amount then due to them. This note included the purchase price of said land and the $36 mentioned.

That the Nowell children had no notice of the claim of Elvada Bunn, and the said Todd, guardian, secured said note by a mortgage on the said lot No. 6, and also on another tract of land, but the second tract will not pay the amount of said bond for $400.

That at the time M. G. Todd took said bond from J. E. Todd, payable to M. G. Todd, guardian of the Nowell children, and at the time of the execution of the mortgage to secure the same, M. G. Todd had notice of the claim of Elvada Bunn upon which said judgment was rendered; but at the time of the sale of the lot No. 6 by M. G. Todd to J. E. Todd, and at the time of the execution of the bond and mortgage, neither J. E. Todd nor the Nowell children had any notice of said claim, but M. G. Todd did have notice at the time of said sale to J. E. Todd of lot No. 6 of the said claim of Elvada Bunn.

That said M. G. Todd has never credited their note, and it is now in the hands of the clerk of this Court to abide this action. That the said M. G. Todd has never settled with his wards.

The question submitted on these facts is, who has the right to said note of J. E. Todd, except the $36—Elvada Bunn or the wards of M. G.

Todd, the said Bunn claiming $364 of the said note, with interest on same, being the purchase price of the land sold to J. E. Todd as above set out?

That M. G. Todd is insolvent.

That M. G. Todd is still administrator of James Todd, de-
(141) ceased, and was at the time of giving the note and mortgage of J. E. Todd.

There is no property of the estate of James Todd to pay Elvada Bunn, except this bond.

That J. E. Todd purchased the land from M. G. Todd, for which the bond for $400 was given, more than two years after the qualification of the administrator of James Todd, and that J. R. Todd was not one of the heirs at law of James Todd.

That the administration of the estate of James Todd by M. G. Todd, his administrator, had not been settled at the time of said sale to J. R. Todd by M. G. Todd.

W. N. Jones and Strong & Strong for plaintiff.
J. B. Batchelor and J. C. L. Harris for defendant.

SHEPHERD, C. J. The sale of the land by M. G. Todd, one of the heirs at law of James Todd, having been made more than two years after the grant of letters of administration, for value and without notice, was valid as to the purchaser, and it is now sought to subject the proceeds of such sale in the hands of the said heir to the payment of the outstanding indebtedness of the estate.

It is insisted by counsel that the proceeds in such cases cannot be so subjected, and that the liability of the heir is personal only. Although this question was not the distinct ground of decision in *Winfield v. Burton,* 79 N. C., 388 (the proceeds being in the hands of an assignee of the heir), it cannot be denied that the contention of counsel is sustained by what is said in the course of the opinion. But it is not a little remarkable that in the same volume (in *Badger v. Daniel,* 372) a contrary view is declared by the Court, through the same Justice who delivered the opinion in the former case. The Court said: "Whitfield held the
(142) land as Henry Joyner did, and sales by Whitfield after the two years passed unincumbered estates to his vendees, Whitfield holding the price paid him *in lieu of the land and subject to its liabilities.*" This view is fully adopted by the Court in *Davis v. Perry,* 96 N. C., 260, where the foregoing language is quoted with approval. The opinion sustains the principle succinctly stated in the head-note, as follows: "Where a devisee or heir at law sells land derived from the devisor, or ancestor, more than two years after the issuing of letters testamentary,

etc., to a *bona fide* purchaser for value and without notice, such purchaser gets a good title against the creditors of the devisor, or ancestor, but the devisee or heir holds the price received for the land in lieu thereof and subject to the claims of such creditors, just as the land would have been." And again, in *Arrington v. Arrington,* 114 N. C., 151, after declaring that one who purchased of the heir after two years and gave his note for the purchase money was a purchaser for value, the Court distinctly stated that the creditor could subject "the purchase money, or its securities in the hands of the vendor." This principle being determined, its application to the facts of the case before us is quite easy. Here the heir was *also* the administrator, and had notice of the claim of the plaintiff against his ancestor. It is his duty, the personal assets being exhausted, to apply the proceeds of the sale to the outstanding indebtedness of the estate; but, instead of doing this, he attempts to apply them to the settlement of a debt due by him to his wards, the Nowell children. Procuring a note for the purchase money to be made payable to himself, as the guardian of these children, did not constitute them assignees for value so as to preclude the rights of the plaintiff, as it is expressly found as a fact that the note due by him to the said children has never been credited or surrendered and that he has never settled with them. The said note is now in the hands of the clerk, and the bond of the guardian is solvent. These children have parted with nothing, and their claim is still subsisting and can be collected. *Holderby* (143) *v. Blum,* 22 N. C., 51. To take the proceeds of the sale of the land, which the administrator holds in trust by virtue of his office, and apply them to the payment of his own debt instead of the indebtedness of the estate would, under the circumstances of this case, be contrary to the plainest principles of equity. We think the plaintiff was entitled to judgment.

Reversed.

Cited: Lee v. Giles, 161 N. C., 546.

ANTIETAM PAPER COMPANY v. CHRONICLE PUBLISHING COMPANY ET AL.

Corporation Mortgage, Validity of—Priority of Claims for Materials Furnished a Corporation Over Previous Mortgage.

1. Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness.
2. A mortgage executed by a corporation pursuant to a resolution adopted by a majority of the stockholders at a meeting which was specially called, but was not a "regular general meeting," is valid against creditors of the corporation other than the mortgage creditors.
3. In the absence of fraud and of objection on the part of the stockholders, defects in a proceeding by which the assent of the stockholders is given cannot invalidate the mortgage unless they are of such a substantial character that the giving of the assent cannot be inferred.
4. Materials furnished to a corporation which in no sense attach to or enhance the value of the property do not, under the provisions of sec. 1255 of The Code, have priority as to lien over a previously recorded mortgage.

CREDITOR'S SUIT, tried before *Hoke, J.*, and a jury, at April Term, 1894, of WAKE. It was brought for the purpose of collecting the (144) assets of the Chronicle Publishing Company and having the proceeds of the same distributed among its creditors according to their respective priorities.

The main questions involved were the validity of the mortgage executed by the defendant corporation to Josephus Daniels, and the preference claimed by certain creditors who had furnished supplies consumed in the operations of the company, over the mortgage, under section 1255 of The Code. The verdict and judgment sustained the validity of the execution of the mortgage, and his Honor adjudged that the claims of the "material" creditors were not entitled to the priority claimed.

The plaintiffs and defendants, except Daniels, appealed, and both appeals were considered together.

J. W. Hinsdale and Armistead Jones for plaintiff.
Haywood & Haywood and C. M. Busbee for defendant Holt.
Strong & Strong for defendant Raleigh Paper Mills.
R. O. Burton and W. N. Jones for defendant Daniels.

SHEPHERD, C. J. This is a creditor's bill brought for the purpose of collecting the assets of The Chronicle Publishing Company, and apply-

ing the same to the claims of its various creditors. The receivers appointed by the court having sold the property of the said defendant, and there now being in their hands the proceeds of such sale, it becomes necessary to determine the claims of the several creditors to the said fund.

1. We are clearly of the opinion that the mortgage to Josephus Daniels was properly executed under the Act of 1893, chapter 95, and the only point made against the validity of the said mortgage which seems to be seriously insisted upon is that it was not authorized by a regular general meeting of the stockholders. The mortgage was made pursuant to a resolution of a majority of the stockholders at a meeting (145) held by them on 19 March, 1892, which was not "a regular general meeting." It is well settled that corporations, other than railroad corporations, have a general power to mortgage their property, unless there is some provision in their charters expressly prohibiting or regulating this right. "The right to mortgage is a natural result of the right to incur an indebtedness." Cook on Stock and Stockholders, 760-779. Even where the charter provides as to how the assent of the stockholders is to be given, and this is not strictly followed, "such a provision is regarded as intended for the protection and security of the stockholders, and in the absence of fraud and objection upon their part, defects in the proceeding by which the assent is given cannot be made to invalidate the mortgage, unless they are of such a substantial character that the giving of the assent cannot be inferred. . . . Other corporate creditors cannot raise this objection to the martgage." Cook, *supra,* note 2, and the authorities cited. In the case before us there is no objection on the part of any stockholder, and, according to the principles above stated, we must hold that the mortgage in question is valid so far as this action is concerned.

2. Several of the creditors claimed priority over the above-mentioned mortgagee under section 1255 of The Code. They insist that the articles in question (paper, ink, gas, a cut of Santa Claus, and the like) are "materials furnished" within the above provision. Without discussing the various authorities cited on the argument, we are content to adopt the construction placed upon the statute by this Court in *Bank v. Manufacturing Co.,* 96 N. C., 298. The Court said: "We are disposed to concur in the view of counsel for the appellant Hall that the section, so far as it relates to claims for labor performed or material furnished, pursuing very nearly the words used in section 1781, was designed by its disabling effect to more effectually secure the liens given by the Constitution to the laborer (Art. X, sec. 4), and the statute (146) extending the lien to materials furnished. But the lien is further extended to torts, and compensation is provided against any alienation attempted to defeat the claim." After holding that, under the circum-

stances of that case, machinery or other articles purchased abroad and used in putting up a mill "or facilitating its workings afterwards" was not within the act, *Smith, C. J.*, remarked that "the consequences would be pernicious and destructive of all fair and safe dealings with corporations if a secret lien, founded upon a sale by a distant creditor, of which a person had no information or means of information provided by law, could be set up as paramount to his demand, and unless imperatively demanded such a construction ought not to be put upon an enactment as will lead to this result."

We have examined the numerous authorities to which we have been referred by counsel, but they do not, in our opinion, sustain the contention that the articles furnished by the appellants are embraced by the statute. We do not deem it necessary to enter into a general discussion of the subject. It is sufficient to say that these articles, which in no sense are attached to or enhance the value of the property, cannot be considered as within the spirit or letter of the act.

The order as to the cost was, in this case, within the discretion of the court.

Affirmed.

APPEAL OF DEFENDANT SADLER IN SAME CASE.

For the reasons given in the foregoing appeal, the judgment is affirmed.

Cited: Heath v. Cotton Mills, post, 208; *Benbow v. Cook, post,* 334; *Coal Co. v. Light Co.,* 118 N. C., 234.

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(147)

ANTIETAM PAPER COMPANY v. CHRONICLE PUBLISHING COMPANY ET AL.

(APPEAL BY DEFENDANT HOLT.)

Practice—Issues—Exceptions to Charge.

1. The form in which issues are submitted is of little consequence if the material facts in controversy, as appear from the pleadings, are clearly presented by them, and provided they be such that the court may proceed to judgment, and such as will allow the parties to present to the jury any material view of the law arising out of the testimony which counsel may request the court to embody in the instructions to the jury.
2. An exception "to the charge as given" is too general and will not be considered.

3. The statement of the trial judge as to what he said in his charge to the jury is conclusive, and an exception based upon an alleged instruction which does not appear in the charge as given in full by him will not be considered.

ACTION, tried before *Hoke, J.*, and a jury, at April Term, 1894, of WAKE.

The defendant Holt appealed. The facts appear in the opinion of *Associate Justice Burwell.*

John W. Hinsdale and Armistead Jones for plaintiff.
Haywood & Haywood and C. M. Busbee for defendant Holt.

BURWELL, J. This appeal brings up for our consideration the exceptions taken on the trial by the defendant Holt alone. His controversy in this action was with his codefendant Josephus Daniels, to whom the defendant, The Chronicle Publishing Company, had executed a mortgage on 24 March, 1892, to secure a debt of $2,600, evidenced by two bonds of that date, one for $1,000, due 1 February, 1893, and the other for $1,600, due 1 February, 1894.

We have adjudged that that mortgage and those bonds were valid acts of that corporation, and that by virtue thereof the (148) owners of those bonds had a lien on the property described in that mortgage. [See this case at this term on the plaintiffs' appeal.] The validity of this mortgage was averred by each of these defendants, and in his answer the defendant Holt alleged that he was the owner of the note for $1,000 described therein, by purchase from defendant Daniels on 1 February, 1893, the day of its maturity. To this allegation the defendant Daniels answered, averring that on the said date the amount due to him on account of this note or bond was *paid* to him, and he expressly denied that the defendant Holt had on that day purchased that note or bond from him.

The issue between these two defendants, as shown by the pleadings alone, was, Did T. M. Holt, on 1 February, 1893, purchase of Josephus Daniels the $1,000-note described in the mortgage of The Chronicle Publishing Company, or was the said note on that day paid and discharged?

Notwithstanding the fact that this single issue was raised between these two defendants by their pleadings, the counsel of the defendant Holt tendered the following four issues:

"Was T. M. Holt the purchaser, and is he the owner of the note for $1,000 mentioned in section 7 of his answer?

"Did Thomas R. Jernigan act as the agent of Holt in the purchase of

the note for $1,000 secured in the mortgage to Daniels set out in the pleadings?

"Did Jernigan, as such agent, have authority to agree that the second note secured in the mortgage should have priority over the note for $1,000?

"Was the note for $1,000 left in the possession of B. S. Jerman until the point as to which of the notes described in the mortgage should have priority of payment could be determined?"

Defendant excepted because the court refused to submit these issues to the jury.

(149) The court submitted the following issues to the jury in lieu of those tendered:

"1. Did The Chronicle Publishing Company execute to Daniels a valid mortgage on its property, of date 24 March, 1892, to secure two notes for $1,000 and $1,600, and was the same duly proved and registered?

"2. What property of the company was conveyed by such mortgage to the grantees therein?

"3. What was the value of the property sold by the receiver, and which did not pass by mortgage?

"4. Was there a payment on 1 February, 1893, to Daniels of $1,066.89, the amount of the $1,000 note with accrued interest?

"5. Was such payment in discharge and satisfaction of such note?

"6. Was the money given by T. R. Jernigan to Daniels with the intention and agreement that the $1,000-note should be paid as to Daniels, and so postponed in right to the $1,600 claim?"

And to the sixth issue the defendant Holt excepted.

These two exceptions, the one to the refusal to submit the four issues tendered by him, and the other to the submitting of the sixth issue, may be considered together.

In *Davidson v. Gifford,* 100 N. C., 18, it is held that "the material issues of fact *raised by the pleadings* must be submitted, unless it appears to the Court that this right is waived by the parties." But the form in which issues are submitted is of little consequence, if the material facts in controversy are clearly presented by them. *Cuthbertson v. Insurance Co.,* 96 N. C., 480. And "the only restriction upon the power of the trial judge to settle the issues for a jury is that they shall be such as arise out of the pleadings, such that the court, upon their verdict, may proceed to judgment, and such as will allow the parties to present to the jury any material view of the law arising out of the testimony

(150) which counsel may request the court to embody in the instructions to the jury." *Vaughan v. Parker,* 112 N. C., 96.

While the first issue tendered by the defendant Holt was distinctly "raised by the pleadings," it seems evident from the other issues which

he himself submitted, and from the issues that were submitted, and from the evidence set out in the statement of the case on appeal, and the charge to the jury, that it was conceded on the trial that he was the purchaser and owner of the note mentioned in that issue. So evident was it that there was really no controversy at the trial upon this particular matter, that his Honor, without objection or exception taken, told the jury if they believed the evidence they should answer the third issue "Yes" and the fourth issue "No," and thus find that on 1 February, 1893, there was paid to defendant Daniels the amount due on said note, but that that payment was not "in discharge and satisfaction" of it. These two issues, thus answered, established the fact that while Daniels, on the day named, received the amount due him on this note, it was not, strictly speaking, a payment, for it did not discharge and satisfy the note, but left it, as both conceded, a valid and subsisting claim against The Chronicle Publishing Company in the hands of the defendant B. S. Jerman, who held it for the use and benefit of the defendant Holt, as was also conceded. Thus, it is apparent that at the trial there was an elimination of some disputed matter, and there was left between Holt and Daniels only this issue: Was the former, who was admittedly the real owner of the note ($1,000) held by Jerman, entitled to share *pro rata* with the latter (who was admitted to be the holder and owner of the other mortgage note, $1,600) in the proceeds of the sale of the mortgaged property, or was Daniels' part of the mortgaged debt to be paid in full out of these proceeds before Holt was to be allowed any part thereof as a credit on the note he had purchased? It was conceded that the money given for this note by Holt was actually handed to Daniels by Jernigan, the only dispute about that being as to Daniels' notice or knowledge that Jernigan was not acting for himself in (151) the transaction, but for Holt or some other person.

The material fact in controversy seems to us to have been presented by the sixth issue with sufficient clearness to the jury. It is to be read and considered in connection with the testimony and the charge, as the jury considered it. Under it the counsel might have embodied in special instructions such "material views of the law arising out of the testimony" as they thought pertinent.

The first and second exceptions of the appellant cannot, therefore, be sustained.

Exceptions to the Charge.—1. It is stated that there was an exception "to the charge as given." This general exception cannot be considered. It was not urged before us. 2. It is also stated that the appellant in this case on appeal excepts to the above charge as follows: "That the court charged the jury that defendant Holt would be bound by whatever

his agent Jernigan did in his dealings with Daniels, unless he made known to him (Daniels) that he was acting for a principal."

Upon an examination of his Honor's charge, which is set out in full, we do not find that he so told the jury. His Honor's statement of what he said is conclusive, and puts this exception out of the case.

We find no error of which the defendant Holt can justly complain, and, as to him the judgment must be affirmed.

Affirmed.

Cited: Simmons v. Allison, 118 N. C., 778; *Kerr v. Hicks,* 131 N. C., 94; *Hart v. Cannon,* 133 N. C., 14; *Falkner v. Pilcher,* 137 N. C., 451; *Moseley v. Johnson,* 144 N. C., 263; *Rich v. Morisey,* 149 N. C., 41; *Morrisett v. Cotton Mills,* 151 N. C., 32; *Carr v. Alexander,* 169 N. C., 667; *Cowles v. Assurance Society,* 170 N. C., 371; *Shannonhouse v. White,* 171 N. C., 18; *Hutton v. Horton,* 178 N. C., 553; *Drenhara v. Wilkes,* 179 N. C., 513.

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(152)

J. W. HINSDALE v. B. S. JERMAN.

Contract—Note—Pledge of Collaterals—Rights of Payee of Note.

For "money borrowed" J. gave his note to H. and pledged certain shares of stock as collateral security. A contemporaneous agreement between them provided that all assessments upon the stock should be paid equally by them and the stock should be sold to pay the note; any surplus up to a certain amount to go to J. and all beyond that amount to H. The stock became worthless and unsalable: *Held,* that the transaction was merely a loan of money secured by collaterals, and, the security having become worthless, H. is entitled to enforce the secondary liability of the maker of the note.

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

ACTION, tried before *Hoke, J.,* and a jury, at April Term, 1894, of WAKE. Plaintiff declared on a note for $790, bearing date 12 November, 1890, as follows:

$790. RALEIGH, N. C., 12 November, 1890.

One day after date, for value received in borrowed money, I promise to pay John W. Hinsdale, or order, the sum of $790, with interest at 8 per cent from date.

This note is secured by the pledge of ten shares of Rockbridge stock, Certificate No. 192. B. S. JERMAN.

Defendant admitted execution of note, as presented, but denied his liability on same because, by the terms of the entire transaction, of which the note was a part, the plaintiff and defendant became and were partners in the matter, and offered in evidence an agreement, entered into by plaintiff and defendant at the time the note was signed, and (153) which was a part of the entire transaction, with the note, as follows:

RALEIGH, N. C., 12 November, 1890.

In consideration of the sum of one dollar, paid by John W. Hinsdale to B. S. Jerman, it is agreed between them that the ten shares of stock of the Rockbridge Company, Certificate No. 192, which is pledged to John W. Hinsdale to secure the payment of note of B. S. Jerman for $790, shall be sold first to pay the said note, and that all between that sum and interest thereon that the said stock shall (154) sell for up to $900 shall be paid to B. S. Jerman, and that all over the sum of $900 that the said stock shall bring shall be divided equally between the said Jerman and Hinsdale.

It is further agreed that all future assessments upon the said stock shall be paid by the said Jerman and Hinsdale equally, each paying one-half the same, to be refunded to each of them out of the proceeds of the sale of the said stock next after the payment of the said note to the said Hinsdale, and before the payment of any amount to the said Jerman.

Witness our hands and seals the day and year first above written.

J. W. HINSDALE. [SEAL.]
B. S. JERMAN. [SEAL.]

Judgment on verdict for plaintiff, and defendant appealed. (157)

R. O. Burton and Armistead Jones for plaintiff.
Haywood & Haywood and Thomas M. Argo for defendant.

PER CURIAM. The note set out in the complaint, with the contemporaneous agreement between the plaintiff and defendant, which the latter put in evidence, constituted the contract between the (158) parties to this action. We think the construction put by his Honor on this written contract was correct, and that the transaction was merely a loan of money, secured by collaterals which have become worthless, thus leaving no course open to the plaintiff to recover the money he loaned to defendant except to enforce the secondary liability of the maker of the note. It seems to us very evident that he has the right so to do.

Affirmed.

Cited: Sykes v. Everett, 167 N. C., 609.

ROWAN JONES v. ELIZABETH EMORY ET AL.

Evidence—Competency of Witness—Transaction With Deceased Person—Interest.

1. The true test of the competency of a witness under the exception contained in sec. 590 of The Code is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action; if not, he is not disqualified: Therefore,
2. In the trial of an action to recover land, a person living as a member of plaintiff's household on the land and aiding in her support is not a party so "interested in the action" as to be incompetent to testify in regard to a transaction with a deceased father of the defendants.
3. In the trial of an action to recover land, wherein a parol trust was claimed, testimony that the plaintiff had entered upon the land more than twenty years before the trial, under a bargain with defendant's grantor, a son-in-law of plaintiff's father, and had built a house thereon, paid taxes and lived thereon undisturbed, claiming the property as her own, with her invalid father until his death, and that the proceeds of the sale of certain articles had been applied in payment of the purchase money by her or for her benefit, together with an explanation of the reason for the conveyance of the title to defendants' ancestor instead of to plaintiff, was sufficient to go to the jury as tending to establish the parol trust.

(159) ACTION, tried before *Hoke, J.*, and a jury, at February Term, 1894, of WAKE. Plaintiff, who was a daughter of Willis Emory, deceased, seeks to establish a parol trust in a tract of land, or lot, the legal title to which is in defendants, who are the children and widow of W. C. Emory (called Clint Emory), deceased, who was brother of plaintiff and son of said Willis. Plaintiff offered evidence tending to show that she had moved upon the lot in controversy more than twenty years ago, under a bargain with one Saintsing, who was a son-in-law of Willis Emory; that she had built a house upon the land, and had lived in same with her invalid father and mother until their death, and since that time had resided on the lot, claiming to own same, paid taxes on it, etc.; that W. C. Emory, deceased, father of defendants, owned and lived on a lot adjoining the one in controversy, and had taken the legal title from Saintsing to plaintiff's lot by direction of Willis Emory, the purchaser in trust, to hold same for plaintiff's benefit.

The reason given for this arrangement was that prior to the execution of the deed from Saintsing for the lot in controversy, Willis and Clint Emory had made their exchange and this would save the execution of so many deeds. That Willis Emory had a horse and a gun and some other personal property, and these had been sold and proceeds had been applied in payment for the lot in controversy and for the use and benefit of

plaintiff. Defendants offered the deeds from Saintsing to their father, W. C. Emory, for the lot in controversy, and offered evidence tending to show that W. C. Emory was a laboring man, making fair wages, and that Willis Emory, the father, was an invalid and poor, etc.

Saintsing having testified that he had made no bargain with plaintiff about the land, and Ephraim Emory, one of plaintiff's witnesses, testified that he had lived with Willis Emory, who was his uncle, until he died, and helped support him, and since that time had lived on the lot with plaintiff, boarding there and helping to support (160) plaintiff; that he had no legal or other pecuniary interest in the lot in controversy nor in the action, but if plaintiff lost her suit he would have to move from the land. He then was permitted to testify that in a controversy between Willis and W. C. Emory, who were both dead, he heard the arrangement under which W. C. Emory took the deed for the lot in trust for plaintiff. Defendant objected because W. C. and Willis Emory were dead at the time and he had a disqualifying interest. Overruled, and defendants excepted.

The evidence was as follows:

Mrs. Jones: "W. married Jones and then Small; both are dead before suit brought; W.'s father and mother were invalids; father twenty years and mother five years before death were under doctor's treatment; W. contracted with defendant Robert Saintsing to buy a piece of land for forty dollars; doctors advised W. to move her mother out of town; went out, occupied lot and built a house on it twenty-one years ago last January; father lived there with W., and W. has lived there ever since, claiming the lot as her own; lot was in shape of three-cornered; W. paid the taxes on property; taxes paid, receipt shown; father died in 1880."

Cross-examined.—"W. contracted for land from Robert Saintsing twenty-two years ago, and has lived on it twenty-one years. Bargain was made before W. ever moved on lot."

Ephraim Emory: "W. lives on land and has for fifteen years; is nephew of Willis Emory, and lived with him and took care of him until he died, and has lived on the land since; has no legal interest in controversy, but supposes he would have to remove from land if plaintiff lost possession."

Defendant objected to question as to what took place between Willis and Saintsing and W. C. Emory—Willis Emory and W. C. Emory being dead; overruled and defendants excepted. W. C. Emory recognized Willis Emory's ownership by exchanging a part of his own land for a slip off this to improve shape. Heard conversation between (161) Willis and Saintsing. Saintsing says: "Old man, suppose I make Clint a deed and let him make you one. This will only require two deeds, whereas if I make a deed to you, owing to swap, there will be

four deeds necessary." It was then agreed upon that Saintsing should make the deed to Emory, and he was to make the deed to W.'s father. Willis, the father, was acting for Mrs. Jones, plaintiff. W. paid Saintsing $20 in money in 1874; old man Emory furnished money; it was taken for him; he had a horse and a gun, etc.; his daughter supported him. Boundary 107x150x90x68.

Cross-examined.—"Conversation took place out in yard; Willis Emory was not bed-ridden continuously; Clint Emory got regular wages; W. was a carpenter first and then became a farmer."

John S. Thompson: "W. is a party defendant, having married one of the children of Willis Emory."

Defendant introduced in evidence a deed from Saintsing to W. C. Emory, February, 1870, and a deed from John Devereux to W. C. Emory, 14 September, 1886.

R. A. Saintsing: "Rowan Jones never made any bargain with W. for the purchase of the land, and W. never had any conversation with her on the subject. Willis Emory was sick with rheumatism sixteen or seventeen years; helpless a great deal of the time, and was very poor. Was never present at conversation between Rowan Jones and others, as she testifies."

Cross-examined.—"W. is defendant and has filed no answer."

Mrs. Emory (now Mrs. Glenn): "Willis Emory was sick and poor and did not work any. W. was never present at any conversation between Rowan Jones and Ephraim Emory."

George W. Perry: "W. wrote the deed at the request of Mr. (162) Saintsing."

The issues submitted were as follows:

"1. Did W. C. Emory take a deed for the lot in controversy from Robert Saintsing in trust, to hold the same for the use and benefit of plaintiff?

"2. Did W. C. Emory take and hold the deed for the lot in controversy in trust for Willis Emory, his father?"

The court charged the jury that if they answered the first issue "Yes," they need not respond to the second issue.

"That, ordinarily, in determining an issue in a civil suit, plaintiff was not required to establish his claims by the greater weight of the evidence, but in the case at bar such was not the rule as to the character of proof. That the deed as written was presumed to express the contract of the parties, and would not be disturbed unless the plaintiff established her claim by clear, strong and convincing proof, etc. That if the jury were so satisfied that Willis Emory, having bought and paid for the land in controversy, if Willis Emory, having bought and paid for the land from Robert Saintsing, caused same to be conveyed to W. C. Emory, under an

arrangement, or with the direction at the time, that W. C. Emory would hold for his daughter's benefit and convey same to her, Emory would hold in trust for her; same result if land bought and paid for by father, who gave direction it should be conveyed for his daughter's benefit prior to conveyance, the conveyance being after made pursuant to this direction and purpose. If Willis Emory, the father, bought and paid for the land not specially for his daughter, but for himself, and caused the deed to be made to W. C. Emory for his own benefit, under an arrangement, or with the direction at the time or before, the deed being made pursuant to direction, defendant would hold in trust for estate of Willis Emory. If for daughter, first issue should be answered 'Yes,' and need not answer second issue. If not for daughter, but for himself, first issue 'No'; second 'Yes.' If for neither—not established by the clear strong proof—deed holds, and both issues 'No.' "

The court then recited the evidence pertinent to the issues.

There was a verdict for plaintiff on the first issue. (163)

Defendant moved for a new trial:

1. For error in ruling on the question of the evidence of Ephraim Emory.

2. For error in the charge, for that there was not sufficient evidence to establish a parol trust under the rule of law as to such claim.

Motion overruled, and defendant excepted, and from the judgment on the verdict for plaintiff the defendant appealed.

Armistead Jones for plaintiff.
T. R. Purnell for defendants.

AVERY, J. The general rule (The Code, sec. 589) is that no person offered as a witness shall be excluded on account of his interest in the event of the action. The exception (The Code, sec. 590) is that neither a party interested in the event of the action, nor any one from, through or under whom such interested person derives his *interest or title* by assignment or otherwise, shall be examined as a witness, etc., concerning a personal transaction or communication between the witness and the deceased person. The witness Ephraim Emory lived with the plaintiff on the land in controversy and helped to support her. If she should lose the suit he would seek a home elsewhere with her, but he had no legal or pecuniary interest in the lot in controversy. The statute does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or (to apply the principle more exactly to the case before us) a direct legal or pecuniary interest in the result. Unless the witness bear such a relation to the controversy that the verdict and judgment in the case

may be used against him as a party in another action, he is not disqualified to testify. The fact that the witness as a member of the
(164) family must move out along with the servants of the plaintiff, if the defendant should prevail in this suit, would not, he being neither privy nor party, estop him from setting up a claim to the land in a future action as against present defendants. Were this record offered in such a suit, it would be *res inter alios acta. Mull v. Martin,* 85 N. C., 406; *Williams v. Johnson,* 82 N. C., 288; *White v. Beaman,* 96 N. C., 122. When we ignore this test and give to the word "interest," as used in statutes, a meaning so broad as to include every person who stands in such a relation to the controversy as would naturally be calculated to enlist his prejudices for or excite favorable emotions in his breast toward the party on whose behalf he is introduced as a witness, we embark on a sea of uncertainty without chart or compass. This same principle was evidently applied in *Lawrence v. Hyman,* 79 N. C., 209, where the testimony of one of the trustees of a church, who was a party, was excluded as to such a transaction, while that of members who worshiped in the congregation was admitted. To show how unsatisfactory it would prove to dispense with this test, one need but recall the fact that every citizen is interested in having good roads constructed in the county in which he resides, but it does not follow that every such citizen is a proper or necessary party to a proceeding to lay off a public road, because the statute requires that every person interested must be notified and allowed the opportunity to resist the order asked for. It has been held that in such cases a reasonable construction, and one that can be applied as a test, must be adopted. 11 Am. & Eng. Enc., 422; *Taylor v. Norval,* 88 Ill., 527. So, too, we would say in common parlance that every citizen of a county or of a State is interested in collecting tax claimed as due to the county or State, when he has no such direct legal or pecuniary interest as would make him a proper party to a proceeding against a delinquent
(165) tax collector. We think that there was no error in admitting the testimony of Ephraim Emory.

After the trial the defendant moved for a new trial on the ground that there was not sufficient evidence to establish a parol trust.

We think the testimony that the plaintiff had entered upon the land more than twenty years before the trial, under a bargain with one Saintsing, who was a son-in-law of Willis Emory, and had built a house upon it, and had paid taxes and lived thereon undisturbed, claiming the property as her own, with her father, Willis Emory, until his death; that the proceeds of a sale of a horse, a gun and other personal property had been applied in payment of the purchase money by her or for her, and that exchanges of portions of the two lots had been from time to time made, together with reasons given, according to the wit-

nesses, for agreeing to have title to both lots made to W. C. Emory, the father of the defendants, was sufficient to go to the jury as tending to establish the parol trust. *Shields v. Whitaker,* 82 N. C., 519; *Wood v. Cherry,* 73 N. C., 110; *Turner v. Eford,* 58 N. C., 106. The recognition of her right by W. C. Emory during his life by exchanging parts of two lots so as to throw both into better shape, grows in importance when considered with the fact that the controversy did not arise till after the death of both Willis Emory and W. C. Emory. If the testimony for the plaintiff is to be believed, in these exchanges the father of the defendants repeatedly recognized the rights and dominion of the occupant of the lot in controversy. This was a direct recognition of an adverse interest in her or her father. The other evidence tends to explain who was the claimant, and the jury have found that the consideration proceeded from, and the recognition of the right was intended for, the plaintiff. It is not material whether there was or was not conflicting evidence, if that offered by the plaintiff was sufficient to go to the jury. *Smiley v. Pearce,* 98 N. C., 185. There was no error in submitting the issues to the jury. (166)

Affirmed.

Cited: Clark v. Edwards, 117 N. C., 247; *Lyon v. Pender,* 118 N. C., 150; *Fertilizer Co. v. Rippy,* 124 N. C., 650; *Henderson v. McLain,* 146 N. C., 334; *Helsabeck v. Doub,* 167 N. C., 205; *Ins. Co. v. Woolen Mills,* 172 N. C., 537.

R. O. BURTON v. R. M. FURMAN, STATE AUDITOR, ET AL.

Mandamus, Writ of—State Auditor—State Treasurer—Discretion of Officers—Suit Against the State as Trustee.

1. *Mandamus* is now a writ of right, to be used as ordinary process, to which every one is entitled where it is the appropriate and only remedy.
2. *Mandamus* will not be granted to compel the performance of an act involving the exercise of judgment and discretion on the part of the officer to whom its performance is committed.
3. The duty of the State Auditor is to examine and to liquidate the claims of all persons against the State in cases where there is sufficient provision of law for the payment thereof, and where there is no such provision, to examine and report the fact, with his conclusions, to the General Assembly.
4. Where, in pursuance of an act of the General Assembly compromising certain litigated claims against a railroad company, a sum of money was paid by the railroad company "into the State Treasury to provide a fund for

the payment of the attorneys employed by the State" in such litigation, one of whom was settled with in full and the other was paid a part of the fee which he charged for his services, and there remained of such fund so provided for the attorneys more than enough to pay the balance of the fee so charged, and the State Treasurer refused to pay such balance and the State Auditor refused to issue a warrant for the payment thereof: *Held*, that *mandamus* will not lie either against the Treasurer to compel him to pay, since the statute provides that "no moneys shall be paid out of the treasury except on the warrant of the Auditor," nor against the Auditor to compel him to issue a warrant, inasmuch as his duty in the premises is not ministerial simply, but involves the exercise of his discretion in the examination and liquidation of the claim.

(167) ACTION, heard at April Term, 1894, of WAKE, before *Hoke, J.* The nature of the action is stated in the opinion of *Associate Justice MacRae.* His Honor, *Judge Hoke,* granted the motion of the defendants to dismiss the action on the ground that it did not state a cause of action, and the plaintiff appealed.

R. O. Burton for plaintiff.
The Attorney-General and R. C. Strong for defendant.

MACRAE, J. This is an action whereby the plaintiff, an attorney at law, seeks to recover $974.88, the balance of a fee of $5,000 claimed by him for services rendered the State in litigation with the Wilmington and Weldon Railroad Company over its liability for State, county and city taxes, and to compel the payment to him of said sum out of the fund placed in the State Treasury by the counties and the railroad company, under provisions of section 7, chapter 100, Private Laws of 1893.

As set out in the complaint, there had been much litigation concerning the right to tax the said company, and the act above named was the result of long negotiation for an adjustment of all matters in difference on said account. Section 7 is the final section of this act and reads as follows: "That to provide a fund for the payment of the attorneys employed by the State in litigation against said company, in making payment to the counties, cities and towns of the amounts due each under this act, the said company shall deduct from the amount due each county, city or town, fifteen *per centum,* which said *per centum* the said company shall pay into the State Treasury. . . . And said company shall, for like purposes, pay into the State Treasury the sum of $2,500." . . . The parts omitted are immaterial for our present purpose.

(168) The action is both to ascertain and declare the amount due and to procure a *mandamus* to the Auditor compelling him to issue his warrant, and to the Treasurer to compel him to pay the same.

There is no further contention that the writ of *mandamus* is a high prerogative writ, as it was at common law. It is now a writ of right, to be used as ordinary process, and every one is entitled to it where it is the appropriate process for asserting the right claimed. The Code, sections 622 and 623; *Belmont v. Reilly,* 71 N. C., 260. So the first question presented is, Is this the appropriate process for ascertaining the plaintiff's right?

The purpose of this writ of *mandamus* is to require some Superior Court, officer, corporation or person to do some particular thing which appertains to their office or duty, and it will not be granted where the law affords to the party aggrieved another and complete specific remedy. Neither will this writ be granted to compel the performance of an act involving the exercise of judgment and discretion on the part of the officer to whom its performance is committed. The law is so thoroughly settled in this State by the former adjudications of this Court that we have nothing to do but refer to them.

A case strikingly like the present one is *Boner v. Adams, Auditor, and Jenkins, Treasurer,* 65 N. C., 639, where the plaintiff, a clerk of the General Assembly, who had received a warrant for the entire number of days to which he was entitled, at $7 per day, claimed that he was entitled to be paid $3 per day in addition to what he had already received, under an Act of Assembly, chapter 1, session 1869-70, which provided that the mileage and *per diem* of the clerks "shall be the same as allowed by the last General Assembly." And further, it was provided that "the Auditor of the State is hereby authorized to draw his warrant upon the Treasurer for such sums as have not been paid, or may hereafter be due." The Auditor refused to draw his warrant upon the Treasurer for the additional sum demanded, and thereupon (169) application was made to the court for the writ of *mandamus* to compel the Auditor to issue the warrant and the Treasurer to pay it. It was held that *mandamus* would not lie against the Treasurer, because no warrant had been issued, and not against the Auditor, because it was something more than a ministerial duty sought to be required of him. This was before the Act of 1871, section 622 of The Code, which provided that all applications for *mandamus* should be made by summons and complaint, but the principles governing the issue of *mandamus* were the same then as now, and the decision is a controlling one, in which we fully concur.

Since the passage of the last-named act the subject has been often considered. Selecting one of such cases, *Brown v. Turner,* 70 N. C., 93, we find a very clear statement by *Mr. Justice Bynum: "Mandamus* will lie when the act required to be done is imposed by law, is merely ministerial; the relator has a clear right and is without any other adequate

remedy. Moses on Mandamus, 68. But it does not lie where judgment and discretion are to be exercised; nor to control the officer in the manner of conducting the general duties of his office. 2 Dillon on Corp., sec. 665; 34 Pa. St., 496."

In *Decatur v. Spaulding,* 14 Pet., 497, it was held that *mandamus* would not lie against the secretary, because the duty required by the writ was executive, in which judgment and discretion had to be used, to wit, in construing and passing upon an act of Congress. To the same effect is *Brashear v. Mason,* 6 How., 92; *United States v. Guthrie,* 17 How., 284, where the Court says: "It has been ruled that the only acts to which the power of the court by *mandamus* extends are such as are purely ministerial, as to which nothing like judgment and discretion in the performance of the duties is left to the officer."

The Code, section 3350 (7), prescribes, among the duties of the Auditor, "to examine and liquidate the claims of all persons
(170) against the State in cases where there is sufficient provision of law for the payment thereof, and, where there is no provision, to examine the claim and report the fact, with his opinion thereon, to the General Assembly." It will be seen at once that the duty of the Auditor is not in this instance a ministerial one, but he is required to exercise his judgment in the examination of claims and the construction of statutes applicable thereto.

Some authorities have been cited to us by the plaintiff, among them Heard's Shortt's Ex. Rem., which goes so far as to say that while in former times a *mandamus* was held to lie only to compel the performance of a ministerial duty, modern cases have gone much further, and a *mandamus* will now be granted, when necessary, to compel the performance of any public duty. Perhaps the present case aptly illustrates the meaning of the author. If, upon the presentation of his claim to the Auditor by the plaintiff, the Auditor should refuse to examine the same, the action for a *mandamus* would lie, and the Auditor would be commanded to do his duty; but the court would not undertake to direct or control him in the exercise of his judgment and discretion in the course of such performance. There have been occasional cases of this kind against boards of county commissioners to compel them to hear applications of persons applying for license to retail spirituous liquors, but the court could go no further than to require them to exercise their discretion. This claim has been presented to the Auditor, he has examined it, and has refused to issue his warrant; it must be that in his opinion there is no provision of law for its payment. We have no power to require him to do more than he has done, unless, perhaps, if he should refuse to report the case, with his opinion, to the General Assembly.

As to the Treasurer, his duty is, if possible, more clearly defined. Section 3356: "To pay all warrants legally drawn on the Treasurer by the Auditor, and *no moneys shall be paid out of the* (171) *Treasury except on the warrant of the Auditor.*" There are some exceptions to this general provision, as in sections 1169 and 1170 of The Code, by force of which the Governor may draw his warrants in certain events; but there is nothing to affect the general rule in its application to this case. No *mandamus* will lie to compel the Treasurer to pay except upon his refusal to honor a warrant.

But it is contended that by virtue of the Act of 1893 the Treasurer becomes a trustee for the plaintiff and his associate counsel as to the money put into the State Treasury to be paid to them, and that this Court has the jurisdiction to enforce the performance of the trust. And, in this view of the case, it is admitted by the plaintiff that if this were a claim against the State this suit could not be maintained. But by examination of the aforesaid section 7 of the Act of 1893 this fund is to be paid into the *State Treasury,* out of which, as we have seen, no money can be paid but upon the warrant of the Auditor. If there is a trust in this case, it is the State which is the trustee, and the State cannot be sued, except as provided in section 9, Article IV, of the Constitution. It would hardly be contended that the State Treasurer is not liable on his official bond for the safe-keeping and disbursement of this particular fund. If such be admitted, it follows that the Treasurer's trust is in favor of the State. Besides, if by virtue of this act the Treasurer became a trustee for plaintiff, it would be a personal trust apart from his office. No warrant from the Auditor would be required, and *mandamus* would not lie against him as an individual to compel its performance, there being other adequate remedy afforded him by law.

Since the argument we have been referred by the learned counsel for the plaintiff to several authorities in other States bearing upon the question before us, but as the statutes of those States may be different from those of our own, they cannot have weight with us against the clear and controlling enunciations of this Court to which we (172) have referred.

In this case it will be seen that the Treasurer had already paid the plaintiff, presumably upon the warrant of the Auditor, the sum of $4,125.02, and the Auditor, in his answer, avers that the sum so paid is sufficient compensation for the services rendered by the plaintiff. It is not distinctly alleged in the complaint that there was a special contract between plaintiff and one authorized to make it, fixing the amount of said compensation, although it is alleged that the amount charged by plaintiff for his fee was well understood by the Governor and Treasurer to be $5,000. It was, therefore, clearly committed to the Auditor to

exercise his discretion in the examination and liquidation of the claim, and it may be that he declined to allow this further claim because he had already acted in the matter and made such allowance as in his judgment was proper, and, therefore, that there was no provision of law for a further payment. If there had never been any allowance made to plaintiff for his services, it might be that the refusal to audit the account, when it appeared to the court that there was provision of law for its payment, would subject him to the jurisdiction of the courts in this proceeding to command him to audit and make such allowance as he deemed proper, as in the cases cited in the opinion of the Court in *Sloan v. Warner,* 55 Wis., 271. But we do not think that under the statutes in this State the court below would have been warranted in submitting an issue as to the value of the services to a jury, as was done in the case last cited.

Neither is there in our case a specific appropriation by statute of a sum certain to be paid to this plaintiff, and a direction to the Auditor to issue his warrant for the same, as in the case of *Sayer v. Moore,* 59 S. W., 755 (Nebraska), leaving but a ministerial duty to be performed, in which case we think the writ of *mandamus* would lie.

(173) Nor is there an admission of the correctness of the bill presented and of the existence of a special fund for its part payment, as in the case of *Journal Co. v. Boyd,* 36 Neb., 60, where it was intimated that the peremptory writ would issue to the defendant, the Governor, to issue his warrant upon said special fund, if it had not been made to appear that he was ready to issue such warrant.

The other cases cited seem to have been founded upon the statutes of the several states, and are not authority for the plaintiff's contention.

Some question was made as to the propriety of making the Governor a party to these proceedings, which it will be unnecessary for us to consider. Neither are we called upon to examine into the merits of the case. There is no error.

Affirmed.

Cited: Russell v. Ayer, 120 N. C., 197; *Garner v. Worth,* 122 N. C., 257; *White v. Auditor,* 126 N. C., 598, 613; *Ewbank v. Turner,* 134 N. C., 83; *Board of Education v. Comrs.,* 150 N. C., 123; *Vineberg v. Day,* 152 N. C., 358; *Key v. Board of Education,* 170 N. C., 125; *Board of Education v. Comrs.,* 178 N. C., 313; *Hamlin v. Carlson, ib.,* 434.

CALVIN J. COWLES v. THE STATE OF NORTH CAROLINA.

Action Against the State—Petition for Recommendatory Judgment—Right of State to Plead Statute of Limitations.

1. In proceedings under sections 947 and 948 of The Code for the adjudication of alleged claims against the State, the State has the right to plead the bar of the statute of limitations to prevent a recommendatory decision.
2. When the facts pertaining to an alleged claim against the State are well known or readily ascertainable, and there are no "grave questions of law" to be decided in order that the General Assembly may be informed as to its duty under the law, this Court will not undertake to render a recommendatory judgment thereon, nor was it intended by the provision of the Constitution (Art. IV, sec. 9) that it should do so.
3. The fact that the General Assembly of North Carolina, in funding its recognized debt by the Act of 1879 and the amendatory acts, made no provision for a certain class of bonds, is tantamount to a declaration by it that such bonds did not constitute a valid obligation of the State.

PETITION by Calvin J. Cowles, under sections 947 and 948 of (174) The Code, for the recommendatory judgment of the court, filed 31 March, 1894, and is as follows:

"1. That by an act entiled 'An act to incorporate the Chatham Railroad Company,' ratified 14 February, 1855, a charter for the incorporation of a railroad from Raleigh, or some point on the North Carolina Railroad west of Raleigh, to the coal-fields of Chatham County, was granted. But the said charter expired because sufficient funds were not raised to put it in operation.

"2. That a second charter was granted 15 February, 1861, by an act entitled 'An act to incorporate the Chatham Railroad Company'; and by an act entitled 'An act supplemental to an act passed at the present session of the General Assembly, entitled "An act to incorporate the Chatham Railroad Company,"' ratified 23 February, 1861, the Public Treasurer was authorized to issue $200,000 of bonds for the benefit of the Chatham Railroad Company, under certain conditions. That efforts were made to raise stock sufficient to organize the company and to comply with the conditions required by the supplemental act, but without success.

"3. That thereupon application was made to the Convention of State for a change of those conditions and increased aid by the State; that this application was granted by an ordinance entitled 'An ordinance in addition to and amendment of an act of the General Assembly, ratified 15 February, 1861, entitled "An act to incorporate the Chatham Railroad Company, and to repeal an act supplemental thereto, ratified 23 Febru-

ary, 1861,"' which ordinance was ratified 30 January, 1862; that by this ordinance the supplemental act of 1861 was repealed, and it was provided that solvent corporations subscribing to the stock of the Chatham Railroad Company could pay their subscriptions with six per cent twenty-year State bonds, which the State agreed to furnish said
(175) corporations in exchange for their bonds of like amount, the total State bonds not to exceed $800,000.

"3½. That the Chatham Railroad Company, on _____, executed and delivered to Z. B. Vance, Governor of North Carolina, a deed of mortgage, under the seal of said company, wherein and whereby was conveyed to said Governor and his successors in office, for the use and benefit of the State, all the estate, both real and personal, belonging to said company, or in any manner pertaining to the same, conditioned for indemnifying and saving harmless the State of North Carolina from the payment of the whole or any part of the bonds of the State authorized to be made by the Public Treasurer, and to be delivered to the several corporations subscribing as aforesaid to the capital stock of the said Chatham Railroad Company, a copy of the said mortgage being hereto annexed and made a part hereof, and marked 'Exhibit A.'

"4. That under these provisions the Raleigh and Gaston Railroad Company, a solvent corporation, subscribed to $200,000 stock in the Chatham Railroad Company, executed its bonds for that amount to the State, and received in exchange $200,000 State bonds, which were immediately paid over to the Chatham Railroad Company, and by that company were sold in the market to the highest bidder, except $14,000 undisposed of. The city of Raleigh, in pursuance of a vote of its inhabitants, subscribed for $50,000 stock, and paid $1,000 in cash, depositing its bonds for $49,000 in the Treasury of the State, and received therefor $49,000 of State bonds, and paid them to the Chatham Railroad Company for said stock. Of these the latter company sold only $15,000.

"5. That there are now outstanding of said bonds $215,000.

"6. That none of these bonds were issued 'in aid of the rebellion.' That the work intended to be accomplished by their issue was the opening up of the Deep River region, long a cherished object of the State. That immense appropriations had been made by the State to secure
(176) slack-water navigation on Cape Fear and Deep Rivers, and large sums had been granted in aid of the railroad connecting Fayetteville with the coal-fields. That a charter for the incorporation of the Chatham Railroad Company was granted as long ago as 1854, renewed, and $200,000 granted before the war. That the ordinance authorizing the bonds in question is an amendment to the charter granted before the war. That the appropriation was not made at the instance of the late Confederate Government, or any department or officer thereof; in fact,

no aid was lent to the enterprise by said government, or any of its officers, until January, 1864, many months after the passage of the ordinance.

"That the appropriation was not asked for by the Governor of the State, or any military or other officer, nor is it possible to infer that the subscribers to the stock—mainly the Raleigh and Gaston Railroad Company, the city of Raleigh, and a few citizens of Wake and Chatham counties—had any other purpose in view than to subserve their private interests.

"That the Convention, at the same session, chartered the Fayetteville and Florence Railroad Company, the Washington and Tarboro Railroad Company, and made important amendments to the charter of the Cheraw and Coal-field Railroad Company and the Western Railroad Company, all of which enterprises evidently were not designed to aid the rebellion.

"That nothing in the words of the charter, or the amendments to the same, or in the character of the vote given for the appropriation or against it, or the enterprise itself, or the promoters, shows that these bonds were issued with the object of aiding the war.

"That the State bonds referred to are dated and were issued as aforesaid on 1 January, 1863, at which time gold was selling at three for one, this being the scale of depreciation of Confederate money (177) fixed for that date by the State of North Carolina. (See The Code, sec. 2495).

"That the plaintiff Calvin J. Cowles is the owner and *bona fide* holder, for value, of $10,000 of said bonds of the denomination of $1,000 each, dated and issued on 1 January, 1863, with all the coupons from 1 January, 1867, to 1 January, 1883, inclusive, attached thereto; five of these bonds, being numbered 11, 12, 13, 14 and 15, were issued to the city of Raleigh and indorsed by it, and five of them were numbered 18, 19, 20, 21 and 22 and were issued to the Raleigh and Gaston Railroad Company and indorsed by it.

"Wherefore, the plaintiff demands judgment:

"1. That said bonds be declared valid and binding against the said State.

"2. That the plaintiff Calvin J. Cowles do recover against the said State the sum of $10,000, with interest thereon from 1 July, 1867, subject to the legislative scale.

"3. That this court shall recommend to the General Assembly of North Carolina that provision be made for the settlement of the said judgment at the rate of forty cents on the dollar.

"4. For other and further relief."

The answer of the State was as follows:

"The defendant, answering the complaint in the above-entitled cause, but reserving the right to remove or dismiss the action, says:

"1. That the allegations contained in the first, second and third paragraphs of the complaint are true.

"2. That as to the allegations contained in the fourth paragraph thereof, this defendant has no knowledge or information sufficient to enable it to form a belief as to the truth, and therefore denies the same.

"3. That as to the allegations contained in the fifth paragraph thereof, this defendant has no knowledge or information sufficient
(178) to enable it to form a belief as to the truth, and therefore denies the same.

"4. That as to the allegations contained in the sixth paragraph thereof, 'that none of the bonds upon which this complaint is filed were issued in aid of rebellion,' is not true. That the defendant has no knowledge or information sufficient to enable it to form a belief as to the truth of the other allegations of this paragraph, and denies the same, except so much as states 'that a charter for the incorporation of the Chatham Railroad Company was granted as long ago as 1854, renewed, and $200,000 granted before the war; that the ordinance authorizing the bonds in question is an amendment to the charter granted before the war,' and the defendant admits the truth of this statement.

"5. The defendant admits the truth of the allegations contained in the seventh paragraph.

"6. That the allegations contained in paragraph 8, 'that Calvin J. Cowles is the owner and *bona fide* holder, for value, of the bonds described in the complaint,' is not true."

The defendant, further answering the complaint, says:

"1. That more than ten years have elapsed since the plaintiff's cause of action accrued, as is apparent on the face of the complaint.

"2. That more than three years have elapsed since the plaintiff's cause of action accrued, as is apparent on the face of the complaint.

"3. That as appears on face of said bonds, they are payable in Confederate money alone, and this, as defendant is advised and believes, was in aid of rebellion.

"4. That by an act of the Legislature, ratified 4 March, 1879, provision was made to compromise, commute and settle the State debt then existing, of which said State debt the said bonds purport to be a part; and that there is in the said act of the Legislature no recognition of said bonds as a part of the State debt, and no provision for the payment or settlement thereof.

"Wherefore, the defendant prays that it may be dismissed with
(179) its costs."

John W. Hinsdale for petitioner.

F. H. Busbee and the Attorney-General for the State.

BURWELL, J. The State, through its proper officer, interposes the plea of the statute of limitations against the prayer of the petitioner for the recommendatory decision of this Court on the claim which, in his petition, he sets up as the basis of this action, and it appears on the face of this petition that more than ten years have elapsed since his alleged cause of action accrued.

It was intended by the provision of the Constitution—Art. IV, section 9, and the statute, Code, sections 947 and 948—that persons who asserted that they held legal claims against the sovereign State should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law.

We see no good reason why, in such proceedings as this, we should not be required to determine the rights of the petitioner and the liability of the State by the same laws that would govern those rights and that liability if the action were against an individual debtor. While it may be true that the statute of limitations would not be allowed to bar the prosecution by the State of its claims against the citizen, except for the provisions of The Code, section 159, it does not follow from this that the State may not herself plead that statute and interpose its bar to prevent our recommendatory decision against her. It is not for us here to say whether or not there is a moral obligation resting upon the Commonwealth to pay the petitioner a certain sum of money, but (180) whether, under the law that controls such a controversy when waged between two citizens, the State is indebted to this petitioning citizen. "Considerations of honor or magnanimity can have no bearing in determining what the law is. The State has referred its rights to judicial tribunals to be decided by the law. If by it the claim is barred, they must so declare, though it might be just and honorable for the State to pay it if it has never been paid, notwithstanding the bar." *Baxter v. Wisconsin*, 10 Wis., 454.

This tribunal to which the petitioner now comes to have his alleged rights against the State adjudicated was open to him for that purpose when his rights accrued more than ten years ago. The remedy—such as it is—given him by the Constitution and the law for alleged wrong done him by the State was then exactly what it is now. He has seen fit to delay to prosecute his supposed right in the only tribunal open to him for its adjudication. Because of the length of that delay the law has barred his claim, and we cannot declare that the State is legally indebted to him.

Moreover, we do not think that the claim against the State set out in

the petition is one that calls for the exercise by us of our recommendatory decision. If, in any sense, it may be called a claim against the Commonwealth, it is a part of that mass of bonded indebtedness which was outstanding when the Constitution of 1868 was adopted. It is well known that the legislative department of the government to which our recommendation will be made, if made at all, has done what it has thought best to do in the settlement of those liabilities. The Act of 1879, and the several acts amendatory thereof, express the will of the Legislature in regard thereto. The refusal or failure of the General Assembly in each of these acts to recognize and provide for the class of claims to which those of the petitioner belong, is tantamount to a
(181) declaration by that department that they constitute no valid obligation of the State. The facts which are set out in the petition are such that, if true, they are well known to the proper officers. A legislative committee can as easily inquire into them as can a court. Not only are the facts pertaining to the matter well known or readily ascertainable, but it does not seem to us that there are here any "grave questions of law" that must be decided by us in order that the legislative department of the government may be informed as to its duty under the law. It was intended, as it seems to us, by this provision of the Constitution that the opinion of this Court upon important questions of law in certain cases might be had in order that the General Assembly might be thereby aided in the discharge of its duties under the law (*Reynolds v. State,* 64 N. C., 460), and not that this tribunal should be the censor of the legislative department in such matters, and authorized and required to sit in judgment upon the acts of a coördinate department of the government in a matter about which it is necessarily as well advised as we can be.

The petition must be dismissed.

Cited: Marcom v. State, post, 181.

J. C. MARCOM, ADMINISTRATOR OF JOHN D. RAGLAND, v. STATE OF NORTH CAROLINA.

THE PETITION in this case is substantially the same as that in *Cowles v. State* at this term, and was filed 23 April, 1894.

J. W. Hinsdale for petitioner.
Attorney-General and F. H. Busbee for State.

BURWELL, J. For the reasons stated in *Cowles v. State* at this term, this petition must also be dismissed.

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(182)

J. R. DOWNS v. CITY OF HIGH POINT.

Trial—Issues—Instructions to Jury.

1. It is not error to refuse to submit an issue when the party asking it has an opportunity to present, under another issue submitted, such views of the law arising out of the evidence as are pertinent in support of his contention.
2. When, in the trial of an action, an instruction to the jury was in effect the same as was asked for, but not in the same words, and was in strict accord with the principle of law for which the appellant contended, it was not error to refuse to charge in the words requested.

APPEAL from *Brown, J.*, at August Term, 1893, of GUILFORD.

The plaintiff sought damages for injuries to his property and the health of his family resulting from a filthy drain or sewer kept and maintained by the defendant corporation in a street and on property adjoining the lot of plaintiff. The defendant, among other defenses, contended that the ditch, drain or sewer was a natural one, which was in existence at the time the plaintiff bought the property on which he lived adjoining the ditch; that the drain was necessary to be kept and maintained according to the best judgment of the town authorities, and that plaintiff, before his purchase of the property and his removal thereto, knew that he would be exposed to an injury (if any was really sustained) and assented thereto.

The issues submitted, and the answers thereto, were as follows:

"1. Did the defendant negligently fail to keep the ditch referred to in the complaint and section 4 of the answer in a proper condition, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage has the plaintiff sustained thereby, if any, up to date of his demand, 14 July, 1892? Answer: 'Two hundred dollars.'"

Defendant, in apt time, tendered one issue and requested the (183) court to submit it, together with those framed by the court, which issue was as follows:

"Was the sickness of the plaintiff and that of his family complained of the result of the ditch alone?"

At the close of the evidence defendant presented requests for numerous instructions, but as error is assigned in respect to first and second only, those only are considered. Defendant requested the court to charge:

"1. The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If the injury is in part the result of the vapors or odors from the ditch, and part the result of other causes or the pig and slaughter-pens, then action must fail."

The court gave instructions in the very language, but added: "Unless it be clearly established that the injury would not have resulted except from the vapors or odors arising from the alleged nuisance from the ditch, and that it is directly traceable to the ditch or alleged nuisance."

This said addition defendant objected to.

"2. That as the evidence fails to show that the sickness and death of which plaintiff complains was the result of the condition of the ditch, he is not entitled to recover."

This prayer was refused. Exception by defendant. The court recited the evidence fully relating to both issues. It is unnecessary to set out the charge upon the first issue, as there is no exception thereto.

Upon the second issue the court charged, among other matters, as to what is special damage: "It is difficult sometimes to determine when a person can recover damages from the authorities of a town or city for permitting a nuisance. The evidence in this case shows that if there be a nuisance occasioned by this city ditch at all, it is a public nuisance,

one that may affect the community in common; that the plaintiff (184) in this case is not entitled to recover anything whatever under the second issue, unless he can show special damage to himself, traceable to the alleged nuisance, apart from the injury sustained by the general public and of a different character, so that plaintiff's damage cannot fairly be said to be a part of the common injury.

"An injury differing in degree only, but not in kind, is not a special injury.

"The plaintiff alleges that his special damage consists in the fact that proximity to alleged nuisances caused illness of a serious nature to himself and family, much expense on account of such illness, and that the other parts of his neighborhood were not so affected. If this be true, it

is special damage within the meaning of the law." Wood, p. 659, sec. 624; *Morlay v. Praynall,* also p. 674, secs. 644-647.

The court recited evidence on both sides as to damages, and told the jury if plaintiff sustained actual special damage he was entitled to compensation not to punitive damage. That if the jury answer the first issue "No," they need not consider the second issue. That if they answer the first issue "Yes," they must answer the second issue by allowing plaintiff such special damage as he has sustained up to date of his demand, which said damage must be special to plaintiff, and also must be directly the result of the defendant's negligence in permitting the existence of such nuisance, if defendant did permit it. Otherwise, the plaintiff would not be entiled to damage. The court also instructed the jury that the city authorities must have had knowledge of the condition of the ditch, or by reasonable and due diligence could have had knowledge of it, and by city authorities is meant not the aldermen or commissioners alone, but those deputed by them to control and supervise the streets and drains.

There was a verdict for plaintiff on both issues, and from the judgment thereon defendant appealed.

James E. Boyd for plaintiff. (185)
L. M. Scott and Dillard & King for defendant.

AVERY, J. The first issue submitted involved the question whether the defendant negligently failed to keep the ditch in good condition, or, in other words, carelessly suffered a public nuisance to be created by want of care in attending to it. The additional issue passed upon was as follows: "If so, what damage has the plaintiff sustained *thereby,* if any, up to the date of his demand, 14 July, 1892?" The affirmative finding, that the nuisance was caused by the defendant's want of care, and the assessment of the damage sustained by the plaintiff *"thereby"* was necessarily an ascertainment of the damage due for the private nuisance suffered peculiarly by the plaintiff. In order to enable the jury to comprehend that such was the end in view in passing upon the inquiries, the judge told them the damage must be assessed, if at all, for an injury differing in kind, not simply in degree, from that suffered by the public generally. The defendant tendered the issue, "Was the sickness of the plaintiff and that of his family complained of, the result of the condition of the ditch alone?" Precisely the same inquiry was answered when the jury found the amount of damage resulting peculiarly to plaintiff and his family from neglect to keep the ditch in good condition ("thereby"). That issue was not a simple inquiry as to damage, but was so framed that no damage could be assessed in response to it except such as arose from some injury peculiar to the plaintiff. There

was no danger, therefore, that the defendant would be mulcted for any injury done by the filth emanating from the hog-pen mentioned by the witness. In fact, the best evidence that the court did not abuse its discretionary power in framing issues is found in the fact that the very legal question suggested by the issue tendered was raised by the prayer for instruction offered. If the defendant's counsel had the oppor-
(186) tunity to present such views of the law, arising out of the evidence, as were pertinent in support of their contention, they have not been deprived of any legal right. *McAdoo v. R. R.*, 105 N. C., 140; *Emry v. R. R.*, 102 N. C., 209.

This case differs from that of *Denmark v. R. R.*, 107 N. C., 185, in that here the inquiry involves the question of proximate cause as well as damage, while in *Denmark's case* the jury were not required to pass upon or find anything but the amount of damage without ascertaining on what account. The addition to the instruction asked was in strict accord with the very principle for which the defendant contended. The jury were told in effect that unless it was clearly established that the injury would not have resulted from any other cause than the odors arising from the nuisance of the ditch, and that if the injury was directly traceable to the nuisance, they would assess no damage at all. We think that there was no error in refusing to instruct the jury upon the evidence that plaintiff could not recover. The instruction given was warranted by the evidence, and embodied the principle laid down by leading text-writers. Wood Nuisances, secs. 561-574.

There was no error in the ruling of the judge refusing to submit the issue, nor in the charge given as a substitute for that asked.

Affirmed.

Cited: Mfg. Co. v. R. R., 117 N. C., 587; *Reyburn v. Sawyer*, 135 N. C., 337; *Hull v. Roxboro*, 142 N. C., 460; *Staton v. R. R.*, 147 N. C., 436; *Little v. Lenoir*, 151 N. C., 418; *Hines v. Rocky Mount*, 162 N. C., 414, 416; *Petree v. Savage*, 171 N. C., 439.

(187)

HENRY W. HARRIS v. A. S. CARRINGTON ET AL.

Action on Note—Principal and Surety—Practice—Case on Appeal.

1. The service by an appellee of a countercase on appeal instead of a statement of his exceptions to appellant's case on appeal is a substantial compliance with the statute, sec. 550 of The Code.
2. Where on the trial of an action on a note (which had been assigned by the obligee to the plaintiff after maturity), one of the obligors testified that he was principal and the other obligor a surety, and that their relations were known to the payee, and the payee testified otherwise, it was error (there being a conflict of testimony) to instruct the jury that if they believed the evidence they should find that the suretyship of defendant was known to the payee at the time of signing the note.

ACTION, tried before *Boykin, J.*, and a jury, at the July Term, 1894, of GRANVILLE, to recover an alleged balance due on a sealed promissory note executed by one B. H. Cozart and the defendant to one George B. Harris for the payment of $276.34, dated 2 April, 1883, and payable one day after its date and indorsed to plaintiff.

(189)

T. T. Hicks and A. A. Hicks for plaintiff.
Edwards & Royster and J. B. Batchelor for defendant.

CLARK, J. The appellee returned a countercase as a statement of his exceptions to appellant's case. This is often convenient, and sometimes it is the only mode in which the appellee can intelligently present his objections. The practice has always been recognized as a substantial compliance with the statute. *State v. Gooch,* 94 N. C., 982; *Horne v. Smith,* 105 N. C., 322; *McDaniel v. Scurlock,* at this term. The court adopted the countercase. We must, therefore, take it as the "case on appeal."

The defendant testified that he signed the note as surety, and that fact was known to the payee at the time. He then called the payee (the note having been transferred since maturity to the plaintiff), who testified that he did not know of the suretyship till after this (190) action was brought. The court instructed the jury, if they believed the evidence, to find the issue whether the suretyship of defendant was "known to the payee at the time of signing the note" in the affirmative. There being a conflict of evidence, this was error, for which there must be a

New trial.

STATE ON THE RELATION OF W. D. TROTTER v. SAMUEL S. MITCHELL.

Quo Warranto—Public Administrator—Removal of Officer Without Notice Void.

1. The office of public administrator is a property right, and the incumbent cannot be deprived of it except by the law of the land.
2. The judgment of a Clerk of the Superior Court removing a public administrator for failure to renew his bond, without notice to the delinquent to show cause, etc., was not only irregular, but void.

QUO WARRANTO, to try title to the office of public administrator, before *Hoke, J.*, and a jury, at May Term, 1894, of GUILFORD.

The pleadings show that the relator of the plaintiff was, on 17 July, 1889, duly appointed public administrator in and for Guilford County for the term of eight years, and gave the required bond, which was renewed on 2 February, 1891. That he failed to renew his bond in February, 1893, and on 30 January, 1894, the Clerk of the Superior Court, without issuing any notice to relator to show cause, etc., removed the latter from office, and on 15 February, 1894, the defendant was appointed to the office, and on 13 March, 1894, gave bond and qualified.

(191) It was admitted that no notice was given or received of the removal of relator or of the appointment of his successor.

On the pleadings his Honor submitted issues to the jury, and the jury responded thereto as follows, to wit:

"1. Was the relator, before removed, notified orally or otherwise by the clerk of the court that a renewal of his bond was required? 'No.'

"2. Had relator notice of removal before appointment of his successor, the defendant, and for how long? 'No.'

"3. Has relator ever tendered a renewal bond, as directed by statute? 'No.'"

Thereupon the relator moved the court for judgment on the pleadings, and the said verdict of the jury on the issues submitted to them, and on consideration thereof the court adjudged "that the order made by the Clerk of the Superior Court for the removal of the relator, W. D. Trotter, from the office of public administrator is void, and that defendant is guilty of usurping, intruding into and unlawfully holding and exercising the office of public administrator; that his pretended appointment be revoked and declared void, and that he be excluded from said office, and the relator, W. D. Trotter, be restored thereto, and to all his rights and privileges as such public administrator, and be recognized as such by the Clerk of the Superior Court of Guilford County, and that said clerk grant unto him letters of administration in all proper cases,

as prescribed by law, and that plaintiff recover his costs against the defendant."

The defendant appealed from the judgment, and assigned error in the following particulars, to wit:

"1. In the matter of the removal of an administrator, the clerk has a special jurisdiction separate and distinct from his general duties and power as clerk of the court, and the relator having been removed, and no reversal of that order on appeal to the judge, the order of removal became final and conclusive, and, this being so, the question of the plaintiff's title to the office was settled against him thereby; and it was error in the action *quo warranto* to submit any issues to the jury, and, upon their verdict, to adjudge the order of removal void. (192)

"2. The judgment of the clerk removing plaintiff not being appealed from, and standing in full force, every intendment of its correctness and validity is to be made in support of it; and thus viewing the order of removal, the plaintiff had no right to the office which could be considered in the action *quo warranto,* and it was therefore error in his Honor to adjudge anything in the action to the contrary of the clerk's order of removal.

"3. The sufficiency of plaintiff's failure to renew his bond from 2 February, 1893, to January, 1894, as a ground and jurisdiction of removal, was a question to the clerk (a court of independent and special jurisdiction as to that), and the clerk having adjudged it sufficient cause of removal, that judgment, remaining in full force and unappealed from, is in law a bar to any collateral attack or reversal in the independent action of *quo warranto.*

"4. Supposing the scope of the action to extend to defendant's removal from office and to plaintiff's restoration, yet it was error to go beyond, and adjudge that plaintiff be recognized as public administrator, and that the clerk grant letters of administration to him, while it was expressly found by the jury that plaintiff had not given nor tendered a renewal bond from 2 February, 1893, to 30 January, 1894, nor after down to the time of the trial.

"5. Error, in that judgment of his Honor was based, as appears from the issues submitted, on failure of the clerk to notify plaintiff to renew his bond, and on his failure to give him notice of removal before the appointment of his successor, the default being such as to admit of no legal excuse or justification, even if notice had been given."

L. M. Scott for plaintiff. (193)
King & Dillard for defendant.

PER CURIAM. We think that the order of removal on the ground that the relator had failed to renew his bond was, under the circumstances

of this case, not only irregular, but void. The relator's office of public administrator was a property right, and it is well settled that he cannot be deprived thereof but by the law of the land. In *Vann v. Pipkin,* 77 N. C., 408, it was held that although the statute declared that the failure of a sheriff to renew his bond and produce receipts, etc., should create a vacancy, such vacancy was not in fact created until so declared by a competent tribunal, and that no such vacancy "can be declared until the alleged delinquent shall have had due notice and a day in court if in reach of its process." See also *Hoke v. Henderson,* 15 N. C., 1. The judgment of the clerk, without any pretense of notice, was not only irregular, but absolutely void. *Jennings v. Stafford,* 23 N. C., 404. There was, therefore, no error in the ruling of the court. The judgment of the court, as we construe it, did not deprive the clerk of the right to require a renewal of the bond, or to remove the relator for any other proper cause, and the objection upon this ground is untenable.

Affirmed.

Cited: Wilson v. Jordan, 124 N. C., 709; *Greene v. Owen,* 125 N. C., 215.

IN THE MATTER OF W. D. TROTTER, PUBLIC ADMINISTRATOR.

Removal of Public Administrator—Failure to Renew Bond.

Where a public administrator, having failed to renew his bond, tendered a bond, with sureties, in response to a notice served upon him, and it was found that he was in default in any other particular, it was error in the clerk to refuse to accept the bond so tendered.

(194) APPEAL from the clerk of the Superior Court of GUILFORD, heard before his Honor, *R. W. Winston,* at chambers, in Oxford, N. C., on _____ July, 1894.

On 2 June, 1894, the Clerk of the Superior Court of said county issued notice to and had it served upon W. D. Trotter, public administrator for said county, to show cause, if any he had, why he should not be removed from the office of public administrator of said county for having failed to renew his bond as such officer on 2 February, 1893, as required by law. The respondent appeared before the clerk on 19 June, 1894, as required by said notice, and filed his sworn answer, and therein and thereby attempted to show cause why he should not be removed, and used the same as an affidavit on the hearing, and he also put in evidence the record

of the Superior Court of Guilford County, in the case entitled *The People of the State of North Carolina by the Attorney-General ex rel. W. D. Trotter v. Samuel S. Mitchell;* also copies of applications made by said Trotter for the issuance of letters of administration to him upon the estates of Charles E. Shober and Elijah Doak; also tendered to the clerk a bond as public administrator executed by said respondent with sureties.

Upon hearing the case the clerk rendered judgment as follows:

"It is considered by the court that the answer of the said Trotter is insufficient in law, and he having failed to renew his bond as public administrator on 2 February, 1893, as required by law, and having failed to renew or tender a renewal of the same continuously ever since until after the service of the aforesaid notice, and having further shown his unfitness to continue in said office by his efforts to have estates committed to him without giving his bond, it is ordered and adjudged by the court that the said W. D. Trotter be and he is hereby removed from the said office."

From this judgment the respondent appealed to the judge of the court, who at chambers in Oxford decided and adjudged that (195) there was no error in the ruling of the court removing the respondent, and affirmed the order of removal, and from this judgment Trotter appealed.

L. M. Scott for Trotter, appellant.
King & Dillard contra.

PER CURIAM. We have examined the authorities cited by counsel with much care, and after due consideration we conclude that his Honor erred in sustaining the action of the clerk in refusing to accept the bond of Trotter upon the ground stated by him. It is not found that the said Trotter has been in default in any particular, except a failure to renew his bond, and this he offers to do in response to the notice served upon him.

Reversed.

C. ISLEY v. ROWENA BOONE ET AL.

Action to Recover Land—Trial—Parol Evidence—Lost Records.

1. Parol evidence of lost records is admissible.
2. The testimony of the attorney who drew the decrees of sale and of confirmation in proceedings for the sale of lands for assets was admissible in the trial of an action to recover the land, to show that such decrees were regularly drawn and signed by the clerk before the acts authorized thereby were performed.
3. In the trial of an action to recover land, the record of proceedings for the allotment of dower was admissible for the purpose of showing that the continued occupancy of the land by the widow and her daughter, the defendant, who lived with her, was permissive and not adverse.

(196) ACTION, tried before *Hoke, J.*, and a jury, at July, 1894, special term of ALAMANCE, to recover a tract of land which was formerly the property of Samuel Adams, deceased. Plaintiff claimed under a purchase at a sale by administrator of Samuel Adams to make assets, and the defendant, Rowena Boone, being in possession of the land, claimed to own the same as one of the children and heirs at law of Samuel Adams. Defendant Calvin Boone was a child of Rowena Boone, who lived with his mother, and set up no claim to the land. Plaintiff derived his title by and under special proceeding from the administrator, John Ireland, deceased, bearing date prior to the commencement of this suit, and to which deed and special proceedings no objection was made and no defects alleged or specified. John Ireland had bought land at a sale under decree of court by E. S. Parker, administrator of Samuel Adams, to which proceeding Rowena Boone was a party, and the deed conveyed land subject to dower of the widow of Samuel Adams. It was admitted that Mrs. Adams, the widow, had died before the suit was brought; that defendant Mrs. Rowena Boone was occupying that part of the land which had been allotted to Mrs. Adams as dower under the proceedings heretofore referred to.

Plaintiff offered in evidence the special proceedings under which E. S. Parker, administrator, professed to sell the land, and such proceedings were defective in that there was no decree among the papers, either of sale or of confirmation. The summons bore date in 1875, and the sale was in 1880 or 1881. There was read a verified petition and entries, but no decrees. To supply the defect the plaintiff offered as witnesses the three successive clerks, including the present clerk, and others, to show that due search had been made and that the decree could not be found. The plaintiff offered the administrator, E. S. Parker, who testified that both of these decrees had been properly and regularly drawn and signed

by the clerk. The decree for sale before same was had, and the decree for confirmation before deed was made, were both drawn (197) by himself, and he recollected distinctly their being so drawn, and that they were signed by the clerk. He stated that he could not give the exact language of these decrees, except by saying that he drew quite a number of such decrees, and could swear that these were drawn in the customary and usual form.

Defendants objected to the witness speaking of the contents of these decrees, since he had stated that he could not give the language. In answer to a question by the court, witness stated that while he could not give the exact language of the decrees, he could state, of his own knowledge and memory, that these decrees conferred on him the power to sell the lands as administrator to make assets to pay debts of Samuel Adams, and that the clerk confirmed said sale. Defendants insisted on these objections, both to questions of plaintiff's counsel and to the question (and answer thereto) asked by the court. The objections were overruled, and defendants excepted.

Plaintiff further offered in evidence a petition in special proceedings by the heirs of John Ireland, praying an allotment of dower to the widow of Samuel Adams and the allotment of dower then made to her. Defendants' objection to this testimony was overruled, and exception was in the view taken by the court, that in no event could the statute of limitaken. This was offered chiefly to show that the continued occupation of the land by Mrs. Adams and her daughter Rowena, who had lived with her on the dower, was permissive and not adverse. It became immaterial, tations avail the defendants, because they had shown no color of title for their occupation.

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

L. M. Scott, C. E. McLean and J. E. Boyd for plaintiff. (198)
J. W. Hinsdale and John Gatling for defendant.

PER CURIAM. Parol evidence of the contents of the lost record was admissible (see this case reported in 109 N. C., 555), and upon due consideration we think that Mr. Parker's testimony, under the peculiar circumstances, was properly received. We are also of the opinion that the defendant was not prejudiced by the introduction of the proceedings for dower. Upon the whole record, we see nothing that warrants a new trial.

Affirmed.

ALFRED MORTON ET AL. v. CAROLINA MANUFACTURING COMPANY.

Practice—Purchase at Sale by Receiver—Finding of Judge as to Facts Conclusive.

Where there was a dispute between receivers and a bidder at a sale made by them as to what property was bid off by him, and a decree was entered directing the bidder to pay the amount of his bid, and no exception was taken because the judge below did not set out the facts found by him as a basis for the decree, it will be assumed that the judge found the statements of the receivers and their witnesses to be true. In such case this Court has no authority to review the conclusions of the judge.

RULE against W. H. Ragan, a purchaser at a sale made by receivers of the defendant corporation, to show cause why he should not be compelled to pay the sum bid by him at the sale, and heard before *Hoke, J.*, at August Term, 1894 of GUILFORD.

(199) Ragan declined to comply with his bid, upon the ground that he had bid $3,000 for the sash and blind factory of the defendant corporation and all the machinery connected therewith necessary for its operation, and that after the same had been knocked down to him the machinery was put up and sold to other bidders.

The affidavit of Ragan was supported by affidavits of other persons who were present at the sale. There were counter-affidavits by the receivers, also supported by affidavits of others, tending to show that the announcements at the sale, before Ragan bid for the property, were definite and well understood as to what was offered for sale. His Honor rendered a decision directing Ragan to pay the amount bid, but the facts found by him were not set out in the decree. From this order Ragan appealed.

Dillard & King for W. H. Ragan.
L. M. Scott for appellee.

BURWELL, J. There is a dispute between appellant Ragan, who was a bidder at a sale made by receivers, and those receivers, as to what property was offered for sale by them when he made his bid—as to what was sold by them and bought by him at that time. No exception was taken because his Honor did not set out the facts found by him as a basis of his decree, but we take it that he found the statements made by the receivers and their witnesses to be true. We have no authority, we think, to review his conclusions upon such a matter.

Affirmed.

(200)

GEORGE A. NICHOLSON v. WILLIAM E. NICHOLS.

Mechanic's Lien—Contract With Owner of Land.

Unless a contract, express or implied, is made with the owner of the land, no lien can attach thereon for work done or materials furnished for erecting or repairing buildings thereon.

ACTION to enforce a mechanic's lien, tried upon appeal from a justice's court, before *Hoke, J.*, and a jury, at the Special Term, 1894, of the Superior Court of ALAMANCE. The plaintiff claimed that the defendant was indebted to him in the sum of $45, and interest thereon from 1 January, 1893, due for work and labor done and for material furnished in the erection of an ell to defendant's house, under a contract with the defendant. The defendant denied that he had contracted with plaintiff for the construction of said ell.

The following issues were submitted to the jury:

"1. Is defendant indebted to the plaintiff; if so, in what amount?

"2. Has plaintiff a valid lien upon the property?"

The only witness examined was the plaintiff, who testified in his own behalf as follows:

"That he is a carpenter, and in the summer of 1892 he built an ell to defendant's house; that he furnished the material—lumber, weather-boarding, shingles, etc.; that the size of the ell was 12x14, one story. There were two rooms in the main building. Mrs. Nichols, mother of defendant, and an aunt of defendant lived in the house at this time. Witness built this main-building house some time before the summer of 1892. Witness made contract to build the ell with the mother. Witness had built and completed this house (that is, the main building) for $200, under a contract in writing with defendant before this time; of this $200 defendant paid $100 and Mrs. Nichols $100. Defendant (201) told witness in reference to this contract that he and his mother would pay as fast as they could make the money; the ell was built by contract made with mother of defendant. When defendant was North, and some time after the main building had been completed under the original contract, witness saw defendant some time after he had built the ell, when defendant told him he would have paid him if he had not put the matter in the hands of a lawyer, but that now he could get it the best way he could. It was worth more than $50 to build the ell; Mrs. Nichols had paid $5 on contract for building the ell. Nichols the defendant was not at home when the ell was built; he was in Rhode Island. Before Nichols left to go to Rhode Island plaintiff asked him to have an ell built and let him (plaintiff) do the work; defendant said he was not

able to have it done, but as soon as he got able he would give the job to plaintiff. Mrs. Nichols, mother of the defendant, had been using the ell since it was built.

On cross-examination witness said that he built the first house under written contract with defendant; that he never had a word with defendant about building the ell; that defendant was in Rhode Island at the time that he made the contract to build the ell with defendant's mother, who told him that she would pay him along as she could; that he knew the deed to the lot was made to W. E. Nichols; brother of plaintiff had sold the lot to Nichols; the mother of Nichols had bargained for the land, but the deed was made to W. E. Nichols, defendant.

The plaintiff rested, and the court announced that there was no evidence that the plaintiff ever contracted with the defendant, and directed the jury if they believed the evidence to answer the first issue "Nothing," and the second "No." To which plaintiff excepted. There was a verdict for defendant, and plaintiff appealed.

(202) *J. E. Boyd and W. H. Carroll for plaintiff.*
C. E. McLean and L. M. Scott for defendant.

PER CURIAM. It is well settled that there can be no lien in cases of this character, unless the work was done or materials furnished under a contract either express or implied. *Weir v. Page,* 109 N. C., 220; *Thompson v. Taylor,* 110 N. C., 70. There is no evidence of any such contract in this case.

Affirmed.

Cited: Weathers v. Cox, 159 N. C., 577.

HEATH, SPRINGS & CO. v. BIG FALLS COTTON MILLS.

Corporation Deed—Execution—Registration—Certificate of Probate—Omission of Seal from Record.

1. When a deed of a corporation is signed in the name of the corporation by its president, vice-president, secretary and treasurer, who constituted all the stockholders, directors and officers of the corporation, and the corporate seal is affixed to it, it is properly executed as a common-law deed.
2. A certificate by the clerk of the Superior Court that the officers of the corporation who signed the deed "acknowledged the due execution of the annexed instrument for the purpose therein set forth," was sufficient to warrant the registration of the deed.

3. Where an instrument which the law requires to be sealed is in all respects correctly recorded, except that the record does not show a copy of the seal or any device representing it, the record will nevertheless be valid and sufficient as notice, provided the record represents on its face in another way, as by recitals or otherwise, that the instrument was sealed and it was in fact duly sealed.

4. Debts contracted by a cotton mill company for cotton, flour and other like materials which do not attach to the freehold or permanently improve the property of the corporation, are not entitled to priority over a mortgage debt under the provisions of sec. 1255 of The Code.

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

ACTION in the nature of a creditor's bill, heard before *Hoke, J.,* (203) at Spring Term, 1894, of ALAMANCE.

The following facts were agreed upon by the parties to be taken in connection with the undisputed facts contained in the pleadings, and all issues of law arising between the parties upon the facts were submitted to the court:

1. That the Big Falls Cotton Mills was duly incorporated, and on 16 August, 1888, the corporation executed to James E. Mitchell of Philadelphia, a mortgage deed, a copy of which is hereto attached, marked "A," signed by Big Falls Cotton Mills, James V. Pomeroy, president; Junius H. Harden, secretary and treasurer, and P. R. Harden, vice-president; and the corporate seal was properly attached at the time of the execution of the mortgage by Junius H. Harden, the secretary and treasurer, in the presence and by the direction of the president and all the stockholders and officers of the corporation.

2. That the said mortgage was authorized to be executed by resolutions adopted at a regular meeting of the stockholders and (204) directors of the corporation, all the stockholders and directors being present at the time.

3. That on 31 August, 1888, the said mortgage deed was acknowledged and probated and recorded in the office of the register of deeds of Alamance County in Book No. 10, pp. 87 to 91, inclusive, said registration being on the same day of the probate, to which book of registry reference is hereby made as a part of the facts of this case.

4. That at the time of the registration of said mortgage deed the register of deeds omitted to indicate the seal of the corporation upon his registry, through inadvertence or because of the fact that it was not the custom of himself or his predecessors in office to indicate or attempt to indicate or describe upon the record any corporate seal affixed to deeds registered in Alamance County.

5. That the mortgagee, James E. Mitchell, is a resident of the city of Philadelphia, Pennsylvania, and had no knowledge of the omission of

the seal by the register of deeds until after the commencement of this action, and that upon learning of the omission he took steps to have the error or omission corrected, and the same was corrected, as appears in the decree in the special proceedings to correct the said error or omission, which decree is hereby referred to as a part of this case, and the register of deeds, in obedience to the said decree, has corrected the error or omission by indicating the seal on the record as appears from the Book No. 10 heretofore referred to.

6. That after the mortgage deed was executed and registered as aforesaid, it was sent by the corporation to the mortgagee, Mitchell, and the mortgage, when received by him, had upon it the common corporate seal of the corporation, and the certificates of probate and registration as now appears, and the said mortgagee thereupon sent to the corporation
(205) the sum therein named, to wit, $25,000, as a loan.

7. That the debts due the plaintiffs, Heath, Springs & Co., Pool & Moring, Ed. H. Lee & Co., and the Granite Manufacturing Company, by the Big Falls Cotton Mills, are just and true and are for the amounts found in the report of the referees filed in this cause, and the consideration of said claims or debts is cotton and flour sold and delivered to the corporation by said plaintiffs.

His Honor rendered the following judgment:

"This cause coming on to be heard, and it appearing to the court that at March Term, 1894, the receivers, B. D. Springs and J. A. Long, filed their report, setting forth all the claims found and ascertained to be due by the Big Falls Cotton Mills, and that they also filed at this term a supplemental report as to the claims of J. A. Mitchell & Co., and Pool & Moring, and no exception being taken to said reports, it is, on motion, ordered and adjudged by the court that the said reports be, in all
(206) respects, confirmed. And this cause now coming on to be heard at this term of the court, upon the pleadings, reports of the receivers and the facts agreed, hereto attached and marked 'Exhibit No. I,' and the same, upon agreement, being fully considered by the court, it is ordered and adjudged that the mortgage deed executed to James E. Mitchell & Co., is a valid and subsisting mortgage as executed, probated and recorded, and is a prior lien upon the fund produced by the sales heretofore ordered and entitled to be paid in full out of the same in priority to all other creditors, and is hereby directed to be paid by the receivers out of the first moneys in their hands.

"It is further considered and adjudged that the debts of the Granite Manufacturing Company, Heath, Springs & Co., Pool & Moring and Ed. H. Lee & Co., arising from cotton and flour sold and delivered to the Big Falls Cotton Mills, and more fully described in 'Exhibit No. I,' are not, by reason of said claims being for the articles mentioned in said

'Exhibit No. I,' a prior lien to the mortgage of James E. Mitchell & Co., hereinbefore mentioned, nor as against the claims of the other creditors in this action.

"It is further ordered by the court, all parties consenting thereto, that the receivers proceed to pay out, at once, *pro rata* among all the creditors of the Big Falls Cotton Mills, as per reports of receivers and referees, the money now on hand or due, saving and preserving, however, enough of said money in their hands to meet and discharge whatever balance may be found to be due to Ed. H. Lee & Co. and James E. Mitchell & Co. on their debts upon which they claim priority, in case the priority claimed by them shall hereafter be established.

"This order is in no way to prejudice the claims of Ed. H. Lee & Co. and James E. Mitchell & Co., for which they claim priority, nor is it to extend to those creditors, to wit, the operatives of Big Falls Cotton Mills, whose claims have, by another order made in this cause at this term of the court, been ordered to be paid in full. This cause (207) is retained for further orders and directions."

The creditors above mentioned appealed.

Haywood & Haywood for plaintiffs.
L. M. Scott and W. P. Bynum, Jr., for defendants.

SHEPHERD, C. J. The question presented in the exception of the appellants is whether the mortgage deed to J. E. Mitchell & Co. has been properly executed, probated and registered so as to give the note secured therein priority over the claims of the excepting creditors. The deed is signed in the name of the corporation by its president, vice-president, secretary and treasurer, who constitute all the stockholders, directors and officers of the corporation, and the corporate seal is affixed to it, as appears by the profert of the original deed on the trial, as well as from the fact agreed. We are of the opinion that it is properly executed as a common-law deed. *Bason v. Mining Co.*, 90 N. C., 417. We are also of the opinion that the certificate of the clerk was sufficient to warrant the registration of the same. *Quinnerly v. Quinnerly*, 114 N. C., 145.

It is earnestly insisted, however, that the omission of the register to copy the seal on his book destroys the efficacy of the registration as constructive notice of the said mortgage. Very respectable authorities, which accord with our conception of the true principle, sustain the position that if the attestation clause recites that the deed (208) was signed and sealed, it will be presumed that the original deed was sealed. "Where an instrument, which the law requires to be sealed, is in all respects correctly recorded, except that the record does not show a copy of the seal, or any device representing it, the record will never-

theless be valid and sufficient as notice, provided the record represents on its face, in any other way, as by recitals or otherwise, that the instrument was sealed, and it was in fact duly sealed." *Beardsley v. Day,* 55 N. W., 46 (Minn.). To the same effect, 1 Jones Mort., 493.

This view is fully supported by the case of *Aycock v. Railroad,* 89 N. C., 323. A similar objection was made to the introduction of certain grants, but as it appeared from the attestation clause that the seal was affixed, the objection was overruled. The Court said: "It thus affirmatively appears that the grants were issued under the great seal, and this is shown in the registration. As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll or attempted imitation of the form of the seal should be required in addition to the words spoken in the grant. The registry furnishes all the information that could be derived from an examination of the original, as both utter one and the same language."

His Honor was also correct in his ruling that the debts of the plaintiffs and others arising from cotton and flour sold and delivered to the defendant are not entitled to priority over the said mortgage. *Paper Co. v. Chronicle, ante,* 143.

Upon a careful inspection of the whole record, we are unable to find any reason to disturb the judgment of the court below.

Affirmed.

Cited: Strain v. Fitzgerald, 128 N. C., 397, 400; *s. c.,* 130 N. C., 601; *Smith v. Lumber Co.,* 144 N. C., 49; *Johnson v. Lumber Co.,* 147 N. C., 251; *Edwards v. Supply Co.,* 150 N. C., 176; *Withrell v. Murphy,* 154 N. C., 90; *Brown v. Hutchinson,* 155 N. C., 210; *Weston v. Lumber Co.,* 162 N. C., 206; *Hopkins v. Lumber Co., ib.,* 534; *Power Corporation v. Power Co.,* 168 N. C., 221, 222; *Buchanan v. Hedden,* 169 N. C., 224.

(209)

JAMES B. JONES v. SAMUEL JONES.

Injunction—Controversy as to Ownership of a Fund—Preservation of the Fund During Suit.

Where there is a serious controversy as to the ownership of a fund, it is proper to preserve it by a restraining order until the rights of the contestants can be determined.

MOTION to continue a restraining order until the hearing, heard before *Battle, J.*, at Spring Term, 1894, of GREENE. The defendant appealed.

Swift Galloway and J. B. Batchelor for plaintiff.
George M. Lindsay for defendant.

PER CURIAM. The fund here in dispute stands in the place of certain crops which the plaintiff insists belonged to him because he was the landlord of the defendant by whom they were raised. There being a serious controversy as to the true ownership of these crops, and therefore of this fund, it is proper to have it preserved till the rights of the contestants can be determined. We see no error in the order appealed from.

Affirmed.

(210)

W. D. SPENCE v. WILMINGTON COTTON MILLS.

Action for Breach of Contract—Void Contract of Corporation—Renewal—Ratification.

1. A contract of a corporation, void under section 683 of The Code, is incapable of ratification, notwithstanding the repeal of the statute.
2. In April, 1891, a corporation, by an agreement, not in writing, employed plaintiff for twelve months at $1,200 per annum, and he continued in its employment without any further agreement until May, 1893, when he was paid off and discharged: *Held*, in an action for breach of contract, that as the contract was void when made (not being in writing), there could be no presumption of a renewal for another year and no ratification, although in February, 1893, section 683 of The Code was repealed.
3. In such a case the plaintiff could only recover on a *quantum meruit* for any services he might have rendered and for which he had not received pay.

ACTION for breach of contract, tried before *Brown, J.*, at January Term, 1894, of NEW HANOVER. At the conclusion of the evidence, his

Honor intimated that the plaintiff could not recover. Thereupon he took a nonsuit and appealed. The facts are stated in the opinion of *Associate Justice MacRae.*

J. D. Bellamy, Jr., for plaintiff.
Iredell Meares for defendant.

MACRAE, J. The plaintiff had full benefit, on cross-examination, of the testimony objected to and ruled out upon the direct examination. So it appears that plaintiff made a contract with defendant's superintendent to begin on 6 April, 1891, and agreed to work for twelve months at $1,200 per annum; that he did work for defendant without further agreement until he was discharged on 10 May, 1893, and that
(211) nothing was said between the parties after February, 1893, as to a contract.

It is admitted that under section 683 of The Code the alleged contract of 1891 was invalid, because it was not in writing and accompanied by the other formalities in said statute required. But this statute having been repealed on 11 February, 1893 (see ch. 84, Laws 1893), the plaintiff contends that this was evidence to go to the jury to enable them to determine whether there was such contract between the parties to run for twelve months from 6 April, 1893—upon the principle that where the parties have entered into a contract of service for a certain period, as, for instance, twelve months, and after the expiration of that period the service continues for another twelve months upon the same terms, the contract will be presumed to have been renewed if the service continue longer without a new agreement.

We have seen, however, that this alleged contract was void under the statute, and, if void, it was incapable of ratification as a simply voidable one, like the contract of an infant would have been. A new agreement after the repeal of the statute would have been an independent contract to pay for services already performed, if anything were due therefor, and for future employment there was no further bar of the statute to its operation. It could not operate to ratify an attempted contract executory in its nature. "The act to be ratified must be voidable merely, and not absolutely void. A principal cannot ratify an act which he could not have authorized in the first instance." 1 Am. and Eng. Enc., 430, note 1, where many authorities are cited.

We think that under The Code system the complaint in this action not being in writing, but noted on the docket of the justice of the peace, was broad enough to enable the plaintiff to recover on a *quantum meruit* for work and labor done, if anything were due therefor. *Stokes v. Taylor,* 104 N. C., 394. But in this case the plaintiff was notified on 22

April, 1893, to close the dye-house, that in which his services (212) were rendered for some time, and he would be notified when defendant wanted him again. His services were not required again, and he was paid up to 10 May and discharged. There was no work done by him for which he has not been paid, and no special contract for the breach of which he can recover damages.

No error.

Cited: Jenkins v. Mfg. Co., post, 537.

GEORGE M. LINDSAY v. HAMBURG-BREMEN INSURANCE COMPANY.

Contract in Writing, Construction of.

Where the letters between the parties constitute a written contract, it devolves upon the court to ascertain the intention of the parties and to declare their rights thereunder.

APPEAL from a justice of the peace, heard by *Brown, J.*, and a jury, at May Special Term, 1894, of GREENE. The plaintiff complained upon a special contract, and when the case was called for trial, by consent of defendant's counsel plaintiff was allowed to amend his complaint so as to set out a second cause of action for the value of services rendered, as upon a *"quantum meruit."*

Plaintiff introduced in evidence the correspondence, as follows:

Letter from John W. Gordon to W. J. Jordan:

RICHMOND, VA., 20 November, 1893.

W. J. Jordan, Esq., Snow Hill, N. C.

DEAR SIR:—I am in receipt of yours of the 17th instant, enclosing copy of summons served on you. This is not a valid summons, as you are in no wise agent for the Hamburg-Bremen Insurance (213) Company, and have no right to accept service for them. The law of North Carolina requires the appointment of a general agent of the State who may accept service in all cases of this kind, and that man is Joseph D. Smith of Wilmington. However, we do not wish judgment to be obtained against us by default, and I write now to ask you to ask Mr. Lindsay, of whom you have written me several times, to put in an answer for us next Monday. On 15 November I wrote you the enclosed

two letters, but just as I was about to mail them I received a letter from Mr. Orren Williams which led me to suppose that he might have made Mr. Fields very recently some definite proposition for a compromise either to him or his attorney, Governor Jarvis. I therefore withheld these letters, waiting to hear further from Mr. Williams. You will see that the letter on the large sheet is so worded that you could show it to Mr. Fields, and it might induce him to make a compromise settlement with us for $1,000. The other—short letter—addressed to you confidentially, was explaining the matter. I now enclose both of them. . . .

Please endeavor to make a specific agreement as to fee with Mr. Lindsay for his services next Monday, or at the Appearance Term of court. This fee for simply filing an answer should be very small, but to avoid any misunderstanding I will be glad if you will engage him for a definite fee and advise me. I suppose he would not charge over $10 for this service. Any subsequent service to be performed when the case comes on for trial of course I will open correspondence with him and make a definite arrangement.

Please bear in mind, however, as I have always said, we would prefer to have the matter compromised, and if Mr. Fields is disposed to settle for $1,000 cash I will send him draft for that amount, which will be much better for him in the end than if he gets a verdict against
(214) us for the whole amount; his lawyers and costs will not be much less than 50 per cent on whatever amount he may recover.

Very truly yours,

JNO. W. GORDON, G. A.

Letter from John W. Gordon to George M. Lindsay:

RICHMOND, VA., 29 November, 1893.

George M. Lindsay, Esq., Snow Hill, N. C.

DEAR SIR:—Your esteemed favor of the 24th instant came duly to hand and has been carefully noted. "Now as to your fee, there was no previous agreement as to what was to be charged for putting in an answer for us this week. I will leave that to you to make what you believe to be reasonable, but for any future service after this term of court you will have to make a specific agreement, as the company will not engage an attorney in any other way, for the reason that they have had with one or two attorneys serious misunderstandings after the service was performed about proper charges, and they have, several years ago, adopted and rigidly adhere to the rule of insisting upon a specific agreement in every case before employing an attorney."

I note you concur in my opinion that the service upon Mr. Jordan is not valid, and that you will put in a special appearance for the company and move to dismiss the claim for want of sufficient service, all of which I think is very proper. . . .

I do wish, however, this loss to be compromised, if possible, before the trial term of court, and if you succeed in getting the case dismissed at this term on account of improper service, I should think you might be able to compromise it for $700 or $800. Of course we will pay you a fee for your services in comprising the case in addition to your services in appearing for us at this term of court. I received a letter from Mr. Williams day before yesterday, saying that Governor (215) Jarvis had offered to settle for $1,100, and told Mr. Williams that he would submit the proposition to his client and advise him to accept it, and that Mr. Williams, in the meantime, could submit the proposition to his company. I have not made any reply yet to Mr. Williams, because I have been waiting, hoping to hear from you that you had made some better settlement, or gotten some better offer than $1,100 from Mr. Fields.

As to your fee for compromising, I think 10 per cent of whatever sum you succeed in settling for less than $1,100 would be fair in addition to your fee for services at this term of court. That is, if you settle for $1,000 you save $100 on Governor Jarvis' offer, 10 per cent of which would be $10; if you settle for $900 your fee would be $20; if for $800 your fee would be $30, and so on. If you do not think that fair, we might say 15 per cent of the amount thus saved.

Waiting to know the result of the present term of court, and of your efforts to compromise, I am

Yours very truly,

JOHN W. GORDON, G. A.

Letter from George M. Lindsay to John W. Gordon:

SNOW HILL, N. C., 4 December, 1893.

John W. Gordon.

MY DEAR SIR:—I have not succeeded in compromising the W. R. Fields claim against the Hamburg-Bremen Company. I made the motion to dismiss the case for insufficient service of summons and I brought them to terms. Judge Connor and Captain Swift Galloway were the attorneys on the other side, and they agreed if I would not press the motion to dismiss, that the case should not stand for trial at the next term of our court, but at the second term, which does not convene until August, and the next term, which is in February, will

(216) be the Appearance Term, and the pleadings are to be filed as of that term. I had this stated on the docket so as to make it binding. This has all the beneficial features of a dismissal, as it delays the trial just as long as if the action was dismissed and begun again, and in this time I think Mr. Fields will want to compromise. It might be very difficult to settle with Mr. Fields for less than $1,000, or even at that sum, because you had offered him this sum before I was engaged. If you had not made this offer I think it probable that I could have settled with him for less—however, I think it best to let him sweat awhile and cool off from the effects of the fire, and perhaps he will realize that he did not have as many goods in his store as he thinks now that he had. You want me to state what my charges are. You can send me a check for a retainer fee of $50, and when I try the case I will charge $50 more, and then if it goes to the Supreme Court I will charge you $50 if I lose and a larger fee if I win it. I think this is very reasonable; in fact, it is just as low as I charge my home clients in cases involving an equal amount. If I can compromise the case on terms satisfactory to the company I will charge the same as if I tried it in the Superior Court. A lawyer always charges the same to settle a suit by compromise as he does to try the case in court; it is usually more trouble and vexation to compromise than to try the case. If my charges are not satisfactory send me a check for $25 for what I have done and then get some other attorney, for I cannot afford to do the work for less. I do not need any one to help me, as I feel that I can do the work as well as if you had more lawyers; but if you desire to have other counsel I have no objection, and if you desire to get other counsel in this State it might be to your interest to correspond with me as to whom it would be best to get, as I could perhaps engage them to aid me cheaper than you could do, and could perhaps suggest an attorney that would be of more service than you could, but I have no objection to your following your own judgment in
(217) this matter. Hoping that my terms will be satisfactory to you, and that what I have done so far will please you, I am,

Yours truly,

GEO. M. LINDSAY.

[*Receipt.*]

SNOW HILL, N. C., 16 December, 1893.

Received of John W. Gordon, general agent, twenty-five dollars ($25) for attorney fee for appearing for the Hamburg-Bremen Fire Insurance Company, at Greene County (N. C.) Court, 4 December, 1893, in the case of *W. R. Fields v. The Hamburg-Bremen Fire Insurance Company.*

GEO. M. LINDSAY,
Attorney at Law.

Letter from John W. Gordon to W. J. Jordan:

RICHMOND, VA., 14 December, 1893.

W. J. Jordan, Esq., Snow Hill, N. C.

DEAR SIR:—You will please pay to Mr. Lindsay, our attorney, $25 and take his receipt on the enclosed voucher. We wish to pay this money to Mr. Lindsay at once, and I have written him to call on you for it. We will write you under separate cover in regard to your account.

Yours very truly,

JOHN W. GORDON.

Letter from John W. Gordon to George M. Lindsay:

RICHMOND, VA., 14 December, 1893.

George M. Lindsay, Esq., Snow Hill, N. C.

DEAR SIR:—*In re* Field's loss. On my return to Richmond after an absence of several days I find your esteemed favor of the 4th inst. I am very much pleased at the dismissal or postponement of the case for want of sufficient service of summons, and fully agree (218) with you that we had better rest awhile on our oars and give Mr. Fields time to cool off and reflect. He will probably approach you or myself for a compromise before the February Term of court, and I have no doubt the matter will be closed in that way.

You will please call on Mr. Jordan, whom I have instructed to pay you $25 for your services rendered, and for which please give him voucher. I would enclose check, but Mr. Jordan owes me some money, and I suppose you had just as soon have cash. Now as regards future fees in case your services are further needed: I beg leave to say that your charge of $50 retainer and $50 when the case has been tried in the Superior Court is satisfactory, and $50 more to be paid to take the case through the Supreme Court if necessary. That is as far as your proposition is definitely stated. You say if you win the case in the Supreme Court you will charge a larger fee. I think the labor and trouble to an attorney is the same whether he wins or loses the case, and we will not enter into any agreement with any attorney without a definite understanding on every point.

As to your fee for compromise, I do not at all agree with you that you should charge the same as if you were to take the case through court. Mr. Fields may come to you and offer to accept a certain sum which we would be willing to pay, and which would give you no trouble at all. It has always been our custom, and, I believe, that of almost all companies, to pay for all compromises, and generally for taking all suits through the court, on the basis of the amount saved. I have no doubt Mr. Fields

will accept now (if offered him) $1,000, as I have just had a letter from Mr. Williams saying that Governor Jarvis had walked into his office day before yesterday very unexpectedly and asked where was his $1,100. We never offered any $1,100. That was his proposition. Williams
(219) told him that we had dropped and were not disposed to pay, even now, as much as we had at first offered.

It is understood, then, that the fees above named, in case you conduct the matter through the Superior Court and the Supreme Court, are agreed upon. I have no desire whatever to take the case out of your hands and give it to any other attorney. Your services, so far as I can judge, have been entirely satisfactory, and I do not propose to employ any other attorney. Mr. Jordan will pay you the $25 for services, which ends the matter thus far. If, however, the matter is not compromised before the February Term of court I will send you $25 more, as a retainer, as I understand it was your intention to include the $25 to be paid now in the $50 retainer if you are further employed.

Trusting this will all be satisfactory, I am

Yours very truly,

JNO. W. GORDON, G. A.

Letter from George M. Lindsay to John W. Gordon:

SNOW HILL, N. C., 18 January, 1894.

John W. Gordon, Esq.

MY DEAR SIR:—I learn through Judge Connor that the case of *W. R. Fields v. The Hamburg-Bremen Fire Insurance Company* has been settled. You seem in a hurry to settle it, but I am perfectly willing for it to be settled, though it is usual for clients to consult their attorney before any action is taken in such matters. You stated in your letter that you agreed with me that we had better let "Mr. Fields cool off and reflect awhile." I think the case could have been settled for $1,000, or perhaps less; but if the company is satisfied I am not interested. I of course expect my fee in accordance with my letter to you, which was retainer fee $50, and $50 to try or compromise case. You have paid me $25, which leaves a balance due me of $75, which amount you
(220) will please send me at once. The case could not have been disposed of without my consent, and therefore Connor sent me your letter and asked me to get the clerk to make the necessary entries on the docket. I had entered a general appearance for the company, and no disposition of the case out of term time could be made without I agreed to it; but I consented of course. I am always willing to any compromise that is satisfactory to my clients. Hoping to hear from you very soon, I am Yours truly, GEO. M. LINDSAY.

Letter from John W. Gordon to George M. Lindsay:

RICHMOND, VA., 19 January, 1894.

DEAR SIR:—I am in receipt of your favor of the 18th inst. and note contents. We did not see any prospect of settling the Fields loss before February Term of court at less than $1,100, and as the company was anxious to get all outstanding losses settled before closing their books for the year 1893, preparatory to filing their report with the various insurance departments, I thought we had better close this matter.

Your claim for additional fees is preposterous, and it is very well that I was so particular as I was to insist upon a plain understanding with you before engaging you. In your letter of 4 December, after naming the terms on which you would further conduct the case if we desired it, you said: "If my charges are not satisfactory, send me a check for $25 for what I have done, and then get some other attorney." In the same you said: "It will be very difficult to settle with Mr. Fields for less than $1,000, or even at that sum, because you had offered him that sum before I was engaged." My reply to your letter, dated 14 December, 1893, leaves no room for doubt as to the understanding between us. The terms proposed by you in case your services should be wanted to take the case through the Superior Court and Supreme Court were discussed, and you were paid the $25 charged for (221) services rendered as stated in my letter of 14 December, viz.: "Mr. Jordan will pay you the $25 for services, which ends the matter thus far. If, however, the matter is not compromised before February Term of the court, I will send you $25 more as retainer." You have never made any objection at all to the terms stated in this letter as understood and agreed between us. . . .

Yours very truly,

JNO. W. GORDON, G. A.

Letter from John W. Gordon to George M. Lindsay:

RICHMOND, VA., 25 January, 1894.

George M. Lindsay, Esq., Snow Hill, N. C.

DEAR SIR:—Your remarkable communication of the 22d inst. has been received. Believing the language employed in our former correspondence regarding fees to be too plain and explicit to be misunderstood, I have submitted the entire correspondence to a prominent attorney of this city, and all I have now to say is, that you can proceed to carry out your threat of suit against the Hamburg-Bremen whenever you choose.

Very respectfully,

JNO. W. GORDON.

Plaintiff testified that the receipt dated 16 December was signed by him before he had received the letter from John W. Gordon dated 14 December, 1893, the same being presented to him by W. J. Jordan, who paid him the $25.

Plaintiff testified that the above correspondence was all that ever passed between himself and John W. Gordon, general agent of the defendant, relative to his employment as attorney for the defend-
(222) ant in the case of *W. R. Fields v. The Hamburg-Bremen Fire Insurance Company.*

Plaintiff then offered to introduce evidence of the value of services upon *quantum meruit.* Defendant objected. Objection sustained. Exception by plaintiff.

Plaintiff testified that he signed the receipt of 16 December, 1893, and received the $25 from W. J. Jordan, the agent of the defendant, before he received the letter from John W. Gordon, bearing date 14 December, 1893; that he received said letter on the same day, 16 December, 1893, but an hour in the day later than that upon which he signed the receipt.

The court being of the opinion, upon all the testimony, that plaintiff was not entitled to maintain his action, rendered judgment for defendant, and plaintiff appealed.

G. M. Lindsay for plaintiff.
No counsel contra.

PER CURIAM. The letters of the defendant's agent to the plaintiff, and his replies thereto, constitute a written contract between the parties. It was for the court, therefore, to ascertain the intention of the parties and to declare their rights thereunder. *Simpson v. Pegram,* 112 N. C., 541. The services to be rendered and their value were fixed by that written contract, upon which we think his Honor put the proper construction.

Affirmed.

Cited: Wilson v. Cotton Mills, 140 N. C., 56.

(223)

THOMAS B. KENNEDY, EXECUTOR OF ZILPHIA J. COX, v. FIRST NATIONAL BANK OF WILSON.

Bank Stock—Dividends—Surrender of Life Interest—Transfer of Certificate.

Where one to whom the use and enjoyment of certain shares of bank stock were given during her life or widowhood, after which the stock was to go to her daughter, assented to the transfer of the stock to her said daughter, she thereby assented to the payment of the dividends to the assignee, and ceased, so far as the bank was concerned, to have any claim upon the stock.

ACTION, tried before *Boykin, J.*, at August Term, 1894, of GREENE, upon exceptions to referee's report. The facts, as found by the referee (and corrected by his Honor, upon exceptions to the findings of the referee), are as follows:

1. That S. P. Cox died in August, 1882, leaving a last will and testament, which has been duly admitted to probate.

2. That by the terms of the will of S. P. Cox ten (10) shares of the capital stock of the defendant bank were bequeathed to Willie P. Cox, Charles P. Farmer and Obedience C. Darden, "in special trust and confidence that they will allow my wife Zilphia J. Cox the use and enjoyment of the same during her life or widowhood; and after her death or marriage of my wife, then the said trustees will hold the remainder for the use and enjoyment of my daughter Frances E. Williams, and after the death of the said Frances E. Williams, if she leaves no living heir to the age of twenty-one years, then the remainder to my living children, if any; if no living children, then to my grandchildren."

3. That after the death of said S. P. Cox the executors of his said will collected one dividend declared on said stock about 1 January, 1883, and divided and paid over the same to said Zilphia J. Cox (224) and Frances E. Williams.

4. That on 21 February, 1883, the said Zilphia J. Cox and Fannie E. Williams executed and delivered to said executors a receipt and discharge for the certificate for said ten shares of stock, and at the same time the said executors indorsed, transferred and delivered said certificate to said Frances E. Williams, in the presence and with the consent of said Zilphia J. Cox, said certificate to be held by Zilphia J. Cox and Frances E. Williams, on the conditions prescribed in Item 1 of the will of S. P. Cox, according to their respective rights under the same.

5. That on said 21 February, 1883, the said Frances E. Williams delivered said certificate of stock for safe-keeping to said Zilphia J. Cox,

and the dividends on said stock were paid to said Frances E. Williams alone, until she sold the same to the defendant F. W. Barnes.

6. That about two years after said certificate was so delivered by said Frances E. Williams to said Zilphia J. Cox, H. G. Williams, the husband of said Frances, demanded of said Zilphia J. Cox the delivery to him, for said Frances, of said certificate, which demand was refused.

7. That shortly thereafter C. P. Farmer, one of the executors of the will of said S. P. Cox, demanded of said Zilphia J. Cox, in behalf of said Frances E. Williams, the possession of said certificate, which was thereupon delivered to him, and he forthwith delivered the same to said Frances E. Williams.

8. That on 15 March, 1884, the said Frances E. Williams and her husband H. G. Williams indorsed and delivered said certificate to the defendant bank, and took in exchange therefor, in the name of said Frances E. Williams, two certificates, each for five shares of the capital stock of said bank. That at the time of such delivering of said certificate and issuing of the two certificates aforesaid the defendant bank (225) had no notice of any claim of a life-interest of said Zilphia J. Cox in said first-named certificate. The said indorsement and delivery of said certificate, and the issuing of two new ones, was done without the knowledge or consent of the said Zilphia J. Cox.

9. At the time of the surrender of the said ten shares of stock to the defendant bank, and the issuance of the two certificates of five shares each to Frances E. Williams, the said bank had notice of the contents of the will of said S. P. Cox.

10. That the said Zilphia J. Cox died in July, 1892, leaving a last will in which the plaintiff was named executor.

Upon the foregoing facts the referee found as conclusions of law—

1. That the demurrer of the defendant F. W. Barnes, for the reasons therein stated, be sustained.

2. That the plaintiffs take nothing by this action; that the defendants recover of the plaintiff and his surety the costs of this action.

The plaintiff excepted to the conclusions of law. His Honor overruled the exceptions and allowed a *nol. pros.* to be entered as to the defendant Barnes, whereupon plaintiff appealed.

George M. Lindsay for plaintiff.
No counsel contra.

PER CURIAM. By the terms of the will of S. P. Cox the dividends on the shares of stock of the defendant bank were given to his widow during her life or widowhood. The certificate represented this stock, when she, who was entitled to the dividends thereon, consented that this certificate

should be transferred to her who was to have it in the event of her death or marriage. She thereby assented, as it seems to us, to the bank's paying the dividends accruing on said stock to the assignee. After (226) such assignment was made with her assent, she ceased, so far as the bank was concerned, to have any claim upon it.

No error.

COMMERCIAL AND FARMERS NATIONAL BANK OF BALTIMORE v. JUNIUS DAVIS AND JAMES A. LEAK, RECEIVERS OF THE BANK OF NEW HANOVER.

Banks and Banking—Insolvent Bank—Principal and Agent—Collections—Trustee and Cestui Que Trust—Conversion—Creditor and Debtor.

Plaintiff bank, being ignorant of the insolvency of the Bank of New Hanover, sent to it items for collection and remittance. New Hanover Bank mingled the proceeds of the collections with its own funds, so that the specific money received on the items so sent by plaintiff bank could not be traced. No mutual account was kept between the parties. Before remitting for the items so collected, New Hanover Bank failed, and there was money enough on hand and turned over to the receiver to pay the plaintiff's claim: *Held*, that upon the collection of the items and the mingling of the proceeds with the assets of the New Hanover Bank, the relation of principal and agent, trustee and *cestui que trust* ceased, and that of principal and debtor arose between the parties, and plaintiff became a simple contract creditor with no preference over other creditors, and it is immaterial in such case whether or not the officers of New Hanover Bank knew that it was insolvent.

PETITION in the cause entitled *S. McD. Tate, Treasurer, et al. v. The Bank of New Hanover et al.* Jury trial was waived. By consent his Honor, *Brown, J.*, at April Term, 1894, of NEW HANOVER Superior Court, found the facts as follows, to wit: Petitioner is a National Bank, doing business in the city of Baltimore. The Bank of New Hanover was a State bank, doing business in the city of Wilmington, which failed, and Junius Davis was appointed receiver 19 June, 1893. (227) The petitioner, for some months prior to the failure of said bank, had been sending drafts and other commercial paper to the Bank of New Hanover for collection, each collection being enclosed in a letter exactly like the one herewith sent, marked Exhibit "A." Said banks kept no mutual deposit account with each other, but upon collection of commercial paper sent to it the Bank of New Hanover was in the habit of mingling said funds received with all its other funds, and in due time remitting its own check upon its correspondent in New York or else-

where to the petitioner in settlement of collections, in accordance with the usual custom of banks dealing with each other where no mutual deposit account is kept. The Bank of New Hanover, it is admitted, is indebted to the petitioner in the sum of $6,788.32, for which the petitioner claims a priority over other creditors, which right of preference is denied upon the part of the receiver. This sum represents the amount collected by the Bank of New Hanover on account of the petitioner between 9 June and 17 June, 1893. Said sum was received as follows: In cash, 10 June, 1893, $50.60; in cash, 12 June, 1893, $600; credited to the Bank of New Hanover by other banks with which Bank of New Hanover kept mutual deposit accounts, and to which some of these collections were forwarded, $841.43. The amount of collections made by the Bank of New Hanover between said dates, payments being made by the drawee giving checks on Northern banks, Bank of New Hanover and Atlantic National Bank of Wilmington, $5,909.07. The collection charges, made by the Bank of New Hanover, as appears on its books, $18.78, being deducted, leaves balance due petitioner, $6,788.32. Of the said sum of $5,909.07 aforesaid, the sum of $252.69 was collected as follows: Some days prior to 7 June, 1893, the Bank of New Hanover had received from plaintiff out-of-town collections, $252.69, which (228) it had immediately sent out to its several correspondents. On the arrival of the mail, 6 p.m., 17 June, or thereabouts, Bank of New Hanover received from its correspondents checks on New York and other cities amounting to $252.69 in payment of the aforesaid collections sent to them. When these checks were received the night of 17 June, the clerks in the Bank of New Hanover, in accordance with the usual custom, forwarded said checks same night by next mail, which left Wilmington for New York about 11 p.m., to its New York correspondent to be placed to its credit, the same being payable to Bank of New Hanover. The collections received from the plaintiff had been entered on the collection book kept by the Bank of New Hanover, and upon receipt of these checks on the night of 17th from its out-of-town correspondents the collections represented by them were marked paid on the collection book. It was the habit of the clerks in said bank to remail checks, post up the collection books by checking up collections paid every night, and especially every Saturday night, so as to utilize the night mail.

The petitioner also claims another item, $1,266.37, 9 June, 1893, as set out in section 4 of the petition. Section 4 of the petition is admitted. In addition to the facts stated in section 4, the following facts are found in reference thereto:

The said sum represents checks drawn by the Bank of New Hanover on its New York correspondent, Importers and Traders Bank. At the date of failure the Bank of New Hanover had a deposit account with said

Importers and Traders Bank, and on 19 June there was over $1,266.37 to credit of Bank of New Hanover in the Importers and Traders Bank. But the Bank of New Hanover owed the Importers and Traders Bank about $150,000 borrowed money, not appearing on the cash deposit account. There was a written agreement between the Bank of New Hanover and Importers and Traders Bank, whereby the latter could hold cash balances for any debt due it, or to become due it, by the Bank of New Hanover, which said agreement was in force (229) and effect at the time of the failure of the Bank of New Hanover, and for a number of months prior. At the date of failure of Bank of New Hanover it had drawn $69,000 checks upon its deposit account with the Importers and Traders Bank, which remained unpaid. The cash balance in the hands of the Importers and Traders was not sufficient to pay half of the checks drawn on it.

W. L. Smith, cashier of the Bank of New Hanover, testified as follows: "Bank of New Hanover had no special agreement with petitioner and kept no mutual deposit account. Petitioner sent us collections always enclosed in a collection letter exactly similar to the one in evidence, marked Exhibit 'A.' Collections were entered on our collection book, and when collected were marked up 'paid' and remittance made by draft of the Bank of New Hanover on its New York correspondent, payable to the petitioner or for whomsoever the collection had been made.

"This work was generally done at night and outside of banking hours. The Bank of New Hanover and no other bank kept its collections received separate from any other money. All of our funds were kept together in one place. Bank of New Hanover had no special deposit for plaintiff nor for any one else. The moneys were constantly changing every day. This is the custom of all banks. Bank of New Hanover failed to open on Monday morning, 19 June. As a matter of fact, it was insolvent on 17 June, but I did not believe it was insolvent. It is impossible to separate or identify any money collected for the plaintiff. All banks universally keep all money together. The Bank of New Hanover, at the time of its failure, had $25,000 in cash on hand."

The court finds the facts testified to by said Smith to be true, except in respect to the statement that on 17 June said cashier did not believe Bank of New Hanover to be insolvent. In respect to this statement, the court does not find the fact as to the cashier's knowl- (230) edge and belief one way or the other, because the court is of the opinion that it is immaterial.

It is admitted that at the date it failed Bank of New Hanover owed other banks and bankers $175,000 for collections made under similar circumstances and relations, as plaintiffs claim.

It is admitted that in addition thereto it owes $418,000 interest-bearing certificates of deposit, and deposits subject to check $266,000. That its nominal assets at the time of its failure amounted to about $1,600,000, and it is admitted by the petitioner that all collections made by the Bank of New Hanover for petitioner and others were, in all cases, covered into and mixed with its general funds, and that at the time of its failure it was and is still impossible to identify or separate collections made for petitioner from any other of its funds. Petitioner then offered evidence tending to prove that the nominal assets of the Bank of New Hanover during the month of June, 1893, were about $1,600,000, and its liabilities at that time about $900,000, exclusive of its capital stock; that the character of these assets was such that they were not worth more than a fourth of their face value; that debts were due the bank by three or four persons, aggregating about $400,000, which were utterly worthless, and that the president and cashier were largely indebted to the bank, or enterprises in which they were largely interested. This evidence was offered for the purpose of showing that the president and cashier must have known during the month of June, 1893, that Bank of New Hanover was utterly insolvent, although said bank continued to keep open and to receive deposits and to receive collections from petitioner and others. The court being of the opinion that the fact that the Bank of New Hanover kept open during the month of June,
(231) 1893, that it received deposits, made collections for petitioner and others, and did a general banking business as usual, although its officers knew it was utterly insolvent, would not, in law, give petitioner priority in the distribution of assets, although its officers might possibly be individually liable, that the liability of its officers is not to be determined in this proceeding. The evidence was therefore excluded, to which petitioner duly excepted. It being admitted that the collections sent by petitioner to the Bank of New Hanover were all enclosed in collection letters similar to Exhibit "A," and it being further admitted that the proceeds of said collections cannot be identified or traced or separated from the other funds of the Bank of New Hanover, and could not have been at the time of its failure and the taking possession by the receiver, the court adjudges that the Bank of New Hanover is indebted to the petitioner in the sum admitted to be due, to wit, $5,788.32; that said sum is provable and shall be paid by the receiver *pro rata* with the other debts of the bank; that petitioner has no priority or right of preference. It appearing that the receiver has always admitted the amount of said debt, and this proceeding is brought solely to establish a right of preference, it is adjudged that the cost thereof be taxed against peti-
(232) tioner.

Exhibit "A" was as follows:

COMMERCIAL AND FARMERS NATIONAL BANK,
W. L. SMITH, ESQ., *Cashier*, BALTIMORE, 6 June, 1893.
Wilmington, N. C.

DEAR SIR:—Your favor of the 31st received, with inclosure.
Credited, $1,026.25.
Entered for collection _____
I enclose for collection _____ items as stated below.
Respectfully, JOHN D. EARLY, *Cashier*.

Goldsboro	$10.00		Warsaw	No Pro.	$ 6.00
"	9.90		Durham	"	41.20
Scotland Neck	69.97		New Bern	"	6.75
Wilson	17.99		"	"	15.00
"	28.91		Rocky Mount	"	12.60
Tarboro	34.80		Wadesboro	"	17.28
Goldsboro	16.25				

J. D. Bellamy, Jr., for plaintiff.
George Rountree and George Davis for defendant.

BURWELL, J. We find no error in the ruling of his Honor, and hold that his judgment must be affirmed. It is sufficient, we think, to cite the case of *Bank v. Dowd,* 38 Fed., 172, where *Judge Seymour* has fully set out the reasons and authorities that led him to the conclusion he reached in a controversy about the assets of an insolvent National bank. Both because it is important that there shall be accord between the rules laid down by the Federal Court in regard to the assets of insolvent National banks in the hands of receivers and those rules which are to govern the distribution of the assets of an insolvent State bank, and because the conclusions there reached are those to which we have come after a careful consideration of the authorities, we content (233) ourselves with referring to the elaborate opinion filed in that case. Later decisions sustain what is there said. *Slater v. Mills,* 18 R. I., 352; *Freiburg v. Stoddard,* 161 Penn., 258; *Nonotuck Silk Co. v. Flanders,* 87 Wis., 237.

Affirmed.

Cited: Packing Co. v. Davis, 118 N. C., 554.

MERCHANTS NATIONAL BANK OF NEW YORK, APPELLANT, v. JUNIUS DAVIS AND J. A. LEAK, RECEIVERS.

T. W. Strange for plaintiff.
George Rountree and George Davis for defendant.

BURWELL, J. For reasons stated in the opinion in *Bank v. Bank, ante,* 226, the judgment in this cause is
Affirmed.

F. D. KOONCE v. J. J. PELLETIER ET AL.

Action on Administration Bond—Breach—Summons, Alias and Pluries—Statute of Limitations.

1. A failure to keep up the chain of summonses issued against a party by means of an *alias* and *pluries* summons is a discontinuance as to such party; and if a summons is served after a break in the chain it is a new action as to him, and the running of the statute of limitations is not arrested until the issuance of the summons so served.
2. Where administrators filed their final account on 23 August, 1883, and an action was begun on 5 March, 1888, against the administrator and sureties for a breach of the bond, and one of the sureties, A, was not served with the original summons, and no succession of *alias* and *pluries* summonses was kept up, and a summons issued in February, 1891, of which a *pluries* was served in March, 1892: *Held,* that the issuance of the latter summons was the commencement of a new action as to A.
3. Where a complaint alleges as the cause of action the breach of a bond, and the statute of limitations is pleaded, it is incumbent on the plaintiff to show that the breach was within three years before the commencement of the action.
4. A notice issued by a referee appointed to state an administrator's account, and served upon a surety on the administrator's bond to appear before him, no order having been made to make such surety a party, was not legal process effective to bring him into court or to arrest the running of the statute of limitations.

(234) ACTION, tried at Fall Term, 1893, of ONSLOW, before *Bryan, J.,* upon an agreed statement of facts, of which those most material are stated in the opinion of *Associate Justice Clark.*

J. B. Batchelor for plaintiff.
P. H. Pelletier for defendant.

CLARK, J. The administrators filed their final account on 23 August, 1883. An action was begun on 5 March, 1888, against them and the sureties on their bond for the nonpayment of a judgment in favor of the plaintiff relator which had been obtained against their intestate. The summons was not served on the appellee, one of the sureties on the bond, nor was there a chain of *alias* and *pluries* summonses kept up against her. On 11 February, 1891, a summons was issued against her, and a succession of summonses was kept up until she was served, on 15 March, 1892. The failure to keep up the chain of summonses was a discontinuance of the action as to her. *Etheridge v. Woodley,* 83 N. C., 11; *Penniman v. Daniel,* 91 N. C., 431. This is, there- (235) fore, a new action as to her, or at most a notice under section 223 of The Code, which was begun on 11 February, 1891. In either case the statute ran till that date. *Rufty v. Claywell,* 93 N. C., 306. The complaint alleged a breach of the bond by a demand and a refusal to pay the debt. The defendant pleads the three-years statute of limitation. Code, sec. 155 (6). Being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. *Hussey v. Kirkman,* 95 N. C., 63; *Moore v. Garner,* 101 N. C., 374; *Hobbs v. Barefoot,* 104 N. C., 224; *Nunnery v. Averitt,* 111 N. C., 395. This was not done, and the surety is protected by the lapse of three years after demand and refusal. *Norman v. Walker,* 101 N. C., 24; *Woody v. Brooks,* 102 N. C., 334; *Kennedy v. Cromwell,* 108 N. C., 1; *Brawley v. Brawley,* 109 N. C., 524. In the original action against the administrators, in which this defendant was not served with summons, the referee nevertheless had a notice served upon her on 25 May, 1889, to appear at the hearing before him. She did not appear, and this notice to one not brought into court by legal process was of no effect. It is true the referee had power to make additional parties. Code, sec. 422; *Perkins v. Berry,* 103 N. C., 131. But this was not an amendment making an additional party. It did not purport to be such. It was simply a notice served on one who had not been served with process to appear before the referee without any order to make her a party. But had it been otherwise, the making her a party on 25 May, 1889, would not affect the principle above laid down. It does not appear that the breach of the bond was within three years prior to that date.

Affirmed.

Cited: Parker v. Harden, 121 N. C., 58; *House v. Arnold,* 122 N. C., 221.

(236)

ELLIOTT BROTHERS v. GEORGE W. SUGG ET AL.

Commission Merchant's Contract—Penalty—Usury.

1. A contract between a commission merchant and a planter, whereby the former agrees to lend the latter a sum of money, to draw eight per cent per annum, and the latter agrees to ship cotton in payment, the cotton to be sold by the lender at a commission of two and one-half per cent, is not usurious; the purpose of the contract being to promote the business of the lenders as cotton factors and not to evade the statutes against usury.
2. A provision in such contract for the payment of a penalty for failure of the borrower to ship the cotton as agreed will not be adjudged usurious upon the face of the contract, but only upon proof *aliunde* of an intent to make the penalty a device for securing more than the legal rate of interest.

ACTION to recover money due on a note and to foreclose a mortgage, heard before *Brown, J.*, at Spring Term, 1894, of PITT, upon exceptions to a referee's report.

The facts found by the referee were as follows:

"1. That on the ____ day of _____, 1885, the plaintiffs and the defendant George W. Sugg entered into a contract for the making of advances by the plaintiffs and the shipment of cotton by the defendant Sugg. That the purpose and intention of the plaintiffs in entering into said contract was the promotion of their business as cotton factors and commission merchants, and not to evade the usury laws of the State, or obtain a larger rate for use of money advanced than that fixed by law upon specific contract at 8 per cent.

"2. That pursuant to said contract the plaintiffs, between 1 March, 1885, and 12 April, 1886, advanced to the defendant George W. Sugg an amount in money and merchandise which, together with the amount due at the date of the contract, aggregated the sum of $11,856.93. That the defendant shipped to the plaintiffs in discharge thereof 275 bales
(237) of cotton, the proceeds of which amounted to the sum of $10,063.30. That the balance of interest on said transaction at 8 per cent amounted to $360.73, leaving a balance due plaintiffs 12 April, 1886, of $2,154.36, for which amount the defendant George W. Sugg executed his note to the plaintiffs.

"3. That on 4 March, 1886, the plaintiffs and defendant G. W. Sugg entered into another contract, of similar import and for the same purpose as the one referred to in the next preceding paragraph. That pursuant thereto the plaintiffs advanced to the said defendant money and merchandise aggregating the sum of $6,671.25 up to 7 February, 1887. The defendant Sugg, in discharge thereof, shipped to the plaintiffs 187

bales of cotton, the proceeds of which amounted to $6,943.58. That the interest on said amount advanced, together with the said note of $2,154.36 and interest thereon, amounted to the sum of $2,416.36, aggregates the sum of $9,087.61, and leaves a balance due the plaintiffs of the sum of $2,144.03, for which the said defendant executed to the plaintiffs his note on 7 February, 1887.

"4. That on 28 March, 1887, and on 30 June, 1887, the plaintiffs and the defendant George W. Sugg entered into contract of similar import and for the same purpose as that referred to in the next preceding paragraph. That pursuant thereto the plaintiffs advanced to the defendant G. W. Sugg, up to 14 February, 1888, in money, an amount aggregating the sum of $4,508.86. The defendant George W. Sugg shipped to plaintiffs in discharge thereof 124 bales of cotton, the proceeds of which amounted to $4,924.11. That the interest on said amount advanced, together with the said note of $2,144.03 and interest, amount to the sum of $2,357.61, aggregates in all the sum of $6,866.47, leaving due the plaintiffs the sum of $1,942.36, for which amount the defendant George W. Sugg executed his note to the plaintiffs on 14 February, 1888, carrying interest at rate of 8 per sent. (238)

"5. That on 11 April, 1888, the defendant George W. Sugg and the plaintiffs entered into the contract filed with the evidence in this case, wherein the said defendant agreed to pay said note by shipment of cotton during said year, and that the plaintiffs agreed to indulge the payment of said note until 1 January, 1889, in consideration of the shipment of said cotton and payment of a penalty of $1.50 per bale if the said defendant failed to ship said cotton in pursuance of said contract.

"5½. That by sundry payments made on said note the amount due thereon was reduced to $570.55, on 31 July, 1889.

"6. That the defendant G. W. Sugg failed to ship to the plaintiffs during the year 1888 the amount of cotton agreed to be shipped by said contract.

"7. That on 31 January, 1889, the defendant G. W. Sugg executed to the plaintiffs his note for the sum of $648.55, within said amount included a charge of $68, claimed by the plaintiffs to be due them on account of the failure of the defendant G. W. Sugg to ship sixty-eight bales of cotton at a forfeiture of $1.50 per bale, as provided in the contract of date April, 1888—the said amount was reduced to $1 per bale by consent of the plaintiffs.

"8. That this action was brought to recover payment of the said note, and the same was introduced in evidence upon the trial of the action; that the plaintiffs agree to waive claim for the said sum of $68, and requested the referee to enter said amount as a credit upon said note.

"9. That on _____, 1889, the plaintiffs paid to John W. Gordon insurance on account of property mortgaged to said defendant Sugg, which mortgage was deposited with the plaintiffs as collateral security, the sum of $10, and on 1 January, 1890, paid the further sum of $10.

"10. That the said sum of $68 was charged by the plaintiffs,
(239) and agreed to be paid by the defendant Sugg as a consideration for the indulgence of the payment of the said sum of $570.55 for one year.

"11. That on 1 June, 1891, the defendant G. W. Sugg paid on said note the sum of $155.58."

I find as conclusions of law—

"1. That the contract for the payment of the said sum of $68, in addition to 8 per cent interest, for the indulgence of the payment of the said sum of $570.55 was usurious.

"2. That the defendant G. W. Sugg is indebted to the plaintiffs in the sum of $434.97, with interest thereon from 28 November, 1893, which amount shall be paid by the commissioner out of the proceeds of the sale of the lands of the defendant Owen Sylevant, to be made as directed by the judgment of this court rendered at Spring Term, 1892."

The defendants filed various exceptions to the referee's findings of fact and conclusions of law, but his Honor rendered judgment as follows:

"This cause coming on to be heard at the above term of the court, *Brown, Judge,* presiding, upon exceptions filed by defendant G. W. Sugg to referee's report and judgment rendered, the court adopts and affirms the several findings of fact made by the referee. The court further finds that on 14 February, 1888, the said Sugg executed to the plaintiffs his note for $1,942.36, secured by the Owen Sylevant mortgage and notes. That there was no charge for this sum exceeding 8 per cent for indulgence and forbearance, and there was no penalty or charges for failure to ship cotton included therein—said note was executed 14 February, 1888, and was due and payable 14 December, 1888.

"On 11 April, 1888, the defendant Sugg entered into a separate contract with plaintiffs to ship cotton, and providing that for failure to ship, the said defendant should pay $1.50 per bale for every bale he failed to ship.

"That on 31 January, 1889, said Sugg and plaintiffs had a settlement,
and there was found to be due plaintiffs $648.55, for which Sugg
(240) executed his note and the other note was canceled. Sixty-eight dollars was included in the new note as penalties for failure to ship cotton. This is the only penalty for failure to ship cotton that has been charged to said Sugg in any of his transactions with plaintiffs.

"It is admitted that the referee has not allowed the $68, and has deducted it; also that referee has not allowed any interest on the said note of $648.55, and the said $68 and all credits have been taken from the principal thereof.

"The judgment and report of referee, upon motion of the plaintiffs, is affirmed.

"The plaintiffs are entitled to a decree and judgment against George W. Sugg for the amount due on the principal of said note, after deducting the credits from said principal, as reported by the referee. Said sum will bear interest from the rendition of judgment as reported.

"The plaintiffs are also entitled to a decree of foreclosure of the Owen Sylevant mortgage, in default of the payment of the said judgment within ninety days."

Defendant Sugg appealed to the Supreme Court.

The contract referred to recited the loan of money to be advanced to the defendant from time to time, in consideration of the payment of interest at 8 per cent per annum, and the agreement of the defendant to ship cotton to the plaintiffs in payment of the sum due, the plaintiffs to receive a commission of 2½ per cent upon the sale of the cotton. It also provided for the payment by defendant of a penalty of $1.50 per bale in case of default in the shipment of the cotton as agreed.

George M. Lindsay for defendants.
No counsel contra.

MACRAE, J. There were numerous exceptions to the report of the referee heard before his Honor below, who adopted and affirmed the several findings of fact, and found other and further facts as (241) a foundation of the judgment rendered, but there were no exceptions to the findings of the judge. The simple entry is, "Defendant Sugg appealed to the Supreme Court," and the record is sent up without any assignment of errors as made by his Honor. The plaintiffs would be entitled to have the judgment affirmed. We may say, that upon the examination of the record and the exceptions before the referee, we find the principal contention to be that it was error to have found that the purpose and intention of the plaintiffs in entering into said contract was the prosecuting their business as cotton factors and commission merchants, and not to evade the usury laws of this State and obtain a larger rate for the use of money advanced than that fixed by law upon special contract at 8 per cent. And the ground of plaintiff's contention is that there was no testimony to support this finding. Upon examination of the evidence sent up, we think there is evidence tending to establish the truth of the finding of the purpose of the plaintiffs in making

the contracts in the contracts themselves, which set forth the objects in view. And the evidence tends to establish the second proposition that there was no intent to evade the usury laws, in the fact that no usury was charged upon the advances made by plaintiffs to the defendant, unless it be that the provision in the written contract for the payment of a penalty for failure to ship the cotton which the defendant contracted to ship to plaintiffs had in itself the taint of usury. This point was incidentally before this Court in *Arrington v. Goodrich,* 95 N. C., 462, but was not necessary to be decided. Reference was then made to *Mathews v. Cole,* 70 N. Y., 239, where it is said that "Such an arrangement was not necessarily usurious to be so adjudged on the face of the contract, but the intent must be shown to secure a larger interest on the loan, and this a device resorted to to give it effect. In the absence
(242) of any such evidence *aliunde,* the contract must be declared legal and valid."

And in *Cockle v. Flach,* 93 U. S., 344, the Court held that such provision is not so conclusive that the court ought to have held, as matter of law, that it was usury.

Affirmed.

JOSIAH EXUM, ASSIGNEE OF DAIL BROS., v. BRYANT BAKER.

Practice—Writ of Assistance, when Granted—Parties and Privies—Title Cannot be Tried on Application for the Writ—Lien of Taxes Superior to Mortgage.

1. The writ of assistance can be issued only against parties or persons in privity with parties who have been concluded by a decree, and yet refuse, after notice, to let purchaser at a judicial sale under such decree into possession.
2. A question of title will not be tried on an application for the writ of assistance as against persons in possession claiming adversely and not bound by the decree.
3. The lien of the tax on land is generally superior to the rights of mortgagor or mortgagee, and it is the duty of the mortgagee and of his assignee to see to the discharge of the tax liens as they fall due.

PETITION for writ of assistance, heard before *Brown, J.,* at February Term, 1894, of GREENE.

The plaintiff was the purchaser of certain lands described in the complaint (filed in the original action for foreclosure, etc.).

The defendant appealed from the judgment below.

George M. Lindsay for plaintiff.

J. B. Batchelor and Swift Galloway for defendant.

AVERY, J. It is found as a fact by the court below, upon peti- (243) tion for a writ of assistance and the answer thereto with exhibits, that the defendant Jasper Baker bought the tract of land in controversy on 5 December, 1894, when sold for taxes due for the year 1886 by Sugg, tax collector, acting under the Law of 1891, chapter 391, and that on failure of the owner to redeem, he took title for said land from said tax collector on 6 December, 1893, "entered and acquired possession under the same, and has lived thereon ever since." The question of the surrender of possession by the defendant Bryant Baker, of his eviction, is no longer an open one. It appears as a fact that there was a change of possession from Bryant to Jasper Baker. How it was effected we do not know, and therefore the fact that Bryant Baker has continued to live with the new occupant is not material, nor is it material what relation the two sustain to each other.

The controversy hinges upon the question whether the defendant Jasper is in privity with the original mortgagees of Bryant Baker, Dail Bros., or the assignee, the plaintiff Exum, or holds adversely to Exum.

The lien of the tax on the land, if it be a lien at all, as against a person without notice, is generally superior to the right of either mortgagor or mortgagee. *Wooten v. Sugg,* 114 N. C., 295. Hence it is ordinarily the duty of the mortgagee, certainly on the failure of the mortgagor to discharge such lien, to avail himself of the privilege given him by statute (The Code, sec. 3700) and save his security. If the assignee of mortgagee negligently suffered another to acquire a superior right by purchasing at a tax sale, he cannot complain of consequences which naturally followed. If the lien for tax was superior, Jasper Baker acquired, on the expiration of the time allowed for redemption and the execution of a deed by the tax collector, a better title, legal and equitable, than that of mortgagor or mortgagee. But whether Jasper Baker, under the circumstances, acquired a better or a worse title, he, at all events, obtained possession, and is not in privity with mortgagor, mortgagee or the assignee of the latter, since he was not a party to the original (244) foreclosure proceedings, nor does he claim through or under any such party.

A writ of assistance is only granted (as was said in effect by the Court in *Knight v. Houghtalling,* 94 N. C., 408) when land has been sold under a decree and the *terre* tenant, or some one holding in privity with him, refuses to surrender possession. Jasper Baker, being a stranger to the original foreclosure proceeding, at least claims, if he does not hold, by another and an adverse right. It does not appear that he acquired the possession from Bryant in such manner as to subject him to the estoppel of the decree. If, therefore, it be conceded that the tax assessed in 1886, after the execution of the mortgage deed in 1875, and

before the assignment to the plaintiff Exum as trustee for them and their creditors in 1888, was not, without direct notice to said trustee, a superior lien under the Act of 1891, chapter 391, to that of the mortgage or decree of foreclosure, the plaintiff would still have failed to establish clearly his right to a writ of assistance against a person who has acquired the possession and was not a party or in privity with any party to the suit for foreclosure. *Knight v. Houghtalling, supra; Coor v. Smith,* 107 N. C., 430.

It seems to be established by the weight of authority in the courts of this country, first, that the writ of assistance can be issued only against parties or persons in privity with parties who have been concluded by a decree, and yet refused, after notice, to let purchasers at a judicial sale under such decree into possession. *Terrell v. Allison,* 21 Wall., 291; *Howard v. Bond,* 42 Mich., 131; *Howard v. R. R.,* 101 U. S., 849; and second, that a question of title will not be tried on an application for that writ (*Boston v. Beatty,* 28 N. J. Eq., 412) as against persons in possession, claiming adversely and not bound by the decree of sale. 21 Am. Dec., 152, note.

It is perhaps sufficient to determine that the writ of assistance (245) was erroneously issued in this case against a stranger to the judgment heretofore rendered in the cause in which it is issued. But looking solely to the construction of the Act of 1891, under which the sale for tax was made, and its effect upon the right of the parties, we must note a marked discrepancy in the facts in this case and in that of *Moore v. Sugg,* 114 N. C., 292. The mortgage was executed by Bryant Baker in 1875, and the tax which became due in 1886 constituted a lien superior to that of the mortgage. *Wooten v. Sugg, supra.* The assignee who took for the benefit of the assignors and creditors was in no better condition than Dail Bros., who were affected with notice of the tax falling due while the lien of the mortgage subsisted. If the plaintiff had notice, he did not rid himself of the effect of such notice or the duty of removing the incumbrance by obtaining a decree of foreclosure. The mortgagee was required to see to the discharge of the tax liens as they fell due, if the mortgagor should make default in the payment, or submit to the consequences of his neglect to do so. He is presumed to have known that the tax for 1886 was not paid when he conveyed to the plaintiff as trustee in 1888, and that it constituted a lien which it was competent for the Legislature to revive after it should become dormant. The plaintiff, as trustee, was affected with the same notice, because it was his duty also to see, as it had been that of his assignor, that taxes due on the land were discharged, and he might, by reasonable inquiry, have ascertained that the mortgagor had failed to pay them. He not only failed, we must suppose, to make inquiry before, but after the sale

for taxes, and before the time for redemption had expired. As the controversy as to title is still to be settled, we deem it best for the parties that we should not only declare that it was error to grant the writ as prayed, but that we should pass upon the question which may still arise in another action.

The prayer for the writ of assistance should have been denied.

Error.

Cited: Powell v. Sikes, 119 N. C., 232; *Wagon Co. v. Byrd, id.,* 464, 467; *Matthews v. Fry,* 141 N. C., 586; *Clarke v. Aldridge,* 162 N. C., 328.

(246)

MARTHA A. HARPER v. THEO. EDWARDS ET AL.

Description of Debt in Mortgage—Registration—Notice—Statute of Limitations—Payment of Note by Purchaser of Land from Mortgagor.

1. A reference in a mortgage to a note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry and to charge them with notice.
2. Registration of a mortgage on proper probate is notice to the world of the existence thereof, and of the nature and extent of the charge created by it.
3. Where the purchaser of land from a mortgagor agreed to assume and pay off the mortgage debt, the mortgagor and mortgagee assenting thereto, he became a co-principal or agent of the mortgagor to pay the debt, and payments by him arrested, at least as to the right to foreclose the mortgage, the running of the statute of limitations. (*LeDuc v. Butler,* 112 N. C., 458, distinguished.)

ACTION to foreclose a mortgage, heard on exceptions to the report of a referee, before *Boykin, J.,* August Term, 1894, of GREENE.

There was judgment for the plaintiff, and the defendant appealed. The facts are sufficiently stated in the opinion of *Associate Justice MacRae.*

J. B. Batchelor for plaintiff.
George M. Lindsay for defendants.

MACRAE, J. It was objected by the defendants that the mortgage was void for uncertainty in description of the debt intended to be secured thereby. The condition of the deed is, "Whereas, the parties of the first

part have executed to the party of the second part a certain promissory note bearing even date with these presents, to be due and payable 1 January, 1877, and for which this mortgage is made to secure: (247) Now, therefore, if the said parties of the first part shall pay, or cause to be paid, said note, and the interest thereon when it shall become due," etc., etc. The point has never, to our knowledge, been passed upon in this Court, and the authorities in other States are conflicting. The general rule as laid down in 1 Jones Mort., sec. 70, is universally recognized: "Literal exactness in describing the indebtedness is not required; it is sufficient if the description be correct so far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it." It is upon the application of the last clause cited above that the diversity of decision has arisen. While a general description of the debt secured is conceded to be ordinarily sufficient, it has been sometimes held that the amount of an ascertained debt should be stated, and that the failure to state the amount of the note secured renders the mortgage invalid as against subsequent incumbrances; and this is what is contended for in the present case. The ground of the above construction is, that the failure to insert the amount of the note in its description in the mortgage leaves the matter in such uncertainty that there are large possibilities of fraud by the substitution of fictitious debts. The cases in support of this view are collected in 1 Jones Mort., sec. 344; 15 Am. and Eng. Enc., 755, note and Pingrey Mort., sec. 464. By reference to the two text-books just cited it will be seen in the same sections that each of the authors comes to the conclusion, upon all the authorities, that the view above contended for is not sustained by the weight of authority, and that under the general rule, "a reference in a mortgage to a note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry and to charge them with notice." And the authorities for this conclusion are also cited in the works and at the pages above named.

It is so often in business impracticable to state the exact amount (248) to be secured, as upon open accounts for future advances, and in many other instances which might be mentioned, where the facility for fraudulent substitution would be equal to that afforded in this instance, that we cannot hesitate to adopt the general rule as stated, and hold that the description under the maxim *id certum est,* etc., is sufficient to put subsequent purchasers on notice.

It is well established in this State that registration of a mortgage on proper probate is notice to the world of the existence thereof and of the nature and extent of the charge created by it. *Ijames v. Gaither,* 93 N. C., 358.

While many exceptions were taken before the referee and not before the court, the only other point argued before us was that of the statute of limitations, the contention of defendant being that payments by J. K. Harper, the purchaser of the land from the mortgagor, would not prevent the statute from running in favor of the defendant mortgagee and maker of the note. And for this proposition the case of *LeDuc v. Butler,* 112 N. C., 458, is relied upon, it being insisted that the maker of the note and mortgage and the purchaser of the land were not debtors in the same class, there not being a community of interest between them. There was a reference by consent in this action, and the referee finds, section 4, that there was notice to all parties of the conveyance of the mortgaged property to J. K. Harper, and the assumption by him of the payment of the balance due upon the mortgage debt, and this was assented to by defendants, "the plaintiff retaining said note and mortgage security." The action is brought to foreclose the mortgage and subject the land described therein to the payment of the debt. We are of opinion that the principles laid down in *LeDuc v. Butler* have no application to this case; that here J. K. Harper, by consent of all parties, undertook, either as a co-principal or as the agent of the mortgagor, to pay the debt, and that payments by him inured, at least as to the right to foreclose the mortgage, against the running of the statute. (249) *Williams v. Kerr,* 113 N. C., 309.

No error.

Cited: Garrett v. Reeves, 125 N. C., 540; *Cole v. Boyd,* 175 N. C., 558.

W. A. DUNN, RECEIVER, v. A. F. JOHNSON.

Insolvent Corporation—Cashier—Trustee—Corporate Funds—Breach of Trust—Bill for an Accounting.

1. Where an agent is entrusted with money to be disbursed, his principal may sustain a bill in equity against him for an account of his agency; and under our present system of practice, in which legal and equitable relief may be demanded in the same action, a cashier of an insolvent bank may, in an action by the receiver to recover an alleged balance in his hands, be held to an accounting, an account being necessary to ascertain the amount of said balance, if any.
2. In an action by the receiver against the former cashier of an insolvent banking association, the complaint alleges that defendant, in the course of his agency, received into his possession of the funds of the association

a certain amount, and that he accounted for and turned over to his successor a smaller amount, and that demand has been made upon him for the balance, which he has failed to turn over to the receiver: *Held*, that the complaint states a cause of action in the nature of *indebitatus assumpsit*, in which it is not necessary to state the particular items constituting the debt.

ACTION, heard on complaint and demurrer before *Brown, J.*, at February Term, 1894, of SAMPSON.

The amended complaint was as follows:

"1. That on 28 September, 1871, the plaintiffs, other than W. A. Dunn, receiver, and the Clinton Loan Association (incorporated), and the defendant A. F. Johnson, formed an association under the (250) name of the Clinton Loan Association, under articles of agreement, a copy of which is hereto attached and made a part of this complaint.

"2. That on or about 1 October, 1873, the defendant A. F. Johnson was elected cashier of said association under said articles of agreement, and entered upon the discharge of the duties of said office, and continuously thereafter exercised and discharged the duties of said office until 28 May, when he resigned.

"3. That by virtue of his said office of cashier said defendant came into the possession of all the moneys, notes, accounts, mortgages, books and property of said association.

"4. That at or about the time of the resignation of said office by the defendant, said defendant turned over to his successor in office a part of the money and property that he took possession of by virtue of his said office of cashier, but he wrongfully failed and neglected to turn over and account for moneys and property of said association in his possession, of the value of over $50,000, as plaintiffs are informed and believe, and converted the same to his own use.

"5. That the value of the money and property so taken possession of by the defendant, during his term of office, was about $275,735.72, and the amount paid out by him and the total of the assets, nominal and otherwise, turned over to his successor was about $223,586.15.

"6. That the sources of information of the plaintiffs are principally the books of said Clinton Loan Association, made and kept by the defendant during his said term of office, and said plaintiffs are unable to state from said books at what time and in what amounts the defendant misappropriated or lost the property of said association.

"7. That the defendant fraudulently misappropriated the funds of said association during a long period of time, and in his reports to the board of directors fraudulently concealed the real condition of the

business from them, and the deficit was never discovered till after (251) he ceased to be cashier.

"8. That an account is necessary in order to ascertain the exact amount of the liability of the defendant to the plaintiffs. The taking of said account involves the examination of all the books and accounts kept by the defendant during his term of office, and the said liability cannot be ascertained without the taking of such account, which is a work of great magnitude and great labor.

"9. That the plaintiffs are unable to make the several allegations in this their amended complaint more specific, and to require this to be done will be to deprive the plaintiffs of the right and opportunity to prosecute their action and to call the defendant to an accounting.

"10. That plaintiffs have demanded a settlement of said defendant, which has been refused.

"11. That on or about 18 March, 1891, the plaintiff, the Clinton Loan Association (incorporated), was duly organized under an act of the General Assembly of North Carolina, and ratified on 14 February, 1891.

"12. That on the ____ day of ----------, 1891, all the property, rights and credits of the said association formed on 28 September, 1871, were duly transferred and assigned to the plaintiff corporation.

"13. That on 22 December, 1891, in an action pending in the Superior Court of Wake County, wherein Donald W. Bain, State Treasurer, and the State of North Carolina on the relation of Donald W. Bain, State Treasurer, are plaintiffs, and the Clinton Loan Association is defendant, the plaintiff W. A. Dunn was appointed receiver of said corporation and said association."

Wherefore, the plaintiffs demand judgment—

1. For an account and settlement of the defendant's receipts and disbursements and dealings as such cashier.

2. For $52,149.57, or such other amounts as may be ascertained by said accounting. (252)

3. For such other and further relief as may be just and proper, and for costs.

The plaintiffs, for an amendment to their complaint, alleged—

"1. That the defendant, while acting as such cashier, received from exchange, discounts, collections, premiums and bank dividends the amounts, and at the time set out in the paper hereto attached, marked 'A A,' and that he received upon the capital stock $47,860, a large part of which was turned over to him upon election as cashier, and the balance soon thereafter.

"2. That at the time of the resignation of the defendant there were outstanding certificates of deposit issued by said defendant to the amount

of $110,978.47, a list of which certificates is hereto attached, marked 'B B,' which amount was received by the defendant as cashier.

"3. That at the time of the resignation of said defendant there were outstanding deposits, subject to check, amounting to $20,863.76, a list of which deposits is hereto attached, marked 'C C,' which amount was received by the defendant as cashier.

"4. That while acting as such cashier the defendant paid out, on account of dividends, general expenses and interest, the amounts, and at the time set out in the account hereto attached, marked 'D D.'

"5. That at the time of the resignation of the defendant he delivered to his successor in office notes, secured by mortgage, amounting to $59,178.01, and notes not secured amounting to $64,379.04 and about $9,000 in cash, and said notes embrace all evidences of debt, solvent or otherwise, so turned over.

"6. That at the time of the resignation of the defendant he failed to turn over to his successor any book or paper showing his cash
(253) account as cashier, and the plaintiffs, after diligent inquiry and investigation, have been unable to find such accounts, and said defendant kept no complete and accurate account of time deposits, and the plaintiffs are unable to state the balances due from year to year by the defendant, and at what times the funds of the plaintiffs were misappropriated by the defendant. The amount of outstanding certificates stated in paragraph 2 has been ascertained from the certificates presented by the holders thereof since said resignation, and not from the books.

"Wherefore, the plaintiffs pray judgment as prayed for in their amended complaint."

The defendant moved that the plaintiffs be required to make the allegations of their amended complaint more definite and certain, upon the ground that the same are so indefinite and uncertain that the defendant cannot be and is not advised thereby of the precise nature of the charges brought against him, and cannot intelligently defend the same.

"1. That the complaint does not state what specific property came into the possession of the defendant, nor the value of the same, nor the times when the same came into his possession. That it does not state what amount of money came into his possession, nor the times when it so came into his possession. That it does not state what specific property, nor the value of the same, that defendant converted to his own use, nor when he converted the same; and that it does not state what amount of money defendant converted to his own use, nor the time when he converted the same, nor the manner of such conversion.

"2. That while the plaintiffs allege that the defendant, during a long period of time, fraudulently misappropriated the funds of said association, and in his reports to the directors fraudulently concealed the real condition of the business from them, yet it does not state any specific act of fraud, or of fraudulent misappropriation, or any (254) facts going to show fraud. Nor does it state wherein or how he fraudulently concealed, by his reports, the real condition of the business from the directors, or state any facts going to show any fraudulent concealment in or by such reports, or that he ever made any such reports.

"Defendant further moves that plaintiffs be required to furnish him a bill of particulars showing separately the specific property and the specific moneys which they allege the defendant converted to his own use, and also the value of such property, the amount of such moneys, and the several and various times when the same was so converted by the defendant."

The defendant moved that the plaintiff be required to make his amended complaint more definite and certain, upon the grounds—

"1. That the plaintiff has filed an amended complaint and separate amendments to the same, and by reason of the fact that said amendments are not incorporated into the body of said amended complaint so as to constitute but one pleading, this defendant is at a loss and unable to answer the same intelligently, or to know to what allegations of the amended complaint amendments apply or how they are connected therewith.

"2. That it does not allege any specific money or property converted by defendant to his own use, or any specific act or acts of conversion, or the time or times of such conversion.

"3. That it does not allege any specific money or property fraudulently misappropriated by the defendant, or any specific act or acts of fraudulent misappropriation, or the time or times of such fraudulent misappropriation.

"4. That it does not state or allege any specific facts or circumstances tending to show any fraud or fraudulent misappropriation on the part of the defendant.

"5. That while the amended complaint alleges in one article a (255) wrongful conversion of moneys and property of said association, it yet alleges in another article a fraudulent misappropriation of moneys and property, and does not state specifically what money or property was so wrongfully converted by defendant, nor what money or property was so fraudulently misappropriated by defendant.

"6. That the schedules annexed to the amendments to the complaint are unintelligible.

"7. That the amended complaint and the amendments to same are so indefinite and uncertain in their allegations that this defendant cannot be advised as to the charge or charges brought against him, or how to make a sufficient or intelligent defense or answer to the same, and that he cannot, without serious prejudice, answer the same."

His Honor rendered the following judgment:

"The defendant moved in this cause before me in writing to require the plaintiffs to make their complaint more specific.

"The plaintiffs contend that they are unable to make the complaint more specific, and that if it is required of them they will be compelled to suffer a nonsuit.

"Defendant also demurs *ore tenus* to the complaint because it does not state a sufficient cause of action, upon the ground that an action or bill for an accounting will not lie against the defendant.

"It is specifically alleged that the defendant fraudulently misappropriated the funds of the said Clinton Loan Association during a long period of time, and in his reports to the directors fraudulently concealed the real condition of the business from them.

"Amended complaint alleges that according to the constitution of the association, which is made a part of the complaint, the cashier shall receive and hold, subject to the board of directors, all moneys, notes and mortgages, bonds, policies of insurance, deeds and other valuables belonging to the association.

(256) "It is contended that defendant is not liable to an accounting, because he held subject to the paramount authority of the directors. If he disposed of the moneys and other property under such authority he may, in defense, show the orders of the board.

"I am of opinion that an account should be taken, and that the complaint states a cause of action."

Motion denied and demurrer overruled, and defendant appealed.

Robert O. Burton for plaintiff.
George Rountree for defendant.

MACRAE, J. The defendant was cashier of a joint-stock company, a copartnership doing a banking business. *Faison v. Stewart,* 112 N. C., 332; *Bain v. Loan Association, ibid.,* 248; *Hanstein v. Johnson, ibid.,* 253. By its articles of agreement, styled "The Constitution of the Clinton Loan Association," the duties of defendant as cashier were defined: "The cashier shall receive and hold subject to the order of the board of directors, all moneys, notes, mortgages, bonds, policies of insurance, deeds and other valuables belonging to the association." And by a further provision, "The board of directors, or any three of them,

together with the cashier, shall constitute a finance committee, whose duty shall be to loan, invest and collect the moneys and other securities of the association, as defined in the constitution and by-laws."

It will appear from the above quotations that the cashier, while he may not have been invested alone with all the powers generally delegated to cashiers of banks, was the custodian of all the funds, securities and effects of the association, "subject to the order of the board of directors." He occupied the relation of a fiduciary while a member of the copartnership; he was also its servant and agent. The reception of its effects constituted him not simply a debtor; he had no separate authority to disburse, but was bound to pay over on request or order; and (257) it was also provided that he should give bond for the faithful performance of his duties. It was not a case of deposit, like a bank or its depositor, where the bank could mingle the funds with its own and use the same until drawn out, and it was in no sense a loan, as in *Hervey v. Devereux,* 72 N. C., 463. It was clearly akin to a pure trust. "The relation of trust between the bank and cashier gives equity jurisdiction to compel an account for money misappropriated or other breach of trust." 1 Morse Banking, sec. 173.

The gravamen of the charge here is that the defendant, as cashier, received into his possession all the moneys, notes, etc., of the association, and failed and neglected to account for a part of the same, but converted and fraudulently misapporpriated it. The necessity of an account is set out in order that the true liability may be ascertained.

We have been impressed with the very interesting and ingenious argument of the learned counsel for defendant, to the effect that the defendant was neither baliff, guardian, nor receiver, and that consequently the old and now obsolete action of account would not lie against him. Without undertaking to decide whether this be so or not, we are entirely satisfied that a bill in equity for an account would be sustained, for, "where an agent is entrusted with money to be disbursed, his principal may sustain a bill against him for an account of his agency, and, in some instances, although no discovery is sought. Adams Eq., 321, note; *McCaskill v. McBride,* 17 N. C., 265. And we think it clear that, under our present practice, in which legal and equitable relief may be demanded and obtained in the one form of action, this defendant may be held to account, the action being to recover a balance alleged to be in the hands of defendant, and an account being necessary to ascertain the amount of said balance, if there be any. The old bill of discovery is dispensed with, but the law affords better facilities for reaching the desired end than was provided in the distinct equity system (258) once in practice. Code, sec. 579 *et seq.* Old forms have been done away with, but principles of substantial justice ever remain.

The association became incorporated; the corporation succeeded to its rights and liabilities, and becoming insolvent a receiver was appointed to take charge of and administer the assets. This action is not brought by a creditor, but it is the receiver who seeks through this means to secure the effects of the insolvent corporation for the benefit of all parties in interest and have distribution according to law. The Code, sec. 668 *et seq.* His allegation is, in substance, that those assets have been wasted by the defendant who had them in charge. If the defendant failed to turn over the property entrusted to him, he might have been sued by the association or its successor, the corporation. While one copartner had no action at law against another to recover the partnership property to which each had equal title, the equitable jurisdiction to compass a dissolution of the partnership and the administration of its effects has always existed. 1 Story Eq. Jur., sec. 463; *Marvin v. Brooks,* 94 N. Y., p. 81. This corporation having succeeded to the rights of the copartnership, is now in liquidation under our statute, and being under the control of the court, no one else can collect its assets but the receiver. Among its assets is this claim against the cashier of the copartnership association. If said cashier has not fully accounted for the property which came into his hands, the only remedy left is an action by the receiver against the cashier. If there were any ascertained balance in his hands there would be no necessity for an account, but the plaintiff, a receiver, alleges that a long account is necessary to enable the court to ascertain the sum for which judgment should be rendered against the defendant. Section
(259) 421 of The Code provides for a reference to state an account. If upon the taking of such account before a referee it should be found that defendant has had in his possession property of the association, and has not paid over the same to his successor, the opportunity is then offered the defendant to discharge himself of all liability by showing that such property has been disposed of by him by order of the directors, or has been dissipated in any way other than by his neglect or default.

It is further contended by the defendant that the complaint as amended is too vague and uncertain to require an answer. We reiterate what has more than once been said, that The Code has by no means dispensed with that certainty and regularity in pleading which is essential to every system adopted for the administration of justice. *Rowland v. Windley,* 82 N. C., 131. And that now, as in the old equity practice, "there should be such certainty in the averment of the title upon which the bill is found that the defendant may be distinctly informed of the nature of the case which he is called upon to meet" (Story Eq. Pl., sec. 241), that a charge of fraud in general terms is insufficient, and that to open a settled account specific errors should be pointed out. But if we should reject the charge of fraudulent misappropriation of the funds of the

association, we still have the distinct allegation that defendant, in the course of his agency, received into his possession, of the funds of the association now represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount; that a demand has been made upon him for the balance which went into his hands, and that he has failed to pay over the same to the receiver.

Here is the foundation for an action in the nature of an *indebitatus assumpsit,* upon an account stated, in which action it is not necessary to state the particular items constituting the debt. 1 Selwyn Nisi Prius, 68. And The Code, as we have seen, provides the means for discovery and the statement of an account to ascertain the balance in the hands of the defendant, if any there be. *Marvin v. Brooks, supra.* (260) Neither is there necessity in equitable proceedings of this character, if we look at it in the light of a bill for discovery and account, to state with precision each item of the balance claimed, for in such case there would be no necessity for a discovery or an accounting.

It may be proper, however, to remark that every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, for otherwise he will not be permitted to offer or require any evidence of such fact. A general charge or statement, however, of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to let them in as proofs. Story Eq. Pl., sec. 28.

Affirmed.

J. T. MEDLIN v. MARY BUFORD ET AL.

Action to Foreclose Mortgage—Deed, Void and Voidable—Fraud in Factum—Fraud by Representation or Treaty.

1. No rights can be based upon a deed that is *void,* whereas fair titles may be derived from a deed that is *voidable* only.
2. A deed into which fraud enters in the *factum* is absolutely *void,* whereas a deed that is obtained by fraudulent representation or concealment is *voidable* and can be relieved against only in equity.
3. Where one who could read was induced to sign a mortgage upon the representation of another that it was not a mortgage, but "only a lien that could be done away with in thirty days," and the grantor did not require the instrument to be read, the fraud was not in the *factum,* but in the "representation or treaty."

4. In such case the mortgage is good in the hands of a mortgagee who advanced money upon it to an agent of the mortgagor and had no notice of the fraud practiced upon the mortgagor.

5. In such case the fact that the note which the mortgage purported to secure was not signed by the mortgagor does not prevent the foreclosure of the mortgage.

6. Where parties for whom an attorney had invested money were requested by him to give a lien upon their property for $1,000, so that he could, in some way which he said would be safe for them, "put it out" and increase the income from the existing instrument, signed a mortgage without reading or having it read to them, acknowledged its execution before the clerk and entrusted it to the attorney, who obtained $1,000 on it from a lawyer and kept the proceeds for his own purpose: *Held*, such parties, by their gross negligence and blind confidence, invested the attorney with all the *indicia* of agency to obtain money on faith of the mortgage and were bound by his acts, although they received no part of the money.

(261) ACTION to foreclose a mortgage executed by the defendants to the *feme* plaintiff Sallie Medlin, and tried upon certain issues submitted to the jury at the June Term, 1893, of NEW HANOVER, before *Connor, J.*

The following are the issues and the responses of the jury to the same:

"1. Did the defendant Mary E. McGirt execute the note described in the complaint? Answer: No.

"2. Were the defendants induced to execute the mortgage by the false and fraudulent representations of John C. Davis? Answer: Yes.

"3. Did the defendants, or any of them, receive any money at all from plaintiff's attorney Cutlar for the note and mortgage sued on? Answer: No.

"4. Was John C. Davis the agent or attorney of the defendants? Answer: No.

"5. Was the fraud practiced on defendants, if any was practiced by John C. Davis in procuring the execution of said deed, brought to the knowledge of the plaintiff or her attorney before she accepted the same? Answer: No."

DuBrutz Cutlar, a witness for the plaintiffs, testified as follows:

(262) "I drew the mortgage; the blanks in the printed form are filled in by me; John C. Davis had no connection with the preparation of it; I knew very little of Mrs. McGirt; John C. Davis came to my office representing himself as the attorney for Mrs. McGirt, wishing to borrow $1,000; I had a mortgage signed by one R. H. Smith to Mrs. Medlin; I told Davis that he must find Smith, that I knew nothing of him; he said that he would fix it; he came to my office about one or two days before the execution of the mortgage in controversy and paid the

R. H. Smith mortgage. He asked me what I was going to do with the money. I told him that I would lend it out. I wrote my client at Mount Airy. Davis called again, and said that he wanted to borrow $1,000 for Mrs. McGirt. I agreed to let him have it upon the execution of the note and mortgage. He agreed to this. I prepared the note and mortgage and gave them to him. He brought them back signed. I paid him the $1,000 in gold which he had paid me in settlement of the R. H. Smith note. John C. Davis did not in any manner represent the plaintiff. I represented her; I was her attorney. I never heard or had brought to my knowledge anything wrong about the note and mortgage before paying the money. This paper, purporting to be the note in controversy, was written by me. I have had experience in my profession in regard to handwriting. I have noticed that members of a family write alike. I had no communication with Mrs. McGirt before letting Davis have the money for her. I gave Davis the money after he had brought back the note and mortgage, signed and probated, after he delivered same to me."

Cross-examination.—"This was the first transaction of a business character that I had with Davis. I had frequent transactions with him afterwards. The note of R. H. Smith was put into my hands in July by Mr. R. H. Beery for Mrs. Medlin. I had several notes and mortgages put into my hands by Mrs. Hancock, a sister of Mrs. (263) Medlin and daughter of Mrs. Grafflin. Five mortgages were put into my hands by Mrs. Hancock, Mrs. Grafflin and Mrs. Medlin in July. They were all for loans made by John C. Davis. I suspected that they were all forged, but did not know it. I examined the records for the Robert H. Smith mortgage and discovered that there was no conveyance on the records for the lot to Robert H. Smith, and I did not know any such man. Davis assured me, however, that there was such a man; that he had brought him down from Wilson with other workmen to assist in building the new Fifth Street Methodist Church, and that he, Smith, was then working in the country. The mortgage of Smith was canceled 23 July, 1891, by me as attorney for Mrs. Medlin. I also examined the records for the James L. Long mortgage for Mrs. Hancock. I could not find any such person or any conveyance on the records; it is canceled on the same day, 23 July. The mortgage of R. H. Smith was canceled 19 August, 1891, the same day the mortgage in controversy was filed for registration. I found that the Long mortgage was executed in the same way as the R. H. Smith mortgage, and suspected that it was forged and fictitious; there were no such persons. I thought that there was a resemblance between the signature to the R. H. Smith mortgage and the handwriting of John C. Davis. I told Davis that I could find no such person as the maker of the mortgage; that I was very unhappy

about it, as my clients also were. I had told Mr. Beery, the agent of my clients, that I could not find the parties to the mortgages or any evidence of the title in them. I learned, before this transaction, that Mr. Junius Davis had in his hands mortgages to Mrs. Oakley of the same suspicious character as the Long and Smith mortgages. I do not think that he showed them to me. John C. Davis paid me $1,000 in gold in settlement of the R. H. Smith mortgage. I do not know where he got the money. I did not threaten to prosecute him. Davis was
(264) anxious to get this money. He paid me only the ordinary fee for drawing the papers and searching Mrs. McGirt's title. Davis, at that time, stood as high as any man in the community. I went to see Mrs. McGirt. I did not go at the time of the transaction to see whether she got the money or signed the note. It was several months after this before I heard that there was anything wrong. When I went to see Mrs. McGirt she said that she did not sign the note; she never signed anything but the mortgage; that Davis told her that it was a lien upon her house; that Davis told her about what she had said in her answer. When Davis paid me the thousand dollars it was not with the understanding that he was to borrow again; he said that he had friends who would help him. There was no connection between the payment of the R. H. Smith mortgage and the loan to Mrs. McGirt. There was a mortgage of George Hall among the five given me by Mr. Beery. It was paid under the same circumstances. I loaned it all out to Davis's friends, LeGwin Brothers and others. The Hall mortgage was canceled 19 August, 1891. I loaned in all $10,000. I went to see Mrs. Girt just before I brought this suit. She said that she executed the mortgage supposing that it was a lien upon her house for $1,000 for the purpose of putting it with $2,000 that he already had in his hands for her children, and that he would pay her $25 per month."

Thomas Evans, a witness for the plaintiff, testified as follows: "I have made the comparison of handwriting a study. Thirty years ago I took lessons in counterfeit detection. I have given more than ordinary study to it. I have practiced it and think that I am an expert. The signature to the note is in the same handwriting as the signature on the mortgage, as to the name of Mary E. McGirt. They are very similar; one is in a larger hand than the other. They are more similar than usual; the note is the larger."

(265) The following evidence was submitted on the part of the plaintiff:

The note and mortgage executed by Mary McGirt, Mary Buford and Elizabeth Buford to Sallie Medlin, dated 12 August, 1891, acknowledged and duly recorded. The mortgage was partly written and partly printed on pink paper.

Mrs. McGirt, one of the defendants, testified as follows: "I knew John C. Davis fifteen years. I am a member of the Fifth Street Methodist Church; have been for eleven years. John C. Davis was a member of the same. My husband's life was insured for $2,000 for my children and myself. He died August, 1890. I went to see Mr. Davis. He advised me to qualify as guardian. He said he would give the bond; he went on my bond. I let him put my money out at interest. This continued for a year, when he came and said that he wanted to make a proposition; that he had the $2,000 out at such good interest that if I would give a lien on my house for $1,000 he would put it out with the $2,000 and pay me $25 a month. The afternoon of that day or the morning of the next he came back. I would not take any steps until I consulted with my mother. I called my mother in. He brought the paper (mortgage); my mother protested against any mortgage on the house. He said that it was no mortgage, that it was a perfectly safe transaction; that she could do away with it in thirty days; he did not read it. We signed the paper under the circumstances. He took the paper off and came back the next day with Colonel Taylor. Colonel Taylor presented the paper and asked us if it was our signature. We acknowledged it. It was never read to us until last year. I first saw the note last fall, after the suit was commenced. I never signed the note. I did not know, until several days after it was signed, that the paper I did sign was a mortgage. I heard that John C. Davis was involved about a week after I signed it. I went to see him. I told him what I had heard." (The plaintiffs objected to the declarations of the defendant to John C. Davis, after the signing of the paper. (266) Objection overruled; the court admitted it as corroborative evidence. The plaintiff excepted.) "I told him that I was nearly crazy. I asked him where that paper was that he had me to sign the week before, concerning our house. He said that he would give it to me in a day or two." (The plaintiffs objected to the declarations of the defendant to John C. Davis after the signing of the paper. Overruled; admitted as corroborative; exception by plaintiff.) "He would never tell me where it was. I did not know that it was in Mr. Cutlar's hands for some months after. I went to Mr. Davis a good many times for the paper. I did not get it or learn where it was. I do not consider, in the case of that mortgage, that I had any attorney; it was an unsought-for thing. I never paid him any fees; he never asked for any. I remember the conversation with Mr. Cutlar. I first saw the note last fall when Mr. Cutlar brought it. Mr. Cutlar said that he had heard that I had hard feelings towards him. I told him that I had; that when he knew that John Davis was a fraud, he took the mortgage against me. Mr. Cutlar said that he did not know that Davis was a fraud."

Cross-examination.—"I first knew Davis when he became superintendent of the Sunday school. I went to him about collecting the insurance money. He advised me to become guardian of my children. He and Mr. Summerell became my sureties; he had the money as surety. He never came to my house until the mortgage transaction. I went to his office often. He said that he would advance $1,000 of his own money. He said that he had the $2,000 out. He paid me $30 the latter part of November, 1890, as the interest on my $400. This was all he ever paid me. He said that he would make arrangements to pay me monthly. I did not know then what a lien was. I know now that a mortgage is a lien. He said that it was a transaction between us. We protested against doing anything to endanger our home. I lost confidence in him (267) on the Monday following. I have a good education—a good common-school education. I expected Davis to hold the paper. Mr. Cutlar said he did not know at the time that he took the mortgage that Davis was a fraud. Davis never gave me any paper to show for the $2,000. Mr. Summerell, the surety, paid the $1,600, the children's money."

Mrs. Mary Buford, one of the defendants, testified as follows: "I am one of the defendants. I signed the pink paper, the mortgage. I knew John C. Davis. I have known him by sight for several years. I knew him well after he became superintendent of the Fifth Street Sunday school. I am a member of Fifth Street Church. I had known him two years before I signed the mortgage. I was not in the room the first time Davis came. My daughter told me the day that he came what he said. She said that he had proposed to take a deed for $1,000 to put with the $2,000 that he had. When he came again I was in the room. He said that he wanted to do us a favor; that we give a deed for $1,000 to be put with the $2,000 that he had. I said that I would not sign any mortgage to endanger our house. He said that the transaction was a safe one; that it was not a mortgage. He was indignant. He had only one paper. No other paper was signed by my daughter. He came back the next day with Colonel Taylor and brought the mortgage or pink paper; no other. We acknowledged our signatures. I had several conversations with Davis afterwards. I told him that I wanted the paper back as he had promised; I did this repeatedly." (Plaintiff objects and excepts. Defendants offer to show his declarations. Objected to; objection sustained. Exception by defendants.) "I signed the paper without reading it, because I thought what he said was true."

Cross-examination.—"I thought that it was a lien; Davis said so. Mrs. McGirt told me there was a mortgage found among John C. Davis' papers to us securing the $1,000. I do not know why I did not (268) ask him to read the paper; I can read. Colonel Taylor asked me

if that was my signature. I was present when Mr. Cutlar came. He had the paper. He said that he did not know that John C. Davis was a fraud when he took the mortgage. I expected Colonel Taylor to give the paper to John C. Davis."

Mrs. McGirt, one of the defendants, recalled: "John C. Davis nor any one for him gave me any mortgage or security for the money. I never had any such paper."

John D. Bellamy, Jr., a witness for the defendants, testified as follows: "No mortgage was ever given to me or my father for Mrs. McGirt."

Mr. DuB. Cutlar, a witness for the plaintiffs, was recalled and testified as follows: "Davis gave me an insurance policy on the house, payable to Mrs. McGirt and Mrs. Buford and assigned to Mrs. Medlin by the agent for $500, dated 1 September, 1890, expiring 1 September, 1891; increased $200 26 August, 1891. It may have been left with me at the time or some days afterwards. It was brought by Davis."

Mrs. McGirt, one of the defendants, was again recalled and testified as follows: "On Saturday after I signed the mortgage on Tuesday, Davis came and asked me to let him see my policy. He said that my policy was not for enough. He proposed to increase it. He took the policy, and I never saw it again until now. I never authorized him to deliver it to Mr. Cutlar or Mrs. Medlin. I did not pay the premium for the increase. I believed him to be a truthful, honest man. He had money of mine in his hands to pay the insurance."

Counsel for the plaintiff requested his Honor to charge as follows: "If the jury believe that J. C. Davis took the mortgage deed from Mr. Cutlar as attorney for Mrs. Medlin, under the circumstances testified to by Cutlar, and Davis brought back the deed properly signed and proved before the Clerk of the Superior Court of New Hanover County, that Mr. Cutlar had the right to infer that Davis was authorized to act for Mrs. McGirt, and if said Cutlar allowed said Davis to (269) have the money under the circumstances testified to, and Mrs. McGirt did not get a cent of it, Mrs. McGirt would be bound by Davis' acts." His Honor refused the instruction, and plaintiff excepted.

The case being given to the jury, they returned the verdict as hereinbefore stated.

The plaintiff moved for a new trial on the following grounds:

1. On the ground of improper admission of the declarations to John C. Davis of the defendants after the signing of the mortgage.

2. That the verdict was palpably contrary to the weight of the testimony.

3. For failure to give instructions asked for.

4. Misdirection and error in his Honor's charge to the jury.

His Honor overruled the motion. The plaintiff then moved for a judgment on the verdict, contending that on the whole evidence, as testified to by both the plaintiff and the defendants' witnesses, plaintiff was entitled to a judgment. His Honor denied the motion, gave judgment for the defendant, and plaintiff appealed.

J. D. Bellamy, Jr., for plaintiff.
T. W. Strange for defendant.

SHEPHERD, C. J. The first question to be considered is, whether the mortgage executed by the defendants to the plaintiff is absolutely void by reason of fraud in the *factum*. If such be the case, it would be immaterial whether the plaintiff is an innocent party, since, the deed being a nullity, no rights could be asserted under it in favor of any person whomsoever. It is this very serious consequence which influences courts to adhere strictly to the old and well-settled principle applicable
(270) to cases of this character; and, tested by these, we have but little difficulty in reaching the conclusion that the fraud in the present instance was in the representation or treaty, and not in the *factum*. A deed made by reason of this species of fraud is often said to be void; but it will be found, upon examination, that this term is indiscriminately used in connection with any deed that may be avoided, either at law or in equity. But, as is said in *Somers v. Brewer*, 2 Pick., 191, the distinction between void and voidable deeds becomes highly important in its consequences to third persons, "because nothing can be founded upon a deed that is absolutely void, whereas from those which are only voidable fair titles may flow." The distinction is clearly drawn in *McArthur v. Johnson*, 61 N. C., 317. In that case a person proposed to convey a tract of land in trust, and his brother undertook to have the deed drawn, but, without the knowledge of the vendor, inserted therein a conveyance also of another tract in trust for himself, and upon presenting the deed for execution, in reply to a question by the vendor, said that it was "all right," whereupon the latter executed it without reading it or hearing it read. It was held that the conveyance was valid at law, there being no fraud in the *factum*. The Court, after giving the surreptitious substitution of one deed for another, and the false reading of a deed, upon request, to a blind or illiterate person, as examples of fraud in the *factum*, then proceeds to speak of what is meant by fraud in the representation or treaty. "In all of the cases it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but

refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it." The opinion quotes with approval the following language from 1 Shepherd's Touchstone, 56: "If the party that is to seal the deed can read himself, (271) and doth not, or, being an illiterate or blind man, doth not require to hear the deed read or the contents thereof declared, in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but equity may correct mistakes, fraud," etc.

In 3 Washburn Real Prop., 252, it is said: "But if the party can read, it is not open to him after executing it to insist that the terms of the deed were different from what he supposed them to be when he signed it. . . . And one who executes a deed cannot avoid it on the ground of ignorance of its legal effect. The rule on the subject is thus stated: 'A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practiced upon the grantor in procuring his signature and seal—a fraud which goes to the question whether the deed ever had any legal existence.' The law does not reach the cases of deeds procured by *undue influence* over the grantor, if he be of legal capacity. The only relief in such cases is in equity."

Applying these principles to the facts of this case as related by the defendants, who testified in their own behalf, it would seem clear that the mortgage in question is not void, but voidable only in a court of equity. The defendant Mrs. McGirt stated that she had a good common-school education, and it appears that neither she nor the other defendant read the deed or requested that it be read. They knew that the object of the deed was to raise $1,000, which was to be invested together with the $2,000, which, it appears, had already been invested by Davis. It is true that Davis deceived them that the deed was not a mortgage, and that they "could do away with it in thirty days," but they admit that they knew they were executing a "lien" upon their house for $1,000, although they say they did not know it was the same as a mortgage. If they had read the deed they would have discovered that it was a mortgage to the plaintiff, securing $1,000, which she afterwards advanced upon the faith of the mortgage, through her attorney, (272) Mr. Cutlar. These and other circumstances relied upon by the defendants were not sufficient, in our opinion, to establish fraud in the *factum*. Indeed, the case does not seem to have been tried upon this theory, as the issue itself appears to have been framed for the purpose of presenting the proper view of the tendency of the testimony, which is that the deed was procured by fraud in the representation or treaty. To hold otherwise would, it seems to us, be productive of the most alarming results as to the security and stability of titles in the hands of innocent purchasers who have acted upon the faith of conveyances actually

executed by the owners, and, as in this case, openly and freely acknowledged before the proper authority to be their act and deed.

The deed then being voidable only in a court of equity, and the jury having found that neither the plaintiff nor her attorney had notice of the fraudulent conduct of Davis in procuring the execution of the same, it becomes necessary to determine whether the instruction asked by the plaintiff should not have been given. This instruction relates to the issue involving the agency of Davis in making the transaction with Mr. Cutlar, the plaintiff's attorney, and must be considered in connection with the facts admitted in the testimony of the defendants. Could the defendants, under these circumstances, be permitted to say that they were not bound by the acts of Davis? "It is a general and just rule that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint. Suppose him to be prevailed upon by fraudulent representations to execute a deed without asking advice of friends or counsel: he has *locus penitentiæ* when he goes before a magistrate to acknowledge it." *Somers v. Brewer, supra.* These general principles are well sustained and illustrated by several decisions of this Court and the numerous authorities therein cited, and are applicable, we think, to the question under consideration. *Railroad v. Kitchen,* 91 N. C., 39; *Vass v. Riddick,* 89 N. C., 6; *Barnes v. Lewis,* 73 N. C., 138. According to the statements of the defendants, they intended to give a lien upon their property for $1,000. This money, it must necessarily be inferred, was to be raised on the faith of the lien, and it was to be submitted to Davis, who was "to put it out" with the $2,000 he had already invested, so that the defendant could get $25 per month. The defendants, without reading the mortgage, executed the same, and it remained in the hands of Davis. Davis came the next day with the clerk of the court (Taylor), and the defendants acknowledged the due execution of the said mortgage, and it cannot be doubted that it remained in the hands of Davis in pursuance of the arrangement agreed upon. As we have said, had they read the instrument they would have discovered that it was a mortgage to the plaintiff for the sum of $1,000; and, so far as this case is concerned, it must be assumed that they were aware of its contents. At any rate, they admit that they knew that it was a lien for that amount, and under these circumstances they per-

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mitted the said Davis to take away the instrument obviously for the purpose of raising the money. In other words, by their gross negligence and blind confidence in Davis, they invested him with all the *indicia* of agency to obtain the money of the plaintiff upon the faith of this mortgage, and, as between the plaintiff and these defendants, who are all innocent parties, it cannot be questioned as to who should bear the loss. We think the instruction should have been given, and (274) that because of its refusal there should be a new trial.

Of course, if upon another trial it should appear that Mr. Cutlar had notice of facts sufficient to put him upon inquiry, the plaintiff would be affected by such notice and the defendants be entitled to relief. We have examined the authorities cited by the counsel for the defendants, and see nothing in them which seriously conflicts with the principles we have declared in this opinion. The fact that the note was not executed by the defendants does not in itself prevent a foreclosure of the mortgage. 1 Jones Mortgages, 353.

New trial.

Cited: Dixon v. Trust Co., post, 279; *Medlin v. Buford,* 117 N. C., 287; *Cutler v. R. R.,* 128 N. C., 480, 481; *Gwaltney v. Assurance Co.,* 132 N. C., 928; *Griffin v. Lumber Co.,* 140 N. C., 519; *Tarault v. Seip,* 158 N. C., 378.

NANCY DIXON v. WILMINGTON SAVINGS AND TRUST COMPANY.

Action to Declare Mortgage Void—Deed, Void and Voidable—Fraud in Factum—Fraud in Representation or Treaty—Innocent Holder.

Where, under the fraudulent representation of her agent, whom she trusted implicitly, a party executed to a third party a mortgage on her land, without reading it or requesting it to be read to her, and delivered it to the agent, who obtained the money thereon and kept the proceeds for his own purposes: *Held,* in an action to have the mortgage declared void, that the fraud being in the representation or treaty, and not in the *factum,* the deed was not void, but only voidable in a court of equity, which will not grant relief against an innocent purchaser who has been induced to part with his money on the faith of a mortgage duly executed according to law.

ACTION, heard on complaint and demurrer at the Fall Term, 1893, of NEW HANOVER, before *Boykin, J.*

The plaintiff, complaining against the defendants, alleges: (275)

"1. That she is administratrix of the estate of R. E. L. Dixon, deceased, having qualified as such on the ____ day of December, 1893.

"2. That her intestate, R. E. L. Dixon, was the owner of a certain note and deed of mortgage upon the following piece or parcel of real estate situated in the city of Wilmington and described as follows: . . .

"3. That the said note and mortgage was for the sum of $300, executed on 31 December, 1883, by the plaintiff Nancy Dixon to Thomas F. Bagley as trustee; and after $100 had been paid upon the same on 1 July, 1884, by the said Nancy Dixon, the plaintiff, the said note and mortgage were both assigned and transferred to the said R. E. L. Dixon, the said intestate, by the said Thomas F. Bagley, trustee, the consideration being $200 paid to the said Bagley by the said R. E. L. Dixon on the same day that the said assignment or transfer of the said mortgage was made, to wit, 11 February, 1886; and on the same day and date a record of said assignment and transfer was entered upon the records of New Hanover, on the margin of the page on which said mortgage was recorded. And some time thereafter, to wit, 24 January, 1887, the said R. E. L. Dixon wrote on the margin of the page of the said records of New Hanover County an agreement not to foreclose said mortgage until after the death of his mother, the said Nancy Dixon, this memorandum being a copy of an agreement written upon the mortgage itself about the time the same was assigned to him by the said Thomas F. Bagley, trustee.

"4. That subsequently to the date above mentioned, and subsequently to the death of the said R. E. L. Dixon, the said Thomas F. Bagley, without the consent of the said R. E. L. Dixon, or any one acting for him with authority so to act, and without any authority from the plaintiff Nancy Dixon, partially erased from the record of New Hanover the memorandum of the assignment made by him as aforesaid, (276) and, without any authority so to do, did, on 4 June, 1889, mark the said mortgage fully satisfied and cancel the same. And this act of the said Thomas F. Bagley, plaintiffs are advised, was null and void, and that the said note and mortgage remains and is now in full force and effect.

"5. That some time thereafter, to wit, ____ March, 1890, there was placed upon the record in the register of deeds' office in New Hanover County a paper-writing purporting to be the deed of mortgage from the said Nancy Dixon to the Wilmington Savings and Trust Company for the sum of eight hundred ($800) dollars, bearing date ____ March, 1890, which paper-writing this plaintiff Nancy Dixon declares to be fraudulent and void. And she alleges as follows: That she never executed any note or deed of mortgage or other conveyance to the Wilmington Savings and Trust Company; that about the latter part of the fall or

beginning of the winter of 1889, one John C. Davis, well known to her as a prominent member of her church, a leader in the Sunday school of said church, to wit, the Fifth Street Methodist, and a prominent lawyer in the city of Wilmington, whom she had known from his boyhood, and who had been intimate in her family, approached her with the statement that he knew her to be a hard-working woman, and that he had been endeavoring for some time past to find a way in which he could be of service to her, and that he had at last found a way; that there was one R. M. Williams living in the city of Wilmington who wanted to borrow from him on bond and mortgage the sum of $800, and that he (Davis) intended to lend him the money, of which he had at that time all he desired, and that the interest from said loan he intended to give to the plaintiff Nancy Dixon, and he was also going to turn over the note and mortgage which the said Williams was to give him in order that Williams might think that she had loaned the money, but that as life was very uncertain, and in the event of her death no one would know that (277) he (Davis) and not she had made the loan, he desired her to give him a paper-writing setting forth the fact that the loan was made by him, and he was giving her the interest thereon. This she consented to do, and signed the same without reading the same, her eyesight being very defective, and having the most implicit confidence and reliance upon his honesty and integrity, and was induced thereby to sign the same without having it read to her. And she alleged that she signed the same in the presence of the said John C. Davis only, and that there was no witness to the same, but that immediately upon her signing it he took it from the table upon which it was lying and carried it away; and this, she asserts, is the only paper-writing of any nature or any kind that she signed or gave to any one on or about the period mentioned, or for many years previous thereto; but she is informed and believes, and upon such information states, that the said deed of mortgage to the Wilmington Savings and Trust Company purporting to be signed by her is the paper-writing which was obtained from her by fraudulent acts of the said Davis; and she alleges and charges that if it be the same, that her signature to the same was obtained through fraudulent misrepresentations and fraud, and that the paper-writing purporting to be a mortgage is absolutely without consideration, fraudulent and void.

"6. That for about six or eight months the said Davis did pay her about $5 a month, which he said was the interest given to him by Williams; and a short time after she signed the paper he also gave her a note and mortgage for $800, purporting to be signed by one R. M. Williams, but she was informed and advised, and upon said information states, that no such person as R. M. Williams ever existed, and his signature to both the note and mortgage was forged by the said Davis; and

just after the arrest and imprisonment of the said Davis, when, for the first time, she learned that the Wilmington Savings and Trust
(278) Company had a deed of mortgage upon her property, she made diligent inquiry, but could neither find that any such person as R. M. Williams lived or had any property in the city of Wilmington, and that he was not the owner of the property described in the deed of mortgage given to her by Davis, and which purported to have been signed by the said Williams."

Wherefore, the plaintiff prays judgment:

"1. That the said paper-writing above described, purporting to be a deed of mortgage from Nancy Dixon to the Wilmington Savings and Trust Company, be decreed to be null and void, and ordered to be canceled.

"2. That if such paper-writing should be declared valid as a mortgage, that this court will decree it to be a second mortgage, subject to the payment of the amount remaining due and unpaid upon the note and mortgage described in this complaint as executed by Nancy Dixon, and Thomas F. Bagley, trustee, and by him assigned for value to plaintiff's intestate, R. E. L. Dixon.

"3. That the Wilmington Savings and Trust Company be restrained from foreclosing their alleged mortgage until this suit is ended.

"4. That a commissioner be appointed to sell the said property under the provisions of the said mortgage from Nancy Dixon to Thomas F. Bagley, and after paying to the plaintiff so much of the proceeds thereof as will satisfy and pay the balance due upon said mortgage to plaintiff's intestate, to pay over the residue to the plaintiff, the said Nancy Dixon.

"5. And for the costs of the action."

The defendant trust company demurred to the complaint of Nancy Dixon individually, which is stated in the fifth and sixth articles of the complaint, for that it does not state facts sufficient to constitute a cause of action, in this: "That the facts therein stated do not constitute
(279) such fraud upon the plaintiff Nancy Dixon inducing her to sign the mortgage to the defendant as is liable against a *bona fide* purchaser for value without notice, and the complaint does not allege that the defendant The Wilmington Savings and Trust Company participated in any fraudulent practice or had any notice of any such practices, or that it did not pay full value for such mortgage."

The demurrer was sustained, and plaintiff appealed.

T. W. Strange for plaintiff.

George Rountree for defendants.

SHEPHERD, C. J. However much we may sympathize with the plaintiff, who, like the defendants in the case of *Medlin v. Buford, ante,* 260,

has been cheated and defrauded by reason of her perfect confidence in the rectitude and piety of John C. Davis, we are unable to see how we can grant her the relief prayed for. To do so would amount to the abrogation of some of the plainest principles of jurisprudence and so unsettle the law that but little confidence could hereafter be placed in those solemn assurances of title so necessary to the welfare and repose of society. The grave results of holding a deed, executed under the present circumstances, to be void and not voidable merely, are mentioned in the case of *Medlin v. Buford, supra,* in which will also be found an enunciation of the principles which apply to this appeal. There is no pretense here that the plaintiff did not intend to sign and deliver the instrument in question. She alleges that she consented to do so, and executed the same without reading or having it read to her. In addition to the authorities cited in *Medlin's case, supra,* we will add the case of *School Com. v. Kesler,* 67 N. C., 448, in which it was held that if a grantor, although an illiterate man, executes a deed without demanding that it be read, or elects to waive a demand for the reading, the deed will take effect. See, also, 1 Devin Deeds, 225, (280) where it is said: "It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared, if required; but if the party who should deliver the deed doth not require it, he should be bound by the deed, although it be penned against his meaning." It being very clear, then, that the deed is not void by reason of fraud in the *factum,* it must follow that it can only be avoided in equity, and for the reasons given in *Medlin's case,* that Court will never grant relief against an innocent party who has been induced to part with his money on the faith of a mortgage duly executed according to law. By the gross negligence of the plaintiff she allowed herself to be imposed upon by the fraudulent representations of Davis, and executed a mortgage directly to the defendant trust company. She delivered this mortgage to Davis, and upon the faith of this deed, acting presumably as her agent, he obtained the money. This is one of those "hard cases" that are sometimes called "quicksands" of the law, but the improvidence of the few should not tempt the courts to depart from those well-settled principles upon which depend the safety and security of the many. The judgment sustaining the demurrer is

Affirmed.

(281)

H. L. HALL, ADMINISTRATOR OF D. M. McDONALD, v. THE CITY OF FAYETTEVILLE.

Taxation—Non-residents—Situs—Fiduciary Funds—Remedy Against Illegal Tax.

1. Though generally personal property is taxable at the domicile of the owner, the Legislature may, in the absence of constitutional restrictions, subject bank stock, money or solvent credits to taxation either at the domicile of the owner, the constructive *situs*, or at the place where the property is actually situated.
2. The charter of a town authorizing the taxation of the property of non-residents "doing business within the limits" of the town, "upon their respective avocations and business, stock in trade, *solvent credits* growing out of their business located as above, just as though they were actual residents," does not subject to taxation money held by a non-resident administrator of a decedent who died in the town, although the administrator has an office in the town.
3. An injunction will not lie to restrain the collection of an invalid or excessive tax. To obtain relief, one must pay the tax and pursue the remedy given by section 84, chapter 137, Acts of 1887.

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

CONTROVERSY without action, heard before *Bryan, J.*, at May Term, 1894, of CUMBERLAND, upon facts agreed, as follows:

"1. That H. L. Hall is and was on 1 June, 1892, administrator of D. M. McDonald, and as such had in his hands $5,172 on 1 June, 1892, the same being deposited in the Bank of Fayetteville, Fayetteville, N. C.

"2. That H. L. Hall is and was on 1 June, 1892, a resident of Black River Township, and held and now holds the office of Register of Deeds of Cumberland County, with office at Fayetteville, N. C., and as such register of deeds spends a large part of his time in Fayetteville.

"3. That D. M. McDonald resided and died in Fayetteville,
(282) and his family have since his death resided there.

"4. That H. L. Hall, administrator, listed the said $5,172 for taxation, for State and county purposes only, in Black River Township, and the list-taker for Fayetteville put the same on the tax books for Fayetteville for municipal taxation.

"5. That S. W. Tillinghast is tax collector for Fayetteville, and also for the city of Fayetteville, and as collector for Fayetteville has levied on the funds of the said H. L. Hall, administrator, to the amount of $51.72, the same being tax claimed by Fayetteville for the year 1892, at the rate of 1 per cent on the said sum of $5,172.

"6. That as a part of this 'case agreed,' all private acts of the General Assembly in any way affecting 'Fayetteville,' or 'The City of Fayetteville,' are hereby made a part of said case.

"7. That this 'case agreed' is adopted and agreed upon by the parties plaintiff and defendant as a substitute for and in lieu of an application for a restraining order or injunction against the defendant."

The contentions of the parties being as follows: The plaintiff contends:

"1. That the defendant has no legal right to collect the said $51.72 as municipal taxes for 'The City of Fayetteville,' or 'Fayetteville.'

"2. That the injunction against the defendant should be granted."

The defendant contends:

"1. That the said $5,172 was properly listed for the purposes of municipal taxation in Fayetteville, and the plaintiff is legally liable for the said tax.

"2. That no injunction should be granted against the defendant."

His Honor, being of the opinion that the plaintiff was not entitled to a restraining order, adjudged that the plaintiff was liable for the tax, and that the defendant recover the amount of $51.72 and the costs of this controversy.

From the foregoing judgment the plaintiff appealed.

Samuel H. MacRae for plaintiff. (283)
H. McD. Robinson for defendant.

AVERY, J. As a general rule, personal property is taxable at the domicile of the owner, *mobilia sequantur personam* being usually the governing maxim. 25 A. & E., 133; Cooley Taxation, 322-369. The Legislature, in the absence of constitutional restrictions upon its powers, is authorized to regulate taxation by imposing its burdens upon bank stock, money or solvent credits, either at the domicile of the owner, which is the constructive *situs,* or where such property is actually situated. *Moore v. Commissioners,* 80 N. C., 154; *Winston v. Taylor,* 99 N. C., 210; 25 A. & E., 138. For the purpose of fixing the locality in which personal property is liable to taxation, the holder of the legal title thereto is deemed the owner. 25 A. & E., 120. Hence, unless the statute cited in express terms subjects the money held by the administrator Hall in his fiduciary capacity at the place where it is actually deposited, or where the decedent resided, it is liable only at the place of his residence in Black River Township.

The material provisions of the statute which came before the Court for construction in *Moore v. Commissioners, supra,* remain unaltered. Private Laws 1883, ch. 112, sec. 6; Private Laws 1885, p. 975; Private Laws 1893, ch. 153, secs. 1 and 54. The Act of 1885 applies by its express terms only to nonresidents "doing business within the limits" of the city, "upon their respective avocations and business, their stock in trade, bank stock, *solvent credits* growing out of their business located

as above, just as though they were actual residents." The statute cannot be construed as applying to money held by the defendant in the capacity of the administrator of the decedent McDonald, either because he was at the time of his death a resident of the city of Fayette-
(284) ville, or because as register of deeds the defendant had an office in the city. Money held by him in his fiduciary capacity was not within the meaning and intent of the law subjecting his own property, even if we concede that the language of the act is broad enough to include money held by him in his individual right.

It was admitted by counsel for the plaintiff that the plaintiff was not entitled to a restraining order, but must pursue the remedy prescribed by statute. *R. R. v. Reidsville,* 109 N. C., 494; Laws 1887, ch. 137, sec. 84. We have, however, passed upon the question discussed by counsel because it seemed to be important that it should be settled. The plaintiff may still pay the tax and pursue his remedy before a justice of the peace, if he has not already paid it.

There is no error.

Cited: Armstrong v. Stedman, 130 N. C., 221.

THOMAS SCARLETT v. JAMES NORWOOD.

Action by Father for Damages for Seduction of Daugher—Loss of Services.

A father, being entitled to the services of his minor daughter, and it being incumbent on him to pay the expenses attendant upon her illness and death, has a right of action against her seducer for the loss of such services, etc., and the jury may add punitory damages for the injury to his affections and the destruction of his household.

ACTION heard before *Bynum, J.,* upon complaint and demurrer, at August Term, 1894, of ORANGE, sounding in damages for loss of services of the infant daughter of the plaintiff, and for damages by reason
(285) of the criminal connection, seduction, enticing, debauching and degrading said daughter, thereby damaging said plaintiff, and for medical care, nursing and attendance upon said daughter during her illness, as well as for the services rendered the said Norwood by said daughter.

The demurrer was sustained, and plaintiff appealed.

John W. Graham for defendant.

No counsel contra.

CLARK, J. This was an action brought by the father, alleging seduction of his infant daughter, loss of her services, expenses of her illness, her death, injury in his affections, etc. It is the common-law action of seduction, and we know of no statute depriving the father of his remedy in such cases. If an action on facts can be maintained for wrongful act causing death, under the provisions of The Code, sec. 1498, it could be brought only by the personal representative, as is rightly contended by defendant's counsel. But the plaintiff is entitled to any relief to which the facts stated in his complaint (if proven) entitle him. *Patrick v. R. R.*, 93 N. C., 422; *McNeill v. Hodges*, 105 N. C., 52; Clark's Code (2 Ed.), pp. 150, 151. Here the allegation of death caused by wrongful act of defendant is only a circumstance in aggravation of damages in the action for seduction. *Hood v. Sudderth*, 111 N. C., 215, relied on by defendant, has no application. That case held that when the woman seduced is of age, there being no loss of services to the father, the only cause of action in such case is the tort, the fraud and deceit causing injury to her person and good name. It held that the woman herself can in such case maintain the action, being the party injured. But here, the girl being a minor, the father was entitled to her services; it was incumbent upon him to pay the expenses attendant upon her illness, and the jury, upon common law and immemorial (286) precedent, might add punitory damages for the wrong done him in his affections and the destruction of his household. He is the party in interest, and can maintain the action under The Code, section 177, and, it has been ruled, could have the defendant held in arrest and bail. *Hoover v. Palmer*, 80 N. C., 315.

Whether, when an action for seduction of a minor is brought by the parent, another action can be brought by the girl herself for the injury to her person, suing by next friend, as in *Smith v. Richards*, 29 Conn., 232, or after her arrival of age, is an interesting question not before us. It is settled that this can be done when an infant has been injured by the negligence of another. *Bottoms v. R. R.*, 114 N. C., 699, 708. It is such action, if it can be brought by the minor, as would die with her person, under The Code, sec. 1491 (2); *Hannah v. R. R.*, 87 N. C., 351. That section does not apply to this action brought by the father, which is not for the injury to the person and good name of the daughter, but for loss of services, expenses incurred by him and injury in his affections. Hence, it does not abate at her death. *Wilton v. Webster*, 32 E. C. L., 491; *Ingram v. Miller*, 47 Barb. (N. Y.), 47. In overruling the demurrer there was

Error.

SHEPHERD, C. J. (concurring). I concur in the conclusion that the father can maintain the action for loss of services, etc., but I do not concur in the reasoning of the opinion, and especially in that part which approves the doctrine laid down in *Hood v. Sudderth,* that a woman can maintain an action for her own seduction. *Volenti non fit injuria.*

BURWELL, J. I concur in the opinion of the *Chief Justice.*

Cited: Abbott v. Hancock, 123 N. C., 102; *Willeford v. Bailey,* 132 N. C., 404; *Snider v. Newell, id.,* 616, 624, 625; *Bolick v. R. R.,* 138 N. C., 372; *Howell v. Howell,* 162 N. C., 287; *Tillotson v. Currin,* 176 N. C., 482.

(287)

W. J. RODDEY v. J. N. TALBOT.

Action on Note—Contract—Consideration—Payment of Premium on Life Insurance Policy.

1. A father gave a note for the first premium on a life insurance policy, taken out by his son, in consideration that the policy should be made payable to him and his heirs. The policy, when issued, was made payable to him, and after his death to the son, and he made no objection until after the maturity of the note: *Held,* that the failure of the maker of the note to give notice of his objection to the form of the policy within a reasonable time after acquiring knowledge of its precise terms was a waiver of his right to object to it.
2. The benefit of the policy for the year, with the privilege of continuing it in force for the lifetime of the father, constituted a partial consideration for the note given by him.
3. The fact that the note was given to an individual instead of to the company which issued the policy is immaterial.

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

ACTION, tried before *Bryan, J.,* and a jury, at May Term, 1894, of CUMBERLAND. The issues and responses were as follows:

"Did the defendant J. N. Talbot, on 18 December, 1890, execute a note to W. J. Roddey for $97.65, payable on 1 October, 1891? Answer: 'Yes.'

"2. Was there a total failure of consideration of the note made by J. N. Talbot to W. J. Roddey? Answer: 'Yes.'"

This action was instituted in a justice's court upon a note for $97.65, executed by the defendant to the plaintiff, dated 18 December, 1890, and payable 1 October, 1891. The plaintiff pleaded the general issue and

total failure of consideration. There was an appeal to the Superior Court. The plaintiff proved the loss of the note and its execution.

Mr. H. F. Adicks, witness for the plaintiff, testified: "I drew (288) the note for $97.65, dated 18 December, 1890, and due 1 October, 1891, at the Bank of Fayetteville, signed by the defendant and payable to the plaintiff. I was selling life insurance. Mr. Roddey was a banker and the agent of the Equitable Life Insurance Company. The note was given for money to be advanced by Mr. Roddey for premium on policy on the life of the defendant's son. His son was a minor. Mr. Roddey lived in South Carolina. Roddey advanced the money to the Equitable Company. He advanced $93; $97.65 included the interest. I turned over to the assured a receipt for the money. The policy is the receipt. I also signed a receipt for Mr. Talbot for the note in suit, the consideration, etc. The note was for $97.65. Mr. Talbot did not ask Mr. Roddey to advance anything. I approached the defendant, made a proposition and he accepted. It was: that as his son was not of age, if the defendant would give a note Mr. Roddey would carry it until 1 October, interest added in. The Equitable required the premiums to be paid in cash." The plaintiff asked the witness whether the proposition in question was reduced to writing, and if there was any other proposition that was not reduced to writing. The witness answered that all propositions were in writing. The witness further testified that the defendant agreed to sign the note with the understanding that the young man, his son, was to pay him in labor—that he was working for him. He then objected that his son might run off and leave him before the year was out, and requested that we should make him the beneficiary. The witness further said, upon cross-examination, that he did not propose to credit $20 upon the note upon the defendant paying him $5. The defendant asked the witness how much he was to get out of the $97.65. The plaintiff objected. Objection overruled, and plaintiff excepted.

The witness answered: "I was working for wages, and it made no difference whether the note was paid or not. Mr. Wiley Malloy was with me at the time of this transaction in 1890. I employed (289) Mr. Malloy in 1890 for about thirty days. I was working for a salary in 1890. The policy was issued on 10 January, 1891. The policy was under contract of 1890." The policy, a copy of which is hereto annexed and made a part of this case, was introduced by the defendant and read. "I live in South Carolina."

The defendant John N. Talbot, a witness for himself, testified: "Adicks wanted my son Greeley to give security on that note. Greeley said if he had to give security he would have no policy. He was under age. Adicks said he was sorry that he (Adicks) did not get note. I said that it was not my fault. I said: 'Mr. Adicks, there is only one way in

which I will take the insurance policy. If the policy is made to me and my heirs I will give note.' I asked Mr. Malloy if this was not the proper way. He said that it was. It was upon that condition that I gave the note. I have never received the policy. I never saw it. After I gave the note he said if I would give him $5 he would give me credit for $20; that he was hard-up. I refused. He never gave me anything for the note. On 1 September I will be seventy-four years old. *I am a farmer.*"

Cross-examined, he said: "Greeley is now twenty-one or twenty-two years old. He has lived with me always. My son told me when he received the policy that he had received it. I can't tell when I first saw the policy. It may have been a week after he received it. The policy was sent to my son. I did not see the policy a great number of times. I made objection to Adicks, after the maturity of the note, for the first time, that the policy was not made payable according to the understanding. Mr. Haigh notified me that he had the note at the bank for collection. A short time after that I saw Adicks at the Hotel LaFayette. I told him I would pay if he would give me a policy such as I bar-
(290) gained for. The first time I saw Adicks, when I gave the note, was in January or February, and I gave the note when I saw him in the lane. At the time that I gave the note he did not have the policy." The witness stated that he had not made any objection to Adicks until he saw him at the hotel, after the maturity of the note. Adicks said that he could not change the policy. The witness further said that he had not written to the company or its agent about the policy.

Peter N. Talbot, a witness for the defendant, testified: "I am a son of defendant. The next day, I think, I saw my father. He said he insured Greeley's life, payable to the defendant and his heirs."

S. P. Talbot, a witness for the defendant, testified: "I am a son of the defendant, and know Adicks. My father told me that he had insured Greeley's life for the benefit of himself and his heirs."

The defendant rested.

The plaintiff introduced W. B. Malloy, who testified: "I was present when the note was executed. Adicks was soliciting Greeley for insurance. He asked Talbot, the defendant, to sign the note. He said he would not do this unless he had some insurance. He asked me to bear witness that he requested the policy to be made payable to him. He said that his son was under age; that unless the policy was made payable to him he would not sign the note. That was for the first premium. That is the only note that he signed or agreed to pay, and all that he agreed to pay. I was present all the time, but did not hear anything about heirs. I knew nothing about getting a credit for $20 for the payment of $5. I was present when Horace Greeley signed the application.

Don't know whether the old man signed. He was present when Horace Greeley signed."

Upon cross-examination, he said: "I was employed by Adicks to look up people. There is a little unsettled business between us. Greeley got out of the buggy. The note and application were written in the road, on back of buggy."

The defendant introduced Horace Greeley Talbot, who testified: "I signed the application on 18 December, 1890. My father (291) was not present. I told Adicks that if he would not take my note I did not want the policy. My father said if he would have the policy made payable to him and his heirs, executors, etc., he would give a note. The policy was not made as he wished it. When the policy was received my father said he had nothing to do with it. Adicks said at another time if father would give him $5 he would give him a credit of $20."

On cross-examination he said: "My father did not sign the application. The policy was sent to me in January or February, shortly after its date. Adicks delivered the policy to me in person. My father did not think that it was for him. The reason my father would not accept it was because it was not made payable to him, his heirs, etc. That was one reason. He told me to keep it. Adicks told me that was my policy."

The plaintiff resumed: "H. F. Adicks said the note was made in the road near Talbot's house. Application same time and place."

The plaintiff asked the witness what premiums the defendant agreed to pay, and what premiums the young man. The defendant objected. The objection was sustained, and the plaintiff excepted. The plaintiff stated that he expected to prove by the witness that the first premium represented by the note was the only premium that the defendant was to pay, and that the son was to pay all the other premiums.

The witness further said: "I am not indebted to Malloy, except that he has an interest in a note that I hold for $25 or $30."

The plaintiff, in apt time, requested the court to charge the jury, among other things:

"2. That it was incumbent on the defendant at once to notify the company or its agents that he objected to the policy.

"3. That upon the defendant's own testimony he did not object to the policy until after the maturity of the note, and that he must therefore be deemed to have waived the form of the policy as (292) to the party to whom it was payable.

"4. That upon its face the policy of insurance which was introduced by the defendant was a valid policy, and that by its terms, if the assured Horace Greeley Talbot had died during the life of the policy—that is,

the first year of the policy and up to this time—the amount of the policy would be payable to the defendant and he could have recovered it.

"5. That this policy was a valid consideration for the note of the defendant.

"12. That if the jury shall believe that the payee of the note has advanced the amount of the premium to the company for the policy, this is a sufficient consideration for the note, without regard to the fact that the policy was made payable to the father, and after his death to the son and his executors and administrators, etc.

His Honor refused to give the instructions, and charged the jury as follows:

"If the jury believe from the evidence that the defendant gave his note for $97.65 to the plaintiff, with the agreement and understanding that he was to receive a policy payable to him and his heirs, and that such policy was not delivered to him, that the policy as made was delivered to his son and not accepted by the defendant, then you will answer the second issue 'Yes.'" The plaintiff excepted.

The court charged the jury: "That if they believed that defendant gave his note to the plaintiff because his son was not of age, and that a policy was made and delivered as agreed upon, then you will answer the second issue 'No.'" The plaintiff excepted.

The jury found the verdict on the first issue in favor of the (293) plaintiff, by consent, and the second issue in the affirmative.

Judgment for the defendant, and appeal by the plaintiff.

J. W. Hinsdale and Samuel H. MacRae for plaintiff.
George M. Rose and Thos. H. Sutton for defendant.

AVERY, J. The benefit of the policy for the year, with the privilege of continuing it in force for the defendant's lifetime, constituted a partial consideration for the note. The acceptance of this benefit until the maturity of the note, with full notice of the modification of the original agreement, was a waiver of objection to the policy in the form in which it was issued. To lend our sanction to the contention of the defendant would give him all of the advantage of a beneficiary under the policy held by the assured for him, even though his purpose may have been, by apparent acquiescence, to place himself in a position to recover in case of the death of the assured, while he entertained the purpose during the interval to repudiate the contract in case his son should survive the maturity of the note. If defendant's conduct did not estop him, it was at least a waiver of the right to object when he failed to give notice of such objection within a reasonable time after acquiring knowledge of the precise terms of the policy delivered to the assured.

That the note was given to the agent as an individual, instead of to the company, does not affect the principle. If the plaintiff's money paid for the benefit that he silently accepted, it was not less a fraud to repudiate it than one payable to the insurer. The delivery to the assured was sufficient, and the failure to object must be construed as an acceptance of its benefits. There was error in the charge given and in the refusal of instruction asked, for which a new trial must be granted.

New trial.

Cited: Annuity Co. v. Costner, 149 N. C., 298.

(294)

J. M. MONGER, ADMINISTRATOR, v. J. M. KELLY ET AL.

Appeal—Record—Errors not Apparent on the Record—Sale of Land for Assets—Sufficiency of Petition.

1. Where the record on appeal shows that a complaint was amended, and it is suggested by counsel in this Court that the amendment was made without his knowledge and that no order for it appears in the record, it will be presumed that it was regularly allowed below, though, in case of inadvertence, the amendment could be made here.
2. It is not necessary in a petition by an administrator *de bonis non* for leave to sell land for assets to show that the bond of the first administrator has been sued on and exhausted.

PETITION by J. M. Monger, administrator *de bonis non* of A. F. Harrington, for leave to sell lands to create assets for the payment of debts.

The defendants demurred to the petition as follows:

"For that it does not appear on the face of the complaint, as it should, and, as defendants allege, it is necessary, that action has been had on the bond of the former administrator by the administrator *de bonis non,* and nothing realized therefrom."

The clerk of the Superior Court of Moore overruled the demurrer, and defendants appealed to *Brown, J.,* who, at chambers, sustained the ruling of the clerk, and defendants appealed.

Black & Adams for plaintiff.
Thomas B. Womack for defendants.

CLARK, J. The first and second grounds of demurrer have been removed by the amendment of the summons and complaint. The oral

suggestion of counsel here that one of these amendments was made without his knowledge, and that no order for it appears in the (295) record, cannot avail him. We are bound by the record, and upon the maxim *omnia presumuntur rite acta* we must take it that the amendment was regularly made below. But if there was any inadvertence in that regard, the Court could allow the amendment to be made here. The Code, sec. 965; *Grant v. Rogers,* 94 N. C., 755; *Hodge v. R. R.,* 108 N. C., 24.

The third ground of demurrer is without merit. It is not requisite to show that the bond of the first administrator had been sued and exhausted. This would be to unconscionably delay the creditors of the estate who are entitled to be paid. The petition is sufficient in law. *Shields v. McDowell,* 82 N. C., 137; *Brittain v. Dickson,* 104 N. C., 547.

No error.

TAMA McDANIEL v. G. C. SCURLOCK.

Practice—Case on Appeal—Service of Original Case Instead of Copy—Compulsory Reference—Right to Jury Trial.

1. An appellee cannot complain of the service of the original case on appeal instead of a "copy" thereof, the word "copy" in section 550 of The Code bearing no such restricted meaning.
2. An appellant cannot complain that his original statement of case on appeal was not returned to him within five days, when in fact the appellee's exceptions thereto were duly filed with him within the five days.
3. Where an appellant, after exceptions filed to his "case on appeal," fails to apply to the judge to settle the case, this Court may consider the appellant's "statement" and the appellee's exceptions as the case on appeal, or in case of any complications, the case will be remanded in order that the judge may settle the case.
4. The record proper controls the "case on appeal," and if error appears therein a new trial will be granted.
5. Upon the coming in of the report of a referee in a compulsory reference, a jury trial may be demanded upon such issues of fact as are raised by the pleadings and designated by the exceptions to report.
6. When an action is referred by consent, and upon the coming in of the report the order of reference is stricken out, without objection, and at a subsequent term, and in the face of a demand for a jury trial and despite objections, a re-reference is made, the reference thereupon becomes *compulsory.*

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

ACTION, tried before *Bryan, J.,* on exceptions to referee's (296) report, at May Term, 1894, of CUMBERLAND. The plaintiff appealed from the judgment rendered for the defendant. The facts sufficiently appear in the opinion of *Associate Justice Clark.*

Samuel H. MacRae for plaintiff.
Thomas H. Sutton for defendant.

CLARK, J. The appellee cannot complain that the appellant's original "statement of case on appeal" was served on him instead of a copy. The word "copy" in section 550 of The Code bears no such restricted meaning. It simply means that a statement of appellant's case on appeal must be left with the appellee so that he may scrutinize it at his leisure, and make out his exceptions thereto within the five days allowed. Nor can the appellant complain that such statement was not returned to him in five days, when the appellee's exceptions were in fact served within the statutory five days, unless it appear that the appellant was injured in his rights thereby. The essential points are the legal service in ten days of plaintiff's statement on the appellee and legal service in five days of appellee's exceptions (or his countercase, *Horne v. Smith,* 105 N. C., 322) on appellant, and the latter's application to the judge to settle the case. This diligence is due by each to the opposite party. The other matters above insisted on do not affect the rights of parties, and would lead us into the realm of "red tape," whither we have no inclination to enter. His Honor has found the facts on the con- (297) troverted question of service of case and countercase as it was his duty to do. *Cumming v. Huffman,* 113 N. C., 267. Upon such findings, it appears that the appellant did not apply to the judge to settle the case, and we might take his "statement" as amended by the appellee's exceptions as the case on appeal. *Russell v. Davis,* 99 N. C., 115; *Owens v. Phelps,* 92 N. C., 231. Or, if this would be complicated, the Court would remand that the case might be properly settled by the judge. *Arrington v. Arrington,* 114 N. C., 115; *Hinton v. Greenleaf,* at this term.

But an examination of the record proper, which would control the "case on appeal," shows error which entitles the appellant to a new trial. It is true that a consent to a reference once given cannot be withdrawn. *Armfield v. Brown,* 70 N. C., 27; *Perry v. Tupper,* 77 N. C., 413; *Fleming v. Roberts,* 77 N. C., 415. Here, the plaintiff asked originally for a reference and it was made without his excepting thereto. But it appears from the record that at a subsequent term, July, 1892, the referees failing to agree, the order of reference was stricken out by the court. Neither party excepted to this. At November Term, 1892, the

court re-referred the case to the same two referees named in the first order of reference, adding thereto a third. To this new order of reference both parties excepted. It was therefore compulsory reference. In such case the procedure is thus stated by *Bynum, J.*, in *Armfield v. Brown,* 70 N. C., on page 31: "There will be cases, those involving complicated matters of account, for instance, where, without a reference there would be a failure of justice, and where if the parties refuse consent the reference must be compulsory. In such cases, if demanded, a jury trial must be allowed at some stage of the proceedings, at what period of the trial must be determined by the court in such way as will be most conducive to the ends of justice and a speedy and final determination of the controversy. In analogy to equity proceedings it (298) may be found most proper to order a jury upon the coming in of the report, when the material issues will be eliminated by the findings of the facts and the exceptions thereto." The right to trial by jury does not extend to questions of fact passed upon by the referee (*Grant v. Hughes,* 96 N. C., 177; *Carr v. Askew,* 94 N. C., 194), but only to issues of fact raised by the pleadings and designated by the exceptions. *Yelverton v. Coley,* 101 N. C., 248. Where there has been a reference by consent, or which is the same thing, a reference without objection by the party seeking afterwards a jury trial, if the judge sets aside the report in whole or in part and recommits the case, it is still a consent reference. *Morisey v. Swinson,* 104 N. C., 555. But in the present case the order of reference itself was stricken out without objection, and at the next term the court referred the case against the exception of the parties. This made it a compulsory reference.

There is error.

Cited: Harris v. Carrington, post, 189; *Simmons v. Allison,* 119 N. C., 563; *S. v. King, ib.,* 910; *Stevens v. Smathers,* 123 N. C., 498; *Kerr v. Hicks,* 129 N. C., 144.

McPHAIL BROS. v. J. H. JOHNSON.

Practice—Amendment of Summons—Jurisdiction of Justice—Amount of Sum Demanded—Effect of Remittitur of Excess of $200—Filing of Account—Conduct of Trial—Attorney.

1. Where a summons issued by a justice of the peace did not state the sum demanded, an amendment permitting the blank to be filled was properly allowed on the trial of the action on appeal. It served only to *show* and not to *confer* jurisdiction, and was retroactive.

2. Where the sum demanded was not stated in a summons issued by a justice, but the complaint demanded over $200, a *remittitur* before the justice of the excess over $200 sufficiently showed the jurisdiction of the justice.
3. In an action on a contract for sawing timber it is not necessary to set out the items in the pleadings; section 591 of The Code being applicable only to actions brought under the "book-debt law."
4. While it is the duty of a trial judge to see that no litigant should be abridged of his rights in the trial of an action, he should also see that the public time is not uselessly consumed: *Therefore*, where counsel persisted in repeating questions and asking others entirely foreign to the subject-matter of the trial, and needlessly protracted the trial, it was not error in the judge, after repeatedly cautioning the counsel, to stand the witness aside.

APPEAL from a justice of the peace, tried on appeal of de- (299) fendant by *Shuford, J.*, and a jury, at November Term, 1893, of CUMBERLAND.

After the case was called and the jury impaneled, the defendant moved to dismiss the action on the ground that the summons failed to state the amount of money demanded by the plaintiffs, so as to show the jurisdiction of the court, as required by section 832 of The Code, the summons simply requiring the defendant to answer the plaintiff "in a civil action for the sum of $_____, due for timber sawed by contract for defendant, and ____ cents, with interest from the _____ day of _____."

It appeared from the record that pleadings were filed before the justice of the peace, and that the plaintiffs, in their complaint, claimed only $200, and forgave and remitted all of their debt in excess of said amount. The court declined the motion and allowed the plaintiffs to amend the summons by inserting the words "two hundred" as the sum demanded. The defendant objected, on the ground that the court could not allow the amendment, as it was an amendment conferring jurisdiction, and, the jurisdiction of the Superior Court being appellate and derivative, the said court could not amend the summons in an essential particular, so as to confer jurisdiction that did not appear by original process. Objection overruled, and defendant excepted. (300)

The plaintiffs offered in evidence a contract between H. Wade & Co., the execution of which was admitted by the defendant. The plaintiffs further offered in evidence a paper-writing, containing terms of dissolution of the copartnership of H. Wade & Co., the execution of which was admitted by the defendant.

The defendant objected to the introduction of this last-mentioned agreement, for the reason that it undertakes to transfer the contract of 16 April, 1890, which the defendant insists was *res inter alios* and without consideration, to defendant, and, in law, was not assignable.

Before ruling upon this question the court permitted the plaintiffs to introduce as a witness D. A. McPhail, who testified that Johnson had notice of the change in the firm of H. Wade & Co., and made no objection. The day the dissolution was made, and before it was made, he had a conversation with Mr. Johnson about the dissolution, and he said he was glad the dissolution was made, as he thought they could get along better than before. They continued the business under the contract just as before. Mr. Johnson received the lumber from the mill, which was sawed just as before.

After hearing the foregoing testimony, the court overruled the objection of the defendant to the introduction of the paper-writing containing terms of dissolution of the firm of H. Wade & Co., by which McPhail Bros. became their successors, and allowed the same to be read, and to this ruling the defendant excepted.

The plaintiff offered J. H. McPhail as a witness, who testified as follows: "We furnished the defendant lumber to the amount of $297.78, which we claim in this action, less the amount remitted."

(301) The defendant objected to this manner of proving an account in bulk and without items. Objection overruled, and defendant excepted.

On cross-examination this witness stated that $297.48 was not all that was furnished, but that lumber amounting to $1,064.76 had been furnished the defendant; that a large part thereof had been paid for, and only a balance of $297.48 was due.

Defendant's attorney asked witness if he did not have a book account showing the dealings between the plaintiffs and defendant, and the witness stated that he did, and produced in court a book containing the account of the defendant and the plaintiffs, and tendered the same to defendant's counsel for examination and inspection. One of the defendant's counsel examined the witness in reference to the book and the items of account until the counsel seemed well-nigh exhausted, and the witness was then, by permission of the court, taken up on further examination by another of defendant's counsel, and the examination continued quite lengthy and with frequent repetition of questions. Plaintiff's counsel objected to the repetition of questions, and charged that the defendant's counsel were prolonging the examination to a great and unusual length for the purpose of consuming the entire day (it being the last day of court and late in the afternoon), and thereby avoiding a judgment against the defendant. The court, during the examination, frequently notified defendant's counsel that the examination should be conducted in a legal and proper manner, and only such questions asked as were pertinent to the issues; and the defendant's counsel still persisted in repeating questions and asking questions entirely foreign to the

issue, and thereupon the court stood the witness aside. The defendant's counsel insisted on still further examining the witness, but if they made any exception at the time, the same was not heard by the court. In their statement of case on appeal, however, they take exception to the action of the court in standing the witness aside. (302)

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

T. H. Sutton for plaintiffs.
G. M. Rose for defendant.

CLARK, J. The amendment permitting the blank in the summons to be filled was not to confer, but to show, jurisdiction. *Cox v. Grisham,* 113 N. C., 279; *Mfg. Co. v. Barrett,* 95 N. C., 36; *Leathers v. Morris,* 101 N. C., 184; *Allen v. Jackson,* 86 N. C., 321. It was properly allowed. The Code, sec. 908; *Henderson v. Graham,* 84 N. C., 496; *S. v. Norman,* 110 N. C., 484. In fact, the *remittitur* before the justice of the excess over $200 sufficiently showed jurisdiction. *Noville v. Dew,* 94 N. C., 43; *Dalton v. Webster,* 82 N. C., 279; The Code, sec. 835. Had the summons as issued stated the amount, that would have settled the jurisdiction. *Starke v. Cotten, ante,* 81. The amendment was retroactive, *nunc pro tunc.* The second and third exceptions were without merit and need no discussion. Nor was it requisite that the items should be set out in the pleadings. The Code, sec. 259. A bill of particulars could have been ordered by the court if demanded. The Code, sec. 840; Rule 10. The Code, sec. 591, only applies to actions brought under the "book-debt law," and has no bearing in a case like this.

The conduct of counsel in repeating questions and asking questions entirely foreign to the matter in hand, after repeated caution by the court, so as to needlessly protract the trial, amply justified the standing aside of the witness. The judge is charged with the duty of having the trial properly conducted. He should take care that the time of the court is not wasted. Courts are very expensive. While a judge should see that matters are not so hurried that any litigant is abridged of his rights, he should also see that the public time is not use- (303) lessly consumed. He is not a mere moderator, but the court itself, and owes duties to the public as well as to litigants.

No error.

Cited: Elliott v. Tyson, 117 N. C., 116; *Whitaker v. Dunn,* 122 N. C., 104; *Lassiter v. R. R.,* 136 N. C., 95; *Teal v. Templeton,* 149 N. C., 34; *Hosiery Mills v. R. R.,* 174 N. C., 453; *Shoe Store Co. v. Wiseman, ib.,* 717.

H. A. NASH v. D. C. FERRABOW.

Practice—Dismissal of Action—Action on Contract—Indefinite and Vague Contract.

1. The objection that a complaint does not state a cause of action can be taken for the first time in this Court by the defendant, or it may be taken by this Court *ex mero motu*.
2. The contract alleged in this case is held too vague and indefinite to sustain an action.

ACTION, tried before *Shuford, J.*, and a jury, at January Term, 1894, of GRANVILLE.

There was a verdict for defendant, and from the judgment thereon the plaintiff appealed. In this Court the defendant moved to dismiss upon the ground that the complaint did not state a cause of action. The complaint was as follows:

"1. That on 1 April, 1890, the plaintiff and the defendant entered into an agreement, in writing, of which the following is a copy, to wit:

" 'This agreement, made this 11 April, 1890, between the properly authorized officers of the Stem Citizens Association, whose names are appended, of the county of Granville and State of North Carolina, of the first part, and Dr. H. A. Nash, of the county of Wake and State aforesaid, of the second part, witnesseth: The said Citizens Association agree to pay unto the said Dr. Nash, for professional services (304) rendered unto the various families composing the said association, the sum of $1,500 per annum, quarterly in advance, and the said Dr. H. A. Nash agrees to furnish such medicines as are usually furnished by country physicians and to give prompt attention to patients belonging to the said association; and in the event that parties belonging to the association and those not belonging to the same should send for him at the same time, he agrees to give the citizens of the association the preference. As to the fees charged by the physician for practice, these are arranged entirely by the association as to its membership. As to outside parties, the association has nothing to do. We have already $1,000 subscribed, and we pledge ourselves to use our best efforts to secure the remaining $500.

'D. C. FERRABOW, Chairman.
'JOHN C. HUDGINS,
'M. C. WASHINGTON,
'Committee.
'H. A. NASH, Doctor.
'J. W. BROWN, Secretary.'

"2. That the defendants were, at the time of their entering into said agreement with the plaintiff, who is the Dr. H. A. Nash mentioned in said agreement, members of said 'Stem Citizens Association,' and thereby became and are liable to plaintiff for the payment to him of said sum of $1,500, according to the stipulations contained in said agreement.

"3. That plaintiff faithfully performed his part of said agreement, according to the stipulations contained therein.

"4. That said defendants have paid to plaintiff, in part satisfaction of their said liability, the sum of $472 only.

"5. That said defendants are indebted to plaintiff, after crediting them with said sum of $472, in the sum of $1,028, with interest thereon from 1 April, 1891.

"Wherefore, plaintiff demands judgment against said defendants for said sum of $1,028, with interest thereon from 1 April, (305) 1891, until paid; and for such other and further relief," etc.

J. B. Batchelor and Edwards & Royster for plaintiff.
J. W. Graham for defendant.

CLARK, J. The defendant moves to dismiss in this Court because the complaint does not state a cause of action. This is one of the two objections which can be taken in this Court, when not made below. Rule 27 of this Court. Indeed, the Court could take it *ex mero motu*. *Hagins v. R. R.*, 106 N. C., 537, and other cases cited in Clark's Code (2 Ed.), p. 698. We are of opinion that the objection is well taken. The paper-writing relied on as the foundation of the action is too vague and indefinite to fix the defendant with liability. It recites that the agreement is made with them as "the properly authorized officers of the Stem Citizens Association." If contracted with as officers, clearly the association, and not the officers personally, were to be liable. Besides, it further provides, as if to guard against personal liability, "1,000 is already subscribed, and we pledge our best efforts to secure the remaining $500." It does not appear whether the association was incorporated or not. As the writing was signed by "the properly authorized officers" of the "Stem Citizens Association," it would seem that it was so. If so, the corporation and not these defendants should have been sued. If not incorporated, there is no proper averment that it was a partnership. A mere allegation that the defendants were "members of said Stem Citizens Association, and thereby became liable," is not a sufficient allegation of partnership, and without such it is difficult to see how liability could be incurred in the absence of allegation of incorporation and of fraud in the conduct of defendants as officers of such cor- (306)

poration. Furthermore, the paper-writing specifies no term other than "$1,500 per annum, payable quarterly." The complaint does not aver services for any specified time, nor indeed any service beyond what might be inferred from the allegation that "plaintiff faithfully performed his part of said agreement." For how long a time is not stated. If for a quarter, then the payment he admits in the complaint has overpaid him and he has stated no cause of action. There is no presumption of law based upon the terms of the alleged agreement that he has served beyond the minimum stipulation of a quarter. If the plaintiff has rendered service to these defendants, or others belonging to said association, there is nothing to defeat his recovery upon a *quantum meruit* against each for the services rendered him. The attempted contract, being too vague and indefinite, is simply a nullity and is in the way of neither the plaintiff nor the defendants.

Action dismissed.

Cited: Hines v. Vann, 118 N. C., 7; *Fowler v. Fowler,* 131 N. C., 171.

V. ROYSTER, RECEIVER OF ELLINGTON, ROYSTER & CO., v. F. M. FARRELL AND WIFE.

Foreclosure of Mortgage—Statute of Limitations—Acknowledgment in Writing—New Promise.

1. An admission in writing that the relation of mortgagor and mortgagee exists between the parties who sign it, is an acknowledgment on the mortgagor's part that the debt secured by the mortgage has not been paid.
2. A written acknowledgment of a debt is as effective to stop the running of the statute of limitations against the right to foreclose a mortgage by which the debt is secured as would be a payment on the debt.
3. Where, just before the sale of Farrell's property advertised to be sold under his mortgage to Ellington, Royster & Co., the parties signed a memorandum stating that "Farrell pays Ellington, Royster & Co. $10 and gives his acceptance for $350, payable 25 June, in compromise of all claims against him, . . . and Ellington, Royster & Co., at the request of Farrell, postpones sale under mortgage until 8 July, 1884, no further advertising is required by Farrell, and upon payment of said acceptance, mortgage to be cancelled, and this to be a settlement in full," etc.: *Held,* that such writing, especially if considered in connection with the acceptance referred to, constituted an express and unconditional promise to pay the mortgage debt and an explicit acknowledgment of the mortgage.

ACTION, tried before *Hoke, J.*, and a jury, at Fall Term, 1894, (307) of CHATHAM, for the foreclosure of the mortgage described in the complaint. Among other defenses the defendants pleaded the statute of limitations.

The following issues were submitted to the jury:

"1. Was plaintiff duly and properly appointed and qualified as receiver of Ellington, Royster & Co.?

"2. Has there been a payment by defendant on the note and mortgage at any time within ten years next before action brought?

"3. Has there been any binding acknowledgment in writing of said note and mortgage at any time within ten years before action brought?

"4. Has the note and mortgage been paid off?

"5. What amount is still unpaid on claim?"

To repel the statute of limitations, the plaintiff introduced the following paper-writing, after having proved its execution by the parties thereto, viz.:

"F. M. Farrell pays Ellington, Royster & Co. $10 and gives his acceptance for $350, payable on 25 June at Florence (Alabama) National Bank, in compromise of all claims against him, Farrell guaranteeing that M. T. Arnold did not ship Ellington, Royster & Co. any lumber through him, and that said Arnold is not entitled to (308) recover for any lumber shipped by him, Farrell, to said Ellington, Royster & Co., and said Ellington, Royster & Co., at the request of Farrell, postpones sale under mortgage until Tuesday, 8 July, 1884. No further advertising is required by Farrell, and, upon payment of said acceptance, mortgage to be cancelled and this to be a settlement in full, except as to the above guarantee. The mill to be the property of Ellington, Royster & Co. 4 June, 1884.

"F. M. FARRELL,
"ELLINGTON, ROYSTER & Co."

There was evidence, and it was admitted by plaintiff and defendants:

"1. That the property described in the mortgage had been advertised to be sold under the mortgage on 7 June, 1884, and in pursuance of the above paper-writing the sale was postponed until 8 July, 1884, the said acceptance not having been paid, and the property was bid off by Ellington, Royster & Co.

"2. That the defendants F. M. Farrell and wife have been in the continued possession of the property described in the mortgage ever since its execution.

"3. That the summons in this action was issued on 14 April, 1894.

"4. That on 4 June, 1884, Ellington, Royster & Co. claimed an account against defendant Farrell growing out of the mill mentioned in the

paper-writing, and defendant claimed to have made a payment of $200 on the mortgage in February, 1883, which plaintiff claimed was on the mill account."

The witness Ellington, for the plaintiff, testified that the $10 referred to in the above paper-writing was paid on the mortgage, and the defendant F. M. Farrell testified that the said $10 was paid for postponing the mortgage sale and the costs thereof.

(309) His Honor instructed the jury that there was no evidence of any binding acknowledgment, in writing, of said note and mortgage at any time within ten years next before action brought, and directed the jury to find the third issue "No," to which charge the plaintiff excepted.

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

H. A. London for plaintiff.
T. B. Womack for defendants.

BURWELL, J. The writing set out in the record seems to us to be an acknowledgment that the relation of mortgagor and mortgagee existed between the parties who signed it—that F. M. Farrell was, at its date, the mortgagor of Ellington, Royster & Co. The admission of the fact that that relation existed was, of course, an acknowledgment on Farrell's part that the debt secured by the mortgage had not been paid. It is also, it seems to us, a promise to pay the mortgage debt. At the time this writing was signed the mortgagor gave to the mortgagee an acceptance for $350 (a sum that exceeded the mortgage debt), payable on a date fixed before the date to which the sale under the mortgage was postponed under the agreement, and it was therein stipulated that "upon payment of said acceptance" the mortgage should be cancelled. We think this writing, especially if considered in connection with the acceptance spoken of, constituted an express and unconditional promise to pay the mortgage debt and an explicit acknowledgment of the mortgage, and that there was error in the charge excepted to.

It was argued before us that while a written acknowledgment of the debt would take it out of the operation of the statute of limitations, only a payment could have that effect on the right to foreclose a mortgage.

(310) A written acknowledgment is as effective in the one case as in the other. The Code has not altered at all the effect of a new promise or acknowledgment. Sec. 172 (Lord Tenderden's Act) is merely a rule of evidence enacted to prevent fraud and perjury. The original statute of limitations (21 James I., ch. 16) had no provision as to new promises and acknowledgments. The courts made the law on

this subject, and made it apply to all causes of action that rested on a promise. Before the adoption of The Code, proof of a promise or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. *Brown v. Becknall,* 58 N. C., 423; *Ray v. Pearce,* 84 N. C., 485; *Hughes v. Edwards,* 8 Wheat., 489; *Simmons v. Ballard,* 102 N. C., 105. And now the bar of our present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. *Hill v. Hilliard,* 103 N. C., 34.

New trial.

Cited: Wells v. Hill, 118 N. C., 904; *Phillips v. Giles,* 175 N. C., 412.

C. H. WELCH v. JOSIAH CHEEK.

Action for Damages—Malicious Prosecution—Nolle Prosequi—Probable Cause—Burden of Proof.

1. Where a warrant by a justice of the peace is dismissed by the prosecution it is a sufficient determination of the proceeding to warrant an action for malicious prosecution.
2. Where a criminal prosecution is dismissed under an agreement between the parties by which the party prosecuted is to pay part of the costs, the burden, in an action for malicious prosecution, is not on the defendant to show probable cause.

ACTION, tried at Spring Term, 1894, of RANDOLPH, before (311) *Battle, J.*

The action was for malicious prosecution and false arrest, charging that the defendant had prosecuted the plaintiff before J. P. Phillips, a justice of the peace, for the crime of embezzlement.

There was evidence tending to show that in September, 1889, the plaintiff C. H. Welch purchased guano from H. S. Miller & Co., of Newark, N. J., and for the price of the same a note was executed to them for $234.56, and interest from 1 November, 1889, by said C. H. Welch as principal, and Thomas F. Cheek and the defendant Josiah Cheek as sureties. The said sureties contended that at the time they signed the note the plaintiff promised them that the money collected by him from parties purchasing the guano from him should go to pay said

note, and that he had violated this promise by applying money collected as aforesaid to the payment of a mortgage debt he owed one John R. Lane. It was on this account that the criminal prosecution for embezzlement was instituted by the defendant against the plaintiff.

The defendant insisted that he bought the guano absolutely from H. S. Miller & Co., and that there was no trust whatever affecting the same, or the proceeds of the sale of the same, and denied that he had ever done anything to give the sureties any ground to think that he intended to leave them in the lurch. The plaintiff Welch having been arrested and carried before J. P. Phillips, Esq., a justice of the peace, both sides desired the presence of said John R. Lane, and they waited some time till he arrived at the place of trial.

The following is an extract from the testimony of said J. P. Phillips, who was examined as a witness for the plaintiff:

"Mr. Cheek, the defendant, came to my house on the night of 2 December, 1890, and made the affidavit. It may have been after midnight. I had retired before he came and was asleep. The warrant was delivered to Mr. Cheek. It was returned by J. A. Brady, then constable of Brower Township, about 10 a.m., 3 December, 1890. The officer's (312) return was that he had executed the warrant by arresting the said C. H. Welch, who was brought before me at Josiah Cheek's, three or four miles from my house. This was at the request of Mr. Cheek, who was unwell, and for the convenience of other witnesses, and of Mr. Welch, too. No particular hour was fixed for the trial. I went there at 10 a.m. I never did try the case at all. The defendant (that is, the plaintiff herein, Welch) was released some time in the afternoon, about 2 o'clock or later. I found him there in the custody of the officer at 10 a.m. Three or four others were there. None of these parties had been subpœnaed as witnesses, except perhaps Thomas F. Cheek. Something was said there at the defendant Cheek's about a note for guano given by Welch and others. Colonel Lane (John R. Lane) finally came and asked for a private interview with Welch, Cheek, Brady, and, I think, Lowdermilk. I heard it said that Welch had taken money collected for guano and applied it to pay a mortgage he owed Lane. Then Lane having asked for a private interview, they went off into a room together. After a while they called me in. Colonel Lane drew up and signed a certain writing. There was no further prosecution. Welch paid part of the costs and the case was dismissed."

John R. Lane, a witness for the plaintiff, testified as follows: "I have known the plaintiff for twenty years; know his general character, and it is reasonably good. I was subpœnaed 3 December, 1890, at 8 a.m., in *S. v. C. H. Welch*. I got there to Josiah Cheek's at 12 m., and left between 2 and 4 p.m. I saw nothing of any arrest or discharge from

arrest. I explained the matter to them, telling them that it was a State case, that there had been no trial, and that Welch ought not to be made to pay the costs. I understood that the costs were compromised and that plaintiff Welch paid the same. All of these gentlemen were friends of mine, and I was interested in the financial condition of all of them. I knew nothing about the note. I told them at the con- (313) ference that Welch was doing his best to pay the note; that he had proposed to me to take $162 and hold it for him till the note became due, and to pay him interest on it. I declined to do this, and told him to place the money in bank in Greensboro. He came to me on 6 November, 1890, and said he had not heard anything of his note. He asked me to write to the bank and find out what had become of it. I did so, and heard in reply that the note had been sent back to the owners of it, 'for want of funds.' When I told Welch this (he having in the bank at this time to his credit the $162 aforesaid) he became much excited, and wanted to know what had become of his money, the receipt of which, by the bank, had not been acknowledged. The bank had not been notified of his address. I told him not to be uneasy, to give me a check for the money and I would be responsible to him for the same. He did give me a check accordingly, and the money I collected on it was his money. Hearing that H. S. Miller & Co. were in financial straits, I advised Welch not to send them any money on the note till he ascertained definitely where it was. They wrote in answer to a letter to them that note was there in bank. Mr. Welch again wanted me to pay him interest on the $162, which I refused to do. Then he paid me what he owed me to save interest, and he got a check from me payable to H. S. Miller & Co. for the balance I had in hand for him 25 November, 1890, and said check was forwarded to them. The balance then due on the note was $115. They were notified to send the note either to C. C. Cheek or myself, and it would be paid in thirty days, and they replied that that was satisfactory. At that conference, I have already mentioned, John Brady said to me, 'Colonel, you have had the handling of the money; I think you ought to see to it that the "boys" are kept harmless. We do not wish to send Welch to the penitentiary or to give him any trouble.' John Brady is a great friend of mine, and I at once agreed to do as he suggested. A paper was accordingly drafted and signed (314) and sealed by me, whereby I agreed to save the sureties harmless. Everything was pleasantly arranged, and I went off well satisfied. Welch did not recollect where the note was payable. On the debt he owed me he paid $80 to stop interest. After I had given my obligation as aforesaid, I sent for the note and paid it."

J. P. Phillips, Esq., was introduced as a witness for the plaintiff, and testified that at the instance of the defendant, and upon his affidavit, he

had issued a warrant for the arrest of the plaintiff, and that the plaintiff had been arrested by virtue of said warrant and brought before the justice at 10 o'clock a.m., 3 December, 1890, for trial; that there was no trial, and the plaintiff (who was defendant in the warrant) was released some time in the afternoon, about 2 o'clock, or later, without a trial. Welch paid a part of the costs, under protest, and the case was dismissed.

The plaintiff proposed to ask the witness the contents of the warrant. The defendant objected to the proving of the contents of the warrant in this way, insisting upon the production of the warrant.

Plaintiff had given defendant notice that he would offer testimony to show loss of the warrant, and would offer secondary evidence.

Witness Phillips testified that he did not have the warrant; that he had returned the warrant to the clerk as required by law, and that the last time he saw it it was in the hands of *Judge McIver,* who presided at the trial of a criminal action against the defendant.

The clerk of the court, Mr. Bradshaw, then testified that he recollected having the warrant in his office; that he had made diligent search in his office for it among the papers returned by justices of the peace, and had made thorough search in his office, and that he could not find the warrant in his office, and that the last time he saw it it was in the hands (315) of the judge at the trial of a criminal action against defendant.

The plaintiff testified that he had had the warrant before the trial before *Judge McIver;* he had produced it at said trial, and that was the last time he ever saw it or knew where it was.

A paper-writing is shown the witness J. P. Phillips by the plaintiff's counsel, which the witness identifies and swears is the affidavit made by the defendant Cheek, and the same on which he issued the warrant for the arrest of the plaintiff.

The affidavit was then offered in evidence and read to the jury. It is dated 3 December, 1890. A copy of said affidavit is attached as a part of the case on appeal, and is in the following words, to wit:

"Josiah Cheek, being sworn, deposes and complains before the undersigned, that one C. H. Welch of Randolph County did, on or about 15 November, 1890, fraudulently convert to his own use a certain amount of money, viz., about one hundred dollars, with intent to defraud and embezzle Josiah Cheek, T. F. Cheek and others. JOSIAH CHEEK."

The preliminary facts were found and decided by the court to exist for the purpose of admitting secondary evidence of the contents of the warrant. The notice served on the defendant by the plaintiff, heretofore referred to, was then read and held to be sufficient, a copy of which will be found in the record. The court found that diligent search had

been made by the clerk for the missing instrument, and the same not being found, admitted secondary evidence.

The defendant objected. Objection overruled, and defendant excepted.

Witness Phillips then testified that he did not recollect the exact language of the warrant, but as he remembered it was in (316) substance the same as the affidavit of the defendant upon which the warrant was issued; that he issued the warrant in pursuance of the affidavit. The substance of the warrant was about the substance of the affidavit. It was directed to the sheriff or other lawful officer, and commanded him to arrest defendant Welch and bring him before me to answer the charge aforesaid. The warrant was signed by me as justice of the peace, and a seal after my signature. The warrant was delivered to Mr. Cheek. It was returned before me on 3 December, 1890. The officer returned the warrant executed, and he brought the defendant Welch before me. The return was made at 10 a.m. I never did try the case at all. Defendant Welch was released some time in the afternoon. Welch paid part of the costs, as before stated, but he paid it under protest. No judgment rendered, and the case was dismissed.

Both parties introduced testimony tending to support their respective contentions. Among other things, the plaintiff offered evidence of his good character, and also evidence to show bad and unfriendly feeling toward him on the part of the defendant, at the time of the arrest.

The issues set out in the record proper were submitted to the jury.

His Honor instructed the jury, among other instructions, as to other legal questions: "That if they believed the testimony offered and introduced by the plaintiff, that the charge contained in the warrant was that of embezzlement," to which the defendant excepted.

And at the request of the plaintiff the court gave the following, among other special instructions:

"If the jury believes from the testimony that the defendant in this action voluntarily discontinued his prosecution of the plaintiff before the justice, then it is a positive act and a relevant fact tending to show want of probable cause.

"That if the jury believes from the evidence that the defendant authorized the discharge of the plaintiff, it is not only a relevant (317) fact tending to show want of probable cause, but places upon the defendant the burden of proving there was no probable cause."

The defendant excepted, upon the ground that however the special instructions might be as a general proposition, as to the facts of this they were inapplicable and misleading, and that in this connection the jury's attention should have been called to the fact that the prosecution, as the defendant claims, ceased by reason of the agreement with the

plaintiff, and that for this reason the law as embodied in the instructions asked and given should not have been given.

Verdict for the plaintiff. Plaintiff moved for judgment, and defendant moved for a new trial. Judgment for plaintiff, and the defendant appealed.

L. M. Scott for plaintiff.

J. T. Morehead and J. N. Wilson for defendant.

PER CURIAM. The dismissal of the warrant by the justice of the peace with the consent of the defendant was a sufficient proceeding to authorize the plaintiff to sustain this action, and ordinarily such a determination would place the burden upon the defendant to show probable cause. Where, however, the proceeding is dismissed by virtue of an agreement between the parties, the principle does not apply. There was testimony in this case tending to show some arrangement between the parties, under which the plaintiff paid a part of the costs and was discharged. In Massachusetts it is held that "where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for (318) malicious prosecution." *Langford v. R. R.*, 144 Mass., 431, and the cases cited. It is unnecessary to go to this extent in the present appeal, but we are of the opinion that in view of the testimony as to the agreement, there was error in charging the jury, without qualification, that the burden of showing probable cause was on the defendant.

New trial.

Cited: Marcus v. Bernstein, 117 N. C., 33; *Welch v. Cheek,* 125 N. C., 355.

J. T. HARRIS v. B. J. FISHER ET AL.

Action for Damages—Ferocious Dogs, Ownership of—Knowledge by Principal of Ferocity of Agent's Dog.

If the owner of premises, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits the dog to run at large on the premises, he is liable for any damage that may be done by the dog to a passer-by. It would be otherwise if only the agent and not the principal had such knowledge, for the knowledge of the agent, not being within the scope of the agency, would not be the knowledge of the owner of the premises.

HARRIS *v.* FISHER.

ACTION for damages alleged to have been caused by the dogs of the defendants, tried at Fall Term, 1894, of RANDOLPH, before *Bryan, J.*

There was evidence on the part of the plaintiff tending to show that the defendants were the owners, and one Bevins the keeper in charge, of what was known as the "Randolph Kennels," the defendants having established the same for the purpose of keeping, training and raising dogs; that among the dogs kept on the premises, not by the "Kennels," there was a large black collie dog, the property of Bevins' wife, as claimed by the defendants, which with other dogs was allowed to run at large; that there were some dogs that were not allowed to go out except for the purpose of exercise and training by Bevins, who (319) resided at the place, and whose duty it was to keep and take care of the dogs. The defendant Wainman resided in the neighborhood, about one mile from the kennels, and the defendant Fisher was seen often at the place where the dogs were kept, which was on the public road, about seventy-five feet from said road.

There was evidence on the part of plaintiff that the said collie dog and three or four and sometimes a greater number of said dogs, in the spring and early summer prior to the time of the accident complained of, had, on various occasions, been allowed to run at large about the premises, and frequently attacked people and horses and frightened them while passing along the said road near which the said kennels were located, and that these facts were known to said Bevins, the same happening in his presence on several occasions and the dogs being called off by him.

That on 22 June, 1892, as testified to by the plaintiff, he was riding a mule along said road, with a blind bridle on and a saddle without a girth, as had been his custom for a long while, and that as he passed in front of said place the collie dog and three other grown dogs which were lying on the side of said road in full view of the house sprang up, barked and ran into the public road at the mule, making a great noise, and bit the heels of his mule, causing him to kick up with great violence and throw the plaintiff out of his saddle on the neck of the mule; that the mule instantly turned around in the road and threw the plaintiff with great force against the embankment at the side of the road; that by this fall his hip-bone at the joint was broken, besides other bodily injuries received by him, and that he was disabled for life thereby; that he suffered severely at the time, and still suffers from said injury, and has to go upon crutches. (320)

On the part of the plaintiff, expert witnesses testified that the injuries received by the plaintiff were permanent, he being seventy years of age at the time of the accident.

On the part of the defendant the evidence was that the kennel was established for bird dogs only, and tending to show that on the day of the accident, and immediately before the same, the collie dog and three four-months-old pointers were playing in the yard with the children, and that as the plaintiff was passing by the collie dog jumped the fence, crossed the road behind and within three feet of the plaintiff's mule; that the mule kicked at the dog, threw the plaintiff off, and the dog went into the woods on the other side of the road; that shortly before the accident Bevins had nailed up the gate to the yard to keep the puppies from going out of the yard, and that on this particular day the said puppies did not and could not go out of the yard; that at the time of the accident every dog belonging to the kennel, other than the three pointer puppies, were closely confined in the enclosure prepared for them, and did not nor could they get out of the same.

There was evidence on the part of the defendants tending to show that the defendants and Bevins were partners or joint owners of the dogs, and that the wife of Bevins owned the collie, and that the puppies were three months old.

At the close of the testimony the defendants, in writing, asked his Honor for the special instructions, a copy of which is hereto attached as a part of this case, which he gave as requested, excepting the fifth, which he amended by inserting after the words "defendants' dogs" the words "or those over which the defendants or their agent or partner had control as such living on the place," and the defendants insisted to his Honor that, though the jury should find that the pointer puppies ran out with the collie, yet if the mischief was occasioned by the collie biting the mule, only the owner of said collie would be responsible for
(321) the injury, and that though the puppies were in company with the collie, that each owner is responsible for the injury done by his own dog, and no more. His Honor did not concur in this view of the law, and reduced his instructions to writing.

The plaintiff asked a witness who had testified that the dogs ran out in front of his mule and barking and snapping at the head of the mule: "What appeared to be the temper and disposition of the dogs when they ran out?"

The defendants objected to the question and answer. His Honor admitted the testimony, and defendants excepted.

The witness answered: "They seemed a little ill." The defendants offered testimony as to the temper and disposition of the dogs, without objection on the part of the plaintiff.

The jury found the issues in favor of the plaintiff.

The appellant assigned for errors the admission of the testimony objected to, the refusal of his Honor to give the fifth instruction as

requested, and the giving of the instructions as amended by him, and his failing to instruct the jury that each owner was only responsible for the injuries done by his own dog, as insisted upon.

L. M. Scott for plaintiff.
J. N. Wilson for defendants.

CLARK, J. The evidence objected to was properly admitted. It was corroborative of the evidence as to the bad character of the dogs, and also tended to confirm plaintiff's version of the manner of the accident. Defendant, however, further excepted to the addition by the court to the fifth prayer for instruction. By that addition the court, in effect, charged the jury that the defendants were liable, if the injury was caused by dogs belonging either to the defendants or their agent living on the place, if said dogs were ferocious and mischievious and so known to be by the defendants. The defendants placed much stress on the fact that one of the dogs—the collie—belonged not to defendants, but to (322) their agent's wife; and, the ownership of the collie being not within the scope of his agency, his knowledge of the character of the collie owned by his wife was not the knowledge of the defendants. But that point is not presented by the addition to the charge, which is: that if the dogs were ferocious and mischievous, and that fact was known to the defendants, whether the dogs were owned by them or their agent living on the place, the defendants would be liable. This must be so. If the defendants, knowing the dog was vicious and dangerous, permitted their agent to retain him in company with their other dogs at a place on the side of the road where he would be likely to commit damage to passers-by, and he does so, the principal is liable. 1 A. & E., 584. It would be otherwise if the agent owning the dog knew he was dangerous, but the owner of the premises did not, for the knowledge of the agent not in the scope of the agency is not the knowledge of the principal. The ownership of the dog in such case is not within the agency. Here, however, the instruction excepted to is: that if the owner of the premises, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits said dog to run at large on his premises, said owner of the premises is liable. As to the third exception, the court charged in substance as prayed by defendants.

No error.

Cited: Halliburton v. Fair Assn., 119 N. C., 528; *McGhee v. R. R.*, 147 N. C., 162.

(323)

NANCY A. HILL v. B. F. DAVIS ET AL.

Trust Deed—Preference of Claim.

Where an insolvent trustor set out in his deed certain claims, which he described, to be paid in full, and declared that the reason he did not include in the list a note held by plaintiff for the balance due on land was that it was already secured, but directed the trustee to make settlement of the same "without discount," and the note was really not secured as trustor thought: *Held*, that there was an express trust in favor of the plaintiff, and its efficacy was not destroyed because the trustor was mistaken as to the debt being already secured.

ACTION, tried at Spring Term, 1894, of SURRY, before *Whitaker, J.*, upon complaint and demurrer *ore tenus*, for the recovery of $500, balance due on the purchase of land for which a deed had been given and no lien retained, and for a sale of the land in satisfaction of a debt.

It appeared from the complaint that the defendant B. F. Davis, in a deed of assignment for benefit of creditors, provided for the payment of certain claims, and added: "The following creditors are not included in the above enumeration, for that their claims are secured and referred to as existing encumbrances: M. R. Gay, $135; Craddock & Terry, $275; Nancy A. Hill, $500. And the trustee is authorized and directed to make settlement of the same without discount." The plaintiff's claim consisted of two notes, aggregating $500, given for the purchase of land which had been conveyed by her to B. F. Davis, no mortgage or other security being taken for the same.

The plaintiff prayed for judgment on the notes, and "that the said judgment be declared a lien on the tract of land fully described in this complaint as for the balance of the purchase money yet due thereon, and that the land be sold by a commission," etc.

(324) His Honor gave judgment on the notes, but refused to order a sale of the land to satisfy the same, and plaintiff appealed.

R. L. Haymore for plaintiff.
No counsel contra.

PER CURIAM. The deed in trust explicitly authorizes and directs the trustee to settle the claim of the plaintiff "without discount." Here is an express trust in favor of the plaintiff, and its efficacy is not destroyed because the trustor was mistaken in believing that the claim was already secured. It was clearly his intention that this claim should be preferred, at least to the extent of the value of the land which constituted

its consideration. While the plaintiff was not entitled to the specific relief asked, there was sufficient in the complaint to have warranted a judgment be declared a lien on the tract of land fully described in this deed, and that it should be paid by the trustee as directed.

Reversed.

(325)

D. W. C. BENBOW v. J. W. COOK.

Corporation—Organization of Corporation—Meetings of Stockholders—Notice—Mortgage, Validity of.

1. When corporate powers are granted by a special act of the Legislature, there must be evidence of the acceptance by the corporators of the privileges conferred and compliance with all conditions precedent prescribed by law in order to show affirmatively that the corporation is lawfully organized. It is otherwise when the corporation is formed under the general law, for by the signing of the articles of agreement, and the due recording thereof, the corporators become a body politic for the purposes set forth in the agreement.
2. In order to protect the rights of minorities the law requires that notice of the meetings of the stockholders of a corporation shall be given to every shareholder, either by the method prescribed in the charter or by-laws or by express notice; but where it appears that every person interested had express notice and participated in a meeting, there is no necessity for proving a compliance with the statute (sec. 665 of The Code) as to such notice.
3. When a minute of the proceedings of stockholders or directors of a corporation is made, it is presumed that notice was duly given and that the meeting was regularly and lawfully held.
4. Although it be actually shown that a meeting of the stockholders of a corporation was not called in the manner prescribed by law or the by-laws of the company, the action of the meeting will nevertheless be declared valid when it appears that every stockholder who did not participate in the meeting ratified its action afterwards.
5. When three directors, being all of the directors of a corporation and also the holders of all the stock of the company, met without notice and agreed to create an indebtedness and authorized the execution of a mortgage to secure it, and failed to make a record of their proceedings, but subsequently made and signed minutes of said proceedings: *Held*, that the action of such directors and stockholders was valid. (*Duke v. Markham*, 105 N. C., 131, distinguished.)
6. When a corporation deed recites that it is sealed with the corporate seal it will be presumed that what purports to be such seal placed after the name of the officer executing the deed is the seal of a corporation.
7. A private corporation may dispose of its property without express authority of the Legislature.

8. A mortgage deed of corporate property is not an executory contract within the meaning of section 683 of The Code.

ACTION, tried before *Shuford, J.*, and a jury, at February Term, 1894, of GUILFORD.

The plaintiff sued to recover possession or damages for the nondelivery of certain cotton-mill machinery which he claimed under a mortgage by the Crown Mills Corporation and which the defendant Cook, as sheriff, seized and sold under executions in his hands against said corporation.

The defendant denied the validity of the mortgage, first, because
(326) the corporation was not lawfully organized, in that the corporators did not lawfully assemble together and give their collective assent in meeting assembled to the adoption of by-laws and other acts alleged in the record of their meeting; second, because the alleged mortgage was not authorized by the by-laws nor by the corporation.

The Crown Mills was incorporated before the clerk of the Superior Court of Guilford County, and the record of the organization offered in evidence was as follows:

"GREENSBORO, N. C., 17 March, 1890.

"Pursuant to a call heretofore authorized, and signed by A. A. Holton, clerk of Superior Court of Guilford County, N. C., the same being published as required by law, and certified to by said clerk on 14 February, 1890, a meeting of the corporation and stockholders of the Crown Mills took place at 12 o'clock noon on 17 March, 1890, at the office of the Crown Mills.

"Present: Amos Ragan, R. E. Causey, O. S. Causey, corporators and subscribers to the stock of the company.

"On motion, O. S. Causey was called temporarily to the chair and acted as secretary *pro tem.*

"On request of the chairman, R. E. Causey read to the meeting the plan of the corporation, the permit to open books of subscription, the call for this meeting, the certificate of the publication of such call, signed by A. A. Holton, clerk of Superior Court, dated 14 February, 1890; the number of subscribers to stock and the amount of their subscription. It was ascertained that a sufficient amount of the capital stock had been subscribed as required by law, to wit, the following amounts:

"Amos Ragan, ten shares; O. S. Causey, ten shares; R. E. Causey, ten shares; making in all thirty shares, of $100 each, amounting to the par value of $3,000.

(327) "On motion of R. E. Causey, it was decided to fix the number of directors at three, and the election thereof was proceeded with, when the following were unanimously chosen directors:

"O. S. Causey, R. E. Causey, Amos Ragan, who proceeded to elect the following officers:

"Amos Ragan for president, and R. E. Causey for secretary and treasurer, the same being accepted and ratified by the stockholders, when the following was unanimously adopted as the by-laws," etc.

The testimony tended to show that the incorporators were not all present at the meeting, but that the record was entered in a book purporting to be the record book of the company, and afterwards signed by all the stockholders.

The record of the proceedings of the directors at which the alleged mortgage was authorized was as follows:

Pursuant to a call by the president, the directors met this day for the purpose of transacting business relative to negotiating a loan of money for the use of the company. Present: Amos Ragan, R. E. Causey, O. S. Causey. And in accordance to previous understanding it was ordered by this board of directors that R. E. Causey, treasurer, be and he is hereby authorized to execute the company's obligation to the amount of $12,000, and to secure the same by executing a mortgage on the machinery now owned by the company. And he is hereby authorized to execute other obligations of the company not to exceed $10,000, and secure the same by mortgage or otherwise as he may determine; said moneys to be used in the due course of the company's business.

AMOS RAGAN, President.
R. E. CAUSEY, Sec. and Treas.
O. S. CAUSEY.

Greensboro, 24 April, 1890.

There was testimony tending to show that there was no call (328) issued for the meeting at Greensboro on 24 April, 1890; that all did not meet there that day, but that they talked over the matter of the mortgage at High Point about that time, and subsequently, after the minutes had been entered on the book as the minutes of the meeting of 24 April, the books were carried to High Point, where they were signed by the three (being all of the) stockholders and directors.

The mortgage was signed:

R. E. CAUSEY, Sec. and Treas. [SEAL.]
O. S. CAUSEY. [SEAL.]
R. E. CAUSEY. [SEAL.]

An alleged corporate seal was also affixed to the instrument. There was no record or other evidence of the adoption by the corporation of a seal, but the secretary and treasurer testified that he knew the seal of the

company, and that the seal affixed to the instrument and purporting to be the corporate seal of the company was such seal.

Upon the conclusion of the testimony, and an intimation from his Honor that the plaintiff could not recover, the latter submitted to a nonsuit and appealed.

L. M. Scott for plaintiff.
Schenck & Schenck and W. W. Fuller for defendant.

AVERY, J. If the corporation never had any lawful existence, as the defendant contends, of course it did not authorize the execution of a mortgage some months after it is claimed that it was duly organized. The statute, The Code, sec. 677, provides that "Any number of persons, not less than three, who may be desirous of engaging in any business not unlawful, except building railroads or banking or insurance, at any place within the State, may, if it please them, *become incor-*
(329) *porated* in the manner following," etc. It seems that three persons, Amos Ragan, O. S. Causey and R. E. Causey, as the sole corporators of a manufacturing company, having ten shares each, signed articles of agreement before the clerk of the Superior Court of Guilford County, which were duly recorded. Having complied with the requirements as to the form of the articles of agreement and caused the proper record to be made, the three persons named as sole corporators became a body politic for the purposes set forth in the agreement. The Code, secs. 678, 679. When corporate powers are granted by a special instead of a general act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. But in our case every corporator affixed his hand and seal to the articles of agreement recorded, and by such signature and the recording of the instrument, became invested with all the powers which it was contemplated by law to confer in such cases. The Code, sec. 679. Private corporations are formed when the necessary contractual relations are created between the persons clothed by law with the powers of a body politic. 1 Morawitz, 24. The existence of the company depends upon the fact of the acceptance of the privilege (1 Morawitz, 26), and it was evidently the intent of the Legislature that the signature to the articles should be deemed an acceptance, leaving no other condition precedent to be performed, except the recording, this being a substantial compliance with the requirements of the law. 1 Morawitz, 32, 33, 27 *et seq.* In such cases the corporators are usually constituted only a *quasi* corporation, "whose sole function is to bring into existence the corporation consisting of the real body of stockholders." But in our

case the signers of the certificate, as appears from the recorded articles of agreement, were not only the sole corporators, but the only stockholders, and, as between themselves, constituted a corporate body, wanting only formal organization in order to transact business with the public.

The law, intending to protect the rights of minorities, requires that notice of the meetings of the stockholders of a corporation (330) shall be given to every person who holds a share of the stock, and, if no other mode of notification be provided in the charter or by-laws of a company, or by statute, express notice must be given. The owner of every unit of interest constituting a part of the aggregate body of stock is entitled to the opportunity which due notice affords him of protecting it, by being present and participating in meetings. 1 Cook on Stockholders, sec. 574. The reason for this rule is plainly met, so far as the organization of the company is concerned, when it appears that all of the stockholders assented to the call of the meeting, participated in it, and acquiesced in its consequences afterwards. The State has not complained or taken any steps to question its rights or annul its powers as a body politic. If we concede that section 665 of The Code was intended to apply in such a case as this, the only purpose of the Legislature in enacting it was to provide that every corporator should have notice of the time and place of a meeting for organization. There was no necessity for proving a compliance with the statute, when every person interested had express notice and participated in the meeting. Angell & Ames on Corporations, sec. 492. The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, "the meeting and all proceedings are as valid as they would be had the full statutory notice been given." 1 Cook, *supra,* sec. 599.

It is always presumed that notice is given, and that any meeting of which a minute is found in the proceedings of the stockholders of a corporation was regularly and lawfully held, Cook, sec. 600. When a party assumes the burden of showing irregularity, and actually shows that the meeting for organization, or any subsequent one, was not called in the manner prescribed by law or the by-laws of the company, the action of the meeting will nevertheless be declared valid when it appears that every stockholder who did not participate in the (331) meeting ratified its action afterwards. *Stutz v. Hendly,* 41 Fed., 531; *Nelson v. Hubbard,* 96 Ala., 238; *Campbell v. Argenta, etc., Co.,* 51 Fed., 1.

If the three directors, Amos Ragan, O. S. Causey and R. E. Causey, met at High Point without notice, they being also the holders of all the stock, it was a waiver of the requirement of the by-laws that such meetings should be called by the president or a majority of the directors.

Nelson v. Hubbard, supra; Jones v. Turnpike Co., 7 Ind., 547. Whether the directors met at Greensboro or High Point, and whether in pursuance of previous notice or not, is immaterial, if in fact they met together and agreed to create the indebtedness and authorize the execution of the mortgage to secure it; they, as stockholders and directors, constituting as they did the whole of each body, waived objection to the want of the notice prescribed by the by-laws, and the failure to make a record of their proceedings at that time does not affect the validity of their action. *Hendly v. Stutz*, 139 U. S., 417. The signing of the minutes at another time would not affect the validity of the action of the board, if in fact all three met, discussed the question of executing the mortgage and agreed to what was afterwards entered on the minutes and signed by them. It is true that the assent of each of the three, obtained at different times or places, to a certain course of proceedings would not bind them, because it would not be the action of the directors as a collective body; but if as a body they assembled together and conferred in taking certain action, they waived all objection to irregularities, though the meeting may have been informal and the minutes may not have been then recorded. The case of *Duke v. Markham*, 105 N. C., 131, is clearly distinguishable in that there the stockholders at no time assembled as a body, but the assent of each individual was asked and obtained separately. It is not contended that the consent of each individual has
(332) the same force as the concurrence of all assembled together, given after an opportunity to discuss their proceedings, interchange views, and to acquire benefit of such consultation.

A corporation must at least affix its seal to such instruments as would be invalid if executed by a natural person without a seal. 1 Morawitz Pr. Corp., sec. 338. It was therefore essential that the seal should be affixed to the mortgage. If R. E. Causey, the secretary and treasurer, was authorized to sign the instrument, as agent, it will be presumed that what purported to be a seal, and would have been declared sufficient if attached to his signature as an individual, was the seal of the corporation affixed in accordance with the recital in the attestation clause. 2 Cook, *supra*, sec. 722. That clause is as follows: "In testimony whereof the said party of the first part has caused this deed to be signed by its secretary and treasurer and two stockholders, and sealed with its corporate seal.

"R. E. CAUSEY, Sec. and Treas. [SEAL.]
"O. S. CAUSEY. [SEAL.]
"R. E. CAUSEY. [SEAL.]"

The deed was made in the name of the corporation (Crown Mills) inserted in the body of it as the grantor, and if it can be shown that

R. E. Causey, the secretary and treasurer, was the agent of the company, clothed with authority from the corporation to execute a mortgage of its property, the form of attestation adopted would be practically that approved by Cook, *supra,* sec. 723, note. But it is contended that the secretary and treasurer was empowered only "to execute the company's obligation to the amount of $12,000, and to secure the same by executing a mortgage on machinery now owned by the company," whereas the mortgage was, in fact, given to secure a debt incurred previously by O. S. Causey for money loaned by the plaintiff to buy the machinery, afterwards turned over to the corporation to be used in the mills, the seizure of which on several executions by the defendant as sheriff (333) giving rise to this controversy. The authority given was to execute the company's obligation, without specifying for what purpose or for what consideration. The property was, in fact, conveyed to secure the payment of the money with which the property in controversy was bought. O. S. Causey had obtained the money from the plaintiff to buy the machinery for a company to be thereafter organized, and had attempted to transfer the title to the machinery, as purchased, to the plaintiff.

After the formation of the corporation this property was turned over to it, and the purpose in executing the mortgage was to secure the money advanced to buy it. If we admit that it is questionable whether there was any obligation on the part of the corporation to pay the debt, it must nevertheless be conceded that every director and stockholder had notice of the execution of the instrument by the secretary and treasurer claiming to be acting as agent of the company. It might have been sufficient to estop them to show that with notice of the execution they took no steps to disaffirm the mortgage deed (2 Morawitz, sec. 631), but it seems clear that they cannot disavow the act of the agent. This is not a question as to the validity of a mortgage deed. It is conceded that the subsequent ratification by the directors or stockholders of an invalid deed or one not in form a mortgage would not validate it so as to create a lien superior to any other lien attaching in the interval between the execution or registration and the ratification. But in our case the ratification is accomplished by signing before the delivery or registration of the deed, and it is registered in such shape that its validity as a lien can only be questioned by showing, in rebuttal of the presumption of authority, that the agent purporting to act was not in fact empowered to do so. There was no seal attached to the paper offered in *Duke v. Markham, supra,* and purporting to be a deed, and ratification would not have made it a mortgage deed, while no act of the (334) company by amendment or otherwise could have made it relate back so as to give it the force of a lien from registration superior to

such liens as attached when it stood upon the record in its original form. A private corporation, not charged with any duty to the public, and not *quasi* public in its character, may dispose of its property (as certainly distinguished from its franchise) without express authority from the Legislature by virtue of the general right of alienation that is an incident of ownership by natural or artificial persons. 4 A. & E., 238; *Paper Co. v. Chronicle, ante,* 143. We do not think that this is a case in which the statute limiting the liability that may be incurred by executing contracts of corporations (Code, sec. 683) applies, if that statute be still in force, as to existing suits. Laws 1893, cc. 84 and 388. There was no executory contract in this case. The corporation executed, if anything, a mortgage deed conveying its property.

For the reasons given, we think that the judge below erred in ruling that the plaintiffs are not entitled to recover in any aspect of the evidence, and we must therefore grant a

New trial.

Cited: Powell v. Lumber Co., 153 N. C., 55.

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(335)

JOEL TRIPLETT v. JOHN T. FOSTER.

Action to Foreclose Mortgage—Ownership of Notes—Statute of Limitations.

1. When in an action to foreclose a mortgage given to secure notes assigned to plaintiff, the answer did not state facts sufficient to amount to a plea of illegality or fraud in the inception or transfer of the notes, and there was no evidence tending to support such a defense, the production of the notes by the plaintiff was *prima facie* evidence of ownership, and it devolved on defendant to rebut the presumption.
2. The statute of limitations on a mortgage begins to run from the maturity and not from the date of the notes which it secures.

ACTION for foreclosure of a mortgage, tried at Fall Term, 1893, of WILKES, before *Winston, J.,* and a jury. The issues submitted to the jury, and responses, were as follows:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount?" Answer: "Yes, according to prayer of complaint."

"2. Is the plaintiff's cause of action barred by the statute of limitations?" Answer: "No."

"3. Is the plaintiff the owner of the notes sued on?" (The third issue is excluded and covered by the first issue).

"4. Is the plaintiff's cause of action for the foreclosure of the mortgage described in the pleadings barred by the statute of limitations?" Answer: "No."

The plaintiff introduced in evidence notes, and mortgage securing the same, made to Joel F. Ferguson. The date of the maturity of the last note was 2 January, 1886. The mortgage was dated 2 January, 1882. There was evidence of the assignment of the notes and mortgage to plaintiff by Ferguson, 10 August, 1892. The summons in this action was issued, dated 22 August, 1892.

The defendant John T. Foster testified that the plaintiff Trip- (336) lett said the notes were put into his hands or were assigned to him by Ferguson to secure a debt of $200, and said he had promised to collect them, but that he could not make any settlement without the consent of Ferguson, as part of the money was going to the latter. All this testimony was excluded by his Honor as not bearing on the issues and as not depriving the plaintiff of an affirmative answer to the issues. The defendant excepted.

The defendant offered no further testimony, and closed his case. The jury returned their verdict, as above indicated, under the instructions of the court, and the defendant excepted. There was no evidence of fraud, collusion or payment. From a judgment for the plaintiff the defendant appealed.

Cranor & Buxton and C. B. Watson for plaintiff.
W. W. Barger for defendant.

SHEPHERD, C. J. The answer does not state facts sufficient to amount to a plea of illegality or fraud in the inception or the transfer of the notes sued upon, nor is there any evidence tending to sustain such a defense. This being so, the production of the notes by the plaintiff was *prima facie* evidence of ownership, and it devolved upon the defendant to rebut the presumption. *Jackson v. Love,* 82 N. C., 405; *Holly v. Holly,* 94 N. C., 670; *Ballinger v. Cureton,* 104 N. C., 474; *Bank v. Burgwyn,* 108 N. C., 62. Apart from this, however, the evidence of the defendant, who was examined in his own behalf, shows that the payee of the notes transferred them to the plaintiff as collateral security. This gave the plaintiff a right to maintain the action. There was no error, therefore, in the charge of the court as to the third issue. Neither is there error in holding that the notes were not barred by the statute of

limitations. The statute commenced to run, not from the date of
(337) the execution, but from the maturity of the said notes.

Upon the whole record we think there is

No error.

Cited: Beaman v. Ward, 132 N. C., 71; *Trust Co. v. Bank,* 167 N. C., 261.

M. C. CALL, EXECUTRIX OF I. S. CALL, v. TOWN OF WILKESBORO.

Eminent Domain—Condemnation of Lands for Streets—Laying Out Streets—Necessity for—Power of Town—Authority Conferred by Legislature.

1. Where an act of the General Assembly expressly authorizes the laying out a certain street across certain lands, the owner of the land cannot be heard to complain that the street is not necessary for public purposes.
2. Whether a particular use for land is public or not, within the meaning of the Constitution, is a question for the judiciary; and whether a public highway, which is for public use, is a necessity or not, is a question for the legislative department to determine.
3. An act authorizing the laying out of a certain street is not affected by a prior judgment of the Superior Court that such street is not a public necessity.
4. By section 2, ch. 306, Private Laws 1893, the General Assembly provided that a certain street directed by section 1 of said act to be laid out in the town of Wilkesboro should be located under the law providing for the location of streets and rights-of-way as provided in the charter of said town: *Held,* that this was not intended to restrict the town to the powers existing under its charter, but to regulate the procedure in ascertaining the most practical way of laying out the street.

ACTION, commenced on 8 April, 1893, heard upon a temporary restraining order issued by *Boykin, J.,* at chambers at Mocksville, N. C.

(342) The restraining order was dismissed, and plaintiff appealed.

W. W. Barber for plaintiff.
Watson & Buxton for defendant.

SHEPHERD, C. J. On 6 March, 1893, the General Assembly passed chapter 306, Private Laws 1893, as follows:

"Section 1. That the board of town commissioners of the town of Wilkesboro are hereby authorized to lay off, locate and establish a public street in the town of Wilkesboro, not less than sixteen feet wide, commencing at the southeast approach of the iron bridge across the Yadkin River, between Wilkesboro and North Wilkesboro, thence down the bank of said river, the most practical way, to Garrett Vine's saw and lumber mills.

"Sec. 2. That said street shall be located under the law providing for the location of streets and rights-of-way, as provided in the charter of said town.

"Sec. 3. All laws and clauses of laws in conflict with this act are hereby repealed.

"Sec. 4. This act shall be in force from and after its ratification."

The first section of the above act expressly authorizes the laying off the street which is the subject of this controversy, and it is not open to the plaintiff to say that the said street is not necessary (343) for public purposes. The Constitution provides that private property shall not be taken except for public use, and it is well settled "that whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary." Lewis on Em. Domain, 185; Mills Em. Domain, 10, 11. It cannot be doubted that a public highway like the one under consideration is a public use; and, this being determined, the question as to its necessity or expediency is a matter which rests entirely with the legislative department. Lewis, *supra,* 238; Mills, *supra,* 10, 11.

According to these principles, the plaintiff is, as we have said, precluded from denying the necessity for the street, and the fact that previous to the passage of the act of Assembly the Superior Court had adjudged that no such necessity existed, cannot defeat the express grant of authority by the Legislature. The act (sec. 1) in its terms substantially locates the street, and there is nothing in the plaintiff's contention that section 2 has the effect of so qualifying the provisions of section 1 as to restrict the town authorities to the same powers only that existed under the charter of 1889. The act explicitly grants the authority to lay off the street, and section 2 was intended simply to regulate the procedure, as, to ascertain "the most practical way," and other incidents attending the exercise of the right of the power of eminent domain. The judgment of the court below is

Affirmed.

Cited: Stratford v. Greensboro, 124 N. C., 133; *Cozard v. Hardwood Co.,* 139 N. C., 296; *Jeffress v. Greenville,* 154 N. C., 498.

(344)

LOUISA GRADY, ADMINISTRATRIX OF W. B. GRADY, v. J. W. WILSON, ADMINISTRATOR OF JOHN TUETT.

Quantum Meruit—New Promise—Pleading—Statute of Limitations.

1. Where a complaint alleged the rendering of services by plaintiff to defendant and the frequent promise of the latter to pay for the same, and also alleged the reasonable value of such services, the answer alleged that "if defendant promised any compensation it was in parol, and more than three years had elapsed since the making of such promise": *Held*, that the statute was sufficiently pleaded, whether the action was founded on the express or the implied promise.
2. After the statute of limitations has begun to run in favor of one who afterwards becomes insane it is not suspended by the supervening disability.
3. Where a debt against a ward could have been established by a judgment against the guardian of a lunatic before action thereon was barred by the statute of limitations, the fact that the debt could not have been enforced until after the death of the lunatic, on account of his entire income being required to maintain him, did not suspend the running of the statute.
4. A reply by an administrator of a deceased debtor to the demand of plaintiff for payment that he would "see the judge and do whatever he said," was not a waiver of the statute of limitations.

ACTION, tried at Fall Term, 1894, of BURKE, before *Allen, J.* A jury trial was waived, and it was agreed that the judge might try the action and find the facts. After hearing the evidence the following facts were found:

1. That during 1881, 1882, 1883 and 1884 the plaintiff's intestate, William Grady, lived with, furnished lodging, did washing and mending and performed other services for the defendant's intestate, John Tuett, at his request, and that the said services for the years 1882, 1883 and 1884 were reasonably worth the sum of $250.

(345) 2. That during the time such services were being rendered, the defendant's intestate stated on several occasions that he intended to sell a portion of his land and get money with which to build a house for plaintiff's intestate and pay him for his board, but he died without ever doing so.

3. That during 1886 the defendant's intestate became insane and continued so until his death in 1892.

4. That the defendant J. W. Wilson was appointed guardian of the said John Tuett on 18 September, 1886, and continued to act as such until the death of said Tuett, as above stated.

5. That the proceeds from the property of the said John Tuett during the time he was insane, which amounted to about $35 per year, were insufficient for his support, and the same, which consisted of the rents

from his land, were paid by plaintiff's intestate, under the direction of his said guardian, to the authorities of the Western North Carolina Insane Asylum (now State Hospital), where said Tuett was then confined.

6. That J. W. Wilson was appointed administrator of said Tuett on 24 May, 1892, and within one year after such appointment the plaintiff's intestate, by and through his son and agent, presented his account for said services to defendant, who took the account and promised that he would do all he could for plaintiff's intestate; and on another occasion, and within one year after the appointment of said administrator, said agent again mentioned the said account to defendant, and stated to him that perhaps he had best get a lawyer, when defendant replied: "No, I will have to see the judge and do whatever he says," and again assured said agent that he would do all he could for plaintiff's intestate; that these statements were made in good faith and with no intention to mislead; that, relying on these promises and assurances so made by defendant, plaintiff's intestate did not enter suit for such services during his life. (346)

7. That plaintiff's intestate died 27 March, 1893, and this action was brought within one year thereafter, to wit, on 8 March, 1894, by plaintiff, who was duly appointed administrator of the said William Grady on 8 March, 1894.

Upon the consideration of the foregoing facts and the plea of the statute of limitations attempted to be set up in the answer, the court was of opinion that the said statute was neither sufficiently pleaded nor had any application to this action, the same seeming to be an attempt to plead an old or a new promise, neither of which is sued on in this action, and there being no facts alleged showing that the cause of action had not accrued within three years, nor within ten years prior to the bringing of the action, nor was it alleged that the action had not been brought within one year after the appointment of the administrator Wilson.

The court was further of opinion that the defense, if any, was to the cause of action and not to the promise, and that the fact upon which the defense was grounded must have been set out in the answer before it could be relied on by the defendant.

The defendant excepted, insisting that the action was barred, and that the answer sufficiently pleaded the statute of limitations.

The son of the plaintiff, and of the plaintiff's intestate, was examined as a witness on behalf of plaintiff as to the board furnished and other services rendered defendant's intestate by his said father.

Objected to by defendant under section 590 of The Code. Objection overruled, and defendant excepted.

The defendant J. W. Wilson was offered as a witness in his own behalf, and it was proposed to prove by him that while guardian of Tuett he had a conversation with William Grady, and that Grady claimed the land of Tuett as his heir, but never said anything about any indebtedness or any claim against him.

(347) Objected to by plaintiff. Objection sustained, because the evidence was immaterial and also prohibited by section 590 of The Code. Defendant excepted.

Judgment was rendered upon the facts found in favor of the plaintiff for $250. Defendant excepted and appealed.

Isaac T. Avery and S. J. Erwin for plaintiff.
Battle & Mordecai for defendant.

CLARK, J. The allegation of the complaint is that the plaintiff's intestate rendered services during the years 1881, 1882, 1883 and 1884 as a servant for defendant's intestate, who promised time and again to pay for them. The complaint further alleges the reasonable value of said services, so as to recover upon a *quantum meruit*. The answer alleges full payment of said services, and says that if defendant's intestate promised any additional compensation, or any compensation, it "was in parol and more than three years had elapsed since the making of such promise, and the defendant specially pleads the statute of limitations upon such promise." The statute was sufficiently pleaded, whether the action is on the express promise or the implied promise. *Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Stubbs v. Motz,* 113 N. C., 458. This is not a case where the alleged promise is to pay out of the estate after death. Here the statute began to run for each year's services at the end of the year. The statute began to run for the last year's services on 1 January, 1885, and three years had elapsed before the death of either plaintiff's intestate or of defendant's intestate. The Code, section 164, has therefore no application. The claim as to 1881 and 1882 was already barred upon the defendant's intestate becoming insane in 1886. As to the claim for 1883 and 1884, the statute, having begun to run, was not suspended by the supervening insanity. *Chancey v. Powell,* 103 N. C., 159. Action should have been

(348) brought within three years against the employer, or, after the insanity, against his guardian. The debt could have been established by judgment, even if the allegation was correct that it could not have been collected till after the ward's death on account of the income being required for his support. The claim being barred before the death of defendant's intestate, and there being neither proof nor allegation of a new promise in writing (The Code, sec. 172) by the defendant, it is

not necessary to consider the question which that would have raised. *Fleming v. Fleming,* 85 N. C., 127. The reply of the administrator to the plaintiff that it was not necessary to get a lawyer and that he "would see the judge and do whatever he said," was not conduct which waived the statute and justified the plaintiff in not bringing action. *Hill v. Hilliard,* 103 N. C., 34; *Joyner v. Massey,* 97 N. C., 148. Besides, the claim was already barred, and the plaintiff was not prejudiced by the delay.

Error.

Cited: Duckworth v. Duckworth, 144 N. C., 622.

W. J. McEWEN v. JOSEPH LOUCHEIM.

Practice—Referee's Findings of Fact—Action by Agent for Commissions—Quantum Meruit.

1. Where, in passing upon exceptions to a referee's report, the judge below makes no specific findings of fact, it will be presumed, upon appeal to this Court, that he adopted the referee's findings of fact.
2. Where plaintiff, who was entitled under contract with defendant to commissions on all goods sold within a certain territory, went beyond such territory, at the request of defendant, for the purpose of making sales, and obtained orders which were turned down by defendant, he is entitled to his expenses and reasonable compensation for his time.
3. The findings of fact by a referee cannot be reviewed by this Court, when they have been approved by the judge below.
4. A receipt given in a settlement between parties is only *prima facie* evidence.

ACTION, tried before *Allen, J.,* at Fall Term, 1894, of ASHE, (349) upon exceptions to a referee's report.

The sixth exception was:

"That the referee's conclusions of law are erroneous, in that he finds the defendant is indebted to the plaintiff in any amount (351) at all."

His Honor overruled the exceptions and confirmed the referee's report, and the defendant appealed.

R. A. Doughton for plaintiff.

Haywood & Haywood for defendant.

CLARK, J. The judge having made no specific findings of fact, he is presumed to have adopted those of the referee. *Battle v. Mayo,* 102 N. C., 413. The plaintiff sued for commissions on the bill of goods sold to Carroll & Co. While this was disallowed because the sale was made in territory not embraced in the contract, it being found as a fact that the trip to make the sale was made at the request of the defendant, the referee properly allowed the plaintiff his expenses and reasonable compensation for his time. *Stokes v. Taylor,* 104 N. C., 394. There was no error in allowing the commissions on the sale to Yarborough, which was according to the contract. There were allegations of fact in the answer which, if found true, negatived liability as to this item and for the $27.32, but the finding of the referee was adverse and we cannot review his findings of fact. The judge below possessed that power, but he approved the referee's findings. We do not find in the pleadings or the referee's report any admission by plaintiff of a credit of $28.54, as stated in the fourth exception. The receipt was only *prima facie* evidence, and it was directly impeached by the replication. *Harper v. Dail,* 92 N. C., 394. The sixth exception is too general to be considered,
(352) except as it covers matters embraced in the specific exceptions just referred to. Clark's Code (2 Ed.), pp. 413, 414.

No error.

Cited: Foushee v. Beckwith, 119 N. C., 179; *Dunavant v. R. R.,* 122 N. C., 1001; *Smith v. Smith,* 123 N. C., 234; *Ramsey v. Browder,* 136 N. C., 253.

JAMES McMILLAN v. R. H. GAMBILL ET AL.

Practice—Failure to Deny Allegations of Complaint Equivalent to Admission—Chain of Title.

In deducing his title in the trial of an action to recover land, the plaintiff traced the title from the State to J. M., but failed to show a conveyance from J. M. to M. B., under whom he claimed. The complaint alleged that J. M. conveyed the land in fee to M. B. and that the deed had been lost or destroyed. These allegations were not denied by the answer: *Held,* that the failure to deny being equivalent in such case to an admission, these admitted allegations made the plaintiff's chain of title as complete as if the deed alleged to have been destroyed had been produced.

ACTION to recover possession of a tract of land, tried at Fall Term, 1894, of ASHE, before *Allen, J.*, and a jury. The court held that plaintiff could not recover.

R. A. Doughton for plaintiff. (353)
No counsel contra.

BURWELL, J. This is an action to recover land. The case states that "the plaintiff showed a regular chain of title covering that in dispute from the State to John McMillan and from the heirs of Meredith Ballou to himself." If he could have shown a deed from John McMillan to Meredith Ballou his chain of title would have been complete.

Upon an examination of the pleadings we find that it is alleged in the third section of the complaint that "John McMillan, who was then the owner of said land, conveyed the same in fee to Meredith Ballou; that the deed made to Ballou has been lost or destroyed"; and these allegations are not denied in the answer. Failure to deny is equivalent in such case to an admission. By this admission the plaintiff's chain is therefore made as complete as it would have been if he had produced the deed so alleged to be lost. It seems evident that the fact that there was no denial of these allegations was not called to the attention of the judge below.

New trial.

Cited: Willis v. Tel. Co., 150 N. C., 324.

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(354)

BRADDY & GAYLORD v. NEW YORK BOWERY FIRE INSURANCE COMPANY.

Arbitration—Bad Faith—When Agreement Ends.

1. While an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the insured is not invalid, yet a contract which ousts the jurisdiction of the courts by leaving all other matters involved in any controversy that may arise between insurer and insured to such arbitrament is void as against public policy.
2. When either party to an arbitration acts in bad faith in order to defeat its real object, the other is absolved from duty with regard to it.
3. Where, by the terms of an agreement to submit to appraisers the question of the amount of loss by fire, the appraisers, when appointed, were to meet at a certain place and on a certain date, and the parties were to

waive all further notice of the meeting on that day, or their subsequent meetings, and the appraisers met, the parties will be presumed to be cognizant of all that was done by the arbitrators.

4. It is not unreasonable for an arbitrator, acting with a view to secure the service of an unprejudiced, competent and honest umpire, to insist that only the names of persons living in the vicinage or in the State, or in some way known to him, at least by reputation, shall be tendered to him to act as such.

5. When the failure of an arbitration is evidently due to the unreasonable conduct of the arbitrator selected by one of the parties who had notice of all that was done by such arbitrator, the agreement for arbitration may be considered as ended.

APPEAL from *Whitaker, J.*, May Term, 1894, of FORSYTH. From the judgment on a verdict for the defendant, the plaintiffs appealed.

The facts sufficiently appear in the opinion of *Associate Justice* (355) *Avery.*

Watson & Buxton and Jones & Patterson for plaintiffs.
Glenn & Manly for defendant.

AVERY, J. While it is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person insured is not invalid (*Manufacturing Co. v. Insurance Co.*, 106 N. C., 28; *Carroll v. Insurance Co.*, 72 Cal., 297), it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy that might arise between insurer and insured to such arbitrament is void as against public policy. Angell on Insurance, 431; *Scott v. Avery*, 20 E. L. & E., 327; *S. c.*, 8 Exch., 487; *Sancilito v. C. U. A. Co.*, 66 Cal., 256; 2 Biddell Ins., sec. 1154. If a stipulation in the policy to submit all controverted questions that may arise in case of loss to arbitrators cannot be enforced, will the courts allow a contract, making the submission of the single question of the amount of loss sustained, to deprive a plaintiff of the opportunity to try the issues of fact involved, of his right to recover before a jury by reason of the misconduct of the parties or of the arbitrators? If either party acts in bad faith in order to defeat the real object of the arbitration, the other is absolved from duty in regard to it, and from any obligation to enter into a new agreement for arbitration. 2 May Ins., sec. 496b; *Uhrig v. Ins. Co.*, 101 N. Y., 362; Wood Ins., sec. 230. "A claimant under such a policy," said the Court in *Uhrig's case, supra*, "cannot be tied up forever without his fault and against his will." Citing that case to sustain the proposition, Biddell, in his work on Insurance, sec. 1162, says: "Where each party duly selects an arbitrator, but the umpire fails of

selection, it is said there need not be a new arbitration." The Supreme Court of Pennsylvania, in *Ins. Co. v. Hoiking,* 115 Pa. St., 416, held that where two arbitrators, appointed under an agreement (356) like that in the policy sued on, failed to agree, then a suit brought by the plaintiff should be deemed a revocation of such an agreement. The parties can contract that, at the written request of either of them, they will each select an arbitrator and empower them to choose an umpire; but if the courts should give their sanction to any course of conduct on the part of the insurer or of the arbitrator selected by the defendant, that might be repeated in any case which might arise and operate to indefinitely delay the precedent arbitration and prevent the bringing of an action, it would manifestly enable the insurer by appointing an interested and corrupt appraiser to accomplish indirectly what the law declares shall not be done directly by virtue of a stipulation or agreement.

By the terms of the contract to submit to the appraisers, they were, when appointed, to meet in the town of Winston on 1 December, 1892, and the parties were to waive all further notice of the meeting on that day, or their subsequent meetings. The plaintiffs named one L. G. Cherry, of Winston, and the defendant selected one Westbrook of Atlanta, Georgia. When the two met, we must assume that the defendant, having waived all claim to further notice, was cognizant of all that was done by the arbitrators selected. The first proposition, emanating from Westbrook, was to select one Wilson, a resident of Winston. Cherry objected, and assigned as a reason that Wilson had already been suggested by another insurance company, liable for the same loss, as a suitable appraiser to act for it in estimating the very same loss. This objection was not an unreasonable one, since supposing that Cherry's objection was to secure the services of not only honest, but unprejudiced men, he did what any cautious lawyer would have advised his client to do in reference to a juror when he objected to having the rights of the plaintiff passed upon by a man who might be biased by the fact (357) of his selection by another company which was antagonistic to the plaintiff, to represent it in passing upon the very same question. The next move was also made by Westbrook, when he proposed that each appraiser should nominate three men for umpire, and the two should try to agree upon one of the six so selected. Cherry named three business men of the town of Winston, to all of whom Westbrook objected, but it does not appear that he assigned any cause. Westbrook named three persons, all residents of the State of Georgia. Cherry objected, and stated as a reason for so doing that they all lived in the State of Georgia, and, as we assume, were unknown to him. The trial of the question of the amount of loss was to be left for decision to appraisers instead of a jury,

to whom but for the agreement the plaintiff might have demanded that it be submitted. We do not think it unreasonable for an appraiser, acting with a view to secure the services of an unprejudiced, competent and honest associate, to insist that only the names of persons living in the vicinage, or in the State, or in some way known to him, at least by reputation, should be tendered to him to take the place and discharge the functions of a juror. The failure of the arbitration was evidently due to the unreasonable conduct of the appraiser selected by the defendant, and they had notice of all that was done by him. It is not necessary for us to follow the ruling of the Court of Pennsylvania in holding that, in any failure of arbitrators selected to agree, the plaintiff is left at liberty to sue, though good reasons could be given for so doing. But in this particular case, where the defendant permitted the appraiser, chosen by it, to leave for Georgia, giving his address to Cherry, after acting so unreasonably, and held its peace then and thereafter till 10 February, 1893, when the summons was issued, it is manifest that if the company did not intend or consent, by dilatory measures, to defeat the bringing of an action altogether, the success of the stratagem adopted by Westbrook, if approved, might point out the way for an unscrupulous
(358) agent in the future designedly to accomplish what the law would declare unlawful if it were attempted by means of the enforcement of a contract.

The court instructed the jury that if they believed the evidence, to find by an affirmative response to the first issue that the arbitration was still in force. In this ruling we think that there was error. As another trial will be had, and other additional evidence may be brought out bearing on the other questions involved, we deem it unnecessary to advert to any other exception.

New trial.

Cited: Pretzfelder v. Ins. Co., 116 N. C., 497; *Pretzfelder v. Ins. Co.*, 123 N. C., 166; *Kelly v. Trimont Lodge*, 154 N. C., 100; *Williams v. Mfg. Co., ib.*, 209; *Nelson v. R. R.*, 157 N. C., 201.

JOHN W. GRAYSON ET AL. v. J. L. ENGLISH.

Action to Recover Land—Entry—Grant—Senior Grant on Junior Entry—Vague Description of Land in Entry—Constructive Notice to Junior Enterer.

1. If the description contained in an older entry so identifies the land intended to be covered by it that a junior enterer can, upon reading it, ascertain that it is the same land for which he subsequently obtains a grant under his junior entry, he takes with constructive notice of the inchoate equity of the senior enterer.
2. While the rule in reference to the sufficiency of description of land in entries of land as between the State and the enterer is more liberal than that applicable to descriptions of land in conveyances and contracts between individuals, yet a vague and indefinite description in an entry is not constructive notice to a subsequent enterer until the location is made certain by an actual survey.
3. Constructive notice to subsequent enterers may be given by an enterer of land in two ways—first, by making a survey of a vague entry, or one containing an indefinite description, and thus identifying that which was before uncertain; and, second, by making the description in the entry so explicit as to give reasonable notice of the first appropriation.
4. An entry (No. 2252) for 640 acres was so drawn as to include all vacant lands on the summit of H. Mountain at the north end and extending down from the summit on the east and west sides to the lands of others mentioned in the entry. Another entry (2253), made the same day by the same party, described "640 acres adjoining the above (the lands covered by entry No. 2252), the lands of E. G., C. D., B., the Powell place, Allen's Dealsville tract, extending along the summit of the H. Mountain and down both sides to deeded land." A subsequent entry for land covered by entry No. 2253 was made by plaintiffs, who obtained a grant therefor prior to the date of the survey and grant to defendant on the entries Nos. 2252 and 2253: *Held*, that the senior entry contained upon its face a sufficient description to affect the subsequent enterers of the same land with notice of the equity of the senior enterer.

CONTROVERSY without action, submitted under section 567 of (359) The Code, heard before *Allen, J.*, Fall Term, 1894, of MCDOWELL.

The following is the case agreed:

"1. That John B. Grayson died 26 April, 1885, leaving him surviving the plaintiffs above named, his only heirs at law, except Margaret L. Grayson, who is his widow.

"2. That the said John B. Grayson died intestate, and his real estate descended to the plaintiffs, his heirs at law.

"3. That R. Don Wilson is dead, and left a last will and testament by which he devised his interest in the land in controversy to Martha L. Sledge.

"4. That Martha L. Sledge executed a deed conveying her interest in said land to J. L. English.

"5. That on 25 November, 1868, R. Don Wilson caused to be entered on the book of the entry-taker of McDowell County the following writing:

" 'No. 2252. R. Don Wilson enters 640 acres of land lying on both sides of Huntersville or (or and) Haney Mountain, extending from the north end along the summit and down both sides to deeded lands adjoining lands of Mills Higgins, Dr. Gilbert, John Jarrett, the Prices and others. This 25 November, 1868.'

(360) "And on the same day a like writing on the entry-taker's book was made, in the following language, to wit:

" 'No. 2253. R. Don Wilson enters 640 acres of land adjoining the above, the lands of Early Gurley, Charles Dixon, Butler, the Powell place, Jason Allen's Dealsville tract, extending along the summit of the Huntsville Mountain and down both sides to deeded land. This 25 November, 1868.'

"On 30 December, 1870, R. Don Wilson procured a grant to be issued to him by the State of North Carolina, on the last-mentioned writing in entry-taker's book. A copy of said grant is hereto attached, marked 'Exhibit A.'

"6. That on 26 December, 1868, Albert Conley caused to be entered in the entry-taker's book of McDowell County the following writing, to wit:

" 'No. 2270. Albert Conley enters 100 acres of land on the waters of North Muddy Creek, adjoining the land now owned by Rebecca Elliott and others. This 26 December, 1868.'

"That on 1 February, 1869, John B. Grayson caused a like entry to be made in the following language, to wit:

" 'No. 2329. J. B. Grayson enters 100 acres of land on the waters of North Muddy Creek, joining the lands of John E. Goforth and others. This 1 February, 1869.'

"7. That on 6 January, 1879, Albert Conley procured from the State of North Carolina a grant on his said entry, a copy of which is hereto attached and marked 'Exhibit B.' And the said Albert Conley, by deed, duly conveyed his interest in said land to J. B. Grayson, who died seized thereof, if Albert Conley was ever seized of same. That on 6 January, 1870, J. B. Grayson caused to be issued to him by the State of North Carolina a grant for sixty acres of land on his above-mentioned entry (his grant calling for sixty acres, and a copy thereof is hereto attached and marked 'Exhibit C').

"8. That prior to the date of the survey of the Wilson entries above set out there were surveys on the Conley and Grayson entries, and

grants issued to Conley and Grayson. The lands granted to R. Don (361) Wilson cover the lands granted to Conley and Grayson.

"Upon the above statement the court is asked to render judgment.

"Upon the foregoing facts the plaintiffs contend that the entries of R. Don Wilson are void on account of vagueness and uncertainty in description, and the defendant contends that the description in said entries is sufficiently definite to give notice to the plaintiffs at the time of their entry."

His Honor, being of opinion with the defendant, adjudged that the plaintiffs "hold the legal title to the land in controversy in trust for the defendant, and that said plaintiffs execute to the defendant a good and sufficient deed releasing all their right, title and interest in said lands. It is further ordered that the plaintiffs pay the costs of this proceeding."

From this judgment the plaintiffs appealed.

Justice & Justice for plaintiffs.
Morris & McCall for defendants.

AVERY, J. The question that gives rise to this controversy is, whether the plaintiff is the owner of the equitable as well as the legal estate of the land in controversy. If the description contained in the older entry of the defendant so identified the land intended to be covered by it that the plaintiff could, upon reading it and prosecuting any inquiry as to boundaries suggested by its terms, have ascertained that it was the same land for which he subsequently obtained a grant under the junior entry, then the latter, as junior enterer, took with constructive notice of the inchoate equity of the senior enterer. It is not to be understood that any description in an entry, not void upon its face for uncertainty (however imperfect as a means of identification it may be), operates as constructive notice to all persons making subsequent entries of (362) the land that such description was intended to embrace. The rule in reference to the validity or sufficiency of the descriptions in entries as between the State and the enterer is much more liberal than that applicable to deeds and to contracts for sale of land between individuals. In *Harris v. Ewing,* 21 N. C., 374, *Chief Justice Ruffin* said: "It appears to the Court, therefore, that a vague entry is not void as against the State, but gives the enterer an equity to call for the completion of his title by the public officers." In the subsequent case of *Johnston v. Shelton,* 39 N. C., 85, the same learned judge, in speaking of the validity of an entry and its sufficiency as notice, said: "Its vagueness renders it void as against a subsequent enterer who surveyed and paid his money before the plaintiffs had made their entry more specific, if the expression may be allowed, by a survey identifying the land they meant to appropriate." As between the State and the enterer, the inchoate equity

created by making an entry, not containing a specific description that confines it to a particular place, is "in some degree a floating right to have a certain quantity of unappropriated land anywhere the enterer may select within two years on a certain stream or mountain in the county." *Johnston v. Shelton, supra.* While, therefore, an entry containing a description that would be altogether insufficient in a contract for sale or a conveyance of land was not void as between the State and the enterer, it was, nevertheless, not notice to subsequent enterers until its location had been made certain by an actual survey. Constructive notice might be given to one desiring to enter the same land in two ways, and whenever given by either method the junior enterer, being affected by it, would hold under any grant taken out by him, subject to the right of the person holding the older entry to take out a grant also and have the senior grantee declared a trustee and ordered to convey to him.

(363) *Nunn v. Mulholland,* 17 N. C., 381. The two methods of affecting all subsequent enterers with constructive notice are:

1. By making a survey of a floating or vague entry or one containing an indefinite description, and thus identifying that which was before uncertain. *Currie v. Gibson,* 57 N. C., 25; *Munroe v. McCormick,* 41 N. C., 85; *Johnston v. Shelton, supra; Harris v. Ewing, supra.*

2. By making the description "so explicit as to give reasonable notice to a second enterer of the first appropriation." *Johnston v. Shelton, supra,* at p. 92; *Harris v. Ewing, supra,* at p. 372. "The object of description is to identify the thing for which the contract is made, and whatever means will effect that end must be all-sufficient." *Harris v. Ewing, supra.*

The statement sent up by the parties as the foundation of a controversy without action contains a description which is certainly not so vague as to affect the validity of an entry. Indeed, upon its face it seems probable that it may have pointed to extrinsic proof, such as would have made the identification complete. If it does, then it was constructive notice, and the plaintiff holds in trust for the defendant. The equity of the defendant depends upon this question.

Two entries were made on the same day, in the following terms:

"No. 2252. R. Don Wilson enters 640 acres of land lying on both sides of Huntsville or (or and) Haney Mountain, extending from the north end along the summit and down both sides to deeded lands adjoining lands of Mills Higgins, Dr. Gilbert, John Jarrett, the Prices and others. This 25 November, 1868."

And on the same day a like writing on the entry-taker's book was made, in the following language, to wit:

"No. 2253. R. Don Wilson enters 640 acres of land adjoining the above, the lands of Early Gurley, Charles Dixon, Butler, the Powell

place, Jason Allen's Dealsville tract, extending along the summit of the Huntsville Mountain and down both sides to deeded land. (364) This 25 November, 1868."

On 30 December, 1870, R. Don Wilson procured a grant to be issued to him by the State of North Carolina on the last-mentioned writing in entry-taker's book.

It would seem that the description contained in Entry No. 2252 was so drawn that it must include all vacant land on the summit of Haney Mountain at the north end and extending down from the summit on the east and west sides of the summit to deeded land or lands for which claimants (several of whom are mentioned) had titles. The second entry, No. 2253, upon which the junior grant, through which defendant's claim was issued, is located by its terms so as to adjoin the other entry on the south, include the summit further south and to extend from said summit on either side so as to join the deeded land of Early Gurley and others mentioned. The land intended to be appropriated must have been surveyed so as to join the lands of the persons named on either side of the summit, and on the south and on the north so as to extend to any vacant land surveyed under the preceding entry, or, if none should be found, to the lands of adjacent owners named in said entry. Though the more advisable practice in such cases is to locate the bounds of the entry by means of an actual survey, and thus make the sufficiency of the description appear more clearly by proof of extrinsic facts to which it points, yet, in this particular case, we must hold, without any parol proof, that the land entered appeared upon its face to lie between the tracts of the persons mentioned therein, or, in case no vacant land was found to constitute the northern boundary, then the lands of persons named in Entry No. 2252. Instead of specifying a beginning corner in a certain line and lying on the headwaters of a particular creek, as in *Horton v. Cook,* 54 N. C., 273, the entry in our case is declared to include the summit of a certain mountain—in effect, to lie between the deeded lands of certain owners and to lie south of certain other deeded tracts or any vacant land that might be found between (365) them along the northern end of said summit. While we would have been saved from some hesitancy by incorporating into the affidavit, as a part of the statement of facts agreed, some proof of the location of the lands of the adjacent owners, we conclude that the senior entry contained upon its face a sufficient description to affect subsequent enterers of the same land with notice of the equity of Wilson. We deem it proper to say, however, that it must almost necessarily be more advisable for one or the other of the parties in any case where the right to recover in an action or on a counterclaim depends upon the question whether an entry is so definite as to affect subsequent enterers with constructive

notice of its location, to offer testimony, if the facts are in dispute, and have a finding by a jury or by consent by the court, of the developments made by an actual survey.

For the reasons given, the judgment of the court below is

Affirmed.

Cited: Wyatt v. Mfg. Co., 116 N. C., 277; *Carr v. Coke, ib.,* 252; *Fisher v. Owen,* 144 N. C., 654; *Call v. Robinett,* 147 N. C., 617; *Lovin v. Carver,* 150 N. C., 711; *Cain v. Downing,* 161 N. C., 596.

(366)

HAMILTON ERWIN v. GEORGE P. ERWIN, EXECUTOR OF A. H. ERWIN, DECEASED.

Action for Legacy—Construction of Will—Conditional Devise of Land.

A testator devised a tract of land to his sister C. for life, remainder to his son G. and his children, provided G. should pay to his estate the sum of $2,000. He also, in another item, directed his executor to pay his sister C. $300 annually during her life for her partial support. The will contained no residuary clause. For a number of years before the death of C. the annuity was not paid, and the claim for the sums then due having been assigned to plaintiff, he reduced the same to judgment against the executor, and after the death of C. brought an action to subject the fund of $2,000 to the payment of the judgment, there being no other assets: *Held* (1), that the payment of the $2,000 by G. was a condition precedent to the vesting of the devise of the remainder, and not a charge upon the land; (2) that, there being no specific disposition of the $2,000 and no residuary clause, the testator died intestate as to the $2,000, which, if paid, will be subject to the satisfaction of the plaintiff's judgment; otherwise, the land, as undevised real estate, will be subject to the payment of the judgment.

CONTROVERSY without action, heard before *Allen, J.,* at Fall Term, 1894, of BURKE, upon an agreed statement of facts as follows:

"1. That A. H. Erwin, a citizen and resident of Burke County, died in said county on 4 October, 1877, having first made and published a last will and testament appointing the defendant George P. Erwin his true and lawful executor, a copy of which said will, duly admitted to probate and recorded in the clerk's office in Burke County, is hereto attached as part of this case.

"2. That the said George P. Erwin qualified as such executor on 15 October, 1877, and immediately entered upon the duties of his said office.

"3. That according to the provisions of Item 7 of said will, which reads as follows:

" 'I give and bequeath to my sister Cecelia M. Erwin all my (367) household and kitchen furniture and my buggy and harness, to dispose of as she pleases, and direct my executor to pay her three hundred dollars annually during her life, which will enable her to board herself where she pleases if she is not disposed to live at Belvidere, and this amount be sufficient to support her, with the rents from Belvidere, wherever she may desire to live' . . .

"Cecelia M. Erwin was entitled to be paid by said executor out of the estate of the said A. H. Erwin the sum of $300 annually during her life.

"4. That the said executor failed to pay the said sum of money to the said Cecelia M. Erwin as provided in said Item 7 of said will for a number of years, and the account therefor having been duly assigned to the plaintiff Hamilton Erwin, he brought two several suits in the Superior Court of Burke County, and recovered two several judgments thereon, to wit, one for the sum of $1,680, with interest on $1,500 from 21 March, 1892, at six per cent per annum, and one for $210 and interest from 20 March, 1893, to be paid by the said George P. Erwin whenever assets should come into his hands belonging to the estate of his said testator, or whenever any sum or sums of money should be due from him to said estate, or for any reason payable by him to said estate.

"5. That the personal property belonging to the estate of said testator has been exhausted, and there are no assets with which to pay said judgments unless the funds hereinafter mentioned are liable therefor.

"6. That Item 1 of said will is as follows:

" 'I will and devise to my sister Cecelia M. Erwin my tract of land, including this old mansion of my father, known as Belvidere, and the improvements on such parts thereof as I may not include in the specific devises in this will, to have and to hold for and during her natural life, and at her death the remainder to George P. Erwin and his children, provided he pays to my estate the sum of $2,000; my object being to keep this old family mansion in the family as long as (368) possible.'

"7. That Cecelia M. Erwin, the devisee for life named in said Item 1 of said will, died on the ____ day of _____, 1894."

The respective parties claim as follows:

"1. The said Hamilton Erwin claims that he is entitled to have the said sum of $2,000, which is to be paid by the said George P. Erwin, applied to the payment of the sums due him on the judgments hereinbefore set forth.

"2. The said George P. Erwin, executor as aforesaid, claims that the said fund is not applicable to the payment of said judgments, or any part thereof, but should be paid to the heirs of A. H. Erwin."

His Honor rendered the following judgment: "This cause coming on to be heard upon the case agreed, and the court being of opinion that the sum of two thousand dollars, which is or should be in the hands of said executor, should be applied to the payment of the judgment mentioned in case agreed, it is now, on motion of Avery & Erwin and J. T. Perkins and S. J. Erwin, counsel for the plaintiff, considered and adjudged that the defendant G. P. Erwin, executor of A. H. Erwin, pay to the plaintiff Hamilton Erwin the said judgments out of the said sum of $2,000, which he is due said estate, as stated in the case agreed, the said judgments to be paid *pro rata,* and the cost of this proceeding to be taxed by the clerk. This judgment is without prejudice to the rights of claims by J. W. Wilson as assignee or otherwise."

The defendant excepted to this judgment and appealed.

John T. Perkins and S. J. Erwin for plaintiff.
M. Siler for defendant.

MACRAE, J. The Belvidere place was devised to Cecelia M. Erwin for her life, with remainder after her death to George P. Erwin
(369) and his children, "provided he pays to my estate the sum of two thousand dollars." It will be seen that a condition was attached to the devise of the remainder. This devise could never take effect until the payment of the sum named. This sum was not a charge upon the land, for if such were the case the estate in remainder in the land would have vested in George P. Erwin and his children, subject to a lien or charge thereon for the same. But by virtue of the condition precedent the estate in remainder could not vest until the payment of the sum named.

It will appear by Item 8 of the will that the testator intended to make further disposition, by codicil, of the personal estate and the proceeds of real estate directed to be sold, and which should remain in the hands of the executor after payment of debts and charges incident to the execution of the will and of the specific legacies. Having failed to make such disposition, it necessarily follows that he died intestate as to such portion of his estate as was not specifically devised or bequeathed, there being no residuary clause in the will. There is nothing in the will to indicate that the testator intended that the two thousand dollars to be paid by George P. Erwin should be distributed in any other manner than the balance of the personal estate. It, therefore, when paid in

becomes part of the said personal estate liable for the debts, charges and legacies.

The annuity of three hundred dollars bequeathed to said Cecelia never having been paid, and her claim therefor having been duly assigned to the plaintiff and reduced to judgment, has now become a debt against the estate, and all the other personal property having been exhausted, it will be the duty of the executor to satisfy these judgments out of the said two thousand dollars if the same has been paid in. If the same shall not be paid, the condition not being fulfilled, the devise of the remainder in fee of the Belvidere place will never take effect, and said lands will become a part of the undevised real estate of the testator, (370) subject to the satisfaction of the judgments. This was clearly the will of the testator. His expressed desire was to keep this old family mansion in the family as long as possible, so he devised it to Cecelia for her life, and if George P. Erwin should pay the two thousand dollars, then it will go to him and his children in fee as tenants in common. It rests with him whether the first desire of the testator shall be carried out.

Affirmed.

Cited: Allen v. Allen, 121 N. C., 334; *Helms v. Helms,* 135 N. C., 170.

W. SPRINGER ET AL. v. JOHN SHEETS ET AL.

Jurisdiction—Removal of Causes—Separate Controversy—Diversity of Citizenship—Rearrangement of Parties—Action for Cancellation of Mortgage—Foreclosure of Mortgage.

1. Where there are mortgages upon land in this State held by nonresident mortgagees, and a subsequent trust deed affecting part of the same land, the trustee and one *cestui que trust* being resident in this State, and another *cestui que trust* being resident of another State, the mortgagor and trustor (being resident in this State) can bring and maintain in the State courts (1) an action against the trustee and the *cestuis que trustent* asking for an adjudication of the amount due on the claims and a sale to satisfy them, and pay over to the plaintiff any balance due him, thus treating the older mortgages as satisfied, or (2) an action against the first mortgagees for a settlement and cancellation of the mortgages, or (3) a combined action against all the parties for foreclosure of the trust deed and cancellation of the mortgages.
2. Though separate suits may be brought against the different lienors, yet when complete relief cannot be had without the presence of all the defendants to an action by the mortgagor against the senior and junior

mortgagees for the ascertainment and settlement of the rights of all parties, there is not a separable controversy.

3. In an action by a mortgagor to cancel certain mortgages and to foreclose a subsequent trust deed to the same property, although the *cestuis que trustent* have a common interest with plaintiff in showing the discharge of said mortgages, they are nevertheless his adversary parties as to the other matters in controversy and will not be rearranged as parties plaintiff so as to show diversity of citizenship.

4. A beneficiary under a trust deed is a necessary party to an action by a mortgagor to cancel certain mortgages on the land described in said deed, and to foreclose said trust deed, although the trustee has been made a party to the action.

5. It is not sufficient ground for removing a cause to the Federal Court that plaintiffs might have brought separate suits or omitted certain defendants, though if they had done so the cause would properly belong in said court.

6. In an action for the cancellation of certain mortgages and the foreclosure of a subsequent trust deed to the same land the mortgagor may join with him as parties plaintiff the *cestuis que trustent* under such deed.

(371) MOTION to remove the cause to the Federal Court, upon petition of defendants (other than Mayo, trustee, and L. M. Herring and L. Hassell Lapp), heard before *Armfield, J.*, at Fall Term, 1894, of BEAUFORT.

The complaint in the cause was as follows:

"1. That for many years, beginning about 1875, and continuing till 1893, the defendants Howes & Sheets, and those whom they succeeded in business, and these plaintiffs, have had large business dealings together, the plaintiff shipping to the said defendants and their predecessors in business, as commission merchants, for sale on their account large quantities of lumber of great value, and receiving from them from time to time money and other things.

"2. That in the course of the said dealings the plaintiffs made the mortgages and deeds of trust herein stated, conveying therein the property respectively described in said county. . . .

"3. That the amounts set forth and secured in said deeds of trust and mortgages were regularly charged against these plaintiffs in
(372) the accounts kept with them by Howes & Sheets and their predecessors in business, and said accounts were likewise credited with shipments of lumber made to them by plaintiffs and sold for their account and statements thereof rendered from time to time to these plaintiffs.

"4. That they are advised and believe and aver that the entire amount secured in the deeds of trust and mortgages aforesaid have been and are more than paid by the shipments and credits aforesaid, and that the said deeds and mortgages are no longer binding and in force against the property in them described.

"5. That each of the debts secured in the several mortgages aforesaid matured, and the cause of action of defendants thereon (if any they had) had accrued more than three years before the bringing of this action, and the said debts are therefore barred by the statute of limitations, and plaintiffs specially plead the same; and the said mortgages, maturing more than ten years prior to the bringing of this suit, the said mortgages are barred by the statute of limitations, and plaintiffs specially plead the statute of limitations and lapse of time to said mortgages.

"6. That the defendants Howes & Sheets claim and insist that the sums secured in deeds aforesaid are still due and unpaid, and that the said deeds are valid liens upon the lands therein conveyed, and are holding the same as security for the said sums.

"7. That the defendants Howes & Sheets claim that the plaintiffs owe them on account, including the sums secured as aforesaid, $56,310.34, with interest at 7 per cent from 27 October, 1893. These plaintiffs deny that they owe said defendants said amount, or that they owe them anything. On the contrary, they believe and aver the said defendants are indebted to them in a large sum.

"8. That the accounts rendered by the said defendants are erroneous, unjust and false, in that the said defendants and their predecessors have negligently or fraudulently failed to sell and account (373) for the timber shipped by these plaintiffs to them for sale on commission, but have credited these plaintiffs far below the sums which like lumber brought at the same time in the same market; that they have not properly accounted to the plaintiffs for the lumber which went into their hands and into the hands of those whom they succeed; that they have charged illegal and usurious interest against plaintiffs by charging 7 per cent on general account, when there was no agreement in writing to pay that rate, by rendering annual, semiannual and quarterly accounts, adding interest each time at said rate, and calculating interest thereafter on the balance each time as a new principal sum due by plaintiffs; by charging commissions for selling lumber largely in excess of what is usual and proper, as a device for charging usury and concealing the same.

"9. That the existence of the mortgage and trust deed aforesaid uncanceled upon the records, and the defendants Howes & Sheets's false claim with respect to the same, create a cloud upon the plaintiffs' title to their property therein named, and greatly damage them in their credit and business, and they ought to be canceled and removed.

"10. That the defendants, Samuel A. Sheets, John Sheets, Katie E. Howes, Susan McV. Sheets, Robert A. Sheets, Mary C. Runyon and Harriet L. Shinn, are the heirs at law of J. A. J. Sheets, deceased, to

whom the legal title to the lands described in said deeds has descended, the said Sheets having died before the bringing of this action.

"11. That on 24 June, 1892, plaintiffs being indebted to L. Hassell Lapp and Louisa Mayo Herring, as stated in the deed of trust herein described (to Lapp in the sum of $3,000 and to Herring in the sum of $700), to secure the same conveyed to defendant L. R. Mayo the land described in the deed to J. A. Sheets, dated 8 June, 1880, upon which there is now due the sums aforesaid, except as to Mrs. Herring,
(374) to whom has been paid about $200; said deed of trust is recorded in Book 85, page 434.

"12. That the deed of trust to Mayo is subsequent to the others in point of time, but by reason of the facts aforesaid these plaintiffs believe and aver that it is now the first and only lien on the said property.

"13. That plaintiffs desire to have the accounts between themselves and Howes & Sheets stated and determined; to have all deeds of trust and mortgages of record against them, which have been paid and settled, duly canceled; to have the right of the defendants Howes & Sheets, and the defendants Mayo, trustee, Lapp and Herring, with respect to and in the said properties ascertained and determined."

Wherefore, plaintiffs ask judgment:

"1. That the accounts between the defendants Howes & Sheets, and those whom they succeed, and the plaintiffs, be stated under the direction of this court.

"2. For such sums as may be found due the plaintiffs.

"3. That the mortgages and deeds of trust described in section 2 hereof be canceled.

"4. That the amount due Howes & Sheets, if anything, be ascertained, and whether the same be secured by mortgage or deed of trust; and if so,

"5. That the same and the deed of trust to defendant Mayo be foreclosed under the direction of this court."

The answer of the defendants, L. R. Mayo, Louisa Herring and L. Hassell Lapp, admitted the material allegations of complaint, and prayed judgment as follows:

"1. That they be declared to have the first and only lien on said lands; that the mortgages and deeds of trust set forth in section 2 of the complaint be declared paid and canceled of record, according to law; that a commissioner of this court be appointed to sell said lands and pay off said debts out of the proceeds, and for such other relief," etc.

The petition for removal was as follows:

"The petition of George A. Howes and John Sheets, trading as
(375) Howes & Sheets, and Samuel A. Sheets, Katie E. Howes, Robert A. Sheets, Mary C. Runyon, Susan McV. Sheets, Harriet L. Shinn and husband, Wilson Shinn, and John Sheets, defendants above named,

shows to the court as follows: That the above suit was begun against your petitioners, and also against the other parties named above as defendants, in the Superior Court of Beaufort County and State of North Carolina, by the issue of a summons on 17 January, 1894, and by service of the said summons upon the defendant George A. Howes upon 19 January, 1894, and by filing of a complaint in the said cause on 27 February, 1894; that your petitioners have not yet filed their answer, but as to your petitioners the said cause is now pending; that the said cause has not been tried, and this is the term of the court at which the said George A. Howes, who has been served with summons, and John Sheets, Samuel A. Sheets, Katie E. Howes, Robert A. Sheets, Mary C. Runyon, Susan McV. Sheets, Harriet L. Shinn and husband, Wilson Shinn, are required to file their answers; that at the time the said suit was begun, and at the present time, the plaintiffs were and are citizens and residents of the State of North Carolina and county of Beaufort, and your petitioners were and are citizens and residents, as follows: George A. Howes and wife, Katie E. Howes, John Sheets, Mary C. Runyon, now the wife of George W. Wannamaker, and Susan McV. Sheets, all of the city of Philadelphia and State of Pennsylvania; Samuel A. Sheets of the city of Camden and State of New Jersey; Robert A. Sheets of the city of St. Augustine, State of Florida; Harriet L. Shinn and Wilson Shinn of the town of Haddonfield and State of New Jersey. That the matters in dispute in said action, and for which the said action is brought, exceed the sum of $2,000, exclusive of costs and interest, and amount to about $50,000, as appears from the complaint herein; that L. R. Mayo, trustee, is a resident and citizen of the county of Beaufort and (376) State of North Carolina, and Louisa Mayo Herring, also a party defendant, is a resident and citizen of Beaufort County and State of North Carolina; that L. Hassell Lapp, also a party defendant, is a resident and citizen of the city of Philadelphia and State of Pennsylvania; that the said L. R. Mayo, Louisa M. Herring and L. Hassell Lapp were citizens of the States and places above named at the time of the institution of this suit, and are now residents and citizens of said places and States; that the real controversy in this action is between the plaintiffs and George A. Howes and John Sheets, trading as Howes & Sheets, and the other petitioners above named as heirs at law of John A. J. Sheets; that L. R. Mayo, trustee, and Louisa Mayo Herring and L. Hassell Lapp are not necessary parties to the determination of the controversy and action between the plaintiffs and your petitioners, and they are made parties defendant herein, as your petitioners believe and aver, for the purpose of preventing the removal of this cause to the Circuit Court of the United States, to which court your petitioners are advised they have the right to remove this cause; that there is no controversy, as ap-

pears from the complaint herein, between the plaintiffs and the defendants L. R. Mayo, trustee, Louisa Mayo Herring and L. Hassell Lapp; that the answer of the said defendants has been filed to the said complaint, and it is apparent therefrom that there is no controversy between them and the plaintiffs; that the interest of the said defendants, if they have any in this action, is identical with that of the plaintiffs, and is adverse and hostile to that of your petitioners. Your petitioners ask that the said defendants above named be arranged in this action according to their true interests, and that they be not permitted to interfere with and defeat the rights of your petitioners to remove their cause to the Circuit Court of the United States; and the defendant peti-
(377) tioners hereby offer Seth Bridgman and W. P. Baugham of the town of Washington, county of Beaufort and State of North Carolina, as sureties for their entering in the Circuit Court of the United States for the Eastern District of North Carolina, wherein the said suit is pending, on the first day of next session of the said court, or before, a copy of the record in said suit, and for paying all costs that may be awarded by said Circuit Court, if the said court should hold that the said suit was wrongfully or improperly removed thereto; and for their appearing and complying with all the provisions of the acts of the United States relating to the removal of causes from State courts.

"Wherefore, petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law," etc.

His Honor denied the motion, and the defendant Howes appealed.

Pruden & Vann and J. H. Small for plaintiff.
John W. Hinsdale and W. B. Rodman for defendants.

AVERY, J. The plaintiffs could have brought and maintained in the State courts any one of these suits growing out of the transactions covered by the complaint.

1. They might have filed their complaint against the trustee Mayo and his *cestuis que trustent,* asking an account or an adjudication of the amount of their claims and a sale to satisfy them, and pay over any balance to the plaintiffs, acting on the assumption that the older mortgage debts were satisfied.

2. They might have instituted an action against the first mortgagees solely for the purpose of effecting a settlement and having the court formally declare the mortgage debt satisfied.

They had the right to demand that all of these questions be
(378) settled by one action, in which, if they should prevail, the older mortgage debts should be declared satisfied, the property sold to

pay the later mortgage debts to Mayo, and freed by the decree of the court from the clouds of the other claims, and the residue of the purchase money above the amount required to discharge the debts of the mortgages under the Mayo deed, if any, adjudged to belong to the plaintiffs.

The fact that the plaintiffs and those claiming under the last mortgage deed have a common interest in showing that the debts secured by the older mortgage deeds have been discharged makes them none the less adversary parties as to the other matters involved in this controversy. Louisa M. Herring, one of the *cestuis que trustent* secured under the last or Mayo deed, and the trustee L. R. Mayo are and were at the institution of the suit citizens and residents of the State of North Carolina. Supposing that the plaintiff's purpose is in good faith to first relieve the property of the cloud which the incumbrance of the first mortgages cast upon it, and to satisfy a purchaser at a foreclosure sale that the junior mortgagee, Louisa M. Herring, among others, will be concluded from setting up any further claim, and thereby to secure a large price, with possibly the incidental advantage of securing a considerable surplus after discharging debts out of purchase money, there can be no doubt about the necessity and propriety of making both of these residents of this State parties to this proceeding in order to obtain the complete relief desired. It is not our province to act upon a suspicion of improper motives, or indeed to impute to parties invoking the aid of the court anything but good faith, in the absence of plenary proof of a wrongful intent. *Wilson v. Township,* 151 U. S., 56. Looking at the controversy in this view, and taking the allegations of the complaint to be true, Louisa M. Herring is a necessary adversary party, notwithstanding the fact that she admits the material allegations of the com- (379) plaint, and it would be manifestly unjust, perhaps ruinous to the interests of the plaintiffs, to have the questions involved adjudicated separately by different tribunals and at different periods of time. Desty on Removals, sec. 95, 1 J, K. Louisa M. Herring is not a mere formal party, but a beneficiary under the trust deed which the plaintiffs seek to have foreclosed, and the summons was served on her within two days after it was issued, on 17 January, 1894. It is not material, therefore, to discuss the question whether the trustee L. R. Mayo is a necessary party, though he is at least not an improper party. We have one beneficiary under the Mayo mortgage deed whose presence is indispensable in order to the granting of a conclusive decree, such as that which the plaintiffs seek, and whose interests are in some respects antagonistic to both parties to the older deed. It is true that a separate suit might have been prosecuted against Howes & Sheets for an account and cancellation of the mortgage deed, but complete relief could not have been granted in

such an action without the presence of the *cestuis que trustent* under the later mortgage deed, if not the trustee, and, such being the case, this is not a separable controversy. *Hinson v. Adrian,* 86 N. C., 61; *Jones v. Britton,* 102 N. C., 178; *Faison v. Hardy,* 114 N. C., 429; *Fidelity Co. v. Huntington,* 117 U. S., 280. The plain principles which make the mortgagees under the Mayo deed proper parties and indispensable to the accomplishment of the end aimed at by the plaintiffs were, first, that they would not be concluded if not parties, and that they were interested in the settlement of the prior incumbrances upon which their own security depended, and were to that extent adversaries to the other defendants; second, that plaintiffs could not have complete relief except by a decree declaring what amount secured by each of the mortgages was still due, and enabling them to ascertain what residue would be left for them as mortgagors. *Fidelity Co. v. Huntington, supra.*

(380) This suit, therefore, was brought for a complete adjustment of priorities and equities between all of the parties in interest. If the plaintiffs, having the right to elect that they will have such a complete adjustment of all liens and equities affecting certain property, bring in all parties interested in one action instead of suing separately, when some of the defendants are from the same and others from a different State from that in which the plaintiffs reside, a portion of the defendants cannot demand a rearrangement of parties according to residence, because some of the defendants from the State in which the plaintiffs reside admit the material allegations made by the plaintiffs. It is not a sufficient reason for removal that the plaintiffs might have brought separate suits or without associating other joint plaintiffs with them. 2 Foster Fed. Pr., secs. 382, 384; *Wilder v. Ins. Co.,* 46 Fed., 682.

It would be impossible in our case to rearrange the parties plaintiff and defendant on the one side and the other, so as in that way to show the existence of a separable controversy. If the parties should be classified according to common interest it would result in placing L. R. Mayo and L. M. Herring of North Carolina, together with L. Hassell Lapp of Pennsylvania, with the plaintiffs on the one side as seeking to show that nothing remains due on the mortgages for the benefit of Howes & Sheets, while on the other side would be some of the present plaintiffs, residents and citizens of North Carolina, associated with several citizens of Pennsylvania, two of New Jersey and one each from New York and Florida. So that, by no conceivable rearrangement on the basis of common interest could the appellants show (as it is essential to show in order to establish the right to an order of removal) the existence of a separable controversy wholly between citizens of North Carolina on the one side and citizens of another or other State on the other. *Brown v. Truesdale,* 138 U. S.,

389; *Wilson v. Oswego, supra;* Desty, *supra,* 96 O. We are of the opinion that the plaintiffs had a right to elect between two (381) remedies which the law afforded—between combining two causes of action when lawful to do so, or prosecuting separate actions, and between prosecuting the suit alone or joining proper parties plaintiff with them.

Having chosen to have all parties whose presence is indispensable to obtaining the full measure of relief sought before the court in one suit, that suit cannot be cut up into two and removed, so as to try in piecemeal, against the will and to the possible detriment of the plaintiffs, on the suggestion that some of the indispensable parties, having apparently adverse interests to those of plaintiffs, are really in collusion and making common cause with them. Had the remedy against Howes & Sheets been in nowise connected with or dependent upon the demand against the parties to the Mayo deed, or had no relief been asked that would conclude Mayo, Herring and Lapp, the contention that they were not adversary to the plaintiffs, and that as to Howes & Sheets there is a separable controversy with citizens of North Carolina, might have been more plausible. *Viral v. Ins. Co.,* 34 Fed., 228. Even on that supposititious state of facts other difficulties might arise, growing out of the presence of other parties plaintiff from other States joined in the alleged exercise of a right of election by the plaintiffs. Desty, *supra,* 96 J.

The rule is, that for the purpose of testing the right of removal, the allegations of the bill must be taken as true. Desty, *supra,* 96 M. We think that, conceding the truth of the allegations of the complaint, the plaintiffs could not get the complete relief demanded against all of the parties whose presence is indispensable to that end, and at the same time so arrange the parties, according to interest, that all on one side would be citizens of different States from those on the other. Desty, *supra,* 96 I.

In refusing to grant the motion to remove, we think there is

No error.

Cited: Mecke v. Mineral Co., 122 N. C., 798.

(382)

DANIEL BLACK v. ORE KNOB COPPER COMPANY.

Pleading—Appeal—Insolvent Corporation—Stockholders.

In an action against an insolvent corporation for the appointment of a receiver, a creditor made himself a party for the purpose of prosecuting his claim, and the court adjudged that the stockholders, on account of an alleged nonpayment of their subscription, were liable for the debt of such creditor, and ordered the receiver to institute actions against such stockholders to recover an amount sufficient to pay such debt: *Held*, that an appeal by the corporation from such order will not be entertained, and the question of the liability of the stockholders will not be determined on such appeal, but can only be determined in the actions which it is the duty of the receiver, under the order of court, to bring.

ACTION, heard by *Allen, J.*, at Fall Term, 1894, of ASHE, upon exceptions to a referee's report. (See 109 N. C., 385).

The following facts were found by the referee:

"1. That all the assets that came into the hands of the receivers have been applied to the payment of certain judgments, under order of court.

"2. That the capital stock of the defendant corporation at its organization was $1,500,000, and that the same was divided into 150,000 shares, of the par value of $10 each, and that said capital stock was issued to the corporation as full paid up stock, as allowed by its charter.

"3. That the said capital stock was never paid in cash, but was issued to the corporators in proportion to their several interests in certain real estate owned by them in Ashe County, known as the 'Ore Knob Property,' consisting of a tract of land, on which was a mine of copper, and certain machinery used for mining, and that said capital stock was based upon said property.

"4. That certain debts were created by the corporation, and all the property belonging to it was sold to satisfy judgments rendered
(383) upon such indebtedness, and the proceeds of such sale, amounting to $7,300, has been applied to its indebtedness, under order of the court.

"5. That the indebtedness of the corporation consisted of a judgment in favor of J. E. Clayton and Herman Williams for about $30,000, and in favor of the plaintiff Black for $100, with interest from 1 September, 1882.

"6. Of the aforesaid capital stock, I find that Herman Williams owned $27,750, and J. E. Clayton $28,660. I further find they were both corporators.

"7. From the evidence offered, I find that the property of the defendant was not worth $1,500,000 at the time of its organization, or after-

wards, and that the difference between its real value and the amount at which the property was capitalized or estimated at its organization was greatly in excess of the indebtedness of the corporation now subsisting. I further find that the value of the property of defendant corporation at the time of its organization in February, 1881, and at any time afterwards, did not exceed $750,000.

"Wherefore, I conclude that, as the capital stock of the defendant was neither paid in cash nor in property worth the amount of such stock, that the corporators are individually liable for the amount of the indebtedness of said corporation to Daniel Black, and that it is the duty of plaintiff receivers to collect a sufficient amount from the stockholders or corporators individually to discharge the indebtedness to said Black. *Foundry Co. v. Killian,* 99 N. C., 501. The opinion of the Supreme Court in this case. Murphrey on Foreign Corporations, sec. 389.

"Respectfully submitted,

"R. A. DOUGHTON, *Referee.*"

Defendant excepts to the report filed:

"1. For that the commissioner failed to find the fact as to what the Ore Knob property, on which the stock was issued, was worth at the time of its organization.

"2. For that he failed to find when the corporation defendant (384) was organized.

"3. For that he failed to find the fact when, how, and under what circumstances the property so greatly depreciated.

"4. For that his seventh finding of facts is meager and unintelligible.

"5. For that his conclusions of law are erroneous."

The judgment was as follows:

"This cause coming on to be heard upon the pleadings, evidence, exhibits, the reports of Referee Doughton, exceptions thereto filed by defendant, and all the exceptions being overruled, and the referee having amended his report showing the value of the property: It is, therefore, considered and adjudged by the court that James E. Clayton and Herman Williams, receivers, collect and pay into the clerk's office of this court a sum sufficient to discharge the plaintiff's judgment, and all costs incurred in this court, and all costs of the appeals to the Supreme Court, and also including the allowances heretofore made by the court to R. A. Doughton, referee, and one-half of $50 allowed said referee for his last two reports in this cause; and that it be paid into the office within ninety days from this date, 29 September, 1894.

"That a copy of this judgment be sent by mail to the receivers, James E. Clayton and Herman Williams, at Baltimore, Md., by the clerk of this court."

J. W. Hinsdale and A. P. Massey for plaintiff.
J. W. Todd and Strong & Strong for defendant.

BURWELL, J. Upon the argument before us all the defendant's exceptions were abandoned except the last one, and that is intended to raise a question that should not be considered and determined upon this appeal, which is taken and is prosecuted by the defendant corporation alone. It has no assets, it seems, out of which what it owes the (385) plaintiff may be paid, unless it be, as the referee has found, that some amounts are legally due to it from its stockholders, or some of them, for stock issued but not fully paid for. The order appealed from merely directs the receiver to collect enough of these unpaid subscriptions to satisfy the plaintiff's judgment against the appellant corporation. The liability of the stockholders to the corporation on account of these alleged unpaid subscriptions should not be prejudged. It is the duty of the receiver to obey the order and endeavor by suits, if necessary, to enforce their alleged liability. If their individual interests are antagonistic to their duty as officers of the court, they may be removed and others put in their place who will endeavor to perform it. In actions thus brought, it will be properly determined whether or not the stockholders, or any of them, are indebted to the corporation, as the referee has found, and his conclusions of law can then be reviewed, the parties really concerned in their correctness being before the court.

Appeal dismissed.

Cited: Black v. Gentery, 119 N. C., 504.

W. A. LEAVERING v. J. B. SMITH, SHERIFF.

Action for Damages—Wrongful Seizure and Sale by Sheriff—Evidence—Description—Deed of Personal Property—Instructions.

1. Where plaintiff sells his claim after beginning the action, the purchaser may, in the discretion of the court, be made a party plaintiff, even though under The Code the right of action were not assignable.

2. On a trial of an action for damages for the wrongful sale of property by a sheriff, who justified his seizure by alleging that he had levied upon it as the property of a third person, it was competent for the plaintiff to show by such third person that he did not own it at the time of the levy, and to this end the latter's acknowledgment of the execution of a bill of sale offered in evidence and antedating the levy was properly allowed to go to the jury to show that he had sold the property at its date and had also delivered it into plaintiff's possession.
3. Where, in the trial of an action against a sheriff for the wrongful sale of property, the plaintiff had furnished evidence tending to establish the ownership of the property at the date of the levy, the fact that he had subsequently, and after the commencement of the action, assigned his interest to another who had become a party plaintiff, could have no bearing on the issue relating to the ownership of the property at the date of the levy and sale, and defendant's objection to evidence of such assignment was properly overruled.
4. It is competent for the plaintiff, for the purpose of proving his assignor's possession of the property at date of assignment to plaintiff, to show that the original owner had leased the ground on which the property was situated to plaintiff's assignor.
5. As between plaintiff and a sheriff who seized property as belonging to A, which in fact A had sold to B, and B to plaintiff, the mode of conveyance from B is immaterial, and an unregistered deed of assignment is a valid means of proof.
6. Where it is proved that other lumber had been placed in the yard with plaintiff's after the date of the bill of sale, a charge that plaintiff must show that the lumber seized was a part of that in the yard before the bill of sale, or that he was the owner of all the lumber in the yard at the time of the seizure, is proper.
7. A deed executed in Philadelphia, Pa., and containing the description, "All the real estate, and also all the goods, chattels and effects and property of every kind, real, personal and mixed," of the said grantor, will include lumber owned by grantor in Cumberland County, N. C.
8. It is not necessary that an instruction asked for shall be given in the language used, but only that the substance thereof is given.

ACTION, tried before *Shuford, J.*, at November Term, 1893, of CUMBERLAND.

The plaintiff sought to recover the value of lumber alleged to belong to plaintiff, and seized and sold by the defendant under execution against H. W. Steinhelper and the Starr Lumber Company. (387)

The facts appear in the opinion of *Associate Justice Burwell.* Defendant appealed.

J. W. Hinsdale for plaintiff.
N. W. Ray for defendant.

BURWELL, J. The executions which came to the hands of the defendant sheriff directed and authorized him to seize and sell for their satis-

faction the property of H. W. Steinhelper and the Starr Lumber Company. The two actions brought against him, which, without objection in apt time, were treated as one and tried together upon one set of issues, were founded upon the allegation that in executing those writs the defendant had taken certain personal property that did not belong to the defendants in those executions, or either of them, nor was in their possession. Of course, if that fact were true, he became by such unauthorized and wrongful act liable to some one for damages.

The plaintiff C. W. Sparhawk, the originator of these actions, alleged in his complaint that the personal property which the defendant wrongfully seized and sold to satisfy the said writs belonged to him and was in his possession, and demanded the damages due to him for this alleged trespass upon his rights.

While such a cause of action as was thus set out by the plaintiff Sparhawk was not assignable (Code, sec. 177), the rights of the defendant were not prejudiced by allowing one to become a party plaintiff who claimed that whatever sum should be recovered by the original plaintiff should be paid to him because of an agreement to that effect made between him and that plaintiff. If the latter did not object to his
(388) presence in the action the defendant should not be allowed to do so, for his defense could in nowise be affected by what had occurred between them after the alleged causes of action against him accrued.

The issues submitted to the jury by his Honor, without objection, and the responses thereto, are as follows:

Issues as to first cause of action:

"1. Was the plaintiff Sparhawk, at the date of levy and sale, 17 September and 28 September, 1891, the owner of the lumber levied on and sold by the defendant sheriff under the executions mentioned in the third paragraph of plaintiff's first alleged cause of action? 'Yes.'

"2. If so, what damage has plaintiff sustained? 'Five hundred and sixty-five dollars, with interest from date of sale.'"

Issues as to second cause of action:

"1. Was plaintiff Sparhawk, at the date of levy and sale, 28 September and 26 October, 1891, the owner of the lumber levied on and sold by the defendant sheriff under the executions mentioned in the first paragraph of plaintiff's second alleged cause of action? 'Yes.'

"2. If so, what damage has plaintiff sustained thereby? 'Six hundred dollars, with interest from date of sale.'

"3. Has plaintiff Sparhawk, since the commencement of this action, sold and for value transferred his claim for damages to the plaintiff Leavering? 'Yes.'"

The third issue was one that concerned only the plaintiff Sparhawk and his associate, Leavering, and we need give it no further consideration.

There seems to have been no dispute between the parties as to the proper measure of damages, in case it was found that the seizing of the property by defendant was a trespass upon the rights of the plaintiff Sparhawk, and there was no exception taken to evidence or to the charge, so far as related to the damages, in the event the jury should find issue numbered 1 in favor of the plaintiff.

We have therefore to consider the exceptions taken by defendant to the admission of evidence and to the charge of his Honor as relating solely to the question: "Was the plaintiff Sparhawk the (389) owner of the lumber sold by defendant sheriff at the date of the levy and sale?" We will pass upon these questions without regard to the order in which they appear to have been taken in the case on appeal.

The plaintiff offered in evidence a bill of sale from H. W. Steinhelper to W. A. Leavering, dated 5 May, 1891, for 2,367,741 feet of lumber. H. W. Steinhelper, a witness for the plaintiff, testified that he signed the bill of sale; that it was written and signed in the city of Philadelphia and was witnessed by John Warner and G. A. Leinan, who signed the same as subscribing witnesses. The defendant objected to the introduction of this bill of sale, on the ground that the same could only be proved by the subscribing witnesses. This objection was overruled and the defendant excepted.

Inasmuch as the defendant in his answer justified his seizure of the lumber by the allegation that he had levied on it as the property of H. W. Steinhelper, it was of course competent for the plaintiff to show by Steinhelper himself that he did not own it at the time of the levy. The very best evidence that Steinhelper had sold it to Leavering before that time was the bill of sale made and signed by him. It is very clear that his acknowledgment of the execution of this writing was competent to go to the jury as evidence that he had sold the lumber to Leavering at its date, and had also delivered it into his possession. This exception cannot be sustained.

2. Having thus produced evidence tending to show that Steinhelper had sold the lumber to Leavering before the date of the seizure of it by the defendant, and having theretofore, without objection, introduced a deed of assignment from Leavering to him (Sparhawk) conveying to him all his "property of every kind, real, personal and mixed," dated after the sale from Steinhelper to Leavering, but before the levy by defendant, the plaintiff Sparhawk had furnished evidence which, if believed by the jury, established the affirmative of the (390) issue numbered 1. The fact that, after the commencement of these actions by Sparhawk, he assigned his interest to Leavering, could

have no bearing on these issues and could affect only the finding of issue No. 3, and that issue, as we have said, did not concern the defendant. *His* objection to evidence addressed solely to that issue was properly overruled, as it could not affect his liability. Hence, there was no error in overruling *his* objection to the introduction of the reassignment from Sparhawk to Leavering.

3. The plaintiff further offered a lease made on 5 May, 1891, by Steinhelper to Leavering of the mill-yard for five years at the rent of $100 per year; said lease had not been registered, and defendant objected to its introduction as evidence. The court took a recess, and when it met again the lease had been registered upon the acknowledgment of its execution by the parties thereto. The court thereupon overruled the defendant's objection and admitted the lease to be read in evidence, and defendant excepted. The lease was offered for the purpose of showing that the land was leased by Steinhelper to Leavering, and that Leavering was in possession of the land where the lumber was delivered.

This lease, whether registered or not, was competent evidence, its execution being proved or admitted, to show that the place where the lumber was stored was in the possession of Leavering when the latter acquired the title to the lumber from Steinhelper, as alleged. The fact that such a lease was made was pertinent to the controverted fact, to wit, the possession of the lumber by Sparhawk, who claimed it as the assignee of Leavering.

4. Exceptions relating to the charge to the jury:

(1) The defendant asked the court to charge the jury that Sparhawk's trust not having been registered in this county until 2 October, 1891, he did not have such title on 27 September, 1891, as would sustain
(391) this action. The court declined, remarking that Sparhawk claimed the property by reason of his possession. Defendant excepted.

We do not think that, for Sparhawk's purposes in this action, it was necessary that the assignment of the lumber from Leavering to him should have been registered. This is not a contest between creditors of Leavering and his assignee, but between that assignee and the defendant, whose act in seizing the lumber was wrongful, unless it was the property of Steinhelper, the judgment debtor. This assignment was valid *inter partes* without registration, as they conceded. Its effect in this action was merely to show that the act of the defendant, if wrongful, was a trespass on the rights of Leavering's assignee, and not on the rights of Leavering himself.

(2) Defendant asked the court to tell the jury that, suit having been commenced in October, 1891, the deed from Sparhawk to Leavering of 19 December, 1891, did not pass to Leavering any title to this suit or

right to prosecute this action. The court declined, and the defendant excepted.

This request was properly denied. It contained a correct statement of a proposition of law, but it was not pertinent to the issues submitted to the jury.

(3) The third request was, that unless Leavering on 11 August, 1891, had title and possession, the trust deed of that date did not pass to Sparhawk such title as could support this action. The court gave this instruction, but told the jury, in the course of the charge, that Sparhawk must prove ownership of the lumber levied on and sold at the date of levy and sale, and that he claimed title through Leavering, and that if Leavering was not the owner at the date of the assignment to Sparhawk, no title passed to Sparhawk under said deed. Defendant excepted because the court did not give the charge in the language requested.

It is not required that the instruction asked for should be given in the language used. It is sufficient if the substance is given.

(4) Defendant's fourth request was that Leavering having attempted to show title to 5 May, 1891, for such lumber as was (392) then on the yard, and having allowed other lumber made after that time to be mixed with it or placed on the same yard, and not having proved that the lumber levied on was part of the lumber that was on the yard on 5 May, 1891, then he cannot recover. The court gave this charge, but modified it as follows: "That Leavering having attempted to show title to 5 May, 1891, for such lumber as was then on the yard, and having allowed other lumber made after that time to be mixed with it or placed on the same yard, he cannot recover unless he has proved that the lumber levied on was part of the lumber that was on the yard on 5 May, 1891, or that he was the owner of all the lumber on the yard." Defendant excepted, insisting that there was no testimony tending to show that the lumber levied on was on the yard 5 May, 1891.

This exception was not urged on the argument before us. The question at issue was: Who owned the lumber at the time it was seized? Who was in possession of it? There was evidence that Leavering had bought from Steinhelper all the lumber on the yard on 5 May, 1891, and had then leased the land where it was piled. It was further in evidence that all the lumber subsequently put upon that yard by Steinhelper was put there by Leavering, and into his possession. Leavering himself testified that the lumber levied on was Sparhawk's; that he had assigned it to him.

(5) Defendant's fifth request was that the deed of trust from Leavering to Sparhawk was too indefinite in its description of the property

conveyed to include this lumber in Cumberland County, N. C. The court declined to give this instruction, and the defendant excepted.

The description in the deed referred to—"All the real estate, and also all the goods, chattels and effects, and property of every kind, real, personal and mixed of the said William A. Leavering"—is as com-
(393) prehensive as it could be made. We see no error here.

Having thus disposed of the defendant's exceptions, we conclude that no incompetent evidence was admitted, and no error was committed in the charge, and therefore that the fact is properly established by the finding of the jury that the plaintiff Sparhawk was the owner of the lumber levied on and sold by defendant sheriff. That being true, the plaintiff Sparhawk was entitled to damages. The jury found the amount of such damages, and there was no exception relating to that matter. The third issue did not concern the appellant.

No error.

MARY A. SIMPSON v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

Contract—Insurance Policy—"Incontestable Policy"—Death by Suicide.

An original policy of insurance contained in one clause restrictions against certain travel, occupation and residence, and in another stipulated that if the insured should die by suicide the company should not be liable beyond the net value of the policy, to be ascertained by certain methods. Subsequently the company executed an agreement declaring that "all restrictions of travel, occupation and residence expressed in the original policy are hereby waived, and that said policy shall from this date be incontestable, and when the policy becomes a claim the amount of insurance shall be paid immediately upon approval of proof of death." The insured paid all premiums as they fell due and died by suicide: *Held*, in an action to recover the amount of the policy (1), that by the new contract the policy was rendered "incontestable" for any cause except nonpayment of premiums and fraud, and (2) that the "amount of insurance" payable when the policy became a claim by the death of the insured was the full amount expressed upon the face of the policy.

MACRAE, J., dissents.

(394) ACTION, tried before *Winston, J.*, at Fall Term, 1894, of RUTHERFORD, upon a case agreed, from which it appeared that the plaintiff Mary Alice Simpson is the widow of Robert Simpson, deceased, and the other plaintiffs are his children; that Robert Simpson on 15 May, 1875, and also on 15 May, 1876, insured his life for the

sum of $1,000 in the North Carolina State Life Insurance Company, and received from said company two policies of insurance, each for the sum of $1,000, to be paid at his death to his wife and children.

The fourth clause of the policies contained restrictions as to travel and residence in certain countries and as to engaging in certain occupations.

The fifth clause was as follows:

"That in case the death of the insured shall be caused by the use of intoxicating liquors, or of opium; or if the insured shall die by suicide, whether sane or insane; or from or in consequence of a duel, or the violation of law, or of any condition or agreement contained in this policy, or the application upon which this policy is issued, this company shall not be liable beyond the payment of the net value of the policy, determined by the American Experience Table of Mortality, and six per cent interest."

On 13 April, 1887, the defendant The Life Insurance Company of Virginia assumed the payment of said policies when they should become due, and on the same day executed and delivered to the said Robert Simpson a contract in writing as follows:

"In accordance with the application made to them this 13 April, 1887, by Robert Simpson, the holder of policy No. 2034, The Life Insurance Company of Virginia hereby changes said policy (hereafter called the original policy) to a term policy, renewable annually without medical examination by the payment of premiums for each age of life according to the published rates of the company for annual renewable term policies.

"It is agreed that the term policy shall be continued in force for the same amount as the original policy by the payment at (395) the next renewal and subsequently at such times as are named in the original policy of the annual, semiannual or quarterly premiums set opposite the then nearest age of the insured in the aforesaid table. . . .

"The company further agrees that all restrictions of travel, occupation or residence expressed in the original policy are hereby waived, and that said policy shall from this date be incontestable, and when the policy becomes a claim the amount of insurance shall be paid immediately upon approval of proof of death."

At the same time a like contract was made in regard to the other policy. Robert Simpson, from the said 13 April to the time of his death, paid and the said defendant received all premiums due upon said policies.

Robert Simpson died by suicide 2 January, 1894.

The plaintiffs bring this action upon said policies for the sum of $2,000.

The defendant contended that under the fifth condition in said policies it was not liable beyond the payment of the net value of said policies, determined by the American Experience Table of Mortality, and six per cent interest, and in its answer the defendant tendered judgment for that amount.

The plaintiffs contended that the restriction as to suicide was waived by the contract of 13 April, 1887, and that by virtue of said contract said policies became incontestable and said suicide clause was waived.

Upon the above facts the court was of the opinion, and so adjudged, that the plaintiffs were entitled to recover the sum of $2,000 and the cost of the action. Defendant appealed.

McBrayer & Durham for plaintiff.
Osborne, Maxwell & Keerans for defendant.

(396) BURWELL, J. The defendant agreed "that all restrictions of travel, occupation or residence expressed in the original policy" should be waived. By this stipulation the fourth section of the original policy was in effect stricken out and forms no part of the contract between these parties.

It further agreed that the policy should be from the date of that agreement "incontestable"; and, as if to emphasize this promise, it added that when the policy became a claim "the amount of insurance" should be paid to the beneficiary immediately upon approval of proof of death. If the policy had lapsed or been discontinued, as by nonpayment of the stated premium, it would not, upon the death of Robert Simpson, have become a claim against the defendant insurer. It was in full force at the time of that death and has become "a claim," and the plaintiff demands the "amount of insurance." What is meant by "the amount of insurance"? Certainly the sum for which the life was insured—the sum which, under the contract, was to be paid to the plaintiff in case of her husband's death as indemnity for her loss. Those words cannot, we think, be construed to mean "the net value of the policy," a sum which, by the terms of the original contract, was to be paid under certain circumstances in lieu of the amount of insurance, to wit, $2,000. This construction is consonant with the preceding provision that the policy should be "incontestable." The quality of incontestability could with no propriety be predicated on this contract of insurance if it was still allowed to the insurer to dispute its liability to the insured for the "amount of the insurance," upon the ground that the death was caused "by the use of intoxicating liquor or opium, or from the violation of law, or any condition or agreement contained in this policy, or the application upon which this policy is issued." And yet, if it may now, under its contract,

contest with this beneficiary as to its liability for the amount of insurance, upon the allegation that the deceased committed suicide, it may contest with beneficiaries under other similar contracts upon (397) the grounds enumerated above. If this can be done, the policy is certainly not incontestable, for the whole field of dispute would then be open to the defendant.

In Bliss Life Insurance (2d Ed., p. 428) the word "indisputable" is used to designate the quality here expressed by the word "incontestable." In a note on page 431 that author remarks: "*Lord Campbell* says (*Wheelton v. Hardisty*, 8 E. & B., 232, 283) that a promise that all assurances shall be unquestionable means indisputable, and amounts to an absolute guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured, subject to the implied exception of personal fraud, which will vitiate the contract." This policy became, by virtue of the defendant's agreement, what Mr. Bliss, on page 432, denominates "a really indisputable policy," which should be "subject to no condition whatever."

Affirmed.

MACRAE, J., dissenting: I cannot concur with the reasoning or the conclusion arrived at by a majority of the Court in this case. It seems to me that by all the rules of construction the agreement of defendant that the policy should be incontestable had reference to the matters named in the same sentence, "all restrictions of travel, occupation or residence."

Further, the express agreement in the original policy was that, if the insured should die by suicide, the company should not be liable beyond the net value of the policy. In other words, in the case of natural death, the amount of insurance was $2,000; in case of suicide, it was only the net value of the policy, and this the defendant is not contesting.

(398)

E. J. HEATH AND WIFE v. C. R. MCLAUGHLIN, EXECUTOR OF JOSEPH MCLAUGHLIN.

Will—Specific Legacy—Pecuniary Legacy—Abatement.

1. The bequest of certain shares of stock owned by the testator at the date of the will and at his death is a specific legacy.
2. Specific legacies do not abate with or contribute to general legacies, except where the whole estate is given in specific legacies, and then a pecuniary legacy is given, or where an intention appears in the will that the specific legacies shall so abate.

3. A provision in a will that all the legacies shall abate before there is any abatement of a designated legacy, while protecting the latter from abatement, does not affect, as to other legacies, the usual order of abatement—the general legacies first and then the specific.

SPECIAL PROCEEDING before the clerk of MECKLENBURG, to compel the defendant executor to turn over to *feme* plaintiff certain shares of stock bequeathed to her by his testator, and heard on appeal of the defendant before, *Winston, J.*, at Fall Term, 1894.

The complaint was as follows:

"1. That Joseph McLaughlin, late of the county and State aforesaid, died on the ____ day of August, 1893, leaving a last will and testament, a copy of which is hereto attached, and asked to be taken as a part of this petition.

"2. That J. T. Barrett and Charles R. McLaughlin, the executors named in said will, duly qualified as such before the clerk of the Superior Court of said county, and entered upon the discharge of their duties as such executors. That the said J. T. Barrett has since died, and the defendant McLaughlin, as surviving executor, has undertaken to execute the will of the said testator.

"3. That as appears by the fifth item of said will, the said testator bequeathed to the plaintiff Annie Heath two shares of the capital
(399) stock of the Columbia Manufacturing Company and ten shares of the capital stock of the Peoples Bank, and the sum of $200.

"4. That after paying the debts of the said estate and the expenses of administration, and after setting apart the $4,500 bequeathed in said will in trust for the widow of the testator, there still remains in the hands of the said executor about the sum of $7,000, which is applicable to the legacies bequeathed in said will.

"5. That the testator owned at the time of his death the exact number of shares of stock in the several corporations which were bequeathed in the said will to the several legatees, and the executor now holds said stock, and has collected the dividends that have accrued and that have been paid on them since the death of the testator.

"6. The plaintiffs have demanded of the said executor that he turn over to the plaintiff Annie Heath the two shares of the capital stock of the Columbia Manufacturing Company bequeathed to her, each being of the value of $500, and also the ten shares of the capital stock in Peoples Bank, each share being of the par value of $100. The said executor has declined to comply with said request, for the reason that an abatement of the legacy is rendered necessary on account of the fact that there is not a sufficient amount of money to pay all of the same in full, and said executor has demanded of the plaintiffs that they should con-

tribute to make up the deficiency in proportion to the value of their said stock and money bequeathed to the said Annie Heath.

"7. That the plaintiffs are advised and believe that the legacies to the said Annie Heath of stock in the Columbia Manufacturing Company and the Peoples Bank, as aforesaid, are specific legacies, and that the said Annie Heath is entitled to have the said stock turned over to her without any contribution on her part to make up any deficiency that may arise by reason of the lack of funds to pay the pecuniary legacies mentioned in said will. Wherefore, the plaintiffs pray judgment that the said executor be required by order of this court to turn (400) over to the plaintiff Annie Heath two shares of stock of Columbia Manufacturing Company and ten shares of stock of the Peoples Bank, together with any dividends that may have been paid on the same since the death of the testator."

The answer of the defendant was as follows:

"1. That he admits the allegations of articles 1, 2, 3, 4, 5, 6 and 7.

"2. For a further defense the defendant alleges that he is informed and believes that after the assets of said estate have been reduced to money in the manner required by law there will not be a sufficient amount of money to pay in full the pecuniary legacies bequeathed in said will, and he is advised and believes that the plaintiff Annie Heath should be required to make a contribution, in proportion to the value of the stock and money, to make up the deficiency. So that the said Annie Heath, and the other parties in said will to whom stock in the several corporations therein named was bequeathed, shall be required, before receiving the stock bequeathed to them, to pay to the defendant a sufficient amount to make the legacies of stock and the money abate ratably.

"Wherefore, the defendant prays judgment that an account be taken to ascertain the value of the stock bequeathed to the plaintiff, and also the amount of assets which will be available to meet the pecuniary legacies, and that the plaintiff be required to contribute to make up the deficiency in proportion to the value of her said stock and money bequeathed to her."

The will contained various bequests to divers persons, of shares of stock in the Columbia Manufacturing Company, the Peoples Bank of Monroe, and the Commercial Bank of Charlotte.

Items 14 and 15 of the will were as follows: (401)

"5. I give and confirm to my daughter Annie Heath all that I have heretofore given her and put into her possession; and in addition to what has heretofore been given her, I give and bequeath unto her two shares of the capital stock of the Columbia Manufacturing Com-

pany, ten shares of the capital stock of the Peoples Bank, and the sum of two hundred dollars ($200).

"14. It is my further will and desire, and I hereby direct that if at my death I do not own the number of shares of the capital stock of the three corporations herein named that I have bequeathed above, then my executors shall pay to the legatees who shall fail to get the stock bequeathed to them the market value of said stock in money at the time of my death.

"15. It is further my will and desire, and I hereby direct that in case it becomes necessary that there shall be an abatement of any of the legacies herein bequeathed in order to pay debts or for other purposes, that all the other legacies shall abate before there is any abatement of the legacy bequeathed in trust for my wife."

His Honor sustained the judgment of the clerk that "the plaintiff is not required to contribute any sum to make up the deficiency that there may be in funds to pay the pecuniary legacies, and said executor is hereby ordered to turn over forthwith to the said Annie Heath the two shares of capital stock of Columbia Manufacturing Company and ten shares of stock of Peoples Bank, and that the plaintiff recover the costs of the action," and defendant appealed.

Walker & Cansler for plaintiff.
Jones & Tillett for defendant.

CLARK, J. The testator owned at his death the shares of stock bequeathed to the plaintiff. The legacy was a specific one. *McGuire*
(402) *v. Evans,* 40 N. C., 269. It is a general rule that specific legacies do not abate or contribute to general legacies. There are exceptions, as where the whole estate is given in specific legacies and then a pecuniary legacy is given, or where an intention that the specific legacies shall abate appears in the will. *White v. Beattie,* 16 N. C., 320; *White v. Green,* 36 N. C., 45; *Biddle v. Carraway,* 59 N. C., 95. But nothing of that kind appears in the present case. The provision in clause 15 of the will simply provides that all the legacies shall abate before there is any abatement of the legacy given in clause 1 to his wife. But this, while protecting that legacy from abatement, does not affect as to the other legacies the usual order of abatement, to wit, the general legacies first, and then the specific legacies.

Affirmed.

Cited: In re Wiggins, 179 N. C., 327.

VIRGIN COTTON MILLS v. W. M. ABERNATHY.

Action on Note—Subscription to Stock—Practice—Issues—Allegation of Tender—General Denial of Plaintiff's Right to Recover—Judgment Non Obstante Veredicto.

1. It is too late after verdict to except to failure to submit issues tendered and to issues actually submitted.
2. The trial judge may, in his discretion, submit one or many issues arising on the pleadings, subject only to the restriction that sufficient facts be found to enable the court to proceed to judgment and that each party may have the opportunity to prevent any view of the law arising upon the evidence through pertinent instructions.
3. A general denial by the defendant of the plaintiff's right to recover cures the failure of plaintiff to allege a tender before action brought.
4. Where one executes a note to a corporation as security for the payment of stock therein, the transaction is a subscription to or purchase of the stock from the company itself, and not a purchase from another, and hence a tender of the certificate by the company is not necessary before bringing action on the note.
5. Judgment *non obstante veredicto* is only granted when the answer confesses a cause of action and the matter relied on in avoidance is insufficient.

ACTION, tried at March Term, 1894, of MECKLENBURG, before (403) *Boykin, J.*, and a jury, having been brought there by defendant's appeal from a justice of the peace.

The action was brought by the plaintiff to recover upon two promissory notes or bonds, executed by the defendant, in the following words and figures, viz.:

$200. HUNTERSVILLE, N. C., *23 May, 1891.*

On or before *15 October, 1891, I* promise to pay to the order of J. W. Mullen, treasurer of the Virgin Cotton Mills, or his successor in office, *two hundred* dollars, being security for the payment of *two* shares of stock in said corporation, and bearing eight per cent interest after maturity. W. M. ABERNATHY. [SEAL.]

The other note or bond was of the same form as the foregoing, except it was made to fall due on 15 October, 1892. Both of the above notes were printed except the words in italics, which were in writing.

The defendant on the trial put in a "general denial" to the plaintiff's right to recover, and tendered the following issue:

"Is the plaintiff entitled to recover of the defendant? If so, in what amount?"

The court announced that as soon as the evidence was developed he would frame the issues accordingly. To this there was no exception.

The plaintiff then introduced J. W. Mullen, the treasurer of the mills, who testified in substance that the notes or bonds above referred
(404) to were executed by the defendant, in his office in the town of Huntersville, and were given in payment of four shares of the stock of the plaintiff corporation, of the par value of $100 each. That frequent demand has been made on the defendant for the payment of both of said notes, but that the defendant had failed to pay the same, or any part thereof.

On being cross-examined, the witness said that both of the notes were "filled up," that is, the amounts and dates were inserted in the blank spaces before the defendant signed them. That he did not agree with the defendant that the plaintiff would take lumber at $1 per hundred in payment for the first note. That he did say that the mills would need lumber, and they would as soon buy from the defendant as any one else, but there was no agreement that the note should be written so as to express such a contract, or that the note itself should be paid in lumber. That the defendant never did tender, deliver or offer to deliver to the plaintiff lumber in payment of said note or any part of the same. That when the first note fell due he presented same to defendant in person, and defendant said that he would have to wait until he could sell his cotton, but said nothing about the note being payable in lumber at that time, or any time thereafter. That the plaintiff had not issued the stock to the defendant, because it was a rule of the company that no stock should be issued until paid for in full. That both of the notes were put in the hands of attorneys for collection, and that the first time witness ever heard of defendant's contention that the first note should be paid in lumber was on the trial before the justice of the peace. That the plaintiff was an incorporated and organized company at the time the notes were signed.

The defendant then testified in his own behalf, that on 23 May, 1891, while passing the witness Mullen's store, the defendant was
(405) stopped and Mullen wanted to sell him some of the plaintiff's stock. That he told Mullen that he did not have the money, whereupon Mullen proposed to take payment for two shares, amounting to $200, in lumber at $1 per hundred. That he was running a sawmill, and for that reason agreed to purchase two shares upon these terms. That Mullen then drew out of his pocket a blank book containing the notes, partly printed, and asked defendant to sign the same, which he did, on condition that Mullen was to insert in same the provision that the note should be paid in lumber, as above stated. After this, Mullen asked the defendant to take two shares payable in cash, inasmuch as he

had agreed to take lumber for the others. Defendant agreed to purchase one share and pay cash, provided he be given until 15 October, 1892, to pay the same, whereupon Mullen handed defendant another blank note to sign, which he did, authorizing the witness Mullen to fill in the amount, etc. Neither the dates, amounts nor shares were filled in in either of the notes at the time the defendant signed them. That he got the lumber ready by 15 October, 1891, but that the plaintiff refused to allow him to deliver it, on the ground that a larger stockholder had furnished the lumber to build the mills. That he never attended any of the stockholders' meetings, and had no notice as to when they were held, and did not consider himself a member of the company until the shares were paid for. Did not know but that the notes were filled in properly until the day of trial. No certificate of stock was ever tendered defendant by the plaintiff.

Plaintiff recalled the witness Mullen, who denied that there was any agreement with reference to the execution of the notes, as testified to by the defendant, and also denied that defendant ever tendered the lumber. Witness said that notice of the stockholders' meetings was sent to defendant like other stockholders.

Defendant then requested his Honor to hold, as a matter of law, and instruct the jury, that in no aspect of the case could the plaintiff recover, inasmuch as no tender of the certificate of stock had been (406) alleged or proven by the plaintiff.

This was refused, and defendant excepted.

His Honor then stated that he had concluded to submit the following issues to the jury, viz.:

"1. Did the defendant sign the note due 15 October, 1891, and instruct the plaintiff's agent to insert in the blank '$200, payable in lumber'?

"2. Did the defendant deliver or offer to deliver the lumber at the maturity of said note?

"3. Did the defendant sign that note due 15 October, 1892, and instruct the plaintiff's agent to insert in the blank '$100'?"

To the submission of these issues by the court there was no exception.

The defendant then, in due time, asked the court, in writing, to charge the jury as follows:

"1. That if the jury believe that the amount of the note sued on was not filled in at the time of the signature by the defendant, and that he did not authorize the insertion of the same, except upon the condition that the amount was to be paid in lumber, then the issue should be answered 'No.'

"2. That if the jury believe that no tender of the certificate of stock was made to the defendant by the plaintiff prior to the commencement of this action, then the issue should be answered 'No.'

"3. That if the jury believe that the defendant made a proposition to J. W. Mullen, treasurer of the plaintiff mills, to take or purchase two shares in said mills, and signed a note in blank, on condition that the amount and terms of the offer were to be inserted, then the issue should be answered 'No.'

"4. That even if the jury believe that the defendant signed the note for the purchase of the shares unconditionally, the plaintiff would
(407) be entitled to recover only the damages suffered, that is, the difference between the amount which the defendant agreed to pay or contribute on account of the shares and the value of an equal number of shares on the market.

"5. That it is incumbent upon the plaintiff to show the damages sustained, if any, and if none were shown by it, the issue should be answered 'No.'"

His Honor refused to give the foregoing prayers for instruction, except as set out in his charge, and the defendant duly excepted.

His Honor then charged the jury that the defendant had admitted the signing of the notes in suit, but had set up the defense that he had instructed the plaintiff's agent to insert in the note due 15 October, 1891, the words, "$200, payable in lumber," and likewise instructed the plaintiff's agent to insert in the note due 15 October, 1892, the words, "$100," but that the said agent had failed to carry out his instructions in these particulars. That the defendant contended that he had complied with his part of the contract, so far as the first note was concerned, by making a tender of the lumber in payment of the first note. That all of these allegations were denied by the plaintiff, and the burden was upon the defendant to establish the truthfulness of the same by the weight of the evidence. That if the jury believed that the defendant had established by a preponderance of evidence that, at the time he signed the note due 15 October, 1891, he instructed the plaintiff's agent to insert the words, "$200, payable in lumber," they must answer the first issue "Yes"; otherwise, "No." His Honor then took up the evidence, and presented every phase of the same in any way bearing on this issue to the jury, and fully explained to the jury the different contentions of the parties with reference thereto.

As to the second issue, his Honor instructed the jury that if they believed that the defendant had established by a preponderance
(408) of the evidence that he tendered or offered to deliver to the plaintiff the lumber in payment of the first note, after 15 October, 1891, then they should answer the second issue "Yes"; otherwise, "No."

As to the third issue, his Honor instructed the jury that if the defendant had satisfied the jury by a preponderance of the evidence that at the time he signed the note due 15 October, 1892, he instructed the

plaintiff's agent to insert therein the word "$100" instead of "$200," that they should answer the third issue "Yes"; otherwise, "No." The court fully explained to the jury what was meant by a preponderance of the evidence, as used in his charge, and recapitulated all of the evidence before closing his charge.

There was no exception taken to the charge as given.

The jury returned their verdict in favor of the plaintiff, answering all the issues "No."

The defendant then asked the court for a judgment *non obstante veredicto*. Motion refused, and defendant excepted.

Motion for a new trial: Motion refused. Defendant excepted, and appealed from the judgment for plaintiff.

The defendant, in his case on appeal, assigned the following error:

1. That his Honor erred in not submitting to the jury the issue tendered by the defendant.

2. That his Honor erred in the issues submitted.

3. That his Honor erred in refusing to hold as a matter of law, and instruct the jury, that in no aspect of the case could the plaintiff recover, inasmuch as no tender of the certificate of stock had been alleged or proven by the plaintiff.

4. That his Honor erred in refusing to give Nos. 2, 4 and 5 of defendant's prayers for instruction.

5. That his Honor erred in rendering judgment for the plaintiff upon the issues found by the jury.

Walker & Cansler for plaintiff. (409)
Maxwell & Keerans for defendant.

CLARK, J. The first and second exceptions for failure to submit the issue requested, and for issues actually submitted, come too late after verdict. The Code, sec. 412 (2); *Phifer v. Alexander,* 97 N. C., 335; *Taylor v. Plummer,* 105 N. C., 56; *Lowe v. Elliott,* 107 N. C., 718. The issues are, however, in fact, sufficient under the rule approved in *Humphrey v. Church,* 109 N. C., 132. The "general denial" cured any failure to allege tender of the certificate, as the only reason for requiring a tender before action brought is to throw the costs of an unnecessary action upon the plaintiff. *Waddell v. Swann,* 91 N. C., 108; *Moore v. Garner,* 101 N. C., 374. Besides, this is not a purchase from another, but from the company itself, and in effect a subscription to its capital stock. The prayers for instruction, so far as correct and relevant to the case, were given. There was no ground for the motion for judgment *non obstante veredicto,* which is only granted when the answer confesses

a cause of action and the matter relied on in avoidance is insufficient. *Walker v. Scott,* 106 N. C., 56.

No error.

Cited: Martin v. Bank, 131 N. C., 124; *Sykes v. Boone,* 132 N. C., 208; *Shives v. Cotton Mills,* 151 N. C., 291; *Audit Co. v. Taylor,* 152 N. C., 274.

(410)

CHARLOTTE BUILDING AND LOAN ASSOCIATION v. COMMISSIONERS OF MECKLENBURG COUNTY.

Taxation—Stock of Building and Loan Association, How Taxable.

1. The capital stock of a building and loan association organized under chapter 7, Volume II of The Code, is *property,* and hence is taxable according to the uniform *ad valorem* system established by the Constitution.
2. The General Assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other *license* tax or fee.
3. Under chapter 294, Acts of 1893, imposing a license tax upon building and loan associations and forbidding counties and other municipalities to impose any other license tax or fee, the capital stock of such associations is not exempt from State and county taxation *ad valorem.*
4. Under the provisions of section 14, chapter 296, Acts of 1893, it is the duty of the corporation, and not the individual stockholder, to list the stock for taxation and to pay the tax assessed thereon.

APPEAL from *Winston, J.,* Fall Term, 1894, of MECKLENBURG.

This action was begun in a justice's court, and on appeal by the plaintiff to the Superior Court it was there submitted on the following agreed facts:

"1. That the plaintiff, The Charlotte Building and Loan Association of Charlotte, N. C., is a corporation created and organized under chapter 7, Volume II of The Code of North Carolina, and has its residence or place of business in the city of Charlotte, county of Mecklenburg aforesaid, its articles of association having been obtained from the clerk of the Superior Court of said county under and by virtue of the provisions of said chapter of The Code.

"2. That the capital stock of the said association was listed for taxation in Charlotte Township in said county, under protest, for the year 1893, on the ____ day of _____, A. D. 1893, the commissioners of

the said county claiming that the said association was liable to taxation on said stock, and the plaintiff claiming that, under the (411) law, and especially under section 30, chapter 294, of the Acts of 1893, the said association was not liable to taxation on the said stock.

"3. That the said stock, with the valuation thereof, was duly entered on the tax list of said county as required by law, and the following tax, which was also entered on said books or list, was assessed upon the same: State tax for year 1893, $31.17; county tax for the year 1893, $31.67; convict tax for year 1893, $13.57; road tax for year 1893, $5.28; that said tax list, duly certified by the register of deeds and *ex officio* clerk of the said board of commissioners, was placed in the hands of R. A. Torrance, tax collector of said township, with an order indorsed thereon by the clerk of said board, commanding the said collector to collect the taxes therein mentioned, according to the provisions and requirements of the law.

"4. That the said tax collectors demanded payment of said tax from the plaintiff, and said plaintiff, by compulsion and under protest, paid said taxes to said collector on 8 December, 1893, and that within thirty days thereafter the plaintiff duly demanded, in writing, from the treasurer of the State and from the treasurer of the said county of Mecklenburg, that the said tax be repaid and refunded to it; to which demand the said treasurer of the State and the treasurer of said county refused to comply, and that the said tax has not been refunded to this plaintiff, although more than ninety days have elapsed since the said demand was made, and also since the thirty days from the day of payment expired.

"5. That the stock of the plaintiff association is owned in different amounts by divers persons who are citizens and taxpayers of the said township, county and State.

"6. That before this action was brought the plaintiff duly demanded in writing of the defendant the repayment of the said tax which has been paid by it to the tax collector, and with this demand the (412) defendant refused to comply."

The questions submitted to the court on this case agreed are as follows:

"1. Is the capital stock of the plaintiff taxable, under the laws of this State, for State and county purposes, or for either?

"2. Should the said stock have been listed for taxation by the said association, or by the individual stockholders?

"3. If the stock of said association is taxable under the laws of this State, who is liable for the tax thereof, the said association or its individual stockholders?

"If the court shall be of opinion that the said stock is taxable, and that it is the duty of the said association to list and pay the tax on same,

then judgment of nonsuit and judgment against the plaintiff for defendant's costs shall be entered; but if the court shall be of opinion that the said stock is not taxable under the laws of this State, or that, if taxable, the stock should be listed and the tax paid by the individual stockholders, then judgment shall be entered that plaintiff recover of the defendant the amount of said tax so paid by it, to wit, the sum of eighty-one and sixty-nine one hundredths dollars ($81.69), with interest on the same from the date of the payment thereof, and the costs of this action.

"It is also agreed that if the court should be of the opinion and shall determine that the said tax or any part thereof was levied or assessed illegally or without authority, or was for any reason invalid, judgment shall be rendered in favor of the plaintiff for the amount of said tax with interest and cost.

"It is further agreed that the court may render judgment, and thereby grant any relief to the plaintiff that it may, under the law, be entitled to in the premises."

His Honor, *Winston, J.*, rendered the following judgment: "In this case the court is of the opinion that the capital stock of the
(413) plaintiff association cannot be doubly taxed; that the plaintiff is the proper person to give in said stock for taxation, and that there is no error in the justice's judgment. The plaintiff will take nothing by its writ, and the defendants go hence, etc., and recover costs." In deference to this ruling, the plaintiff submitted to a nonsuit and appealed.

Clarkson & Duls for plaintiff.
E. T. Cansler for defendants.

BURWELL, J. "1. Is the capital stock of the plaintiff corporation taxable, under the laws of this State, for State and county purposes, or for either?"

The capital stock of this corporation is property. The Constitution requires that *all* property shall be taxed uniformly for State purposes. Const., Art. V, sec. 3. "Taxes levied for county purposes shall be levied in like manner with the State taxes." Const., Art. V, sec. 6. And "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same." Art. VII, sec. 9. Only one class of property is exempted from taxation by the Constitution itself, to wit, "property belonging to the State or to municipal corporations." The General Assembly may exempt cemeteries, and property held for educational, scientific, literary, charitable or religious purposes, and also the personal property of a taxpayer "to a value not exceeding three hundred dollars." Const., Art. V, sec. 5. It has no power to make any other exemptions. It is impliedly forbidden to do so. Hence, if there

is any statute which declares that this property—the capital stock of this corporation—shall be exempt from taxation according to the uniform *ad valorem* system established by the Constitution, or that attempts to make the burden of taxation it bears greater or less than that which is laid on other property of the same *situs* and value, such legislation is unconstitutional and void. But the General Assembly may require the plaintiff corporation to pay a license tax for the privilege of (414) carrying on its business. Const., Art. V, sec. 3. It has done this. Laws 1893, ch. 294, sec. 30. And it has forbidden counties or other municipal corporations to exact from it any other *license* tax or fee. It has not exempted the capital stock of this corporation from bearing its share of taxation, State and county.

"2. Should the said stock have been listed for taxation by said association, or by the individual stockholders?"

This association is a corporation and it is "taxable by law." Section 14 of chapter 296 of the Acts of 1893 enacts that "persons owning shares in incorporated companies taxable by law are not required to deliver to the list-takers a list thereof, but the president or other chief officer of such corporation shall deliver to the list-taker a list of all shares of stock held therein and the value thereof, except banks." It seems clear that the statute requires the listing of this capital stock, not by the individual stockholders, but by the association, through its president or other chief officer.

"3. Who is liable for the tax thereof, the said association or its individual stockholders?"

The statute referred to declares that "the tax assessed on shares of stock embraced in said list shall be paid by the corporations respectively." The language is plain. The association is liable for the tax.

Inasmuch as our conclusion is that to which his Honor came, it is not material to inquire whether the plaintiff had a right to appeal from the judgment of nonsuit to which he chose to submit under the circumstances set out in the record.

No error.

Cited: Comrs. v. Webb, 160 N. C., 596; *Southern Assembly v. Palmer,* 166 N. C., 82.

(415)

W. E. NEAGLE v. JOHN HALL ET AL.

Administration—Sale of Land for Assets—Action for Accounting Against Deceased Administrator—Administrator de bonis non.

Where an administrator sells lands for assets to pay debts, and expends only a part of the fund for that purpose, and dies before filing a final account, only an administrator *de bonis non* of his intestate can maintain an action for an accounting to recover the unexpended balance. (*Alexander v. Wolfe*, 88 N. C., 398, distinguished.)

ACTION, heard upon complaint and demurrer before *Boykin, J.*, at Spring Term, 1894, of GASTON.

The demurrer was sustained, and plaintiff appealed.

The facts are stated in the opinion of *Associate Justice Burwell.*

Frank I. Osborne for plaintiff.
No counsel contra.

BURWELL, J. The defendants are the executors of the will of James D. Hall. He was the administrator of the estate of J. B. Neagle, who died in 1865, and, as such administrator, under an order of the court duly obtained, he sold the lands of his intestate to make assets to pay debts. This was done in 1866. He used, it is alleged, only a part of the proceeds of the sale of this realty in the payment of debts, and died in 1892 without having filed any final account of his administration of said estate, and having in his hands about $2,720 of said proceeds of sale of land.

The plaintiff avers that his father was one of the two heirs at law of J. B. Neagle, and, upon the death of said Neagle, inherited one moiety of his land. He further says that his father died in 1872, leaving the plaintiff and another son his only heirs, and that the latter died
(416) intestate in 1883, leaving plaintiff as his only heir.

He seeks in this action to recover of the defendant executor and of his sureties on the administration bond of their testator one-half of the fund arising from the sale of the land of J. B. Neagle, as stated above, which was in the hands of James D. Hall at his death.

To the complaint containing the foregoing averments the defendants demurred, insisting that this action could not be maintained by the plaintiff, the administrator *de bonis non* of J. B. Neagle alone having authority to receive from them the money so alleged to have been in their testator's hands.

The demurrer was sustained, and the plaintiff appealed.

No one save an administrator *de bonis non* has the right to call upon the defendant executors for an account of their testator's management of the assets of the estate of J. B. Neagle. As to personalty this is well settled. *Lansdell v. Winstead,* 76 N. C., 366; *Ham v. Kornegay,* 85 N. C., 119; *Merrill v. Merrill,* 92 N. C., 657. If the allegations of the complaint are true, the administration of the estate of J. B. Neagle is unfinished. The final accounting which the law requires has not been had. That can only be done with an administrator, and not till it is done can it be ascertained what part, if any, of the assets that came to the first administrator has been used for the purposes of the estate, and what part is in the defendant's hands. Though that balance may be the proceeds of the sale of land, it must be paid over to the successor of the first administrator, as administrator *de bonis non,* to be by him accounted for to such persons, whether next of kin or heirs at law, as may be entitled to it.

This case is, we think, clearly distinguishable from that of *Alexander v. Wolfe,* 88 N. C., 398. The fund which that plaintiff heir at law recovered was, in legal effect, *land.* It was the proceeds of the sale of an infant's realty, made by that infant's guardian. The death of the infant had put the right to this fund in the heir, just as it (417) would have put the title to the land in him if it had not been sold. The guardian held it *all as land,* and his representative also so held it. To ascertain how much it was, no accounting for personal assets was necessary.

No error.

N. M. STREET ET AL. v. D. W. Q. ANDREWS.

Action for Damages—Obstruction Causing Overflow of Land—Counterclaim—Irrelevant Testimony—Deposition.

1. Where, in an action for damages caused by the ponding of water on plaintiffs' land by obstruction placed by defendant on his own land, on or near the dividing line, the defendant pleaded as a counterclaim damages caused by the overflow of water on his land by reason of obstructions placed by the plaintiff on the lower edge of her land: *Held,* that the torts were separate and distinct, and that complained of by the defendant did not "arise out of the transaction set forth in the complaint," nor was it "connected with the subject-matter of the action," and hence was properly disallowed as a counterclaim.
2. The rejection of irrelevant testimony, unless its exclusion can be seen to prejudice the party objecting, is not ground for a new trial.

3. It is not error to exclude testimony tending to support a counterclaim which is ruled out as improperly interposed, when it could have no bearing upon the cause of action stated in the complaint.
4. Where it appears from the return of a deposition that it was taken on the day, at the time and by the person designated, it will be presumed, in the absence of evidence to the contrary, that all things were done rightly and that it was taken between the hours appointed for taking the same.
5. An objection to a deposition that the answers were on a separate sheet attached to interrogatories, but not inserted at the end of each interrogatory (the whole, however, being above the signature of the commissioner), is untenable.

(418) ACTION for the recovery of damages for injury to plaintiffs' land caused by the ponding of water thereon, tried before *Armfield, J.*, and a jury, at Special Term, 1894, of RUTHERFORD.

The complaint, after alleging the ownership of a tract of land adjoining that of defendant, alleged:

"3. That there are a number of acres of bottom-land in said tract above described, and a branch runs through the bottom-lands of plaintiffs and then through the lands of the defendant, which branch the defendant has filled up with brush, at or near the line between plaintiffs and defendant, and by so filling up said branch with brush and other things calculated to pond back said branch onto the plaintiffs' land, and stop the flow of said branch, the defendant has wrongfully, unlawfully and wilfully ponded back the water on the lands of the plaintiffs, sobbing and wetting the same to such an extent as to render large parts of plaintiffs' bottom-lands entirely useless and unfit for cultivation.

"4. That by said wrongful act of defendant the plaintiffs have been greatly damaged, to wit, to the amount of $1,000.

"Wherefore, plaintiffs pray judgment for $1,000," etc.

The defendant admitted the ownership of the land by plaintiffs, but denied the allegations in third and fourth paragraphs of complaint, and for further answer alleged as follows:

"1. That he is greatly damaged by the wrongful acts and conduct of plaintiffs by obstructing the branch just above defendant's land so as to divert the water from the channel of the branch and throw same on lands of defendant, until a considerable portion of defendant's land is so sodden and damaged as to render it unproductive and almost worthless. And by such wrongful act of plaintiffs defendant is damaged in the sum of $300.

(419) "2. That plaintiffs, after repeated offers from defendant to assist in opening and cutting a canal through plaintiffs' own land to the river, which would dry plaintiffs' own land, and also save defendant's, refuse to allow said canal opened through their lands.

"3. That defendant's damages are increasing annually from said wrongful conduct of plaintiffs, and defendant can do nothing on his own land to arrest the damages in the way of ditching or otherwise.

"Wherefore, defendant demands judgment against the plaintiffs for damages in the sum of $300 and costs."

On the trial the court ruled out the counterclaim of defendant. Defendant objected. Objection overruled. Defendant excepted.

After objection by the defendant, which was overruled by the court, the plaintiff N. M. Street testified, among other things, that "my son Perry is fifteen years old, and the other plaintiffs are all younger; the youngest is six years old; there are six of them in all."

The defendant offered evidence showing the damaged condition and extent of the damage to his own lands immediately below the injured lands of plaintiffs as tending to prove his innocence of obstructing the stream. This was ruled out by the court. Defendant objected. Objection overruled, and defendant excepted.

The defendant offered in evidence the deposition of A. B. Long, Sr., of which the commission, notice and report of the commissioner are as follows:

The State of North Carolina to M. Edney—GREETING:

We, reposing special trust and confidence in your integrity, do authorize and empower you to cause A. B. Long to appear before you at such time and place as you may appoint, and him upon oath to examine touching all such matters and things as he shall know of and concerning a certain matter of controversy in our Superior Court for the county of Rutherford pending, wherein N. M. Street and others (420) are plaintiffs and D. W. Q. Andrews is defendant. And the deposition in writing by you so taken and the same to transmit, sealed with your seal, to our Superior Court, to be held for said county on 1 February, 1894.

Witness: J. F. Flack, clerk of said court, at office in Rutherfordton, 25 January, 1894.

J. F. FLACK,
Clerk of the Superior Court.

Service of notice to take the deposition was accepted by the plaintiff. The return was as follows:

Pursuant to the annexed commission to me directed, I, B. M. Edney, commissioned under the authority thereof, on 30 January, 1894, at the residence of A. B. Long, Sr., in Logan's Store Township, in Rutherford County, N. C., defendant D. W. Q. Andrews present, plaintiff N. M. Street absent, proceeded to take the deposition of A. B. Long, Sr., who,

being first duly sworn on the Holy Evangelist to speak the truth, the whole truth and nothing but the truth between the parties named in said commission, deposes as follows:

. . . . . .

The foregoing deposition of A. B. Long, Sr., was sworn to and subscribed before me at the time and place mentioned in the caption.

B. M. EDNEY,
Commissioner.

The deposition related to the nature of the respective obstructions and to the damage caused to the lands of the plaintiff and defendant respectively.

The deposition was ruled out by the court. The defendant objected. Objection overruled, and defendant excepted.

(421) The defendant tendered the following instructions to be given the jury:

"1. The plaintiffs were under legal obligations to keep the channel of the branch on their lands in such condition that the water might have easy and natural flow, and if they failed to keep the channel in such condition, then they cannot recover.

"2. If plaintiffs failed to exercise reasonable care in keeping the channel of the branch on their lands properly cleaned out, so as to give the waters a free and natural flow, and such failure, together with the same want of care on part of defendant, produced the damage, then the plaintiffs cannot recover.

"3. The burden is upon the plaintiffs to show that no act or failure to exercise due care on their part contributed to their injury.

"4. If the jury find that the outlet for the branches thirty-five years ago was on the lands of plaintiffs, and since that time has passed through lands of defendant at different points, but through no one channel for the period of twenty years, then the plaintiffs have acquired no easement over defendant's land.

"5. The defendant is not required to keep the ditch clear of sand and other obstructions, so that the water running through it from plaintiffs' land may have an unimpeded flow, though the plaintiffs have the right, if they have acquired an easement therein, to enter the lands of defendant and keep the ditch opened and unobstructed, yet the defendant has not the right to purposely obstruct the water on the lands of the plaintiffs, if such easement has been acquired by plaintiffs.

"6. Though the plaintiffs have acquired an easement over the lands of defendant, the defendant still has the right to direct the course of the water through his own land if he will provide a ditch of capacity equal

to that through which the water ran when the plaintiffs acquired such easement."

The court declined to give instructions Nos. 1, 2, 3 and 4 (defendant objected), and gave the other instructions asked for by (422) defendant. The court in its charge told the jury that plaintiffs were not entitled to recover unless they had satisfied them by the evidence that for more than twenty years before the bringing of the suit the branch had continually flowed through plaintiffs' land and entered defendant's land at the point of the alleged obstructions, and that the defendant wilfully, and not negligently, put obstructions in the branch and thereby overflowed and damaged plaintiffs' land as alleged.

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

McBrayer & Durham for defendant.
No counsel contra.

CLARK, J. The cause of action alleged was an obstruction placed by the defendant on the upper edge of his land, preventing the free flow of water from the land of plaintiffs just above and ponding it back. The counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, thus diverting water which was thrown upon, and water-sobbed defendant's land. These were two separate and distinct torts. The latter did not "arise out of the transaction set forth in the complaint," nor was it "connected with the subject of the action." The Code, sec. 244 (1). It was the subject for an independent action, and was properly disallowed as a counterclaim. *Bazemore v. Bridgers,* 105 N. C., 191.

The testimony as to the ages of the minor plaintiffs was, at most, irrelevant, and as such it is not ground for a new trial, unless it could be seen to have prejudiced the side objecting. It was harmless error. *Glover v. Flowers,* 101 N. C., 134; *Livingston v. Dunlap,* 99 N. C., 268; *McGowan v. Railroad,* 95 N. C., 417; Clark's Code, 2 Ed., p. 586.

The counterclaim having been properly ruled out, it was not error to reject the evidence offered to show the water-sobbed con- (423) dition of defendant's land. This evidence could have no bearing upon the allegation of damages to plaintiff's land.

The deposition was improperly excluded. The return showed that it was taken by the commissioner on the day and at the place mentioned in the notice. There was no evidence offered that it was not taken between the hours mentioned in the notice, and there is no presumption that it was not. It appearing that it was taken on the day, at the place, and by the person designated, the presumption, in the absence of evidence

to the contrary, is that all things were done rightly. *Gregg v. Mallett,* 111 N. C., 76. Where it appears that the deposition was taken on the day named, the presumption, in the absence of evidence to the contrary, is that it was taken between the hours named. *Dearman v. Dearman,* 5 Ala., 202. If the answers were on a separate sheet attached to interrogatories, but not inserted at the end of each interrogatory, the whole, however, being above the signature of the commissioner, it does not so appear in the record sent here, which must govern us. But if that were so, and was one of the reasons why the deposition was rejected, such rejection was without force and should have been disallowed. *Downs v. Hawley,* 112 Mass., 237. Since there must be a new trial for the rejection of the deposition, it is unnecessary to consider the exceptions to the charge and for refusal of prayers for instructions, as a somewhat different state of facts may be presented on the next trial.

New trial.

Cited: Younce v. Lumber Co., 155 N. C., 240; *Hutton v. Horton,* 178 N. C., 553.

(424)

W. H. LOVELACE v. HENRY CARPENTER.

Action to Recover Land—Estoppel—Survey—Deed.

Where, in the trial of an action to recover land, the plaintiff introduced a deed from E., a third party, to the defendant, for the purpose of showing the location of disputed line and corners, and the defendant testified that several years after he received the deed he was present when a surveyor ran the calls of the deed, plaintiff's request for an instruction that the defendant was estopped by E.'s deed to him, and the survey, from denying the location of the disputed corner at the place claimed by the plaintiff, was properly refused.

ACTION to recover land, tried before *Armfield, J.,* and a jury, at Spring Term, 1893, of RUTHERFORD. From a verdict and judgment for defendant, the plaintiff appealed.

The facts are stated in the opinion.

Justice & Justice for plaintiff.
McBrayer & Durham for defendant.

AVERY, J. After examining the map, together with the deeds offered, we can understand why, in the unique brief of defendant's counsel, they

cite no authority to negative a proposition which is itself, as the case is stated for consideration here, supported neither by reason nor authority. The plaintiff's title to the land in controversy depends upon whether he can establish the location of a certain pine tree at a certain point, some distance further north than the location contended for by the defendant, and also whether a certain dogwood corner is at a place on Broad River some distance northwest of that which the defendant claimed to be the true location. The line between the two corners mentioned, if run according to plaintiff's contention, would so locate his deeds (425) as to include the land in dispute, while the defendant insists that the calls of some, if not all, of the deeds constituting the plaintiff's chain of title, pass so far south as not to embrace the *locus in quo* within the plaintiff's boundary. The plaintiff introduced a grant and five *mesne* conveyances. The disputed line is described in the grant as running north 60° east, in four of the *mesne* conveyances as running north 80 east, but in the fifth as running north 70 east to the birch and dogwood. Several witnesses were examined on behalf of the plaintiff, and testified to facts tending to show where the disputed line and corners were, when plaintiff put in evidence a deed from one O. P. Earl and wife to the defendant, dated 15 March, 1878. The defendant thereupon testified on his own behalf that he was present six or seven years after the execution of the deed from Earl to himself, when one Davis as surveyor ran the calls of it so as to pass along the upper line, or that claimed by the plaintiff as the true location of his boundary. We are left to infer, without any explicit statement to that effect, that the defendant's deed appeared to be for land adjacent to that embraced by the plaintiff's deed, the location of the southern boundary of which depended upon the establishing of plaintiff's northern boundary. The plaintiff, upon this assumption, as we infer, asked the court to instruct the jury that the defendant was estopped from denying that plaintiff's corner was located at the point where the surveyor Davis ran the defendant's line in the attempt to determine the dividing line between them.

Whether Davis ran the true line or not, his running was no more conclusive upon the defendant of the controversy as to location than was the running by Watkins, the surveyor appointed by the court in this case, of any one of the lines in making his survey. It is not an estoppel by matter of record, because there is no evidence of a judgment in any former suit between the parties affecting the matter in (426) controversy here. The deed of Earl to the defendant is not executed by the plaintiff, or any one in privity with him, but to him. Estoppel *in pais* is the only remaining kind of estoppel known to the law. 1 Herman Executions, p. 1. Though it may not seem necessary to do so, we will refer to the text-books, where the nature of this third species of

estoppel is explained, to show that there is no aspect of the testimony in which the defendant is precluded from setting up title to the land in controversy, on the ground that his conduct has misled the plaintiff and placed him in position that he must suffer injury if the defendant is allowed to claim the disputed land. 2 Herman Executions, secs. 967, 970 *et seq.*

Judgment affirmed.

. *Cited: Boddie v. Bond,* 154 N. C., 368; *Hardware Co. v. Lewis,* 173 N. C., 295; *Sills v. Bethea,* 178 N. C., 321.

STERN BROS. v. S. F. LEE, ADMINISTRATOR OF D. M. LEE ET AL.

Homestead Exemption—Rights of Remainderman—Conveyance by Homesteader, Effect of.

1. The docketing of judgments against a debtor who holds land in remainder, dependent upon life estate in another, creates a lien upon such estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions.
2. But where, in such case, the judgment creditors do not exercise their right to sell their debtor's estate in remainder, and, by a determination of the particular estate, his right to a homestead accrues, and he thereupon conveys the land to another in fee (the land being all that he owns and worth less than $1,000), the enforcement of the judgment is postponed, not only until the death of the debtor, but until the arrival at full age of his youngest child.

CLARK and MACRAE, JJ., dissent.

(427) ACTION, heard at Fall Term, 1893, of CHOWAN, before *Graves, J.*

The facts appearing from the complaint are as follows:

"By deed, dated 1 July, 1879, certain land in Chowan County was conveyed to D. M. Lee in fee, reserving a life estate to *feme* grantor S. F. Bond, to be terminated on her second marriage. In 1883 and 1884 judgments were regularly docketed in Chowan Superior Court in favor of defendants, Fieldman and Perkins, and the plaintiffs in the order named. Nothing has ever been paid on either of them. When docketed Lee had a living wife (Sallie) and children, two of whom are about sixteen and eighteen years of age. Sallie died, and in 1888 Lee married said S. F. Bond. In 1892 Lee died, leaving small children by her. She qualified as his administratrix. Lee left no personalty to be applied to said judgments. At time said deed was made Lee owned no other land,

nor did he own other thereafter. Said land was then, and has been ever since, worth less than $1,000. No homestead has ever been allotted to Lee. After his second marriage Lee and wife Sarah F. conveyed said land in fee to defendant White, who conveyed same to defendant Parker, and he mortgaged same to White to secure purchase money. Defendants Parker and wife are now in possession of the land.

Defendants Parker and White demurred on the grounds, in substance: "(1) That Parker has the right to occupy the land exempt from sale until Lee's youngest living child is twenty-one, and (2) that plaintiffs' remedy, if they have a right to sale of the land, is by issuing execution, and not by an independent action, and because they claim complaint does not show that the judgments are still liens on said land."

Plaintiffs contend that they are entitled to an immediate sale of the land to satisfy their own after paying the prior judgments of Fieldman and Perkins, or that, if not entitled to an immediate sale, they have a right to a judgment declaring the judgment liens on the land, and fixing the time when exemption from sale will cease, as being (428) either when living children by first marriage are all twenty-one, or at farthest, when there is no living child by either marriage under age.

His Honor sustained the demurrer, and the plaintiffs appealed.

W. M. Bond for plaintiffs.
W. D. Pruden for defendants.

BURWELL, J. "Land held in remainder dependent upon a life estate in another is not susceptible of that immediate occupancy which is contemplated by law in order to constitute a homestead." *Murchison v. Plyler,* 87 N. C., 79. Hence, while the estate of the judgment debtor Lee in the land mentioned in the pleadings was only an estate in remainder after the life estate of Mrs. Sarah Frances Bond, his interest in the land was subject to sale under execution. The docketing of plaintiffs' judgments, under the provisions of our statutes, gave them a lien on the estate of their debtor in this land, and the Constitution and the laws, as interpreted by this Court in the case cited above, did not protect that estate from sale, though it was all the realty owned by the debtor and was worth less than one thousand dollars.

But the plaintiffs did not see fit to exercise this right to sell their debtor's estate in remainder, and, by a determination of the particular estate, his right to the land has become such as clearly to entitle him to claim homestead privileges and immunities therein. Plaintiffs' liens are not at all displaced or affected by the change of the debtor's title. Their enforcement is postponed, however, because *in lieu of that estate in remainder,* which was not protected from sale, there has come to the

debtor an estate which, by force of the provisions of the Constitution, brought to him a "homestead" in this land.

Being thus entitled to "a homestead" in all the land (it being
(429) worth less than one thousand dollars and all that he owned), he conveyed it to another in fee. He could not by that act deprive the plaintiffs of any of their rights, or change or in any degree affect them. The limit of the effect of that deed is the line which marks the beginning of plaintiffs' rights under the law. The plaintiffs have liens on the land by virtue of their docketed judgments; the debtor's deed cannot annul or change those liens. The plaintiffs have a right to enforce their liens at the time and in the manner prescribed by law; the debtor's deed cannot for an instant postpone that enforcement. The effect given to the properly executed deed of the "homesteader" and his wife conveying the homestead land, by the decisions of this Court, does not at all interfere with or affect the rights of judgment creditors. By the law they are given a lien. Their lien continues in force notwithstanding the debtor's conveyance, unimpaired. By the law the enforcement of their liens by sale is postponed until the determination of the "homestead" right. That postponement is not extended by the debtor's conveyance of the land.

It seems clear, therefore, that the judgment creditors of "homesteaders" have no good cause to complain of the effect allowed to the homesteader's deed, as fixed by the case of *Adrian v. Shaw,* 82 N. C., 474, and the long line of cases of like import. They are left in exactly the plight they were in when the deed was made. On the contrary, the "homesteader" would have, we think, good cause of complaint if it was held that a conveyance by him subjected the land to immediate sale under executions issued on docketed judgments. For, in that event, as is most forcibly pointed out in *Simpson v. Houston,* 97 N. C., 344, the homestead would be in effect unalienable, and, being unalienable, the homestead would become under some circumstances a prison rather than a home. Thompson Homestead and Ex., sec. 399.

In many States where homesteads are secured by law to resi-
(430) dents, and where docketed judgments are liens on the judgment debtor's land, an exception as to such liens is made as to homestead lands. On the homestead lands, while occupied as such, no lien attaches, and the homesteader, though he is also a judgment debtor, can make a good title to the homestead land. His conveyance, if made while holding the homestead, is good against the docketed judgments.

In this State it is settled, *nemine dissentiente,* that a docketed judgment creates a lien on the homestead land. That being fixed, the courts here were driven to the conclusion either that the "homestead" was, in effect, not alienable, or that the rule announced in *Adrian v. Shaw,*

supra, was the law of this Commonwealth. Under that rule, those who acquired by proper deed the "homesteader's" title to the land have the right to assert every right to the land that is not inconsistent with or injurious to the rights of the lienors, the judgment creditors.

What the rights of the homesteaders' vendees are will be disclosed by an ascertainment of the rights of the plaintiff judgment creditors. The rights of the latter are paramount, and should not be encroached upon. What are they? To have the homestead land sold to satisfy their debts just as soon as the "quality of exemption from sale under execution," as it has been called, passes from the land; just as soon as the land could have been sold to satisfy the judgments, had no conveyance been made, and no sooner. When does that quality of exemption from sale under execution cease? It seems to be conceded by plaintiffs' counsel that that quality, according to the decisions of this Court, followed the land in the hands of the purchaser from the homesteader, and continued till his death. But it is insisted that it ceased at his demise. We do not accede to that proposition. The Constitution, Art. X, sec. 3, expressly provides that "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of (431) his children or any one of them." The duration of this quaility of exemption from sale under execution is thus plainly extended beyond the life of the homesteader. Had he not sold the homestead land, the plaintiffs could not have sold it to satisfy their judgments until all his children had arrived at full age. We do not subtract anything from their rights when we decide (as we think the former decisions of this Court, running through a long series of years and establishing a rule under which many have acquired rights to property, require us to do) that the purchasers of the homestead land from the homesteader and his wife acquired the right to hold the land against judgment creditors, not only for the life of the homesteader, but also "during the minority of his children or any one of them." In a very recent case (*Ladd v. Byrd,* 113 N. C., 466) it was decided that where, in an action to recover possession of land, a homestead right is shown to have existed, the burden is on the plaintiff (claiming to own the "reversion" after the expiration of that right) to show not only the death of the homesteader, but also the arrival at full age of his youngest child. That case seems decisive of this one.

In *Rogers v. Kimsey,* 101 N. C., 559, there was a contest, as there is here, between judgment creditors and the vendee of the deceased judgment debtor. One question in that appeal was: When did the homestead right terminate so as to allow the creditor to have a sale of the aliened land? *Chief Justice Smith* there said that "the right to such homestead terminates at his death without wife or infant children, and

hence if a lien has been acquired it may now be enforced." This language clearly implies that if he had left infant children it would not have terminated at his death, and so that case is also decisive of this one.

In *Fleming v. Graham,* 110 N. C., 374, the *Justice* who delivered the opinion, combatting the rule established by *Adrian v. Shaw,* (432) *supra,* uses this language: "If this were law, upon the termination of the homestead right by the death of such debtor, *and the arrival of his youngest child of age,* numerous one-thousand-dollar tracts of land would be for sale, which he had kept *till then* exempt from his creditors." The words we have italicised in the above quotation seem to indicate an opinion that the homestead right did not terminate till the youngest child of the "homesteader" became of age.

No error.

MACRAE, J., dissenting: I do not think that any question of homestead arises upon this appeal. In September, 1883, the first judgment was taken and docketed against D. M. Lee, and in May, 1884, the other two judgments were docketed against him, and from the docketing of these judgments the lien attached upon his estate in remainder. The Code, sec. 435; *Mannix v. Ihrie,* 76 N. C., 299.

It is perfectly clear that during the widowhood of Sarah F. Bond, the remainderman D. M. Lee had no estate in the land which could be set off by metes and bounds, or that was susceptible of present occupancy. It has been so expressly held in *Murchison v. Plyler,* 87 N. C., 79, where, under the same circumstances, the tenant in remainder, without the joinder of his wife, mortgaged the land; the Court held that, not being subject to a homestead in favor of Murchison, the joining of his wife was unnecessary, that his power to convey was without limit. "And if he should exert this power, either absolutely or conditionally, by a sale of his estate and interest in the land while thus untouched by the right of exemption, it can never again be made subject to that right by anything that may thereafter occur."

When D. M. Lee, in 1888, married Sarah F. Bond, the particular estate determined, and he became owner in fee of the land, and upon his interest the lien of the docketed judgments had already attached when there was no right of homestead exemption. This lien (433) could not be divested by the falling in of the particular estate.

It is like the case of *McKeithan v. Terry,* 64 N. C., 25, where, the lien having been acquired in 1867 by a levy, it was held to be a vested right which could not be divested by the homestead provision of the Constitution. If there was no homestead exemption, the lien of the docketed judgment was lost at the expiration of ten years. So the first judgment lost its lien in September, 1893, and the others in May, 1894,

and the plaintiff is not entitled to the relief demanded. *Whitehead v. Latham,* 83 N. C., 232.

CLARK, J., dissenting: The homestead is prescribed and its limits defined by the Constitution. The Legislature has no power to increase it. *Wharton v. Taylor,* 88 N. C., 230. Of course neither can the courts enlarge it. In construing its limitations we must look to the plain, unvarnished language of the Constitution, and not back of it to some supposed public policy which caused the adoption of this constitutional provision, as to which minds may easily differ.

Looking at the Constitution itself, it is clear that the homesteader was given a life exemption—no more. There is no indication whatever that he should have the power to exempt any part of his property from liability for his debts longer than his life. Another clause gives his children the right to claim the exemption for themselves during minority—and this, it has been held, they may do, whether the homesteader has had the homestead laid off or not. And still another clause provides that, when there are no children, the widow may likewise have it laid off during her widowhood, if she have no homestead in her own right. The only limitation upon this right of the widow and minor children is that it must be as to a homestead of which the father and husband is the "owner" when he dies. As to the homesteader himself, his right in the homestead dies with him. He has no interest therein which he can transmit to another by devise, to the detriment either of (434) his creditors, his children or his widow. Whatever right he had to protect the land from sale by virtue of the homestead dies with him if he remains in possession of it till his death, and he cannot extend it by conveying the land to another, neither by deed nor by devising it in his will.

The Constitution, Art. X, sec. 3, provides that "the homestead, after the death of the *owner* thereof, shall be *exempt* during the minority of his children, or any one of them." Was the debtor here the "owner of the homestead" at his death? If so, his minor children would have the benefit of a shelter for their heads till the youngest became of age. They, and they alone, after the death of the homesteader, have the right to longer postpone the enforcement of the just claims of his creditors, except in the case in which the widow can make the claim. This is a wise and beneficent provision, intended to shelter the helpless. But if the homesteader has conveyed away the homestead right to other parties by conveying away the homestead lot, where is the protection of the roof-tree for the children? What object could the Constitution have in protecting from his creditors these purchasers from the life tenant and leaving the minor children upon the cold charities of a heartless world?

Now, I understand the majority of this Court to be of the opinion that if the homesteader convey the homestead, he cannot take a second, or a third, or a fourth, or a tenth homestead. This would seem clearly so in the face of the constitutional provision for a homestead "not exceeding in value one thousand dollars." Otherwise, during the homesteader's life, there might be several homesteads outstanding in the hands of his grantees, each of one thousand dollars, exempt from liability for his debts. If the father, owning a homestead, die, not having had it laid off, the children can have it laid off under this provision
(435) of the Constitution. *Gregory v. Ellis,* 86 N. C., 579. But if the homesteader has already conveyed a former homestead, and such conveyance protects it in hands of his grantee from judgment liens, even beyond his life, then either the children and the widow are deprived of the constitutional protection given *them* to the shelter of the homestead of which he dies in possession, or else the rights of the creditors are impaired by having two homesteads (or more) held against them—one by the children, or widow, and the other (or several others) by the grantees of the debtor; and this in the face of a Constitution which exempts only one homestead, and that "not exceeding one thousand dollars."

This confused state of things, it seems to me, is due solely to the fact that the homestead right and the homestead lot have not always been distinguished. The homestead right is personal and inalienable. It is the right to a shelter from the storms of life, to a roof-tree. The homesteader can claim it as often and whenever he has the roof over his head. When he dies, his children, during their minority, can claim it as to the homestead their father owned when he died. As to the tract or lot of land over which, at any given moment, he claims the homestead exemption, the homesteader is empowered to convey that to prevent the tying-up of realty. But to argue that with such conveyance there must also go the grantor's homestead right, because otherwise the liens of judgment creditors might take the land and the conveyance would be futile, is, at best, the argument *ab inconvenienti.* It should not avail to change an "exemption" personal to the "owner and occupier of a homestead" which the Constitution gives, into an "estate," or so-called "quality," which, invisible to mortal eyes, attaches to the lot and travels around with it into all the successive hands into which that lot of land may go. Besides, even this argument loses sight of the fact that when the homestead lot is conveyed there are not always liens upon it,
(436) and if liens, not necessarily for the full value of the homestead. And if the liens are for the full value, the homesteader need not convey. He can stand as he is. If he voluntarily, nevertheless, should see fit to abandon his shelter, the Constitution expressly authorizes him

to do so as to the lot conveyed. But he has an inalienable and indefeasible power to assert his homestead right, not by proxy over the lot he has conveyed away, but in his own behalf, as to any other lot he may become the owner of, and his minor children and wife can assert it as to any homestead he may be the owner of at his death. It is true, in the late case of *Vanstory v. Thornton,* 112 N. C., 196, this Court (though not by a unanimous bench) departed from the then recent decision of *Fleming v. Graham,* 110 N. C., 374, and reverting to the older decision of *Adrian v. Shaw,* 82 N. C., 474, held that the conveyance of the homestead lot was not merely a conveyance of the land described, but also of an invisible "quality" attached to it by virtue of the grantor's homestead right. Taking it, for the argument's sake, that the latter case will be adhered to after the maturer thought which already in so many instances (notably in *Long v. Walker,* 105 N. C., 90) has corrected the erroneous earlier rulings as to the homestead, still *Vanstory v. Thornton* does not go to the extent of holding that a person can convey an interest in land which he cannot devise, nor that the owner of a lifetime exemption, which expires as to him at his death, can prolong it after his death by conveying it to another. If any one can claim the homestead right after his death, it is the minor child, or widow, and not the grantee.

The extension of the homestead exemption given to the minor children may last twenty-one years. That in favor of the widow (when there are no children) may last fifty or sixty years. Such instances are not infrequent. The Constitutional Convention certainly never intended that a man could take, say, a dozen homesteads, all at one time, notwithstanding liens of docketed judgments, and protect all twelve pieces of land from sale in the hands of grantees, nor that all twelve (437) should be further protected after the debtor's death, perhaps for twenty-one years, if there are minor children, or fifty or sixty years when there is a widow, and during all that time the children and widow receive no benefit from such extension of the exemption. Such a result would be against the common sense of mankind. The Convention, instead of that, would have given him one homestead in fee, which they voted down, in preference to a multitude of such as this. Our predecessors, handling a new subject, made a mistake in *Adrian v. Shaw.* This Court has not hesitated to overrule nine other erroneous rulings as to the homestead. There is every reason to overrule this, which is the greatest mistake of them all, and which, if allowed to stand, will surely jeopardize the existence of the homestead provision itself.

With the profoundest respect always for the opinions of my respected associates on this Bench, my convictions of my own duty prohibit my permitting it to be understood that I yield assent now to the doctrine of *Vanstory v. Thornton.* In my humble opinion the principle there laid

down is so clearly and palpably a misconception of the plain meaning and letter of the Constitution, which confers an "exemption," and nowhere intimates an intention to create a "homestead estate"—it is so evidently, in my judgment, a construction against the best interests alike of the homesteader and of the just rights of creditors—and will so certainly lead us into inextricable confusion and uncertainty (of which the present case is a fair example), that I still deem it the wisest course to adhere to what seems to me to be the plain meaning of the Constitution. In this way we will not only come to the construction held by all the other States having similar provisions, but we will place our feet on the solid rock. If the homestead right is, as the Constitution calls it, an exemption—a *cessat executio*—there will be no conflicting or confusing questions like the present which can arise.

(438) In reasserting the views expressed in the dissenting opinion in *Vanstory v. Thornton,* I am but following the precedent set by *Chase, C. J.,* and *Miller* and *Field, JJ.,* of the United States Supreme Court, in *Washington v. Rouse,* 8 Wall., 441, in which, dissenting from the oft-repeated and most unfortunate decision of that Court to the effect that a Legislature could grant to a corporation an irrevocable and perpetual exemption from taxation, they say: "With as full respect for the authority of former decisions as belong, from teaching and habit, to Judges trained in the common-law system of jurisprudence, we think that there may be questions," of constitutional construction, "which can never be finally closed by the decisions of a court," when contrary to the clear meaning of the Constitution. That in such cases the ruling of the Court must ultimately conform to the Constitution, and that the Constitution does not bend to the mistaken ruling of the Court, for the courts have no power to amend the Constitution. They further add that they were strengthened as to that view by the fact that there had been a series of dissents to the preceding decisions relied on by the majority. So, as to *Vanstory v. Thornton* (itself by a divided court), it followed, it is true, the older case of *Adrian v. Shaw,* held by a court of three Judges, but it disregarded the later opinion of a unanimous bench of five Judges in *Fleming v. Graham.*

It is not necessary to go over again the reasons set out for the dissent in *Vanstory v. Thornton.* They will speak for themselves. But one additional argument will be drawn from a most recent decision of this Court. In *Fulton v. Roberts,* 113 N. C., 421, it is held, affirming a long line of decisions, and in accord with the palpable meaning of the Constitution, in an opinion by *Justice Avery,* that the homestead right ceases upon the removal of the homesteader from the State. If this is so when the homestead remains in the hands of the owner till his removal from the State, will it not be so when it is in the hands of his grantee?

Can the homesteader convey a greater or longer right to exempt (439) the property than he has himself? Can he make it greater than the Constitution gave it to him by simply conveying it to another? Will not the exemption cease, and the land become liable to his judgment liens in force at the time of the conveyance, on the removal from the State of the homesteader, equally whether he owns the land or has conveyed it to another? Does not the homestead also terminate as to the homesteader who is in possession "owning and occupying" it at his death, leaving to his minor children and widow *their* right to claim it during infancy and widowhood? And if so, can he extend his rights and debar them of claiming a homestead in the land he leaves by having conveyed away a former homestead? In truth, *Fulton v. Roberts* recognizes the true basis of the homestead, i.e., exemption in favor of an *occupant*. The Constitution gives an exemption to the owner and occupier if a "resident" of the State. It determines certainly upon the occupier ceasing to be a resident of the State. But it must equally determine upon his ceasing to be the owner and occupier. Each of the three requisites is named by the Constitution, and each is essential. It is true he can occupy it by a tenant, for the occupation of the tenant is the possession of the owner. But he cannot "own" it when he has conveyed it away, and such conveyance forfeits the right to exemption given only to the owner as surely as the removal to another State forfeits the exemption given only to a resident.

The homestead provision in different States and the judicial construction placed thereon vary much, but the decisions are uniform in this, that wherever a judgment is held to be a lien on the homestead, there, on a conveyance of the homestead, the lien can be enforced; and wherever a judgment is held not to be a lien on the homestead, there a conveyance of it passes it exempt from liability. Thompson on Homesteads, secs. 398, 399. The only exception to this line of demarcation is *Adrian v. Shaw*, which recognizes that a judgment (440) is a lien, whose enforcement the homesteader by his occupancy can postpone, but which also illogically holds that such right or postponement can be transferred to the grantee of the homestead lot, to be enjoyed as fully as if the grantee was the homesteader himself. Our Constitution, however, contemplated only the protection of the homestead to the debtor himself and his wife and children after him. It did not embrace his grantee.

With all deference to my colleagues, I am of the opinion, therefore:

1. That the homestead *right* is personal and indefeasible, save by death or removal from the State. That the conveyance of a lot of land over which a homestead right has been asserted neither alienates the right to assert it again as to another tract of land, nor does it go attached

as a "quality" or "estate" with the conveyed land so as to enable the debtor to maintain two or more homesteads outstanding at one and the same time against his lawful creditors.

2. That even if this could be true, still the grantee could not hold longer than the homesteader himself could have held if he had remained in possession. When he dies or leaves the State, the homestead exemption would determine equally in the hands of his grantee as it would if it had remained in the grantor's possession. The grantee takes the land subject to the determination of the homestead exemption (when there are judgment liens at the time of the purchase), and the duration of the exemption in favor of the grantor cannot be altered or extended by his mere conveying the exempted property. When the exemption ceases by the homesteader ceasing to be a resident, the judgment liens on it come into vigor no more certainly than when by deed he ceases to be the owner of the lot.

I find no warrant in the Constitution for the proposition that a debtor can abstract from liability for his debts as many homesteads as (441) he sees fit, all at one and the same time. Nor do I find, on the other hand, any warrant there for the proposition that if a homesteader convey away the homestead lot forever thereafter, no matter how many other lots of land he may own, he and his minor children and widow at his death are forever debarred from claiming a roof to shelter them when it may be needed most. Yet, if the homestead is an "estate" or a "quality," to one of these two alternatives we must come. Either may be cruel and unjust, and either must bring upon us confusing and perplexing situations to solve. But I find nothing in the Constitution in regard to the homestead being a quality or an estate. But I do find it called in the Constitution an "exemption." Treated as an exemption, the way is smooth and clear. No complications can possibly arise. While the homesteader has the constitutional requirements of "owning and occupying" the lot, and being a "resident" of the State, he has his "exemption," not exceeding one thousand dollars of realty, protected from sale for debt. There is the plain letter and meaning of the Constitution. When he ceases to be a resident (*Fulton v. Roberts, supra,* and cases cited), or ceases to own and occupy the lot (*Fleming v. Graham, supra*), in either case that lot ceases to be protected from the liens in force against it by docketed judgments at the time of the conveyance, or from enforcement of any indebtedness when there is removal from the State. Should he "own and occupy" another lot, he can, if a resident of the State, claim it as his homestead. Viewed as an estate or quality—a doctrine which is not found in the Constitution, but first "invented" in *Adrian v. Shaw*—the contradiction and confusion are interminable, and will become greater as we wander from the plain

guidance of the Constitution. Viewed as an exemption, all difficulties vanish, and the constitutional homestead is beautiful in its very simplicity.

(442)

AVERY, J., concurring: The Constitution (Art. X, sec. 8) provides that nothing in that article shall "operate to prevent the owner of a homestead from disposing of the same by deed, but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law." The necessity for the joinder of the wife only arises where the homestead right attaches, or when he becomes the owner not only of land but of land devoted by law to the purposes of a homestead. *Hughes v. Hodges,* 102 N. C., pp. 250, 251. The first sentence in the section is inserted to exclude any possible conclusion that the homesteader could not alien his homestead, whatever that term may mean. We have numerous decisions to the effect that the homestead is not a determinable estate, but a determinable exemption. *Gheen v. Summey,* 80 N. C., 190; *Bank v. Green,* 78 N. C., 247; *Markham v. Hicks,* 90 N. C., 204. The legal effect of the Constitution and statutes "is simply to protect the occupant in the enjoyment of the land set apart as a homestead unmolested by his creditors." *Markham v. Hicks, supra.* Two questions are suggested by the announcement of this principle in connection with the case at bar: 1. When does this exemption terminate? 2. What occupants are freed from molestation by the creditors of the homesteader until such determination?

In *Adrian v. Shaw,* 82 N. C., 474, the Court said: "The Constitution then vests the homestead right in the resident owner of the land and authorizes him to convey it. The vendee must take it with the same quality annexed that had attached in the possession of the vendor, that is, to be exempt from execution for the debts of the debtor *at least during his life,* for the homestead is a right annexed to the land and follows it, like a condition, into whosesoever hands it goes, without regard to notice." The quality of exemption annexed to the land must continue "at least" during the life of the homesteader, because that is the shortest time for which it is operative, when the right of disposition is not exercised. In the hands of the homesteader (443) and of his family, the liability of the homestead does not accrue till his youngest child arrives at the age of twenty-one years. It is conceded that the right of disposition is guaranteed to the homesteader by the Constitution, and that the homestead is not an estate, but an exemption, which lasts according to circumstances—at least for the life of the original owner, and, when he has children, after his death till the

youngest of them arrives at the age of twenty-one years. The language of section 3, Article X, is that "the homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the children or any one of them." If the Constitution in plain language confers the *jus disponendi* on the husband, with the joinder of the wife, of a homestead, and the homestead has been defined to be not an estate, but a determinable quality of exemption, I confess my inability to conceive of any principle upon which the courts can interpolate a provision into the Constitution limiting the right of alienation to only such portion of the exemption as may be covered by the life of the owner. When *Justice Ashe* said for the Court that in such cases the estate of the vendee must last "at least" for the life of the vendee, the inference is irresistible that the earliest possible determination of the exemption was to be fixed at the death of the alienor, with a possible extension of the right "after the death of the owner" during the minority of any surviving infant child. "When once established and impressed upon the land (said *Justice Ruffin* in *Murchison v. Plyler,* 87 N. C., 82) the right to the homestead cannot be waived. Nor can it in any manner be divested save as provided for in the Constitution, and then, too, on the possible rights of wife and children in the right of exemption observed and guarded by law." Here we find a clear recognition of the possible elongation for the benefit of wife and children of the exemption, and quite as distinct an acknowledgment that,
(444) while even the possible rights of wife and child could not otherwise be aliened or divested, they could be disposed of "as provided in the Constitution."

In *Simpson v. Houston,* 97 N. C., 346, *Chief Justice Smith* said: "While the primary object of the exemption is to preserve a home for the insolvent and his family, there is nothing in the enactments of the State or the United States . . . to indicate that the interdict put upon the creditor is to cease by the debtor's transfer and leave the property at once exposed to sale under execution. . . . The value of what is assigned consists in the right to possess and enjoy it, as the assignor could, for the same term and under the same securities." The doctrine announced in *Adrian v. Shaw, supra,* and reiterated when that case was again considered on rehearing (84 N. C., 832), as well as in *Baker v. Leggett,* 98 N. C., 304, was that while the homestead right was conferred for the benefit of residents, and might be abandoned by the removal of the occupant of the land from the State, if no right in favor of others had attached, yet when the right of homestead was conveyed in conformity to the requirement of the Constitution, the alienee acquired a vested right which could not be divested by any subsequent act of the

alienor. The case of *Ladd v. Byrd,* 113 N. C., 472, is exactly in point. The Court in that case, after adverting to the recognition by the Court in *Lowdermilk v. Corpening,* 92 N. C., 333, and in *Corpening v. Kincaid,* 82 N. C., 202, of the right of the creditor, suing even upon an old debt, to favor the debtor by selling only the reversionary interest accruing after the expiration of the exemption, held expressly that the purchaser of the reversionary interest must show affirmatively, not only that the homesteader had died, but that there was no elongation of the exemption in favor of an infant child.

The *dictum* announced in *Fleming v. Graham,* 110 N. C., 374, was expressly so characterized in *Vanstory v. Thornton,* 112 (445) N. C., 196, and the doctrine of *Adrian v. Shaw* upon the original and the rehearing, that the conveyance of a homesteader, with the joinder of his wife, passed the determinable exemption attached to the land in the hands of the debtor, was reaffirmed. The same principle had been announced in unmistakable terms by *Justice Merrimon* in *Jones v. Britton,* 102 N. C., 166, before the *dictum* in *Fleming v. Graham* was written, and before it was expressly held by the whole Court *nemine dissentiente* in *Ladd v. Byrd, supra,* that the right of the holder of the reversionary interest accrued, not upon the death of the homesteader and the failure of a minor child to set up any claim, but upon a showing, in the assertion of such right, that there was no minor child.

While it is admitted that we are confronted by these direct authorities as to the effect of a conveyance by a homesteader and his wife, it is contended that a long line of decisions shall be overruled in order to avoid some quicksand that has never been encountered during the twenty-six years in which our exemption laws have been enforced. The case of *Long v. Walker,* 105 N. C., 90, is adverted to as one in which a previous ruling of the Court in reference to our homestead law was overruled. In that case the Court said (at page 107): "The general policy of adhering to the declared opinions of the Court is subject to the limitation that inadvertent decisions should be overruled, unless they have been acted on for a long time and property has been bought by reason of the public faith in the stability of the principles decided in them." The decision was then based upon an argument intended to show that the overruled case could not have become a rule under which property had vested. It is familiar learning that while it is safer generally to adhere to precedent, yet it is the duty of a court to overrule erroneous decisions when they operate perniciously, if no property rights have been founded upon them, but to preserve them in their integrity, how- (446) ever erroneous, if they have become a rule of property under which contracts have been framed and titles acquired. 23 A. & E., 28.

I do not concede that any case has ever arisen where it became necessary to decide whether a resident of North Carolina could acquire and dispose of more than one homestead, nor do I admit that a majority of the Court are committed to any theoretical opinion upon that question. When the point is properly presented grave reasons may readily suggest themselves for standing by the long line of decisions, beginning with *Adrian v. Shaw,* filed in January, 1880. The most potent and serious of them is that during fourteen years homestead rights have been freely offered in the market on the faith of the stability of our decisions, and probably hundreds of purchasers have bought with an eye to the chances of life of the owners of homesteads and the probabilities as to minor children. A constitutional inhibition prevents a court from divesting property out of one person in whom it is rightfully vested and transferring the title to another by its decrees. The principle that underlies this fundamental provision of law makes it injustice, if not judicial robbery, on the part of the Court to arbitrarily so modify its decisions as to destroy titles which are valid under such overruled opinions.

But if hereafter some person should attempt to indulge in the luxury of acquiring a series of homesteads, though we have no judicial knowledge that any resident of the State has done so during the last twenty-six years, and should succeed in having them laid off in different counties to which he had migrated successively, innocent purchasers of such rights would receive hard measure under the new rule insisted on as correct. In this country, where it is deemed so essential to commercial prosperity that property of all kinds should pass freely from one to another,
(447) and, that in order to facilitate that object, no lien should attach to real estate that cannot be discovered by a diligent examination of public records, it would be startling to the legal profession and to dealers in real estate to announce that, after a careful searching of such records, a purchaser might in many instances be still unsafe, unless he should trace the proposed vendor, by the aid of detectives, through all of his wanderings in different counties of the State for a score of years, in order to ascertain whether the allotment of some other homestead to him in another county had disabled him from making a valid title to that offered for sale. It is always best, when suppositious cases are conjured up as an argument for disturbing settled principles, to wait till we reach the stile before attempting to jump it.

This Court, in a number of decisions heretofore rendered, has adverted to the fact that it is not safe to follow decisions of courts of other States where no lien whatever attaches to the homestead in the hands of the person to whom it is allotted. I concur in the conclusions reached by my brother *Burwell* in delivering the opinion of the Court.

Cited: Thomas v. Fulford, 117 N. C., 677, 681, 692; *Bevan v. Ellis,* 121 N. C., 234; *Joyner v. Sugg,* 132 N. C., 588; *Moody v. Phillips,* 133 N. C., 786; *Thomas v. Bunch,* 158 N. C., 178; *Brown v. Harding,* 171 N. C., 690.

NOTE.—The statute now conforms to the dissenting opinion. Rev., sec. 86.

(448)

A. M. BASKET ET AL. v. JOHN R. MOSS.

Illegal Contract—Sale of Office—Agreement to Procure Appointment of Another to Office—Mortgage to Secure Void Contract—Injunction.

1. Traffic in public offices is against good morals and contrary to public policy.
2. Not only an agreement by A to pay to B, a public officer, an amount equal to the emoluments of the unexpired term of his office in consideration of his resignation and his influence to secure the appointment of A to the office is void, but likewise an agreement to compensate any one for or to pay the expenses of any one in attempting to secure the appointment.
3. A mortgage given to secure an agreement connected with the traffic in public office being void, an injunction will lie to restrain a sale thereunder.

SHEPHERD, C. J., dissents in part.

APPLICATION before *Bynum, J.,* at February Term, 1894, of VANCE, after notice to defendant to restrain the defendant W. E. Moss, trustee, from the sale of certain real estate described in the affidavits.

The affidavit on which the application was founded, after setting forth that the defendant John R. Moss was postmaster at Henderson on 1 September, 1893, and that the full term to which he had been appointed expired 1 March, 1894, stated that the deed in trust was executed in pursuance of the following agreement:

"The said A. M. Basket has proposed to John R. Moss that if he, A. M. Basket, could induce the President to appoint him (454) postmaster at Henderson, N. C., that he desired said John R. Moss to resign in his favor. The said John R. Moss has agreed to do so under the following conditions:

"1. Basket is to secure to John R. Moss the amount of his salary up to the time his commission as postmaster expires, the amount of which is $575. (455)

"2. To secure the amount of $200, his clerk hire, up to the time his commission expires.

"3. To secure to John R. Moss $100 as expenses to Washington City and for the pay of a clerk to take said Moss's place in the postoffice during his absence; said Moss to take along with him A. R. Wortham to assist him, etc., paying his expenses out of the $100 allowed.

"4. To secure to John R. Moss the sum of $37.50, money heretofore lent to said A. M. Basket.

"5. To secure in said deed in trust $60, and the said W. E. Moss is to pay this sum in settlement of the trust to A. R. Wortham or his assigns. All of which is included in the amount of the bond executed this day by A. M. Basket to John R. Moss.

"If the President should fail to appoint Basket as postmaster upon Moss's resignation, then the sum of $575 and the sum of $200 is to be subtracted from Basket's bond, leaving him nothing to pay except the items of $100 allowed for expenses, $60 to A. R. Wortham and $37.50 of personal debt now existing and owing by Basket to Moss. We, and each of us, are bound by the above obligation, and bind ourselves in good faith to carry it out with no after-claim upon each other.

"A. M. BASKET.
"W. E. Moss.
"JOHN R. Moss."

(456) Basket executed his note, under seal, for $972.50, dated 1 September, 1893, and due at ninety days and expressed to be secured by a deed in trust on real estate. The note bore an indorsement of a credit of $773.50, dated 31 October, 1893.

His Honor continued the restraining order until the hearing, (457) and defendants appealed.

H. C. Zollicoffer for plaintiffs.
T. T. Hicks for defendants.

CLARK, J. The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. The Code, sec. 1871, provides: "All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void." Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Such agreements are void at common law, as well as by statute. So also contracts to procure appointments to office are void (Mechem on Public Officers, sec. 351); or to resign office in another's favor. *Ibid.*, sec. 357; *Meacham v. Dow,* 32 Vt., 721; *Gracone v. Wroughton,* 11 Exch., 146.

Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the public. Hence, such agreements, of whatever nature, have always been held void as being against public policy. *Maguire v. Comine,* 101 U. S., 108; *Tool Co. v. Norris,* 2 Wall., 45; *Gray v. Hook,* 4 N. Y., 449; *Gaston v. Drake,* 33 Am. Rep., 548; *Filson v. Himes,* 47 Am. Dec., 422; *Faurie v. Morin,* 4 Martin (La.), 39; *Liness v. Hes-* (458) *sing,* 92 Am. Dec., 153. Says *Ames, C. J.,* in *Eddy v. Capron,* 67 Am. Dec., 541: "By the theory of our government, appointments to office are presumed to be made solely upon the principle *detur digniori,* and any practice whereby the bare consideration of money is brought to bear in any form upon such appointments to or resignation of office conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment and tempts to peculation, overcharges and frauds in the effort to restore the balance thus disturbed." Besides, the moral sense revolts at traffic to any extent in the bestowal of public office. It is against good morals as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. The law wisely guards against the first step in that direction. For that reason, not only the sum agreed to be paid directly to the holder of this office to resign, but the amounts advanced for expenses and compensation of persons to go to Washington to procure the authorities there to accept the resignation of one party and the appointment of the other, are not recoverable. For the same reason that agreements to pay for lobbying the passage of bills before a legislative body are void (Lawton on Contracts, sec. 309, and Mechem on Officers, sec. 360, and cases cited), all agreements for expenses and compensation of persons seeking to influence or procure appointments to office are void. Lawton, *supra,* sec. 310. "The courts condemn the very appearance of evil, and it matters not that in a particular case nothing improper was done or expected to be done. It is enough that the employment tends directly to such results." *Clippinger v. Hepbaugh,* 40 Am. Dec., 519; *Wood v. McCann,* 6 Dana (Ky.), 366; *Mills v. Mills,* 100 Am. Dec., 535, and numer- (459) ous other cases cited in notes to Mechem on Officers, sec. 360; Lawton, *supra,* sec. 311, and cases cited.

If an action had been brought to recover these sums, or to foreclose a mortgage given to secure payment thereof, the Court would dismiss the

action. The defendant contends, however, that as he was careful to take a mortgage with a power of sale, the courts will not interfere by injunction, but will let him proceed to collect his ill-gotten gains. This would simply legalize the practice which is denounced both by statute and common law. Reasons of public policy forbidding this species of corruption are too profound and too important to the public welfare to be evaded and nullified by so simple a device. A mortgage given to secure a sum of money upon an agreement against public policy is void. The Code, sec. 1871; *Teal v. Walker,* 111 U. S., 252; *Wildey v. Collier,* 7 Md., 275; *Crowder v. Reed,* 80 Ind., 1. The sale under a void mortgage would be a cloud on the title, and an injunction lies, especially when the invalidity does not appear upon the face of the mortgage, but requires extrinsic evidence to prove it. 1 High on Injunc., sec. 469; *Yager v. Murkle,* 26 Minn., 429. In cases where the consideration is immoral the deed will be set aside. 2 Addison Cont., 716.

Pomeroy Eq. Jur., sections 939, 940, 941, 942, calls attention to the fact that the rule *in pari delicto* is often misunderstood, and its application is properly and correctly that in such cases *"potior est conditio possidentis"*—that is, that the Court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will, by injunction, prevent his collecting on a mortgage denounced as void by reasons of public policy. In sec. 941 he says: "Whenever public policy is considered as advanced by
(460) allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this high principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance or transfer, and decree the recovery back of money paid or property delivered in performance of the agreement." Also, in section 940, he says that whenever the defensive remedy at law will not be equally certain, perfect and adequate, the equitable remedy will be granted by injunction and the like. "The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto;* on the contrary, it carries that maxim into effect." So, in the present case, the injunction against sale under the void mortgage taken against public policy enforces that maxim by prosecuting either party recovering anything from the other. This is also the well-settled rule in England. In *Lloyd v. Gordon,* 2 Swan, 181, *Lord Eldon* granted an injunction to restrain the negotiation of bills of exchange which were made void by Stat. 9 Anne, ch. 14, which is in the

very tenor of section 1871 of The Code applicable to the present transaction. *Lord Hardwicke* granted the injunctive relief in a similar case. *Smith v. Aykwell,* 3 Atkins, 566, and the Vice-Chancellor in *Earl of Milltown v. Stewart,* 3 Simons, 371, which was affirmed by *Lord Cottenhan,* 3 M. and C., 18.

In such case, before the Master of the Rolls, *Sir John Romilly,* where part of the consideration was for money loaned and part was for an immoral consideration, the whole mortgage was ordered to be canceled, the Court declining to pass upon the question whether the mortgagee could recover at law for the valid part of the consideration, i.e., the money loaned. *Willyams v. Bullmore,* 33 L. J. R. (Eq.), N. S., 461. In the present case, upon the defendant's own showing, $37.50 is the only valid part of the sum attempted to be secured. Whether the mortgage can be upheld to that extent is not before us, as the (461) plaintiff in his reply expresses his willingness to pay said sum. The plaintiff recovering judgment for the cancellation of the mortgage, the defendant should be taxed with the costs. The injunction was properly continued to the hearing.

Affirmed.

SHEPHERD, C. J., concurring: I concur in the conclusion of the Court that the agreement which the mortgage is given to secure is contrary to public policy, and therefore illegal, and I am also of the opinion that the injunction should be continued until the final hearing. It is alleged that the plaintiff Joseph Basket has a resulting trust in the land included in the mortgage, and as it does not appear that he had any connection with the illegal transaction between A. M. Basket, the mortgagor (the holder of the legal title), and the mortgagee, I see no reason why the equitable aid of the Court should not be extended to him.

I cannot agree, however, in that part of the opinion which declares that A. M. Basket is entitled to equitable relief. "Whenever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in pari delicto,* it is a well-settled rule, subject only to a few special exceptions depending upon other considerations of policy, that a court of equity will not aid a *particeps criminis,* either by enforcing the contract while it is yet executory or by relieving him against it by setting it aside, or by enabling him to recover the title to property which he has parted with by its means. The principle is thus applied in the same manner when the illegality is merely *malum prohibitum,* being in contravention of some positive statute, and when it is *malum in se,* as being contrary to public policy or to good morals. Among the latter class are agreements and transfers, the consideration for which was violative of chastity, compounding a felony, gambling, false swearing,

the commission of any crime or breach of good morals." 1 Pom. Eq., 402.

(462) "Where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or is base and unconscionable on his part—in such cases courts of equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life. . . . Courts of equity could not, without staining the administration of justice, interfere to save the party from the just results of his own misconduct, when the failure of success in the scheme would manifestly be the sole cause of his praying relief." 2 Story Eq., 696; Adams Eq., 418.

These principles are so well established that it is hardly necessary to produce authority to their support, and that they have been recognized by this Court is plainly evident by a reference to the cases of *York v. Merritt,* 77 N. C., 213; *Sparks v. Sparks,* 94 N. C., 527, and authorities cited.

There are, it is true, limitations to the rule, as where parties are not equally in fault, or as in the case of usury, where the borrower is considered as *in vinculo,* or where the security is for past cohabitation; and there are cases where, under peculiar circumstances, considerations of public policy will be best subserved by granting relief. These and other instances will be found in the text-books and notes to which I have referred, and there seems to be some confusion in the decided cases upon the subject. No satisfactory authority, however, can, in my opinion, be found to take the present case out of the general rule. If, as we have seen, the Court will not interfere where the consideration is the compounding of a felony for the commission of a crime, it is difficult to understand why it should extend its relief where the consideration is for the commission of the offense alleged in the complaint. Certainly, considerations of public policy are as grave in the former cases

(463) as in the latter. Again, it will hardly be contended that the plaintiff A. M. Basket is not equally in fault. Indeed, it appears from the written agreement executed contemporaneously with the mortgage that he was the *moving* party in the transaction. The proposition was made by him, and it is perfectly clear that his guilt is equal if not greater than that of the defendant. Again, if it be conceded that he is entitled to the relief on the ground that part of the contract—the note—is executory, the Court would only grant it upon terms, and as the mortgagee has, under the agreement, so credited the note that everything is eliminated except certain expenses and counsel fees, and a preëxisting

debt (leaving only a balance of about $200), it would seem very clear that the Court, even if it interfered, would not place him in any better condition. The expenses and counsel fees were actually expended in furtherance of his own proposition, and it would seem a complete reversal of the maxim *in pari delicto melior est conditio defentis* to so use the equitable power of the Court as to extricate the plaintiff from the position in which he has placed himself and put the entire expense of carrying out his own proposition upon the shoulders of the defendant. No clearer case can, in my opinion, be conceived for the application of the rule than the present.

Furthermore, it is a fundamental principle that a court of equity never interferes where there is a complete defense at law. High on Injunction, 473. In the present case it is said that the mortgage is utterly void. If this be so, there is no occasion for equitable relief, not even on the ground that it is necessary to discover and preserve the evidence of its illegality, as the contemporaneous agreement executed by all of the parties is plenary proof of the vitiating element. 2 Story Eq., 700.

This consideration, as well as the firmly established rule *in pari delicto,* etc., is also a complete bar to the prayer that the deed be cancelled on the ground that it is a cloud upon plaintiff's title. (464) 2 Story Eq., 700. Public policy will be far better subserved by leaving the plaintiff where his illegal conduct has placed him than by encouraging him in another attempt to violate the law by the assurance that a court of equity will always stand ready to relieve him against the consequences of his unsuccessful experiments. "The suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern practice is established." 1 Story Eq., 298.

The case of *Patterson v. Bonner,* 48 Cal., 369, cited in the opinion, to the effect that a mortgage given to secure money upon an agreement against public policy does not divest the title, does not aid the plaintiff, for, if the title is not divested, there is certainly no occasion for resorting to a court of equity where the illegality is evidenced, as in this case, by the contemporaneous agreement referred to. The case, however, decides the other way. It holds that the title passes, but that the performance of the illegal condition will not divest the title of the grantee. The case cited from Indiana is equally inapplicable, as it was an action at law to enforce an illegal executory agreement, and it was, of course, held that the defendant could plead the illegality of the consideration. The case from Maryland is also inapplicable, as it was an action to foreclose

a mortgage given upon an illegal consideration, and the Court refused relief. It is no authority that the Court would have aided the mortgagor had he been seeking a decree for cancellation. The case of *Willyams v. Bullmore,* 33 L. J. R., cites no authority. It seems, however, that the mortgagee was seeking foreclosure, and that this action was consolidated with one brought by the mortgagor for cancellation. Under these circumstances there was a decree for cancellation. It is doubtful (465) whether the Court would have made such a decree had not the mortgagee been seeking foreclosure. However this may be, it cannot be regarded as sufficient authority to overturn the well-established rule embodied in the maxim which I have quoted. There is nothing in the reference to Pomeroy's Eq. Juris. which at all countenances relief under the circumstances of this case. The defendant has already agreed to terms as favorable as would be imposed by a court of equity.

I think that A. M. Basket has no standing in a court of Equity, and that, under the circumstances, he is entitled to no relief. To interfere in his behalf would be giving aid and comfort to the moving party in this illegal transaction.

Cited: Somers v. Comrs., 123 N. C., 585; *McNeill v. R. R.,* 135 N. C., 733; *King v. R. R.,* 147 N. C., 266; *Cansler v. Penland,* 126 N. C., 795; *Vinegar v. Hawn,* 149 N. C., 357; *Pfeifer v. Israel,* 161 N. C., 410.

ALFRED JONES ET AL. v. R. S. PULLEN.

Mortgagor and Mortgagee—Purchase by Mortgagee of Mortgaged Property—Ratification—Trust Relation—Presumption of Fraud—Rebuttal of Presumption.

1. In the absence of ratification, the right of a mortgagor to avoid a sale under a power, where the mortgagee has indirectly become the purchaser, is not barred by his laches for a shorter period than the statutory limitation of ten years.
2. Entry on land by a mortgagee who purchases at his own sale, upon surrender of possession by the mortgagor, is not of itself evidence of ratification of the sale by the mortgagor.
3. When a mortgagee with power of sale indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, whether or not it was fairly made and for a reasonable price.
4. Where a mortgagee with power of sale deals directly with the mortgagor and purchases from him the equity of redemption, there is by reason of

the trust relation a presumption of fraud, which, however (as decided in *McLeod v. Bullard*, 86 N. C., 210), may be rebutted by showing that the transaction was free from fraud or oppression, and that the price paid was fair and reasonable, in which case the mortgagor cannot avoid the sale, and a court of equity will grant him relief.

5. Where a mortgagee with power of sale, and expressly authorized by the mortgagor to purchase the mortgaged land at the sale, becomes the highest bidder, he is placed within the rule enunciated in *McLeod's case* (86 N. C., 210), and may hold the land, provided he rebuts the presumption of fraud arising from the trust relation.

6. A mortgagee having the right to acquire the equity of redemption by virtue of a sale under the mortgage which authorized him to purchase at the sale, the fact that a trustee to whom the mortgagor had conveyed the equity of redemption joined with a mortgagee in the sale and in the execution of the deed cannot affect the result or bring it within the principle of *Taylor v. Heggie*, 83 N. C., 244.

7. While a mortgagee, with power of sale and authorized to become the purchaser, may execute a deed to himself upon the principle that a donee of a power may execute a deed in that capacity to himself, it seems, nevertheless, that the mortgage should contain an express power to that effect.

ACTION, heard upon exceptions to referee's report, before (466) *Hoke, J.*, at April Term, 1894, of WAKE. The plaintiffs sought to recover from the defendant certain lands which he had bought at a sale under a mortgage and deeds of trust executed by the plaintiff to him.

The action was begun 13 October, 1893. The findings of the referee, Mr. R. O. Burton, were as follows:

"3. On the ____ day of _____, 18____, one Elizabeth T. Jones died, domiciled in Wake County, leaving a last will and testament, which was afterwards duly probated, and a copy of which is hereto attached, marked 'Exhibit No. 1,' as part of this report. The plaintiff Alfred Jones is the son of said testatrix, and the land mentioned in said will embraces, among other lands, that now in controversy in this action.

"4. That on 5 June, 1876, the devisees named in said will— Alfred Jones, Needham P. Jones and Nannie P. Jones and Mil- (467) lard Mial—executed a deed, a copy of which is hereto attached, marked 'Exhibit No. 2,' as a part of this report. Said deed was duly proved and registered in Book 45, pages 1 to 6, of the register's office of said county.

"5. That on 28 April, 1883, to secure a bond of $3,000 executed by Alfred Jones to said Pullen, due and payable twelve months after date, with interest at the rate of 8 per cent per annum, and dated on said day, the said Alfred Jones and wife Lizzie C. Jones and Millard Mial executed unto the defendant R. S. Pullen a deed of mortgage on the land in controversy, which was duly probated and registered in the register's office

of Wake County on 7 May, 1883, Book 73, page 780, and a copy thereof is hereto attached, marked 'Exhibit No. 3,' as part of this report.

"6. That on 20 August, 1883, the said Millard Mial and Alfred Jones and Lizzie C. Jones his wife, to secure the bond of said Alfred Jones, of even date therewith, payable to said Pullen twelve months after date, with interest from date at 8 per cent, payable semiannually, executed unto A. W. Haywood a deed of trust on said land, which was duly proved, and was, on 22 August, 1883, duly registered in the register's office of said county, Book 74, page 591, and a copy thereof is hereto attached, marked 'Exhibit No. 4,' as part of this report.

"7. That on 17 February, 1886, the said Alfred Jones and wife Lizzie C. Jones and Millard Mial executed unto Ernest Haywood a deed of trust on the lands in controversy, and one other tract of land in Pasquotank County, which was duly proved, and on 2 March, 1886, was duly registered in the office of the register of deeds of said county, Book 87, page 699, and a copy thereof is hereto attached as part of this report, marked 'Exhibit No. 5.' The said trust deed secured not only a loan of $1,525 then made by said R. S. Pullen to said Elizabeth C. Jones,
(468) evidenced by the bond of even date of said Elizabeth and Alfred, payable twelve months after date, with interest from date at the rate of 8 per cent per annum, payable semiannually, but also the aforesaid notes or bonds of $3,000 and $500.

"8. That in the early part of the year 1887 the land in Pasquotank County was sold by the said Alfred and Elizabeth Jones, with the consent of said Ernest Haywood, trustee, to one T. B. Hewett, for $3,000, and the defendant and said Ernest Haywood afterwards released to him. The net amount of the sale was $2,839.48. Of this amount $1,515.37 was credited 6 April, 1887, on the note for $1,525 aforesaid, and the residue thereof ($1,324.11) was on 15 July, 1887, credited on the note for $3,000. Said amounts were credited on the date of their receipt by the defendant.

"9. That on 6 October, 1888, default having been made in the payment of the debts aforesaid (except as hereinbefore mentioned), the said R. S. Pullen, A. W. Haywood, trustee, and Ernest Haywood, trustee, after having duly advertised the land in controversy for sale at the courthouse door in Raleigh, under the aforesaid deed of mortgage and the deeds of trust to A. W. Haywood and to Ernest Haywood, sold said land at public sale for cash at the said courthouse door, when and where J. S. Wynne, acting as the agent of said R. S. Pullen, became the last and highest bidder at the price of $4,000, and it was struck off to him, a deed was at once executed to him, which was duly probated, and was registered 2 January, 1887, in the register's office of said county, Book 104, page 570, and a copy thereof is hereto attached as part of this

report, marked 'Exhibit No. 6.' Shortly thereafter the said J. S. Wynne conveyed said land by proper deed to said R. S. Pullen, and the same was duly registered in said county.

"10. That the said sale was fairly and honestly conducted, in conformity with the terms of the mortgage and trust deeds, and (469) there was no effort to suppress bidding. The land brought a fair price. There were no circumstances of (see report) fraud or undue advantage taken.

"11. That soon after said sale, to wit, on 17 December, 1888, the said Alfred and Lizzie Jones surrendered the possession of said land to said R. S. Pullen, and he has held the possession ever since."

Conclusions of law:

"1. That by virtue of the sale of 8 October, 1888, and the deeds made in conformity therewith, the said R. S. Pullen acquired the title of said Alfred and Lizzie C. Jones, his wife, and Millard Mial, as owner, and ceased to be a mortgagee.

"2. That such title is a fee simple as to a half interest in said land, and an estate for life of said Alfred Jones as to the other half, with a contingent remainder to such of the children of said Alfred Jones as shall be living at his death. But if the said Alfred Jones shall die without any child living at his death, then the estate of said R. S. Pullen in said half interest will be enlarged into a fee by virtue of the said deeds from said Alfred Jones, and the warranties and covenants in the aforesaid deed mutually executed between Alfred Jones, Needham P. Jones, Nannie P. Jones and Millard Mial. (Exhibit No. 2).

"3. In the view I have taken of the case, the question of ratification does not arise."

The plaintiffs excepted to the report of the referee "for errors in the finding of fact and law, in that, first, the referee finds as a conclusion of law that the sale to R. S. Pullen, the defendant, was valid; second, the referee finds the sale on 6 or 8 October, 1888, was in every respect fair," etc.

The defendant excepted to that part of the second conclusion of law of the referee which declared and decided that such title was an estate for the life of said Alfred Jones as to one-half interest in said land, and with a contingent remainder to such of the children of said Alfred Jones as are living at his death; for that and because said referee, (470) on the facts found by him in his report filed in this action, and on the pleadings herein, ought not to have made or come to any conclusion of law at all in this regard as this case is now constituted in this court.

His Honor overruled the plaintiff's exceptions and sustained those of the defendant, and rendered the following judgment, from which plaintiffs appealed:

"This cause coming on to be heard upon the report of the referee, R. O. Burton, Esq., and the exceptions filed to said report, it is now considered, ordered and adjudged that the exceptions filed by the plaintiffs to said report be and the same are hereby overruled, and that the exceptions filed by the defendant to said report be and the same are hereby sustained, and in all other respects said report is hereby confirmed. It is further considered, ordered and adjudged by the court that by virtue of the sale of 8 October, 1888, and the deeds made in conformity therewith, the said R. S. Pullen acquired all the estate, right, title, interest and property of the plaintiffs, Alfred Jones and Lizzie C. Jones, his wife, and of the other plaintiff, Millard Mial, in the Wake County land described in the pleadings as owner, and ceased to be a mortgagee, and that plaintiffs are not entitled to any account whatever of the defendant in this action. That the rights of the infant plaintiffs as to the title to the land in question are reserved and not passed upon in this judgment, and that the defendant recover of the plaintiffs herein the costs of this action, in which shall be included an allowance of $25 to the referee, R. O. Burton, Esq., for his services in this case."

T. M. Argo and T. R. Purnell for plaintiffs.
Haywood & Haywood and J. W. Hinsdale for defendant.

(471) SHEPHERD, C. J. On a previous investigation of this case, we were of the opinion that the decision in *Joyner v. Farmer,* 78 N. C., 196, would amply sustain the action of his Honor in denying the plaintiffs the relief prayed for. The delay of the plaintiffs of over five years after the sale and their surrender of possession (there being no fraud, and the price being reasonable) were sufficient under the principle of the above-mentioned case to bar the plaintiffs of their alleged right of election to set aside the sale. Our attention, however, has been called to the more recent case of *Bruner v. Threadgill,* 88 N. C., 361, in which it is said that "in the absence of affirmation the right of a mortgagor to avoid a sale under a power where the mortgagee has indirectly become the purchaser, is not barred by his laches for a shorter period than the statutory limitation of ten years." The Code, sec. 158. As the mortgagee had a right to enter under his legal title, the entry in this case would not alone be sufficient evidence of affirmation, and nothing further appearing, the principle of *Bruner's case* would seem to apply. This renders it necessary to further investigate this case in the light of the other facts found by the referee, and in this we have had the aid of a second argument by counsel on each side. There is no question, according to our authorities, that if a mortgagee, with power to sell, indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and

this without reference to its having been fairly made, and for a reasonable price. This is an inflexible rule, and it is "not because *there is,* but because there may be fraud." *Gibson v. Barbour,* 100 N. C., 192; *Froneberger v. Lewis,* 79 N. C., 426; *Cole v. Stokes,* 113 N. C., 270; *Dawkins v. Patterson,* 87 N. C., 384. If, however, the mortgagee with the power of sale deals directly with the mortgagor and purchases of him the equity of redemption, quite another principle applies. In such case there is, by reason of the trust relation, a presumption of fraud, but the mortgagee so purchasing may rebut this presumption by (472) showing that the transaction was free from fraud or oppression, and that the price was fair and reasonable. The doctrine is fully discussed in *McLeod v. Bullard,* 86 N. C., 210, and need not be elaborated in this opinion. If the presumption of fraud is rebutted the plaintiff has no election to set aside the sale, and a court of equity will grant him no relief.

Now, if this be the rule applicable to a direct purchase of the equity of redemption, why should it not also apply to a case like the one before us, where the mortgagor has by his deed expressly authorized the mortgagee to become the purchaser? If the mortgagee can directly purchase, if the transaction is fair, why can he not, when the transaction is fair, purchase as the highest bidder at the sale, when expressly authorized to do so? In 1 Jones on Mortgages, 1883, provisions of this kind are said to be in general use where there is no statute authorizing the mortgagee to purchase at his own sale, and cases are cited which deny that the privilege should be strictly construed, and the author remarks that it is generally held that "under such a provision the court will not interfere with a purchase by the mortgagee unless there be some other objection which would invalidate a purchase by any one else under the same circumstances."

On the other hand, while the right to purchase is fully recognized, there are numerous authorities to the effect that the mortgagee so purchasing "will be held by a court of equity to the strictest good faith and the utmost diligence in the execution of the power for the protection of the rights of the mortgagor, and his failure in either particular will give occasion to allow the mortgagor to redeem."

In *Fox v. Mackrith,* 1 White & Tudor, L. C., 244, note, it is said: "The mortgagor may indeed dispense with the restraint by authorizing the mortgagee to sell to himself, if he is the highest bidder. This results from the right of every man to waive a rule intended for his benefit. But such transactions will, notwithstanding, be closely scrutinized, and may be set aside if the sale is not conducted with entire (473) frankness, and in a way to obtain the market value."

In *Gibson v. Barbour,* 100 N. C., 192, after denying the right of a trustee like a mortgagee to purchase at his own sale, and remarking that "a court of equity will not tolerate the attempt and give efficacy to what is done, when opposed by competent parties in interest," the Court proceeds as follows: "The cases to which the brief of counsel calls our attention are in no degree hostile to this universally accepted rule. *Dexter v. Shepard,* 117 Mass., 480, simply decides that a trustee, expressly authorized under the deed to purchase at his own sale, and so might the Court, directing a commissioner interested in the trusts to make a sale, give him authority to bid, as a means of securing himself against loss, as was done in *McKay v. Gilliam,* 65 N. C., 130, although the fact does not appear in the report, *and so we think this may be allowable with the general consent of all who could otherwise make objection to the sale.*"

These remarks seem to recognize the right of the mortgagee to purchase under the circumstances of this case, and the numerous authorities cited by Mr. Jones from courts of the highest respectability, such as New York, Massachusetts and Alabama, as well as the "reason of the thing," in our opinion, fully establish the proposition. In passing, we will observe that *Howell v. Pool,* 92 N. C., 450, cited by counsel, does not distinctly pass upon this question. Although we adopt this view, it is nevertheless true that the mortgagee is still the agent or trustee of the mortgagor, and while he may purchase under such a provision, we are of the opinion that the exercise of such authority should be watched with a most jealous eye by the courts. Indeed, we think it more consistent with the principles of equity, as enunciated by this Court, to place (474) such a purchaser within the rule declared in *McLeod's case, supra,* that is to say, that being still trustee, although with power to purchase, there is a presumption of fraud, and it lies upon him to rebut such presumption. If he does this, we see no reason why he should not hold the land as if he had purchased the equity of redemption directly from the mortgagor.

The mortgagor, in effect, says: "You may sell my land to the highest bidder, and if you act fairly and purchase at a reasonable price you may yourself become the purchaser." If this agreement is honestly carried out, why should the mortgagor have the right to repudiate it, and especially in the present case, when he has surrendered the possession after such sale, and the defendant has occupied the land for over five years?

The referee finds that the "sale was fairly and honestly conducted, in conformity to the terms of the mortgage and trust deeds, and there was no effort to suppress the bidding. The land brought a fair price. There were no circumstances of fraud or undue advantage taken." The right to purchase having been conferred upon the mortgagee, we think our

case is not within the principle that the mortgagor may avoid the sale, even though it be fair and the price reasonable.

Under this view, the defendant had a right to acquire the equity of redemption by virtue of the sale under the mortgage and, this being so, the principle of *Taylor v. Heggie,* 83 N. C., 244, does not apply. The equity of redemption was conveyed subsequently by the mortgagors to Mr. Haywood, in trust, it seems, to secure the payment of the mortgage debt, though the trust provided that it shall be subject to the mortgage, and, as the mortgagee had the right to purchase at his own sale under the mortgage, the fact that the trustee joined him in the sale, by virtue of the trust, and also joined in the execution of the deed to Wynne (who afterwards conveyed to the defendant), cannot affect the result. Inasmuch as the legal title passed to Wynne, we have not deemed it necessary to pass upon the supposed difficulty of the mortgagee (475) (when a direct purchaser) executing a deed to himself. This may be done upon the well-settled principle that the donee of a power may execute a deed in that capacity to himself. Whether the mortgage should contain an express power of this kind is not before us, but has been held to be necessary by several courts, and this view seemed to be entirely sound. All that it is necessary, however, to decide in the present case, is that, where the legal title has passed through a third person to the mortgagee with power to purchase, the power will be so far recognized as to place such purchaser within the principle of *McLeod v. Bullard, supra.*

Affirmed.

Cited: Tuttle v. Tuttle, 146 N. C., 493; *Rich v. Morisey,* 149 N. C., 46; *Pritchard v. Smith,* 160 N. C., 85; *Hayes v. Pace,* 162 N. C., 292; *Shepherd v. Lumber Co.,* 166 N. C., 133; *Owens v. Mfg. Co.,* 168 N. C., 399; *Cole v. Boyd,* 175 N. C., 558; *Jones v. Williams,* 176 N. C., 246.

WILSON COTTON MILLS v. C. C. RANDLEMAN COTTON MILLS.

Corporation—Stockholders, Liability of—Unpaid Subscription to Stock—Assignment by Corporation for Benefit of Creditor—Creditor's Bill—Judgments—Unconscionable Advantage.

1. The capital stock, paid or unpaid, of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation.

2. Although it is the better practice, yet the statute (section 677 of The Code) does not require that the number of shares subscribed for by each corporator shall be stated in the articles of agreement to form a corporation.

3. It is not the articles of agreement filed with the clerk which fix the liability of subscribers under the statute (section 677 of The Code), but the subscriptions upon the books of the company; and hence, where the articles of agreement do not state the number of shares of the proposed capital stock subscribed for by a corporator, he cannot, in the absence of fraudulent statement or concealment, be held liable for the whole of the unpaid capital stock of the company nor for the unpaid subscription of a co-corporator whom he knows to be insolvent. (*Hauser v. Tate*, 81 N. C., 81, distinguished.)

4. Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable *pro rata* with other debts.

5. This Court will not review a referee's findings of fact under a consent reference, except upon the ground, taken in apt time, that there is no testimony to support them.

6. An assignment by an insolvent corporation for the benefit of creditors will be set aside at the suit of creditors within sixty days from the assignment, as provided in section 685 of The Code.

7. Where an attorney of a creditor of a corporation was sent by the creditor with specific instructions concerning the collection of a claim against such corporation, and, without having authority to do so, consented to the assignment by the corporation for the benefit of creditors, such creditor is not estopped by the conduct of his attorney from bringing and maintaining a creditor's bill against the corporation.

8. A draft drawn by a creditor on a debtor and accepted by the latter, covering part of an account due the former, amounts to payment and satisfaction *pro tanto* so long as it is in existence and not returned to the acceptor.

9. An account in excess of $200 cannot be split up so as to bring the same under the jurisdiction of a justice of the peace, except as to items constituting one transaction and under $200 in amount; but objection must be made before the justice of the peace; otherwise it cannot be made on appeal.

10. While there is no jurisdiction to vacate a judgment except in a direct proceeding to set it aside for fraud, yet, when the judgment creditor brings a creditor's bill seeking equitable jurisdiction and joining all other creditors who may make themselves parties and contribute to the expenses, etc., the latter may assert the want of equity in such judgment creditor and avoid the preference inequitably obtained by his judgment: *Therefore*,

11. Where a creditor of an insolvent corporation, by splitting up an account, obtained several judgments thereon, and no objection was made to the jurisdiction of the justice because of an unconscientious advantage taken of the defendant, and the creditor thereupon brought a creditor's bill, making all other creditors parties, and insisted upon the preference which he had obtained by the judgments so taken, the court, while not setting aside the judgments, will not permit them to have preference over the claims of the other creditors in the distribution of the assets of the insolvent corporation.

COTTON MILLS *v.* COTTON MILLS.

ACTION, tried before *Battle, J.*, at Spring Term, 1894, of RANDOLPH, upon exceptions to the report of P. D. Walker, referee. (477)
From the judgment of his Honor upon divers exceptions to the report, both the plaintiff and defendants appealed. The facts necessary to an understanding of the opinion, in each appeal, are sufficiently stated therein.

B. F. Long for plaintiff.
J. H. Dillard, L. M. Scott and J. N. Wilson for defendants.

PLAINTIFF'S APPEAL.

MACRAE, J. There is abundant authority, both in reason and decisions, for the proposition stated by the late *Chief Justice Merrimon* in *Clayton v. Ore Knob Co.*, 109 N. C., 385: "Very certainly the capital stock, paid or unpaid, of the defendant constitutes a trust fund for the benefit of its creditors, and whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts. If the capital stock has not been paid for, it is the plain duty of the court to require it to be collected, or so much thereof as may be necessary to pay its unpaid debts." NOTE.—For the meaning of this expression, *trust fund,* we refer to *Bank v. Cotton Mills, post,* 507.

The findings of fact by the referee, affirmed and amended by his Honor, show that the corporation defendant was formed under the general law—section 677 of The Code as amended by Laws 1885, (478) ch. 19 (other amendments are not material to our investigation).
By this law the articles of agreement filed with the clerk, and upon which letters of incorporation are to be issued, are to contain: (1) the corporation name; (2) the business proposed; (3) the place where it is proposed to be carried on; (4) the length of time desired; (5) the names of persons who have subscribed; (6) the amount of the capital, the number of shares and amount of each.

It will be observed that in the last requirement it is not provided, as it is in similar acts of other States, that the number of shares taken by each subscriber or stockholder should be set out, although in practice it is generally done, and it would have been better had the statute required it.

The incorporators in defendant corporation seem to have complied strictly with the statute in their articles of agreement upon which the letters were issued. It is made to appear, however, as a fact that, although the capital stock was stated in the articles to be $50,000, the property turned over by C. C. Randleman in payment of his subscription of $49,700 to the capital stock was a cotton mill and its products, worth,

at a fair valuation, $22,447.57, and that he did not intend to pay in the balance to make up his subscription otherwise than by the application of dividends or profits which he expected to realize from the enterprise, or so much thereof as he might conveniently apply to the payment of said difference, and that he was insolvent and unable to pay it otherwise. It is also found that the other corporators participated in the formation of the company, in the conduct of its business and the dealings with creditors, well knowing the said facts, and that the alleged or represented capital did not in fact exist, and that no part had been or would be paid in except the sum of $22,447.57. It appears that
(479) a stock book was kept by the company, which seems to have been mislaid so that it could not be produced before the referee. In said stock book C. C. Randleman subscribed for 497 chares; T. C. Worth, J. H. Ferree and L. H. Weaver, for one share each. When operations were begun under the letters of incorporation Randleman was insolvent. We suppose by this it is meant that he was unable to pay the balance of his subscription. Weaver was also insolvent, and Worth and Ferree were solvent and possessed of large means. The corporation was rated high by Dun and Bradstreet. The venture was a failure. Large debts were contracted and the concern failed within a year.

It is contended by counsel for plaintiff in this creditor's bill that the conclusion of law reached by the referee should have been sustained and the court should have declared "that the subscription of Randleman over and above the amount he paid by transferring property to the company was not actual and *bona fide,* and that Randleman, together with his associates, having obtained the charter, organized the company and conducted its business, and having dealt with outside parties, the plaintiff and other creditors who have proved their claims in the case, upon the basis of an actual and *bona fide* subscribed capital of $50,000, and upon the representation that the actual capital of the company in money, or money's worth, was equal to the capital stock which it purported to have, there being no evidence that said capital has been impaired by any business losses, the said Randleman, Ferree, Weaver and Worth are jointly and severally liable to the said creditors of the corporation for the difference between the amount paid in by Randleman and his full subscription, to wit, the sum of $27,252.43, or for so much of said amount as may be necessary to pay the costs and expenses of the suit and all the just liabilities of the corporation allowed by the referee or the court, after applying the assets of the corporation to the payment of the same, including as part of the assets the amounts
(480) due by said Weaver, Worth and Ferree on their individual unpaid subscriptions.

There is no doubt of the liability of Randleman for the amount of his unpaid subscription, or so much thereof as may be necessary to pay the debts and costs and expenses of this action. But are the other stockholders liable on their individual unpaid subscription for the same amount? The books of the company showed the amount subscribed by each corporator to be as stated above, and while their liability for all of their said subscription, which is still unpaid, is beyond question, it is equally clear to our minds that upon their contracts they cannot be held for a larger sum than was subscribed by them. It is not the articles of agreement filed with the clerk which bind the liability of each subscriber under our statute. It is true that if in said articles it had been stated that each subscriber had taken a certain number of shares, this notice would have bound them in their dealings, for the agreement could contain this stipulation as well as the subscription on the stock book; but the statute did not require it, and parties dealing with the corporation were not required to go to the articles to ascertain the liability of each corporator. We may say that we consider it a defect in the law not to require the corporators to state the number and value of shares taken by each corporator, but we cannot make law—we must take it and interpret it as it is written. The statute, then, only requiring the number of shares and the amount of each to be set out in the articles, we cannot hold any corporator liable for the whole amount of the capital stock, because upon the articles filed it did not appear how many shares were taken by each corporator. The law requires the stockholders to name their capital and publish it to the world, and they did it, but it does not, though it ought to, require it to be stated how those shares are apportioned among the stockholders. There is a record commonly kept by corporations called a stock-book, and to this book (481) persons interested, before dealing with said company, may have access to enable them to ascertain by whom the said shares are held. If access to this book, or information on the subject, shall be withheld, there is no law to compel persons to deal with the corporation. It nowhere appears that any false statements were made in reference to the ownership of the stock. Its distribution did not appear and was not required to appear in the articles of agreement. It was therefore necessary for their protection that persons proposing to deal with said corporation should inform themselves upon this point. The liability of the corporators to the amount of their subscription was established. The prospectus or published notice of incorporation failed to inform the public as to the number of shares held by each corporator, and consequently as to the liability of each for unpaid subscription. Persons proposing to deal with the said corporation must inform themselves about it. There is no evidence or findings that such information was ever

withheld. It would seem, therefore, that the parties dealing with the corporation were not exercising great care in the management of their business in failing to make due examination before making contracts with the corporation.

The fallacy in plaintiff's argument is that the *"agreement and charter"* failed to set out the distribution of shares, and therefore that all subscribers are bound as if stockholders to the whole number of shares, and that the apportionment of shares as appeared on the stock-book was in derogation of the original agreement. The cases cited do not bear out plaintiff's contention. In *Curran v. Arkansas,* 15 How., 304, cited also in Myers Fed. Dec., secs. 1316, 1323, the State was the sole stockholder in a bank, and laws passed vesting the property of the bank in the State were in impairment of the contract between the bill-holder and the bank, and were unconstitutional.

(482) *Sawyer v. Hogg,* 17 Wall., 610, was where one had subscribed for a certain number of shares and paid by check the full amount of his subscription, and had immediately borrowed 85 per cent of the sum paid in. The Court held that this 85 per cent was still unpaid subscription, and its payment could be enforced by an assignee in bankruptcy, for the benefit of the creditors of the insolvent and bankrupt corporation.

Wood v. Pearce, 2 Disney, Cincinnati Superior Court, 411, simply holds a stockholder liable for the full amount of his subscription. And to the same effect are the citations from Angell & Ames on Corp., secs. 146, 531. We have examined many of the authorities cited by plaintiff's counsel, and they all go to show—and in this we fully concur—that subscribers, in case of insolvency of the corporation, are strictly held to the payment of the unpaid part of their subscription, and that the public, in dealing with a corporation, has the right to assume that its actual capital in money, or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has also the right to assume that the capital stock has been, or will be, fully paid up, if it be necessary, in order to meet the corporate liabilities. But they nowhere reach a case like the present, where it is sought to subject subscribers to a greater amount than their unpaid subscription, such liability not being provided for in the charter.

But the contention of the plaintiffs goes further. They say that permitting the capital stock to be advertised at $50,000, while to the knowledge of all the corporators the property contributed by the largest stockholder was not worth half the amount of his subscription, and he was insolvent and did not intend to pay in the balance unless the venture was a successful one and enabled him to pay it in, was a fraud upon

persons dealing with said corporation, and that independent of their liability on their stock subscriptions they are liable for the injury done, and ought to be held to the payment of the balance of the (483) debts of the concern after the exhaustion of its assets.

This rule is stated in plaintiff's brief, with regard to the debts of an insolvent corporation: "When it is made to appear that some of the stockholders are insolvent, the solvent must pay the proportion of the insolvent, to be apportioned among them according to and up to the amount of their stock *subscribed and unpaid.*" 9 Ore., 200.

It will be seen that special reference is made to the amount of their stock *subscribed* and *unpaid.* We have found no authority for the position that a shareholder can be held upon his contract of subscription for a greater amount than his unpaid subscription, except in the case of larger liability being imposed by the statute. All tort feasors may be held liable in an action for tort for the immediate consequence of their wrongful acts. We are not prepared to hold that stockholders in corporations who have subscribed for a limited number of shares may be held liable, in case of insolvency of the corporation, for the whole amount of its debts because they knew that other stockholders who were insolvent had not paid their subscription and did not intend to pay it. The books of the company ought to furnish to those with whom it deals a full knowledge of the names of stockholders and the number of their shares, and the charter, or the general law, the measure of their liability.

Does this case fall within the principle of *Hauser v. Tate,* 85 N. C., 81? In that case the defendant permitted his name to be used and published as the president of a bank, and a business to be operated as an incorporated bank, when in fact there was no organization under the charter and no bank at all; the person holding himself out as cashier, using the defendant's name as president, and carrying on a spurious business. It was held that the liability of the defendant was direct and original, and not the collateral liability of a stockholder upon his unpaid subscription. "The gravamen of the complaint was that (484) there was never any proper organization under the charter, and the bank having no legal corporate existence, its name was assumed by said Simonton and his personal banking transactions conducted thereunder in silent if not active coöperation with the defendant, and that the association of them in imposing upon the public a fraudulent as and for a regular and real banking company, and thus securing and abusing the plaintiff's confidence, to his injury and loss, renders each personally and equally exposed to his demand for redress."

The present case is different from the above. The organization was perfected under the law; the stock-book showed the number of shares held by each stockholder; there is no evidence of concealment from the

public of the true status of the concern, and there was nothing to hinder one from informing himself thereof. It is found that there was a stock-book, and that it was mislaid and could not be produced at the hearing before the referee, which was long after the insolvency of the corporation. It was also found that the credit was extended by plaintiff, The Wilson Cotton Mills, upon the report of the financial status of defendant corporation in Dun and Bradstreet, and there was no evidence that this report was procured to be made by defendants. We concur in the view taken by his Honor that the defendant corporators are liable only for their unpaid subscriptions. This disposes of plaintiff's exceptions 6, 7, 8, 9 and 10. Exceptions 1, 2, 3, 5 and 12 to the findings of fact were withdrawn.

The fourth exception is for failure to find that the deed of assignment was not regularly executed, and therefore was void. As we shall hold, on defendant's appeal, that this deed was void under section 685 of The Code, action having been brought by creditors within sixty days from its execution, it will not be necessary for us to consider this (485) exception.

The eleventh is the last exception relied on by the plaintiff—the ruling of his Honor that the commissions of the receiver, Worth, should be included in the expenses and paid as such, instead of being classed as a debt. It seems plain to us that the commissions are a part of the costs and expenses.

No error.

DEFENDANT'S APPEAL.

MACRAE, J. The first and second exceptions of defendant are to findings of fact. This was a consent reference. This Court will not review such findings except upon the ground, taken in apt time, that there is no testimony to support them. *Battle v. Mayo,* 102 N. C., 413. We have examined the testimony sent up, and are of the opinion that there is some evidence to support the findings.

The third, fourth, fifth, sixth and seventh exceptions relate to the validity of the deed of trust and to estoppels arising from the conduct of the attorney of The Wilson Cotton Mills in connection therewith. Notwithstanding the very able argument of defendant's counsel, to the effect that the making of an assignment for the benefit of all its creditors by an insolvent corporation does not fall within the spirit and meaning of section 685 of The Code, we are impelled to hold that by the plain terms of the act it is in the power of a creditor to defeat the operation of "any conveyance of its property, whether absolutely or upon condition, in trust or by way of mortgage executed by any corporation," by the commencement of proceedings to enforce his claim

within sixty days after the registration of said deed. This section must be interpreted in connection with all of chapter 16, of which it is a part. And section 668 of the same chapter provides means by which any creditor of an insolvent corporation may have the effects of said corporation put in the hands of a receiver and settled under the direction of the court. There might be reasons why some creditor (486) should prefer that the court should, by its officers, take charge of the settlement of the affairs of the corporation, with the security of bonds and under its own supervision, rather than that they should be administered by trustees selected by the corporation. As to the contention that The Wilson Cotton Mills, plaintiff, is estopped from taking this step by the act of its attorney, we think the evidence is convincing that the attorney was sent with specific instructions, and that no authority was given him to agree to the assignment on the part of his client.

We come now to the very interesting question raised by the eighth exception of defendant, whether the taking of judgments upon the account due by defendant company to the plaintiff cotton mills, especially those judgments covering the sum of $2,992.82, for which said defendant had given its acceptance, and the splitting up of the account in order to bring it within the jurisdiction of a justice, was a fraud upon the said jurisdiction; and whether such judgments may be attacked in this proceeding and set aside to prevent the taking by said plaintiff of an unconscientious advantage over the other creditors. In 1890 defendant company was indebted in a large sum to plaintiff cotton mills, and on 14 November accepted the draft of the plaintiff, at thirty days, for $2,992.82 in part payment of said account. Many of the aggregated items of said account exceeded the sum of $200 for a particular day. Said plaintiff, through its attorney, after the execution of the deed of assignment, obtained judgments for all of the open accounts, including that part of it for which the acceptance had been given, by *splitting* it up so as to bring the amounts claimed within the jurisdiction of a justice, and so has obtained a preference, or priority, over the other creditors. That the sum of $2,992.82 included in the draft was merged into it, and while said draft was in existence and *not delivered up to the acceptor,* the said draft amounted to a payment and satisfaction, if it was so intended, of so much of the open account, is well (487) established. *Mauney v. Coit,* 86 N. C., 463; *Spear v. Atkinson,* 23 N. C., 262; *Wilson v. Jennings,* 15 N. C., 90. It is equally clear that an account may not thus be split in order to get the same under the jurisdiction of a justice, except as to all items constituting one transaction. *Caldwell v. Beatty,* 69 N. C., 365, the leading case. It is also well settled that such objection must be made before the justice; other-

wise it cannot be made in the Superior Court on appeal. *Blackwell v. Dibbrell,* 103 N. C., 270. But can these judgments be attacked in this proceeding upon the ground that under the circumstances it is unconscientious and inequitable on the part of the plaintiff in this action to assert such rights?

This is a creditor's bill, brought under the statutes, sections 668 and 685 of The Code. Its object is to set aside an assignment attempted to be made by an insolvent corporation, and to bring about the settlement of the affairs of the corporation under the direction of the court by its receiver, and for the benefit of all the creditors, and upon the doctrine that the corporate assets are a trust fund for the benefit of all the creditors. But the great principle of this jurisdiction is that when the court takes hold of the property it will make an equitable distribution thereof in the interest of all the creditors respecting priorities theretofore acquired. The other controlling principle is that he who seeks equity must do equity.

Although there is no jurisdiction to vacate the judgment unless it be a direct proceeding to set it aside for fraud, yet when the plaintiff comes into the court seeking its equitable jurisdiction and joining all other creditors who may make themselves parties and contribute to the expenses of the suit, they may be heard to assert the want of equity on the part of the plaintiff and the injustice of securing to it the payment of its judgments in full, because those judgments were obtained by deceit and to their detriment.

(488) It was held in *Grantham v. Kennedy,* 91 N. C., 148, that while courts of equity refuse aid in cases where their action would be tantamount to the exercise of appellate jurisdiction, or simply for error in law, they will protect a party against an unconscientious advantage secured by fraud, surprise, accident or mistake, when it clearly appears that it would be iniquitous and against conscience to enforce a judgment so as to give priority over other creditors.

This is the first opportunity given the other defendants besides the defendant corporation to be heard in opposition to the enforcement of this preference, and they have quickly taken advantage of it.

We are bound by the findings of fact. The findings of fact of the referee will show that the plaintiff's attorney, who at that time was a trustee in the deed of assignment, had access to the books of defendant corporation to compare the accounts of his clients, The Wilson Cotton Mills, with the account stated in defendant's books; that he split up said account against defendant, a large part of which had been settled by acceptance; that he represented that by so doing and reducing the same to judgment, he only desired to reduce The Wilson Cotton Mills claims to judgment in order to put them on an equal footing with the indebted-

ness due banks, and to prevent their running out of date. It is found in sections 24 and 25 that while the representations made to Sharpe were not made with the intent that they should be communicated to defendant's president, they were so communicated, and no defense was made to the actions before the justice. While the law of North Carolina does not hinder preferences being made by insolvent corporations before the proceedings for the appointment of receivers have been begun under the statute, and while it permits the vigilant to reap the fruits of their watchfulness—*Bank v. Cotton Mills, post,* 507—the courts in administering their equity jurisdiction will distribute equity in its true spirit, and while not setting aside judgments which might have been reversed for error in law, will not permit them to have a prefer- (489) ence in their payment over other creditors in the bill when it appears that unconscientious advantage was taken in the obtaining of said judgments.

It follows that the judgment of the court below should be so modified as to require that the fund shall be distributed ratably among the creditors without preference to the plaintiff, The Wilson Cotton Mills, by reason of its judgments.

Error. Modified.

Cited: S. v. Harris, 120 N. C., 578; *Cromer v. Marsha,* 122 N. C., 565; *Dunavant v. R. R., ib.,* 1001; *Belvin v. Paper Co.,* 123 N. C., 151; *Bank v. Bank,* 127 N. C., 434; *Smathers v. Bank,* 135 N. C., 414; *Smith v. Lumber Co.,* 140 N. C., 378; *Benson v. Jones,* 147 N. C., 424; *Williamson v. Bitting,* 159 N. C., 325; *Robinson v. Johnson,* 174 N. C., 234.

CONGREGATION OF UNITED BRETHREN OF SALEM AND VICINITY v. COMMISSIONERS OF FORSYTH COUNTY.

Taxation—Exemption—Property Used for Educational or Religious Purposes.

1. Under section 5 of Article V of the Constitution, the Legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the Legislature can exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others.

2. Under chapter 137, Laws 1887, chapter 218, Laws 1889, and chapter 326, Laws 1891, exempting from taxation property set apart and exclusively used for religious, charitable or educational purposes, only such property was meant as was used directly, immediately and solely for the purposes named; and hence property rented out was not exempt, though the rents, so applied, were.
3. Under section 20, chapter 296, Laws 1893, the exemption given by the previous acts named was extended so as to include property rented out, provided the rental should be applied *exclusively to the support of the gospel.*
4. Solvent credits held by a religious society, the income from which is applied exclusively and faithfully to educational, religious and charitable purposes, are exempt from taxation under the Act of 1893, but any part of the fund on which the interest is not so applied, but is allowed to accumulate, is not exempt.
5. A parcel of land of twenty acres lying within the corporate limits of a town and belonging to a religious society, and on one part of which is a church situated on a lot, fenced in, of about two acres (the same being held for sale, excepting the church lot), is not, other than the church lot, exempt from taxation.
6. A tract of eighty acres, chiefly in forest, lying near a town, held by a religious society, on one side of which is situated a schoolhouse, is not exempt from taxation, except such part of it as is necessary for the school.
7. A town residence belonging to a religious society, not needed or used for a church, parsonage, school or hospital, but rented out, is not exempt from taxation; otherwise as to the rental applied to religious, educational or charitable purposes.

APPLICATION for an injunction to restrain the collection of tax, heard before *Battle, J.*, at August Term, 1894, of FORSYTH, upon a restraining order theretofore issued by *Whitaker, J.*

His Honor found the following facts:

"1. All the allegations of fact contained in the complaint and not denied in the answer; and further,

"2. That the plaintiff corporation owned, on 1 June, 1893, and owns now, owning other property, the following:

"(*a*) Solvent credits, notes against individuals secured by mortgages, amounting to $87,043.48.

"(*b*) A parcel of land containing about twenty acres, lying in the town of Winston, said land being known as 'The Reservation.'

"On the north side of said tract is a church, covering about one-third of an acre, situated on a lot of less than two acres surrounded by a fence. Leaving out this two-acre lot, the residue of 'The Reservation' is worth $18,000. A number of lots have been cut off from said tract (reducing it to its present area) and sold by the plaintiff corporation, some (491) within the last four years, at prices from $800 to $1,000 per lot of seventy-five feet by one hundred and forty feet. Public

notice was given in 1891 that these lots were for sale. The south end of 'The Reservation' is now leased to certain parties. It has been in contemplation by many members of the congregation, though no official action has been taken, to hold 'The Reservation' as an endowment for Calvary Chapel (the church built on the north side of the tract).

"(*c*) A tract of land in West Salem, containing about eighty acres, worth $5,000. This tract is chiefly forest land. There stands on the eastern side a schoolhouse. The land necessary for this school does not exceed two acres.

"(*d*) A house and lot in the town of Salem, known as the Bishop's house, worth $3,000, which is rented out as a residence, the plaintiff corporation receiving rents therefrom.

"3. The plaintiff owned all said property, and the status of the same was as above stated during the years 1887, 1888, 1889, 1890 and 1892.

"4. The said property (the solvent credits, 'The Reservation,' less two acres on which the church is situated, the eighty-acre tract, less the two acres on which the school is situated, and the Bishop's house) was placed on the tax lists by the defendant commissioners for the years 1887, 1888, 1889, 1890, 1892 and 1893, each piece of land at a valuation not more than it was worth.

"As for the solvent credits, the amounts at which they were listed, as stated in sixth article of complaint, were for each year considerably less than the solvent credits actually owned by the plaintiff.

"5. That the taxes assessed as aforesaid against the plaintiff were State taxes at the fixed rates, county taxes for general purposes, at the fixed rates; also a sum levied and assessed to pay bonds and interest on bonds for the extension of the Northwestern North Carolina Railroad, to which improvement Winston Township subscribed (492) for stock and issued its bonds for $60,000.

"Also, to pay bonds and interest on bonds of the Roanoke and Southern Railway, to which improvement Winston Township subscribed for stock and issued its bonds for $100,000.

"Since the year 1890, and now, a levy has been and is annually made on the property in said township of twenty cents on the $100 worth of property on account of said railroad bonds.

"All the personal property of the plaintiff corporation, its principal place of business and the residences of its officers and nearly all its lands are located in said township. The plaintiff makes no question about the propriety of levying taxes to pay these bonds on property other than that held for educational, charitable or religious purposes, and on account of these bonds its property has been taxed as other property in the township.

"6. That said property was never listed by its owner for the years above named, and no taxes have even been paid thereon.

"7. That the rents and profits, and the interest from said property, and all the property of the plaintiff corporation has been strictly and faithfully applied to educational, charitable and religious uses as directed in section 12, chapter 48, Private Laws 1873-4."

His Honor held as matters of law on these facts:

"1. That the general principle on which taxation is to be levied is that of uniformity, exemptions are exceptional and to be construed strictly, and every reasonable doubt is to be resolved against the exemption.

"2. That the provision in the Constitution which allows the General Assembly to exempt from taxation property held for educational, charitable or religious purposes, contemplates the direct or immediate use for such purposes. Property used for farming, or in manufacturing, or in trades, cannot fairly be said to be "used exclusively for (493) religious, charitable or educational purposes" (in the language of the Revenue Acts), even though the resulting profits may be exclusively directed to such purposes.

"3. That as for the second proviso in Laws 1893, chapter 296, section 20, subsection (2), it is not warranted by the Constitution, and further is not broad enough to cover the property here sought to be taxed.

"4. That on the facts found by the court the plaintiff corporation is liable for the taxes, the collection of which it seeks to enjoin."

From the judgment dissolving the restraining order and refusing the injunction, the plaintiff appealed.

Watson & Buxton for plaintiffs.
Glenn & Manly for defendants.

CLARK, J. The Constitution, Article V, section 5, empowers the Legislature to exempt from taxation "property *held* for educational, scientific, literary, charitable or religious purposes." This is the limit. The Legislature can exercise this power to the full extent, or in part, or decline to exempt at all. It can exempt one kind of property held for such purposes, either realty or personalty, and tax other kinds. It can exempt partially, as for instance up to a certain value, and tax all above it. It can exempt the property held for one or more of those purposes and tax that held for others—as, for instance, it may exempt churches or other property held for religious purposes, and tax buildings or other property held for scientific or literary purposes, for the constitutional provision is in the disjunctive, and authorizes the Legislature to exempt property held "for educational, scientific, literary, charitable *or* religious purposes." The property which is left subject to tax will be taxed uni-

formly as laid down in *Redmond v. Commissioners,* 106 N. C., 122. It is the power of exemption, within the limit, which is discretionary. Whether the Legislature can discriminate in the same class by exempting to a large value the property of a college or university, (494) and to a smaller amount the property of an academy or high school, is a large question which is not before us, for there is here no attempt to discriminate between corporations holding property for the same purpose, and any expression of opinion on that point would be *obiter dictum.* The Legislature has used its discretion of discriminating between the classes by exempting property held for religious purposes when rented out, "if the rentals are applied exclusively to the support of the gospel," while refusing to exempt any property held for the other classes if rented out. But it has not discriminated between institutions in the same class.

The act of the Legislature being therefore well within the constitutional discretion reposed in them, it only remains to apply it to the case in hand. Laws 1887, chapter 137, section 21, subsection 2, exempts from taxation "property belonging to and set apart and exclusively used for the university, colleges, institutions of learning, academies, the Masonic fraternity, Order of Odd Fellows, Knights of Pythias, Independent Order of Mechanics, Good Templars and Friends of Temperance, Knights of Honor, Good Samaritans and Brothers and Sisters of Love and Charity, Royal Arcanum, Hibernian Benevolent Society of Wilmington, the Israel and Priscilla Tent of Wilmington, schools for the education of the youth, or the support of the poor and afflicted, orphan asylums, such property as may be set apart for and appropriated to the exercise of divine worship or the propagation of the gospel or used as parsonages, the same being the property of any religious denomination or society: *Provided,* that any such property is used exclusively for religious, charitable or educational purposes."

Thus the Legislature did not go to its full constitutional power of exempting all property *held* for the purposes named, but restricted the exemption to the property "belonging to and set apart and exclusively used" for such purposes. It emphasizes this by (495) again repeating in the proviso, if "such property is used exclusively for religious, charitable or educational purposes." This statute is copied in Laws 1889, chapter 218, section 23, and 1891, chapter 326, section 21. By the words "set apart and exclusively used" is contemplated such property as is used directly, immediately and solely for the purposes named. Property rented out is not "so set apart and used," even though the rents may be so applied. That would exempt the rents, but not the real estate itself. This was thought to work a hardship as to church property, so Laws 1893, chapter 296, section 20, extends the

exemption as to property held for religious purposes, even though rented out. The proviso under that act reads: *"Provided,* that all property not used exclusively for religious, charitable or educational purposes, or which is held for the purpose of speculating in the sale thereof, investment, or for rent, shall not be exempt: *Provided, further,* that when the rental from such property is applied exclusively to the support of the gospel, the property shall not be taxed."

It was, and is, competent for the Legislature to also exempt property whose rental is applied to educational or charitable purposes; but it has not so enacted. That matter rests in the legislative discretion.

The property sought by the plaintiff to be exempted, in addition to its large property admittedly exempt, consisted of (1) solvent credits and notes secured by mortgage amounting to $87,043.48. It is found as a fact that the interest on these is applied exclusively and faithfully to educational, religious and charitable purposes. It seems to us that the *corpus* of this fund is "set apart and used exclusively" for such purposes. It is the only mode in which it can be so set apart and used, and it is therefore exempt until the Legislature shall declare its will to tax it. This fund is not held for "investment" in the meaning of the proviso, for that contemplates the holding of the property for the benefit (496) of the corporation, to await enhancement or future use, but here the whole use—the interest—is applied as received, for the purposes named. Any part of such fund on which the interest is not so applied, but is allowed to accumulate, would not be exempt. (2) The second piece of property is a parcel of land of about twenty acres in the town of Winston, known as "The Reservation." On the north side is a church, covering about one-third of an acre, situated on a lot fenced in of about two acres. Excluding these two acres, the reservation is found to be worth $18,000. A number of lots have heretofore been sold off, leaving the tract of the present dimensions, and public notice has been given that lots were for sale. A part of it is now under lease. This property (leaving out the church enclosure) is certainly not in use for educational, charitable or religious purposes, and was properly held liable to taxation. (3) A tract of eighty acres in West Salem, chiefly in forest, and worth $5,000. A schoolhouse stands on the eastern side. It is found as a fact that only about two acres were necessary for the use of the school. It was properly held that the remainder of the tract was liable to taxation. It would be advantageous, no doubt, to the corporation to hold the unused seventy-eight acres as an investment, and reap the benefit of the increased value which will come to real estate adjacent to a growing and prosperous town like Winston; but in the meantime such property must bear its share of the public burdens. The exemption is for property now used for religious, charitable or educa-

tional purposes, and not for property abstracted from all use or used to create a large fund in future, which fund when so created may be used for such purposes. When so used, it will be exempt (subject to legislative change), but not till then. (4) A house and lot in the town of Salem, known as the "Bishop's House," worth $3,000, which is rented out as a residence, the corporation receiving the rents therefor, which are applied to religious, charitable and educational pur- (497) poses. For the reasons heretofore stated, the rents are exempt from taxation, but not the house and lot. The house not being needed for religious, charitable or educational purposes, nor used for a church, parsonage, school or hospital, the corporation is showing business judgment in renting it out. But the act of Assembly only exempts from taxation property which is used for the specified purposes, which, in this case, is the rent. The Legislature can exempt property whose rental is so applied, but so far it has only granted exemption to property rented out when the rental is "applied exclusively to the support of the gospel." *Expressio unius, exclusio alterius.* The house and lot would be equally subject to taxation if not rented out and unused. It is only property used for the specified purposes which is exempt.

The general rule is liability to taxation, and that all property shall contribute its share to the support of the government which protects it. Exemption from taxation is exceptional. It needs no citation from reiterated precedents that such exemptions should be strictly construed, and that if we had any doubts (which we have not), they should be resolved in favor of liability to taxation. *R. R. v. Alsbrook,* 110 N. C., 137. As above modified, the judgment is

Affirmed.

Cited: Keith v. Scales, 124 N. C., 508; *Corporation Commission v. Construction Co.,* 160 N. C., 588, 590; *Davis v. Salisbury,* 161 N. C., 58; *Southern Assembly v. Palmer,* 166 N. C., 182.

(498)

W. F. CAMPBELL, ADMINISTRATOR, *v.* A. J. SMITH ET AL.

Amendment of Officer's Return of Process—Discretion of Judge.

An officer has not, "as a matter of law," the right to amend his return of process in order to correct an error, but it is within the discretion of the presiding judge to permit such amendment in meritorious cases.

MOTION by F. F. Rankin, sheriff, to be allowed to "correct" his return made on a summons in a special proceeding, which was denied by the clerk, but upon appeal from such refusal, *Battle, J.*, at Fall Term, 1894, of STOKES, permitted the amendment, and held "that as a matter of law," under the circumstances, the sheriff had a right to have the return amended. It appeared from the affidavits that a deputy sheriff having the summons to serve upon one Darian Smith, who was a doctor, and with whom he was not acquainted, asked a bystander in a courtroom whether he knew "Dr. Smith," and being directed to one Dr. J. R. Smith, made service upon the latter. The return stated that the summons had been served upon "Darian Smith."

From the order of the judge allowing the amendment, the plaintiff appealed.

Stack & Bickett for plaintiff.
Watson & Buxton for defendants.

CLARK, J. If the person upon whom a summons is incorrectly returned as "served" moves to have the record amended, he is entitled to have it amended, so far as it may affect him, as a matter of right, so that the record may "speak the truth." Not so as to the officer making the return in a proceeding against him for liability for such (499) return, for then, as to him, the record does already speak the truth, which is that he made such and such return. Whether such return was in fact true or not when made, is not a matter of record evidence. Amendments in such cases have been allowed by the courts, at the instance of the officer, to prevent hardships (*Hassell v. Latham,* 52 N. C., 465; *Patton v. Marr,* 44 N. C., 377; *Finley v. Hayes,* 81 N. C., 368), but only "by the leave of the court," in the exercise of the powers wisely vested in the presiding judge. To hold that in such cases, "as a matter of law," the officer has the right to amend his return, would be simply a repeal by the courts of every statute which the Legislature in its wisdom has seen fit to provide as a security against carelessness or fraud in the return of process. *Tomlinson v. Long,* 43 N. C., 469; *Albright v. Tapscott, ib.,* 473. The courts have never gone further than to leave the question of relief to the judgment of the presiding judge, under the discretionary power of amendment in meritorious cases. Whether even this could be done after proceeding for the penalty, or motion for amercement had been entered, was left an open question in *Manufacturing Co. v. Buxton,* 105 N. C., 74, though finally sustained in *Stealman v. Greenwood,* 113 N. C., 355. But that question is not before us. His Honor, in effect, held that he had no power, but, "as a

matter of law," the sheriff was entitled to make his amendment. In this there was error.

Error.

Cited: Grady v. R. R., 116 N. C., 953.

(500)

J. L. HALL v. LEANDER TILLMAN ET AL.

Claim and Delivery—Answer Alleging Sale and Purchase—Measure of Damages When Property is Beyond Control of Court—Liability of Sureties on Replevin Bond.

1. In an action of claim and delivery, where it appears that the defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities will be adjusted and judgment rendered against the defendant for the balance of the purchase money, with interest from the date of purchase.
2. Where, in such case, the property is placed beyond the control of the court by a sale under an order granted contrary to the course and practice of the court, reported and confirmed without objection, and the proceeds paid to the plaintiff and credited upon the irregular judgment, the defendant will be allowed credit upon the purchase money for the proceeds of the sale as of the date of sale.
3. Summary judgment will be rendered in such case against the sureties on the defendant's replevin bond for the penalty of the bond, to be discharged upon the payment of the judgment against the defendant, their bond having been given prior to the Act of 1885, chapter 50, and conditioned "that the plaintiff shall be paid such sum as for any reason may be rendered against the defendant."
4. In such case evidence as to the value of the property at the commencement of the action or the date of sale was irrelevant and immaterial, and issues presenting such questions were properly refused.

CLARK, J., dissents.

ACTION, begun by the issue of summons 19 November, 1884, in which the ancillary proceeding of claim and delivery was resorted to on the same day for the purpose of acquiring possession of a portable engine and sawmill, last heard before *Bryan, J.,* at February Term, 1893, of CHATHAM. The facts appear in the opinion.

T. B. Womack and J. B. Batchelor for plaintiff.

A. P. Gilbert for defendants.

(501) AVERY, J. The plaintiff complained for the wrongful detention of, and demanded judgment for, the property (which was detained by defendants under replevin bond), if a return could be had, for $900 damages and costs, etc. The defendants answered that they had bought the property for $800; denied that it belonged to the plaintiff or had been damaged; pleaded a payment of $100, a set-off for $35, and a counterclaim for damage done by pulling down a house in removing the machinery.

At the Spring Term, 1886, a trial by jury was had, and the verdict was set aside by consent of parties. At the Fall Term, 1886, the issues were tried by a jury, and a verdict was rendered on only two of the six issues, as follows:

1. Is the plaintiff the owner of the sawmill and engine described in the pleadings? Yes.

2. Is the plaintiff entitled to the immediate possession of said sawmill and engine? Yes.

3. What was the value of said sawmill and engine at the time of the contract of the defendants to buy?

4. What sum has been paid by defendants on the contract price?

5. What is the value of the sawmill and engine now?

6. What damage, if any, has the plaintiff sustained by reason of the detention of said sawmill and engine?

The actual value placed upon the property by the plaintiff's affidavit, upon which the first order of seizure was made, was $800, and the defendants on 28 November, 1884, gave the usual bond in the sum of $1,600, conditioned for the safe return of the property, if such delivery should be adjudged, and for the payment to plaintiff of such sum as he might recover against the defendants. At the same term when the said partial verdict was rendered it was adjudged by the court that the plaintiff recover of the defendants the sum of $666.63, with interest on $587.08 from the first day of the term till paid, together with

(502) costs of action, etc., and that unless said sum should be paid before 1 December, 1886, then the commissioners therein named should sell the property on certain terms and apply the proceeds to the payment of the judgment and costs, and the residue, if any, to the defendants.

At the Spring Term, 1887, the commissioners reported that the property had been sold in pursuance of the order for $250, and the said sum had been applied to the payment of the judgment, and on motion the said report was confirmed.

At the February Term, 1888, it was, on motion for summary judgment on the defendant's replevin bond, adjudged by the court that the plaintiff recover of the defendants and the sureties the sum of $1,600

(the penalty of the bond), to be discharged upon the payment of $448.59, with interest from the first day of the term, with costs, etc.

Judge Gilmer presided at this term.

Thereupon, at said February Term, 1888, before *Gilmer, J.*, the defendants moved to set aside as irregular and contrary to the course of the court the judgment rendered at the Fall Term, 1886, by *Connor, J.*, and from the refusal of the said motion, appealed to the Supreme Court.

It was held by this Court (103 N. C., 276, *Justice Davis* delivering the opinion) that it was not in accordance with the course of the court to render any judgment upon the findings or response to two issues, which determined only the title and right of possession, except for restitution, and that the judgment for damages that was rendered not being authorized by The Code, section 326 (as amended by the Act of 1885, ch. 5) and section 431, the jury must find, preliminary to a final judgment, upon at least one of the issues not passed upon at the former trial. Accordingly, another trial was had, and the case was heard on appeal in this Court at February Term, 1892 (110 N. C., 220), when attention was called to the fact that the defendant had set up as a defense that he became possessed of the property under a contract of sale for $800, and had made certain payments on the contract price. The (503) court held that where a defendant proved such an agreement to sell, and it also appeared that the property had been sold and was beyond the control of the court, while ordinarily the value is assessed under the statute, as amended, "as of the time of the tortious taking or wrongful detention by the defendant," with interest from that time, in such a case the purchaser would be treated as though the original taking had been tortious instead of permissive, and the damage would be assessed as of that date. And it was declared in that case, at page 227, citing *Taylor v. Hodges,* 105 N. C., 349, that where the owner reserves title in himself in a contract for sale, or takes a reconveyance by way of mortgage, "though he has the right to demand possession on default in the payment of the price or breach of the conditions of the mortgage, the sureties upon a final adjustment of their liabilities may justly demand that the jury shall find what was the price agreed upon between the parties for the property, and what sums had been actually paid." This was declared upon the principle announced in *Walsh v. Hall,* 66 N. C., 233, and substantially reaffirmed in *Wilson v. Hughes,* 94 N. C., 182, that the court will look at the transaction that is being investigated before it, without regard to the form or manner of action. The history of the transaction in this case was fully developed before the court. It was admitted on the trial that $800, the sum alleged in plaintiff's affidavit to be the value, and in the defendants' answer to be the price agreed upon at the time of the sale, was in fact the contract

price, and so, in response to the issue, was entered. The amount of the payments was found in response to another issue, and the balance still due after deducting the partial payments was the answer to the third issue. This last sum was, therefore, the amount that still remains unpaid of the original purchase money, with interest allowing for the two partial payments, with interest on each, found by the jury
(504) to have been made, and for the sum realized by the sale made by the commissioners and paid to the plaintiff, with interest thereon. So that upon the findings of the jury judgment was rendered against the defendants' sureties for $1,600, the penalty of the bond, to be discharged upon the payment of the precise amount of the original purchase money still remaining unpaid, with costs. This was an equitable adjustment of the whole matter, and was in exact accord with the opinion in *Hall v. Tillman,* 110 N. C., 226-227.

From the refusal of the court, *Judge Gilmer* presiding, to set aside the judgment first rendered by *Judge Connor,* the appeal was taken, which was first heard in this Court, and it appears (103 N. C., 281) that the Court declared there was error, and sent the case down for trial upon additional issues, only the plaintiff's title and right of possession having been determined by the previous findings. The sale which had been made under the same order and subsequently confirmed was left undisturbed, the property having passed to a purchaser, and the proceeds having been paid to the plaintiff and credited on his judgment. It was this question that was declared by this Court (110 N. C., 225) to have been adjudicated. The property having been placed beyond the control of the court, or the reach of the parties, the question of deterioration was no longer a living issue. The defendant had contracted to pay $800, and set up the contract in the answer. When he allowed the property to be sold and the proceeds applied to his debt without objection, it was equivalent, for the purposes of this appeal, to an agreement that it should be so disposed of. If the court was not in error, as we hold, in requiring the jury to ascertain as a basis of the judgment the contract price with interest, less payments, then the testimony offered, tending to show the value of the property at the commencement of the action, was irrelevant and incompetent. For the same reason the offer to show the value at the October Term, 1886, when the property was
(505) ordered to be sold, or at the commencement of the action, was properly refused, and it was not error to decline to submit issues involving the question of value at these periods.

In view of the original contract set up in the answer, and the subsequent history of the transaction, this was a cause in which the court could not properly have given any other construction than that the net damage due plaintiff was the contract price, less the payments made by

the defendants and the proceeds of sale by order of the courts, and under the statute the proper judgment was that given.

The material portion of the undertaking of the defendants was as follows: "Now, therefore, we, J. R. Jones, of Chatham County, and D. A. Palmer, of Chatham County, undertake in the sum of sixteen hundred dollars that if said property be returned to defendants it shall be delivered to plaintiff if said delivery be adjudged, *and that the plaintiff shall be paid such sum as for any cause may be recovered against the defendants in this action.*" Accordingly, the plaintiff recovered the amount still due on the original contract price. Surely this recovery falls within the express letter of the undertaking. The decision of the case as to the sureties is founded upon the language of the undertaking, and it may be that under another undertaking, differently drawn, the liability of sureties would be limited to actual value. No such case is before us. No error, and the judgment is

Affirmed.

CLARK, J., dissenting: As to the defendants, the proposition is unquestionable that the plaintiff can recover, as to him, the contract price less the payments made by the defendants, and the proceeds of sale made by order of the court. But as to the sureties in claim and delivery, it is "not so nominated in the bond." They did not become liable for the debt, but for the return of the property or its value. As on the plaintiff's objection they were debarred from showing the value (506) of the property when the replevy bond was given, the sureties were clearly liable only for its proceeds when sold, and such proceeds having been applied on the debt, they are no longer liable therefor. The condition of the bond "for the return of the property if it should be adjudged, and for the payment to plaintiff of such sum as he may for any cause recover against the defendants," means such sum as he may recover for any cause concerning the property replevied, as for failure to return the property, and for damage to or use of same, and not liability on the part of the sureties for any indebtedness of defendants to plaintiff over and above the value of the property agreed to be returned if so adjudged, and the damages caused by the detention. This is in accord with the express decision of this Court (*Davis, J.*) in this case when it was here (103 N. C., 276). The rule as to the measure of the liability of sureties laid down when the case was again here (110 N. C., 223) applies only when the property is worth or sells for more than the balance due on the contract price. I do not think the sureties on the replevy bond are bound for the deterioration of the property between the time of the contract and the date of the seizure under the claim and delivery and giving the bond thereunder.

(507)

MERCHANTS NATIONAL BANK OF RICHMOND, VA., ET AL. *v.* THE NEWTON COTTON MILLS.

Preference of Creditors—Corporation—Confession of Judgment—Validity of Confession of Judgment.

1. An insolvent corporation may, under the laws of this State, exercise preference in favor of creditors, not corporators or officers, provided it is not done with a purpose to defeat, delay or hinder other creditors or parties in interest (*Hill v. Lumber Co.*, 113 N. C., 173, and *Killian v. Foundry Co.*, 99 N. C., 501, distinguished), and subject (in the case of preference by a conveyance by deed) to the right of other creditors to avoid the preference by commencing suit to enforce their claims within sixty days from the date of the registration of the deed, as provided in section 685 of The Code: *Hence*
2. The preference of one creditor by the confession of judgment by a corporation is not void as against other creditors.
3. The term "trust fund," as used in various decisions of the courts in reference to the assets of a corporation, does not imply that upon the insolvency of a corporation its assets will be administered strictly as a trust for the benefit of all the creditors *pro rata*, but that whenever proceedings under the statute are had and the court takes charge of the assets through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights.
4. Although a confession of judgment does not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is equivalent to an express authority for its entry and sufficiently conforms to the statute.
5. A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due by a certain promissory note due and payable on a day named, and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute, provided the statement is true, for then it follows that it is shown that the amount "is justly due."
6. The failure to file with the confession of judgment the note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter.
7. It is sufficient if a confession of judgment state concisely the facts out of which the indebtedness arose, and where such confession is for "goods sold and delivered," it is sufficient, although the time of sale, quantity, price and value of the goods are not stated.
8. A confession of judgment for a greater rate of interest than the note or contract upon which it is based bears will not, in the absence of fraud, invalidate the judgment.

9. Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment.

10. A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors and does not vitiate the judgment.

APPEAL from *Allen, J.*, Fall Term, 1894, of CATAWBA. (508)

Action in the nature of a general creditor's bill brought by the plaintiffs, The Merchants National Bank of Richmond and others, against the Newton Cotton Mills, alleging the insolvency of the defendant corporation, and asking for the appointment of a receiver and the distribution of its assets among its creditors. The action was commenced in October, 1893, and was brought to the February Term, 1894, at which time, no answer being filed by the defendant, M. L. McCorkle was appointed receiver to collect the choses in action of the corporation and to sell the real and personal property, and was also appointed referee to take and state an account of the debts, liabilities and assets of the corporation and to determine the rights and privileges of the creditors in the distribution of the assets.

On 2 April, 1894, the Potter & Atherton Machine Company and James E. Mitchell & Co. appeared in the action and made themselves parties thereto, and filed their complaint, to which complaint no answer has been filed.

In said complaint they alleged that the judgments confessed by the defendant to The Merchants National Bank of Richmond and others hereinafter mentioned were void, for the reason that they were not confessed in conformity to the requirements of the statute, (509) section 571 of The Code, and for the further reason that at the time of their confession and for some time prior thereto the defendant corporation was insolvent and had no right or power to prefer one creditor to another by confession of judgment or otherwise.

The referee proceeded to take the account as ordered by the court, and filed his report at the July Term, 1894.

At said term the Potter & Atherton Machine Company and James E. Mitchell & Co. filed their exceptions as set forth in the record.

The referee held that certain judgments as set forth in the printed case were invalid, and to this ruling there was no exception before either the referee or the judge.

The referee further held that the other judgments, in favor of the following persons, to wit, The Merchants National Bank of Richmond, The Bank of Lancaster, The Exchange Bank of Chester, The Bank of

Orangeburg, The Peoples Bank of Winnsboro, Boyden & Overman, and J. R. Gaither, were valid.

James E. Mitchell & Co. and the Potter & Atherton Machine Company excepted to the ruling of the referee as to the validity of the last above-enumerated judgments and attacked the same on the grounds set forth in their exceptions, which exceptions are substantially as follows:

First. That the said judgments were not confessed in conformity with the requirements of the statute, section 571 of The Code, in the following particulars:

(*a*) That there is no authority for entering the judgments stated in the confessions.

(*b*) That it is not shown in the confessions that the sums for which judgments are confessed are justly due or to become due.

(*c*) That the evidences of indebtedness or copies of the same were not filed with, attached to, or described in the confessions.

(510) (*d*) That the said judgments were confessed for goods sold and delivered, and the time of sale, quantity, price, value of the goods and the "exact consideration" of the indebtedness are not stated in the confessions.

(*e*) That said judgments, except that confessed to J. R. Gaither, were confessed for a greater rate of interest (to wit, 8 per cent) than was allowed by the notes or contracts upon which the said judgments are alleged to have been based, which notes and contracts, when filed—not with the confessions, but before the referee—showed that they carried only 6 per cent interest.

(*f*) That plaintiffs in said judgments could not, after said judgments had been confessed and before the referee, after the hearing was begun, amend or change the same by filing the evidences of indebtedness, or resolutions, or remitting interest, or in any other respect or particular.

Second. That in the case of the three judgments confessed in favor of The Merchants National Bank of Richmond, The Exchange Bank of Chester, and The Bank of Lancaster, on 31 July, 1893, the reservation by the debtor, with the consent and agreement of the plaintiffs in the judgments, that no execution should issue until after the expiration of nine months, was a benefit reserved by the debtor for his own ease and comfort to the impairment of the rights of the other creditors, and its then insolvent condition was a fraud upon their rights, and for this reason the referee and the court should have held that the said judgments were void, or, at least, in the circumstances of this case, that they acquired no priority thereby.

Third. That the Newton Cotton Mills being utterly insolvent at the time the judgments were confessed, the referee should have held that it

had no right or power to prefer one creditor to another by confession of judgment or otherwise, and that for this reason the said judgments are void.

The judge sustained the third exception, and held that the Newton Cotton Mills, being insolvent at the time of the confes- (511) sion of the judgments, could not by the confessions prefer one or more of its creditors over others, and adjudged that after paying all costs, expenses and charges, and the debts of admitted priority, all of which are set forth and classified in the printed case, the remaining assets should be distributed *pro rata* among all the other creditors, and further held that the judgments were not invalid by reason of the other grounds set forth in the foregoing exceptions; but he did not overrule the other exceptions, as he had sustained the third exception and set aside the judgments on that ground. The Merchants National Bank of Richmond and the other plaintiffs in the confessed judgments excepted to the ruling of the judge invalidating their judgments.

James E. Mitchell & Co. and the Potter & Atherton Machine Company, in order that they might not be prejudiced by the ruling of the court upon the other grounds of objection to the said judgments, filed exceptions to his Honor's ruling in those respects, and they ask that those exceptions be considered only in case this Court should hold that the reason assigned by the court below for setting aside the judgments is erroneous.

In order to present these questions the following brief statement of the facts relating to it, as gathered from the record, is pertinent:

"The Newton Cotton Mills was a manufacturing corporation, created and organized in 1883, and in the prosecution of its business became heavily involved in the spring and early summer of 1893, so much so that its indebtedness at that time amounted to about $60,000. On 21 July, 1893, notes of the corporation for large amounts went to protest, the corporation not having, nor being able to raise, the money with which to pay them, and for some time prior to the date of the confession of the first judgments the corporation was unable to (512) pay its debts and was actually and hopelessly insolvent. Being thus insolvent, the corporation, on 31 July, 1893, confessed three judgments aggregating about $15,000 to The Merchants National Bank of Richmond, Va., The Bank of Lancaster, and The Exchange Bank of Chester, S. C., on certain antecedent debts, in the form of notes which the said banks held against the corporation as indorsees and only one of which had become due. On 11 August, 1893, the corporation confessed other judgments to Boyden & Overman, J. R. Gaither and others to a large amount; and on 14 August and 23 August, 1893, it confessed other judgments, among others to the appellants, The Peoples Bank of Winns-

boro, The Exchange Bank of Chester, and The Bank of Orangeburg, S. C., the said judgments amounting in all to $50,000 or $60,000.

"The entire property of the corporation was sold on 2 April, 1894, after extended advertisement, for the sum of $31,000, and the court found that the property had sold for a fair price, and without objection confirmed the sale; and the property of the corporation was in better condition at the time of the sale than when the judgments were confessed. The property of the corporation, outside of that sold on 2 April, 1894, was not worth exceeding five hundred dollars."

Jones & Tillett and L. L. Witherspoon for plaintiffs.

Walker & Cansler and W. P. Bynum, Jr., for Potter Machine Co. and Mitchell & Co., appellees.

MACRAE, J. Let us examine first the case presented by the appeal as to the right of an insolvent corporation to make a preference. It is contended with great learning and research by the counsel for the appellees that when a corporation becomes insolvent it is thence-
(513) forward unlawful for its directors to make any preference in the payment of its debts, but that all its property must be kept and administered for the common benefit of all its creditors, in the same manner as if the receiver had taken charge thereof under sections 379 and 668 of The Code.

The late cases of *Hill v. Lumber Co.*, 113 N. C., 173, and *Foundry Co. v. Killian*, 99 N. C., 501, are cited as direct authority for such contention.

If it has been adjudged by this Court that such is the law, every consideration in favor of the stability of judicial decision demands, except in the face of manifest error, that we should abide by it.

This leads us to inquire what was decided in *Hill v. Lumber Co.* The question there was to the validity of a preference made in favor of a director of an insolvent corporation. His duties and liabilities, as one occupying a fiduciary relation to the stockholders and creditors, were there discussed, and the language of the opinion delivered is to be understood in its application to the facts of that case. In the examination and decision of appeals we are confined to the questions at issue; whatever is written must be taken with reference to its environment, and that which, isolated, would be a broad proposition, when considered in connection with the subject-matter under discussion may be and generally is restricted in its meaning. It is the tendency to give further effect than was intended to words used in reference to a particular state of facts, which sometimes confuses the interpretation of the law and makes

that broader and more comprehensive which in its application to the case at bar is simple and plain.

Could a director of an insolvent incorporation, who was also a creditor, take advantage of the means of information at his hands and so protect himself to the injury of other creditors who were debarred from the same opportunities? Herein was invoked the principles of equity, the relation of trust and confidence borne by the director (514) to all the stockholders and extended in case of danger of loss to all the creditors, and the broad proposition, so often stated and so often explained in cases like the present, where it was thought to extend its meaning beyond the purposes for which it was used, was laid down that a director is a trustee, first for the stockholders and then for the creditors. The present question was in that case not necessary to be, and was not, decided, and if it had been in express terms decided, such decision would have been simply a *dictum,* binding no one further than in its application to the question then before the Court.

Understood as used and applied in *Hill v. Lumber Co.,* in case of the insolvency of a corporation, and as against the fiduciary in charge of its assets, those assets *are* a trust fund, and the general creditors are at least entitled to be secured out of the assets upon equal terms with the directors, who are also creditors.

But after diligent examination we find that by the laws of this State corporations have never been restrained from the exercise of preference in favor of creditors, not corporators, further than individual persons are, subject, of course, in both instances to the controlling principles of the statute of frauds that these preferences must not be made with a purpose to defeat, delay or hinder other creditors or parties in interest. We may here say that the expression used in *Hill v. Lumber Co.,* that creditors have a lien upon the assets, was a quotation from 2 Story Eq. Jurisprudence, section 1252, where the word *lien* is explained to mean simply a right of priority of payment in preference to any of the stockholders in the corporation.

Foundry Co. v. Killian, 99 N. C., 501, presented one single question—the liability to creditors of corporations, of the stockholders thereof to the extent of their unpaid subscriptions—and the decision there was founded upon the principle that the property, including the capital stock, paid and unpaid, constitutes a fund for the benefit (515) of creditors, "that the capital stock of a corporation is a trust fund to be preserved for the benefit of corporate creditors."

Our laws provide for the appointment of a receiver of an insolvent corporation, or one in imminent danger of insolvency. This appointment is to be made on application of any creditor, stockholder or member of such corporation. The Code, sec. 668, as in *Killian's case.* And

when the receiver shall have collected the assets he is required to pay all the debts, if the funds shall be sufficient, and, if not sufficient, to distribute the same ratably among all the creditors who shall prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed *pro rata* among the creditors, subject to such priorities as have already accrued.

It is provided in section 685 that corporations may convey by deed, but that such conveyance shall be void as to existing creditors, etc., provided proceedings to enforce such claims be commenced within sixty days after the registration of said deed. The converse of this provision is, if no creditor or party injured brings his action within sixty days his remedy fails and the conveyance is good. Thus, a conveyance by an insolvent corporation, not forbidden by the statute of frauds, is good unless some creditor or party injured objects within sixty days.

These corporations, creatures of the statute, artificial persons, under the direction of the Legislature, have all the rights and liabilities, generally speaking, of individual persons. Before the passage of the amendment to the Act of 1798, we think by Laws 1872, now section 685 of The Code, a corporation might convey land, etc., by deed executed according to the statute or common law. The amendment added the provision that any such conveyance should be void as to pre-
(516) existing debts and torts, "provided such creditors or persons injured shall commence proceedings, etc., within sixty days after the registration of said deed as required by law." The effect of this amendment is not to make void such deeds as against creditors and persons injured unless proceedings are begun in sixty days. This has been expressly decided in *Blalock v. Manufacturing Co.*, 110 N. C., 99, which was cited with approval in *Hill v. Lumber Co.*

This question, then, is settled in North Carolina against the contention of the appellees and the judgment of his Honor below.

The meaning of the words "trust fund," as used in this connection, is to be explained, as it has been many times in other courts, not strictly a trust to be administered in the first instance upon the insolvency of the corporation for the benefit of all the creditors *pro rata*, but whenever proceedings under the statute are had, and the court takes charge of the assets through its receiver, it will make equitable distribution among all the creditors of all the assets not subject to prior liens or rights. Until such jurisdiction takes hold of the assets they are subject to the action of the individual creditors, and such preferences may be made by the corporation as a natural person might make under the same circumstances of insolvency.

The present exigency will not permit us to notice the many authorities adduced by the learned counsel in support of the contrary doctrine

We must content ourselves with a reference to the language used in *Hollers v. Brierfield,* 150 U. S., 371, in reference to the ordinary meaning of these words (trust fund) in the present connection: "While it is true, language has been frequently used to the effect that the assets of a corporation are a trust fund held by the corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur., section 1046, they are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor." (517) After reviewing many cases in that Court where these words are used or explained, the Court proceeds: "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into its possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto. As between itself and its creditors the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor. The assets of such a corporation (an insolvent bank) are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process." *Curran v. Arkansas,* 15 How., 304. The text-writers, while criticising the doctrine with singular unanimity, admit its existence. In 2 Morawitz Private Corporations, section 802: "In the absence of statutory prohibition a corporation has the same power of making preferences amongst its creditors in the distribution of its assets as an individual." This is stated as collected from the repeated decisions of the courts, although the author in the next section, in giving his own views, strongly combats the principle. To the same effect is 2 Shelly Corporations, section 99: "However unjust it may appear in principle, it seems to be settled by the decisions that a corporation may, prior to any interference with the conduct and management of its agents on account of its insolvency, and in the absence of different provisions in bankrupt or insolvent laws, give a preference in payment or security to one creditor or class of creditors over another." And 2 Waterman Corporations, section 208: "A corporation, unless restrained by its charter or by statute, has the same right to prefer one creditor to another in the distribution (518) of its property as an individual, and it may execute a mortgage or give a lien which shall operate as a preference." The author, after admitting that this doctrine is recognized both at law and in equity, proceeds to question its justice.

Seeing, then, that it has already been settled in this State, and is recognized as the law by the Supreme Court of the United States, and admitted by the text-writers, we must declare that his Honor was in error in holding these preferences void as against the other creditors.

It is contended by Mitchell & Co. and the Potter & Atherton Machine Company, appellees, that although they did not appeal from the judgment of the court below, the judgments confessed in favor of The Merchants Bank of Richmond and others were in conformity to the statute, sections 570, 571 and 572 of The Code, they are entitled to have their exceptions to this ruling considered here, in order that if this Court shall be of the opinion that for any reason the conclusion reached by his Honor that said judgment creditors are not entitled to preference or priority over other creditors, the judgment below ought to be affirmed. Conceding this last proposition, under the authority of *Bell v. Cunningham,* 81 N. C., 83, we proceed to consider the question whether said judgments were confessed in conformity to the statute.

We reproduce here a copy of the proceedings on the judgment confessed in favor of The Merchants Bank of Richmond, as all the others except one are substantially similar.

$5,371.60. NEWTON, N. C., 16 March, 1893.

Four months after date we, the Newton Cotton Mills, promise to pay to the order of Heath, Springs & Co., five thousand three hundred and seventy-one and sixty one-hundredths dollars, at Mercantile
(519) National Bank, New York. Value received.

NEWTON COTTON MILLS,
By W. H. WILLIAMS, *President.*

Due 16-19 July, 1893.

NORTH CAROLINA—Newton Township,

CATAWBA COUNTY, 31 July, 1893.

At a meeting of the stockholders of the Newton Cotton Mills, this day duly called, all the stock being represented at such meeting, it was unanimously resolved that the president, W. H. Williams, be and he is hereby authorized to confess judgment against the Newton Cotton Mills, and in favor of The Merchants National Bank of Richmond, Va., for the sum of five thousand three hundred and seventy-one and sixty one-hundredths dollars, for money due the said bank by the corporation. Also, to confess judgment against the corporation in favor of The Exchange Bank of Chester, S. C., for the sum of forty-eight hundred and thirty-two and thirty-eight one-hundredths dollars, for money due the said bank by note made to Heath, Springs & Co., and indorsed to it, which

said note will become due 4 August, 1893. Also, to confess judgment against the corporation in favor of The Bank of Lancaster, S. C., for the sum of forty-seven hundred and fifty-six dollars and ten cents, due by the corporation to said bank upon two notes made by it to Heath, Springs & Co., the one to become due on 20 August, 1893, for twenty-four hundred ($2,400) dollars, and the other to become due on 27 August, 1893, for twenty-three hundred and fifty-six and ten one-hundredths dollars, which said notes have been indorsed to the said bank by Heath, Springs & Co. All of the said judgments are authorized to be entered in the Superior Court of Catawba County, North Carolina.

I certify that the foregoing is a full, true and perfect copy of the resolution passed this day at a meeting of stockholders of the (520) Newton Cotton Mills.

W. H. WILLIAMS, *President,*
Newton Cotton Mills.

G. A. WARLICK, *Secretary.*

STATE OF NORTH CAROLINA—County of Catawba.

In the Superior Court.

THE MERCHANTS NATIONAL BANK OF RICHMOND, VA., *v.* THE NEWTON COTTON MILLS.

The Newton Cotton Mills by W. H. Williams, president, being thereunto duly authorized by the Newton Cotton Mills, hereby confesses judgment in favor of The Merchants National Bank of Richmond, Va., the plaintiff above named, for the sum of five thousand three hundred and seventy-one dollars and sixty cents, with interest at 8 per cent from 19 July, 1893. This confession of judgment is to secure the plaintiff the sum above named, which is due by a certain promissory note made by the Newton Cotton Mills to the firm of Heath, Springs & Co., and the said Heath, Springs & Co. indorsed to the plaintiff for value, which said note became due and payable on 19 July, 1893. That the consideration of this note was for cotton sold and delivered to the Newton Cotton Mills by Heath, Springs & Co.

NEWTON COTTON MILLS,
By W. H. WILLIAMS, *President.*

NORTH CAROLINA—Catawba County.

Before me, J. F. Herman, Clerk of the Superior Court of Catawba County, personally appeared W. H. Williams, president of the Newton Cotton Mills, who, being duly sworn, maketh oath that the statement above signed by him is true. W. H. WILLIAMS.

Subscribed and sworn to before me 31 July, 1893.

J. F. HERMAN,
Clerk Superior Court.

(521) Upon filing the foregoing statement and confession, it is ordered and adjudged by the court that the plaintiff, The Merchants National Bank of Richmond, Va., do recover of the defendant, the Newton Cotton Mills, the sum of five thousand three hundred and seventy-one dollars and sixty cents, with interest at 8 per cent from 19 July, 1893, and costs of action.

J. F. HERMAN,
Clerk Superior Court.

31 July, 1893.

I agree that no execution issue on this judgment until after six months from date.

H. C. JONES,
Attorney for Plaintiff.

The first objection is, that there is no authority for entering the judgments stated in the confession. The Code, sec. 571, provides that "a statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. "It must state the amount for which judgment may be entered, *and authorize the entry of judgment therefor.*" It will be noted that there are no words in the confession expressly authorizing the clerk to enter the same upon the records, but the record does show that the said confession was sworn to and filed, and judgment thereupon entered. The necessary result of the proceedings was to authorize the clerk to enter the same upon the record. The filing with him could be for no other purpose, and we think that the confession itself, with the filing thereof, was express authority for its entry.

2. "That it is not shown in the confession that the sums for which judgments are confessed are justly due, or to become due." It will be observed that it states the amount for which the judgment is confessed, that the same is due by a certain promissory note described therein, which said note became due and payable on a day named, and that the consideration for the same was cotton sold and delivered. The requirement of the statute (the same section last named in subsection 2) is not that it shall *state,* but "and must *show* that the sum confessed
(522) therefor is justly due, or to become due." If the statement is true, it follows that it is shown to *be justly* due.

3. "That the evidences of indebtedness, or copies of the same, were not filed with, attached to or described in the confessions." We do not understand that the failure to file the specialty, when a judgment is rendered, has the effect to invalidate the judgment. Frequently, in practice, when the complaint is upon a promissory note, and there is an answer filed admitting the debt, or where the complaint is verified and no answer filed, judgment is entered and the attorney permitted to bring in the note at subsequent time. The note is not strictly part of the

record, though it should be produced, that it may be canceled when required. In this respect there is no difference between a judgment rendered according to the ordinary course of the court and one by confession. "Among the matters which are not (unless made so by bills of exceptions, or by consent, or by order of court) matters of record, are all matters of evidence, written or oral, including note, bond or mortgage filed in the case, and upon which suit is brought." Freeman on Judgments, 79.

The note upon which the judgment is confessed is thus described in the statement: "A certain promissory note made by the Newton Cotton Mills to the firm of Heath, Springs & Co., and the said Heath, Springs & Co. indorsed to the plaintiff for value, which said note became due and payable 19 July, 1893." We think this is sufficient description to enable a party to make inquiry and ascertain the truth of the matter. 2 Freeman, *supra,* 549.

4. "That the said judgments were confessed for goods sold and delivered, and the time of the sale, quantity, price, value of the goods and 'the exact consideration' of the indebtedness are not stated in the confessions." It is required by the statute that "it must state concisely the facts out of which it arose." Recently, in considering similar objections to a confessed judgment, to those now taken, where (523) the affidavit stated that the amount was due "on a bond under seal for borrowed money, due and payable 2 November, 1876," we held the statement sufficient. *Uzzle v. Vinson,* 111 N. C., 138. See also, 1 Black on Judgments, 63.

5. "That said judgments, except that confessed to J. B. Gaither, were confessed for a greater rate of interest (to wit, 8 per cent) than was allowed by the notes or contracts upon which the said judgments are alleged to have been based, which notes and contracts when filed, not with the confessions, but before the referee, showed that they carried only 6 per cent interest." It appears in the case that upon the hearing before the referee these judgment creditors remitted all claim for interest over 6 per cent. The question is, whether the confession of judgment for a greater amount of interest than was justly due was rendered void thereby, or could the judgments stand for the true amount, interest at 6 instead of 8 per cent. As we have indicated, the object of the statute in requiring a concise statement of the facts constituting the liability does not necessitate a full history of the whole transaction, does not require a bill of particulars, but does require such a statement as will enable one who desires to inquire into the transaction, to do so by reference to the statement made. It would not be contended that an ordinary judgment could be vacated for an overcharge of interest, unless the act was fraudulent. Here, by reference to the note which, if not filed with

the confession, might be required to be produced by proper proceeding, it would at once be ascertained that the interest confessed was too great. The remedy would be the correction of the judgment to that extent, but unless fraud was shown it would not vitiate the judgment. *Hord v. Foster,* 11 S.-W., 763; 2 Freeman Judgments, 545, 549.

6. "That plaintiffs in said judgments could not, after said (524) judgments had been confessed, and, before the referee after the hearing was begun, amend or change the same by filing the evidences of indebtedness or resolutions, or remitting interest, or in any other respect or particular." If the proceeding were so defective in form and substance that it was void upon its face, no amendment could be made to give it life; but if there were irregularities which, in ordinary judgments might be cured by amendment, there is no reason why they could not be amended. 1 Freeman, *supra,* 66, 67. No liens had been acquired by the appellees by force of the filing of their complaint. Our statute, The Code, sec. 273, is liberal in the power granted the court to allow amendments.

The next objection is that to the three judgments confessed in favor of The Merchants Bank of Richmond, The Exchange Bank of Chester and The Bank of Lancaster, the stipulation at the foot that no execution should issue in six months, was a benefit reserved by the debtor for his ease and comfort, to the impairment of the rights of other creditors, and, therefore, a fraud which vitiated these confessions.

The lien of the judgments began from the docketing of the same, as to real estate of the judgment debtor. There is no requirement of law that a judgment creditor should at once proceed to have execution. There is no lien upon personal property, except from the levying. If there were any personal property to be subjected to the payment of the debts of the corporation, this stipulation was more for the benefit than to the detriment of other creditors. And the lien on real estate having been acquired by the docketing of the judgments, their rights could not be affected by the agreement on the part of the judgment creditors to a *cessat executio.*

What we have written disposes of all the exceptions except the additional one as to the Gaither judgment, that he was permitted to amend by appending an itemized statement of his open account, and this before any liens had been acquired by the appellees. This amendment it was in the power of the court to permit. 2 Freeman, *supra,* 554; 1 (525) Black, *supra,* 66. These matters connected with confessions of judgments have been quite fully considered by this Court, and the rule laid down in *Davidson v. Alexander,* 84 N. C., 621, has been upheld, that the confession must contain a concise, verified statement of the facts, circumstances, business transactions and considerations out of which the indebtedness arose. What constitutes such a concise state-

ment has been considered in *Davenport v. Leary,* 95 N. C., 203; *Nimocks v. Shingle Co.,* 110 N. C., 20, and in *Uzzle v. Vinson, supra.*

In *Nimock's case* it was said: "Ordinarily, a corporation should act through its properly constituted board of directors, or its officers or agents duly authorized to do particular acts, such as confessing a judgment. That the officer or agent was authorized to have the judgment confessed, as directed, should appear to the clerk *in some way,* as by a properly authenticated certificate of the proceedings of the directors of the company, and this should be filed with the statement in writing of the claim upon which the judgment is founded. This *perhaps* would be the better course." In our last case, the affidavit set out the authority, but the authority itself, though presumably submitted to the clerk when the judgment was confessed, was not filed until later. We are of the opinion that the failure to *file* the authority at the time of the confession does not vitiate the judgment.

Having disposed of the exceptions of the appellees, as if the points had been made in an independent action to vacate for fraud or other cause making void the judgment, and not upon a motion to set aside for irregularities, it follows that in our opinion there was error in the judgment of his Honor that these judgments were void as to the other creditors, *for any reason.* The judgment will be modified so as to direct the satisfaction of these judgments, after the payment of the mechanics' and laborers' liens, except that of the Potter Machine Company, instead of placing them in the class with all the unpreferred (526) claims proved before the referee.

Modified.

Cited: Cotton Mills v. Cotton Mills, ante, 477, 488; *Light Co. v. Light Co.,* 116 N. C., 120; *Smith v. Smith,* 117 N. C., 351; *Graham v. Carr,* 130 N. C., 273, 274; *Smathers v. Bank,* 135 N. C., 414; *Holshouser v. Copper Co.,* 138 N. C., 251; *Martin v. Briscoe,* 143 N. C., 356; *McIver v. Hardware Co.,* 144 N. C., 483; *Powell v. Lumber Co.,* 153 N. C., 56; *Silk Co. v. Spinning Co.,* 154 N. C., 427; *Whitlock v. Alexander,* 160 N. C., 468; *Whitlock v. Alexander, ib.,* 482; *Gilmore v. Smathers,* 167 N. C., 444; *Drug Co. v. Drug Co.,* 173 N. C., 508.

J. M. PROPST v. JULIUS MATHIS.

Practice—Pleading—Plea of Pendency of Another Action—Hearsay Evidence.

1. The rule governing the plea of the pendency of another action is that the same plaintiff shall not sue the same defendant twice for the same thing; and when the parties are the same and the thing sued for is the same, the right shown in both actions must be identical.
2. When, in order to prove the probate and contents of a will, a party was allowed to testify as to what a former clerk of the court read to him from the records which the clerk told him was the record of the will: *Held*, that the testimony, being hearsay, was inadmissible, and the fact that the one whose unsworn statement was allowed to go to the jury as evidence was the keeper of the record does not justify a departure from the rules relating to hearsay testimony.

ACTION to recover possession of a tract of land, tried at Fall Term, 1894, of BURKE, before *Allen, J.*, and a jury.

The defendant, among other defenses, relied upon the pendency of a former action at the commencement of this action, and one issue submitted to the jury by consent of the parties was as follows: "Was there another action pending between the plaintiff and defendant at the commencement of this action involving the controversy in this action?"

The record in said former action was introduced in support of said plea, and a copy of the summons, complaint, answer and judgment therein are herewith filed as a part of this case.

(527) It was admitted that Joseph Propst, who was a party to said former action, died before the commencement of this action, and that the land described in the complaint in this action is a part of the land described in said former action. The court was of opinion that said former action did not involve the controversy in this action and was no bar, and instructed the jury to answer said issue "No," to which defendant excepted.

The plaintiff, J. M. Propst, was examined as a witness in his own behalf, and testified as follows: "I came to Morganton in 1853 to the clerk's office; W. S. Sudderth was then Clerk of the Superior Court; I asked him to show me the will of Adam Overwenters; he took a book, then in his office, and read it to me, and said it was the will of said Adam. It was a large bound book he read from (and witness was here shown a will-book from clerk's office of date since 1868), and he said the book read from was like that. The will devised the land to the wife of Adam Overwenters for life and then to two daughters."

Evidence was offered to show that the record of wills in Burke County was destroyed in 1865-66; that the record and original of the will of Adam Overwenters could not be found.

The plaintiff relied upon the will of Adam Overwenters in deducing his title. The defendant excepted to the admission of the evidence as to the contents of said will. There was other evidence to which no exception was taken, and no exception was taken to the instruction given to the jury.

Verdict and judgment for plaintiff. Appeal by defendant.

J. T. Perkins for plaintiff.
S. J. Ervin and I. T. Avery for defendant.

BURWELL, J. The record which was introduced in evidence to sustain the plea of the pendency of another action does not effect that object. In that action there are a number of plaintiffs, of which (528) the plaintiff J. M. Propst is one. That controversy is concerning a tract of land, of which the land in dispute here is only a part. The rule is that the same plaintiff shall not sue the same defendant twice for the same thing, and when the parties are the same and the thing sued for is the same, the right shown in both actions must be identical. *Casey v. Harrison,* 17 N. C., 244. The pendency of that action did not render the bringing of this one unnecessary and vexatious. The parties are not the same, and the purposes of the actions also differ. In that suit the object which those plaintiffs principally sought to accomplish was the establishing of the will of Adam Overwenters, the record of which had been destroyed, as they alleged. They did not seek to recover possession of the tract of land. In this action one of those plaintiffs demands the possession of twenty-four acres, which he alleges that the defendant wrongfully withholds from him, and damages for its detention.

We think that the evidence which the plaintiff was allowed to introduce in order to establish the fact that Adam Overwenters' will was probated, and also its contents, should have been excluded. It seems to us to have been mere hearsay. He was allowed to tell what the clerk told him. The fact that the one whose unsworn statement was thus allowed to go to the jury as evidence was the keeper of the record, the contents of which it is proposed to establish, does not afford a sufficient reason for the violation in this instance of the well-settled rules governing the admission of testimony. No witness, so far as this record shows, was produced who could say upon oath and subject to cross-examination, that the will of Adam Overwenters was ever recorded in Burke County. Indeed, so far as appears, no witness was called who testified that any such will ever existed. We do not think that the plaintiff should

(529) have been permitted to prove the existence of this will, its probate, and its contents, by the mere statements of the clerk. To allow this would be to give to his oral communications the effect which is given by law to his solemn certificate, for the use of which as evidence the statute provides. *Nelson v. Whitfield,* 82 N. C., 46, seems to sustain the ruling of his Honor. In that case, however, the fact that the will which was there in controversy had been probated was proved by the testimony of one who had himself read it on the records. Its contents were proved by the oath of other witnesses, who could only testify that they had heard others read what was said to be the will or a copy of it. The learned *Justice* who delivered the opinion of the Court in that case says that "the evidence offered on the part of the defendants relating to the contents of the paper purporting to be the will was slight, and taken by itself might not have been sufficient to satisfy the jury of the contents, but it was some evidence, and when taken in connection with the facts proved, the long possession of the defendants and their ancestors in conformity with the alleged provisions of the will, and the long acquiescence of the plaintiffs in the exclusive possession of the land by the defendants it makes a very strong case for them." While it may have been allowable in that particular case, in connection with the facts proved, to permit evidence of what a person read as the will, we do not think in this case any sufficient reason exists for allowing the plaintiff to tell what the clerk told him. We are not able to see how the fact that he whose words are to be repeated was the keeper of the records that he professed to be reading can alter the wholesome truth that forbids the admission of such evidence because it is mere hearsay—a statement made neither under oath nor subject to cross-examination. There is, as it seems to us, no greater presumption that the clerk would read correctly than that he would speak truthfully about the contents of the will. The same
(530) sound reason that would require us to exclude what he said if it was offered, compels us to exclude what he read.

New trial.

Cited: Jones v. Flynt, 159 N. C., 98.

W. D. SPRAGUE v. L. N. BOND ET AL.

Deed Absolute Intended as Mortgage—Equitable Relief, When Granted.

A deed absolute on its face will not be converted by the courts into a mortgage unless upon allegation and proof that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue advantage taken of the bargainor.

AVERY and CLARK, JJ., did not sit on the hearing of this case.

ACTION, tried at Spring Term, 1894, of CALDWELL, before *Winston, J.*, and a jury.

The nature and history of the action, and the facts developed on the various trials of the same, appear in the reports of the several appeals—see 108 N. C., 382; 111 N. C., 425; 113 N. C., 551—and the facts necessary to the understanding of the decision of this appeal appear in the opinion of *Chief Justice Shepherd.*

M. Silver and I. T. Avery for plaintiff.
S. J. Ervin for defendants.

SHEPHERD, C. J. Several exceptions are presented in the record, but, in order to dispose of the appeal, it is only necessary to consider the ruling of his Honor in reference to the deed executed by the plaintiff to the defendant Rebecca B. Adams. This deed is absolute in its terms, and recites that it was made in consideration of $2,000 paid by the grantee. The plaintiff contends that this deed was intended as a security for certain indebtedness, but there is no allegation that the clause (531) of defeasance was omitted by reason of a mistake of the draughtsman. Indeed, it appears that the instrument was prepared by counsel learned in the law, and the plaintiff himself testifies that he cannot say that anything was omitted which was intended to be inserted in the same. Neither is there any allegation or proof that the deed was procured by reason of undue advantage, or ignorance of the plaintiff, or that it was executed under circumstances of oppression growing out of the relation of debtor and creditor, or any other species of fraud whatsoever. The case is simply one where an absolute deed is delivered to the grantee through her agent, and the question is whether, under the circumstances above mentioned, it can, under our decisions, be converted into a mortgage upon the bare allegation and proof that it was so intended by the parties. There is a practical uniformity of judicial decision that an absolute deed may be shown to be a mortgage, but there is a great diversity of opinion as to the grounds upon which this well-known equitable jurisdiction is exercised.

Perhaps a majority of the cases hold that fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief; and in others it is held that it is deemed a fraud on the part of the grantee to deny that the instrument was intended as a security, and that equity takes jurisdiction on this ground. In Georgia it is enacted that fraud in the procurement of the instrument is the issue to be tried; and in Pennsylvania, for the purpose of upholding titles, a statute has been passed declaring that an absolute deed cannot be shown to be a mortgage, except by a written defeasance signed, sealed, acknowledged and recorded. 1 Beach Modern Eq. Jur., 407. "In other States," says Mr. Beach, "the relief is based upon some ordinary grounds of equitable jurisprudence, such as fraud, accident or mistake, and this is the rule," he remarks, "in North Carolina, (532) Alabama, Connecticut, Florida, Kentucky, Rhode Island, South Carolina, and, perhaps, Michigan." See also, 1 Jones Mortgages, 310. That these authors are correct in their classification as to North Carolina is abundantly manifest from our decided cases. The decisions are so numerous, and the doctrine is so well established, that we need refer to only a few of our authorities.

In *Brown v. Carson,* 45 N. C., 272, the Court said: "The bill, in effect, seeks to correct a deed absolute on its face and to hold it as security for a debt. To do this it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage."

In *Briant v. Corpening,* 62 N. C., 325, the Court said: "The bill is filed for the purpose of converting a deed absolute on its face into a mortgage. To accomplish this, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage taken of the bargainor. There is no such allegation in the present bill. In one place it is stated that the plaintiff 'executed a deed of conveyance for the above described land to defendant Corpening absolute upon its face, but intended simply as a mortgage, as will more fully appear by the proofs.' To this is added that 'plaintiffs show that it was the contract and agreement of the parties that defendant Corpening, having paid the debt to Harper, took the deed absolute on its face, but agreed to make a title bond at a subsequent day to the plaintiffs, conditioned to reconvey on the payment of the debt, interest, etc., on the judgment in favor of Harper.' These are all of the allegations on the subject, and not one of them amounts to a statement that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. The necessity of such an allegation is shown by the case of *Brown v. Carson,* 45 N. C., 272, and by several other cases contained in 3 Batt. Dig., Tit. "Mortgages."

We have thus quoted at length from the opinion of the careful (533) and accurate *Justice Battle,* because the allegations in the case then before the Court were as strong, if not stronger, than the one now under consideration. Whatever may be the language of some of the early cases, the doctrine laid down in those we have cited has been consistently adhered to ever since. See *Link v. Link,* 90 N. C., 238, in which a number of cases, decided before and since *Corpening's case,* are cited in support of the principle therein stated. See also, *Egerton v. Jones,* 102 N. C., 278; *Norris v. McLam,* 104 N. C., 159, and *Green v. Sherrod,* 105 N. C., 197. The allegations in the *McLam case* were much stronger than in this, and the Court held that the complaint did not set forth a cause of action. The Court said: "It is well settled that in order to convert a deed absolute on its face into a mortgage it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. *Streator v. Jones,* 5 N. C., 149; *Bonham v. Craig,* 80 N. C., 224." It was only after a long struggle that the English courts of chancery entertained a bill to convert an absolute deed into a mortgage, it being stoutly contended that it would partially abrogate the statute of frauds. The jurisdiction was finally exercised both in England and America, but, as we have seen, there is much conflict as to the principle, as well as the conditions, under which the relief is granted. We see no reason to depart from the conservative view taken by this Court, and especially in consideration of the fact that such questions, seriously involving, as they do, the stability of titles, are no longer tried by learned Chancellors whose training and experience better enable them to detect the falsity of claims of this character and to guard against which the statute of frauds was wisely enacted.

The existence of a debt, the inadequacy of price, the retention of possession, may, in connection with other circumstances, be evidence of fraud, undue advantage or oppression where proper allegations (534) are made, but, as we have said, we can find nothing in this case which brings it within the principle upon which relief may be given. Neither can we see how the principle that parol evidence may be admitted to rebut an equity applies, as the case is now presented. The defendant Rebecca, under the terms of her deed, was the equitable owner of the lands for which the grants have been issued. The land has been sold and the controversy relates only to the proceeds of the sale. Under her deed she is entitled to those proceeds, and it is unnecessary nor does she seek a specific performance so as to acquire the legal title to the land. Being the equitable owner of the proceeds under the deed, it may be shown that she has conveyed or abandoned the same, or that she is estopped from claiming them, but for the reasons we have given the terms of the deed under which she claims cannot be contradicted as the

case now appears before us. We think there was error in the ruling in question, and that there should be a new trial. As the issues as to abandonment were not passed upon by the jury, we forbear a discussion of the exceptions relating to them.

New trial.

Cited: Porter v. White, 128 N. C., 44; *Coxe v. Carson,* 169 N. C., 139; *Newton v. Clark,* 174 N. C., 394.

(535)

L. L. JENKINS v. THE GASTONIA COTTON MANUFACTURING COMPANY.

Contract—Corporation—Void Contract—Ratification—Renting—Payment of Rent Evidence of Contract.

1. A contract by a corporation in excess of $100 for the renting of premises, not being in writing and therefore being void under section 683 of The Code, could not be ratified by the occupation of the premises after the repeal of that statute.
2. Regular payments of rent, in the absence of an express agreement that the tenancy shall be at will, raise the presumption of a contract for a time certain; and, therefore, when a corporation had rented premises from A from year to year, and, upon purchase by B of the premises three days before the repeal of section 683 of The Code, had paid him the rent quarterly from the time of the sale to 1 October, 1893, and then surrendered the premises: *Held,* in an action by B for the rent of the last quarter of 1893, that there being no contract confining the tenancy to the quarter ending 1 October, 1893, evidence of the occupation of the premises and regular payment of rents should have been submitted to the jury, with proper instructions, that they might determine the rights of the parties.

ACTION, tried before *Boykin, J.,* and a jury, at Spring Term, 1894, of LINCOLN, on appeal from a justice of the peace.

The plaintiff complained that the defendant was indebted to him in the sum of $90.25, and interest on the same from 1 January, 1894, until paid, the same being due by contract for rent of two store-rooms and office, from 1 October, 1893, to 1 January, 1894. The defendant denied the indebtedness; and as a further defense the defendant alleged "that the contract sued on by the plaintiff involved and imposed upon the defendant a liability in favor of the plaintiff for a sum of money greater than one hundred dollars, and that said contract was not reduced to

writing and signed by a duly authorized officer of said defendant, nor was the same under the seal of the defendant company, and that such alleged contract is void under section 683 of The Code of (536) North Carolina."

There was much testimony on both sides as to the contract between defendant and the hotel company, and the public sale of the premises, and announcement of the crier concerning the rights of the tenants. The sale took place two days after the repeal of section 683 of The Code, which required contracts with corporations by which a liability exceeding $100 might be incurred to be in writing, and plaintiff contended that the occupation of the premises by defendant, after said date, was evidence of a new contract of renting by the year, or at least for the balance of that year.

There was judgment for the defendant, and plaintiff appealed.

Jones & Tillett and D. W. Robinson for plaintiff. (537)
Walker & Cansler for defendant.

MACRAE, J. We do not deem it necessary to have the testimony set out in the case, for we have repeatedly considered the statute, section 683; and at this term in *Spence v. Cotton Mills, ante,* 210, we have held that such contract, not being in writing and in compliance with the statute, and being executory in its nature, was void and incapable of ratification. The plaintiff cannot, therefore, be aided by the principle laid down in *James v. Russell,* 92 N. C., 194, that where one stands silently by and hears a contract made by him for another he is bound by it, for a void contract could not be ratified or continued.

But the defendant became the tenant of plaintiff on 13 February, 1894, and paid the rent to him by the quarter, as if the quarter had begun on 1 January, 1893. No special contract was made between the plaintiff and defendant, and we can have no light from the dealings between defendant and the former owner. Did this constitute defendant plaintiff's tenant up to 1 January, 1894? Tenancies at will are not favored, and regular payments of rent, there being no express agreement that the tenancy shall be at will, raised the presumption of a contract for a time certain. "In the absence of words limiting or defining the nature of a tenancy, the principal test of a tenancy from year to year is whether there is a reservation of *annual rent,* or payment of, or an agreement to pay rent for such an aliquot part of a year, as monthly, quarterly or half-yearly, so that a presumption can be raised that the parties intended to create such a tenancy." 2 Wood Landlord and Tenant, 97; *Steadman v. McIntosh,* 26 N. C., 291. There was in this

case evidence to show occupation and three quarterly payments, and no contract confining the tenancy to the quarter.

We are of opinion that this evidence should have been sub-
(538) mitted to the jury, with proper instructions, that they might determine the rights of the parties.

New trial.

S. F. MYER & CO. v. A. W. REEDY ET AL.

Guaranty—Release of Guarantors.

Where one guarantees the return of or payment for goods sold to another, he is entitled to notice, within reasonable time, of the default of the latter, and a delay of three years is unreasonable and discharges the guarantor.

ACTION, tried before *Winston, J.*, at Fall Term, 1894, of LINCOLN.

The plaintiffs sought to hold the defendants liable on a contract of guaranty contained in a letter which they wrote to the plaintiffs as follows:

2 September, 1890.

MESSRS. S. F. MYER & Co.,

48-50 Maiden Lane, New York, N. Y.

GENTLEMEN:—Mr. A. A. Miller, of Lincolnton, desires to open account with your firm, and also wishes to receive goods on memorandum or consignment, either of the latter, for the purpose of selling and remitting the proceeds to you, the title of the same remaining with you, and subject to your demand. In consideration of your firm allowing us a commission of one-eighth of one per cent on the gross amount of goods he may purchase of you during the period of this guarantee, and for the further consideration of one dollar ($1) received from the said A. A. Miller (receipt of which is hereby acknowledged), we do hereby
(539) agree, guarantee and hold ourselves responsible for the return of any merchandise that you may so entrust to him, or sell him on your regular terms, five off 30 days or four months net, that he may now or hereafter desire, order or select from time to time, to and not exceeding the sum of seventy-five ($75); and hereby agree and hold ourselves, our heirs, executors, administrators or assigns, liable and responsible for the payment of the same at maturity, or any time thereafter; hereby waive the receipt of monthly statements, and also waive all right of any exemption laws of this State, as far as our liability in this guarantee is concerned.

A jury trial was waived, and his Honor found as facts that Miller went out of business in 1891, having at that time more than $100 worth of goods on hand, and that he did not give the guarantors notice that he owed the plaintiffs anything; that defendants did not know it until April, 1894, and that had they known it within a year after default they could have saved themselves from loss. That plaintiffs did not notify defendants of the default, and paid them nothing for the guaranty. Miller testified that after the guaranty was made, plaintiffs, without the defendants' knowledge, gave him an extension of time. This was not contradicted. The last item in the account of goods sold to Miller was 31 January, 1891. The last payment was on 13 February, 1892.

His Honor rendered judgment for defendants, and plaintiffs appealed.

R. T. Gray for plaintiffs.
S. G. Finley and D. W. Robinson for defendants.

PER CURIAM: We have examined the authorities cited by counsel, and are of the opinion that they sustain the judgment of the court below.

Affirmed.

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(540)

L. W. CRAWFORD v. J. H. WEARN ET AL.

Devise—Rule in Shelley's Case—Intent of Testator—Effect of the Words "Invest or Use."

1. In the construction of a will the intention of a testator must prevail over merely technical language, when such language is qualified by superadded words.
2. A testator devised to L. "the use of $1,000, also four lots," and added: "The said L. may invest or use all this property as he may in his discretion think best, during his natural life, and at his death to go to the heirs of his body and be used for their education, if necessary": *Held*, that the rule in *Shelley's case* does not apply, and L. takes only a life estate in the property.
3. In such case the words "invest or use" authorize a sale of the property by the life tenant.

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

ACTION, heard on complaint and demurrer, before *Winston, J.*, at September Term, 1894, of MECKLENBURG. The complaint alleges a contract between plaintiff and defendants, whereby the latter agreed to buy and pay for certain lots in the city of Charlotte, the tender of a deed,

and refusal by defendants to comply with their contract. The complaint set out a copy of the will of Mrs. Christina E. Brown, by which the lots in question were devised to the plaintiff. The material item in the will was as follows:

"V. I give and devise to my son Leonidas W. Crawford the use of one thousand dollars ($1,000) in money or notes; also four lots in the town of Charlotte, N. C., purchased from John L. Brown, known as the Depot Lots Nos. 242, 241, 240, and a fraction of Lot No. 239, in Square 37, as the deed will show. The said Leonidas W. Crawford may invest or use all this property as he may, in his discretion, think best, during
(541) his natural life, and at his death to go to the heirs of his body, and be used for their education, if necessary."

There were other similar devises to other children of the testator.

The defendants demurred to the complaint upon the following grounds:

"1. That the complaint and the exhibits show that the plaintiff contracted to sell to the defendants a good and indefeasible fee simple title, with covenants of seizin and warranty to the land or lots described, and that it appears from the said complaint and exhibits that plaintiff derives his title under the will of Christina E. Brown, a copy of which is annexed as an exhibit to the complaint, and that by the said will the testatrix, Christina E. Brown, devises to the plaintiff only a life estate in the said land or lots, with remainder to the heirs of his body, 'to be used for their education, if necessary,' and that under said devise the plaintiff acquired only a life estate in said land and does not own, and cannot convey, to defendants a fee simple estate in the same, which estate he agreed and contracted to convey.

"2. That it appears in the complaint and exhibits that plaintiff is not the owner, and cannot convey a fee simple estate to defendants as he contracted to do."

His Honor overruled the demurrer, and the defendants appealed.

Jones & Tillett for plaintiff.
Walker & Cansler for defendants.

PER CURIAM: After a careful examination of this case, we have arrived at the conclusion that the rule in *Shelley's case* does not apply, and that L. W. Crawford takes but a life estate in the property in question. Such seems the intention of the testator from the context of the will, and this intention, it is well settled, must prevail over technical language, when such language is qualified by superadded words.
(542) We are also of the opinion that the power to "invest or use" all of the property, in view of other expressions in the will, author-

izes a sale of the same by the life tenant, and on this ground the judgment is

Affirmed.

Cited: Hooker v. Montague, 123 N. C., 158; *Foil v. Newsome,* 138 N. C., 123; *Powell v. Woodcock,* 149 N. C., 240; *Ripley v. Armstrong,* 159 N. C., 159; *Albright v. Albright,* 172 N. C., 353.

SADLER GILLESPIE ET AL. *v.* R. W. ALLISON ET AL.

Partition—Sale for Partition—Remainder—Life Estate—Estate Durante Viduitate—Construction of Statute.

1. An estate *durante viduitate* is an "estate for life," determinable upon the widow's marriage, and is within the meaning of the words "life estate," as used in chapter 214, Acts of 1887, relating to the partition of the remainder or reversion in lands.
2. A remainder dependent upon the termination of an estate *durante viduitate* is a vested and not a contingent remainder.
3. Where the tenant of an estate *durante viduitate* joins with some of the remaindermen for a sale for partition of the lands, section 3 of chapter 214, Acts of 1887, will be satisfied with the payment to her of the interest upon the proceeds of the lands sold, until the determination of the particular estate by her marriage or death.
4. A statute giving to remaindermen the right to have partition of lands held in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights.

BURWELL, J., dissents.

SPECIAL PROCEEDING instituted before the clerk of MECKLENBURG for the partition of the real estate described in the petition.

As issues of fact and of law were raised by the pleadings, the case was transferred by the clerk to the term for trial.

It was agreed that the issues might be heard by *Winston, J.,* at chambers as of the term of court. The rights of the defendants (543) in the real estate described in the petition accrued long prior to the year 1887, to wit, about the year 1866.

The defendants contended, first, that as the rights of the defendants accrued prior to the Act of 1887 the petitioners were in no event entitled to partition; and second, that, as there was an estate *durante viduitate* outstanding, the petitioners, as against the defendants, were not entitled to partition.

There was no contention as to the interest of the parties not having been properly set forth in the pleadings. After argument by counsel for plaintiffs and defendants his Honor rendered judgment as follows:

"That the act in relation to partition (chapter 214, Acts of 1887) was intended to apply, and does apply, to life estates existing at the date of its passage.

"That said act affects the remedy only, and, besides, does not interfere with vested rights and is, hence, constitutional. Finally, that an estate *durante viduitate* is a life estate, and such an one is contemplated by the act aforesaid.

"The court considers and adjudges that the plaintiffs, life tenant and remaindermen are entitled to have partition of the land described in the petition.

"The court is further of the opinion, and so adjudges, that as to the lot in the city of Charlotte, on Tryon and Fifth streets, and described as the first tract in the petition, owing to the small quantity of the land and the number of the tenants, actual partition of the same cannot be had without injury to some or all of said tenants in common, and that said land ought to be sold at public auction, as provided in such cases by the statute."

After appointing a commissioner to make a sale, the judgment proceeds:

"The court is further of the opinion, and adjudges, that the widow is not entitled to have the value of her life estate determined and
(544) paid to her in cash, but that she is entitled only to the interest on the value of her said estate, to be received and paid to her annually. The fund arising from such sale said commissioner will pay into court, and the same will be invested and secured to said widow and remaindermen in such manner and with such safeguards as the court shall direct and decree and deem wisest and best for all the parties to this proceeding.

"The court is further of the opinion, and so considers and adjudges, that the second tract, described in the petition as containing sixty acres, is susceptible of actual partition, and directs that actual partition thereof be made between the parties in interest, and to this end J. H. McAden, H. C. Eccles and H. G. Springs are hereby appointed to partition the same among the parties in interest, and that the said commissioners charge the more valuable portions with such sums in favor of the less valuable portions as may be necessary to equalize the several portions among the parties, and that the said commissioners make report of their proceedings in the premises to this court."

The defendants excepted to the judgment and decree, and appealed therefrom, assigning as error: 1, that his Honor held that the petitioners

were entitled to partition in any event; 2, that his Honor held that the Act of 1887 was applicable to this cause; and 3, that his Honor held that the petitioners were entitled to partition, notwithstanding the existence of the estate *durante viduitate.*

Clarkson & Dula for plaintiffs.
W. J. Montgomery and Walker & Cansler for defendants.

MACRAE, J. There being no contention as to the interests of the parties in the lands sought to be partitioned or sold for partition, it appears that the petitioner is, by virtue of the wills of Henry Owens and Jane Owens, tenant of said lands, "so long as she remains (545) the widow of W. A. Owens"; that she has sold her interest in one of the tracts to one of the other petitioners, and that the other parties are tenants in remainder of said lands according to their respective rights as set out in the petition and answer. Before the Act of 1887, chapter 214, cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. *Wood v. Sugg,* 91 N. C., 93; *Aydlett v. Pendleton,* 111 N. C., 28. The provisions of the above-named act are, substantially:

Sec. 1. That actual partition may be made of part of the land sought to be partitioned, and a sale and partition of the remainder, or a part only of any land held by tenants in common may be partitioned, and the remainder held in common.

Sec. 2. 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.

Sec. 3. That in all proceedings for partition of land whereon there is a life estate, the life tenant may join in the petition or proceeding, and on a "note" (this word is an evident mistake and should be "sale") the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually, or, in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely.

The life tenant and her assignee, with others who are tenants in remainder, ask for a sale for partition, and as the life tenant has sold her interest in one of the tracts, they ask that the value of an annuity of 6 per cent of the proceeds of the sale of that tract be paid over to him, and that the other tract be sold for partition and the (546)

proceeds divided according to the interest, etc. The other remaindermen are defendants. They contend:

1. That the estate of the petitioner, Alice B. Owens, is not a life estate in the contemplation of the Act of 1887, because the said estate may be terminated by her marriage at any time before her natural life expires.

Estates of this nature are called estates *durante viduitate,* and such are defined to be "estates for life, determinable on her ceasing to be such widow"; during their continuance, freeholds. Coke Litt., 42a; Cruise Dig., 115; 4 Kent, 26; 2 Blackstone, 121.

Such estates being so long known to the law as life estates are within the meaning of the words used in the Act of 1887, as such words are to be taken in their ordinary and legal acceptation.

2. It is contended that the remainders are contingent, and as such the petitioners are not entitled to have partition of the same. But they cannot be contingent remainders either according to the definition of Blackstone or the arrangement of Fearne; for one criterion of all such remainders is that the particular estate may chance to be determined and the remainder never take effect. Now the particular estate is that *durante viduitate;* it may last for the life of the tenant, and it may be determined by her marriage, but in either event the remainder immediately takes effect, for it is invariably fixed to remain to determinate persons after the particular estate is spent. See 4 Kent, 202 *et seq.,* where the definitions both of Blackstone and of Fearne are given of vested and contingent remainders. The remaindermen in our case have a present fixed right of future enjoyment. Their estates are vested. But if they are contingent it does not follow that there could not be partition, unless it be that there is no one before the court to represent all of the contingent interests. *Aydlett v. Pendleton, supra;*
(547) *Overman v. Tate,* 114 N. C., 571.

3. It is further objected that it is impracticable in this case to give to the life tenant the choice offered by the Act of 1887, either to have the interest on the value of the life tenant's share, or in lieu thereof the value of such share during the probable life of such life tenant, because the life estate may determine by the marriage of the tenant, and therefore there can be no rule for computing the present value of such estate.

The third section of the statute seems to have been framed to meet such an emergency, and we are of the opinion that the statute will be satisfied by the payment of the interest upon the proceeds of sale of the land sold to the life tenant or her assignee until the determination of the particular estate.

And the second section provides for the actual partition of the other tract, not to interfere with the possession of the life tenant or her assignee during the existence of her estate.

4. The defendants claim that they have vested rights which cannot be impaired or affected by the Act of 1887, passed after such rights have accrued; in other words, that they were remaindermen before 1887, when, by the law of this State, they were not permitted to have partition during the continuance of the particular estate. What vested rights did they have? They were tenants of an estate in remainder, and upon the death or marriage of the life tenant, and not until then, they would be entitled to partition or sale for partition. This new law permits them to anticipate the time for partition and have the same made subject to the interest of the life tenant, which is not to be disturbed, or when the life tenant joins in the petition, as in this case, to have a sale for partition, saving her interest.

It seems to us that instead of depriving the remaindermen of a right, the effect of this statute is in furtherance of the public policy which, as was said in *Overman v. Tate, supra,* discourages the tying up of property and the prevention of its alienation, and gives effect to the general principle that every one has the right to enjoy his own (548) in severalty. No vested right of property has been disturbed, and, in our view, this is a remedial statute enlarging rights instead of impairing them.

"Statutes are remedial and retrospective, in the absence of direction to the contrary, when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability, and the like, unless in doing this we violate some contract obligation or divest some vested right." *Larkins v. Saffarans,* 15 Fed., 147. These principles as to vested rights and retrospective laws are fully discussed in the great and leading case of *Calder v. Bull,* 3 Dallas, 386. See also many cases collected in Myers Vested Rights, ch. 1; *Hinton v. Hinton,* 61 N. C., 410; *Tabor v. Ward,* 83 N. C., 294. We hope we shall not be understood as making any reference to *ex post facto* laws, which cannot be made to have a retrospective effect in criminal cases.

This statute differs greatly from that under consideration in *Greer v. Asheville,* 114 N. C., 678, where it was sought to give a retrospective effect to an act amending the charter of Asheville, so as to continue in office during good behavior a city marshal who had been elected under the law, as it then was, for a term. Such an act, as was justly said, was

to act prospectively only, unless the legislative intent to the contrary was made manifest in express terms.

The right to actual partition only exists where such partition can be made without injury to the parties interested, but the right of sale, in case such actual partition cannot be had, has long existed in this State (The Code, sec. 1904), and has been extended by the Act (549) of 1887 to remaindermen and reversioners.

In our opinion, the judgment appealed from protects the rights of all the parties, and in it there is

No error.

BURWELL, J., dissenting: I do not think the act (Laws 1887, ch. 214) was intended to apply to cases such as this. There being no way to ascertain the cash value of the estate of Mrs. Alice Owens, the effect of the decree is merely to convert real estate into money, and not to make any partition whatever of the city lots described in the pleadings or of the funds arising from their sale. I do not think it was the intention of the Legislature to compel these defendants, and others in like circumstances, to run the risks necessarily attendant upon the investment of the fund, or else settle with the particular tenant. I know of no rule by which the fund can be divided, and I do not believe the act applies, unless there can be a division of it according to some rule of calculation recognized by the law. It does not seem to me reasonable to suppose that an act, passed evidently to promote the partition of property, should be called into service to effect the conversion of real estate into money, when no division of the money can be made by the law.

Cited: Gillespie v. Allison, 117 N. C., 513; *Taylor v. Carrow,* 156 N. C., 9; *Baggett v. Jackson,* 160 N. C., 30; *In re Inheritance Tax,* 172 N. C., 174.

(550)

MARY M. CURETON v. JOHN GARRISON ET AL.

Judgment—Writ of Execution—Findings of Judge.

Plaintiff brought an action to recover land against G. alone, and subsequently other defendants were made parties, but no complaint or amendment was filed embracing the latter, and the issue, verdict, judgment and execution were against G. only. Thereafter, plaintiff, upon affidavit that she had recovered judgment for land in possession of the other defendants, applied for a writ of execution against them. Counter-affidavits being filed, the

court below found therefrom and from an inspection of the record and process that the writ of execution conformed to the judgment and that the writ was issued and executed by direction of the plaintiff's agent: *Held*, that the findings of fact by the judge are conclusive, and his refusal thereupon to issue another execution was not error.

THIS was a motion made before the Clerk of the Superior Court of POLK to have another execution issued in the action, which was for the recovery of land. The motion was refused, and, on appeal to *Graves, J.*, the ruling of the clerk was approved, and plaintiff appealed.

The other facts appear in the opinion of *Associate Justice Clark.*

Jones & Tillett for plaintiff.

W. J. Montgomery and Justice & Justice for defendants.

CLARK, J. The plaintiff brought an action against Garrison alone. Subsequently, the other two defendants were made parties, but no complaint or amendment was filed embracing them. The issue, verdict and judgment were against the defendant—in the singular. Writ of possession was sued out by plaintiff against Garrison alone and the plaintiff put into possession. More than a year afterward the plaintiff filed an affidavit that she recovered judgment also for land of which the other two defendants were in possession. Affidavits were filed (551) by the defendants, the surveyor and the jury, that only the title to the tract of which Garrison was in possession was in controversy. We put no stress on defendants' contention that the writ of possession was *functus officio* by having been returned executed, because it was only executed as to the land embraced in the execution, and the gist of the plaintiff's contention is, that the writ of possession should have been broader, so as to embrace the additional land. But his Honor found, "upon an inspection of the record, the complaint and answer, and the judgment and execution, and the return of the sheriff thereto, that said execution conformed to the judgment, and from the affidavits the writ of execution was issued and executed by direction of an agent of the plaintiff," and refused to issue another execution. His finding of fact from the affidavits, there being evidence on the point, is conclusive. *Burke v. Turner,* 85 N. C., 500. Only his inference of law upon such fact and on the record is reviewable. *Trice v. Turrentine,* 35 N. C., 213; *Simpson v. Simpson,* 63 N. C., 534.

Upon such finding of fact and an inspection of the record, we find no error. The title to the land now in dispute not having been put in issue in the former action, it is still open to the plaintiff to bring an action therefor, unless otherwise barred.

No error.

(552)

J. M. BRENDLE v. A. J. REESE ET AL.

Practice—Case on Appeal—Motion to Remand—Appeal from an Interlocutory Order—Amendment.

1. Where there is no case on appeal and the appellant has been in no *laches*, a motion to remand would be allowed if a case on appeal were essential.
2. An appeal does not lie from an interlocutory order before final judgment.
3. The granting or refusing an amendment is a matter of discretion, and no appeal lies therefrom.

MOTION to remand the cause, on the ground that there is no case on appeal.

G. S. Ferguson and J. B. Batchelor for appellant.
No counsel contra.

CLARK, J. The appellant moves to remand the cause because there is no case on appeal, and the judge (*Graves*) died before settling the same. This would be true, if it was an appeal in which a case settled is essential, and the appellant has not been guilty of *laches*. *State v. Parks,* 107 N. C., 821. But the present case is an appeal from a refusal of leave to amend the answer. No case on appeal was necessary, as there were no facts *dehors* the record to be set out. Furthermore, no appeal lay at this stage, as it was an interlocutory order, nor indeed at all, as the granting or refusal of the amendment was a matter of discretion. *Henry v. Cannon,* 86 N. C., 24, and numerous other cases cited in Clark's Code (2 Ed.), pp. 564, 565.

Appeal dismissed.

Cited: Heath v. Lancaster, 116 N. C., 70; *Faison v. Williams,* 121 N. C., 153.

(553)

LINDSEY & BROWN v. FIRST NATIONAL BANK.

Action for Damages—Ancient Light, Obstruction of—Evidence.

1. The easement of light and air cannot be acquired, even by prescription, under the laws of this State, and hence no action lies (as in England) for the obstruction of one's window by a wall erected on the land of an adjacent owner.
2. Where plaintiffs rented the second story of a building for a business that required unobstructed light, and subsequently the owner of the adjacent lot erected a building and obstructed the windows of the plaintiffs, they cannot recover damages therefor, although their lessor owned the adjoining strip of land upon which the wall was erected.
3. Where, on a trial, the evidence for the plaintiff, in the most favorable view of the same, fails to develop a cause of action, the admission of incompetent testimony by the defendant is immaterial.

CIVIL ACTION, tried before *Armfield, J.*, and a jury, at December Term, 1893, of BUNCOMBE.

The facts appear in the opinion of *Associate Justice Avery.* The plaintiffs appealed.

Charles A. Moore for plaintiffs.
M. E. Carter for defendant.

AVERY, J. The plaintiffs who were the lessees for a term of years of the second story of a certain brick building in the city of Asheville, contended that the boundary of the lot on which said building was situated ran parallel with its southern wall and eighteen inches from it, while the defendant, claiming that the line ran with that wall, had erected another structure upon the disputed ground so as to shut off the light from the apartments occupied by plaintiffs and render them unfit for further use in taking photographs. The court instructed the jury that in no view of the evidence were the plaintiffs entitled to recover. The easement of light and air cannot be acquired, according to the general (554) current and weight of authority, in this country, even by prescription (6 A. & E., 152), and, of course, no right to object to the obstruction of one's windows by a wall erected on the land of an adjacent owner can be said to exist independently of the English doctrine. Whether the plaintiffs leased the second-story room for the purpose of taking photographs therein, or with some other object in view, they contracted in terms only for the use of the apartments occupied by them, and not for unobstructed light passing through a certain window or windows in addition. They might maintain an action for any trespass upon the premises

rented by them. But conceding that their lessors were the owners of the eighteen inches of land just outside the wall, which was in dispute, it was not contended that they had entered into any stipulations, so far as we can ascertain from the testimony, that the lease of the plaintiffs should extend beyond the wall. Consequently, the lessors could have purchased the land of the coterminous proprietor and have erected a structure, one wall of which would have shut out the light from the windows of the demised premises, without subjecting themselves to liability on an action of trespass brought by their tenants. They could have conveyed to another this narrow strip of land and have vested their grantee with the same power, their lessee having acquired, in the absence of special stipulations, no right, title or interest in it. Whether the lessors allowed the adjacent owner to build a wall upon it under a verbal license, or left him unmolested when he built without either license or title, the lessees had no remedy against the latter in any event, and could maintain an action against the former only by showing a breach of some special contract in reference to the lights. So that it was not material, in so far as it concerned or affected their rights, whether the defendants were building under a parol license or held the disputed land under
(555) a sufficient deed from their lessors. Had the lessors been adversary parties in the litigation involving the title, it would nevertheless have been left at their option to determine whether they would avail themselves (in one of the modes pointed out by the law) of the benefit of the statute of frauds. No right, title or interest in the *locus in quo* having passed by the demise to the plaintiffs, they were in no sense in privity with their lessors as to it.

We concur with the judge below in the opinion that in no aspect of the testimony did the plaintiffs show any *prima facie* right to recover in the action. It was therefore immaterial, when the plaintiff failed to show a cause of action in the most favorable view of the evidence, whether the defendant was allowed to bring out incompetent testimony. We do not deem it necessary, therefore, to notice *seriatim* the objections and exceptions as to the testimony admitted or refused, unless the testimony offered would have established the plaintiffs' *prima facie* right to recover, or that admitted would have destroyed such *prima facie* right. The judgment must be

Affirmed.

Cited: Barger v. Barringer, 151 N. C., 439, 441.

PENNIMAN & CO. v. B. J. ALEXANDER.

Instruction to Jury—Harmless Error.

While the court should not give instructions in the absence of evidence to which they are pertinent and that warrants them, it is nevertheless not reversible error to do so, when it does not prejudice the party complaining of such instructions.

PETITION to rehear this cause, which is reported in 112 N. C., 778. It was first before this Court on appeal of defendant, at September Term, 1892 (111 N. C., 427), when a new trial was granted (556) him.

The errors set out in the defendant's petition for a rehearing are as follows:

"1. It was erroneous to construe the instrument sued on solely by what appeared upon its face, and to exclude from consideration the surrounding circumstances.

"2. It was error for the court, in putting its construction, to stop where it did, without advising the jury when, upon the face of the instrument, or when, upon the face of the instrument interpreted in the light of the surrounding circumstances, the money sued for would become due from the defendant to the plaintiffs.

"3. It was erroneous for the court to tell the jury that the defendant substantially admitted that its construction of the instrument was correct."

Charles A. Moore and J. B. Batchelor for plaintiffs.
James H. Merrimon and Charles A. Webb for petitioner-defendant.

BURWELL, J. Concerning the first three assignments of error, we deem it sufficient to say that the matters involved in them have all been heretofore considered by us, and the argument of counsel upon the hearing of this petition has failed to show us that we omitted to give attention to the exceptions to his Honor's charge, here again pointed out and insisted on.

The fourth assignment is as follows:

"4. It was error to leave it to the jury to pass upon material facts, without evidence upon which the jury could find the existence of such facts."

This refers to the following portion of the charge:

"If the jury find that there was, at the time of the writing, this agreement, outside of the writing, and that Mooney quit the building

(557) before he did the work which was to have been done before the second payment was to be paid, then the plaintiff cannot recover of the defendant in this action.

"Of course, if there was any fraud or collusion between Mooney and Alexander to defraud the plaintiffs, Alexander could not by fraud avoid his liability. Or, if Alexander prevented Mooney from going on to complete the work, he could not be allowed by his own wrong-doing, by his unlawful interference, to prevent Mooney from doing the work, relieve himself from liability to pay.

"But the plaintiffs must show you that there was such fraud and collusion, or that Alexander did prevent Mooney from going on with the work on his contract with Alexander."

It is to be noted in this connection that upon the trial, as "the case" shows, neither of the parties requested his Honor to give any special instructions, or excepted then to the instructions which he gave the jury. It is evident from the record that the issue of fact between the parties was well understood. His Honor had heard the examination of witnesses and their cross-examinations and the argument of counsel to jury. No doubt it had been urged in the argument there, as it was here, that there were circumstances brought out in the evidence from which the jury might infer that the contractor's abandoning the work so soon after the defendant's acceptance of the order sued on was to enable the latter to escape liability for the payment of that order. It is often difficult to distinguish between that "very slight evidence"—"a scintilla" (*State v. White,* 89 N. C., 462)—which a jury should not be allowed to consider, and those facts and circumstances which rise to the dignity of substantial evidence of the thing intended to be established. His Honor had not only heard the words of the witnesses, but had had opportunity to observe their conduct. There was no request from the defendant's counsel to take away from the jury the consideration of this matter. Arguments had been made to them, and no doubt, as we have said, the (558) plaintiffs' counsel, without objection on the part of the defendant, had urged that there was some foundation for his allegation that the contractor quit the work after the acceptance of the order and the delivery of plaintiffs' brick because of a collusive arrangement between the defendant and himself. Under these circumstances, his Honor seems to have felt it his duty to caution the jury in the defendant's behalf, and he said to them the words quoted above.

In *Leach v. Linde,* 108 N. C., 547, it is said: "The Court should not give instructions, special or otherwise, in the absence of evidence to which they are pertinent and that warrants them. It would be error to do so if they prejudiced the adverse party." The rule thus stated is well established. It seems to us that, under the circumstances, the instruc-

tions thus given by his Honor could not have prejudiced the defendant's cause. We do not say that there are not to be found in the testimony of the witnesses as set out in the case statements from which the jury might have been left to infer that there was collusion between the defendant and his contractor. We do not think it necessary now to review and analyze the evidence to determine that matter. The counsel of the plaintiffs called our attention to many facts there set out which, as they insisted, supported their theory in this particular, and their argument upon this part of the cause confirmed us in the opinion that his Honor said nothing to the jury of which, under all the circumstances, the defendant can justly complain.

Petition dismissed.

Cited: Evans v. Freeman, 142 N. C., 65; *Basnight v. Jobbing Co.,* 148 N. C., 357.

(559)

J. E. HUNT v. GEORGE W. VANDERBILT ET AL.

Action for Damages—Pleading—Variance Between Allegation and Proof—Nonsuit.

1. Where, after the testimony of plaintiff was introduced on the trial of an action, the trial judge intimated that the plaintiff could not recover, and there was no motion to amend, it will be assumed on appeal that the intimation was made with reference to the cause of action stated in the complaint.
2. In an action against V. for damages for an injury resulting from the wrongful act of B., the complaint alleged that the act was committed "under the superintendence, control, management and direction of the defendant": *Held,* that the allegation clearly imports that the defendant was sued for the conduct of B. as the defendant's servant, and not otherwise.
3. When, in such case, the testimony disclosed that B. was not the servant of the defendant, but an independent contractor, the cause of action set forth in the complaint was not sustained, and, as the plaintiff did not ask to be allowed to amend, the intimation of the trial judge that the plaintiff could not recover was correct.

ACTION to recover damages for personal injuries, tried before *McIver, J.,* at Spring Term, 1894, of BUNCOMBE.

The complaint alleged, in substance, that the defendants being the owners of a lot of land in Asheville, employed one E. H. Britt to excavate it (preparatory to building a house thereon) under the superin-

tendence, control, management and direction of the defendants; that said Britt, "under the supervision, control and direction of the defendants," began, by the use of gunpowder, dynamite, etc., to blast out rocks, and created and continued a public nuisance until 28 May, 1892, when the plaintiff, while standing in the doorway of the Swannanoa Hotel, was injured by a rock which was thrown against him by the negligence of the said Britt, acting "under the supervision, direction, manage-
(560) ment and control of the defendants"; that Britt was an unfit, incompetent, unskilled, negligent and inexperienced person.

Defendants in their answer denied so much of the complaint as alleged that the work of excavation was done under their supervision, direction or control, or that they were responsible for the manner in which the work was performed, or for the agents employed by Britt in doing the work. They denied that Britt was either the agent or servant of the defendants, or either of them, and alleged that he was an independent contractor, doing the work as a job and as a whole for a definite fixed sum. They set out in the answer a copy of the advertisement for bids, the bid of E. H. Britt & Co., offering to do the work for "$645 lump job," and the letter signed by the defendant McNamee, accepting the bid, as follows:

BILTMORE, N. C., 30 April, 1892.

MR. ELIHU H. BRITT,

Asheville, N. C.

DEAR SIR:—Your offer to excavate for $645 lot at southeast corner of Eagle and Market streets, in accordance with the plans of the building, which you have seen, which shows an excavation generally of about nine feet in depth the whole length of the lot, and fifty feet wide, is accepted upon the following conditions:

"*First.* The work is to be fully completed by 21 May, 1892, under penalty of $5 for each day's delay after that date.

"*Second.* The excavation is to be done absolutely in accordance with the drawings, and your bid includes the digging of a trench around the exterior line of the excavation, as shown on the plans, of the depth required by the architect.

"*Third.* The work is to be neatly done to the full satisfaction of the architect, Mr. R. S. Smith, and is to be paid for only upon his certificate that the work has been properly completed.

(561) "*Fourth.* The lines of the excavation and all the trenches are to be given by our engineer, probably Mr. Olney."

Please let me know if the terms of this letter are agreed to. If they are, you may begin work Monday morning.

Yours truly, CHARLES MCNAMEE.

To this letter a reply was received by defendant McNamee, from Britt & Co., asking to be allowed until the 25th of May in which to complete the job, which was granted.

There was evidence introduced on the part of the plaintiff tending to show:

1. That plaintiff had his leg broken while standing on South Main Street in front of and partly within the entrance to the Swannanoa Hotel, on South Main Street in Asheville, on 28 May, 1892, by a stone thrown from a blast set off on the premises described by E. H. Britt's foreman, one Thomas.

2. That said blasting had been going on on the premises described in the complaint some ten or fifteen days prior to the blast which, on 28 May, 1892, threw the stone that broke the plaintiff's leg, by which blasting stones had been thrown out upon houses near said premises, and out upon South Main, Eagle and Market streets, and other streets thereto, and over the neighborhood around said premises.

3. There was also evidence tending to show that the plaintiff was injured by a stone thrown from said blast on 28 May, 1892, and that he had sustained damages by reason thereof for loss of time, pain, expenses incurred by him in the way of medical bills, etc.

There was also evidence tending to show that Britt had the reputation of doing cheap and careless work as a blaster. The plaintiff also introduced, without qualification, the answer of the defendants and the letters constituting the contract between Britt and the defendants, and rested. The defendants introduced no evidence. (562)

The court then intimated that, upon the whole evidence, the plaintiff could not recover, and that he should so instruct the jury, whereupon the plaintiff submitted to a nonsuit and appealed.

Charles A. Moore for plaintiff.

M. E. Carter and J. H. Merrimon for defendants.

SHEPHERD, C. J. We have given this case a very careful consideration, but in view of the variance between the allegations and the proof, which in itself affords a sufficient ground for the intimation of his Honor, we have concluded to refrain from the discussion of the interesting questions so elaborately argued by counsel, and which go to the merits of the controversy, when they shall be properly presented to the court. Although we are prepared to pass upon these questions, yet as the case is of a peculiar character, and another action may be brought in which the testimony may present new and varying phases of fact, we have concluded that the course indicated is the safer one to pursue in the disposition of this appeal. After the testimony of the plaintiff was introduced,

the court intimated that the plaintiff could not recover. As there was no motion to amend, we must, of course, assume that the intimation was made with reference to the cause of action stated in the complaint, and if we turn to that pleading it will be seen that it is repeatedly alleged that the act of Britt, for which the defendant is sued, was committed "under the superintendence, control, management and direction of the defendant." This language is so used that it distinctly qualifies and controls any matter alleged in the nature of inducement or explanation, which sometimes, under the very liberal construction of code pleading, is held sufficient to avoid a variance, and it clearly imports that the de-
(563) fendant is sued for the conduct of Britt, as the defendant's servant, and not otherwise. The testimony discloses that Britt was not the servant of the defendant, but an independent contractor, and as the principles of law upon which the defendant may be liable for the conduct of Britt in these distinct capacities are, in some very essential particulars, widely different, and really constitute different causes of action, we have but little hesitation in deciding that the evidence fails to sustain the cause of action set forth in the complaint. *Abernathy v. Seagle,* 98 N. C., 553; *Pendleton v. Dalton,* 96 N. C., 507; *Willis v. Branch,* 94 N. C., 142; *Browning v. Berry,* 107 N. C., 231; *Brittain v. Daniel,* 94 N. C., 781. Doubtless his Honor would have allowed an amendment, but as the plaintiff did not ask for it, and was content to rest his case upon the present complaint, we think the intimation that the plaintiff could not recover was correct, and that the judgment should, therefore, be

Affirmed.

Cited: Talley v. Granite Quarries Co., 174 N. C., 447.

J. B. CONLY v. E. G. COFFIN.

Action to Rescind Contract—False Representations of Value—Evidence.

1. A false representation as to the value of land, when it is not peculiarly within the knowledge of the vendor alone, and nothing is done to prevent investigation and there is no relation of trust and confidence between the parties that may tend to prevent such investigation, will not entitle the purchaser to relief through a rescission of the contract.
2. While it is error to exclude evidence of facts material to the issues submitted in the trial of an action, yet such error is harmless when the excluded evidence could not, if admitted, change the result.

CONLY *v.* COFFIN.

ACTION, brought against the defendant by plaintiff for the (564) rescission of contract and cancellation of deeds for land, upon the ground of a false representation as to the value of land sold by defendant to plaintiff, tried before *Armfield, J.*, at Fall Term, 1893, of SWAIN.

Upon an intimation by his Honor that, in no aspect of the case could the plaintiff recover, he took a nonsuit and appealed. The facts necessary to an understanding of the opinion appear therein.

W. W. Jones for plaintiff.
Fry & Newby for defendant.

BURWELL, J. It is alleged in the complaint that J. B. Conly was induced by the false and fraudulent representations of the defendant to execute to him a deed for certain valuable property in this State, and to accept in exchange therefor from the defendant certain real estate in the State of Kansas. He brought this action to have the whole contract rescinded, and he having died, his heirs and personal representatives prosecute this suit.

Since his Honor held that, in no aspect of the case could the plaintiff recover, we must consider the evidence in the light most favorable to them. The false representations consisted in the allegation that the Kansas property was worth "not less than $12,000." The evidence tended to show that this statement was false—grossly so—and that the defendant made it to cheat and defraud the said Conly, who says in his complaint that he "relied entirely upon the representations of the defendant."

Let us assume, first, that he entered into this contract solely because of this alleged false and fraudulent representation of the defendant.

"A mere false assertion of value when no warranty is intended is no ground of relief to a purchaser, because the assertion is a matter of opinion which does not imply knowledge, and in which men (565) may differ." 2 Kent Com., 486. "The vendor of property may indeed know that the property is not worth what he says it is worth, but the very fact that the representation is made by the owner is enough to put any person of average intelligence on his guard." 1 Story Eq., p. 207, note. *"Simplex commendatio non obligatio* is a maxim of sales, not only in the Roman law, but in the common law. . . . The reason why the law treats such statements as idle, so far as it does so treat them, is that they are only 'trade talk,' and ought not to be accepted as trustworthy. As owner, he will naturally set a high value upon his own, and, if he is about to sell it, everybody knows that the temptation to make the most out of it is characteristic of human nature. The law will not help the purchaser who accepts the exaggerated or false statements of value made by the vendor or his agent." Bigelow Frauds, 491.

In *Saunders v. Hatterman,* 24 N. C., 32, it was decided that "where at the time of the sale of land a false and fraudulent affirmation of its value was made, yet an action on the case for deceit will not lie, as the vendee might by reasonable diligence have informed himself of its true value." And in *Setzar v. Wilson,* 26 N. C., 501, *Ruffin, C. J.,* says: "The law does not give an action against the vendor for his false affirmation as to the value of the thing sold."

"A misrepresentation, to be material, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion . . . goes for nothing, though it may not be true, for a man is not justified in placing reliance on it." Kerr Fraud and Mistake, 83. This author says that "a man who relies on such affirmation, made by a person whose interests might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the conse-
(566) quences of his own imprudence."

There was no evidence tending to show that the value of this property was a matter peculiarly within the knowledge of the defendant; that it was not known to other persons to whom the purchaser might have applied for information; that the defendant did anything to prevent investigation on his part, or that there was any relation of trust and confidence between them that might have that effect.

Hence, the principles announced by the learned authors quoted above, and established by the former decisions of this Court, have application here, and the vendee having seen fit to purchase the property at the price set upon it by the vendor, and in entire reliance upon his statements as to its value, cannot get relief by the rescission of the bad bargain he so negligently made.

It appears from the evidence that J. B. Conly, of his own accord, or at the suggestion of the defendant, before the consummation of the trade, inquired by telegraph of the mayor of the town in Kansas where the property was situated, concerning its value, and this inquiry (the mayor being absent) came into the hands of one Baker who was the resident agent of the defendant and had charge of the property for him, and was answered by said agent in the name of the mayor.

There was no evidence, as it seems to us, that this representation of the value of the property was within the scope of Baker's agency, or that it was made at the suggestion of the defendant, or with his knowledge or consent. There was no evidence that he knew of the existence of the telegram until informed of it by Conly after the whole trade was consummated.

It seems to us, moreover, that this telegram purporting to come from the mayor was of such a nature as should have put him on his guard.

The defendant, he says, had represented to him that the Kansas property which he offered to exchange for his North Carolina property was worth twelve thousand dollars. He made inquiry of a disinterested person, as he supposed, and was told in effect that the defendant had (567) misrepresented the value of his property; that it was not worth twelve thousand dollars in the opinion of the sender of the telegram, but only eight or ten thousand dollars. If, after he received this information, he still chose to rely on what the defendant had told him, he ought not now to ask that a contract, so negligently entered into by him, should be rescinded, for it appears that he consummated the contract after he was informed that the defendant's statement as to the value of his property was false.

His Honor, therefore, did not err when he refused to submit the issues tendered by the plaintiff, and when he intimated that there was no evidence to support the affirmative of the issues that were submitted.

We think there was error in the exclusion of the evidence offered by the plaintiff to show that the defendant had told Conly that the property was worth twelve thousand dollars, and that the statement when made was known to be false, for those facts might have been material upon the issues submitted. But the error became harmless when, as appears here, the excluded evidence could not, if it had been admitted, have changed the result. There would still have been no sufficient evidence to go to the jury to establish the affirmative of the issues, the burden of which was upon the plaintiff.

Affirmed.

Cited: Cash Register v. Townsend, 137 N. C., 658; *Liles v. Lumber Co.,* 142 N. C., 38.

(568)

MARY E. A. FERGUSON v. SAMUEL WRIGHT ET AL.

Practice—Motion by Persons not Parties to the Action to Stay Writ of Possession.

1. It is the duty of one who recovers judgment for possession of land to point out at his peril the land which he has recovered.
2. When a plaintiff in an action to recover land, was adjudged to be the owner and entitled to be let into possession of an undivided one-eighth interest in the lands described in the complaint as part of "Tracts Nos. 33 and 41" (and otherwise described), and defendants made no objection to the

description contained in the complaint, a writ of execution will not be suspended upon the petition of others, not parties to the action, who are in possession of parts of "Tracts Nos. 33 and 41," and who allege that they fear that plaintiff will, under the writ, be placed in possession of the land occupied by them.

3. In such case, should it clearly appear that plaintiff had recovered possession of a tract of land when it, or a part of it, was in actual possession of a person not a party to the action, claiming adversely to defendants as well as plaintiff, the court would have the power to suspend the issuance of the writ until in an action the plaintiff should be adjudged entitled to the possession as against such party also.

THIS was a motion by Iowa George and others for an order to stay a writ of possession, upon petition and affidavit, made after the judgment of the Supreme Court in the original action reported in 113 N. C., 537. The motion was refused, and petitioners appealed. The salient facts appear in the opinion of *Associate Justice Clark.*

F. I. Osborne for plaintiff.
J. W. Cooper for defendants.

CLARK, J. It is the duty of the plaintiff who recovers judgment for possession to point out at his peril the land which he has recovered. *Johnson v. Nevill,* 65 N. C., 677; *Davis v. Higgins,* 87 N. C., 298. (569) The defendants in this action have not objected to the description of the land as set out in the complaint, which, in fact, would seem really sufficient, to wit: "Lying on the waters of Peachtree Creek, in Cherokee County, and more particularly described as follows: Part of No. 39, district No. 1; part of tract No. 41, in district No. 1, and part of tract No. 33, in district No. 1, being the lands on which the defendants now live, adjoining the lands of the old Ammons place, the Jesse White old place, the Leatherwood old place, the Reddix old place, and the Widow place, and others, containing about 700 acres, more or less." The plaintiff recovered verdict and judgment to be let into possession with the defendants, as tenants in common, of one undivided eighth of the lands described as above in the complaint. It does not appear that the petitioners, who are not parties to the action and judgment therein, are in possession of any of said land. They merely aver that they are owners, and are now, and have been for more than twenty-one years, in actual adverse possession of parts of tracts Nos. 41 and 33, and fear that plaintiff may be put in possession of their part. As the plaintiff, by virtue of his judgment and writ of possession, has a right to be put into possession only of his undivided interest in such parts of said tracts Nos. 41 and 33 as he names and further describes as being in possession of the defendants, the fear is hardly well founded that he will go outside and

take possession of land in possession of the petitioners. If he did, it would be by virtue of said writ of possession, and the petitioners would then have their remedy. They have no right to stay the issuance or execution of the plaintiff's writ of possession for the lands described in the complaint as being in possession of defendants.

If it clearly appeared that plaintiff had recovered judgment for possession of a tract of land when it, or a part of it, was in actual possession of a person not made a party to the action, but who claimed to hold adversely to the defendants, as well as the plaintiff, then the (570) court would have power to suspend the issuance of the writ until, in an action, possession is recovered against such party also. *Judge v. Houston,* 34 N. C., 108. This is still so under the present Code. *Springs v. Schenck,* 99 N. C., 551, 556. But this is not the case here.

No error.

JOHN B. WHITESIDES ET AL. v. C. S. COOPER ET AL.

Construction of Will—Contingent Remainder—Contingency with Double Aspect—Partition—Warranty.

1. A testator, after a limitation to his wife for life, provides as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons (naming them), *or such of them as may be living at their mother's death,* and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case": *Held,* that the limitation to each of the sons was a contingent remainder upon a contingency with a double aspect, vesting on the mother's death in case of his survival, but in case of his death before his mother, never vesting in him, but by substitution vesting in his issue, who take nothing from their father, but directly from the devisor as purchasers.
2. Where, in such case, one of the contingent remaindermen conveys his interest in the land, with general covenant of warranty, and dies before his mother, those in whom the estate afterwards vests are not bound by the warranty, even though they would have been his heirs, for they take by purchase and not by descent.
3. Persons to whom a remainder is limited, subject to the death of their father before the life tenant, are not bound by proceedings for partition to which the life tenant and the other remaindermen, but not their father, were parties; for, the limitations being purely legal and not in trust, such persons could not be deemed to be represented by others of the same class or by the life tenant. (*Irvin v. Clark,* 98 N. C., 437, and *Overman v. Tate,* 114 N. C., 571, cited and distinguished).

4. Contingent remaindermen, not represented either by guardian or attorney and not named in the process, pleadings or decree, are not bound by proceedings for partition instituted by the other remaindermen and life tenant.
5. Where the rights of a contingent remainderman accrue at the death of the life tenant, the statute begins to run only from that event.

(571) ACTION by the plaintiffs to be let into possession as tenants in common with defendants of one-sixth undivided interest in land, heard before *Armfield, J.*, at December Term, 1893, of BUNCOMBE. The land was devised by John B. Whitesides in the manner set out in the item quoted in the opinion of *Chief Justice Shepherd.* The plaintiffs are the children of Simpson Jarrett Whitesides, a son of the testator, who, supposing himself to own a vested interest in the land, conveyed the same to one Kimberly, who, joining with the life tenant and other sons of the testator, had the land sold in 1870 for partition, at which the defendant, or those under whom he claims, bought. Simpson Jarrett Whitesides was not a party to the proceedings, and died prior to the death of the life tenant, which latter event occurred in 1887.

The plaintiff contended that, under the will of John B. Whitesides, only such of the seven sons named in said will as should be living at the death of their mother, Catherine M. Whitesides, could take under said will, or in case one or more should be dead at the time of her death, leaving lawful issue, then such issue were entitled to take the deceased father's intended share; and inasmuch as Simpson Jarrett Whitesides, one of the seven sons named in the said will, and the father of the plaintiffs, had died previous to the death of his mother, the said Catherine M. Whitesides, he, the said Simpson Jarrett Whitesides, took no estate under the will, and the share intended for him under said will
(572) went to the plaintiffs upon the death of the said Catherine M. Whitesides.

The defendants contended that the proper construction of said will conferred an absolute fee simple estate on the said Simpson Jarrett Whitesides to the extent of one-sixth interest, although he did not survive his mother, and that his conveyance of his share in said lands to John Kimberly in 1867, in connection with the subsequent proceedings in the Superior Court, the said John Kimberly, as purchaser, standing in his shoes, disposed of the entire one-sixth interest in said lands intended to be devised to him in said will, and left nothing that his sons, the plaintiffs, could take at the death of the said Catherine M. Whitesides; that in any view of the case the plaintiffs were bound by the warranty in their father's deed aforesaid, and could not recover their alleged share or interest in the face of said warranty.

The defendant further insisted that whatever might be the construction of said will, or the effect of the said deed, and the proceedings aforesaid, his long, uninterrupted adverse possession of the said land, as stated in his answer, barred any recovery of any interest therein on the part of the plaintiffs.

It was agreed that the court should pass upon the several questions thus presented. His Honor being of opinion with the plaintiffs, adjudged that they were the owners of and entitled to be let into the possession of an undivided sixth interest in the land, and defendants appealed.

M. E. Carter for plaintiffs.
F. A. Sondley and W. R. Whitson for defendants.

SHEPHERD, C. J. The numerous authorities cited in the elaborate brief of the defendant's counsel fail to convince us that we are warranted in so far departing from the plain and natural import (573) of the language used in the limitation before us as to hold that the seven sons named in the will of their father took a vested remainder in the land therein devised. Fully appreciating, as we do, the public policy which induces the courts to favor the early vesting of estates, we are nevertheless of the opinion that it would be doing violence to the most liberal rules of construction were we to say that it was the intention of the devisor that the estates limited to his said sons should vest before the death of his widow, the life tenant. On the contrary, it was his evident purpose that the entire remainder in fee should be disposed of absolutely at a definite time, and that he did not intend that the remainder, as to any part of the property, should become vested while the remainder in the residue was dependent upon a contingency.

After a limitation to the wife for life, the will proceeds as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons, namely, Henry Clay, James Hardy, Charles Lincoln, Frank Patton, Simpson Jarrett, William Ratliff and John Bowman, or *such of them as may be living at their mother's death,* and to their heirs share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case."

The words we have italicised very clearly do not divest, by way of condition or otherwise, any estate previously limited, but are manifestly used as a part of the description of the persons who are to take; and these persons are plainly such only of the sons as may survive the life tenant. In other words, the limitation, with a very slight transposition of the words, reads, "To such of my sons, Henry Clay, James Hardy, etc., as may be living at their mother's death, and to their heirs." If

the language indicating survivorship were at all doubtful, the
(574) construction we have adopted would be well sustained by the fact that the words of inheritance do not immediately follow the names of the seven sons, but they follow the qualifying language, "such of them as may be living at their mother's death."

Under the construction we have put upon the will, there can be no question that the limitations to the sons were contingent remainders, the contingency being that they should survive their mother, and failing in this, as to any one or more of them, the remainder to vest in his or their issue, as purchasers. This, as we have said in *Watson v. Smith,* 110 N. C., 6, is a limitation of several concurrent fees by way of substitutes or alternatives, one for the other, "the latter to take effect in case the prior one should *fail to vest in interest,* and is known as a remainder on a contingency with a double aspect." If one of the sons die before the mother, his remainder is at an end, and can never vest, and another remainder to the issue is substituted, who take nothing from their father, but directly from the devisor.

That the limitation, under the construction we have adopted, is a contingent remainder is apparent from the decisions of this Court, and these decisions, it is believed, are in harmony with the principles of the common law as enunciated by the most approved authorities in other jurisdictions. In *Starnes v. Hill,* 112 N. C., 1, and *Clark v. Cox, ante,* 93, we quoted with approval the language of Mr. Gray in his excellent work on Perpetuities, "that the true test in limitations of this character is that if the conditional element is incorporated into the description of the gift to the remainderman (as it is in the case under consideration), then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child die in the lifetime of A his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death.
(575) But on a devise (as in the present case) to A for life, remainder to such of his children as survive him, the remainder is contingent."

In *Watson v. Watson,* 56 N. C., 400, the devise was to A for life, and at his death to such of his children as might then be living, and the issue of such as might have died leaving issue. It was held that A was tenant for life "with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children as may have died in his lifetime, leaving children." See also, *Watson v. Smith,* 110 N. C., 6.

In *Williams v. Hassel,* 74 N. C., 434, the Court said: "Inasmuch as the lands are devised to the first takers for life only, with remainders to

such of their children as should be living at their death, it cannot be ascertained *now* who are to take the remainder."

In *Young v. Young,* 97 N. C., 132, the Court said: "The *contingent* remainders limited on the termination of the life estate are to such of her children as are then living, and to the then living issue of such as have died leaving issue, so it is impossible to tell who will be entitled when the life tenant dies."

In *Miller, ex parte,* 90 N. C., 625, there was a devise of land to A for life, with remainder to such children as she may leave her surviving, and it was held that the children took contingent remainders.

Without resorting to the text-books, these authorities abundantly show that the element of survivorship in our case fully characterizes the limitation as a contingent remainder.

In view of the construction we have placed upon the language of the will, and of the decisions of our own Court, we do not deem it necessary to review the many English and other cases cited by counsel. None of them are directly in point, and even if they were, we would not be inclined to depart from our own decisions, which, as we have already remarked, are, in our opinion, well supported by principle as well as authority. If the will should read as we have construed (576) it (and of this we think there can be but little doubt), it is clear that these remainders are contingent. The case most strongly pressed upon us in the argument is *Ex parte Dodd,* 62 N. C., 97. The decision turned upon the construction placed upon the language of the will, under which it seems that the limitation was general, that is, to all of the children of the life tenant, or the issue of such children. The element of survivorship as a condition to the vesting of the remainder was considered as absent, and it was held that the remainder was vested as to the children living, subject, of course, to open and let in after-born children, or the issue of such as should die before the life tenant. That this is the *ratio decidendi* of the case is apparent from the opinion of the Court in *Irvin v. Clark,* 98 N. C., 437. The limitation there was to "Margaret Irvin and her husband during their natural lives, and to descend to the children of the said Margaret equally." This was treated as a vested remainder, but the Court was careful to say that, "if the devise had been to those children *living at the death* of the mother, there would have been a contingent and not a vested interest in either, for until that event occurred it could not be known who would take, and in such case the contingent interest could not be sold by a court of Equity. But when the gift is general, *not being confined to survivors,* when to take effect, it is otherwise, and, by representation, those who may afterwards come into being are concluded by the action of the Court upon those whose interests are vested, but whose possession is in the future.

The distinction is pointed out by *Battle, J.*, in delivering the opinion in *Ex parte Dodd.*"

As we have seen, the remainders to the sons being limited only to such of them as survived their mother, and Simpson Jarrett Whitesides, one of the said sons, having died in 1874, before the death of the life tenant in 1887, it must follow that his children, the plaintiffs, acquired
(577) the interest in controversy as purchasers, and the only question which remains to be determined is, whether they are precluded from asserting their title by the conveyance of their father, and the proceedings for partition under which the land was sold and purchased by one Davis, under whom the defendant claims.

2. If the view we have taken of this limitation is correct, it is hardly necessary to cite authority in support of his Honor's ruling that the plaintiffs are not rebutted by the conveyance and warranty of their father in 1867. The case of *Flynn v. Williams,* 23 N. C., 509, is not in point. It was there held that where one having an *estate of inheritance in possession,* sells the same with general warranty, his heirs are bound, whether the warranty be lineal or collateral, and whether they have assets or not. In the present case, no estate whatever vested in the ancestor, and his children, who take as purchasers under the will, are, therefore, not bound by his warranty. Even had a life estate vested in him, his warranty would likewise have been ineffectual by way of rebutter. The Code, sec. 1334; *Starnes v. Hill, supra.*

3. Were the plaintiffs bound by the sale for partition? It appears that in 1870 John Kimberly (who had purchased the interest of Simpson Jarrett Whitesides), together with the life tenant (Catherine) and the other contingent remaindermen, united in a petition for the sale of the land for partition. Under a decree rendered in this proceeding the land was sold and T. K. Davis became the purchaser. The defendant claims under the said Davis, and denies the claim of the plaintiffs that they are tenants in common with him to the extent of one-sixth interest in the said land. The life tenant (Catherine) having died in 1887, the plaintiffs' contention must be sustained, unless they are bound by the decree of sale. Neither these plaintiffs (if indeed they were in existence at that time) nor their father were parties to the proceeding; but it is
(578) insisted that they were represented by others of the same class, or at least by the life tenant. It is plain that the other parties could not represent these plaintiffs as a part of the same class, and upon this point it is only necessary to refer to *Irvin v. Clark, supra,* and the authorities therein cited. Equally untenable is the position that these contingent remaindermen were represented by the life tenant. This would be a very radical departure from well-settled principles, and has received no countenance from this Court. In *Overman v. Tate,* 114

N. C., 571, we quoted, with approval, the language of *Lord Hardwicke* in *Hopkins v. Hopkins,* 1 Atk., 590, that "if there were so many contingent limitations of a *trust,* it is an established rule that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of *inheritance is vested,* and all that may come after will be bound by the decree, though not *in esse,* unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested." In referring to the application of this principle in one or two jurisdictions where the first remainder was only for life, we stated that we were not prepared to adopt such a view, and *a fortiori* would it be rejected in a case like the present, where the limitations are not in trust, but purely legal. Under the peculiar circumstances of the case referred to, we applied the principle declared by *Lord Hardwicke,* the fact that the limitations were in trust not having been adverted to in a previous ruling. The decision was not based upon the idea that the child of Annie was of the same class as the issue of Caswell, but this was mentioned as a circumstance tending to show that but little prejudice would probably result by the application of the principle above stated, under the particular limitations then before us.

4. Neither is there any force in the contention that our case falls within the principle of *England v. Garner,* 90 N. C., 197, and other decisions in which the Court has gone very far in sustaining judicial sales. It is not pretended that these plaintiffs, even if (579) *in esse,* were represented by guardian or any one claiming to be their attorney. Indeed, they are not mentioned as parties in any stage of the proceedings, nor is there anything in the decree which purports to bind their contingent interests.

5. As to the statute of limitations, it is only necessary to say that it did not begin to run against these plaintiffs until the death of the life tenant in 1887. Their rights accrued only upon that event, and it is therefore clear that they are not barred.

After a careful consideration of the elaborate brief of counsel, we have been unable to discover any error in the rulings of his Honor.

Affirmed.

Cited: Hodges v. Lipscomb, 128 N. C., 63; *Springs v. Scott,* 132 N. C., 553; *Bowen v. Hackney,* 136 N. C., 190, 192; *Latham v. Lumber Co.,* 139 N. C., 11; *Freeman v. Freeman,* 141 N. C., 101; *Vinson v. Wise,* 159 N. C., 658; *Jones v. Whichard,* 163 N. C., 244; *Bullock v. Oil Co.,* 165 N. C., 65; *Lee v. Oates,* 171 N. C., 727; *Springs v. Hopkins, ib.,* 492; *James v. Hooker,* 172 N. C., 782; *University v. Markham,* 174 N. C., 343; *Kirkman v. Smith, ib.,* 605; *Williams v. Biggs,* 176 N. C., 49, 50; *Thompson v. Humphrey,* 179 N. C., 52, 53, 55, 58; *Malloy v. Acheson, ib.,* 95.

JESSE A. GWALTNEY v. SCOTTISH CAROLINA TIMBER COMPANY.

Action for Damages—Injury to Fish Trap—Floatable Stream, What is Not—Negligence—Evidence.

1. A stream which is only capable of floating logs in occasional freshets is not in law a floatable stream, while, if the freshet should arise from natural rainfall for a sufficient period to make a stream useful to the public, it would be considered floatable; yet a temporary rise, passing quickly away, is not sufficient, even if the freshet should continue for two or three days and be reasonably expected every year.
2. In an action for damage to a dam and fish-trap caused by floating logs in a stream not "floatable," the plaintiff need not show that the defendant was negligent in handling the logs.
3. When no specific instruction was asked for on the trial of an action, an exception that the instruction given was too general will not be considered on appeal.
4. In an action for damages to a dam and fish-trap by floating logs on a non-floatable stream, evidence of the value of the annual output of the fishery is competent to show the amount of the damage done.
5. An action will lie for trespass and injury to property in favor of one who, while not the owner, is in possession, and the damages will be estimated according to his interest therein.
6. It is not improper for counsel, in rehearsing the testimony to the jury, to use the stenographic notes when they are read as aids to his memory and are according to his recollection.

(580) ACTION for damages alleged to have resulted to the plaintiff's dam and fish-trap by floating logs placed in the French Broad River by the defendant, tried at Spring Term, 1893, of BUNCOMBE, before *Graves, J.*

The following were the issues:

"1. Was the plaintiff the owner of the dam and fish-trap at the time of the alleged injury?

"2. Was plaintiff in the possession of the dam and fish-trap at the time of the injury alleged in the complaint?

"3. At the time of the alleged injury was the French Broad River, at the point of the alleged injury, such a stream that business men may calculate that, with tolerable regularity as to the seasons, the water will rise to and remain at such height as will enable them to make it profitable to use it as a highway for transporting logs to market or mills lower down?

"4. Was the dam and fish-trap destroyed by the conduct of defendant?

"5. At first the court made the fourth issue as follows: 'Was the dam

and fish-trap destroyed by the negligent conduct of defendant?' but in charging upon that issue struck out the word 'negligent.'"

The case is sufficiently stated in the opinion. Verdict and judgment for the plaintiff. Appeal by defendant.

Thomas A. Jones and F. A. Sondley for plaintiff.
Charles A. Moore and J. B. Batchelor for defendant.

MACRAE, J. The complaint and answer are set out in full in (581) 111 N. C., 547. On the former trial, after the testimony was closed, his Honor, the presiding judge, intimating the opinion that, assuming the facts as testified to be true, the plaintiff was not entitled to recover, he submitted to a nonsuit and appealed.

In the opinion of this Court delivered by the *Chief Justice,* it was held that there was testimony proper to be submitted to the jury in order that they might determine whether the French Broad River, at the point of the alleged wrong and injury was what is now called a floatable stream. It was there said: "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 seasons, 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." There was entire unanimity in this Court as to what constituted such a stream, for *Mr. Justice Avery,* in a very able dissenting opinion, used the same words, with the addition: "When prudent business men may regulate their expenditures with reference to the anticipated rise, the stream becomes a factor in conducting the commerce of the country." The divergence of views was then upon the relative rights of the persons floating timber down and the riparian proprietors along such streams.

When the case was tried the second time, his Honor submitted to the jury an issue framed upon the language above quoted, as follows: "3. At the time of the alleged injury was the French Broad River at the point of the alleged injury such a stream that business men may calculate that, with tolerable regularity as to the seasons, 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?" In his instructions to the jury on this issue, his (582) Honor said: "It is not necessary that the stream is of such volume all the year, or all the season, but it might be for a time long enough to be beneficially used. I cannot say how long a time the stream must be capable of floating in each year, but a stream which is only capable of

floating logs in occasional freshets is not in law a floatable stream. Now, whether the French Broad was such a stream, becomes a question of fact for you to determine from all the evidence, and I can give you no further assistance on this point. The burden rests upon the defendant." Again, his Honor charged: "Upon the question whether the French Broad is floatable, you must look to the testimony of all the witnesses; all the evidence bearing on that question; the size of the stream, the country it drains, the size of the valley; that witnesses testify that it was floatable above Asheville, but it does not necessarily follow from the fact that it is floatable above Asheville that it is floatable below." In answer to an oral request from defendant's counsel the court charged: "If the freshet should arise from natural rainfall for a sufficient period to make it useful to the public, it would be considered a floatable stream. Temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should continue up for even two or three days and be reasonably expected every year."

This question was so examined and discussed by us upon the former hearing that we deem it only necessary now to give our unqualified approval to the issue and the instructions thereon, and thus dispose of all of defendant's exceptions to this part of the charge. The issue itself was not excepted to; indeed, there were no exceptions to the issues, but to the striking out of the word "negligent" from the fourth issue, so as to make it read, "Was the dam and fish-trap destroyed by the
(583) conduct of defendant?" and to the fifth issue, "What damage, if any, has the plaintiff sustained?"

We think that the contentions of the parties were carefully and fairly presented by the issues, and that if there was an injury to plaintiff's property by reason of floating the logs, it was of no moment in this action, certainly after the jury found that the river was not a floatable stream, whether the injury was caused by the negligence of defendant, or otherwise, if it in truth were caused by the act of defendant.

We will next address ourselves to the exceptions of the defendant to the charge of the court upon the measure of damages.

"If the river is not a floatable stream, and the dam was destroyed in consequence of its (defendant's) acts, the defendant is liable to plaintiff for such actual damages as naturally resulted from its acts.

"The measure of damage would depend on the right the plaintiff had in the fish-trap and dam. This damage should be for the injury to his property in the dam and trap, and would be greater for the destruction of property to which he had a title in fee simple than to a mere property in possession."

Upon the question of damages, the jury were further instructed that, "in no view, was the defendant liable for vindictive damages; that the

measure of damage, if the plaintiff was entitled to any, was the actual value of the injury done. The cost of building the dam was not the measure, nor was the cost of rebuilding the measure of damage; but the jury must, from all the evidence, fix the amount of the loss actually sustained by plaintiff as the measure of damage, if plaintiff is entitled to any damage."

These instructions cut off from the jury any consideration of prospective or speculative damages, and confined them to compensation for the injury. The loss actually sustained was to be determined by the jury. Sutherland on Damages, secs. 1011, 1012. It was a very general proposition which his Honor should, and doubtless would, (584) have explained and elaborated if he had been so requested, but "if the parties desire more specific instructions they must ask for them at the proper time." *Morgan v. Lewis,* 95 N. C., 296.

Several exceptions embrace testimony as to the annual "output" of the fishery.

Plaintiff testified: "I caught large quantities of fish; I cannot say how much; supplied my family and laborers; went to the traps twice a day; sold $500 worth a year; the yearly value of products of traps was $1,000."

Witness Morrison testified: "Gwaltney, during my stay, sold a great many fish at the hotel; I can't say how often."

We think all of this testimony was competent, not for the purpose of showing prospective or speculative damages, or as to what he might have made later, but for the injury, for in this view it would not have been admissible; but "all the facts and circumstances constituting, or proximately connected with the trespass, tending to show its character and immediate consequences, may be proved, both to show the amount necessary to a just compensation for the injury and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitory damages should be given, and, if so, how much. In the absence of facts warranting such damages, the principle of compensation governs, and, to ascertain the amount, the mode of proof must be adapted to the facts of each case."

"Where the trespass suspends or impairs the enjoyment of the premises, compensation may be given on the basis of the rental value, in the absence of any ground for special damages, or in addition to such damages, and, if the premises are put out of repair, the cost of repair will be an additional item." The defendant who destroyed the sluice-way to a mill was held liable for the sluice-way and consequential damages to plaintiff for having his mill stopped. Sutherland on Damages, sec. 1015. Where defendant wrongfully destroyed part of plain- (585) tiff's mill-dam, damages were assessed for the cost of repairing

the dam, and also for interruption to the use of the mill, or diminution of profits.

PER CURIAM: "The question is raised as to consequential damages, the interruption to the use of the mill, and the diminution of the plaintiffs' profits on that account were alleged in the declaration and proved on the trial, and we think this was right. The plaintiffs are entitled to recover all the damages they suffered by reason of the trespass." *White v. Mosely,* 8 Pick., 356. Consequential damages, to be recovered in an action for tort, must be the proximate consequence of the act complained of; therefore the tortious conversion of plaintiff's mule would not authorize damages for loss of crop thereby.

"If the action were for damage for breach of contract, the rule would be to give such damage, as being incidental to the breach as a natural consequence thereof, may be reasonably presumed to have been within the contemplation of the parties." *Sledge v. Reid,* 73 N. C., 440. No such contemplation could have been in the minds of these parties. The measure is the actual damage, not the cost of rebuilding, nor the original cost of building; but taking into consideration these things, and the value of the property by reason of its production, the actual damage is to be estimated. In this view the testimony was entirely competent. *Willis v. Branch,* 94 N. C., 142. There were several instructions asked upon the first issue: "Was the plaintiff the owner of the dam and fish-trap at the time of the injury alleged in plaintiff's complaint?" And to the second issue, concerning plaintiff's possession, it is unnecessary for us to examine closely into plaintiff's title. His possession was undisputed, and it is certain that an action will lie for trespass and injury to the possession. *Horton v. Hensley,* 23 N. C., 163; *Smith v. Ingram,*
(586) 29 N. C., 175; *Aycock v. R. R.,* 89 N. C., 321. And his Honor charged the jury, substantially, that the plaintiff could only recover according to his interest: "Of course plaintiff's right to recover, in any event, depends upon his title, or upon his possession. If he have neither, he could not recover; if he have either, he can, if the defendant was guilty of doing him a wrong by reason of his wrongful conduct. The measure of damage would depend on the right plaintiff had in the fish-trap and dam. This damage should be for the injury to his property in the dam and trap, and would be greater for the destruction of property to which he had title in fee simple than to a mere property in possession." As we have seen, if the defendant had desired more specific instructions on this point, he should have asked for them. As a general proposition, the court was correct.

It was contended that the damage, if done at all, was by an independent contractor, and, therefore, the defendant is not liable. It is

sufficient to say that we do not think there was evidence to that effect. The defendant is a corporation, and must of necessity act through its agents and managers, and there was nothing to show that the person moving the logs was other than defendant's agent.

Not to protract the discussion, many of the prayers for instruction and exceptions being based upon the theory that the French Broad River was a floatable stream, and the jury having found to the contrary, will not need to be examined.

We see no objection to counsel's using the stenographic notes, in rehearsing parts of the testimony to the jury when they are read as aids to his memory, and are according to his recollection. They derive no additional weight from being such notes, but are simply counsel's statements, not under oath, but in the course of the argument, as to his understanding of the testimony.

We have given careful consideration to all the exceptions of defendant, and to the very able argument of counsel and the authorities cited by them, and we are of the opinion that the case was very (587) carefully and conscientiously tried below, and there is

No error.

Cited: Comrs. v. Lumber Co., post, 595; *Comrs. v. Lumber Co.,* 116 N. C., 734, 739; *Johnson v. R. R.,* 140 N. C., 579; *Warren v. Lumber Co.,* 154 N. C., 37; *Peanut Co. v. R. R.,* 155 N. C., 156; *Wheeler v. Telephone Co.,* 172 N. C., 11.

FLORENCE R. HARRIS v. CHARLES J. HARRIS.

Habeas Corpus—Foreign Decree—Divorce, Validity of—Service by Publication—Custody of Child.

1. A decree of divorce obtained by a wife, resident in another State, against the husband, domiciled in this State, without personal service of summons upon him, is a nullity in this State, both as to the relation of the parties and as to the custody of a child domiciled with its father at the time of the proceeding.
2. When, under an invalid decree of divorce rendered in favor of the wife in another State, in which the custody of a child was awarded to the wife, it is sought by *habeas corpus* proceeding in this State to obtain the custody of the child domiciled with its father in this State, the proceeding will be regarded as one between husband and wife living in separation without being divorced. (Sec. 1661 of The Code.) In such case the custody of the child rests in the sound discretion of the judge, subject to review, on appeal, upon the facts found.

3. The court will not award the custody of a child to a nonresident mother if it does not appear that the child desires to go to her or that the husband is not a proper person to have it, or that the child will be benefited by the change.

THIS was a proceeding by writ of *habeas corpus* to obtain the custody of an infant child, a boy of nine and a half years of age, brought by its mother against its father, under a decree obtained in Colorado dissolving the marriage and awarding the custody of the child to the wife, the husband being domiciled in this State and not appearing in person or by attorney in such action for divorce, and pretended service being
(588) made on him by publication. The writ was returnable before *Shuford, J.*, at chambers in Asheville, who awarded the custody of the child to the plaintiff, and the respondent husband appealed.

J. H. Merrimon for plaintiff.
W. W. Jones and J. J. Hooker for defendant.

CLARK, J. The decree of divorce obtained by the wife, resident in Colorado, against the husband, domiciled in this State, without personal service upon him, is a nullity in this State. *Irby v. Wilson,* 21 N. C., 568. At the most, it could only be valid in the State where it was granted. It can have no extra-territorial validity. *Davidson v. Sharpe,* 28 N. C., 14; *Schonwald v. Schonwald,* 55 N. C., 367; *Arrington v. Arrington,* 102 N. C., 491, reaffirm *Irby v. Wilson, supra,* though the divorce in the *Arrington case* was upheld because of the appearance of the defendant to the action. *State v. Schlachter,* 61 N. C., 520, merely holds that where a person divorced by a decree, valid in the State where granted, marries another by a marriage recognized as valid in such State, the validity of the latter marriage cannot be questioned by an indictment for fornication and adultery in this State on their removal here.

The decree obtained in Colorado upon constructive service by publication, and by sending summons through the mail to the defendant in this State, has no validity here (*Long v. Ins. Co.,* 114 N. C., 465, and *Wilson v. Seligman,* 144 U. S., 41), either as to the relation of the parties or as to the custody of the child, which at the time of the proceeding was domiciled with its father in North Carolina. This is, therefore, to be treated simply as a contest upon *habeas corpus* between husband and wife living in separation, without being divorced, as to
(589) the custody of the child under The Code, sec. 1661. This rests in the sound discretion of the judge, subject, however, to review on appeal upon facts found as provided by The Code, sec. 1662. According to the findings of fact, the father is a suitable person to have the custody of the boy, nine and a half years old. It does not appear that

the mother (who already has the only other child) is in anywise more suitable than the father. The father is domiciled in this State; the mother is a nonresident. Under these circumstances, unless more shall appear, the custody should remain with the father. The Court certainly would not, upon these facts, award the custody to a person out of the State. To award the custody alternately to the father and the nonresident mother would be to place the child out of the jurisdiction of the Court, so that it would be impossible to enforce so much of the decree as directs the return of the child to the father after the specified time. The bond might possibly secure the payment of damages, but not the return of the child. The Court, under special circumstances, may allow an infant ward to go out of its jurisdiction, but it will not abdicate its functions, and upon the state of facts here appearing take the child from a father of good character, who is taking every proper care of it, and place it out of the reach of its process and beyond its control. *Dawson v. Jay,* 3 DeG. Mac. & G., 764. Indeed, if both parties resided here the law would not take the child by the process of the Court from the custody of the father and award it to the mother, unless it appeared that the interest of the child required it. *Symington v. Symington,* 2 Sch. & D. App. L. R., 415; *People v. Humphries,* 24 Barb., 526. What the preferences of the child were is not found as a fact, though this has weight always with a court in such cases according to the age and intelligence of the child. It does not appear in this case that the child desired to go to the mother, nor that its welfare would be promoted by such change of custody. The prayer of the petitioner should have been denied.

Error.

Cited: Moore v. Moore, 130 N. C., 335; *Newsome v. Bunch,* 144 N. C., 17; *In re Turner,* 151 N. C., 478; *Stokes v. Cogdell,* 153 N. C., 182; *In re Jones, ib.,* 316; *Howell v. Howell,* 162 N. C., 284; *Page v. Page,* 166 N. C., 91; *Floyd v. R. R.,* 167 N. C., 59; *Page v. Page, ib.,* 349, 350; *S. v. Herron,* 175 N. C., 757; *In re Means,* 176 N. C., 312.

(590)

COMMISSIONERS OF BURKE COUNTY v. CATAWBA LUMBER COMPANY.

Floatable Stream—What is Not—Injunction—Right of County Commissioners to Sue—Damages to Bridges.

1. While it is not necessary, in order to establish an easement in a river for floatage, to show that the stream can be used continuously during the whole year for that purpose, it must nevertheless appear that business men may calculate with tolerable regularity as to the seasons 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.
2. Temporary rise of waters, passing quickly down, is not sufficient to make a stream floatable, not even if the freshet should continue for two or three days and be reasonably expected every year.
3. The easement for floatage, when it exists, must be exercised with due care for the avoidance of injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream.
4. *Semble*, that when a stream is floatable, so as to give to the public an easement for transportation, it would be the duty of the county commissioners to so construct bridges on the highways leading across the stream as to permit the use of the stream for the purpose of floatage.
5. The county commissioners, under the general powers granted by section 704 of The Code, may bring an action for an injunction to restrain the use of a non-floatable stream for floatage of logs, causing damage to a county bridge over such stream.
6. For the recovery of damages for injury to county bridges, a remedy is given by section 2055 of The Code.

ACTION, tried before Allen, J., at Fall Term, 1894, of BURKE, to recover damages against defendant corporation for injuries to certain bridges across the Catawba River, known as the Rocky Ford and Lovelady bridges, and to a bridge across Johns River, known as Johns River bridge, and to restrain the defendant from floating logs down said
(591) river. A jury trial was waived, and his Honor found (among others) the following facts:

"7. That the method adopted by the defendant company is, after cutting the trees into proper lengths, to bank them in great numbers along the streams, the lower logs being in the stream, and the whole being so placed that a rise in the river will cause the lower strata of logs to float, and then the other logs will roll into the stream and be carried down by the current.

"That no one is left in charge of said banks of logs, and upon a rise in the waters the logs float down the streams without direction or guidance.

"8. That the Catawba River is a wide, shallow stream, and at Lovelady and Rocky Ford bridges is from 200 to 300 feet wide, and has an average depth, at ordinary water, at those points of about two feet, and is in the deepest parts at those points about four feet deep. That there are shoals in said river, averaging perhaps one each half mile, from twenty to one hundred yards wide, and upon which, at ordinary water, there is a depth of water from eight to twelve inches. That the water in said river is higher in the winter than in the summer, and is dependent for its increase upon the rainfall; that ordinarily the rainfall is sufficient to increase the water eight or ten times each year in sufficient quantity to float logs down said river without obstruction from the shoals, but at such times the rainfall is considerable and sufficient to raise the water in the said river from two to four feet. That the rainfall causing this increase in the water of said river usually occurs in the fall, winter or spring, but occurs at irregular intervals, and the rises in said river, while usually occurring, do not occur at any regular period. That in addition to these rises in the water of the Catawba River there are usually rises once or twice a year of from five to fifteen feet, occasioned by very heavy rainfall, but these rises occur at (592) irregular periods.

"9. That the Johns River is not as wide as the Catawba River, is more crooked, and has a less volume of water. At Johns River bridge it is about 100 feet wide and about two feet deep; that there are shoals in said river about one-fourth of a mile apart from 20 to 100 yards wide, upon which, at ordinary water, there is a depth of water from eight to ten inches. That the water in said river is higher in the winter than in the summer, and is dependent for its increase upon the rainfall; that ordinarily the rainfall is sufficient to increase the water eight or ten times each year in sufficient quantity to float logs down said river without obstruction from the shoals. That this increase in the waters of Johns River is similar in all respects to the increase in the waters of Catawba River, and occasioned in the same way.

"10. That a rise in the waters of Catawba and Johns rivers usually subsides in twenty-four or forty-eight hours.

"11. That between these shoals on Catawba and Johns rivers logs in large quantities may be floated at ordinary water without coming in contact with the soil.

"12. That at ordinary water logs may be carried down Catawba and Johns rivers. That in order to do so it is necessary to have a number of hands, and when a shoal is reached the logs nearest the banks on either side are used as wings by turning the ends of the logs up the stream to either bank, thereby increasing the volume of water in the deepest part of the shoal, and then passing the logs through this deepest

part over the shoal. That in using this method at ordinary water it is sometimes necessary to deepen the channel over the shoals by removing rocks and soil, and sometimes necessary to roll numbers of logs across the shoals.

"13. That the bridges known as the Rocky Ford and Johns River bridges are public bridges within the county of Burke, and a part of a public highway, and in the possession and under the control of
(593) the plaintiff.

"14. That the Lovelady bridge is a public bridge and is a part of a public highway. That half of said bridge is in the county of Burke, and in the possession and under the control of the plaintiff.

"15. That all of said bridges are built about fifteen feet below high water-mark, from two to three feet above ordinary water, without railings, upon piers in the water, the space between said piers being from twenty-five to thirty feet. That from each of said piers pieces of timber extend up the river from twenty to thirty feet, the end furthest from the bridge being bolted to the bottom of the river. That there are no draws in any of said bridges. That said bridges were built and under the control of the plaintiff prior to the time the defendant established its plant below Lovelady bridge and prior to the time they began operation on the Catawba and Johns rivers. That when the waters of Catawba and Johns rivers rise and logs are floated down these streams, the said bridges, as now constructed, prevent the passage of the logs, and that a necessary consequence of floating logs upon a rise of the waters is to destroy the same.

"16. That the banks along the streams where said bridges are built, and from thirty to forty feet from the bridges, are from fifteen to twenty feet high, and it is practicable to raise said bridges to a sufficient height to allow the free passage of logs, but to do so would cost from $1,000 to $1,500, and the county of Burke has not in its treasury money which can be appropriated to that purpose.

"17. That said bridges have been injured from time to time, before and since the commencement of this action, by logs belonging to defendant being driven against them by the current upon a rise of the waters in said rivers. Said logs being driven against said bridges under the conditions set out in finding No. 7.

"18. That the defendant has, from time to time, employed
(594) different persons to watch, guard and protect said bridges, and said persons have done all that could be done to prevent injury to said bridges, but it is impossible to control the large number of logs floating down said streams upon a rise of the waters, from the banks of logs described in finding No. 7, and to prevent injury to said bridges as now constructed.

"19. That the injury to said bridges before this action began amounted to $152.39, and since this action was begun, to $467.82.

"20. That the evidence as to injury to defendants by reason of the restraining order issued herein is unsatisfactory and not convincing, and the court cannot make a finding thereon, being satisfied that the estimates of injury in the evidence are excessive."

Upon these facts his Honor held "that said rivers are floatable; that, upon the whole case, the plaintiff is not entitled to the relief prayed for, and that the restraining order be dissolved, and that defendants recover their costs, and judgment is rendered accordingly."

The plaintiff appealed and excepted to the rulings of the court as follows:

"To the ruling of the court that, upon the facts found, the Catawba River and Johns River are floatable streams.

"To the ruling of the court that, upon the whole case, and upon the facts found, the plaintiff is not entitled to the relief prayed in the complaint (to the recovery of damages, or to an injunction).

"To the ruling of the court that plaintiff is not entitled to the recovery of damages.

"To the ruling of the court that, upon the facts found in paragraphs seven (7) and seventeen (17) of the report, the plaintiff is not entitled to an injunction to restrain the defendants from floating logs on said streams in such a way as to damage said bridges.

"To the ruling of the court that, upon the facts found in 7, (595) 17, and 18 of said report, the plaintiffs were not entitled to either damages or to an injunction."

There was an additional finding by his Honor (he having reserved the right to file any that might be suggested and deemed necessary), to the effect that the bridges referred to are the property of the plaintiff, and that the cost of erecting and repairing the same devolves upon the county of Burke. The Rocky Ford bridge has been used and maintained as a public bridge by the plaintiffs about thirty years; Johns River bridge, since 1878, and Lovelady since 1870.

S. J. Ervin and J. T. Perkins for plaintiffs.
Charles A. Moore and I. T. Avery for defendants.

MACRAE, J. In *Gwaltney v. Timber Co., ante,* 579, and previously considered in 111 N. C., 547, we have carefully examined the subject involved in this controversy, and approved the issue framed by his Honor establishing that which is necessary to create an easement for the purposes of floatage in the non-navigable streams of this State. We repeat: "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 with tolerable regularity as to the seasons 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 to mills lower down." We approved the instruction: "If the freshet should arise, from natural rainfall, for a sufficient period to make it useful to the public, it would be considered a floatable stream. Temporary rise, passing quickly down, is not sufficient to make a stream floatable, and would not be sufficient if the freshet should con-
(596) tinue up for even two or three days and be reasonably expected every year." To apply these principles to the present case: His Honor has carefully found the facts as to the manner of floating logs down these streams on ordinary water, by a kind of improvised slack-water navigation, and by rolling the logs over the shoals. He has also found the manner adopted by the defendant of banking large numbers of logs along the streams that they may be carried down at the will of the current, in times of freshet, and without further assistance or direction, and that these rivers are wide and shallow streams, with frequent shoals, and it fully appears that they are useless for floatage purposes in ordinary water. While the water is higher in the winter than in the summer, the increase in the depth of the streams occasioned by the rainfall, and sufficient to float logs, occurs eight or ten times each year, and the water subsides in twenty-four or forty-eight hours. We do not concur in the conclusion of law reached by his Honor on the facts found. It is manifest that this method of transportation is confined to the occasions of rapid rise and fall of the streams, advantage of which must be taken by previous preparation for freshets, and without power to control the timber when carried off by the current.

We are of the opinion that this floatability on the occasional and tolerably regular rises of the river must depend on more than a rapid freshet, subsiding as rapidly. These streams "are entirely the subject of private ownership, and are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling, or other lawful trade or business. The only restriction upon this right of ownership arises, *ex necessitate,* from the nature of running water, and it is that the owner shall so use the water as not to interfere with the similar rights of other proprietors above or below him, on the same stream." *S. v. Glenn,* 52 N. C., 321.

Even if the streams were of such a character as to give the public an easement for floatage upon them, we should not hold that this
(597) right could be exercised without due care for the avoidance of

injury to the interests of the riparian proprietors and the owners of the soil beneath the bed of the stream.

And on the other hand, it would seem that if these were floatable streams in which the public had an easement for transportation, it would be the duty of the county commissioners, certainly in the absence of express authority to the contrary, to so construct the bridges on their highways as to permit the use of the rivers for the purposes of floatage.

Being of the opinion that, upon the facts found, Catawba and Johns rivers, in Burke County, at the points where the said bridges are situate, are not subject to an easement in the public for the floatage of logs, we declare that there is error in the dissolution of the restraining order. The injunction should have been made perpetual. We think, also, that under the general powers granted by section 704 of The Code to the county commissioners, "to sue and be sued in the name of the board of commissioners," they had the power to bring this action for an injunction. For the recovery of damages for injury to the bridges, the statute, section 2055 of The Code, provides the remedy.

If the public interest shall at any time require the opening of these streams for floatage, and the raising of the county bridges, the matter is entirely in the hands of the Legislature, subject to prudent constitutional restrictions as to vested rights.

Reversed.

AVERY, J., concurring: If it be true, as appeared from the testimony offered, and as was found by the judge below, that neither the Catawba River nor Johns River afford sufficient water to float logs over the shoals that abound in the beds of both, except when they rise suddenly eight or ten times during every year, and continue at a sufficient height to carry the logs off for a period of from twenty-four to forty-eight hours, then neither of the rivers would fall within the definition of a (598) floatable highway heretofore given by this Court. *Gwaltney v. Lumber Co.*, 111 N. C., 547. The record in the case operates as an estoppel only upon the parties to the action, or those who are in privity with them and are bound by the decree. As between the defendant company and every riparian proprietor who owns any portion of the bed of the Catawba or Johns rivers, it is still an open question whether the company can use the water passing over his land as a public highway, just as in *Gwaltney v. Lumber Company* the decree precludes the defendant from claiming the right to use so much of the bed of the French Broad River between Asheville and the State line as is owned by Gwaltney, and no more. The perpetual injunction must, therefore, be so drawn as to restrain the defendants from using the portion of said streams where the county bridges are situated, for the purpose of floatage, and

not any part of either river above or below such bridges. In *Gwaltney's case,* it seemed to have been admitted that so much of the French Broad River as was above the city of Asheville was a floatable stream. *Non constat* in our case, but that for long distances above the county bridges both the Catawba and Johns rivers may not be hereafter found to be floatable. Nothing, therefore, is settled by this judgment except that the defendants are to be forever enjoined from endangering the stability of the bridges mentioned in the pleadings by attempting to float logs over or under them. Whether it was erroneous, in the first instance, to hold that the rights of the public to use a stream as a highway should be passed upon, whenever a riparian proprietor should see fit to sue one so using it for trespass, is, if our former adjudications are to remain undisturbed, no longer a debatable question. The consequence may be that one mill-owner may, by a succession of findings by court or jury, establish his individual right to use a stream as a public highway, notwithstanding the objections of riparian owners or county authorities
(599) along the whole distance, while another less fortunate litigant may establish by verdicts the right of the public to an easement in all but a single tract extending over the bed of the stream, and be driven to buy the right of way over that, or discontinue his business. Right or wrong, the law has thus been written, and we must adhere to it or modify it. In assenting to the opinion of the Court, I wish to exclude the inference that the right of any particular riparian proprietor along the Catawba or Johns rivers to the use of the bed of the stream in his front has been adjudicated, or that the defendant company is precluded from the right to use the water flowing over his land for transporting his logs. It has been long settled that a State may, by statute, regulate the manner of floating logs, even on larger navigable streams passing through its territory, without interfering with interstate commerce. In the exercise of this authority, Legislatures have enacted laws requiring that logs should be floated only in rafts. In the face of conflicting verdicts between different parties, it may be difficult to determine whether the public have an easement in any stream for the purpose of transportation. The power must reside somewhere to settle the question whether a watercourse is a floatable stream. We have seen that the suits between individuals do not determine the rights of the public. If the Legislature should enact a law providing that a company should have the privilege of floating logs along so much of a certain river as was not already subject to an easement as a floatable stream, would the courts sanction the awarding of damages to alternate proprietors along its banks, because one jury declared it not a highway and assessed damages in the manner provided by law, while another found it susceptible of use as a channel of commerce?

While conceding that the conclusions in this case are in harmony with the opinions in the *Gwaltney case,* I deem it proper to point out the quicksands towards which, it seems to me, we are tending, if (600) no way can be devised of ascertaining the rights of the public in floatable streams, except by endless litigation with unsatisfactory and conflicting judgments.

Cited: S. c., 116 N. C., 734, 743; *Lenoir v. Crabtree,* 158 N. C., 362.

WALTER FARRIS v. RECEIVERS OF RICHMOND AND DANVILLE RAILROAD COMPANY.

Corporation—Service of Process on Local Agent—Practice.

1. An action against the receivers of a corporation is in fact an action against the corporation; hence, under section 217 of The Code, service of summons on a local agent is service on the receivers.
2. No appeal lies from a motion to dismiss an action. The proper practice, upon a refusal of such a motion, is to note an exception in the record and proceed on the merits, as pointed out in *Guilford v. The Georgia Co.,* 109 N. C., 310.

MOTION by defendants to dismiss, heard before *Boykin, J.,* at Spring Term, 1894, of MECKLENBURG. It was admitted that the defendants were nonresidents, and were not a corporation, but had been appointed receivers of the Richmond and Danville Railroad Company, a railroad corporation, by the Circuit Court of the United States for the Eastern District of Virginia, and that T. T. Smith was their managing agent at Charlotte, N. C.

The sheriff's return of the summons was as follows:

"Received 4 December, 1893. Executed 5 December, 1893, by delivering a copy of the within summons to T. T. Smith, agent of the defendants at Charlotte, N. C. Z. T. SMITH, Sheriff."

The defendants entered a special appearance, by their attor- (601) neys, and moved to dismiss upon the ground that the defendants, being nonresident individuals, could not be brought into court by the delivery of a copy of the summons to their agents; that this provision

of the law, Code, section 217, for the service of summons by delivering a copy to an agent, applied only to corporations.

Motion overruled, and defendants excepted and appealed.

Walker & Cansler for plaintiffs.
G. F. Bason and F. H. Busbee for defendants.

CLARK, J. This is an action against "S. H. and F., receivers of R. and D. R. R. Co." It is not an action against them individually. It is, in fact, an action against the corporation. The recovery, if any, must be paid out of the property of the corporation. The receivers are named only because they are temporarily in management of the corporation in place of its regular officials. The Code, section 217, provides that when an action is against a corporation, service of summons can be made on a local agent. Here, service was upon the station agent at Charlotte. He could as readily notify the receivers as he could the president, if the latter had been in charge, and he was as truly the local agent of the corporation as the corporation is in fact the real defendant. Whether any judgment recovered might or might not be paid in preference to other debts of the corporation does not affect this question. In *Eddy v. Lafayette,* 49 Fed., 807, it is held that the Act of Congress (24 U. S. St., 554, 3 Mar., 1887, secs. 2 and 3) authorizing suits to be brought against receivers without special leave, "placed receivers on the same plane with railroad companies, both as respects liability to be sued for acts done while operating the railroad and as respects the mode of obtaining service," and hence upheld the sufficiency of service on
(602) a local agent, as in our case. The same service was held sufficient in *Trust Co. v. R. R.,* 40 Fed., 426.

We have decided the question of practice, but it must be noted that the appeal was improvidently taken. No appeal lies from a refusal to dismiss, as has been repeatedly held. The defendants should have had their exception noted in the record and have proceeded on the merits. This is pointed out in *Guilford v. The Georgia Co.,* 109 N. C., 310.

Appeal dismissed.

Cited: Grady v. R. R., 116 N. C., 954; *Graham v. O'Bryan,* 120 N. C., 464; *Howe v. Harper,* 127 N. C., 358; *Kissenger v. Fitzgerald,* 152 N. C., 250; *S. v. R. R., ib.,* 786; *Hollowell v. R. R.,* 153 N. C., 21; *Pants Co. v. Ins. Co.,* 159 N. C., 80.

FRANK HANSLEY v. JAMESVILLE AND WASHINGTON RAILROAD COMPANY.

Action for Damages—Common Carrier—Excursion Ticket—Failure to Transport Passenger—Inadequate Equipment—Punitive Damages.

1. The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with a purpose of buying a ticket, within a reasonable time, or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises.
2. The amount recoverable for a breach of a contract of carriage is limited to the damage supposed to have been in contemplation of the parties and actually caused by such breach; and the measure of damage is ordinarily not materially different, whether the defendant fails to comply with the contract through inability or wilfully disregards it.
3. The rule is that when a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, he is entitled to recover, in all cases, at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching his destination by means of some other conveyance.
4. Such rule obtains whether the passenger sues for a breach of the contract or in tort for the disregard of the duty of the carrier to the public, unless it appear that, in addition to the expense, loss of time, etc., some personal injury accrues directly from the wilful failure to transport him according to the schedule time, or some indignity is sustained by such failure.
5. Punitive damages will not be awarded against a railroad company where, by reason of defective equipment, it failed to carry a person to whom it had sold an excursion ticket back to his starting point, when the only injuries complained of were inconvenience, delay and disappointment, and there was no proof of bad motive on the part of the defendant.

CLARK, J., dissents, *arguendo.*

ACTION for damages, tried before Graves, J., and a jury, (603) at _____ Term, 1893, of BEAUFORT. From judgment for plaintiff, defendant appealed. The facts appear in the opinion.

Charles F. Warren for plaintiff.
J. H. Small and W. B. Rodman for defendant.

AVERY, J. As this controversy grows out of an admitted failure on the part of the railway company to perform its agreement with a passenger to carry him to and from a particular place within a given time, and involves especially the question whether the testimony warranted the

court in instructing the jury that they were at liberty to add exemplary damages to the estimated loss actually sustained by reason of the delay, it is not improper to state in the outset several leading principles of the law governing the relative rights and duties of carriers and passengers, and the rules generally applicable in the assessment of damages in such cases.

The contract of carriage begins when the passenger comes upon the carrier's premises or upon its means of conveyance with a pur-
(604) pose of purchasing a ticket within a reasonable time, or after having purchased a ticket. The relation once constituted continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises or has been allowed a reasonable time to leave such premises. 2 A. & E., pp. 742 to 745. There is always on the creation of a relation an agreement, express or implied, and a legal obligation to perform the stipulation of the contract by transporting the passenger in accordance with the published schedule, or within a reasonable time. Hutchison on Carriers, sec. 603 *et seq.*

If an action be brought for a breach of contract, the amount recovered is limited (with the single exception of a breach of marriage contract, say many law writers) to damage supposed to have been in contemplation of the parties and actually caused by such breach. The measure of damage is ordinarily not materially different, whether the defendant fails to comply with his contract through inability or wilfully disregards it. We shall have occasion presently to advert to the distinction between actions of tort founded upon a wilful omission of a common-law duty, but involving at the same time a breach of contract, and such as are brought to obtain redress for the intentional failure or absolute refusal to comply with the terms of an agreement.

Actionable negligence must be the proximate cause of a legal injury and damage. It may be:

1. A pure tort.

2. An inadvertent breach of contract, which cannot be regarded as independent of the contract, and tortious.

3. A breach of contract in the nature of tort, and which may be treated as such, independent of the contract. 5 A. & E., *supra.*

Treating of torts of this third class, Bishop, Non-contract Law, sec. 74, says: "Because a common carrier, whether of goods or
(605) passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a tort, although there is a contract which is violated by the same act." Whenever there is a public employment from which arises a common-law duty, an action for a breach of

such duty may be brought in tort. *Express Co. v. McVeigh,* 20 Gratt., 264; *Clark v. R. R.,* 64 Mo., 440; Shearman and R. Neg., sec. 22.

In actions *ex delicto* the motive of the defendant becomes material. 1 Sutherland Damages, sec. 373. If a tort is committed through mistake, ignorance or mere negligence, the damages are limited to the actual injury received. 5 A. & E., p. 21, and note 3. But where there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation, in the act causing the injury, punitive damages are allowed, said the Court in *Holmes v. R. R.,* 94 N. C., 318. But the statement of the rule was modified by omission of the terms "gross negligence" in the subsequent cases of *Rose v. R. R.,* 106 N. C., 168, and *Tomlinson v. R. R.,* 107 N. C., 327.

The modification mentioned was due to the fact that this Court in the meantime had said in *McAdoo v. R. R.,* 105 N. C., 140, that "the most learned and discriminating text-writers concur in the opinion that in actions arising *ex delicto* there can be no degree of negligence that can be described by the word 'gross' alone. But where an injury is due and can be traced directly to the wilful act of another, he is not absolved from liability to the injured party. . . . Hence, we often find in opinions which have emanated from this and other courts the expression 'gross and wanton negligence,' but the former word is never used to describe a degree of carelessness that will excuse the fault of the plaintiff in exposing himself to danger, except when it is improperly held synonymous with wilful, malicious or fraudulent."

Thompson Carriers and Passengers, p. 573, section 27, says: "Such damages are termed exemplary, punitive or vindictive—sometimes called smart money—and are only awarded in cases (606) where there is an element of either fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation, in the act of omission causing the injury. . . . Some of the authorities include 'gross negligence' as one of the elements which entitles the plaintiff to exemplary damages. But the better view is given in an opinion delivered in a recent case in the Supreme Court of the United States. In reviewing that case *Mr. Justice Davis,* who delivered the opinion, said: "Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence." *R. R. v. Ames,* 91 U. S., 489.

The general rule, therefore, is that where the violation of duty makes the defendant a wrongdoer, only compensatory damages are allowed, while proof of a wrongful purpose may take a case out of it, as an exceptional one. Fraud, malice or insult imply from their very definitions the existence of an intent on the part of the wrongdoer to cheat, to injure

through hatred, or to oppress. . Where even the rightful ejection of a passenger is accompanied with undue force, "rudeness, recklessness or other wilful wrong" (*Rose v. R. R., supra*), the law assumes the existence of the bad motive, on the principle applicable in ordinary cases of assault, that every person is presumed to intend the natural consequences of his own act. *Tomlinson's case, supra.* It must be noted that Mr. Thompson carefully excludes "gross negligence" as an element warranting allowance of such damages, and substitute the expression "such a degree of negligence as indicates a reckless indifference to consequences," which is equivalent to wanton carelessness. Yet the learned *Justice* who wrote the opinion in *Holmes' case,* supra, inadvertently cited that author (94 N. C., p. 323) in support of his statement of the
(607) doctrine. In the consideration of the case at bar, therefore, it is proper to dismiss from our minds the idea that the weight of authority in our own Court, or elsewhere, leaves us at liberty to hold that punitive damages may be awarded in every instance where a court can, by giving a very comprehensive meaning to that undefined and improper term (gross negligence) as descriptive of the degree of carelessness, classify a case as an exceptional one, taken out of the general rule by the evidence of intent.

Counsel for the defendant asked the court on the trial of the case at bar to charge as follows:

"1. That upon the complaint, and the facts as stated in the complaint, in the absence of any allegations of wilful or gross negligence, the plaintiff is not entitled to recover punitive damages.

"2. Taking the entire evidence in view, the plaintiff is not entitled to punitive damages.

"4. That if the plaintiff knew, when he contracted for transportation to Jamesville and return, of the general character, quality and condition of the defendant's equipment, and the general condition of its road, plaintiff would be entitled to recover no damages, except the cost of transportation back to Washington.

"5. That the cause of action being laid in tort, the plaintiff cannot recover damages for a breach of contract of carriage in this action.

"6. That, upon the entire evidence, the jury should respond to the several issues in favor of the defendant.

"7. That if the defendant was expending the entire income from its road in the maintenance of its roadway and the equipment of said road, it is not guilty of such wilful negligence as will subject it to punitive damages, but the plaintiff can only recover such actual damages as may have been proved."

(608) The court refused to give the instructions asked, but charged the jury, among other matters, as follows:

"2. The plaintiff claims that he bought a ticket from Washington to Jamesville and back to Washington; that the defendant negligently failed to have a train to bring him back; and also punitive damages for the wrongful act of the defendant in failing to bring him back. He alleges that the defendant has wilfully failed and neglected its duty to the public in not properly keeping its roadbed, tracks, engines and cars in such condition as to do the business which it naturally gets, and if you are satisfied that the defendant has wilfully neglected to do this, and in consequence of this wilful negligence they failed to run the engines and cars to return the plaintiff to Washington, then he would be entitled to punitive damages; otherwise he will only be entitled to compensatory damages."

The court also charged the jury that it was the duty of defendant to have known the condition of its road and cars, and if they found that the roadbed, track and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engine would be able to carry the trains through, etc., it would be wilful negligence, for which they might allow punitive damages.

It appeared from the testimony that the road was originally constructed for the purpose of hauling lumber, but ultimately engaged in the business of transporting passengers across the intervening swamp from its northern terminus at Jamesville to its southern terminus at Washington. The roadbed had been made by driving down piles of various kinds to make a foundation for the crossties. In the earlier years of its operations as a carrier of passengers the company had owned two engines, one regular narrow-guage passenger car and one passenger car constructed out of a street car, but the latter car had become unserviceable some time before the injury complained of, and on extraordinary occasions a flat or box car had to be used to accommodate passen- (609) gers. The engines had become worn, and had been jolted and injured on account of the bad condition of the roadbed and the consequent jarring in passing over it. The earnings of the road had been applied exclusively to its improvement during the whole period of its use, as a road for transporting passengers, but latterly the income had been greatly diminished and was insufficient to keep the roadbed in repair, much less to provide additional cars or engines. These are some of the facts testified to by the witnesses.

The gravamen of the complaint is that the defendant company carried the plaintiff from Washington to Jamesville 7 November, 1892, but failed to furnish means of transportation, at the stipulated time, November 9, to bring him back to Washington on his return ticket.

In applying the abstract principles, which we have stated more specifically, to the case before us, we find it to be a well-settled rule that where a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, such person is entitled to recover in all cases at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching the objective point by means of some other conveyance. *Young v. R. R.*, 1 Cal., 353; *Hamlin v. R. R.*, 1 H. & N. Ex., 408; *R. R. v. Banard*, 58 Ga., 180; *Howcroft v. R. R.*, 8 Eng. Law and Eq., 362; *Sears v. R. R.*, 14 Allen (Mass.), 433; *Eddie v. Harris*, 78 Texas, 661; *Walsh v. R. R.*, 42 Wis., 1.

The rule of damage just stated is to be adopted not only when the suit against the railway company is brought for, or the proof confined to, the breach of contract of carriage, but, as well, where the plaintiff elects to sue in tort and rely upon the disregard of duty on the part of the carrier as a cause of action, unless it appear that the plaintiff (610) has suffered, in addition to the expense, loss of time and inconvenience incident to every failure to comply with such a contract, some personal injury, of which the wilful failure to transport him according to the schedule time is a proximate cause. 5 A. & E., 40; *Milwaukee v. Ames, supra; R. R. v. Sellers*, 91 Ala., 9; 3 Sutherland Damages, secs. 934 to 938; *Martin v. R. R.*, 32 S. C., 592; *Wilkinson v. Searcy*, 76 Ala., 176; Shearman & Red. Neg., sec. 23.

In *R. R. v. Sellers, supra,* where the conductor carried a female passenger beyond the station to which the company had contracted to carry her, and ordered her off the train in a driving rain, with an infant in her arms, and so encumbered with baggage that she could not protect herself by using an umbrella, thereby subjecting her to exposure from which she contracted sickness that lasted for three weeks, the Court carefully, and in express terms, rested the decision that the jury might allow exemplary damages upon the ground, not of the "omission of duty" on the part of the conductor of stopping at the station, but of his wilful disregard of her comfort and health in forcing her to expose herself and her infant, instead of letting her off at a house or backing the train to the station. In discussing this doctrine, 3 Sutherland, section 938, says: "Where a person has bought a ticket and is carried beyond the station for which he is ticketed, without any fault on his part, he has a right of action for at least nominal damages, though he suffers no actual injury, and for such actual injury as he may in fact suffer." After laying down the foregoing as the ordinary rule, when the conductor, with a full knowledge of the destination of a passenger, merely takes him beyond that point and lets him off without circumstances of aggravation, pro-

ceeds to refer with approval to the ruling of the Court of Alabama, already cited, that there was evidence in addition that a female passenger was ordered off the train with her infant, the circum- (611) stances attending her expulsion were evidence to be considered by the jury of wilful wrong on the part of the conductor, and consequent liability on the part of the company to punitive damages. It is an error that will lead to endless confusion to hold that "smart money," which is allowed as a punishment to the wrongdoer, may be recovered in every case where under the common-law practice an action *ex delicto* would lie. *Wannamaker v. Bowes,* 32 Md., 42; *Wilkinson v. Searcy, supra; Phelps v. Owens,* 11 Cal., 22. All of the actions brought against railway companies for breach of duty arise out of tort, but it is only in those where the elements already mentioned as indicative of bad motive exist, and where, in addition, some personal injury or indignity is sustained, that the plaintiff is allowed to recover more than compensatory damages. *Morse v. Duncan,* 14 Fed., 396. In *Tomlinson v. R. R., supra,* the Court said: "The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude, as a claimant of punitive damages, than if he had been rightfully ejected, but in an unlawful or unwarrantable manner. It is an essential prerequisite to the acquisition of the right to recover exemplary damages for wrongful expulsion of a passenger from a train that there should be evidence of undue force, unnecessary rudeness in the application of the force or insult, malice or some wilful wrong accompanying the act of ejecting him or causing him to leave the train." *Rose v. R. R., supra,* and authorities there cited.

Justice Clark for the Court, in *Wallace v. R. R.,* 104 N. C., 442, approving the rule laid down in 3 Sutherland Damages, 261 (1 Ed.), said: "Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering both of body and mind, which are the *immediate* and necessary consequences of the injury."

"In the absence of any sufficient testimony to make the company liable for *wilful* disregard of the intestate's danger," said the Court in *Roseman v. R. R.,* 112 N. C., 709, "we think the court below erred in submitting the case to the jury." (612)

It is true that smart money may be awarded by the jury when no actual but only nominal damage is shown, as when a conductor rightfully expels a person from a car, or the owner puts a trespasser off his premises, and either of them uses excessive force, or subjects such person to useless indignity. *Tomlinson v. R. R., supra; White v. Barnes,* 112 N. C., 323. The allowance is made in these instances on account of the assault or rudeness. But where a trespass is committed by mistake, the case is not governed by the same principle as when a wilful assault is committed. *Beveridge v. Welch,* 7 Wis., 465. It is not sufficient ground

for allowing punitive damages that the defendants, when they committed a trespass, had reason to believe, but did not know, that their acts were wrongful and might result in injury to plaintiff. *Inman v. Ball,* 65 Iowa, 543. On the other hand, a trespasser is always responsible for such actual damages as legitimately follow from his act, whether he contemplated the result or not (*Allison v. Chandler,* 11 Mich., 542), while one who assaults another is presumed to have intended the personal injury—that is, the consequence of committing the assault—it being a wrongful act, done purposely and without cause. *Gasty v. Ambs,* 28 Mo., 33; *U. S. v. Taylor,* 2 Sum., 586; *Causee v. Anders,* 20 N. C., 388. We think that the case at bar is one of those where the plaintiff, under the common-law practice, might have elected to bring his suit either for the breach of contract in failing to bring the plaintiff back on schedule time or for the disregard of his duty to the public as a carrier, either an action of assumpsit or of trespass. But, because he chose then to sue for the tort and now to allege such facts as show an omission of duty, it does not follow that upon proof of such allegations exemplary damages will be allowed. There has been a failure to show the sort of (613) wilfulness that manifests its presence in malice, rudeness, violence, indignity and reckless disregard of consequences, and there is no evidence that the plaintiff suffered from sickness contracted by exposure incident to the delay, or was subjected, in consequence of the defendant's failure to furnish transportation, to any other personal injury or to indignity. If neither the intentional and wrongful expulsion of a passenger, not accompanied with undue force (*Tomlinson's case, supra*), nor the negligent carrying him beyond his destination (3 Sutherland, sec. 938), after having inspected his ticket or received it, is sufficient evidence of the wilful infliction of personal injury to warrant the allowance of punitive damages, we fail to see upon what principle we can hold a railroad company liable to be so punished because, with a full knowledge on the part of its manager that the company had but two engines, one of which was in the shop at Norfolk for repairs, it undertook to haul to Jamesville and back with the other, not then in good condition, the train on which the plaintiff and others, who had return tickets, were to be carried as passengers, because only of the delay and inconvenience incident to such detention. If the same engine, in consequence of the bad condition of the track or the engine itself, had, with the cars, been derailed, only those passengers who received bodily injury could have maintained actions against the company and have recovered, as a part of the compensation for the consequences of the accident, exemplary damages. It is not necessary to cite authority in support of the soundness of so plain a proposition, and yet if we sustain the court below the logical result would be that a passenger who is delayed, without suffering

bodily injury, by a defective engine, is entitled to smart money, though he could not have subjected the company to such punishment had he escaped unharmed when it was derailed and upset. "Neither negligence without damage, nor damage without negligence, will constitute any cause of action." Shearman & Red., *supra,* secs. 23-25. The case of *Purcell v. R. R.,* 108 N. C., 414, seems to have been con- (614) fidently relied on to sustain the contention of the plaintiff. The facts in that case were that the plaintiff had purchased a ticket and was waiting, at the time at which it was advertised that the train would stop, at the station where he was to embark, but the cars being overloaded because a circus was to give an exhibition at the station to which the passenger was destined, the conductor did not stop at the station, but left him standing. It was held that the failure to provide sufficient means of transportation, when by reasonable diligence it could have been ascertained that they would be needed, was such evidence of wilfulness and gross negligence as to warrant the court in instructing the jury that they might allow punitive damages. In the opinion, *Heirn v. McCaughan,* 32 Miss., 1, was cited as "exactly in point" to sustain the ruling, though even that extreme case was distinguishable from *Purcell's case,* as well as that at bar, in that the jury must have found preliminary to the assessment of exemplary damages:

1. That, after advertising that the boat would stop for passengers at the landing where the *feme* plaintiff was waiting, the owners or their agent wilfully or capriciously passed by when they could have effected a landing there and had room to accommodate the plaintiff.

2. That the instruction excepted to and sustained was that the plaintiffs were entitled, "from the exposure and discomfort they suffered" in waiting for the boat, to exemplary damages (p. 24), it appearing on the trial that the *feme* plaintiff was pregnant, and that the weather being unusually cold she suffered great pain and anguish, whereby her health and life were in peril.

In addition to the authorities already cited upon this point, we find a summary of the doctrine (compiled from leading cases in Ray Negligence of Imposed Duties, p. 228, section 68), which is as follows: "Where, according to the schedule of trains, a passenger arrives at a station intending to take passage, and he finds no train ready, (615) and is compelled to remain over the night, and in consequence of the delay he fails to keep an appointment and complete business arrangements, while he will be entitled to recover the actual expense incurred in his hotel, he cannot recover beyond more than nominal damages"—citing *R. R. v. Green,* 52 Miss., 779, to sustain the proposition; and the Court say, in that case, on page 229, that "punitive damages will not be allowed in the absence of any circumstances of malice, op-

pression, insult, *personal injury,* mental and physical suffering, although sometimes more than actual damages may be awarded against common carriers by way of punishment for their neglect of duty and as a protection to the public." In the application of the proposition which is taken from that case, the Court held that where a passenger train ran sixty yards beyond the platform and failed to stop there long enough for a passenger, who had bought a ticket and was waiting to embark to reach it, the allowance of $1,500 damages was excessive, because, "no damages were proved except disappointment, delay and inconvenience." The reasonable rule adopted in Mississippi will not, therefore, apply either to *Purcell's case* or to that at bar, since no personal injury was sustained by the complainant in either case, nor was upon any phase of the evidence, to recover punitive damages, shown, except the disappointment, delay and inconvenience resulting from the failure to furnish means of transportation.

We conclude, therefore, that the plaintiff was not entitled, upon any phase of the evidence, to recover punitive damages for the reasons:

1. That he has not proved that he sustained any personal injury or shown any grounds for asking damages except inconvenience,

(616) delay and disappointment.

2. That in no aspect of the testimony is there evidence of bad motive sufficient to entitle the plaintiff to more than compensatory damages.

In passing upon this question we must invoke the aid of commonsense and common observation, since the question whether a given act amounts to negligence at all, and, if it does, what degree of culpability attaches to it, depends not only upon surrounding circumstances, such as the condition of the parties, but the condition of the country and the progress of improvement in science and the arts.

We cannot shut our eyes to the history of railways in North Carolina, and the daily developments of the country by new branch lines built first for the transportation of lumber, and gradually extending their business as carriers to other freight, until at last, though the corporation has been able to purchase not more than two or three engines and a single passenger car with few appointments, its patrons induce it to transport passengers in order that they may have the advantage of saving time and expense by substituting such a conveyance as an improvement on a road wagon or other vehicle. We are not disposed to check the process of evolution which we see around us from a lumber road into a comfortable line for passengers as the development of business justifies the change. Even where a road appears to be retrograding, we see no reason why we should interpose with a harsh rule, such as would have stopped the operation of the Raleigh and Gaston road nearly fifty years ago,

with the best efforts of our distinguished Governor Graham, representing the State as a principal stockholder, and running it with poor equipments and constant danger of injury to passengers by derailments and snake-heads and frequent delays of many days to purchasers of tickets. History has repeated itself in the gradual improvement of the roadbed and equipment of the Western North Carolina Railroad. If the axe is to be brought to the root of the tree by stopping these roads from transporting persons at all unless the conditions be improved, the
Legislature has wisely attempted to vest the necessary power in (617)
the Railroad Commission to accomplish this end, either by ordering a cessation of operations or the improvement of the roadbed and the purchase of new equipments. Meantime, neither the law, fairly interpreted, nor considerations of public policy, warrant the adoption of so harsh a rule as that proposed.

It necessarily follows that *Purcell's case* is overruled as inconsistent with the principles we have laid down. We are less averse to taking this course, because the doctrine there enunciated can never become a rule upon which the title to property depends, and, as we have intimated already, because it may operate in its enforcement to check the improvement and development of sections now too remote from market to justify the most costly roadbeds and the best equipments.

For the reasons given we deem it unnecessary to discuss the other exceptions, which, we may state in a general way, are untenable, and we feel constrained to grant a new trial.

Judgment was entered at last term.

CLARK, J., dissenting: It is the duty of railroad companies to run their trains according to schedule. "Passengers, if delayed, are entitled to compensation for loss of their time (*R. R. v. Books,* 57 Pa., 339), with their expenses during delay, or, when necessary, expenses of procuring another conveyance. As to compensation for loss of time, . . . it is admissible to prove the rate of wages at the place of destination." 2 Harris Damages by Corporation, 545. "A passenger, in order to avoid delay, can only incur a reasonable expense. He cannot take a special train in order to avoid a slight delay. . . . The value of time lost may also be recovered. Evidence of the rate of wages earned by persons of plaintiff's trade at the place of destination is admissible to guide the jury in fixing the damages." 2 Sedg. Dam., 862, 863.
Such are the general principles applicable in cases where, by (618)
reason of the train being behind the schedule time, the passenger misses connection with the first train on a connecting road, or is delayed even in reaching his destination on the carrier's own line according to the advertised schedule when the action is for breach of contract. As in

every such case of delay each passenger is entitled, at least, to nominal damages, it is of importance to the public and the common carrier to revert to the settled principle in actions for breach of contract that the parties are only liable for those damages which were reasonably in their contemplation at the time of making the contract. This is the usual limit of damages, but there may be cases where the neglect of the carrier is so wilful as to make it liable in an action of tort for exemplary damages.

The plaintiff, however, contends that as the present is an action of tort, upon the evidence he is entitled to recover exemplary damages. The question was decided by this Court, no one dissenting, in *Purcell v. R. R.*, 108 N. C., 414, where it is said (pp. 417, 418): "The Code, section 1963, provides, 'Every railroad corporation shall . . . at regular times, to be fixed by public notice, . . . take, transport and discharge such passengers and property . . . on due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.' For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges v. R. R.*, 105 N. C., 170), but he could elect to sue in tort for the injury and the breach of public duty (existing independent of the statute) by the wilfulness or negligence of defendant. Bishop Non-contract Law, pp. 73, 74; Redfield Carriers, p. 422; *Tallon v. R. R.*, 2 El. & El., 844. If the tort was committed by mere negligence of the defendant, as simple carelessness or inadvertence, the plain-
(619) tiff would be restricted to compensatory damages, and as no special damages were alleged and shown other than obtaining another conveyance, the measure of damages, as laid down by the court, to wit, the price of procuring such other conveyance, would have been correct. But if the conduct of the defendant was wilful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition."

In the present case there was evidence of great dilapidation of cars, rolling stock, engines, roadbed and trestles, and of continued neglect to repair the same. So gross was it that for defendant to continue to offer to transport and to receive for transportation passengers, with such defective machinery and roadway, was such a disregard of its duties and the rights of the public that in case of death resulting to a passenger while *en route,* there are authorities which would have sustained an indictment for manslaughter against the president, directors and other chief officers. It is very certain that, with such machinery and roadbed, to contract to take the plaintiff and others on a round trip, and having gotten them to the other end of the line, to leave them there to get back

as they could, was such "gross and wilful disregard of plaintiff's rights as would entitle him to recover punitive damages." As was said in *Purcell v. R. R., supra,* "should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and wilful neglect of the duties it has assumed, and such disregard of the rights of others. Yet such is the effect if, without adequate excuse, it should be allowed thus to act with no other penalty than refunding the price of the ticket, and the price paid for another conveyance, since the latter would be demanded in very few cases, and only when the destination is at a short distance. . . . The refunding of the price of the ticket would, in most cases, amount to nothing, as the passenger would usually buy a ticket by the next train. Yet the inconvenience, annoyance and injustice to the traveling public by such (620) detention would be great and difficult to estimate." In that case, the plaintiff sued for damages because the train ran by its regular station without stopping to take him on. Here, the condition of the machinery and roadbed was such that it was dangerous to travel over the road. The defendant company showed a criminal indifference to the rights of the public in offering to transport passengers when it knew the uncertainty alike of safe transportation and on schedule time, both of which are implied in its offer.

The company owed it to the public to keep its appliances and roadway in proper condition to transport safely and according to schedule. If it had not money in the treasury, it should have borrowed it, and if unable to do that, it should have suspended operations, as we learn it has since done.

It is not every case where a railroad is in a bad condition, and there is delay or failure to convey, that the jury can give punitive damages. The court here told the jury that, "if the defendant had reason to believe, and did believe, from the business of the road for several years past, and the condition of its engines, that it would be able to keep its contract to transport plaintiff, and an accident occurred which they could not, in the ordinary course of their business, have foreseen and provided for, it would not be wilful negligence." To this the defendant did not except. The court further charged, if the jury "found that the roadbed, track and engines of the defendant were, at the time alleged, in such condition as to render it reasonably certain, in the ordinary running of its trains, that the engines would not be able to carry the trains through, or the roadbed and track in such condition as to render it unsafe to carry its trains over it, and they permitted this condition of things to continue up to the alleged time, it would be wilful negligence, for which

(621) you may allow punitive damages. If you find that they had allowed their road, track and engines to get in such condition as not to be able to do the ordinary business of the road by their negligence, and the character of that negligence was such as to satisfy you that defendant did not care, or was indifferent as to whether they had the train there or not, it would be wilful negligence." To this the defendant excepted.

The action was brought for a tort. The second paragraph of the complaint was as follows:

"That the defendant so carelessly and negligently conducted and managed the said railroad, and so carelessly and negligently allowed its track, cars, locomotives and other appurtenances belonging to the said railroad as a common carrier to become so out of repair, and the equipment of the said railroad to become so run down and incomplete, and so negligently failed to provide adequate facilities for the transportation of passengers, that the plaintiff, by reason of the premises, having on 7 September, 1892, purchased at the town of Washington a ticket to the town of Jamesville and return—to return on 9 September, 1892—for which the defendant charged and received from the plaintiff the sum of one dollar, was carried over the railroad of the defendant company to the town of Jamesville. That upon the said 9 September, 1892, at the advertised time, plaintiff presented himself at the defendant's depot in Jamesville, N. C., for transportation over said railroad to Washington, N. C., and because of the negligence, carelessness and lack of proper equipment of a railroad receiving the profit of a common carrier, and owing duties to the public, and without fault on the part of the plaintiff, defendant failed to provide locomotive, cars or other means for the transportation of and failed to transport this plaintiff to the town of Washington according to its public duty and advertisement, to plaintiff's damage five hundred dollars."

(622) And one of the issues submitted was, "Did the defendant negligently suffer and permit its road, rolling-stock and equipment to become in the condition described in section 2 of the complaint, so that it was unable to discharge its duties to the public as a common carrier of freight and passengers?" The above charge was, therefore, appropriate to the controversy in the pleadings, and it was most amply supported by the testimony.

It will be seen by reference thereto that the roadbed, the engines and the rolling-stock were all unfit and dangerous to be used, that the manager of the company reported the condition of the same to the owners in Philadelphia, but that in wilful disregard of their public duties they neither put the road, engines and rolling-stock into fit condition, nor

discontinued holding themselves out to the public for the safe and regular carriage of passengers. If such conduct as the evidence described was not such wilful disregard of the defendant's duties to the public as will entitle the plaintiff to recover punitive damages, it will be absolutely impossible for a railroad company in this State to show that "wilful disregard of its duties and indifference to the rights of the public" as will, under all the authorities, make it liable for punitive damages. The damages recovered was $50. Upon the evidence the defendant has cause to congratulate itself that it is not defendant in an action for damages for death or personal injuries caused by its gross and wilful negligence, or that its officers are not under indictment for manslaughter.

This is not a breach of contract for carriage by a private party. But it is the direct result of a long-continued disregard of duties assumed in regard to the public by a corporation which sought and obtained the exercise of the right of eminent domain to furnish it a right of way, and other special privileges. These were granted solely in consideration of the services which the defendant undertook to render to the public, but which it has wilfully and grossly neglected to properly render. (623) The defendant's own evidence was that its manager had repeatedly, time and again, notified the president and directors of the dilapidated and dangerous condition of the machinery and roadbed, but that adequate relief had always been denied.

In *R. R. v. Hurst,* 36 Miss., 660, it is said: "It is the right of the jury in such cases to protect the public by punitive damages against the negligence, folly or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

The Railroad Commission Act (1891, ch. 320, sec. 11) provides that for a wilful violation of the rules and regulations made by the Commissioners, railroad companies are liable for exemplary damages. It would be an anomaly, certainly, if they are not liable for exemplary damages for a wilful violation of statutory regulations, as in this case.

This disposes of the exception to the charge. The exception to the evidence that an engineer in defendant's employ a year previous was allowed to testify to the bad condition of roadway and machinery at that time cannot be sustained. This was competent, taken with the other evidence, to show the gross neglect of defendant in permitting the dilapidation to continue, all the while holding itself out to the public for the safe and regular carriage of passengers. The exception to issues is also without merit. Every phase of the controversy raised by the pleadings could be fairly presented upon the issues submitted. *Humphrey v. Church,* 109 N. C., 132.

Cited: Brooks v. R. R., post, 624; *Waters v. Lumber Co., post,* 655; *Hansley v. R. R.,* 117 N. C., 566, 570; *Mfg. Co. v. R. R., ib.,* 590; *Daniel v. R. R., ib.,* 610; *Remington v. Kirby,* 120 N. C., 325; *Seawell v. R. R.,* 132 N. C., 859; *Puett v. R. R.,* 141 N. C., 334; *Wilson v. R. R.,* 142 N. C., 340; *Rushing v. R. R.,* 149 N. C., 163; *Peanut Co. v. R. R.,* 155 N. C., 156; *Fulghum v. R. R.,* 158 N. C., 562; *Thomas v. R. R.,* 173 N. C., 495; *Brown v. R. R.,* 174 N. C., 696.

(624)

L. F. BROOKS v. JAMESVILLE AND WASHINGTON RAILROAD COMPANY.

Action for Damages—Common Carrier—Excursion Ticket—Defective Equipment—Punitive Damages.

(For syllabus, see *Hansley v. Jamesville and Washington Railroad,* at this term.)

ACTION for damages, heard before *Graves, J.,* and a jury, at Fall Term, 1893, of BEAUFORT.

The facts are the same as those of *Hansley v. R. R.,* 602, *supra.*

Defendant appealed from the judgment for plaintiff.

Charles F. Warren for plaintiff.
John H. Small for defendant.

AVERY, J. Though a critical examination of the assignments of error shows that some of the instructions given to the jury and excepted to by defendant were erroneous, upon different grounds, yet we deem it best to hold that this case depends upon the principle announced in the opinion in *Hansley v. R. R., ante,* 602, in reference to the allowance of vindictive damages, and therefore we grant a new trial.

CLARK, J., dissenting: When damages are special, and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the pleadings. But exemplary damages are not the subject of a claim in the sense that it is necessary to make an averment thereof in the complaint. Such damages may be allowed by the jury without being specially pleaded, if they find that the injury complained of was committed in such a manner as
(625) justifies the addition of punitive or exemplary damages to the compensatory damages allowed. 1 Boone Code Pleading, sec. 140;

Gustafson v. Wind, 62 Iowa, 281; *R. R. v. Arnold,* 90 Ala., 159; *Wilkinson v. Searcy,* 76 Ala., 176; 2 Thompson Neg., sec. 1245; *Panton v. Holland,* 17 Johns, 92; *Taylor v. Holman,* 45 Mo., 371. Such was the rule at common law, and The Code was not in the direction of mere technical pleading. This rule has been uniformly observed in this State. *Knowles v. R. R.,* 102 N. C., 59.

In *Purcell v. R. R.,* 108 N. C., on p. 418, it is said: "If the tort was committed by carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, as no special damages were alleged and shown. But if the defendant's conduct was wilful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition." This is an action for tort. Bishop Non-contract Law, secs. 73, 74; Thompson Carriers, sec. 544; Redfield Carriers, sec. 414; *Purcell v. R. R.,* 108 N. C., on p. 422. Whether in such actions the jury shall add exemplary damages to the compensatory damages given arises upon the proof, and is not a matter of pleading. In some of the States exemplary damages are not allowed at all. It is settled in this State, in conformity with the rule generally obtaining elsewhere, that in a proper case the jury may add such damages to the compensatory damages given. *Johnson v. Allen,* 100 N. C., 131; *Bowden v. Bailes,* 101 N. C., 612; *Knowles v. R. R., supra; Gilreath v. Allen,* 32 N. C., 67. A most interesting and instructive discussion as to the origin and nature of exemplary damages, and a summary of the jurisdiction and instances in which allowed, will be found in 1 Sedgwick Damages, 8 Ed., 1891, ch. 11, pp. 500-548. It only remains to consider if this is one of the cases in which the jury would be authorized to allow such damages.

The judge correctly charged the jury as follows:

"(3) If you answer the third issue (i.e., Did the defendant (626) negligently fail to transport the plaintiff, as alleged in the complaint?) in the negative, the plaintiff would be entitled only to compensatory damages.

"(12) If the defendant failed to provide proper means for the transportation of passengers, as for instance for the plaintiffs in this case, as they had undertaken to do, wantonly and wilfully, the jury may give punitive or punishing damages, and the amount of such is largely a matter for the jury to determine, but the court will supervise, to see that no harm is done."

The charge of his Honor is full and carefully considered, to which several exceptions were taken, but its correctness depends, after all, upon the legal proposition involved in this section 12.

It is settled in this State that punitory damages can be given against a common carrier for wilful and wanton disregard of its duties to the

public, and that these can be recovered in addition to compensation, by any passenger injured by such conduct of the company. *Purcell v. R. R., supra,* citing *Heirn v. McCaughan,* 32 Miss., 1.

In *R. R. v. Hurst,* 36 Miss., 660, the Court say it is "the right of the jury in such cases to protect the public by punitive damages against the negligence, folly or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

It is contended, however, that though punitive damages are allowed in this State, they cannot be recovered against a corporation:

"1. Because there is a remedy by proceedings to vacate the charter upon failure to discharge its duties properly.

"2. That if the track and rolling-stock were in the frightful condition shown by the evidence, application could have been made to the Railroad Commission to have them put in order.

(627) "3. Because the defendant expended on its track and rolling-stock the earnings of the road, and it was compelled to do no more.

"4. That the plaintiff was guilty of contributory negligence in traveling over a railroad which was in such terrible condition."

As to exception 1, if the plaintiff had been wealthy, public-spirited, possessed of leisure and a knowledge of the condition of defendant's road and rolling-stock (none of which things are in proof), he might, if so inclined, have taken proceedings to have the defendant's charter vacated. But even then it would not be incumbent upon him to do so. Besides, it is not clear that a failure to properly convey the plaintiff, according to contract time, would entitle him to vacate the charter, and the condition of the road only violated his individual rights to that extent.

Exception 2.—For the same reasons, and because the plaintiff could not foresee that he would wish to use the defendant's road, the plaintiff's failure to apply to the Railroad Commission neither cures the defendant's wilful and wanton negligence nor deprives the plaintiff of his remedy in this action. Instead, it is for these very reasons that, where a *quasi*-public corporation has wilfully and wantonly failed to discharge its duties, punitive damages are allowed to a private party who undertakes to punish the corporation by an action prosecuted at his own cost.

Exception 3.—Neither is it a defense that the defendant expended its earnings on the road. It was notified by its superintendent of the dangerous condition of the road and rolling-stock, and that the earnings were not sufficient to put them in proper order. To continue to hold itself out thereafter as a common carrier and invite travel, without putting the property into a safe condition, was wanton and wilful negligence, amounting to criminality. If the earnings were not suffi-

cient, the company should either have borrowed money, on mort- (628) gage or otherwise, to put the road and rolling-stock in a safe condition, or it should have ceased to offer itself to the public as a carrier of passengers. Hutchison Carriers, sec. 312.

Exception 4.—If the fourth objection is seriously raised, it is sufficient to say that the record fails to disclose any previous knowledge by the plaintiff of the condition of defendant's road.

There was ample evidence to justify the court in submitting to the jury the question whether the defendant showed such a reckless disregard of its duties to the public, and to the plaintiff, as amounted to wantonness or wilful negligence. Without reciting the evidence, it may be said that it would be difficult to make out a stronger case. The defendant had only one of its two engines in order, and no shops on its road, so that if an accident happened to that engine a delay of several days must ensue; its roadbed was partly on stringers so infirm that in places the track would sink below the water when the train passed; it had an insufficient number of ties, many of them rotten, so that the track would spread; the rails were laminated, and the general condition of the track and roadbed was such that even a new engine would soon be broken by the jarring and shocks, and its only engine was old and dilapidated. Under these circumstances, to offer itself to the plaintiff and his comrades to take them on an excursion over its line, returning them next day, showed a reckless and wanton disregard by the defendant of its duties to the public and the plaintiff, for which, in addition to compensating the plaintiff for his expenses, the defendant is liable also to punitive damages.

It is urged, however, that the plaintiff suffered no physical injury; but exemplary damages are not given only in cases of physical injury to the plaintiff. They are often added to punish the defendant for his wantonness, wilfulness or breach of public duty, as in cases of wilfully running by a station without stopping to put a passenger off. *R. R. v. Sellers,* 93 Ala., 9; or to take one on; *Purcell v. R. R.,* (629) *Heirn v. McCaughan* and *R. R. v. Hurst, supra,* and *Wilson v. R. R.,* 63 Miss., 352; or wrongfully ejecting a passenger; or doing so rudely; *Knowles v. R. R., supra; Tomlinson v. R. R.,* 107 N. C., 327; or offering an indignity to a passenger, *Croker v. R. R.,* 36 Wis., 636. And there are many other instances. 1 Sutherland on Damages, 748. In these cases, the exemplary damages are added to punish the defendant, and they go to the plaintiff, probably in the nature of a reward for vindicating a public wrong by a private action, undertaken and prosecuted at his own risk and expense. They are, hence, allowed where there is no physical injury, *R. R. v. Sellers, supra;* and where the compensa-

tory damages are nominal only, *Heflen v. Baker,* 19 Kan., 9; *Wilson v. Vaughan,* 23 Fed., 221; 5 A. & E., 22.

Suppose this case: A railroad company in splendid condition, as to roadbed and rolling-stock, agrees to take an excursion party on Thursday, as in this case, say from Charlotte to Ashboro, and bring them back next day. But owing to increased demand for accommodations on other parts of its lines, or for no reason at all, it runs no trains by which the parties could return until the Tuesday following: would it be sufficient in such case to give the parties wronged their board from Thursday till Tuesday, and tell them as they suffered no physical injury that further remedy can only be had by beginning proceedings to vacate the defendant's charter (if it could be vacated for one act of this kind), or by application to the Railroad Commission to require the defendant hereafter to have more engines and cars? The conduct of the defendant is even worse, for it held itself out to the public and to the plaintiff as sufficiently supplied with facilities to take the plaintiff and his party to Jamesville and return to Washington next day, but, in fact, from the condition of its track and rolling-stock, of which its managers (630) are fixed with notice, there was grave doubt if the passengers could be taken over the line at all, alive and uninjured. The accident seems to have been not that the passengers were detained five days, but that they got back at all.

There were other exceptions, but what has been said disposes of the whole matter. The pleadings and the evidence justified the judge in submitting to the jury the question whether the defendant was guilty of a reckless disregard of its duties to the public and the plaintiff. They so found. That other parties may also sue, and the aggregate sum may be excessive, is an argument against allowing punitive damages in any case. But as that has been settled in this State, the remedy is in the judge setting aside the verdict unless the damages are reduced, and that course the judge pursued in this case.

If common carriers, and such other *quasi*-public corporations as exercise franchises by authority of law, can wilfully and wantonly fail or refuse to discharge the duties in consideration of the promise to perform which valuable franchises are given, then their conduct might become arbitrary in the highest degree. In cases where there is no physical injury, as wilfully running by a station without taking up a passenger or putting one off, or not running a train to return on the day promised, if the company is only held to pay compensatory damages, there would be no protection to the public in any case where the company might find it profitable or might arbitrarily choose to disregard the duty it owes to the public and the plaintiff. For this reason, the courts of this and

so many other States, in the cases above cited, permit the jury to impose exemplary damages "as an example," subject to the supervision of the court to prevent excessive damages.

Cited: S. c., 117 N. C., 566, 578.

(631)

FRANK WHITE v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

Action for Damages—Common Carriers—Hiring Boat for Excursion—Liability of Common Carriers to Passengers—Wrongful Act of Servant.

1. A common carrier has no power to relieve itself of liability to passengers simply by delegating its privileges to others, unless it has express authority, by statute, to lease its line and privileges.
2. Hiring a train for an excursion does not excuse a company for liability to passengers for injury caused by its servants; hence, where a railroad company, having by its charter the right to own and operate steamboats, chartered or hired a steamboat, manned by its own officers and crew, under its pay, to the managers of an excursion, it is liable for injuries to a passenger resulting from the negligence or wrongful act of its servants, unless it had transferred to the hirers the *exclusive* right to discharge the servants and employ others in their stead, and this is so although the contract of carriage was between the passengers and hirers. *Semble*, that it might be different if the naked boat had been hired without further stipulations.
3. In such case it is immaterial whether the boat was chartered to run to points not on the regular lines of defendant company.
4. It is the duty of a common carrier not only to carry its passengers safely, but to protect them from ill treatment from its servants, other passengers and intruders, and it is liable for an injury or ill treatment committed by its servants, whether in the line of their employment or not.

ACTION, heard at Spring Term, 1894, of CHOWAN, by *Armfield, J.*, and a jury.

It was in evidence that the defendant owned several steamboats, fully manned and equipped, which it used in its business upon its regular line. That in July, 1893, defendant chartered one of these boats, the Mary E. Roberts, with its regular crew and equipment, to C. D. Morris and K. R. Ferebee, to run an excursion from Edenton to Nag's Head, leaving on Saturday night and returning Sunday night, for the sum of $60. It was admitted that the route from Edenton to (632) Nag's Head was not one of defendant's lines. That the crew on

said boat were employed by the month by the defendant to run said boat, and in that way were paid for their services on said occasion by defendant. That the defendant had no control or direction of said excursion, or of said boat, except that it employed the said crew as aforesaid. The plaintiff bought a ticket for said excursion on the wharf at Edenton (it did not appear from whom, or by whom it was signed), which ticket was collected from him by the captain of The Roberts on said excursion trip. While on said boat returning from Nag's Head, near the engine-room, the plaintiff was struck by one Elliott, the engineer of the boat, near the door of the engine-room, and violently cursed. As soon as the officers of the boat heard of the trouble on board they came down and ordered the engineer to the engine-room, where he remained till the end of the trip, but continued to abuse and curse the plaintiff. The engineer, at the time he struck plaintiff, said to him: "You are one of the parties making a disturbance on the boat." But White denied, on the trial of the case, that he did make any disturbance. It was in evidence that the said engineer was a competent and efficient officer, who had been in the service of the company for nine years, but that upon two occasions, while in its service, he had been on a spree, one of them being while he was engineer of a boat run by one of the officers of The Roberts on this excursion.

There was evidence by the plaintiff to show that Elliott was drunk at the time he had the trouble with plaintiff, and evidence to the contrary offered by defendant.

The court stated that in no view of the case could plaintiff recover, and in deference to this intimation plaintiff submitted to a nonsuit and appealed.

It was alleged in the complaint, and admitted in the answer, that defendant was, on 15 July, 1893, and now is, a corporation duly
(633) chartered under the laws of, and doing business in, North Carolina as a common carrier of passengers, and that it did, on the date stated and does now, employ and use in prosecution of its business, besides its trains and engines, one or more steamboats.

W. M. Bond and J. H. Blount for plaintiff.
Pruden & Vann for defendant.

MACRAE, J. The first contention of defendant is that it is in no event liable, because the boat had been chartered by Morris & Ferebee for the occasion, and the contract of carriage was between the last-named parties and plaintiff. And it is found in the case "that defendant had no control or direction of said excursion, or of said boat, except that it employed the crew as aforesaid." But the defendant is a corporation

duly chartered under the laws of North Carolina and doing business as a common carrier of passengers, for the purpose of using not only its trains, but one or more steamboats. One of these steamboats was *chartered* to Morris & Ferebee. The word "chartered," as here used, means "hired." The defendant, however, by virtue of its franchise, was the common carrier and would have no power to relieve itself of liability to passengers simply by delegating its privilege to others.

It is upon the same principle that it has been so often held that unless there be express authority by statute to a railroad company to lease its line, the company is liable for the negligent acts of its lessee. See 2 A. & E., p. 756, where many authorities are cited. It will be seen also that this boat was hired fully manned by officers and crew in the pay of the defendant.

It cannot differ materially from the hiring of a train for the carrying of an excursion, where the contract of carriage is made between the passengers and the hirers under whose direction the excur- (634) sion is made. In the present case the boat was hired to run from Edenton to Nag's Head and return, between certain hours. The defendant had no control or direction of the excursion, or of the boat, except that it owned the boat and employed the crew. The crew, however, constituted the agency by which the boat was run. There might have been a distinction if the naked boat had been let to parties without further stipulation; but here the specific object of the excursion is stated in the contract and the servants of defendant directed to carry it out.

"Hiring a train for an excursion does not excuse the company from liability to the passengers for injury caused by their servants." 2 Redfield Railways, 212. The case of *Skinner v. R. R.* is cited, where the declaration alleged that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried, etc., for reward to them, etc.; that through the carelessness, negligence and improper conduct of the defendants, the train in which the plaintiff was such passenger struck against another train, whereby the plaintiff was injured. At the trial it appeared that the train in question had been hired of the company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one, and that the accident was occasioned by the train, in which the plaintiff was, running against a train standing at the station, it being then dark. One of the points made by defendants was, that there was no evidence that plaintiff was a passenger, to be carried by defendants for hire. Upon this point *Alderson, B.*, said: "The company, by giving their tickets to the treasurer of the society to distribute, constitute him their agent to contract with those who take the tickets; at all events, that was a question for the jury."

The test in such a case as the present is whether the defendant abandoned the entire control of its servants, the master and crew of
(635) the boat, to the hirers. "If the hirer is vested for the time with the *exclusive* right to discharge the servants and employ others, he alone is responsible for their default." Shearman & Red. Neg., sec. 74, note I. The defendant hired to H. for a day a steamer and crew. The crew were hired and paid and entirely controlled by the defendant, who also had power to substitute others in their place. By the negligence of the crew an injury was occasioned to the plaintiff: *Held,* that the defendant was liable, as the crew were its servants and not those of H. *Dolvell v. Tyser,* El. B. & L., 889.

In this instance would the hirers have had the right to discharge the crew and employ others in their stead? Or did the defendant retain the authority to employ and discharge them? This contract of hiring is something like a charter party, in which the owner may either let the capacity of burden of the ship, continuing the master and crew in the employment, or he may surrender the entire ship to the charterer, who then assumes possession and control and provides himself with master and crew. The first is a mere covenant for the performance of a stipulated service, and the owner is responsible under such circumstances for the conduct of the master and crew. 3 A. & E., 144, note 6.

It is contended that, as the boat was chartered to run to points not upon defendant's regular lines, the defendant would not be liable under the facts of this case. We have held in *Washington v. R. R.,* 101 N. C., 239, that a common carrier who entered into a *special contract* to transport passengers or freight to a point beyond its own line, which can only be reached by another line, thereby constitutes the latter its agent in the performance of the contract, and will be held liable for any damage resulting from the negligence of the agent. So we conceive that the liability of the defendant would not be affected by the fact
(636) that the boat was chartered to run between points not upon defendant's regular lines.

It is contended also that there is a distinction between the liability of the master for negligence and that for a wilful wrong committed by the servant. Upon this point we have held in *Hussey v. R. R.,* 98 N. C., 34, that "the rights, the powers and the duties of the corporate bodies have been so enlarged in modern times and these artificial persons have become so numerous and entered so largely into the every-day transactions of life that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons, and this liability is not restricted to acts committed within the scope of granted powers, but a corporation may be liable in

an action for false imprisonment, malicious prosecution and libel." Pearce Railroads, 273.

We have endeavored to show, however, further on, that the liability of defendant arises here, not for the negligence or wrongful acts of its servants within the scope of their employment, but upon the distinct principle of its obligation to protect its passengers from insult or harm. This being the case, is defendant liable for the assault made by its engineer upon the plaintiff, a passenger? Whether this wrongful act was done by the engineer while acting within the scope of his employment is of no moment. The doctrine of *respondeat superior* is not involved. Its general principle is, that a master is liable for the act of his servant, done in the course of his employment about his master's business. But he is not liable for an act done outside of his employment, nor for the wanton violation of the law by him. Wood Master and Servant, 552-559.

The liability of defendant here rests upon the obligation on the carrier not only to carry its passengers safely, but to protect them from ill treatment from other passengers, intruders or employees. "Kindness and decency of demeanor is a duty not limited to the (637) officers, but extends to the crew." *Judge Story,* in *Chamberlain v. Chandler,* 3 Mason, 242.

"Passengers do not contract merely for ship-room and transportation from one point to another; they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance. In respect to such treatment of passengers, not merely officers, but the crew, are agents of the carriers." See also, 2 Wood Railway, sec. 315.

"It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers will receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, although the act of the servant was wilful and malicious, as for a malicious assault upon a passenger, committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and, among other implied obligations, is that of protecting a passenger from insults or assaults by other passengers or by their own servants." Many authorities are cited to sustain this doctrine.

A very apt illustration of the distinction between the consequence to the master of the wrongful act of the servant, done to one not a passenger and to whom the master owed no duty, and an injury of a passenger by a servant, whether done within the scope of his employment or not, may be found in *Williams v. Pullman Co.,* 8 Am. St. Rep., 512.

We think there was error in the intimation of his Honor, and that the case should have gone to the jury.

New trial.

Cited: Redditt v. Mfg. Co., 124 N. C., 104; *Carleton v. R. R.,* 143 N. C., 50; *Stewart v. Lumber Co.,* 146 N. C., 60; *Jones v. R. R.,* 150 N. C., 481.

(638)

JOSEPH KAHN v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Negligence—Ordinary Care—Province of Judge and Jury—Practice—Instruction to Jury.

1. Upon the trial of an action involving the question of ordinary care, it was error to leave the question to the jury upon no other instruction than that "ordinary care was such as an ordinarily prudent man would have used in the protection of his own property," the well-established practice being that "if the facts are undisputed, it is for the court to decide; if they are controverted, or if the inferences to be drawn therefrom are doubtful, the jury must find such facts or inferences, and the court must instruct them as to the law applicable thereto."
2. In an action for damages resulting from the negligence of the defendant or his agents while in his service, the plaintiff is required to prove the negligence as a part of his case.

ACTION, begun before a justice of the peace and tried on appeal at Fall Term, 1893, of CRAVEN, before *Bynum, J.,* and a jury. The plaintiff sought to recover $150 as damages for the loss of property by fire at the company's depot at New Bern. The defendant denied the allegations of the complaint.

Upon the trial the plaintiff testified that he came to New Bern on the night of 15 April, 1889, on the Atlantic and North Carolina Railroad, having a trunk containing clothing etc., valued at $150; he had a check for the trunk and demanded delivery of the trunk on the morning of 17 April, 1889.

Samuel L. Dill for defendant testified: "Was superintendent and passenger agent of defendant in April, 1889. That train on the 15th of that month and year arrived about six o'clock p.m., about sunset. The custom in New Bern is that baggage is delivered upon delivery of check.

Generally immediately after train arrives. It was moved. We (639) have a baggage-room we store it in, and hold it until parties call for it. We charge no storage. We have the baggage under lock

and key. Watchman in the yard. Never had a piece stolen. The building, one story. In it were waiting-rooms, sleeping apartments and a baggage-room. This building was burned in 1889. Don't know how fire originated. The same burnt about three or four o'clock a.m.; I was there. Had a man who looked after stoves, etc. Plaintiff demanded trunk two or three hours after fire. I saw part of trunk after fire. Not a large trunk. Examined some of contents therein. Saw nothing but paper sacks. Thick paper burnt easier than shoes and pants. I asked plaintiff what his damage was. He would not say. I got to fire in twenty minutes. Don't think it caught in center of building. Fire was near baggage-room. We saved safe and tickets. Don't think baggage-room was opened at all. We let a man sleep in the sleeping-room. He was an employee. Don't think he was in there that night. I can't swear that the articles set out by plaintiff were not in trunk, but don't think they were. Blake slept in room. He was a careful and prudent man."

Morris Sultan for plaintiff testified: "That he was at fire. Got there immediately after alarm. Pump opposite office. I had charge of hose. Boyd and several others in office handed out things. Back part in blaze. Door of baggage-room closed. Room between baggage-room and office. Boyd handed things out. Boyd ticket agent. Fire in back part of baggage-room, and partition was burning. Don't know what was lost. All of the work that was done was in the ticket office. I know plaintiff; he is a drummer. I got there five minutes after the fire began. I belong to a steam fire company. Good engine. Building pretty well burned, the fire was eating its way towards baggage-room and the partition was on fire when I got there. There was no effort made in baggage-room. We could not make any because door was locked. We (640) were putting water on fire. We try to save property sometimes."

His Honor charged the jury that the defendant, if liable at all upon the testimony, was liable as a warehouseman and not as common carrier. That it being admitted that the defendant had received the property of the plaintiff, and had failed to deliver it upon the demand of plaintiff, that the burden was upon the defendant to satisfy the jury by a preponderance of the testimony as to the reason of the failure to deliver the said property when demanded, or that the said property, if lost or destroyed, had been destroyed through the negligence of the defendant or its employees.

Defendant excepts to so much of said charge as states that the burden, etc., was on the defendant to show that said property had not been lost or destroyed through defendant's negligence.

His Honor also charged the jury that the defendant was required to use ordinary care for protecting said property, and that ordinary care

was such care as an ordinarily prudent man would have used in the protection of his own property.

Defendant excepted to so much of said charge as stated that "ordinary care was such care as an ordinarily prudent man would have used in the protection of his own property."

The jury found the issues in favor of the plaintiff. Motion for a new trial was overruled, and there was exception by the defendant. Judgment for the plaintiff, and the defendant appealed.

P. H. Pelletier for plaintiff.

W. W. Clark and P. M. Pearsall for defendant.

SHEPHERD, C. J. There was error on the part of the court in leaving the question of ordinary care to be determined by the jury, upon
(641) no other instruction than that "ordinary care was such care as an ordinarily prudent man would have used in the protection of his own property." This is obnoxious to the ruling in *Emry v. R. R.*, 109 N. C., 589; *Knight v. R. R.*, 110 N. C., 58, and the long line of decisions cited in the opinions in those cases. The well-established practice in this State is, that "if the facts are undisputed, it is for the court to decide; if they are controverted, or if the inferences to be drawn from them are doubtful, the jury must find such facts or inferences, and the court must instruct them as to the law applicable to the same." *Emry's case, supra.*

There was also error in so much of the charge as states that the burden was on the defendant to show that the property had not been lost or destroyed by reason of the defendant's negligence. It very clearly appears that the defendant's liability as a common carrier had ceased when the property was destroyed by fire, and that it was liable only as a warehouseman, for want of ordinary care. *Hilliard v. R. R.*, 51 N. C., 343; *Chalk v. R. R.*, 85 N. C., 423.

"The rules of law require, in an action for damages resulting from the negligence of the defendant, or his agents and employees while engaged in his service, that the plaintiff shall prove the negligence as a part of his case" (*Doggett v. R. R.*, 81 N. C., 461), and we see nothing in the record to show that the present case falls within any of the exceptions to this general principle.

New trial.

Cited: Young v. R. R., 116 N. C., 936; *Chesson v. Lumber Co.*, 118 N. C., 68; *Dunn v. R. R.*, 124 N. C., 260; *Kindley v. R. R.*, 151 N. C., 213.

(642)

MADDOX, RUCKER & CO. v. THE ATLANTIC AND NORTH CAROLINA RAILROAD ET AL.

Trial—Evidence—Irrelevant Testimony—Declaration of Witness.

Where, upon the trial of an action involving the ownership of a draft and bill of lading indorsed by D. to plaintiffs, there was evidence which, if believed, established the plaintiffs' ownership, it was improper to admit as evidence on behalf of the defendants, the adverse claimants, telegram and letters of D., written and sent by him after the alleged transfer of the bill and draft, denying the effect of such transfer, there being nothing to connect plaintiffs with such letters and telegrams.

ACTION for the recovery of the possession of a sawmill and fixtures, and for damages for detention of the same, tried before *Graves, J.*, and a jury.

The plaintiffs claimed title through a bill of lading issued to DeLoatch Mill Manufacturing Company, which plaintiffs claim was transferred to plaintiffs Maddox, Rucker & Co. by DeLoatch Mill Manufacturing Company.

The following issue was submitted to the jury:

"Was the same (the bill of lading) assigned for value to Maddox, Rucker & Co. on or before 7 August?" to which the jury answered "No."

The plaintiff introduced upon this issue the deposition of W. L. Peele, and examined W. G. Bryan, who testified that he was the collecting clerk of the National Bank of New Bern, and as such received on 3 August, 1891, the draft which is attached to the deposition of W. L. Peele, with a bill of lading attached thereto, which was indorsed by the DeLoatch Mill Manufacturing Company. That the papers came in the usual course of business, purporting to come from Maddox, Rucker & Co., for whose account he held the same. That he identified the draft by marks he put upon it, but cannot say whether the bill of lading be the same or not. That the indorsement upon the bill of lading shown him, a (643) copy of which is set out in the complaint, and the same which is attached to the deposition of W. L. Peele and A. A. DeLoatch, is in the same handwriting as the signature to the draft, having qualified himself as an expert upon handwriting. That he kept the said draft and bill of lading attached thereto, until 29 August, 1891, when he returned it to Maddox, Rucker & Co.

The plaintiffs had taken the deposition of one A. A. DeLoatch, a non-resident, and the defendants had cross-examined said witness upon said examination. The plaintiffs declined to introduce said deposition upon the trial. The defendants proposed to introduce the cross-examination of A. A. DeLoatch, as taken in deposition, and the exhibits therein

referred to, for the purpose of showing that the bill of lading referred to had not been transferred *bona fide* and for value before 7 August, 1891. Upon the opening of the deposition the plaintiffs excepted to this part of the deposition, and, by consent, the exception was left to be determined upon the trial. The plaintiffs objected to the admission of the testimony, first, because the defendants could not introduce the cross-examination without the direct having first been introduced, and without the witness having been used upon the trial by the adverse party, which the plaintiffs had not done; and second, for that the exhibits proposed to be read were only the declaration of A. A. DeLoatch, under whom the plaintiffs claimed, but all made at a time subsequent to the date of assignment alleged to have been made, and which was in issue then being tried, the defendants then claiming under the same person.

Objection was overruled and testimony admitted, and the plaintiffs excepted. Verdict for the defendants. Motion for new trial by plaintiffs, upon the ground of error in admitting the testimony of A. A.
(644) DeLoatch above. Motion denied. Judgment for defendants, from which plaintiffs appealed.

W. D. McIver for plaintiffs.
W. W. Clark for defendant.

BURWELL, J. Upon the trial the plaintiffs submitted evidence which, if believed by the jury, made out for them a *prima facie* case according to the principle established when this cause was before the Court on a former appeal. 111 N. C., 122. That evidence tended to show that the plaintiffs were owners of the draft and also of the attached bill of lading, by virtue of an indorsement of it to them by the consignor, the DeLoatch Mill Manufacturing Company, the shipment being to the order of the said consignor, and the indorsement being made by A. A. DeLoatch, the president of the company.

If A. A. DeLoatch had testified on the plaintiffs' behalf that they were the owners of the bill of lading, and that he, as president of the company, had transferred it to them by indorsement at a certain time, then it would have been, of course, entirely competent for the defendants to show, for the purpose of weakening the force of his testimony, that since the date of the alleged transfer of the bill of lading he had made statements, oral or written, contradictory of or inconsistent with his testimony. But the plaintiffs saw fit not to use him as a witness in their behalf, and thus rendered his declarations about the fact at issue entirely irrelevant. Hence, the telegram and letters written and sent by him after the alleged transfer of the bill of lading and the drawing of the accompanying draft to plaintiffs' order, and put in evidence by the

defendants and admitted over the plaintiffs' objection, should have been excluded. There was no evidence that, in any way, connected the plaintiffs with this telegram and these letters, and no statement therein contained should be allowed to affect their rights. It matters (645) not in what manner the sending of the telegram and the writing of the letters by DeLoatch was proved, whether by his testimony as a witness present at the trial and put upon the witness stand by the defendants, or by his deposition; these declarations of his should have been excluded.

It is not necessary therefore to decide whether a defendant, upon the trial of a cause, should be allowed to use for his own purposes a portion of the deposition of a witness which was taken at the instance of the plaintiff—whether he should be allowed to put in evidence what the witness said under his cross-examination without also putting in evidence the whole deposition, for the facts testified to by this witness were irrelevant facts, and had no proper place in the trial, whether established by the introduction of an entire deposition, or part of one, or by the oral testimony of a present witness.

New trial.

Cited: Grandin v. Triplett, 173 N. C., 733.

C. G. EGERTON & SON v. WILMINGTON AND WELDON RAILROAD COMPANY.

Evidence—Duplicate Bills of Lading—Declarations of Agent.

1. The declarations of an agent as to a past transaction are not evidence against his principal.
2. Copies of bills of lading made by an agent of a railroad company from the stub-books from which the originals were issued, some time after the originals were issued, are in effect nothing more than the declarations of that agent as to the fact stated on the same, and hence are not admissible in evidence in an action against his principal.

ACTION, tried before *Bynum, J.,* and a jury, at February Term, (646) 1894, of WILSON.

The plaintiffs claimed that they had delivered to the defendant at Kenly, N. C., on 7 December, 1891, for shipment to Cobb Bros. & Gillam, of Norfolk, Va., ten bales of cotton, and that the defendant had failed to deliver the same to Cobb Bros. & Gillam, and that they had delivered

to the defendant at Kenly, on 15 December, 1891, fourteen bales of cotton for shipment to Cobb Bros. & Gillam, at Norfolk, Va., and that only seven bales of said last-named shipment had been delivered by the defendant to said Cobb Bros. & Gillam.

The plaintiffs contended that during the season beginning 7 December, 1891, and ending some time prior to 4 January, 1892, they had delivered to the defendant at Kenly for shipment to Cobb Bros. & Gillam a total of sixty-seven bales of cotton, only fifty bales of which had been delivered to said Cobb Bros. & Gillam. The defendant admitted the shipment of fifty bales, shipped to said Cobb Bros. & Gillam, of which it is alleged that seven of the bales shipped on 15 December, 1891, were a part. The defendant denied the delivery to it of the ten bales alleged to have been delivered on 7 December, and denied that fourteen bales were delivered to it for shipment on 15 December, alleging that only seven bales were delivered to it for shipment on the said 15 December.

The plaintiff C. W. Egerton was introduced as a witness in his own behalf, and testified that he delivered to the defendant ten bales of cotton on 7 December and fourteen bales on 15 December, and that the agent gave him bills of lading for the shipments. He further testified that he sent the bills of lading to Cobb Bros. & Gillam. Over the objection of the defendant, he was permitted to testify that Cobb Bros. & Gillam wrote him that they had not received them. (Defendant excepted.) That he sent the original bills of lading for all his ship-
(647) ments to Cobb Bros. & Gillam, and that a controversy arising between the plaintiffs and the said Cobb Bros. & Gillam as to the number of bales which had been shipped by plaintiffs to them, the said Cobb Bros. & Gillam claiming to have received bills of lading for only fifty bales, and to have received only fifty bales of cotton from plaintiffs. That plaintiff C. W. Egerton, about 4 January, 1892, after all the shipments of plaintiffs to Cobb Bros. & Gillam had been made, requested the local agent of defendant at Kenly to give to plaintiffs duplicate bills of lading which had been issued up to that time, including the shipments of 7 and 15 December. He was further permitted to testify, over the objection of defendant, that the said local agent at Kenly did, at that time, give him duplicate bills of lading, copied from the stub-book from which the original bills were issued, which duplicates, he afterwards found, had been given to Wilson, the trace agent of defendant, to aid him in tracing the lost cotton, and which showed the delivery to the defendant of sixty-seven bales of cotton. (No notice had been given to defendant to produce the duplicate bills of lading thereof.) Defendant excepted.

Verdict for plaintiffs. Motion for a new trial for error in the admission of testimony. Motion overruled. Judgment and appeal.

Aycock & Daniels for defendant.
No counsel contra.

BURWELL, J. Upon the argument the first exception was abandoned by defendant's counsel.

What are called in the record "duplicate bills of lading, copied from the stub-books from which the original bills were issued," evidently purported to be mere copies of the bills of lading made by defendant's local agent some time after the originals were issued, the data for making them being obtained from the "stubs" of the originals. They were nothing more in effect than the declarations of that agent (648) that the "stubs" in the books of the defendant showed that on certain days it had received certain bales of cotton for shipment. It is well settled that declarations of an agent as to a past transaction are not evidence as against his principal. *Smith v. R. R.*, 68 N. C., 107; *McCombs v. R. R.*, 70 N. C., 178; *Rumbough v. Improvement Co.*, 112 N. C., 751. The admission of this evidence was tantamount to allowing the witness to testify that some time after the shipments were made the defendant's local agent told him how many bales of cotton were received by the defendant.

New trial.

Cited: Williams v. Tel. Co., 116 N. C., 561; *Pegram v. R. R.*, 139 N. C., 305; *Morgan v. Benefit Society*, 167 N. C., 265.

(649)

D. T. WATERS v. THE GREENLEAF-JOHNSON LUMBER COMPANY.

Action for Damages—Independent Contractor—Superior and Servant—Liability of Superior for Acts of Subordinate—Trains—Damage to Land in Constructing Railroad—Compensatory Damages—Punitive Damages.

1. Where the relation of servant and agent is once shown to exist, the master or principal becomes *ipso facto* liable for any trespass committed in the course of his employment or the scope of his agency by the person acting for him, to the same extent as if the wrong had been done by himself.

2. In an action against a railroad company for damages done to land by one who built the railroad under a contract with defendant across the plaintiff's land, it is incumbent on the company to show that it exercised no control and was not interested except in results.

3. The fact that a railroad company which had let to a contractor the building of a part of its road and the cutting of timber which, under certain restrictions, it had acquired the right to cut, supervised the cutting of the timber and issued orders which the contractor was bound to obey, showed affirmatively a state of subjection on the contractor's part that made him, in law, the servant of the railroad company.

4. The owner of land contracted to sell to S. timber of a certain size and to allow the latter's train, tramroad, wagons and employees to enter on the land and remove the timber so cut. S. assigned his contract to defendant corporation, with which one P. contracted to build the road and cut the timber on the land through which the road would run and deliver the timber to the company at the railroad. In an action against the railroad company for damages done to the land by P.: *Held*, (1), that the word "train" must be interpreted to mean a "railroad train"; (2) that the right to enter with such train involved the right to construct a railway across the land and to clean out such roads as would enable use to be made of them in hauling the timber; (3) that the owner of the land is entitled to compensatory damages neither for injury done to the land in cutting and removing so much timber as was reasonably necessary in order to construct a way for the passage of lumber trains, nor for such injury to the drainage of the land as was necessarily incident to its skillful construction.

5. In such case, however, the owner of the land is entitled to compensatory damages for the cutting of cross-ties on land not included in the right-of-way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences.

6. Exemplary or punitive damages are recoverable in actions of tort only when a bad motive is shown, and only for such acts of trespass on land as are committed through malice or accompanied by threats, oppression or rudeness to the owner or occupant.

7. Where a contractor for a railroad company engaged with an agent of the company in locating the right-of-way across plaintiff's land asked plaintiff's tenant what kind of a man plaintiff was—whether he had money and could fight a lawsuit—and the agent of defendant said plaintiff was "only a half-way man": *Held*, in the trial of an action for damages for injury to the land, that the language of the agent was not necessarily evidence of malice, wantonness or insult, so as to entitle plaintiff to punitive damages.

8. Where a contractor engaged in building a railroad for defendant company, being forbidden by the owner of the land to cut trees of a less size than had been agreed upon, replied that he was working for the defendant corporation and was building a railroad for which he was obliged to have cross-ties: *Held*, that such language was neither rude nor indicative of malice, so as to justify punitive damages.

9. In an action for an injury in which the plaintiff asks for punitive damages, it is for the court, and not for the jury, to determine whether the evidence is sufficient to entitle the plaintiff to such damages.

ACTION for damages, tried before *Bynum, J.*, and a jury, at (650) Spring Term, 1894, of MARTIN. From a judgment for the plaintiff the defendant appealed. The facts appear in the opinion.

W. B. Rodman for plaintiff.
Moore & Stubbs for defendant.

AVERY, J. Whatever authority may have been given the defendant by the Legislature in its charter, it was not acting or purporting to act under the right of condemnation for public purposes, but by virtue of a contract between the plaintiff and Dennis Simmons, the benefit of which had been assigned by Simmons to the defendant, in which the plaintiff had sold and conveyed all of the "pine and poplar timber on said land which would measure twelve inches in diameter sixteen feet from the ground, with the right for his train, tramroad, wagons and employees to enter on said land and remove said timber." No copy of the contract was sent up, and we must therefore construe the foregoing portion of it embodied in the statement of the case on appeal and purporting to be its only material provision.

Claiming authority to do so under this contract, the defendant company entered into an agreement with one Parker, whereby Parker was to construct a railroad, "cut the timber on the land through which said road, if extended for ten miles, would run, and deliver the said timber to said company at the railroad." During the months of November and December, 1891, and January and February, 1892, Parker accordingly built a railroad over plaintiff's said land for a distance of 1,952 yards and cleared and occupied a roadbed twenty-one feet wide (651) along the whole line, which passed through uninclosed woodland, except at one point, where the fence, or inclosed woodland, was set back by defendant to clear the way for the track.

The other material testimony sent up as a part of the statement is as follows:

"It was in evidence that the timber on plaintiff's land was cut by Roberson under contract with Parker, and was paid for at so much per thousand feet, Roberson employing and paying his hands. There was evidence tending to show that Parker was instructed by the defendant company to cut the timber as they had bought it, and that they had informed him what they had bought; that plaintiff had rented the cleared land on said tract to a tenant and made advances to the tenant to enable him to cultivate the land, which were, according to the said rental contract, to be paid out of the crop raised thereon; that at the time of building the road there had been enough cotton gathered on the land to pay the rent, but not enough to pay rent and advances; but there

was enough in the field, together with what had been gathered, to pay both rent and advances."

The first contention of the defendant company was that Parker was an independent contractor, and that the corporation could not be made to respond in damages for any unlawful act of his, committed in carrying out his contract. A person may become a trespasser by doing himself a lawful act in an unlawful manner, to the injury of another, because the restriction upon his right to exercise dominion over his own property is that he is not allowed to so use it as to injure another. Where he employs another to do what is unlawful, or to act or work for or serve him in the performance of a lawful act in an unlawful manner, in either case such employer is liable for resulting injury to third persons, whether such employees or servants "are paid by the job or by the year or the day," and whether the master "be present or absent." (652) *Wiswall v. Brinson,* 32 N. C., 554. Where the relation of servant or agent is once shown to exist, the master or principal becomes *ipso facto* liable for any trespass committed in the course of his employment or the scope of his agency by the person acting for him, to the same extent that he would have been answerable had the wrong been done by him in his own proper person. Does the testimony, in any phase of it, tend to show that Parker, who committed the trespass, was not the servant or agent of the defendant company, but an independent contractor? If so, it was error to instruct the jury that if they believed the evidence he was the agent of the company.

Had the entry upon the land been made in the exercise of the right of eminent domain, the company would have been answerable not only for the unlawful acts of its servants, done in the course of their employment, or by its consent, but for injuries done by such contractors when exercising for the company some chartered privilege or power, with its assent, since when so acting the contractor would be deemed a servant as between himself and his employer, upon the principle that a corporation which owes a duty to the public cannot rid itself of responsibility by delegating it to another. *West v. R. R.,* 63 Ill., 545; 14 A. & E., 840 and note 2; Wood's M. and S., sec. 316.

In such cases, however, the corporation is not held liable where the contractor commits a trespass upon uncondemned land, unless it authorizes or assents to the unlawful act. *Wattemeyer v. R. R.,* 30 A. & E. R. R. Cases, 384.

The liability of the superior as master depends upon his right to control the conduct of the person with whom he contracts in the prosecution of the work. 14 A. & E., 830; *R. R. v. Henning,* 9 Wall., 649; *R. R. v. Reese,* 61 Miss., 581.

It does not appear how Parker was paid for the construction of the road—whether he was the mere instrument of the company which directed the work, furnished the material necessary to prosecute (653) it, and paid the hands, or whether it devolved on him exclusively under his contract to attend to all of these matters, though it would seem that the burden was upon the company for whom the work was done to show that it exercised no control and was not interested except in results. But the fact that the corporation supervised the cutting of the timber and issued orders that Parker was bound to obey shows affirmatively of itself a state of subjection on his part that made him, in law, its servant. 14 A. & E., *supra;* Wood's, *supra,* 603, sec. 312.

Conceding, then, that Parker was the servant of the company, it remains for us to determine whether he was shown to have subjected his superior to liability for any trespass committed while acting in that capacity; and, if so, by what rule the measure of damage is to be ascertained. The contract, as set forth in the statement of the case, gives to Dennis Simmons the same right for "his train," his tramroad and his wagons and employees to enter. We think that the word "trains," as distinguished from wagons to be drawn on the ways that were to be constructed, must be interpreted as referring to railroad trains, which Simmons had, under the contract, and the defendant had, as his assignee, the right to take with him on the land for the purpose of removing the timber conveyed. The right to enter with such trains involved the authority to construct a railway, upon which alone a train of cars could enter, as necessarily as the right to take wagons on the land for the same purpose carried with it the implied agreement to permit the clearing out of such roads as would enable Simmons to make reasonable use of them in hauling. In so interpreting the language of the contract between plaintiff and Simmons, we have not overlooked the fact that the judge makes no allusion, in charging the jury, to any contention that the word was used in the sense of railway trains. It may be that there was something in the context of the agreement which showed that the word was used in some peculiar sense, or that there was proof (654) of some custom among lumber dealers to give to it a particular meaning, or counsel below may have agreed upon the proper interpretation. In the absence of such explanations, we must follow the rule (1 Greenleaf, secs. 278 and 295) which requires that we shall give the word its ordinary and popular meaning. Resorting to the lexicons for light, we find (Webster's and Century Dictionaries) that there is no popular or ordinary definition, but that of a railway train, that we can adopt. It is clear that there would be no reason for providing especially for the right of ingress for a string of loose and unattached animals, the only other meaning that would be in the least consonant with the con-

text. It may be that when the case is again tried the court will have the benefit of some competent testimony, either in the context or *dehors* the instrument, that will justify a different interpretation. But in the light of the meager statement before us, we must hold that the court erred in instructing the jury that the plaintiff was entitled to compensatory damages for the injury done to the land in cutting and removing so much timber as it was reasonably necessary to remove in order to construct a way for the passage of lumber trains. Whether a way twenty-one feet was necessary for the purpose, was a question for the jury, under proper instruction. Construing the contract as we do, we conclude that, with the right to build a road sufficient for the passage of trains, the plaintiff, by necessary implication, agreed to surrender his claim to such damage to his land as might be incident to the skillful construction of what he had empowered Simmons to build. The same implication must grow out of a grant of the right to construct a private railway as is held to arise in case of a grant or condemnation for the use of a common carrier. *Fleming v. R. R.*, 676, *post; Adams v. R. R.*, 110 N. C., 325.

Upon the same principle, the right to enter with trains carried with it immunity for such injury to the drainage to the land as was (655) necessarily incident to its skillful construction. But granting that the defendant had the right to construct a railway, it was not authorized, either by the express terms of the contract or by reason of any implication arising out of it, to cut cross-ties off the right of way, or to destroy fences in getting them. It was negligence in the defendant to fill up plaintiff's ditches, instead of building bridges over them, in constructing the wagon roads necessary to remove the timber. The plaintiff was entitled to compensation for any reduction in the value of the land, either by cutting timber below the stipulated size for sawing or cross-ties outside of a reasonable right of way for trains, tramways and wagon-ways. He could recover for unlawful obstruction of the ditches the cost of removing the obstruction, and for destroying fences the cost of replacing them.

Exemplary damages are not recoverable in any action of tort, but only in those where a bad motive is shown (*Hansley v. R. R., ante,* 602), and not for every trespass on land of which a defendant is guilty, but only where it is committed through malice, or accompanied by threats, oppression or rudeness to the owner or occupant. 1 Sutherland, sec. 392; 1 Sedgwick, sec. 362; Wood Mayne Damages, sec. 579; *Merest v. Harvey,* 5 Taunton, 150. By reference to the authorities it will appear that punitive damages have not been allowed where the testimony tended to show good faith and only a mistake as to authority (*Beverage v. Welch,* 7 Wis., 465), or even where the trespasser had good reason to believe he

was in the wrong. *Inman v. Ball,* 65 Iowa, 543. In the case of *Merest v. Harvey, supra,* which is cited by plaintiff's counsel, there was evidence of threats and rudeness, if not violence, and in that it is distinguishable from the case at bar. Where the trespasser's conduct is shown to be prompted by malice, or amounts to rudeness or insult, exemplary damages are always recoverable; and such, in substance, we understand to be the rule laid down in the cases cited by plaintiff's counsel from our own reports. *Wyley v. Smitherman,* 30 N. C., 236; *Duncan* (656) *v. Stalcup,* 18 N. C., 440.

The testimony relied upon as tending to show malice, wantonness or rudeness, is:

1. That while Parker, the contractor, and Mobley, who was the agent of the defendant, were engaged in locating the right of way, Parker called the tenant of plaintiff to him, and said: "What kind of man is Waters? Is he a man of means, and could he fight a lawsuit?" Whereupon Mobley, defendant's agent, said: "He is only a half-way man."

2. That plaintiff, while Parker was building the railroad, forbade him from persisting in the work and from cutting any trees under the size mentioned in the Simmons deed, whereupon Parker replied, "That he was working under the Greenleaf-Johnson Lumber Company; that they had a charter for the road, and he (Parker) must have cross-ties to build it, and for Waters to go to Norfolk and see Johnson."

The natural inference from the conversation between Waters and Parker was that the latter, in good faith, believed that he was constructing the road on a condemned right of way, and had the right to appropriate the necessary cross-ties; the question of damage being one to be adjusted between the officers of defendant company and Waters. The language is neither rude nor indicative of malice.

The language used by Parker to the tenant of Waters is, at most, equivocal, not necessarily evidence of malice, wantonness or insult, the burden being upon one demanding punitive damages to bring the case within the rule by showing the bad motive. It is questionable whether such language, used by a servant, could be imputed to the master, if it did in reality tend to show malice on the part of the servant. Indeed, a similar declaration of a servant, where the trespass consisted in removing certain poles, that "they would obey the orders (to remove the (657) poles) if it broke the owners," was not evidence of bad motive on the part of the employer. *R. R. v. Tel. Co.,* 69 Texas, 281. The question whether there was sufficient evidence to entitle the plaintiff to recover punitive damages was one for the court, not for the jury.

For the reasons given, we think that there was not such evidence as warranted the assessment of more than compensatory damages, and the court therefore erred in leaving it to the jury, if they saw fit, to allow

vindictive damages, and for this, and other erroneous rulings mentioned, we must grant a

New trial.

Cited: Remington v. Kirby, 120 N. C., 325; *Craft v. Timber Co.,* 132 N. C., 155, 158; *Stewart v. Lumber Co.,* 146 N. C., 61; *Jones v. R. R.,* 150 N. C., 481; *Warren v. Lumber Co.,* 154 N. C., 38; *Beal v. Fiber Co., ib.,* 151; *Dover v. Mfg. Co.,* 157 N. C., 327; *Embler v. Lumber Co.,* 167 N. C., 462.

B. N. GILMORE v. CAPE FEAR AND YADKIN VALLEY RAILWAY COMPANY.

Action for Damages—Accident at Railway Crossing—Failure to Give Signal of Approach of Train—Negligence—Contributory Negligence.

1. Failure to blow signal at a railroad crossing is negligence on the part of the railroad company.
2. It is the duty of a person in charge of a wagon and team, when approaching a public railroad crossing, to look and listen and take every prudent precaution to avoid a collision, even though it be at a time when no regular train is expected, and particularly so if the approach way is narrow and dangerous.
3. Where, in the trial of an action against a railroad company for injuries caused by frightening plaintiff's mule at a railroad crossing by an approaching train, which gave no signal as it neared the crossing, it appeared that the plaintiff, upon seeing the train when he was about sixty steps from the crossing, dismounted from his wagon and held the mule, which became unmanageable on hearing the sudden exhaust of steam from the engine. There was also testimony that the road approach to the crossing was very steep and that there were deep gullies on the left side of it, which prevented a team from turning out. Plaintiff testified that the approach was not so dangerous, but admitted that his mule was "scary": *Held,* that it was for the jury to determine, under proper instructions from the judge, whether the approach to the crossing was so dangerous as to make it imprudent for the plaintiff to drive upon it sixty steps from the crossing, and whether the place where the team became unmanageable was so near the crossing as to give the plaintiff reasonable ground to anticipate danger unless he took the usual and necessary precautions.

SHEPHERD, C. J., and BURWELL, J., dissent.

(658) ACTION, tried before *Hoke, J.,* and a jury, at Fall Term, 1894, of CHATHAM. The plaintiff tendered the following issues:

"1. Did the defendant negligently destroy the plaintiff's wagon and injure his mules and daughter?

"2. Was the plaintiff guilty of contributory negligence?

"3. If so, could the defendant, notwithstanding the contributory negligence of the plaintiff, have avoided the injury by the exercise of ordinary care?

"4. What are plaintiff's damages?"

The court did not then decide on the issues tendered, but intimated that it might become necessary to frame two issues as to conduct of defendant, one in reference to injury to child and another in reference to injury to mules; that the issues would be finally determined when evidence was in or during the progress of the cause, and directed the trial to proceed, and to this course no exception was taken, plaintiff, however, insisting that the issues tendered by plaintiff were the proper issues.

The plaintiff then offered evidence tending to show that in August, 1893, plaintiff started from Goldston railroad station, on the Cape Fear and Yadkin Valley Railway, with his wife and four children to take a trip to Moore County; that he was driving a team of two mules to a covered wagon, and his wife and children were in the wagon, and he was sitting in front driving, with his feet out on the tongue; that his route lay down the railroad, going in a southerly direction, first on (659) one side of the road and then on the other; that soon after leaving Goldston the wagon road was for some distance as much as a mile from the railroad, then crossed, and for the remainder of the distance traveled on this occasion ran in the main down the railroad as far as a half mile from the railroad for a part of the way; that at a crossing of the railroad about three miles of Goldston plaintiff's team was run into by the railroad freight train and much damage inflicted; that there was a whistle-post five hundred yards back of the crossing, and at a point opposite whistle-post the wagon road was two hundred yards distant straight across from the railroad, and bore on to the railroad at an acute angle till it crossed the railroad where the injury occurred; that the wagon road from the point opposite the whistle-post and some distance on was first a little down grade and then began to ascend slightly, and at a point sixty-five yards from crossing reached an eminence when it descended at a considerable grade, crossing road at grade or about it. The space between wagon road and railroad was clear at point opposite whistle-post, but a short distance on there were woods between railroad and wagon road, and in going up the slant to the eminence the wagon could not have been seen from the railroad; that on the eminence the wagon could have been seen from the train at the whistle-post, and persons on the eminence where wagon road crossed it could have seen along the railroad back to the whistle-post and about two hundred yards

further; that the way was clear from point where wagon was first stopped across to the railroad, but the railroad was there in a cut about half as deep as a freight car and wagon could not at that point have been seen from the train, but could have been seen further on as cut came down toward grade at crossing; that the freight train going south was due at Goldston when plaintiff left there, had not then arrived, and (660) plaintiff knew this, and plaintiff had not heard it pass, but had been at one time as far as one mile distant from railroad; that plaintiff had passed eminence ten or fifteen steps going down to the crossing when he heard train coming, jumped out and caught hold of the mule on the side next to the train, but the team got away from him and ran on to the railroad at or about the crossing, and the injury resulted as described by witnesses. That no whistle was blown at whistle-post by defendant's train, and witness did not hear any sign of train till he heard it roaring at the point he stopped his wagon.

There was no evidence to show that plaintiff stopped and looked or listened for defendant's train before starting down the incline to the crossing.

At the close of the testimony, the court having intimated an opinion that, in no aspect of the evidence could the plaintiff recover, the plaintiff submitted to a nonsuit and appealed.

H. A. London for plaintiff.
George M. Rose for defendant.

MCRAE, J. There can be no question, upon the uncontradicted testimony, that the failure to blow for the crossing was negligence on the part of the defendant. *Randall v. R. R.*, 104 N. C., 410; *Hinkle v. R. R.*, 109 N. C., 472. The defendant, however, contends that plaintiff failed to "stop, look and listen," when he reached the point from which to the crossing it would be dangerous for the plaintiff to drive when a train was approaching. The principles here involved have been so clearly discussed and settled in recent cases in this Court, in those named above, and others there cited, that nothing is left for us but to apply known rules to the present circumstances.

Did the evidence offered by the plaintiff clearly show that the part of the road upon which the plaintiff had entered after passing the eminence, as it is called, and started down grade to the crossing was so (661) dangerous to travelers, in case of the approach of the train, that it was incumbent upon the plaintiff to look and listen for a train before proceeding further? The law is plain. "Where a person in charge of a wagon and team approaches a public crossing, it is his duty to look and listen and take every prudent precaution to avoid a collision,

even though the approach be made at an hour when no regular train is expected to pass. The same degree of care and caution should be exercised by one who is about to drive into such a narrow and dangerous pass as is described by the witnesses, if he would avoid the responsibility for any injury that may result from his carelessness." *Randall's case, supra.*

According to the plaintiff's testimony, he was in about sixty steps of the railroad when he heard the train and saw it coming, and he immediately jumped out and caught the young mule by the bridle. It was then that the noise was made by the exhaust of steam, or, as the witness said, "steam puffed out," and the team in consequence became unmanageable.

The witness Hall testified that the slope of ground where the accident occurred was considerable, and to the left of the wagon where it occurred were woods and deep gullies, so that the wagon could not turn out. Whether the witness intended to be understood to mean the whole extent of the road from the top of the hill to the crossing, or simply that portion of the road at and near the place where the catastrophe happened, is left in doubt. The plaintiff himself, the principal witness, describes the approach to the railroad, but not in such terms as would warrant the conclusion that it was so dangerous; and he admits that he was driving a young and "scary" mule, and he tells of his action and conduct on the occasion referred to. Was this testimony so clear that only one inference could be drawn from it? If so, it was the duty of the judge to decide whether there was such contributory negligence as relieved the defendant from ordinary care and amounted in (662) itself to the proximate cause of the damage received by plaintiff. The province of the judge and that of the jury is explained in *Deans v. R. R.*, 107 N. C., 686. "Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case." Was the place where the team became unmanageable so near to the crossing or to the track of the railroad that the plaintiff had reasonable ground to anticipate danger unless he took the prescribed precautions for one approaching the crossing? Or was that portion of the county road on which the plaintiff was then driving of such a dangerous character that it would not have been prudent for him to drive upon it at a distance of some sixty steps from the crossing? And, in the solution of these inquiries, was the jury satisfied that from this point all the way to the crossing the plaintiff could not ordinarily have stopped that particular team or turned it away from the railroad? There are possibly other questions involved, facts to be found by the jury under proper instruc-

tions from his Honor, and which were not so clear that he was authorized to pass upon them himself.

New trial.

Cited: Russell v. R. R., 118 N. C., 1108, 1110, 1111; *Mesic v. R. R.,* 120 N. C., 491; *Norton v. R. R.,* 122 N. C., 935; *Powell v. R. R.,* 125 N. C., 374; *Jenkins v. R. R.,* 155 N. C., 204.

(663)

JAMES W. TILLETT v. LYNCHBURG AND DURHAM RAILROAD COMPANY AND NORFOLK AND WESTERN RAILROAD COMPANY.

Passenger—Contributory Negligence—Inconsistent Instructions to Jury—Effect of New Trial Granted One of Two Defendants—New Trial as to Some of the Issues.

1. Where a person comes upon the premises of a railroad company at the station, with a ticket or with the purpose of purchasing one, he becomes a passenger.
2. Where an open passenger car is standing on the track, not coupled to the rest of the train, and the conductor warns a passenger not to enter such car until it has been coupled and moved to a point exactly opposite the depot, it is contributory negligence for the passenger to enter the car before it has been coupled and moved to the point designated by the conductor; and this is true even if the car, before it was coupled and moved, was standing at the place where passengers usually board the train.
3. When the court below, in instructing the jury, states a correct proposition upon a certain point of law, and then upon the same point in another part of the charge states a proposition which is incorrect or defective, a new trial will be granted, as the jury are not supposed to know when the judge states the law correctly.
4. When the lessor railroad company is sued jointly with its lessee company for damages caused by the alleged negligence of the lessee, and after verdict the lessor moves for judgment upon the verdict, but makes no motion for a new trial, while the lessee company moves for a new trial, and both motions are refused and both defendants appeal from the judgment rendered against them: *Held*, that the effect of granting a new trial to the lessee is to vacate the judgment as to both defendants.
5. Where the errors committed pertain only to the issues as to negligence and contributory negligence, a new trial will be granted as to these issues alone, and the issue as to damages and the other issues not affected by the error will be undisturbed.

ACTION for damages, tried before his Honor, *Shuford, J.,* and a jury, at April Term, 1894, of PERSON.

The plaintiff alleged that while he was attempting to board a passenger car on a "mixed train" of the defendant Norfolk and Western Railroad Company at Roxboro, N. C., certain freight cars were negligently backed with great violence against the passenger car, and the plaintiff was severely injured on his head, and thereby lost his eyesight. The action was brought against both the Norfolk and Western and the Lynchburg and Durham Railroad Companies, and the plaintiff sought to hold the latter company liable upon the ground that it had leased its roadbed and franchises to its codefendant, the Norfolk and Western Railroad Company, and thereby remained liable for the (664) act of negligence of its lessee. The defendants filed separate answers.

The following issues were submitted:

"1. Did the plaintiff purchase a passenger ticket from Roxboro to Mt. Tirzah Junction before entering defendant's car, and was he a passenger holding a ticket on defendant's train at the time of the alleged injury?" Answer: "No."

"2. Was the Lynchburg and Durham Railroad in the possession of the Norfolk and Western Railroad Company and being exclusively controlled and operated by said Norfolk and Western Railroad Company under a lease from the Lynchburg and Durham Railroad Company at the time of the alleged injury?" Answer: "Yes."

"3. Was the plaintiff, while rightfully on the train of the defendant, the Norfolk and Western Railroad Company, injured by the negligence of said defendant?" Answer: "Yes."

"4. Did the plaintiff, by his own negligence, contribute to his injury?" Answer: "No."

"5. What damages, if any, has the plaintiff sustained?" Answer: "Nine thousand dollars."

After the verdict was rendered, the defendant, the Lynchburg and Durham Railroad Company, moved for judgment upon the verdict, which was denied. This defendant made no motion for a new trial. The Norfolk and Western Railroad Company moved for a new trial for errors assigned, and this was denied. The court below gave judgment against both defendants, from which both appealed. The Norfolk and Western assigned numerous errors, which it is not necessary to set forth. The other facts necessary are stated in the opinion of the court.

Jones & Tillett and W. W. Kitchin for plaintiff.
W. A. Guthrie for defendant.

PER CURIAM: Among other instructions asked by counsel for (665) defendant were the following:

"8. If the jury believe and should find from the evidence that Walker, the conductor, told the plaintiff to wait at the platform of the station and he would have the passenger car pulled up in front of the station for him to get on, and the plaintiff disregarded what the conductor said to him and went aboard the car before it was coupled, then he took upon himself all the risk incident to so doing, contributed to his own injury, and in this aspect of the case plaintiff cannot recover."

"16. If the jury find from the evidence that the conductor, before the plaintiff boarded the train, told the plaintiff that the passenger car would be pulled up in front of the station for him and other passengers to get aboard before leaving, then, whether the plaintiff had procured his ticket beforehand or not, he had no right to get aboard the car until the passenger car had been pulled up to the front of the station, and it was contributory negligence for plaintiff to do so, and the jury should so find."

The court interlined the former of the two paragraphs by inserting after the word "coupled" the words "and when it was standing at an unusual place to receive passengers," and the latter paragraph by inserting after the word "leaving" the words "and directed the plaintiff to wait."

Where a person comes upon the premises of a railroad company at the station, with a ticket or with the purpose of purchasing one, he becomes a passenger, and may usually enter an open passenger car standing on the track and provided for passengers going on the train on which he proposes to take passage. But, while the conductor may, on the one hand, excuse a debarking passenger from contributory negligence by advising him to get off a car before it has ceased to move, he may, on the other hand, make the passenger's conduct culpable when he gives him an unheeded warning not to enter such open car till it
(666) can be removed to another point.

There seems to have been some evidence tending to show that the conductor told the plaintiff to step off the sidetrack and wait for the passenger car to be drawn up to the station, though as to this the testimony was conflicting.

The defendant was entitled to the unqualified instruction that if the car designed for the train on which the plaintiff embarked was open so as to receive passengers, whether at the usual or an unusual point on the track, the plaintiff would have been negligent in entering it after being warned not to do so. This proposition would hold good if in one paragraph of the instructions given the qualification was inserted, while in another it was omitted, thus leaving the jury at liberty to be misled by the erroneous view of law, rather than guided by the statement of the

correct principle. The jury are not supposed to be capable of determining when the judge states the law correctly and when incorrectly.

But the finding of the jury upon the fourth issue, as well as on the third, drawn as it was, depended upon this very question. The plaintiff was not rightfully on the car, but was himself negligent in entering, if in fact he had been warned by the conductor not to do so. The findings upon the third and fourth issues must therefore be set aside and a new trial granted as to the questions involved in those two, leaving the verdict upon the other issues undisturbed. We take this course because, after careful consideration, we have concluded that there was no error in any of the other rulings of the court excepted to and embraced in the assignments of error. As to the third and fourth issues, the defendant is entitled to a new trial.

The necessary effect of our ruling, giving to the lessee company a new trial on certain issues, is to vacate the judgment both as to the lessor and lessee corporations. Hence, it is unnecessary to determine the liability of the lessor company for the negligence of the lessee company.

New trial.

Cited: Blackburn v. Ins. Co., 116 N. C., 827; *Tillett v. R. R., ib.,* 938; *Mfg. Co. v. R. R.,* 117 N. C., 591; *Pickett v. R. R., ib.,* 639; *Tillett v. R. R.,* 118 N. C., 1041; *Nathan v. R. R., ib.,* 1070; *Styles v. R. R., ib.,* 1090; *Rittenhouse v. R. R.,* 120 N. C., 547; *Everett v. Receivers,* 121 N. C., 522; *Strother v. R. R.,* 123 N. C., 200; *Benton v. Collins,* 125 N. C., 90; *Edwards v. R. R.,* 129 N. C., 80; *Seawell v. R. R.,* 132 N. C., 859; *Edwards v. R. R., ib.,* 101; *S. v. Barrett, ib.,* 1011; *S. v. Clark,* 134 N. C., 712; *Drum v. Miller,* 135 N. C., 218; *S. v. Morgan,* 136 N. C., 632; *Clark v. Traction Co.,* 138 N. C., 79; *Liles v. Lumber Co.,* 142 N. C., 47; *Wilson v. R. R., ib.,* 341; *Morrow v. R. R.,* 147 N. C., 629; *Jones v. Ins. Co.,* 151 N. C., 56; *McWhirter v. McWhirter,* 155 N. C., 147; *Anderson v. Meadows,* 159 N. C., 407; *Hoaglin v. Tel. Co.,* 161 N. C., 399; *Johnson v. R. R.,* 163 N. C., 453; *Tilghman v. R. R.,* 167 N. C., 173; *Raines v. R. R.,* 169 N. C., 192; *Champion v. Daniel,* 170 N. C., 333; *Thomas v. R. R.,* 173 N. C., 495.

(667)

A. M. BLACK v. ABERDEEN AND WEST END RAILROAD COMPANY.

Action for Damages—Railroad Company—Rubbish on Right of Way—Sparks from Locomotive Causing Fire to Turpentine—Negligence.

1. A railroad company having control over its right of way, it is its duty to keep it in such condition as that the property of others may not be endangered, and it is liable for its failure to do so.
2. An allegation in a complaint that the defendant negligently permitted fire to be communicated from their engines or property to the lands adjoining their railroad or right of way, by which said fire, the spread and extension thereof, plaintiff's turpentine was burned and destroyed, is a sufficient allegation of negligence on the part of the defendant resulting in damage to the plaintiff.

ACTION, tried before *Brown, J.*, at August Term, 1894, of MOORE, being an appeal from a justice of the peace.

The plaintiff brought action to recover the value of certain turpentine alleged to have been destroyed by fire communicated by defendant's engine, 1 April, 1893. The defendant denied the allegations that it had been guilty of any negligence.

The plaintiff admitted that the engine of defendant was in good condition and had a proper spark-arrester. The only claim of negligence alleged by plaintiff was that the defendant's roadbed and right of way are foul with rubbish and combustible material, to which fire was communicated.

The following evidence was introduced by plaintiff:

A. M. Black testified: "My turpentine was a mile and a half east of railroad track at Graham's Landing. It was on Daniel Blue's land. Wind blowing on day of fire from railroad track towards my turpentine very hard. Fire reached my turpentine about noon. Large tract of country covered by fire that day. My turpentine strip a half-mile
(668) wide. Fire swept over all my turpentine boxes; I rented them. My damage is $45 for turpentine destroyed; turpentine in 7,000 boxes destroyed. Was impossible to put out fire; did all I could. Several persons owned land between my turpentine trees and the railroad track; fire crossed their tracts before it burned my turpentine. I raked around my boxes and trees the winter before; cleared away straw. It is generally considered perfectly safe among turpentine farmers to rake around trees once in two years. This fire occurred 1 April, 1893. About 8,000 of my boxes not destroyed because fire didn't reach them. About 1,000 of my boxes not damaged much because straw not gathered around them. It is one and one-fourth miles from my trees to West End; one mile to Graham's Landing. There was a fire about West End which did not

reach my place. Graham's Landing is little south of west from my turpentine. There was also another fire. Don't think any reached my place except Graham's Landing fire."

Speight testified for plaintiff: "Saw fire at Graham's Landing; it was in eight or ten feet of railroad track on east side of road and burning towards east. Fire burning dead grass and logs on right of way. Fire burning towards Nick's Creek in direction of Daniel Blue's."

Daniel Blue testified: "This turpentine was easterly from Graham's Landing; wind blowing in that direction from the landing to this turpentine. Plaintiff's turpentine destroyed worth $40 or $50."

C. C. Crocker, engineer on train day of fire, testified for defendant: "Down grade towards Graham's Landing from Aberdeen. Road runs from Aberdeen on east to West End on west. Steam generally shut off on down grade; don't remember on this occasion. With heavy train on down grade, carry light steam—light train, no steam. Roadbed perfectly clean to outside the ditches. No straw near ties inside ditches. The roadbed includes the ditches to outside edge of ditches. This (669) roadbed entirely clean or clear all along by Graham's Landing. Running fifteen miles per hour. Examined spark-arrester day after fire—perfect condition, not a hole in it."

Johnson, section-master: "Roadbed clean and in good condition. Wide space clean; no straw near ties."

There were other witnesses introduced by defendant who testified, in substance, that the engine was in good condition, spark-arrester perfect, no holes in it, and no straw or combustible material on roadbed near track. The right of way of defendant is eighty feet wide on each side of track. There were other witnesses offered to corroborate the testimony of witnesses for plaintiff and defendant, as set out, which it is unnecessary to copy in this case.

The following issues were submitted without objection:

"1. Was the plaintiff's turpentine burned and damaged by the negligence of defendant?" "Yes."

"2. Was the plaintiff guilty of contributory negligence?" "No."

"3. What damage, if any, has plaintiff sustained?" "$40."

The defendant submitted, in apt time, four prayers for instructions. The court refused the second and third and gave the fourth. The first is embodied, with alteration and modification, in the charge of the court.

His Honor charged the jury that there was no evidence of contributory negligence, and directed them to answer the second issue "No."

Upon first issue the court charged:

"It is admitted by the plaintiff that the engine was in good condition and had a proper spark-arrester. It is useless to consider all the evidence relating to that. The only claim of negligence made by the plain-

tiff is upon the ground of rubbish on the right of way or upon or near the roadbed. The law does not require a railroad company to clear up all of its right of way or cut down all the trees except so far as to render its track and roadbed entirely safe. That is a duty it owes
(670) to the passengers and not the public. Nor does the law require that the company shall cut down all the growing shrubbery on its right of way, and it is not obliged to plow up or shrub off its right of way. But there is a duty a railroad company owes to the public and the neighboring landowners, and that is this:

"The railroad company must keep its track and roadbed clear of all such substances as are liable to be ignited by sparks or cinders from its engines. A railroad company is required not only to keep its track and roadbed free from such inflammable substances, but it must go to the extent of keeping a reasonable distance on its right of way beyond its track and roadbed free from such substances. Whatever distance from its track on its right of way that may be reasonable, in the exercise of ordinary care, to prevent such inflammable and combustible substances being ignited by its engines, must be kept free from them. If the company fails in this duty to the public it is liable in damages to those who are directly injured thereby. If it is necessary to keep its entire right of way free from combustible substances to prevent ignition from engine sparks, then its whole right of way must be kept clear of those inflammable and combustible substances."

The court gave the fourth prayer of plaintiff: "You must first ascertain whether or not the fire was occasioned by fire or sparks from the engine. The burden of proof is on the plaintiff to show this. If plaintiff has not shown it, that ends the case, and you should answer first issue 'No,' and find for defendant. If you find that the fire was occasioned by the fire or sparks from the engine, then you must go on further and inquire whether or not the defendant company has been negligent, and whether or not the damage to plaintiff has been proximately caused by such negligence. If so, you should answer the first issue 'Yes.' "

The court then charged, that "if the jury find, from the evi-
(671) dence, that the defendant company permitted dead grass and straw, dried-up leaves and an accumulation of combustible matter to exist on its right of way, so near the track as to collect fire from the engine, and it did collect fire from the engine, and the fire spread across the lands of the right of way and across the lands of another person to plaintiff's land, defendant company would be liable to plaintiff for damages sustained."

There was a verdict for plaintiff. Defendant moved for new trial, assigning errors in the charge of the court, to wit, to so much of said charge as follows:

"The railroad company must keep its track and roadbed clear of all such substances as are liable to be ignited by sparks or cinders from its engines. A railroad company is required not only to keep its track and roadbed free from such inflammable substances, but it must go to the extent of keeping a reasonable distance on its right of way, beyond its track and roadbed, free from such substances. Whatever distance from its track on its right of way that may be reasonably necessary, in the exercise of ordinary care, to prevent such inflammable and combustible substances being ignited, must be kept free from them. If the company fails in this duty to the public it is liable in damages to those who are directly injured thereby. If it is necessary to keep its entire right of way free from combustible substances to prevent ignition from engine sparks, then the whole right of way must be kept clear of those inflammable and combustible substances.

"That if the jury find, from the evidence, that the defendant company permitted dead grass and straw, dried-up leaves and an accumulation of combustible matter to exist on its right of way, so near the track as to catch fire from the engine, and it did catch fire from the engine, and the fire spread across the lands of the right of way and across the lands of another person to the plaintiff's land, defendant company would be liable to plaintiff for damages sustained."

J. W. Hinsdale for plaintiff. (672)
Black & Adams and W. C. Douglass for defendant.

BURWELL, J. The control which railroad companies have over the land covered by their rights of way is given to them that they may properly perform their *quasi*-public duties. They have the authority to keep the land thus subjected to their use in such condition that their use of it will not endanger the property of others. Having this authority, they must exercise it, or else pay for such damage as comes to one who, himself being free from fault, suffers injury from a neglect to keep it in the required condition.

We think the charge of his Honor very properly presented the matter to the jury. The concluding sentence of this charge, as set out in the record, was itself a sufficient statement of the law applicable to the facts of this case.

There was a motion made before us to dismiss the action because the complaint did not state facts sufficient to constitute a cause of action. The allegation of the complaint is that the defendant "negligently permitted fire to be communicated from their engines or property to the lands adjoining their railroad and right of way, by which said fire, the spread and extension thereof, plaintiff's said turpentine was burned and

destroyed." This was a sufficient allegation of negligence on the part of defendant, resulting in damage to the plaintiff, and it was supported on the trial by evidence sufficient, if believed by the jury, to establish those facts upon which the liability of the defendant to the plaintiff depended, which are succinctly stated in the closing portion of the charge.

No error.

AVERY, J., concurring: Concurring fully with the majority of the Court in the judgment announced, I deem it best to state a little more explicitly the grounds upon which I rest my opinion. The right
(673) of way of railroads is, by judgment of condemnation, made subject to occupation whenever the corporation finds it necessary to use it in furtherance of the ends for which the company was created. In assessing the damages it must be assumed that the estimate is not based upon the idea of the exclusive occupation and perception of the profits of the whole of the condemned land by the corporation, but upon the more reasonable view that only so much of the territory will be subjected to occupation and exclusive dominion as is necessary for tracks, ditches and houses to be used for stations and section-hands, while outside of this the owner of the servient tenement will be unmolested, except where entry is made for the purpose of removing something that endangers the safety of passengers traveling on the railroad, or that may subject the company to liability for injury to adjacent lands or property. This is the principle to which this Court has given its sanction in *Ward v. R. R.*, 113 N. C., 566, in the same case 109 N. C., 358, and in *Hinkle v. R. R.*, 109 N. C., 472.

Cited: Blue v. R. R., 117 N. C., 650; *Malloy v. Fayetteville*, 122 N. C., 484; *Shields v. R. R.*, 129 N. C., 4; *Simpson v. Lumber Co.*, 131 N. C., 521; *Ins. Co. v. R. R.*, 132 N. C., 78; *Phillips v. R. R.*, 138 N. C., 19; *West v. R. R.*, 140 N. C., 622; *Maguire v. R. R.*, 154 N. C., 387; *Hardy v. Lumber Co.*, 160 N. C., 121; *McBee v. R. R.*, 171 N. C., 112.

R. M. BURGIN v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Action for Damages—Common Carrier—Injury to Passenger—Jumping from Train in Motion—Contributory Negligence.

The mere fact that a train fails to stop, as is its duty, or as the conductor has promised to do, does not justify a passenger in leaping from it while in motion, unless invited to do so by the carrier's agent and the attempt was not obviously dangerous.

ACTION for damages, heard on complaint and demurrer, at Fall Term, 1894, of MCDOWELL, before *Allen, J.* The demurrer was sustained and plaintiff appealed. The facts appear in the opinion (674) of *Chief Justice Shepherd.*

F. H. Busbee and G. F. Bason for defendant.
No counsel contra.

SHEPHERD, C. J. This action is brought for the recovery of damages sustained by the plaintiff in jumping from the defendant's train while it was in motion. It appears from the complaint that the plaintiff informed the conductor that he desired to get off at Round Knob, a station on the defendant's road, where it was the duty of the defendant to stop its train, but that defendant "negligently and carelessly failed and refused to stop its said train at said station so that plaintiff, who was compelled to stop at said station, being at the time on his way home to the bedside of one of his children, who was at the time in a dying condition, jumped from said train as it was passing said station of Round Knob, and in doing so was painfully and seriously injured," etc.

We think there can be no question as to the correctness of the ruling sustaining the demurrer. "The general rule is that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury." *Browne v. R. R.*, 108 N. C., 34; Hutchison Carriers, sec. 641. In *Lambeth v. R. R.*, 66 N. C., 494, it was said: "If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover." In addition to these authorities, there are a great number to be found in other jurisdictions which abundantly sustain the proposition that it is contributory negligence to "attempt to alight from a moving vehicle although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited to alight by some employee of the carrier whose duty it is to see to the safe egress of the passengers from the conveyance. (675)

The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent, and the attempt was not obviously dangerous." *Walker v. R. R. Co.,* 41 La. Ann., 795; *Jewell v. R. R.,* 54 Wis., 610; *R. R. v. Morris,* 31 Grat., 200; *Nelson v. R. R.,* 68 Mo., 593; 2 Wood Railways, 1133. To the same effect are the cases cited in defendant's brief from Pennsylvania, Tennessee, Iowa, Texas, Georgia, Michigan, Mississippi and other States.

It is true, as stated in the cases of Browne and Lambeth, *supra,* that there may be exceptions to the general rule that it is contributory negligence to alight from a moving train, but there is nothing in this complaint to bring it within any of the exceptions indicated in those cases or other authorities. The anxiety of the plaintiff to see his child does not relieve him from the legal consequences of his reckless conduct. *R. R. Co. v. Bangs,* 47 Mich., 470. It was clearly the proximate cause of the injury and bars a recovery.

Affirmed.

Cited: Watkins v. R. R., 116 N. C., 967; *Hinshaw v. R. R.,* 118 N. C., 1053; *Rittenhouse v. R. R.,* 120 N. C., 546; *Denny v. R. R.,* 132 N. C., 345; *Morrow v. R. R.,* 134 N. C., 98; *Whitfield v. R. R.,* 147 N. C., 238; *Dortch v. R. R.,* 148 N. C., 579; *Reeves v. R. R.,* 151 N. C., 320; *Carter v. R. R.,* 165 N. C., 251; *Myers v. R. R.,* 166 N. C., 235; *Parks v. Tanning Co.,* 175 N. C., 30.

(676)

S. J. FLEMING v. WILMINGTON AND WELDON RAILROAD COMPANY.

Action for Damages—Issues—Railroad Embankment—Culvert—Diverting Watercourse—Natural Waterway.

1. When the issues submitted in the trial of an action are raised by the pleadings, and, with the findings thereon, form a sufficient basis to proceed to judgment, no exception to them is available unless it appear that there was some view of the law arising out of the testimony which the party appealing was precluded from presenting for the consideration of the jury.
2. The damage due to the erection of a waterway over a running stream at the point of its intersection with a railroad is considered, when the work is skillfully done, to be included in the cost and valuation of the easement or to have passed as incident to the grant of it; and when it is admitted that it was so constructed, neither the owner of the land nor the

proprietor of the tract above can maintain an action for damages caused by placing the structure across the stream.

3. In such case, on the trial of an action for damages, testimony to prove on what principle the commissioners estimated damages in the condemnation proceedings is immaterial and incompetent.
4. Admissions by counsel, in the course of a trial, of facts to which the issues relate, preclude such counsel from excepting, after the trial, to instructions to the jury to answer the issues in accordance with such admissions.
5. Although the diversion of a natural stream from its channel by a railroad company is a trespass, when it is not necessary to the skillful construction of the road to change its course, yet the authority to divert surface water accumulating at a proper embankment, the building of which was necessarily contemplated by those who assessed or agreed upon the value of the right of way, and to carry it in side-ditches constructed on the right of way to its natural outlet or to some natural outlet adequate to receive it, is included in the easement and damages therefrom covered by the estimate of such cost.
6. When, in the trial of an action for damages for the diversion by a railroad embankment of the water of a stream from its natural course, there was conflicting evidence as to whether a certain "Barnfield Branch" was a natural watercourse, it was error in the trial judge to instruct the jury that it was the duty of the company to build a culvert over such ravine, and it was also error to express the opinion that the said branch was not a natural watercourse.

ACTION, tried before *Hoke, J.*, and a jury, at December Term, (677) 1893, of PITT.

The plaintiffs alleged that they were the owners of a tract of land through which the Scotland Neck and Greenville branch of the defendant, the Wilmington and Weldon Railroad Company's road, was constructed, and that they, the plaintiffs, before the construction of said branch road, had, by means of various ample and sufficient ditches leading into the canal belonging to the Great Swamp Canal Company, said canal aiding largely in said drainage, carried the waters into Tar River, a natural watercourse.

Three causes of action were set out, to wit:

First. (1) That in the construction of said road the defendant negligently caused to be thrown up over and upon the lowlands of the aforesaid swamp an embankment to the height of four feet, leaving no sufficient opening or culverts for the passage of the bulk of water that usually flows down said swamp; (2) that the space left at the aforesaid canal by the defendant is and has been entirely too little space for the passage of the waters of said swamp, so that the same becomes dammed and choked up and the waters thereof ponded back upon the lands of the plaintiffs, to its great injury and diminished productiveness for purposes of agriculture; (3) that by means of said embankment and said negligent

culverting the defendant has within the three years before the bringing of this action negligently and unlawfully caused the waters of the aforesaid swamp (which annually or almost every year overflow the aforesaid canal and take the broad course of said swamp, thus passing off in a very short while) to be ponded back upon the lands of the plaintiffs, to the very great injury of the land and the crops growing thereon, to wit, five hundred dollars.

(678) Second. That in the construction of its said road the defendant negligently and unlawfully filled up two of the plaintiffs' ditches—one of said ditches in two places—thereby ponding water on the lands of the plaintiffs, rendering the same, which had heretofore yielded good crops, worthless, or nearly so, for purposes of agriculture; (2) that by reason of said obstruction to the plaintiffs' ditches the defendant has within the three years next before the bringing of this action negligently and unlawfully caused the waters of the aforesaid swamp to be ponded back upon the lands of the plaintiffs, to the very great injury of the land and the crops growing thereon, to wit, $500.

Third. (1) That in the construction of its said road the defendant dug, or caused to be dug, a ditch on each side of the bed of said road, whereby a large and unusual volume of water is directed from its natural course and turned upon the lands and into the ditches of the plaintiffs, thereby flooding the land and filling the ditches with sand and mud, rendering the land, which heretofore yielded good crops, worthless, or nearly so, for purposes of agriculture; (2) that by reason of said negligent direction of waters the defendant has within the three years next before the bringing of this action negligently and unlawfully caused the aforesaid lands to be flooded with water after every considerable rainfall, to the very great injury of the land and the crops growing thereon, to wit, $500.

Wherefore, the plaintiffs pray judgment for $1,500 damages to the land and crops, the costs of this action, and for other and further relief.

The defendant, in its answer, did not admit the allegations of plaintiffs' ownership of the land, and averred that in the construction of the said extension it became necessary to dig a small ditch along the roadbed for the proper drainage of the same, but they deny that they did so wrongfully or that they directed a large or unusual volume of

(679) water from its natural course, or that they ponded back any water on plaintiffs, or that they caused the lands of the plaintiffs to be overflowed, or in this or any other way injured the land of the plaintiffs.

Further answering, the defendant said:

"1. That in 1889, at the earnest request of a large number of the people of Pitt County, they consented to extend the Scotland Neck branch of the Wilmington and Weldon Railroad to the town of Greenville. That for

this purpose they employed skilled engineers and mechanics and used the very best material. That in building said road it became and was absolutely necessary to dig upon each side a ditch or drain for the purpose of draining the roadbed, in order to render it suitable and safe for transportation purposes, and without said ditches or drains it was utterly impossible to construct a proper and safe roadbed. That such ditches or drains are cut only where they were necessary, and of such dimensions only as were absolutely essential. That they were cut in a workmanlike manner and with the least possible damage, if there was any, to the adjoining lands.

"2. That the said extension is one of the best roads in the State and a great public convenience and built upon the lands of the defendant, and the ditches were dug upon the lands of the defendant.

"3. That in its construction the defendant has done nothing that it was not fully authorized to do, and if any damage has resulted, defendant is not responsible therefor."

The following were the issues submitted to the jury, and the responses thereto:

"1. Are the plaintiffs the owners and in possession of the land described in the complaint?" "Yes."

"2. Is Great Swamp a natural watercourse and drainway for said land?" "Yes."

"3. Did the defendant wrongfully and negligently construct its road across said swamp, so as to cause the waters thereof to be ponded back and sob and injure plaintiffs' land?" "Yes." (680)

"4. Has defendant wrongfully and negligently filled up and obstructed plaintiffs' ditches, causing injury to plaintiffs' land?" "Yes."

"5. Has defendant wrongfully and negligently diverted the water and drainage of Barnfield Branch and turned the same on plaintiff's land, causing damage thereto?" "Yes."

"6. What damage have the plaintiffs sustained by the wrongful acts of the defendant?" "Two hundred dollars."

Upon the pleadings the plaintiffs and defendant tendered issues, the issues tendered by defendant being as follows:

"1. Are the plaintiffs the owners of the land described in the complaint?

"2. Were the culverts placed by the defendant on the lands described in the complaint sufficient for the passage of the bulk of water that usually flows on said land?

"3. Was the erection of the embankment on the lands described in the complaint necessary to the construction of defendant's roadbed?

"4. If the defendant did not place sufficient culverts, or the erection of the embankment was not necessary, what damage have plaintiffs sustained thereby?

"5. Did the defendant negligently and unlawfully fill up the ditches of the plaintiffs?

"6. If yes, then did defendant supply other ditches or drainways equally good and available?

"7. What damage have plaintiffs sustained thereby?

"8. Did the defendant divert any natural waterway and turn it upon plaintiffs' land?

"9. Is Barnfield Branch, as described, a natural waterway?

"10. What damage have plaintiffs sustained thereby?"

The court declined to submit the issues tendered by the parties, and submitted the issues set out in the record and responded to by (681) the jury.

Defendant excepted to refusal of court to submit the issues tendered by them.

The plaintiffs were the widow and children, heirs at law and legatees, etc., of one Peter Fleming, deceased.

There was evidence tending to show that Peter Fleming, deceased, had occupied and possessed the land described in the complaint, claiming to own same from fifty to sixty years continuously to his death, which occurred four or five years before the action was commenced. That after the death of Peter Fleming, his widow, Sidney Fleming, continued to occupy the land as before, down to the time of trial, one or two of plaintiffs living with her.

The will of Peter Fleming was also introduced, properly proven and recorded, in which the land in complaint was willed to plaintiff, Sidney Fleming, his widow, for and during her natural life, and at her death remainder to some of his children, who were made parties plaintiff.

It was admitted that such will gave a life estate in the land described in the complaint to plaintiff Sidney Fleming.

In the examination of one Reeves, for defendant, who was one of the commissioners to appraise the land under said proceedings, the defendant proposed to prove by said witness that the commissioners, in estimating damage to said land, did consider and estimate the damage to same likely to be caused by ponding or interruption to water caused by construction of trestle across Great Swamp Canal, and asked a question to this effect, or one of similar import.

Question was objected to by plaintiff. Objection sustained and defendant excepted.

Defendant, in apt time, requested the court to put its instructions to the jury in writing. Defendant further filed nineteen requests for instruction by the court at or about the close of the evidence, but this last request was not signed by counsel.

The defendant made no other exception to the charge at the time, but in its case on appeal, tendered in apt time, and filed (682) specific exceptions to the judge's charge. In the course of the trial counsel, in behalf of defendant, admitted plaintiffs owned and were possessed of the land, and the court directed the jury to answer the first issue "Yes."

Counsel for defendant further admitted that Great Swamp Canal was a natural watercourse and drainway of plaintiffs' land, and the jury was directed to answer second issue "Yes."

Counsel for plaintiffs and defendant both admitted, and consented in open court at close of charge, that the jury need not respond to each amount of damage separately if more than one cause of damage was found to exist, but that the jury might find the aggregate damage for all causes and respond only to the ninth issue on that question.

His Honor charged, among other things, as follows:

"1. The first issue addresses itself to the ownership of the land, and on this issue I charge you: if you believe the evidence, the legal title and right to possess the land for purposes of this action is in plaintiff, Sidney Fleming, widow of Peter Fleming; and on the evidence, if you believe it, your answer to the first issue should be 'Yes.' Defendants in their argument consent to this answer to this issue.

"2. On second issue defendant admits that Great Swamp is a natural watercourse and drainway for said land, and on this admission and the evidence you will answer the second issue 'Yes.'

"Then there are three issues on the question as to whether defendant has, in constructing its road, done the plaintiffs actionable wrong. There are three causes or sources of damage alleged by plaintiffs—one as to the obstruction across Great Swamp itself, the main swamp; one in filling up plaintiffs' ditches, one on north side of canal near Mrs. Fleming's and on south side of canal, at point on map E and B; and third cause in diverting or turning the waters of what is termed Barnfield Branch from its natural outlet, three hundred yards below (683) road, and carrying its waters by lateral ditches across a ridge or hill onto plaintiffs' land, so causing damage to same.

"The third issue in number of those submitted is as to character of structure across main swamp, and the rule as to defendant's responsibility in this respect I charge you to be as follows:

"The defendant is required to so construct its road or trestle across said swamp as to leave an opening that will carry off the waters of said swamp without additional damage or injury to land above in all ordinary times; also such usual rainfalls as are likely to occur in the course of the seasons, even such heavy rains as are likely to occur and which could and should have been foreseen and provided against.

"And if the defendant, in constructing its road, has failed to provide an opening of this nature, and damage has resulted thereby to plaintiffs' land, this would be an actionable wrong by defendant, and jury should answer the third issue 'Yes.'

"The burden is on plaintiffs to satisfy the jury in this respect, by the greater weight of evidence, that the defendant has failed to make an opening of this character and that damage has thereby resulted to plaintiffs' land; and if they have so satisfied you, you should answer third issue 'Yes.'

"If plaintiffs have failed so to satisfy the jury—if defendant has left an opening sufficient to carry off water in ordinary times and such rains as are likely to occur—you should answer third issue 'No'; or, if there has been no damage done to plaintiffs' land, answer should be 'No.'

"The defendant is not responsible for damage resulting from extraordinary rains and freshets; and if plaintiffs' damages, if he has any, only arise from such rains, answer to third issue should be 'No.' Now, applying this rule to the evidence in this case, how say you in answer to this third issue? Has defendant left a sufficient opening, or is plain-
(684) tiffs' land damaged by the structure as it exists? (Court here referred to evidence in the cause on this issue for plaintiffs and defendant.)

"Now this is the evidence on this issue, so far as I recall it, and I will remind the jury it is only given by the court to aid the jury and to make the charge pertinent to the evidence in this issue. If you recollect the evidence different from the way I recite it, or more or less, you will act on your own memory, for by our law the jury are made the judges of what the witnesses say, and what credit you will give to the evidence.

"On the fourth issue, as to injury claimed by the ditches, you are instructed that defendant in crossing plaintiffs' drain ditches which are properly placed for purposes of drainage, and so used, should have a sufficient opening under their roadway to permit the ditches to effect their purpose, provided it can be done consistent with the safety and proper construction of their roadbed and its protection. The burden here is also on plaintiffs to show a failure on the part of defendant, and if the jury are satisfied that the defendant in building their road filled plaintiffs' ditches, when the proper building of their road did not require it, and that this has caused damage to plaintiffs' land, answer to this issue should be 'Yes.' But if defendant has not filled up the ditches, answer to this issue should be 'No,' or answer to issue 'No' if defendant has done plaintiffs' land no damage. And if defendant in filling up the ditches has left an open way along its right of way, and permitted and made ditches affording equally good drainage, answer to issue should be 'No'; or if from the evidence you should conclude that these ditches had been

abandoned by plaintiffs, and were not used for purposes of drainage, there was no injury caused by filling up such ditches, and issue should be answered 'No.' I am asked to charge you, by defendant, that if these ditches appeared to be abandoned, the road had a right to fill them up, but I do not think this a proper charge. If they were (685) used for purposes of drainage, being properly placed, the fact that they were imperfectly kept open should be considered in the question as to amount of damages, but would not justify defendant in filling them and closing plaintiffs' drainways. Now consider the evidence under these rules, and say on this fourth issue whether defendant has done plaintiffs an actionable injury in reference to ditches. If you are so satisfied by greater weight of evidence you should answer this issue 'Yes,' and if not, the issue should be answered 'No.'

"In considering the question of damage by the ditches you will not take into your estimate the effect of acts in reference to Barnfield Branch, as there is a separate issue as to this.

"And on the fifth issue, as to Barnfield Branch, the burden is on the plaintiffs to establish that the defendant had wrongfully diverted the water from the place termed Barnfield Branch from its natural outlet and on to the plaintiffs' land, and has thereby caused damage to such lands. I am asked, in this connection, to define to the jury what is a natural watercourse, and to say that this place, called by the witnesses Barnfield Branch, is not such. The definition given in the prayers for instructions seems to be accurate enough, that it is a way or course worn by water making its way naturally on the surface, and so making for itself a defined channel, having banks in which it naturally flows. And I am also inclined to the opinion that, in the evidence, Barnfield Branch is no such watercourse as this; but I do not deem it necessary for the jury or the court to determine this question, because, in the opinion of the court, whether Barnfield Branch be a natural watercourse, or a ravine, or depression in the earth, draining any considerable portion of land and carrying off any considerable amount of water, the result is the same, as far as it affects the case, and I charge you that, if you find, from the evidence, that this branch was a depression of low land making out from Great Swamp at a point three or four hundred yards (686) below the defendant's road, and having its natural outlet at that point, and, diverging from the swamp, continues its course until it terminates at the foot of a hill eighteen hundred feet, or six hundred yards above defendant's road, crossing the road at a distance of about two hundred yards from the swamp, and being six hundred yards across where it terminates, and separated from the swamp along its route by a sandhill or ridge two feet high and thirty or forty yards across, and being at the extreme southern line of plaintiffs' tract, and located partly

on adjacent lands, the defendant, unless the safety of the road required it, would have no right to divert the drainage of the branch from its natural outlet and turn the waters of the same by lateral ditches, onto plaintiff's land, and if it has done so, when the proper construction of the road does not require it, and thereby caused damage to plaintiffs' lands, the defendant has committed a trespass, and the jury should answer the fifth issue 'Yes.'

"The defendant has a right to protect its roadbed and make it safe by cutting lateral ditches along the same, and where it does so for such purpose, and the protection of their road requires it, it has the right to carry the water so collected by its ditches into plaintiffs' ditches, and any increased supply of water and incidental damage thereby occasioned must be borne by plaintiffs. Such damage is included in the amount paid for their right of way, and for this plaintiffs cannot recover.

"And again, defendant's right of way protects it from damage caused by the action of surface water, when the change of grade and direction is caused by the construction of the road itself; but the defendant has no right under the protection and sanction of either principle to so construct its natural slope and contour of the ground to any considerable extent, and so divert any considerable amount of even surface or rain water from its natural outlet into these ditches, and so cause damage
(687) to plaintiffs' land, unless the necessity for the proper construction of its road requires it. If the safety of the roadbed permits, and within reasonable limits as to cost, the defendant should make a way to pass in its natural way or outlet, and, in the present case, if such safety and expense permitted, the defendant should have placed a culvert at the point where this branch crosses the road, and so permitted the water to take its natural way; and, failing to do so, if damage is thereby caused to plaintiffs' land, the jury should answer the fifth issue 'Yes.'

"Defendant contends, and there is evidence tending to prove, that no considerable body of water comes down this depression or ravine, and that it has provided a lateral ditch fully sufficient to carry it off; that such lateral ditch is connected with plaintiffs' main ditches and as a matter of fact the plaintiff has now a shorter and more efficient drainway than he ever had, and if such is the case, if the body of the water diverted is not considerable, or defendant has by its lateral ditches provided equally good drainage for plaintiffs, or has provided sufficient drainage, then defendant has done the plaintiffs no damage, and you will answer the fifth issue 'No.' You will consider the evidence on this issue under the rules here given, and write your answer to this issue 'Yes' or 'No,' as you may decide the question. On the matter of damage, if you should answer the third, fourth and fifth issues 'No,' that defendant has done the plaintiffs no actionable wrong, then you need not consider the

remaining issues. If, however, you answer either of these issues 'Yes,' you will further consider the evidence on the question of damages. There are three sources of damage alleged, and three separate issues on the question of amount—sixth, seventh and eighth. It is desirable that you would say what damage arises as to each cause you may establish. If there be more than one cause and you cannot divide them and say how much is caused by each, you may answer as to entire amount (688) on the ninth issue.

"It is agreed you may determine this amount of damage and make answer on the ninth issue, and need not answer the sixth, seventh and eighth.

"The rule to guide you on this question is the same in each issue. Plaintiffs can recover the difference in rental value or net profits of the land as it is now and as it was or would have been without defendant's obstruction causing damage. The damage cannot be estimated for the time since suit began in March, 1893. There is no evidence tending to show damage commenced in 1889; indeed, plaintiffs do not demand any damage back of three years. The time then covered by the suit will be the three years, 1890, 1891 and 1892, and the damage is the difference in rental value caused by the defendant's obstruction.

"Defendant would not be responsible for damage by extraordinary freshets nor by damage from overflows, where the damage would have occurred even if the roadbed had not been built; nor for damage done to the land included in the right of way, sixty-five feet on either side of road, nor for such loss as arose from plaintiffs not keeping their ditches cleaned out, if the construction of the roadbed permitted such cleaning; nor for loss caused by general bad crops in these years common to crops in that community and not produced by the obstruction. Defendant is responsible for difference in fair rental value for these three years, to the extent that such difference is caused by defendant's wrongful conduct. Now what do you determine the difference to be on the evidence? Burden here is on plaintiffs. On the part of plaintiffs Mr. Fleming and others testify as follows: 'Five barrels corn on north, three on south.'"

The defendant excepted to the charge as follows:

"1. Because his Honor charged the jury that if they believed the evidence the legal title and right of possession was in the plaintiff, Sidney Fleming, and that they should answer the first issue 'Yes.'

"2. Because he charged the jury that the defendant, in his (689) argument, consented that the jury should find the first issue in the affirmative, whereas the defendant specially requested the court to charge to the contrary.

"3. Because he charged the jury that if defendant filled up plaintiffs' ditches it was defendants' duty to provide ditches affording equally good

drainage, whereas he should have charged them that it was defendant's duty to provide ditches affording sufficient drainage.

"4. Because he charged the jury that it was not necessary to decide whether Barnfield Branch was a natural watercourse.

"5. Because he charged the jury that, whether Barnfield was a natural watercourse or ravine, or a depression in the earth, draining any considerable portion of land, carrying off any considerable amount of water, the result would be the same, as far as it affects this cause.

"6. Because he charged the jury that this branch, if the jury believed it to be of the description set forth in the charge, could not be diverted and turned by the defendant by its lateral ditches.

"7. Because he charged the jury that it was the duty of the defendant to place a culvert to take the waters of this branch its natural way.

"8. Because he charged the jury that they need not answer the sixth, seventh and eighth issues specifically, but might aggregate the entire damage in their answer to issue No. 9."

And these errors constitute the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth exceptions of the defendant.

During the progress of the trial the defendant proposed to prove by one Reeves, a witness in behalf of the defendant, and one of the commissioners who assessed the damages for the right of way over these
(690) lands, that the commissioners who assessed the damages were present on the land, and considered and allowed for all damages done to the land, or likely to be done, by reason of any ponding or interruption of water that the trestles might occasion, and at the time of such assessment the roadbed and trestle were already complete.

Objection by the plaintiffs. Objection sustained. Defendant excepted.

The jury returned a verdict finding the first, second, third, fourth and fifth issues in the affirmative, and finding in response to the ninth issue, $200, and making no response to sixth, seventh and eighth issues, and from the judgment thereon defendant appealed.

J. B. Batchelor for plaintiffs.
John L. Bridgers for defendant.

AVERY, J. The rule adopted by this Court restricts the trial judge in settling the issues to those raised by the pleadings, but does not require him to frame an issue involving the truth of every fact alleged on the one side and denied on the other. When those submitted are raised by the pleadings, and with the findings upon them form a sufficient basis for the court to proceed to judgment, no exception to them is available to either of the parties, unless it can be made to appear that there was some view of the law arising out of the testimony which the party appealing

was precluded from presenting for the consideration of the jury for want of a pertinent issue.

The question whether the culverts constructed were sufficient to carry off the water was involved in the broader and more general inquiry suggested by the third issue submitted. If the defendant negligently constructed the culvert, so as to cause the water to be ponded on plaintiffs' land, then it was insufficient for the purpose and the defendant was liable. It would seem impossible to conceive of any legal (691) proposition growing out of the testimony, in reference to the culvert, that could not have been considered in passing upon the third issue, if it had been presented by the defendant in the shape of a prayer for instruction.

To build a culvert that is insufficient to carry off the water, whereby water is ponded on a complainant's land, is a wrongful and negligent construction. The gist of the controversy, or that part of it, was involved in the inquiry whether the plaintiff had been damaged by the negligent ponding of water by the defendant in constructing its road. The building of an insufficient culvert is one species of carelessness that might have been the immediate cause of such an injury. Indeed, all three of the specific allegations contained in the three separate causes of action, and constituting the grounds of complaint, to wit, first, the insufficiency of the culvert; second, the filling up of the ditches; and third, the diversion of water from its natural course so as to cause plaintiffs' land to be overflowed, might have been conprehended under one general issue as to negligent construction, and the judge might, in his discretion, have dispensed with the fourth and fifth issues which involved the specific allegations of negligence in the other cause of action, to wit, the filling of the ditches and the diversion of the creek.

The finding upon one general issue, involving every species of carelessness mentioned in all of the three causes of action, and the judgment thereon, would of necessity have been conclusive upon the parties as to all matters in controversy, and as to the right to recover upon any of the causes of action. Whatever might have been offered in evidence and passed upon, the law will generally presume was presented to the jury.

It being incumbent on the defendant to show that it was deprived of the opportunity to present some material view of the law arising out of the evidence, and its counsel having failed to point out any (692) pertinent principle of law that could not have been applied, through the medium of instruction, to the issues submitted, there is no abuse of the discretionary power of the judge shown in framing them as he did.

The conclusion that the fifth issue is not raised by the pleadings is not tenable. The allegation in the third cause of action was that, "in

the construction of said *road* the defendant dug on each side of the bed of the road, a ditch, whereby a large and unusual volume of water is diverted from its natural course and turned upon the land and into the ditches of plaintiffs," etc. There was evidence that the natural course of the water alleged to have been diverted was through Barnfield Branch. It would be sticking in the bark to say the issue was not raised because, on hearing the proof that water was diverted from its course, the natural course was shown to be a certain branch, and the court specified such alleged natural outlet by name in the issue, in order more clearly to direct attention to the real subject of inquiry raised by the pleadings. The question passed upon was not whether the water of Barnfield Branch was *wrongfully* and *negligently* diverted from its natural course, but simply whether it was diverted. There being "evidence tending to show that the branch was a natural waterway, and evidence to the contrary," as defendant's counsel states in his brief, he had the opportunity to request the court to tell the jury that, if they found that the branch was not a natural channel, it was not negligent or wrongful, on the part of the company, to divert it from the ravine down which it previously ran. The question might have been raised by such a prayer for instruction, but not by objecting to the issue before or after failing to do so.

We shall have occasion, upon the consideration of another branch of this controversy, to discuss the bearing of this question whether that branch was a natural outlet.

"Such damage as is due to the erection of a waterway over a running stream, at the point of its intersection with the line of a railway, (693) is considered, when the work is skillfully done, as included in the cost and valuation of the easement, or to have passed as incident to a grant of it, and the fact that it was so constructed as to pass the water, even in time of ordinary freshet, being admitted, neither the owner of the *servient tenement* nor the proprietor of a tract above can maintain an action for damages caused by placing the structure across the stream." *Adams v. R. R.*, 110 N. C., 725.

It was not competent, then, to prove upon what principle the commissioners estimated damages in the condemnation proceedings. The law determines what rights and privileges pass to the dominant owner, upon proof that the right of way was lawfully condemned for public use. One uniform rule applies in ascertaining what has passed as incidental to the acquisition of the right of way. The dominion and privileges of a corporation have the same limit, and are subject to the same restrictions on every part of its line, except when the right of way is granted by the owner with reservations, presumably allowed by reason of the exaction of a smaller consideration than would otherwise have been charged, as where the width of the way granted is to be narrower, or the company

agrees to construct crossings or cattle-guards at a designated point, or in a particular manner, not otherwise required. The testimony was not competent in any point of view, but, if the undisputed evidence showed that the trestle over the Great Swamp was a sufficient waterway to discharge the water that flowed through it, except when there was an extraordinary rainfall, then it was immaterial, even if competent. *Emry v. R. R.*, 102 N. C., 209.

When two of the counsel for the defendant admitted in the progress of the trial, on behalf of their client, that the plaintiffs owned and were possessed of the land, it was error in the court to instruct the jury to respond in the affirmative to the first issue, involving the question of title and possession. In the same way, counsel were bound by their admission that "Great Swamp was a natural watercourse (694) and drain for said land," and were not at liberty, after the trial, to except to the instruction to the jury to write the response, in accordance with their express agreement.

The same principle applies to the consent of counsel given "in open court, at the close of the charge, that the jury need not respond to each amount of damage separately, if more than one cause of damage was found to exist, but that they might find the aggregate amount for all causes, and respond only to the ninth issue on that question." We need do nothing more than to quote the language used by the judge in stating this exception:

The court told the jury, in substance, that the response to the fourth issue should be "Yes," if the defendant filled up the plaintiffs' drain ditches when it was not necessary to the proper construction of the road to do so, but if the defendant had not damaged plaintiffs' land or filled up the ditches, or in obstructing the ditches had done no injury that was not necessarily incident to a skillful construction of the road, and had provided other drains in connection with their side ditches, affording equally good drainage, the answer should be "No." We fail to comprehend how the defendant was prejudiced, as is contended in the fourth assignment of error, by the refusal of the court to tell the jury that it was defendant's duty to provide ditches, affording "sufficient drainage," and instructing them, in lieu, that he was required only to provide ditches affording equally as good drainage. It may have been possible to provide equally as good drains as had been dug by the plaintiff, at much less cost than to construct such as would have afforded "sufficient drainage," or such as would have thoroughly prepared the land for farming. The defendant cannot justly complain because the court held, that while it was liable for injury to the land, it was not bound to improve its condition after paying for the privilege of passing through it.

(695) The fifth issue arising out of the third cause of action involved the question of the unlawful diversion of water (which the evidence showed referred to Barnfield Branch) from its natural course. The instructions asked, and those substituted in lieu, gave rise to several assignments of error, which may be summarized as follows: That the court erred in instructing the jury—

"1. That it was not necessary for them to decide whether Barnfield Branch was a natural watercourse or not, because the result would be the same if it was a mere depression or ravine, if it carried off a considerable amount of water from a considerable area of land, and yet expressed the opinion, founded upon the testimony, that Barnfield Branch did not fall within the definition given by the court of the natural watercourse.

"2. That the water of Barnfield Branch, according to the description incorporated into the charge, and purporting to embody testimony of witnesses relating to that subject, could not be lawfully diverted from the channel, and if the defendant had diverted it when the proper construction of the road did not require it to be done, it was guilty of trespass.

"3. That it was the duty of defendant to have constructed a culvert at the point of intersection of said branch."

The consideration of the questions thus raised necessarily leads to the discussion of the rights of owners of land to divert a natural stream, flowing over it, from its channel, or to collect surface water falling or flowing thereon, and discharge it by means of an artificial drain. It must be remembered, at the outset of this discussion, that "a railroad company enjoys the same privilege as any other landowner, but no greater, to be exercised under the same restrictions and qualifications." *Staton v. R. R.*, 111 N. C., 278; *Jenkins v. R. R.*, 110 N. C., 438. This principle is subject to the qualifications that necessarily arise out of the fact that such companies usually acquire not the absolute ownership, but a dominion for corporate purposes, conferred with the para-

(696) mount object of benefit to the public. One of the privileges, passing as an incident, is, of course, that of constructing such embankments as may be needed to insure the safety of transportation. The principle is stated by Gould, in his work Waters, sec. 273, as follows: "Damages caused by the displacement or obstruction of surface water may be included in the assessment of damages under the statute caused by the original construction of the road"; but the author adds in the same section, "A railroad corporation has no right, by the erection of embankments, the construction of culverts, or the digging of ditches, to collect and discharge unusual quantities of surface water upon adjoining lands." In *Staton v. R. R.*, 109 N. C., 337, the late *Chief Justice Mer-*

rimon said: "Unquestionably, the defendant had the right to cut through and along its right of way and keep in repair such appropriate ditches and culverts as were necessary to carry off the surface water to a natural drain or outlet adequate to receive it." In *Porter v. Durham,* 74 N. C., at p. 67, the court said: "It has been held that an owner of land is obliged to receive the surface water which falls on adjoining higher land, and which naturally flows on the lower land. Of course, when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet, so that it will not damage him. He cannot, however, raise any dyke or barrier by which it will be interrupted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge."

The counsel for appellant insists that the court erred in instructing the jury that it was the duty of the defendant to provide a separate culvert to carry off the water of Barnfield Branch, whether it was a natural watercourse or a ravine or depression, through which the surface water falling upon any considerable area of land was (697) drained. If it was a natural watercourse, then by diverting it from its channel above the railroad, unless it was necessary to do so in order to make the best provision for the safety of passengers and property to be transported over the road, the defendant company incurred liability for at least nominal damages and for such actual damage for overflow as was caused to the plaintiffs' land above the railroad or below it. *Adams v. R. R., supra,* at p. 332. But leaving the question whether what was called Barnfield Branch was only a ravine which served the purpose of discharging the surface water from a large area or a natural outlet an open one, the court charged the jury, among other things, as follows: "If the safety of the roadbed permits, and within reasonable limits as to costs, the defendant should make a way for water to pass in its natural way or outlet, and in the present case, if such safety and expense permitted, the defendant should have placed a culvert at the point where this branch crosses the road and so permitted the water to take its natural way, and failing to do so, if damage is thereby caused to plaintiffs' land, the jury should answer the fifth issue (which involved the question of the wrongful diversion of Barnfield Branch, etc.) 'Yes.'" The jury, therefore, acted upon the idea that if the construction of the culvert would not imperil the safety of passengers and freight transported over the line, and the cost would be, in the opinion of the jury, reasonable, they must find that the company was negligent in failing to provide the culvert, even though Barnfield Branch was not a natural watercourse, but only a depression extending across the line of railroad and well

defined, both where it entered and where, in high water, it emerged on the other side from the Great Swamp. It is difficult to obtain from the evidence and charge a very clear idea of the topography; but the charge in its application to the testimony must be construed to mean what
(698) we have stated. The general rule, clearly deducible from the authorities cited, is that the diversion of a natural stream from its channel by a railroad company is always deemed a trespass when it is not necessary to the skillful construction of its road to change its course. *Adams v. R. R., supra.* But it is equally well settled that generally the lawful authority to divert surface water accumulating at a proper embankment, the building of which was necessarily within the contemplation of those who assessed or agreed upon the cost of the right of way, and to carry it in side ditches constructed on the right of way, to its natural outlet, or to some natural "outlet adequate to receive it," is included in the estimate of such cost. *Staton v. R. R., supra;* Gould, *supra.* We are not prepared to hold, upon any view of this testimony, that the channel of Barnfield Branch was a depression of such character that though it discharged only surface water, it nevertheless came within the reason which induced the courts to hold it an actionable injury to close a ravine and pond back on the abutting owners of land or carry to a suitable outlet by side ditches the water that usually escapes through it, though some of the courts of this country, with the approval of respectable text-writers, have held that deep depressions in a hilly region through which the water from large areas is discharged sometimes fall within the reason of the rule, and that in such cases the duty, when railroads cross them, is the same as if the crossing were over a branch flowing from a perennial spring. Gould, *supra,* sec. 273. But after the judge had told them that in no view of the testimony did the Barnfield Branch fall within the abstract definition of a watercourse previously given, he further instructed them that it was the duty of the company to have put in the culvert, unless the cost would have proved unreasonable or its construction would have made the road unsafe. Some of the witnesses had testified without objection that the branch was a natural watercourse; others had stated facts which, if believed, would
(699) lead to the inference that it was not. Though it may not have been material in discussing the question to which the court had previously adverted, to adapt the instruction as to the nature of natural watercourses to the evidence, it was manifestly erroneous, in view of the conflicting testimony on which the defendant's liability depended, to express the opinion that the branch was not a natural watercourse. The Code, sec. 413, and cases cited on p. 389 Clark's Code. This error was covered by the exception to the instruction asked and to that given, in lieu. But we see nothing in the testimony to take this case out of the

general rule which permitted the defendant to divert the surface water collected above an embankment constructed skillfully, and in the exercise of authority acquired as an incident to the right of way, along its ditches to its natural outlet, at a different place from its previous entrance through a depression, but at a point where it was amply sufficient to receive such water. In giving the instruction that it was the duty of the defendant to build a culvert over what was known as Barnfield Branch, as well as in expressing the opinion, where the evidence was conflicting upon the question, that it was not a natural stream, there was error, for which a new trial must be granted. It would seem, also, that in response to the prayers more specific instructions adapted to the testimony should have been given as to the character of the branch. We have discussed the main questions as to which we approve of the rulings of the court, because it may be important to do so in order to aid the court in the next trial.

New trial.

Cited: Waters v. Lumber Co., ante, 654; *Wool v. Bond,* 118 N. C., 2; *Simmons v. Allison, ib.,* 778; *Parker v. R. R.,* 119 N. C., 687; *Tucker v. Satterthwaite,* 120 N. C., 122; *Craft v. Lumber Co.,* 132 N. C., 155; *Parks v. R. R.,* 143 N. C., 294; *Moseley v. Johnson,* 144 N. C., 263; *Davenport v. R. R.,* 148 N. C., 293; *Roberts v. Baldwin,* 151 N. C., 408; *Carr v. Alexander,* 169 N. C., 667; *Turner v. Livestock Co.,* 179 N. C., 459.

(700)

W. D. SUMMERS v. ELIZA MOORE ET AL.

PETITION to rehear the case between the same parties, decided at September Term, 1893, of this Court, and reported in 113 N. C., 394.

Justice & Justice and J. L. C. Bird for petitioner.
Armfield & Turner and P. J. Sinclair contra.

CLARK, J. It is true, as contended, that as to the substituted ten acres the heirs of the wife should be parties defendant to bind them. If these same defendants, heirs of the husband, are, as is probable, the heirs of the wife also, they have no cause to complain. If, on the contrary, the heirs of the wife are not the same persons as the heirs of the husband, the latter cannot complain. The heirs of the wife, if not parties, are not bound by the judgment. They can still institute independent proceedings if they desire.

Petition dismissed.

STATE v. J. U. GIBBS AND THE WROUGHT-IRON RANGE COMPANY.

Peddlers—Itinerant Salesmen—Selling by Samples.

One who, while in the employment of another, with a wagon and team and a sample range, exhibited his samples to another in this State and solicited his order for a range similar to the sample, to be delivered in thirty days—the exhibition not being made either in the street or in a house temporarily rented for the purpose of exposing to sale goods, wares and merchandise—is not liable to indictment for failure to pay the license imposed, either upon "*peddlers*," by section 28 of chapter 294 (the Revenue Act) of the Laws of 1893, or upon "itinerant salesmen," by section 23 of said act.

(701) APPEAL from *Armfield, J.*, and a jury, at Spring Term, 1894, of PASQUOTANK. The following is the special verdict and judgment:

"We, the jurors impaneled to try the above cause, find the following special verdict:

"1. The Wrought-Iron Range Company is a corporation existing under the laws of the State of Missouri, all the officers and stockholders of which are citizens and residents of St. Louis, Mo., where said corporation has its factory for manufacture of ranges or stoves.

"2. On or about ____ day of January, 1894, the defendant corporation furnished its agent, J. U. Gibbs, one of the defendants, a wagon, team and sample range, and sent him into Pasquotank County, North Carolina, to canvass the sale of said ranges and to take orders for future delivery for ranges so manufactured and owned by said corporation.

"3. Pursuant to said employment, for which said corporation paid him a salary, the said Gibbs on ____ day of _____, 1894, exhibited said sample range to one Thomas in said county and solicited his order for a range similar to said sample range to be delivered in thirty days—offering to take a note therefor to be void if the corporation failed to deliver the range within thirty days. Said Gibbs took no orders for ranges.

"4. Said corporation's mode of doing business is as follows: They ship from their factory in St. Louis, Mo., a car containing seventy-two ranges consigned to itself in care of their division superintendent, who is a citizen and resident of Tennessee, but temporarily located at Elizabeth City, N. C., where he has an office for correspondence with said company, and to receive and fill the orders for ranges taken by the agents canvassing the county.

"The ranges shipped as aforesaid are received and stored at Elizabeth City in a warehouse rented for the purpose of storing said ranges and

of filling the said orders; no ranges are offered for sale or sold at warehouse except as above stated. The ranges are sold in original (702) packages.

"5. The defendants had no license and paid no tax in North Carolina for doing said business.

"If upon said facts the court is of opinion that the defendants are guilty, then the jury find them guilty; but if the court be of the opinion that the defendants are not guilty upon the facts found, then the jury find them not guilty." And the court having instructed the jury that the defendants were guilty upon the facts found, the jury returned a verdict of guilty. Wherefore, the Solicitor for the State prays judgment, and the court adjudges that the defendants pay a fine of $50 and the costs of the prosecution. Defendants appealed.

Attorney-General for the State.
Strong & Strong for the defendants.

MACRAE, J. The warrant describes two offenses:

"1. That the defendants did, as itinerant salesmen, expose for sale either on the street or in houses rented temporarily for that purpose, goods, wares and merchandise, to wit, certain stoves, contrary to the statute, etc., without a license.

"2. Unlawfully and wilfully did peddle goods, wares and merchandise, to wit, certain stoves, with two mules and a vehicle, the said Gibbs and The Wrought-Iron Range Company not then and there having a license so to sell and peddle said goods, etc., contrary to the statute," etc.

It is admitted by the Attorney-General, on the authority of *S. v. Lee,* 113 N. C., 681, that the defendants were not peddlers, and, therefore, would not be liable for the license tax imposed upon peddlers of clocks, stoves and ranges under section 28, chapter 294 (the Revenue Act), Laws 1893. But it is contended that the defendants are liable under section 23 of said act as "itinerant salesmen." This section, after imposing a license tax upon peddlers, proceeds: "Every itinerant salesman who shall expose for sale either on the street or in houses rented temporarily for that purpose, goods, wares or merchandise, (703) shall pay a tax," etc.

The special verdict finds that defendant Gibbs, in the employment of the defendant company, with a wagon and team and a sample range, exhibited his sample to one Thomas in said county, and solicited his order for a range similar to said sample, to be delivered in thirty days. It is not found that this exhibition was made either in the street or in a house rented temporarily for the purpose of exposing to sale goods, wares and merchandise. It fails to find—indeed, it finds to the con-

trary—that any goods were exposed to sale by defendant. The statute was evidently intended to reach that class of salesmen who, while not strictly peddlers, carry their goods and sell from place to place, are engaged in a business of a transient nature, carried on in booths or stands upon the streets of cities and towns, in houses occupied for this temporary purpose. As the defendants were not liable, either under section 23 or 28 of the Revenue Act, for the payment of a license tax, no Federal question arises upon the right of the State to impose a license tax for doing such business as was found by the special verdict to have been done in this instance.

We hold that, according to the facts found in the special verdict, the defendants are not guilty. There is error.

Judgment reversed.

Cited: Range Co. v. Carver, 118 N. C., 333; *S. v. Frank,* 130 N. C., 725; *S. v. Ninestein,* 132 N. C., 1042.

(704)

STATE v. JAMES TWEEDY.

Indictment for Killing Livestock—Hogs Running at Large—Injury to Personal Property—Cruelty to Animals—Indictment, Sufficiency of—Town Ordinance.

1. It is competent for an incorporated town to enact an ordinance that no hog shall run at large within the town limits, and to prescribe a penalty for its violation, whether the owner lives within or outside the corporate limits.
2. One who kills a hog running at large in a town in violation of an ordinance prohibiting hogs from running at large therein, although the owner lives outside the corporate limits, is not indictable under The Code, sec. 1002, which applies only to the injury or killing of livestock "lawfully running at large."
3. An indictment for killing a hog running at large in a town in violation of a town ordinance prohibiting the running at large of hogs therein, which charges that the killing was done "unlawfully and on purpose," cannot be sustained under section 1082 of The Code, where there is neither an allegation nor finding that the injury was "wilfully and unlawfully" done; nor, for the same reason, can it be sustained under section 2482.

INDICTMENT for killing livestock, tried before *Bynum, J.,* and a jury, at March Term, 1894, of MARTIN.

A special verdict was rendered, setting forth, in substance, that Jamesville, Martin County, is an incorporated town, and that an ordinance had been adopted and was in force at the time of the killing of the hog hereinafter mentioned, as follows:

"Hogs shall not run at large within the town limits. Any hog or hogs found running at large on the streets of the town shall, after three days' notice to the owner of such hog or hogs, be taken up by the town constable, and the owner shall then pay a fine of 25 cents for each hog so taken up, and all costs; and on failure to redeem any hog so taken up, the constable shall then and there advertise and sell, according to law"; that there was no law of the State requiring stock to be fenced up, or prohibiting hogs from running at large in the territory in (705) which the town of Jamesville is located, and that the town of Jamesville had not fenced its limits. That John Gaster, owner of the hog killed by the defendant when it was running at large in the streets of Jamesville, lived seventy-five yards outside the corporate limits of the town.

Upon this special verdict, his Honor was of the opinion that the defendant was guilty, and the jury so found, and from the judgment thereon the defendant appealed.

Attorney-General and W. J. Peele for the State.
James E. Moore for defendant.

CLARK, J. It was competent for the town to enact the ordinance that no hogs should run at large within the town limits, and to prescribe a penalty for violation of such ordinance, and it would make no difference if the owner of the hog should live outside of such limits. *Rose v. Hardie,* 98 N. C., 44; *Hellen v. Noe,* 25 N. C., 493; *Whitfield v. Longest,* 28 N. C., 268. Penal statutes must be strictly construed. The Code, section 1002, applies only to the injury or killing of livestock "lawfully running at large." This hog was unlawfully running at large contrary to a valid town ordinance, according to the special verdict. The defendant could not, therefore, have been found guilty under The Code, section 1002, as held by his Honor. Besides, the indictment fails to charge the material allegation that the livestock was "lawfully" running at large, and judgment might have been arrested in this Court for insufficiency of the indictment. Rule 27 of this Court; *Whitehurst v. Pettipher,* 105 N. C., 40. Nor could the indictment be sustained under The Code, section 1082, "Injury to Personal Property," as there is neither allegation nor finding that the injury was "wilfully and wantonly" done. The words "unlawfully and on purpose" will not supply their place. *S. v. Morgan,* 98 N. C., 641. The indictment is equally insuffi- (706)

cient under The Code, section 2482, "Cruelty to Animals." Upon the special verdict the defendant should have been adjudged not guilty.

Reversed.

Cited: S. v. Isley, 119 N. C., 864; *Broadfoot v. Fayetteville,* 121 N. C., 420; *Jones v. Duncan,* 127 N. C., 119; *S. v. Harwell,* 129 N. C., 551; 555; *Owen v. Williamston,* 171 N. C., 59, 60; *Archer v. Joyner,* 173 N. C., 77; *Marshburn v. Jones,* 176 N. C., 524.

STATE v. HARRIET HARRISON.

Indictment for Murder—Evidence—Confession by Prisoner, When Admissible.

1. In determining the competency of a confession, the true inquiry is whether the inducement offered was such as to lead the prisoner to suppose it would be better to confess himself guilty of a crime he did not commit.
2. When a prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession in either case is admissible, whether made to an officer or a private individual.
3. Upon the trial of a prisoner for murder of her husband, a witness testified that he, as a detective, representing himself as a laborer, went to the house of the prisoner, who told him she was in great trouble because some one had killed her husband, and that she knew who did it. He then said to her: "You had better tell me all about it; I am a right good old monger doctor; I can work roots and gummer folks, and if you will tell me all about it I can give you something so you cannot be caught." Thereupon she told witness that she procured another to kill her husband: *Held,* that the confession was admissible in evidence on the trial, since the inducement offered appealed only to her superstition, but was not a temptation to lead her, if innocent, to pretend that she was guilty.

INDICTMENT for murder, tried at the Criminal Court of HERTFORD, before *Winborne, J.*

The only exception relied upon by counsel in this court was that as to the admissibility of the confessions of the prisoner. It was in
(707) evidence that the prisoner was an infirm and diseased old woman.

The State introduced one Thomas as a witness, who testified that he was a detective, and that he went to the house of the prisoner and represented himself as a stave-getter, and that while at the house of the prisoner, she told him that she was in great trouble because some

one had killed her husband, and that she knew who had killed him. That he then said to her: "You had better tell me all about it. I am a right good old monger doctor. I can work roots and gummer folks, and if you will tell me all about it, I can give you something so you cannot be caught." Thereupon she told the witness that she got Elisha Reed to kill the deceased. Objection was made to the admission of this confession, made by the prisoner under the inducement offered. The court overruled the objection, and the defendant excepted and appealed from the judgment pronounced upon the verdict.

Attorney-General for the State.
Pruden & Vann for the prisoner.

AVERY, J. When the competency of a confession is drawn in question, the correct inquiry in every such case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. *Rex v. Gibbons,* 1 C. & P., 97; *Rex v. Reason,* 12 Cox C. C., 228; *Rex v. Reeve,* 12 Cox C. C., 179. The evil to be apprehended and guarded against is inducing an innocent person to confess guilt through hope or fear.

When the acknowledgment of the truth of inculpating facts is not made under the impression that, whether it is true or false, the mere making of the statement will bring some benefit to, or ward off some danger from, the person making it, in connection with an accusation of crime against such person, there is no sufficient reason (708) for excluding evidence of the confession. There is no pretense of any power on the part of the witness to control the conduct of the authorities of the State as to instituting or pressing a prosecution for the crime. The witness was not known to the prisoner to be a detective. She stated, without inducement, that she knew who had killed her husband, but it did not follow necessarily that she was guilty as principal or accessory before or after the fact, though the witness seemed to think so. The hope held out to her appealed to superstition, and was calculated to make her believe that the witness, in return for her confidence, would give her some dose that would save her not from prosecution, but from detection. The rule which is generally approved is, that where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession, in either case, is admissible. *Rex v. Court,* 7 C. & P., 595; *Meinaka v. State,* 55 Ala., 47; Russell Crimes, pp. 395, 396. It is not material that the witness told her a falsehood in appealing to superstition, since the words used had no tendency to make the

prisoner tell what was untrue. *Rex v. Thomas,* 7 C. & P., 345; *Rex v. Holmes,* 1 C. & P., 248 (4 E. C. L. R.).

If the prisoner had in no way participated in the commission of the crime, she had no reason to fear a disclosure of the truth, which she was invited to tell. The promise to protect by witchery or cabalism from being "caught," though it was an artifice resorted to to ascertain the truth, offered no temptation, in contemplation of law, to an innocent person to pretend that she was guilty. 3 Russell (9 Ed.), 395; 3 A. & E., 481, and note 1. On the contrary, the proposition of the witness was that she should tell him "all about it" (presumably the truth), and not that she should confess her guilt, and it has been held, as a rule, that a request to tell the truth as to a transaction is not an inducement (709) to an innocent person to pretend to be guilty. 3 A. & E., 474, and cases cited. *Meinaka v. State,* 55 Ala., 47.

It is not necessary, therefore, to enter upon the discussion of the interesting questions whether, in the absence of absolute duress, the invitation to confess guilt, when given by a person not in authority, is deemed to be such an inducement as will exclude a confession as involuntary, or whether statements made to such person are admissible, if at all, under a rule different from that obtaining where the prisoner is communicating with an officer, or one connected with the administration of the law. If, in contemplation of law, no sufficient inducement is offered to tempt the prisoner to falsely pretend that he is guilty, it is immaterial whether his statement is made to an officer or a private individual. The motion for a new trial was properly refused. The judgment is

Affirmed.

STATE v. WILLIAM MOORING.

Assault—Resisting Officer—Right of Officer to Forcibly Enter House to Serve Warrant.

1. An officer armed with process on a breach of the peace may, after demanding and being refused by the occupant admittance into a house for the purpose of making the arrest, lawfully break the doors in order to effect an entrance; and if he act in good faith in doing so, both he and his *posse comitatus* will be protected.
2. The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the King.
3. If an officer has valid process in his hands and fails to find the accused in the house after breaking the door, he does not become a trespasser *ab*

initio, although informed by one within the house, before the breaking, that the person whom the officer seeks is not in the house.

4. A person who drew an axe upon an officer who, having the authority to do so, broke into a house for the purpose of arresting one whom he believed to be in the house, was guilty of an assault.

INDICTMENT for assault and battery with a deadly weapon upon (710) one Ray, an officer, tried at the March Term, 1894, of MARTIN, before *Bynum, J.*

The officer Ray had a warrant for the arrest of one Johnson for assault and battery, and after summoning a posse proceeded to the house of the defendant where he demanded admittance with his posse for the purpose of making the arrest under said warrant. The defendant replied that Johnson was not in his house and forbade the officer to enter. The officer Ray then broke open the door, whereupon the defendant drew an axe upon Ray and ordered him to leave his house.

The defendant's counsel asked the court to instruct the jury that upon this state of facts the defendant was not guilty. The court refused to give the instruction asked, and told the jury that if they believed the evidence they would return a verdict of guilty. Motion for new trial for misdirection; motion refused. Appeal by defendant.

Attorney-General and W. J. Peele for the State.
James E. Moore for defendant.

AVERY, J. It seems to be well settled by the courts, both in this country and in England, that where an officer "comes armed with process founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to effect an entrance, and if he act in good faith in doing so, both he and his *posse comitatus* will be protected." 1 Russell Cr., 9 Ed., p. 840; (711) 2 Hawk P. C., Bk. 2, ch. 14, sec. 3; East P. C., 324, ch. 5, sec. 88; *S. v. Smith,* 1 N. H., 346; *Bærnard v. Bartlett,* 10 Cush., 501; 1 A. & E., 746; *S. v. Shaw,* 1 Root, 134.

"The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the King." *Commissioners v. Reynolds,* 21 Am. Rep., 510. Hence, the rules applicable where a forcible entry is effected in order to execute a *capias* issued in a civil action, do not apply in the case at bar. 1 A. & E., 722. The officer did not justify the breaking on the ground that he had a search warrant, but a warrant for the arrest of a particular prisoner, and we

are not called upon, therefore, to enter into a discussion of the constitutional safeguards that protect dwelling-houses against undue search.

If the officer have valid process in his hands, he does not become a trespasser *ab initio* if he fail to find the accused in the house after breaking the door. *Hawkins v. Commissioners,* 61 Am. Dec., 147 (14 B. Mon., 318). The learned counsel called attention to the fact that the defendant notified the officer, before the breaking, that the person against whom the *capias* had been issued was not in his house, and insisted that, in the face of this notice, the officer did not have such reasonable ground for believing he would find the person for whom he was searching as would justify the use of force in effecting an entrance. There is a general presumption of law that the officer in the execution of process was not moved by malice or other improper motive, but acted in good faith with the intent and desire to discharge his duty to the State. Lawson Presumptive Ev., 61. This presumption is not sufficiently rebutted by the mere proof of the declarations of the defendant. It is (712) possible that the officer had good reason to believe that the defendant bore such relation to the accused that he would be tempted to aid him in evading arrest by telling a falsehood. The right to break into houses in order to arrest criminals would be confined within very narrow limits if their comrades could give them shelter in their houses and by simply telling a falsehood take from officers in pursuit of them the benefit of the presumption of law that ordinarily protects them.

If the officer had the authority to break into the house, it will of course be conceded that the defendant was guilty of an assault in drawing an axe upon him when he entered. It was not error to tell the jury that if they believed the evidence the defendant was guilty.

No error.

STATE v. JAMES HAWKINS.

Indictment for Perjury—Defendant Testifying in His Own Behalf—Falsity of Oath—Corroborative Evidence.

1. Where, on the trial of one charged with an offense before a mayor of a town, he permits himself to be called by his counsel and sworn as a witness, and testifies in his own behalf, the examination being conducted by his counsel and the cross-examination by opposing counsel, and the caution and advice prescribed by section 1145 of The Code not being given, he will be deemed to be exercising the right to testify given by section 1353 of The Code, and not under the provisions of section 1145.

2. In the trial of an indictment for perjury it is necessary that the falsity of the oath be proven by two witnesses or by one witness and corroborative circumstances sufficient to turn the scales against the defendant's oath.
3. Where, in the trial of a defendant charged with falsely swearing on a trial before a mayor that he did not have an axe in a fight in which he was engaged, the person assaulted testified that the defendant did have an axe, with which he inflicted a wound on the witness' head, testimony of a physician that the wound "was made with a sharp-edged instrument" was sufficient corroboration to establish the falsity of defendant's oath.

INDICTMENT for perjury, tried before *Bynum, J.*, at September (713) Term, 1894, of WAKE.

The indictment charged the defendant with committing perjury upon the trial of an action in the Mayor's Court of the City of Raleigh, in which the State was plaintiff and said defendant and one Benjamin Curtis were defendants, "by falsely asserting, on oath, that he, James Hawkins, did not have or use an axe, or any kind of sharp instrument, in a fight" in which he, said Hawkins, was charged with having engaged with said Curtis, in the trial aforesaid, knowing said statement to be false, etc.

Thomas Badger, a witness for the State, testified that he is Mayor of the City of Raleigh, and tried the case charged in the following warrant, in substance:

"Whereas, etc., he is informed and believes that James Hawkins did, in the city of Raleigh, on 17 September, 1894, unlawfully, etc., commit wilful perjury, by testifying, under oath, in the trial of a warrant of *The State v. James Hawkins and Benjamin Curtis*, before the mayor of the city, that he did not use or have an axe or any kind of sharp instrument in the fight with Benjamin Curtis, whereas, in said fight, he did have and use an axe, contrary," etc. (The mayor adjudged that the defendant give a justified bond for his appearance at the Superior Court of Wake.) "The defendant was sworn, and he and the other defendant were both represented by counsel. I gave the defendant no caution; did not advise him of any of his rights nor ask him any question. His counsel appeared for him, and when I asked counsel if he desired to introduce any witness, he replied, 'Yes, he desired to introduce the defendant.' The defendant was then introduced and sworn by me, on the Bible, as required by law, his right hand on the Bible, and (714) he was sworn to tell the truth, the whole truth, and nothing but the truth, in regard to the matter then on trial, as charged in the warrant. He was examined by his counsel and cross-examined by counsel for the other defendant. The examination was made publicly, and in the presence of the other witnesses."

The defendant objected to any testimony as to what the witness swore in the examination, upon the ground that the mayor did not caution him, and examined him in the presence of the other witnesses, and the defendant could not take any binding oath under an oath administered as the mayor testified he had administered it to defendant, under sections 1146 and 1149, inclusive, of The Code. Objections overruled, and defendant excepted.

The witness then testified: "I can give the substance of his evidence. The attorney for Curtis asked him (Hawkins) on cross-examination, 'Did you at any time have or use an axe, or any kind of sharp instrument, during the fight with Curtis?' His answer was, 'No, I did not.' Upon his cross-examination, the same counsel said: 'You are under oath, and I put you on your guard.'

"Curtis, a witness for the State, testified that the fight between defendant and himself occurred at Lee's stables; that Hawkins at first hit him two licks with a stick, and then got an axe and cut him with it in the back of the head.

"Upon cross-examination, this witness testified: 'I saw the axe; it was one that was used for cutting the wires off of bales of hay; it was not sharp.'

"Dr. Scruggs, a witness for the State, testified without objection that he was a practicing physician, and was called to attend Curtis shortly after the difficulty. 'He was cut in the back part of the head. The cut was two inches long, through both plates of the skull and to the membrane that covers the brain. I could see the brain. It was an (715) incise wound, that is, a smooth-cut wound, not a lacerated or contused wound. The wound was made with a sharp-edged instrument. It was a severe blow, as it cut through both plates of the skull.' "

This was all the evidence.

Upon the conclusion of the evidence, the defendant's counsel asked the court to instruct the jury that they could not convict the defendant upon the evidence. This was refused, and defendant excepted.

The court left the case to the jury with proper instructions, to which there were no exceptions, except the refusal to charge as above requested.

There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

Attorney-General for the State.
Thomas M. Argo for defendant.

BURWELL, J. The testimony shows that when the defendant made in the mayor's court the statement which is alleged to have been false, he was not being examined under the provisions of section 1145 of The

Code, but was testifying in his own behalf and of his own accord, and at the suggestion of his own counsel, then present. He had a right so to testify. The Code, section 1353. If he saw fit to exercise that right, as it seems he did, he is to be treated just as any other witness.

2. There was the testimony of one witness (Curtis) that the oath of the defendant was false. To prove its falsity it was necessary to supplement this either by the evidence of another like witness or else by proof of corroborative circumstances sufficient to turn the scale against the defendant's oath. *S. v. Gales,* 107 N. C., 832.

We think the evidence of Dr. Scruggs as to the nature of the wound furnished such corroboration. He said that it "was made with a sharp-edged instrument." An axe, though such a one as the witness Curtis described, is "a sharp-edged instrument" within the mean- (716) ing of those words as used by the witness.

No error.

Cited: S. v. Mallett, 125 N. C., 722.

STATE v. FRANK COLLINS.

Indictment for Forgery—Practice—Mistrial—Former Jeopardy—Variance—Idem Sonans.

1. A mistrial in a case not capital is a matter of discretion, and hence the plea of former jeopardy because of a mistrial ordered on a former trial of a defendant for the same offense was properly overruled.
2. It was competent on a trial for forgery for the State to show that a witness whose name was W. W. Vass was commonly known as "Major Vass."
3. Where an indictment for forgery charged that the name forged was "Major Vass," evidence that the signature was "Major Vase" was no variance, the name being *idem sonans.*
4. To sustain an indictment for forgery it is not necessary that the forgery should have been "calculated to deceive and did deceive," but only that there was a fraudulent intent to deceive by a forged paper, however awkward or clumsy the signature may be.

INDICTMENT for forgery and altering the forged paper, tried before *Bynum, J.,* and a jury, at September Term, 1894, of WAKE.

On the first Thursday of the term the case was called for trial, and the defendant pleaded "not guilty." After impaneling a jury, a witness was sworn, and being asked to give the contents of the order alleged to

have been forged, the defendant objected because the State had not served an order on him to produce the order, etc.

The objection being sustained, the solicitor announced that he could not get on with the prosecution without proving the contents of the order and, at his request, a juror was withdrawn, and time given to the solicitor to serve the notice for the production of the original order. The defendant's counsel objected to the withdrawal of a juror, and stated that he would insist on a discharge of the defendant on the ground that he could not be put twice in jeopardy. The court remarked to the counsel: "I will not order the juror withdrawn, then; but if you insist that your client is entitled to his discharge, I will admit the evidence, and give you an exception, and you can appeal from that ruling."

Defendant's counsel then stated he would not insist on the discharge of the defendant. Thereupon, the court ordered a juror withdrawn and a mistrial had. On the following day, after notice had been served to produce the order, the case was again called for trial, but before the jury was impaneled defendant moved to be discharged upon the ground that he had twice been put in jeopardy. The motion was denied.

A jury was then impaneled and Sutton was again examined as a witness for the State. He testified: "The defendant presented me an order, saying, 'There is an order from Major Vass; read it,' and he held it in his hands. I read it and told him to sit down and wait until Mr. Robbins came. The order reads: 'Mr. Robbins, please send me one N. C. ham, 10 lbs.' It was signed 'maj. Vase.' It was poorly written. Before Robbins came defendant left. I told him I could not fill the order."

On cross-examination, witness said: "The 'M' to Major was a small 'm,' and Major was spelt 'Maj.,' and the latter name was spelt (718) 'Vase.'"

W. W. Vass was next introduced as a witness for the State. He testified that he was known as Major Vass, and that his initials were "W. W." The State proposed to ask witness if he knew defendant. Defendant objected, because the witness had not been identified with the person named in the indictment. Overruled. Exception.

Witness resumed: "I never saw him that I know of until this case was before the Mayor of Raleigh."

The State proposed to ask witness if he ever wrote or gave to defendant any such order as the one set out in the indictment and testified to by Sutton.

Objection by defendant, because the witness had not been proven to be the person whose name was signed to the order as "maj. Vase." Overruled. Exception.

Witness answered: "I never did; never gave defendant any order of any kind, nor signed one 'maj. Vase.'"

Mr. Robbins was then examined for the State, and he testified: "Three days before the day the order was brought to Sutton, defendant came to my store and told me that Major Vass said send him a North Carolina ham. I asked him if he was working for Major Vass, and he said yes. I told him to tell Major Vass that I did not do business that way. That he would have to send an order or get a book." All of Robbins' testimony was permitted, under the objection that it had no reference to this case, and was irrelevant and referred to the offense of false pretense, and not that of forgery.

Defendant asked the court to instruct the jury that there was a fatal variance between the allegations in the bill and the proof, in that the name was proven to be "maj. Vase," and it was charged in the bill "Major Vass," and that the jury should acquit. His Honor refused to give this instruction, and told the jury that if they believed that the person referred to in the bill as "Major Vass" was W. W. Vass, and that the order was written "maj. Vase," and that the order was presented by defendant for the purpose of procuring the ham, and that he was attempting to induce the belief that W. W. Vass was the one (719) who signed the order, the spelling "maj. Vase" in the order would not be a fatal variance.

To this part of the charge the defendant excepted.

There was no exception to any of the balance of the charge.

Attorney-General and W. J. Peele for the State.
J. C. L. Harris for defendant.

CLARK, J. A mistrial in a case not capital is a matter of discretion. *S. v. Johnson,* 75 N. C., 123. The plea of former jeopardy was therefore properly overruled. The second, third and fourth exceptions are without merit. The questions objected to were asked for identification. It was competent for the State to show that the witness, whose name was W. W. Vass, was commonly known as "Major Vass." The charge in the bill was that the name forged in the order was "Major Vass." The proof was that the signature was "maj. Vase." This is *idem sonans* and no variance. *S. v. Lane,* 80 N. C., 407. There, the charge was that the forged order purported to be drawn by J. B. Runkins on Dulks & Helker. The proof was that the name of the party whose signature was forged was J. B. Rankin, and the name of the firm to whom it was presented was Helker & Duts. This was held, in an opinion by *Smith, C. J.,* no variance, because "the difference is slight, and creates no uncertainty as to who were meant." As to whether "maj. Vase" and "Major Vass"

are *idem sonans,* an immaterial variance, we find numerous cases where a greater difference was held immaterial.

In this State, Runkins for Rankin, and Dulks & Helker for Helker & Duts, *ut supra,* also Willie Fanes for Willis Fain, 95 N. C., 682; Deadema for Diadema, 24 N. C., 346; Michaels for Michal, 44 N. C., 410; Anny for Anne, 12 N. C., 513; Hawood for Haywood, 94 (720) N. C., 913; Susan for Susannah, 67 N. C., 55.

In other States, among many names held *idem sonans,* and not a variance, the following may be cited at random: Allesandro and Alexander, 105 Pa. St., 1; Anthrom and Antrum, 3 Rich, S. C., 68; Bobb and Bubb, 39 Pa. St., 429; Brearley and Brailey, 46 N. W., 101; Bert Samund and Bernt Sannerud, 38 Minn., 229; Barnabus and Barney, 17 Vt., 562; Beckwith and Beckworth, 4 Black, Ind., 171; Burdet and Boudet, 17 Ala., 106; Cuffee and Cuff, 12 Rich, S. C., 24; Conn and Coen, 8 Ind., 18; Colburn and Coburn, 23 Pick., 57; Deorges and Dierkes, 37 Mo., 576; Dillahanty and Dillaaunty, 12 S. W., 55; Elliott and Ellett, 85 Tenn., 171; Fauntleroy and Fontleroy, 27 Tex. Appeals, 381; Fabruary and February, 4 Tex. Appeals, 70; Fayelville and Fayetteville, U. S. v. Hinman, 1 Bald., 292; Foster and Faster, 1 Tex. Appeals, 533; George Rooks and Geo. W. Rux, 83 Ala., 79; Giddings and Gidinas, 17 Wis., 597; Girous and Geroux, 29 Ind., 93; Heremon and Hariman, 19 Vt., 530; Haverly and Havely, 21 Mo., 480; J. D. Hubba and Joel D. Hubbard, 97 Mo., 311; Isah and Isaiah, 5 B. Mon., Ky., 297; Jefferds and Jervais, 147 Mass., 414; Kay and Key, 16 East, 112; Kealiher and Keolhier and Kelhier, 81 Me., 531; Kreily and Kreitz for Crits, 125 Ill., 141; Leberung and Lebrum, 2 Wash. (U. S.), 201; Lawson and Lossene, 81 Mo., 387; Leaphardt and Leaphat, 5 Black, Ind., 278; T. C. Lucky and C. C. Lucky, Brown v. State, 32 Texas, 124; Mary Etta and Marietta, 2 Texas Appeals, 520; Minner and Miner, 15 Johns., N. Y., 226; McLaughlin and McGlofflin, 52 Ind., 476; Marres and Mars, 103 Mass., 421; Moser and Mousener, 1 Ark., 503; Nuton and Newton, 26 Minn., 529; Pilip and Philip, 1 Ala., 197; Petterson and Patterson, 9 Cow., N. Y., 140; Petrie and Petris (almost this very sound, e for s), 3 Cal., 219; Preyer and Prior, 61 Ala., 16; Rae and Wray, 3 Upp., L. J., 69; Shafer and Shaffer (also similar to the sound here), 29 Kan., 337; Shields and Sheals, 3 Luz Leg. Obs. (Pa.), 174; Stafford and Stratford, Chitty, 355; Sunderland (721) and Sandland, 2 How., Pr., 31; St. Clair and Sinclair, 39 Ill., 129; Storrs and Stores, 81 N. Y., 1; Sofira and Sofia, 7 Tex. Appeals, 329; Tinmarsh and Tidmarsh, 11 Moore, 231; Userrey and Usery, 10 Ala., 370; Whyneard and Winyard, R. and R., 412; Zemeriah and Zimri, 55 Ill., 490.

In *Gooden v. State,* 65 Ala., 178, the name attempted to be forged was Thweatt. The forgery had it Threet. The conviction was sustained. This indictment being for forgery, it was not necessary that the forgery should have been "calculated to deceive, and did deceive." That applies only to obtaining goods under false pretense. The forgery may be awkward or clumsy. The party is guilty if there is the fraudulent intent to deceive by a forged paper, though the forgery is detected. 8 A. & E., 462. It is not essential that any one should be actually defrauded.

In the present case his Honor properly charged the jury that "If they believed that the person referred to in the bill as 'Major Vass' was W. W. Vass, and that the order written 'maj. Vase,' was presented by the defendant for the purpose of procuring the ham, and that he was attempting to induce the belief that W. W. Vass was the one who signed the order, the spelling 'maj. Vase' would not be a fatal variance."

No error.

Cited: Wyatt v. Mfg. Co., 116 N. C., 278; *Henderson v. Dowd., ib.,* 797; *S. v. Hester,* 122 N. C., 1049; *Cogdell v. Tel. Co.,* 135 N. C., 438; *S. v. Drakeford,* 162 N. C., 669; *S. v. Upton,* 170 N. C., 770.

STATE v. W. C. GORHAM.

License Tax—Lightning-rod Agent—Interstate Commerce.

1. The right of a State to tax trades, professions and avocations within the borders of the State is unquestionable, though the goods dealt in be manufactured in another State.
2. Where, in the trial of a person indicted for failure to take out the license provided for by section 27, chapter 294, Acts of 1893, it appeared that he was the agent, for the sale and delivery in this State, of manufacturers of lightning-rods in another State, and that such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was made, and that the rods were shipped in bulk to the agent, who broke the package for distribution to his customers: *Held* (1), that the defendant was an itinerant, putting up lightning-rods under the meaning of section 27, chapter 294, Acts of 1893; (2) that the connection between the pursuit of such avocation and the sale of articles manufactured in another State was so remote in its effect as to impose no burden upon the business of interstate commerce; and (3) that the manner of sale and delivery of the lightning-rods was such as to divest it of any feature of interstate commerce, the original package being necessarily broken before the sale was completed by delivery to the purchasers.

(722) APPEAL from a justice's judgment, tried at Spring Term, 1894, of WILSON, before *Bynum, J.*, upon the following warrant and special verdict:

Warrant.—"J. W. Crowell, being duly sworn, complains and says, that at and in said county, and in Wilson Township, on or about 1 September, 1893, W. C. Gorham did unlawfully and wilfully put up lightning-rods on the house of James E. Rountree without having paid the tax imposed by section 27, Revenue Act of 1893, against the form of the statute in such case made and provided, and contrary to law and against the peace and dignity of the State."

Special Verdict.—"Cole Brothers were, on and prior to 1 October, 1891, and up to 4 June, 1894, and still are, citizens and residents of the town of Greencastle, in the State of Indiana. They were on said 1 October, 1891, and now are, manufacturers of and dealers in lightning-rods, fixtures, ornaments, etc., and prosecuted said business in the several States through their agents, selling and delivering lightning-rods and fixtures by attaching the same to dwellings and other houses and
(723) buildings of their customers.

"In the department of selling and delivering they employ soliciting agents in the several States, who travel on railroads and in buggies from place to place and house to house for the purpose of soliciting and taking orders for lightning-rods by samples thereof, and catalogues illustrating the same. That when orders are received from persons desiring to purchase rods, the same are delivered or forwarded by such soliciting agent to the said Cole Brothers, and the same are filled by the shipment of rods so ordered to some convenient and accessible point from which they are delivered to the person ordering the same. The said Cole Brothers have no place of business in North Carolina. The said Cole Brothers on 1 October, 1891, for the purpose of introducing their goods into the State of North Carolina, entered into contract with the defendant W. C. Gorham, whereby they appointed him their agent and manager to conduct for them in said State the business of selling by sample, and delivering lightning-rods so manufactured by them. That such sale and delivery included the putting up of said rods, whenever the purchaser so requested, for which no extra charge was to be made. That the said defendant W. C. Gorham was authorized to and did employ salesmen and others to assist him in the prosecution of said business. That all orders taken by the defendant W. C. Gorham for lightning-rods and fixtures were in the form of Exhibit 'A,' hereto attached. That on the ____ day of _____, 1893, the said W. C. Gorham, acting as the agent of Cole Brothers, at and in the town of Wilson, county aforesaid, took from James E. Rountree an order, in accordance with a sample, for rods to be attached to his dwelling-house

in said town, in the form and language of Exhibit 'A' hereto attached. That said order, together with other orders of like character, taken from other persons, was forwarded by the said defendant to said Cole Brothers, at their said place of business in the State of (724) Indiana, and the same was filled by shipment of the rods so ordered. That the said rods were received by the said W. C. Gorham, and by him, through his servants and employees, attached to the dwelling-house of the said James E. Rountree, in accordance with the terms of said order. That the shipment of said rods was made at the same time, and as a part of a shipment of other rods to fill other orders so taken by the said defendant, and forwarded to the said Cole Brothers.

"That the defendant had not at the time of taking said order and delivering said rods paid the tax in Wilson County, imposed by section 27, chapter 294, Laws 1893, and had not at the time of the issuing of the warrant herein paid said tax."

The order for lightning-rods (Exhibit "A"), was as follows:

"MESSRS. COLE BROTHERS.

"*Sirs*:—Erect or deliver, at your earliest convenience, your improved lock-screw lightning-rods, manufactured by your Franklin Lightning-rod Company, at or on my _____, in the county of _____, State of_____, viz., _____ points, _____ ground rods, in accordance with the scientific rules, as printed on the back of this order, and I agree to settle for the same by cash, or note due ____, at 47½ cents per foot for the rod, and the price of five feet of rod for each brace, $3.50 for each point, $2.50 for each ball, and $4 for each arrow; no extra charge for putting up rods.

"If this order is revoked by me, or, if through any fault or refusal on my part the rods are not erected, I agree to pay, as liquidated damages therefor, a sum equal to one-half of the cost of material necessary for the work, at prices quoted in the order.

"It is expressly understood by the signer of this order that he signs the same on his own judgment, after due deliberation by him, without any undue influence having been used, or relying on any (725) representation made by any agent or person, other than what is written or printed on this blank.

"Given the ___ day of _____, 189___"

"If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise, they say the defendant is not guilty."

The court being of opinion that the defendant is not guilty, the jury so find; and it was adjudged that the defendant be discharged. The solicitor for the State appealed.

Attorney-General and W. J. Peele for the State.
Perrin Busbee and H. G. Connor for defendant.

MACRAE, J. Section 27, chapter 294, Laws 1893, being a part of Schedule B, the taxes in which are imposed as license taxes for the privilege of carrying on business or doing the act named, is as follows: "On every itinerant who puts up lightning-rods, $50 annually, for each county in which he carries on business." There is nothing in the words of the statute to indicate a purpose to levy a tax in any form upon, or to impose a restriction in any manner, upon citizens or inhabitants of other States from engaging in business connected with the commerce between the States which is protected from State legislation by the Constitution of the United States. The right of a State Legislature to tax trades, professions and avocations within the borders of the State has never been disputed.

It is earnestly contended, however, by the learned counsel, that the defendant was not an itinerant engaged in putting up lightning-rods, but that his business was that of selling, in which, of course, is (726) intended the delivery, an article manufactured in another State. That it appears by the special verdict that such sale and delivery included the putting up of said rods, whenever the purchaser so requested, and for which service no extra charge was to be made; and, therefore, that the imposition of a license tax upon defendant for putting up the rods sold by him "is an attempt to impose a tax on the business of carrying on interstate commerce." We are not disposed to question the principle so often laid down by the Supreme Court of the United States from *Brown v. Maryland,* 12 Wheat., 419, to *Brennan v. Titusville,* 14 S. C., 829, that no State has a right to lay a tax on interstate commerce in any form; neither have we any disposition to extend the application of this doctrine any further than we find it.

Unless there is something in this special verdict which so connects the act of defendant in putting up the lightning-rods sold by him with the business of interstate commerce, it will be our duty to uphold the law of this State, and apply it to the case before us.

The whole matter is in a nutshell. After finding the fact that Cole Brothers were manufacturers in another State, and defendant was their agent in this State for the sale of their wares, it further finds "that such sale and delivery included the putting up of said rods, whenever the purchaser so requested, for which no extra charge was to be made." Under these circumstances, is the defendant liable for the license tax?

It will be seen that quantities of the goods were shipped to the agent, at some convenient point in this State, in original packages, and were after bulk broken distributed and delivered by him to the different purchasers. That the sale was not completed by delivery until after such breaking of bulk in this State, and that the quantity of the article was not determined in the order, as will appear by reference to Exhibit "A," and was to be determined after the importation of the original package. The consideration of these facts leads us to the conclusion that the present case may easily be distinguished from any of the (727) numerous adjudications on the subject. In *Brennan's case, supra,* the pictures were delivered, framed, direct to the purchaser. Of necessity, the goods, if many of them had been shipped to the agent for delivery, were separate and distinct from all other goods of the same character.

It was not obnoxious to the interstate commerce clause of the Constitution when a license tax was laid "on all peddlers of sewing-machines without regard to the place of growth or produce of material or of manufacture," because the test is "whether there is any discrimination in favor of the State which enacted the law." *Machine Co. v. Gage,* 100 U. S., 676. "When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property and amenable to its laws, provided that no discrimination be made against them *as* goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are." *Robbins v. Shelby,* 120 U. S., 489, citing *Machine Co. v. Gage, supra,* and *Brown v. Houston,* 114 U. S., 622.

If this license tax upon itinerants putting up lightning-rods could in the slightest degree affect the sale and delivery of the article, its effect upon the interstate commerce would be so incidental and remote as not to amount to a regulation of such commerce, as in *Fickler v. Shelby,* 145 U. S., 1. Again, as said in *McCall v. California,* 136 U. S., 104, where an agent of a railroad running from another State was soliciting business, but not selling tickets, in California, "The test is, Was the business a part of the commerce of the road? Did it assist or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road?"

In our case the business which could not be taxed was the sale of, or the solicitation of persons to purchase, the lightning-rods manufactured in another State. The avocation requiring a license is that of an itinerant putting up lightning-rods. The sale and delivery of the (728) article is not inseparable from the erection of it, any more than the shoeing of horses is from their importation into the State, or the

shipping here of wheat is from its sowing in the fields. Indeed it appears by the contract that the agent was only to put up the rods when requested so to do by the purchaser. The inference is that the purchaser might choose to employ some one else to put them up, and that a sufficient margin is allowed upon the price to fully pay the expenses of erection and make it to the interest of the purchaser to require the seller to put it up. One who goes through the country putting up rods is none the less liable to be taxed for the privilege of exercising his avocation because he adds to this business that of soliciting the purchase of the articles to be so put up by him. If such is the law it will not be difficult for persons whose avocations are taxed to engraft upon their business a branch for the sale of some article of foreign manufacture which is a necessary part of the business in which they are engaged. We may distinguish the manner of delivery of the articles named in *Spain's case,* 47 Fed., 208, if we were bound by the opinion delivered in that case. Certain specific articles, lamps, lamp-shades, etc., manufactured in West Virginia, were sold by the agent traveling in North Carolina for his principal. Many of the articles ordered were shipped in the same box to the agent, who took out the separate articles and completed the sale by delivery of the same to the purchasers. But here, a sufficient quantity of the lightning-rod material is shipped to the agent from which to fill orders theretofore taken; he selects from the bulk enough to fill the order of his customer and delivers it. The bulk was broken and the same became a part of the general property in the State before delivery when the package was opened, and a part thereof until then indistinguishable from the balance was set apart to be delivered to a particular purchaser.

(729) The latest, as far as we have been able to ascertain, of the very numerous deliverances of the highest court of this country upon the subject we have under consideration, is that of *Brennan v. Titusville, supra.* The plaintiff was the agent of the manufacturer of picture-frames and maker of portraits, residing in Illinois. The plaintiff's business was to travel in Pennsylvania, and to solicit orders for said pictures and frames; the orders were forwarded by the plaintiff to his principal in Chicago, who shipped the goods direct, by express or freight, to the purchaser; the price of the goods was sometimes paid to the express company and sometimes to the agent. An ordinance of the city of Titusville had attempted to lay a license tax upon "all persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited."

This was so clearly within the rulings of the cases of Robbins and Asher that it scarcely required an elaborate opinion; its simple statement will show the particulars in which it differs from ours.

We conclude, then, that his Honor was in error in holding that the defendant was not guilty upon the special verdict, because:

1. The defendant was an itinerant putting up lightning-rods.

2. The connection between the pursuit of this avocation and the sale of articles manufactured in another State was so remote in its effect as to impose no burden upon the business of interstate commerce.

3. The manner of sale and delivery of the lightning-rods was such as to divest it of any feature of interstate commerce, the original packages being necessarily broken before the sale was completed by delivery.

There is error, and the judgment is

Reversed.

Cited: Collier v. Burgin, 130 N. C., 635; *Range Co. v. Campen,* 135 N. C., 519; *S. v. Sheppard,* 138 N. C., 582; *S. c.,* 142 N. C., 589.

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(730)

STATE AND MAGGIE CHURCH v. M. A. PARSONS.

Bastardy Proceedings—Payment of Allowance—Fine and Costs—Enforcement of Payment—Discharge of Insolvent—Objection to Insolvent's Discharge—Exceptions.

1. The legal obligation of a defendant in bastardy proceedings to pay the allowance to the mother provided for under section 35 of The Code is not less a duty imposed by the State, as distinguished from a debt arising under a contract, because the allowance is now required to be paid directly to the mother instead of to the clerk of the court, as formerly.

2. A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition, as provided in section 2948 of The Code.

3. One who has been found to be the father of a bastard child and committed for nonpayment of the fines, costs and allowance, is entitled, under section 2967 of The Code, to be discharged from prison upon filing his petition for a discharge as an insolvent and complying with the requirements of law.

4. When defendant in bastardy proceedings has been ordered to pay a fine and costs, and allowance to the mother, under section 35 of The Code, only the State can suggest fraud as to the fine and costs in answer to defendant's petition for discharge filed under section 2942 of The Code. As to the allowance, the mother of the child has the right to suggest fraud, and upon such suggestion an issue is raised which should be entered upon the trial docket of the Superior Court and stand for trial as other causes.

5. In such case the judge of the Superior Court has no power to make at chambers in a county other than that where the issue is pending any order prejudicial to the mother's rights or interests without her consent.

6. The father of a bastard child who has been ordered to pay an allowance to the mother is not entitled to the constitutional exemption of $500 as against such debt due the mother.

THIS was an issue in bastardy proceedings, tried before *Whitaker, J.*, and a jury, at March Term, 1894, of WILKES.

The defendant was found guilty, and ordered to pay a fine of
(731) $10 to the State, and an allowance of $35 to the prosecutrix, and costs of the action. Upon defendant being unable to pay said fine, allowance and costs, he was committed to the common jail of Wilkes County. The defendant remained in jail the time required by law, and, upon a proper motion to the sheriff to that effect, filed his petition before M. McNeill, Clerk of the Superior Court, to be allowed to take the oath of insolvency, as prescribed by law. In accordance therewith, defendant was produced before the clerk on 9 April, 1894, and asked, by his petition, to be allowed to take the oath and be discharged. The chairman of the board of commissioners, nor any officer interested in the fee-bill taxed against the defendant, made any opposition to his taking the oath, neither verbally nor in writing, but the prosecutrix filed an answer to the petition, alleging that he was worth more than $50, and asking that he be not allowed to take the oath and be discharged. An affidavit, in support of this view of the case, was filed by John Welborn, who was not the chairman of the board of county commissioners, nor an officer interested in the fee-bill. It was admitted by the attorneys for the prosecutrix that defendant was worth less than $500. The clerk held that issues were raised, refused to administer the oath, and remanded the defendant to jail. Defendant appealed to *Spier Whitaker, Judge,* holding the courts of the district. The appeal was granted, to be heard at chambers. Counsel for the prosecutrix did not give the judge any notice nor information, in writing or otherwise, that they desired to be heard on this appeal. On 11 April, 1894, the matter was heard at chambers before *Whitaker, J.* The ruling of the clerk was reversed, and the defendant ordered to be discharged on taking the prescribed oath. From this order the prosecutrix appealed.

(732) *Attorney-General for the State.*
No counsel contra.

AVERY, J. The judgment in the original bastardy proceeding was that the defendant pay a fine of ten dollars, an allowance to the mother of the bastard child, and costs, in accordance with the provisions of section 35 of The Code. Prior to the enactment of section 2, chapter 92, Laws 1879, which was brought forward in the section of The Code referred to, the law (Bat. Rev., ch. 9, sec. 4; Rev. Code, ch. 12, sec. 4) had provided

that on the finding of an issue of bastardy against him, the putative father should "stand charged with the maintenance thereof, as the court may order." In *S. v. Cannady,* 78 N. C., 539, it was held that the judgment for the fine and costs was not a debt, but both were imposed in the exercise of the police power, in order to provide for the child. *S. v. Manuel,* 20 N. C., 144.

In a later case, *S. v. Burton,* 113 N. C., 655, approved in *Myers v. Stafford,* 114 N. C., 234, it was held that the fine imposed by the act of 1879 made the proceeding in bastardy a criminal action, but with the provision that upon conviction an allowance might be imposed as a police regulation, as well as the fine by way of punishment for the criminal offense. The common practice (under the act of 1814, ch. 12, sec. 4, Rev. Stat.; ch. 9, sec. 4, Bat. Rev.) when the defendant, upon the finding of the issue against him, stood charged, etc., was to impose an allowance of $60, to be paid either in bulk or in installments into court, and by the clerk to the mother for the maintenance of the bastard. While the law, where the allowance is paid without objection or resistance, operates as did the practice under the former statute, its language is materially different, in that it fixes definitely the sum to be paid, and in that the payment is made by the clerk to the mother, in obedience to the terms of the statute itself, and not in accordance with the order of the court, as was formely the usual course. But the legal obligation on the part of a defendant in a bastardy proceeding is not (733) the less a duty imposed by the State as distinguished from a debt arising out of contract, because the allowance is now paid, under the terms of the law, directly to the woman instead of to the clerk, to be disbursed by him, under the order of the court, to her as the natural guardian of the child.

On the other hand, a creditor is "one to whom money is due" (Webster's Dictionary), and a mother to whom an allowance has already been declared due and payable is not taken out of the definition because the money must pass into her hands with a moral trust or obligation to apply it for the maintenance of the bastard. If she was a creditor and he was her debtor, then unquestionably she had the right to file an affidavit suggesting fraud, under section 2948 of The Code, in answer to his petition, and to demand that an issue of fraud should be framed for trial in the Superior Court, under section 2947. The subsequent section 2967, in which the putative father of a bastard, and "every person committed for fine and costs of any criminal prosecution," are declared entitled to be discharged from prison "upon complying with this chapter," was manifestly intended to be construed as permitting a defendant convicted in a criminal proceeding, or found to be the father of a bastard child (the proceeding in bastardy being, when that act was

passed, Laws 1868-69, ch. 162, sec. 26, one entered on the civil instead of the criminal side of the docket), to file a petition before the clerk designating the time when he wished to apply for discharge. The petitioner under that section, prior to the passage of the act of 1879, owed the duty to the State to pay fine, costs and allowance, but was not a debtor, and, therefore, was entitled, as a matter of right, to be discharged upon filing his petition and showing himself to be an insolvent, within the legal import of the term, from all obligation to pay the allowance, as well as fine and cost. When, however, the act of 1879 gave rise (734) to the relation of creditor and debtor between the convicted father and the mother of the bastard, the result was that, as to the fine and costs in the newly created criminal action, the petitioner could claim his discharge without question or interference on the part of any person not representing the State in an official capacity, but as to the allowance, which became a debt *eo instanti,* that the order of the court declared it due and payable to the mother, the defendant like any other debtor, might be compelled to meet a suggestion of fraud preliminary to the granting of an order releasing him. The defendant here was entitled to an order of discharge as to the fine and costs, with which the mother had no concern, but not as to the allowance due her, except in the way provided for all other debtors. Upon the filing of her affidavit an issue was raised—The Code, sec. 2949—which should have been entered upon the "trial docket of the Superior Court" and allowed to "stand for trial as other causes." Obviously, the judge could not order his discharge as to the allowance to the mother when the issue was still pending, and the defendant's right to demand release as to that debt to her was dependent upon the finding of the jury thereon; nor, if the law recognized the mother of the bastard as a party, was he empowered, without her assent to his hearing the motion then and there, to make at chambers, and in a county other than that where the issue was awaiting trial, any order prejudicial to her rights or interest. *Bynum v. Powe,* 97 N. C., 374. Had the motion for discharge been made at a regular term of the court when the complainant was or had constructive notice to be present, action upon it must have been postponed till after the trial of the issue.

It will be conceded that the fine and imprisonment do not constitute a debt, and that it is competent for the Legislature to fix the limit of exemption when prisoners are held in default of payment of the (735) one or the other, either at $500, or a smaller sum. *S. v. Davis,* 82 N. C., 610; *S. v. Burton, supra.* The act of 1881 amended the oath prescribed for insolvents by the act of 1869 (Bat. Rev., ch. 62, sec. 31), and which was construed in *S. v. Davis, supra,* by inserting "$50," as the allowance over and above "such an exemption as may be allotted by law." But by section 2972 of The Code an oath that the de-

fendant was not worth $50, "in any worldly substance in debts, money or otherwise" (not above exemptions) was required in all cases. In *S. v. Burton, supra,* this oath was administered to the defendant, and it seems to be settled that as to the discharge from imprisonment for fine and costs it was in the purview of the legislative power to so limit the exemption to the sum of fifty dollars where the application is for discharge from imprisonment for non-payment of fine and costs. But it may have been contended, and doubtless was, on the hearing below, that if the allowance was not a debt due to the mother, only the chairman of the board of county commissioners or some officer interested in the fee-bill (under section 2973) could suggest fraud and raise an issue, while if she was a creditor the defendant was entitled to an exemption of five hundred dollars by virtue of the Constitution. We concede the soundness of the former but not of the latter of the two propositions stated. The allowance is a debt due to the mother in the sense that in accordance with the provisions of the statute the court has ordered it to be paid to her to be used for the maintenance of the bastard. The money intended for the support of the child might have been made payable to the overseer of the poor as the disbursing agent of the county and of the State, for which the county is but an agency, and he would thus have become a creditor in his official capacity in the sense that the mother is, but the State would not have abdicated its right to enforce the payment of a sum exacted by its order from the defendant under its civil jurisdiction in providing for the present support of the child. (736) *S. v. Giles,* 103 N. C., 396. The chairman of the board of county commissioners has the power in such cases to object to releasing a prisoner from the payment of fine and costs, and to raise an issue of fraud, and the mother may make similar suggestions on oath in reference to the allowance; but still the court "in the exercise of a power to compel obedience" to its own orders (*S. v. Giles, supra*) might have imprisoned the defendant in the county jail for a definite and reasonable time, and under the express authority of section 38 of The Code the defendant might have been sentenced to the work-house for a term not exceeding one year. *S. v. Burton, supra.* The defendant, as there was no issue made by the chairman of the board of county commissioners, or by any officer claiming a fee, could rightfully claim to be released from prison on account of the fine and costs, and but for the suggestion of the mother it would have been the duty of the clerk to discharge him. *S. v. Burton, supra.* In making any order at chambers, when the issue stood for trial, without consent, and especially in ordering the clerk to release the defendant on his taking the oath prescribed, there was error. Let

this opinion be certified, to the end that the issue raised by the affidavit may be tried in the Superior Court of Wilkes County.

Reversed.

Cited: S. v. Crook, post, 765; *S. v. Wynne,* 116 N. C., 982; *S. v. Ostwalt,* 118 N. C., 1210; *S. v. Nelson,* 119 N. C., 799; *S. v. White,* 125 N. C., 686.

(737)

STATE v. THOMAS A. MALLOY.

Innocent Woman—Slandering Innocent Woman—Malice.

1. An innocent woman, within the meaning of section 1113 of The Code, is one who has never had sexual intercourse with any man.
2. When a slanderous charge is made, malice is implied, except in case of a privileged communication.
3. Where, in the trial of an indictment charging defendant with maliciously slandering an innocent woman, the defendant admitted using words which amounted to a charge of incontinency and attempted to justify by proving their truth, the only question for the jury was the innocency, or otherwise, of the woman.

INDICTMENT for slandering an innocent woman, under section 1113 of The Code, tried before *Battle, J.,* and a jury, at July Term, 1894, of ROCKINGHAM.

The defendant is charged with attempting in a wanton and malicious manner to destroy the reputation of the prosecutrix, an innocent woman, by speaking words in substance as follows, to wit, that he, the defendant, had on several occasions had sexual intercourse with the prosecutrix.

Testimony was offered by the State tending to prove that defendant spoke the words as alleged to one Kallam, and the prosecutrix testified that she was an innocent woman and had never had sexual intercourse with any man. The defendant, as a witness in his own behalf, testified in detail that on three occasions he had had sexual intercourse with the prosecutrix; that prosecutrix afterwards informed him that she was pregnant and that he was the father, and that he must marry her or go to jail; that he was frightened and consulted his brother-in-law as to what he should do; told him of his intercourse with the prosecutrix; of her telling him she was pregnant and he must marry her, and of the advice he received from his brother-in-law. There was testimony
(738) on each side in corroboration; and that the character of the prosecutrix was good, and that of the defendant was fair.

The defendant insisted that the State should satisfy the jury that the prosecutrix was an innocent woman; that the words were false, and that they were spoken with intent to destroy the reputation of the prosecutrix, wantonly and maliciously. His Honor instructed the jury that the burden was on the State to make good its charge; the principal question is, Is the prosecutrix an innocent woman? If defendant uttered the words, and they were false, the law presumed malice, as in murder when deadly weapons are used, and as lewdness and lasciviousness were presumed in fornication and adultery, the defendant having admitted speaking the words, the only question is, Is the woman an innocent woman? The defendant excepted. There was a verdict of guilty, judgment and appeal. The error assigned is in the charge, to wit: "That since, if the law presumed the malice from the speaking of the words (which was not correct) the judge should have further instructed that the presumption could be rebutted." "That the innocency of the woman was not the only question for the jury."

Attorney-General for the State.
No counsel contra.

MACRAE, J. The defendant admitted speaking words charging the prosecutrix with incontinency. If these words were false, their natural effect and consequence were to destroy the reputation of the prosecutrix. "Where a slanderous charge is made, the law *prima facie* implies malice from the publication, unless in the case of a privileged communication, which appears when the party is acting under a legal or moral duty towards the person to whom it is made, and in such cases malice must be proved." *S. v. Hinson,* 103 N. C., 374. In no view of the case could the words spoken, as admitted by the defendant, have been (739) privileged if they were not true.

An innocent woman in view of this statute is one who has never had sexual commerce with any man. *S. v. Brown,* 100 N. C., 519. When the jury were required to pass upon the question whether the prosecutrix were an innocent woman, there was necessarily involved an issue as to the truth or falsity of the words spoken, for if those words were true she could not be innocent.

The defendant admitted having used the words which amounted to a charge of incontinency, and attempted to justify by proving their truth. The only question for the jury was bound up in the innocence or otherwise of the prosecutrix. If she were innocent, the charge was false; and if false, it was, in this case, from its nature malicious.

No error.

Cited: S. v. Mitchell, 132 N. C., 1035.

THE STATE v. J. M. HORNE.

Town Ordinance, Validity of—Profane Language.

A town ordinance prohibiting "the use of profane language in the town" is invalid. It would be otherwise if it prohibited the use of such language as amounted to boisterous or amounts to disorderly conduct or a disturbance of the public peace. (*State v. Cainan*, 94 N. C., 880; *State v. Debnam*, 98 N. C., 712, and *State v. Warren*, 113 N. C., 683, distinguished.)

INDICTMENT for violation of an ordinance of the town of Wadesboro, heard on appeal from a judgment of the mayor of said town, before *Brown, J.*, and a jury, at Fall Term, 1894, of ANSON.

(740) The jury, by consent, returned the following special verdict:

"That the defendant J. M. Horne went to a livery stable in said town to order his horse. That as he was standing on the sidewalk, in front of same, he swore once or twice (witness did not give exact language used, but used terms 'cursed' or 'swore'). That there was no one disturbed or within hearing except witness, and an ordinary tone of voice was used. That such swearing was not boisterous. The ordinance of the town is as follows, under head of 'Disorderly Conduct':

" 'Section 1. No person shall use obscene or profane language in the town. Any person violating shall pay a fine of five dollars.' "

No obscene language was used. The defendant contended that as to "profane language" the ordinance was void. That the ordinance should have been directed against such language as tended to a breach of the peace or disorder. That under this ordinance a person might thoughtlessly use profane language in his private room, and it would come within the terms of this ordinance.

The court being of opinion with the defendant, that the ordinance was too vague and indefinite, directed a verdict of not guilty, and the State appealed.

Attorney-General for the State.
No counsel contra.

CLARK, J. In *S. v. Cainan*, 94 N. C., 880, this Court held valid a town ordinance which forbade "loud and boisterous cursing and swearing in any street, house or elsewhere in the city." This ruling was followed and affirmed in *S. v. Debnam*, 98 N. C., 712. These decisions are placed upon the ground that such conduct does not amount to a "nuisance" (because not in the presence and to the annoyance of divers persons), which would be punishable under the State's jurisdic-

tion, but is "disorderly conduct," which the town might well (741) forbid and punish. In *S. v. Warren,* 113 N. C., 683, this Court held constitutional an act forbidding the use of "profane language that disturbed the peace" in a certain locality. In the present case the ordinance simply forbids the "use of profane language in the town." It does not forbid it when "loud and boisterous," which would be disorderly conduct, as in the first two cases above cited, nor when it "disturbed the public peace," as in the last-named case. As the ordinance stands, it would make punishable profane language used, perhaps thoughtlessly, in the utmost privacy, when neither loud and boisterous nor calculated to disturb the peace. Indeed, the special verdict finds that the language used was not loud and boisterous, nor obscene, nor calculated to disturb the peace. We do not think the powers granted this corporation, upon a fair construction, were intended to confer jurisdiction to that extraordinary extent, and we must hold the ordinance invalid. We forbear to pass upon the question whether the Legislature could, if it chose, confer upon the town authority to pass such an ordinance, as the question is not before us.

No error.

Cited: S. v. Sherrard, 117 N. C., 719; *S. v. Clay,* 118 N. C., 1236.

STATE v. J. A. REID.

Indictment for Retailing Liquor Without License—City Ordinance—State Law.

A prosecution for selling liquor without license, contrary to a city ordinance, is no bar to a prosecution by the State for the same act of selling without obtaining State license.

INDICTMENT, tried at May Term, 1894, of FORSYTH, before (742) *Whitaker, J.,* and a jury. The defendant was indicted for selling liquor without a license.

The jury found the following special verdict:

"That the defendant is being tried on a bill of indictment, found at May Term, 1894, of Forsyth Superior Court, said bill being found by the grand jury; that the defendant sold whiskey, as set forth in the indictment, without having obtained license from the city of Winston or the county; that for the same act of selling whiskey the defendant was

tried before the Mayor of Winston and fined $50, and appealed to the Superior Court, where the appeal is now pending."

The charter of the city of Winston and the ordinance prohibiting the sale of liquor without license, as well as the warrant and judgment of the Mayor of Winston, were put in evidence. On these facts his Honor adjudged the defendant not guilty, and the State appealed.

Attorney-General for the State.
Glenn & Manly for the defendant.

BURWELL, J. The defendant was tried upon an indictment found against him for retailing spirituous liquors without a license so to do. The special verdict finds that he sold the liquor as charged, and that he had no license, either from the county or from the city of Winston. Upon the facts found, he should have been adjudged guilty, for the fact that he had been prosecuted before the mayor of the city of Winston for a violation of its ordinance, adopted pursuant to authority given to that municipality by section 53 of the Private Laws of 1891, and forbidding the selling of spirituous liquors within that city, without having first obtained a license from the city, was no bar to this criminal action. The offense charged against the defendant here, and of which the special verdict convicts him, is distinct from that with which he was charged before the mayor. *S. v. Stevens,* 114 N. C., 873.

Reversed.

Cited: S. v. Reid, post, 743; *S. v. Robinson,* 116 N. C., 1048; *S. v. Smith,* 126 N. C., 1059; *S. v. Lytle,* 138 N. C., 740; *S. v. Hooker,* 145 N. C., 584.

(743)

STATE v. REID.

(Same party and like facts as in foregoing case.)

BURWELL, J. Upon the special verdict the defendant was properly adjudged guilty. *S. v. Stevens,* 114 N. C., 873, and *S. v. Reid, ante,* 741.

Affirmed.

STATE v. TOM CARSON ET AL.

Circumstantial Evidence—Instructions to Jury.

1. Where the evidence against the defendants in the trial of an indictment was circumstantial it was not error in the judge to refuse an instruction, as a rule of law, that the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eye-witness.
2. Where the evidence in the trial of a criminal action is circumstantial, each fact proving a necessary link in the chain must point to the guilt of the accused and must be as clearly and distinctly proven as if the whole case depended on it, the strength of the chain being determined by the strength of the weakest link.

INDICTMENT for larceny, tried at Spring Term, 1894, of YADKIN, before *Battle, J.*, and a jury. The evidence on which the State relied was entirely circumstantial. Counsel for the defendant, in addressing the jury, said it had been laid down as a *rule* governing circumstantial evidence that the proof must be as convincing as if one credible eye-witness had testified to the facts. His Honor, in charging the jury, said there was no such formula as counsel referred to, to be laid down as a rule of law, but that the jury should be satisfied fully and beyond a reasonable doubt of the guilt of the accused, and each one of them, and that due regard must be had to the presumption of innocence, and further, that in case of circumstantial evidence each fact proving a necessary link in the chain must point to the guilt of the accused, and must be clearly and distinctly proven as if the whole case de- (744) pended on it, the strength of the chain being determined by the strength of the weakest link.

There was a verdict of guilty, and the defendant appealed from the judgment thereon.

Attorney-General for the State.
No counsel contra.

SHEPHERD, C. J. The evidence in this case was circumstantial, and the defendants except to the instructions of his Honor on the ground that he failed "to lay down to the jury, as a rule of law, that the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eye-witness." This very point was raised in *S. v. Norwood,* 74 N. C., 247, and overruled by the Court. This ruling is referred to and approved in *S. v. Gee,* 92 N. C., 756, and cannot be regarded as an open question in this State. His Honor's charge as to the intensity of proof is well sustained by the foregoing authorities.

No error.

Cited: S. v. Trull, 169 N. C., 367.

STATE v. LETHA VARNER.

Practice in Criminal Proceedings—Instructions—Exceptions.

1. A charge to the jury may be specially excepted to after verdict.
2. An exception to the whole charge that it presented the case in a manner to prejudice the defendant should have pointed out in what particular harm was done.
3. The omission to give an instruction to a jury is not ground for an exception in the absence of a request to so instruct.

(745) INDICTMENT for fornication and adultery, tried before *Boykin, J.*, and a jury, at Spring Term, 1894, of LINCOLN. The defendants were convicted and the *feme* defendant appealed. The facts necessary to an understanding of the opinion appear therein.

Attorney-General for the State.
No counsel contra.

CLARK, J. There was no exception taken at the trial, but the defendant excepted specifically to the charge after verdict. This she had a right to do. *Lowe v. Elliott,* 107 N. C., 718, and other cases cited in Clark's Code (2 Ed., p. 383). The first exception, that on the whole charge the court presented the case in a manner to prejudice the jury against the defendant, should have indicated some particular in which harm was done; besides, it is not sustained by an examination of the charge set up. The second, third, fourth and fifth exceptions are for alleged omissions to charge. This is not ground for exception. If the defendant had wished more specific instructions she should have asked for them in writing and in apt time. Clark's Code (2 Ed., p. 382, and cases cited). The last exception is that the court should have instructed the jury on all the evidence to acquit the defendant. If this exception is for an omission to charge, it is no ground for an exception, for there was no prayer to so instruct. If it is either a demurrer to evidence or an exception that there was no evidence to go to the jury, it is too late after verdict. *S. v. Kiger, post,* 746. Besides, the evidence was, in fact amply sufficient to submit to the jury. *S. v. Poteet,* 30 N. C., 23; *S. v. Eliason,* 91 N. C., 564; *S. v. Chancy,* 110 N. C., 507. Its credibility and weight were for the jury to determine. While the indictment is not in the very words of the statute, the offense is sufficiently charged. *S. v. Stubbs,* 108 N. C., 774.

No error.

Cited: S. v. Kiger, post, 750; *Riley v. Hall,* 119 N. C., 415; *S. v. Groves, id.,* 824; *S. v. Moore,* 120 N. C., 571; *S. v. Harris, id.,* 578, 579; *Patterson v. Mills,* 121 N. C., 269; *S. v. Worley,* 141 N. C., 768; *S. v. Houston,* 155 N. C., 433; *S. v. Davidson,* 172 N. C., 945.

(746)

STATE v. SAMUEL L. KIGER.

Larceny—Trial—Evidence—Argument of Counsel.

1. In the trial of an indictment for larceny of brandy, evidence as to marks upon the barrels containing it was competent to identify the packages.
2. In the trial of an indictment it was not improper for the counsel for the prosecution to comment on the fact that the defendant failed to introduce witnesses whom he had summoned and who were present, or that he failed to prove his innocence by his brother, who had been summoned by the State.
3. It is too late, after verdict, for the defendant to raise the point that there was no evidence to go to the jury sufficient to convict him; for, treated as an omission to charge, it is not ground for exception, in the absence of a prayer for instruction, and, treated otherwise than as an omission, it is waived when not taken at the time.
4. An objection that there was no evidence to go to the jury sufficient to convict a defendant cannot be taken for the first time in this Court.
5. Where there is not sufficient evidence to permit a case to go to the jury, the trial judge may so rule and withdraw the case from the jury; but if the evidence is merely weak and such as would not induce the judge, if a juror, to convict, he has no authority to so withdraw the case.
6. The trial judge is vested with the power to set aside a verdict and grant a new trial if he deems the verdict to be against the evidence or the evidence insufficient to justify conviction; but as this is a matter of discretion, his granting or refusing a new trial on such grounds is not reviewable.

INDICTMENT for larceny, tried before *Whitaker, J.,* and a jury, at May Term, 1894, of FORSYTH.

The State offered the following evidence:

Asa Dunkins testified that about 16 January, 1894, he had several barrels of brandy stolen from his place in Yadkin County, about three miles beyond the Shallow Ford, on the Yadkin River. That the brandy was "blockade." He had it concealed near the house, in a piece of woods; part of it in a hole in the ground, about twenty-two (747) miles from Winston. That the day before the brandy was stolen, about noon, he met defendant and one John Bolin about one mile from Winston, going towards the Shallow Ford in a two-horse wagon. That the brandy was taken that night. That the next day, when he missed the brandy, he instituted search and found that two two-horse wagons

had crossed the Shallow Ford, left the main road which passed through the village of Huntsville, and turned off along a by-road through Conrad's plantation, stopped near where the brandy was concealed, and there were signs of the brandy having been rolled out to the wagons and loaded. That near the place, in Conrad's field, he saw where the team had started, and near by found a plow-handle had been broken off of a plow. That he followed the track back to the main road at Shallow Ford, coming towards Winston, where other vehicles had obliterated the track. That the next day he came to Winston, procured a search warrant, and searched defendant's house, his brother Thomas Kiger's house, and found an empty barrel with a sourwood stopper, which he thought was his, in Thomas Kiger's house. That afterwards he searched the premises of Jack Kiger, a brother of defendant and Thomas Kiger, and found six barrels of his brandy concealed in a gully near Jack Kiger's house, covered up with pine trees that had been cut across the gully, with prints showing that barrels had been rolled from Kiger's house through the old-field pines. That Jack Kiger lived one-fourth of a mile from the Shallow Ford road, between Winston and Shallow Ford, about nine miles from Winston and three miles this side of Lewisville. That he knew the barrels by private marks upon them; they were his barrels and were filled with peach and apple brandy, as his were.

(748) This evidence was objected to by defendant, upon the ground that the indictment did not describe the barrels. Exception overruled. Defendant excepted.

Defendant Thomas Kiger and Thomas Bolin and William Bolin were indicted together, but the other three defendants had not been taken, and S. L. Kiger alone was on trial.

William Bevil testified that the evening before the brandy was taken he saw defendant and John Bolin pass along the Shallow Ford road, going towards Shallow Ford, in a two-horse wagon. Several witnesses testified that all four of the defendants passed through Lewisville about 8 o'clock on night the brandy was taken; stopped at a store, left the wagon in the road, bought crackers and sardines, and had a bottle and took a drink and left. There was evidence that two wagons passed a house about one hundred yards from Shallow Ford, coming towards Winston, about 1 or 2 o'clock at night, same night brandy was stolen. That two men were walking. The wagon appeared to be loaded, and was covered with sheets or quilts; that one of the parties walking called to the driver of the front wagon to "hurry up, it was getting d—d late." A wagoner testified that two wagons, appearing to be loaded, passed his camp near Lewisville on the Shallow Ford road, going towards Winston, about 2 o'clock night of the theft, with four men, two driving and two walking behind with guns.

Norman Whitman testified that he lived on the Shallow Ford road, between Westbend and Jack Kiger's, and about twelve miles from Winston. That about 4 o'clock the morning of the theft the defendant came to his door, woke him up and got a lantern, a hammer and some nails, telling him he was from Davie County, and had broken a wagon and wanted to mend it. That he saw him go out into the road where the wagon was standing. That he fixed it and came back with the lantern and hammer. That the next day he went to the place where the wagon was and saw where they had apparently been working on the wagon, and then picked up a piece of a plow-handle, which he (749) gave to Asa Dunkins.

Dunkins testified that he took the piece of plow-handle back to Conrad's field, near where his brandy was stolen, and fitted the broken handle together in the plow, and it was the piece which had been broken off and carried away.

It was in evidence that all four of the defendants lived in the suburbs of Winston, but that John Bolin had worked for the prosecutor in Yadkin, and knew where he kept his "blockade" liquors, and helped to dry the corn.

The defendant introduced no testimony. One of the counsel for the prosecutor, in addressing the jury, said the defendant had called ten witnesses and had them present himself, but that he had failed to show by any witness where he was that night.

To this the defendant objected, and asked his Honor not to allow the comment of counsel.

His Honor stated that counsel was about to get on dangerous grounds, but that he did not comment on what the defendant did or did not do, but as to the other witnesses it was admissible to thus comment.

Another one of the State's counsel, while addressing the jury, turned and faced the defendant, sitting near his counsel, and said: "Your brother, Jack Kiger, knows whether you brought that brandy to his house. He is here in the courthouse. Why, if you did not carry it there and conceal it, did you not show it by him?"

Defendant's counsel here interrupted the comment, and said that Jack Kiger had been summoned as a State witness and sworn, but not tendered to the defendant, and asked the court to stop the counsel. His Honor stated that he could not see that the comment was improper, and directed the counsel to proceed. Defendant excepted.

Counsel continued on that line of argument, saying to the jury: "His Honor does not say that I am off the track."

There was no instruction prayed by either party. There was a verdict of guilty. Motion for new trial for errors excepted to, (750) and on the additional ground that there was not evidence sufficient

to go to the jury and to justify a verdict; but no such point was made before verdict. Motion overruled. Judgment and appeal.

Attorney-General for the State.
E. B. Jones for defendant.

CLARK, J. The evidence as to the marks upon the barrels was competent to identify the packages. It was sufficient to charge the larceny of so many gallons of brandy, and as a matter of evidence to show that it was in barrels and identify them. *S. v. Harris,* 64 N. C., 127. If the State had charged the larceny of barrels of brandy, it would have been held to proof of its having been in barrels when stolen. *S. v. Moore,* 33 N. C., 70.

It was not improper for the counsel for the prosecution to comment on the fact that the defendant had witnesses present, summoned by him, but had not introduced them. *S. v. Jones,* 77 N. C., 520. Nor was there any impropriety in asking why defendant did not prove by his brother where he was that night. It made no difference that such brother had been summoned by the State, or had not been summoned at all. The defendant could have summoned his brother as his witness in either event. *S. v. Johnston,* 88 N. C., 623. In fact, in this case the State had tendered the witness to the defendant, who declined to put him on the stand.

It is too late after the verdict for the defendant to raise the point that there was no evidence to go to the jury. *S. v. Braddy,* 104 N. C., 737; *Sugg v. Watson,* 101 N. C., 188; *S. v. Varner, ante,* 744; *S. v. Keath,* 83 N. C., 626 (for murder); *McMillan v. Gambill,* 106 N. C., 359.

That is a point which must be made in apt time. The defendant cannot lie by and thus take "two bites at the cherry." *Hamlin v. Tucker,* 72 N. C., 503.

This would be trifling with the court. Treated as an omission to (751) charge, it is not ground for exception in the absence of a prayer for instruction. See numerous cases collected in Clark's Code (2 Ed., pp. 382, 394). Treated otherwise than as an exception for omission in the charge, it is waived if not taken at the time. *Taylor v. Plummer,* 105 N. C., 56. Still less could such an exception be made for the first time in this Court. *S. v. Bruce,* 106 N. C., 792; *Lawrence v. Hester,* 93 N. C., 79; *S. v. Glisson,* 93 N. C., 506, which hold that it must be taken "by a request to instruct the jury." The Attorney-General, however, waives the objection that the exception was not taken before verdict, and by consent we consider it as if it had been made in apt time. If there is not any evidence sufficient to permit the case to go to the jury, as a matter of law the court may so rule and withdraw

the case from the jury. But if it is merely weak evidence, not such as the presiding judge, himself, sitting as a juror, might perhaps convict upon, he has no such authority. The twelve jurors are the triers of fact, designated and provided for by the Constitution. If the presiding judge deems that the verdict is against the weight of evidence, or that the evidence was insufficient in his judgment to justify conviction, he is vested with the power to set aside the verdict and grant a new trial. This is a matter of discretion, and his granting or refusing a new trial on such ground is not subject to review here. The fact that twelve men have convicted on the evidence will often and properly make him less sure of his own opinion to the contrary. Nor should even he give a new trial merely because, if a juror, he might have voted for acquittal. Many things give color to the correctness of the verdict—the bearing and manner of the witness, shades of meaning dependent upon tone and emphasis, and the like. These cannot be presented in the record on appeal. The judges of the Superior Courts are humane and intelligent men, in whose hands this discretion has always been wisely vested, and we have no disposition to infringe upon their limits. It is (752) only when there is no evidence sufficient to be submitted to the jury, duly excepted to in apt time, that an appeal has ever been permitted. In some other States the appellate court, reaching out after jurisdiction, has so abused this rule that it has caused a provision to be placed in the State Constitution, notably in the Constitution just adopted by the State of New York, forbidding the Court of Appeals to grant a new trial, even upon the ground that there was no evidence whatever to go to the jury. If there is any abuse, it can be corrected by the pardoning power, and is more easily remedied than that seen in many States of the appellate court sitting as a revisory jury upon the facts, out of sight of the witnesses and those accompanying circumstances of which the jury and presiding judge had the benefit.

Without going into a detailed consideration of the evidence in this case, it is sufficient to say that there was sufficient evidence to warrant the case being submitted to the jury. Of the weight to be given it, the jury were the sole judges, subject to the supervisory power of the presiding judge to set aside the verdict, if in his judgment it was not warranted. His refusal to do so is not reviewable on appeal. This has always been settled law in this State.

No error.

Cited: S. v. Varner, ante, 745; *Holden v. Strickland,* 116 N. C., 190; *S. v. Hart, id.,* 977; *S. v. Green,* 117 N. C., 696; *Sutton v. Walters,* 118 N. C., 500; *Turner v. Lumber Co.,* 119 N. C., 400; *Riley v. Hall, id.,*

415; *Mallonee v. Young, id.*, 553; *S. v. Beal, id.*, 811; *S. v. Leach, id.*, 835; *S. v. Pearson, id.*, 873; *S. v. Harris*, 120 N. C., 578; *Ladd v. Ladd*, 121 N. C., 120; *S. v. Wilson, id.*, 657; *Benton v. R. R.*, 122 N. C., 1010; *S. v. Gragg, ib.*, 1087; *Powell v. R. R.*, 125 N. C., 372; *S. v. Shines, id.*, 731; *S. v. Costner*, 127 N. C., 573; *S. v. Mehaffey*, 132 N. C., 1065; *S. v. Goode, id.*, 985; *Hart v. Cannon*, 133 N. C., 14; *McCord v. R. R.*, 134 N. C., 58; *S. v. Young*, 138 N. C., 571; *Williams v. R. R.*, 140 N. C., 627; *S. v. Houston*, 155 N. C., 433; *Baxter v. Irvin*, 158 N. C., 280; *Supply Co. v. Windley*, 176 N. C., 22.

(753)

STATE v. JOSEPH PATTON.

Indictment for Secret Assault, What Constitutes.

Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of section 1 of chapter 32, Acts 1887, which provides that any person who shall maliciously commit an assault and battery with any deadly weapon upon another, by waylaying or otherwise in a secret manner, with intent to kill such other person, shall be guilty of a felony. (*S. v. Jennings*, 104 N. C., 774, distinguished.)

INDICTMENT for secret assault, under section 1, chapter 32, Laws 1893, tried before *Allen, J.*, Fall Term, 1894, of MCDOWELL.

The defendant pleaded not guilty.

The only witness introduced was one Erwin, who testified that some time in the spring of 1894 he was present at a dance near Marion. That it was in the night-time and there were a good many persons present. That the dance was at a house in which there were two rooms. That the dancing was in one room, and that the other room was lighted by a lantern. That James Cowan slapped a girl in the room where they were dancing, and thereafter went in the other room with the witness. That while in the other room, standing by the said Cowan, both of them with their faces in the direction of the door leading from the dancing-room, he heard the defendant Patton ask where the said Cowan was. That he then saw the defendant in the room where the dancing had been advance towards the door leading to the room in which were the witness and the said Cowan. That the defendant had nothing in his hands, and said nothing to the said Cowan nor to witness, and while in said dancing-room, and near said door, drew a pistol from his right hip-pocket, and immediately shot the said Cowan in the left breast near the heart.

The defendant was represented by counsel, and did not make (754) any request for instructions. The court, after explaining the elements of the offense with which the defendant was charged, told the jury that if they believed the defendant had formed the purpose of shooting Cowan, and came upon him suddenly, and concealed from him his purpose to assault him, and gave him no notice of such purpose, and made the assault so suddenly that there was no opportunity to guard against it, the assault was committed in a secret manner.

The defendant was convicted, and appealed.

Attorney-General for the State.
No counsel contra.

AVERY, J. The principal question raised by the appeal is whether one who stands facing another, or walks up in front of him, and, drawing a pistol from his hip-pocket, shoots him without a word of warning, brings himself within the offense defined by the act of 1887, ch. 32, sec. 1. That statute provides that "any person who shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise in a secret manner, with intent to kill such other person, shall be guilty of a felony," etc. It was contended for the prosecution, and so the learned judge who tried the case below seems to have thought, that every assault made upon another with a deadly weapon and in pursuance of a preconceived purpose to shoot, falls within the language of the statute, unless the assailant, by word or act, gives opportunity of preparing for defense, or warning of his intention to the person assailed. The material facts in *S. v. Jennings,* 104 N. C., 774, which seems to have been relied on to support this view, were that the accused walked up behind the prosecutor and inflicted several severe wounds with a knife on the back of the neck and head and (755) on his shoulder, before the latter ascertained who was attacking him, though the assault was committed in the public square of the town of Kinston, and several hundred people there assembled might have seen him. Though some expressions that were used *arguendo* in that case, one of which is quoted in *S. v. Shade,* at this term, may have been misleading, the only point really settled was that where one steps up stealthily behind another and stabs him without warning, it is as much an assault committed "in a secret manner" as where one lies in ambush and shoots another. Under the charge of the court below, the jury were left at liberty to infer from the circumstances that the purpose to kill was formed before the moment when the attempt was made to carry it into execution, and told them that if they should so determine, then, unless the defendant either actually warned the injured party or other-

wise gave him opportunity to defend himself, he was guilty. While a person may be guilty of this offense without any attempt to conceal his identity from others, where he surprises the person assailed, yet where the two—the assailant and the person assaulted—are standing face to face, when the former pulls a pistol suddenly from his pocket and fires at the latter, we think it is simply an assault with a deadly weapon, and the question of motive or purpose is immaterial, unless death ensue from the wound. To give the statute the interpretation contended for would leave parties at liberty to infer such a purpose in all cases where one should strike another with a weapon capable of producing death, when so used, unless the assailant, by warning or threatening language or conduct, should give some intention of his purpose.

It was not, in our opinion, the purpose of the Legislature to enact a law so sweeping in its operation. While the fact that the accused makes no apparent attempt to conceal his identity from others does not place him beyond the pale of guilt, yet on the other hand the assault cannot be said to have been made "in a secret manner," except where
(756) the person assaulted is unconscious of the presence as well as of the purpose of his adversary till the striking or shooting begins. The law permits juries to consider the fact that one who fights on unequal terms, and without warning uses a deadly weapon, when death ensues, and when death does not ensue, the courts consider such circumstances in aggravation in sentencing upon conviction for a common assault. It is not necessary to discuss the question whether, when the statute makes the "intent to kill" an essential element of the offense, the intent to shoot will be held synonymous with the intent to kill. His Honor told the jury that, if the defendant had formed the purpose, not of killing, but "of shooting the said Cowan," and came upon him suddenly and concealed from him his purpose to assault him, and gave him no notice of his purpose, and made the assault so suddenly that there was no opportunity to guard against it, the assault was committed in a secret manner. In prosecutions for murder it is established as a rule in this Court that the use of a deadly weapon raises a presumption of malice (*S. v. Fuller,* 114 N. C., 885), but not of premeditation and deliberation. It is not necessary, however, to decide this question or proceed further in the discussion of it than to note the fact that it arises. Being unwilling to give the broad range to the statute that is indicated by the instruction to the jury, we conclude without further discussion of this last question that the defendant is entitled to a

New trial.

Cited: S. v. Gunter, 116 N. C., 1070, 1074; *S. v. Harris,* 120 N. C., 579.

(757)

STATE v. RACHAEL SHADE.

Indictment for Assault in a Secret Manner, what Constitutes—Indictment, Sufficiency of.

1. Under Laws 1887, chapter 32, making "an assault committed in a secret manner, by waylaying or otherwise," an offense, an indictment omitting the words "by waylaying or otherwise," in charging that offense, is sufficient.
2. Where an indictment, otherwise unobjectionable, is not sufficiently specific as to the nature of the charge, and the defendant fails to demand a bill of particulars before trial, after conviction the court will not arrest the judgment for such objection.
3. Laws 1887, chapter 32, making "an assault committed in a secret manner, by waylaying or otherwise," an offense, includes, in addition to those accompanied by waylaying, every other assault committed in a secret manner.

INDICTMENT for secret assault, tried at September Term, 1894, of BURKE, before *Allen, J.*

The indictment is, in substance, as follows: "The jurors, etc., present that Rachael Shade, etc., unlawfully, wilfully, maliciously, feloniously and in a secret manner, and with a certain deadly weapon, to wit, a pistol, in and upon the body of one Rose Wright did make an assault with the intent then and there to kill the said Rose Wright, her the said Rose Wright did beat, bruise and seriously injure, against the form of the statute," etc. The case states that the defendant was charged with committing a secret assault under chapter 32, Laws 1887, with a pistol upon Rose Wright, and evidence was offered by the State tending to prove the charge as alleged, and evidence in rebuttal was offered by defendant.

There was a verdict of guilty, and defendant moved in arrest of judgment for that the indictment did not charge that the assault was committed by waylaying, and did not specify the secret manner in which it was committed. Motion overruled. Defendant excepted. (758) No exception made to the charge. Judgment pronounced upon the verdict, and defendant appealed.

Attorney-General and J. T. Perkins for the State.
S. J. Ervin for defendant.

AVERY, J. The defendant's counsel moves in arrest of judgment on the ground that the indictment does not charge that the assault was committed by waylaying, and does not specify the secret manner in

which it was committed. The gravamen of the offense created by the statute (Laws 1887, ch. 32) is that the assault must be committed "in a secret manner with intent to kill" the person assailed. The language which the defendant claims was not so followed in the indictment as to put him on notice of the precise nature of the offense with which he was charged, was "by waylaying or otherwise." We think that the charge is sufficiently "plain, intelligible and explicit" (The Code, sec. 1183) to enable the defendant to prepare his defense and to warrant the court in proceeding to judgment in case of conviction. *S. v. Haddock,* 109 N. C., 873. The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *S. v. Brady,* 107
(759) N. C., 826. The statute denounces as criminal secret assaults with intent to kill, and after giving one explicit illustration, lest the maxim *expressio unius exclusio ulterius* might be invoked in its interpretation, the Legislature added the words "or otherwise," meaning thereby to include every other manner of making such secret attempts, no matter what might be the attendant circumstances. A court is not bound, in seeking to arrive at the intent of the Legislature, to adopt the printer's punctuation, and we think that the purpose in passing the act of 1887 was to include, in addition to those accompanied by waylaying, every other assault committed in a secret manner.

It seems to us no more necessary to set forth the attendant circumstances in the charge of a secret attempt to kill than in an indictment under the statute for an attempt to destroy the reputation of an innocent woman, in which class of criminal actions this Court held, in *S. v. McIntosh,* 92 N. C., 794, that it was unnecessary. If it may be said to be the general rule that the word "otherwise" following an enumeration should be interpreted by supplying after it the words *"ejusden generis,"* this statute, like the famous section 9 of 27 Henry VIII, constitutes a very clear exception, because it is not indefinite, but must be construed as meaning "otherwise in a secret manner." 17 A. & E., 285. Indeed, in the only case involving a construction of the statute that has been before us (*S. v. Jennings,* 104 N. C., 774) it was said *arguendo* that the statute included not only cases where the assailant was shown to have

laid in wait, but also those where a person "otherwise than by lying in ambush hides his purpose from the party assailed till it is too late to guard against its accomplishment."

In the declaration of rights it is announced as a fundamental principle that "in all criminal prosecutions every man has the right to be informed of the accusation against him" (Const., Art. I, sec. 2); but the duty of protecting the public by providing for the speedy trial and punishment of the guilty and against the unnecessary deten- (760) tion in durance of the innocent, devolves upon the Legislature, along with that of guaranteeing to every person charged with crime ample opportunity to prepare for his defense. These two apparently conflicting duties seem to have been discharged and made consistent, in providing that a statement of a charge, which upon its face appears to be plain, intelligible and explicit, shall be sufficient as notice of its nature, subject to the right of the accused in apt time to ask for a more specific bill of particulars where any reasonable ground for making the request is shown. With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being "informed of the accusation against him."

There was no error in overruling the motion in arrest of judgment, and the judgment of the court below is

Affirmed.

Cited: Ante, 755; *S. v. Hester,* 122 N. C., 1052; *S. v. Van Pelt,* 136 N. C., 669; *S. v. Long,* 143 N. C., 676; *S. v. Corbin,* 157 N. C., 621; *S. v. Moore,* 166 N. C., 289; *S. v. Horner,* 174 N. C., 792.

STATE v. LEROY CROOK.

Practice in Criminal Action—Costs—Suspension of Judgment on Payment of Costs—Imposition of Judgment after Payment of Part of the Costs.

1. The order for the payment of the costs of a criminal prosecution upon a suspension of judgment does not constitute any part of the punishment; the legal effect being only to vest the right to the costs in those entitled to them.
2. The payment of part of the costs by a defendant adjudged to pay the costs of a criminal prosecution—judgment as to the punishment for the offense being suspended—is not undergoing or performing a part of the sentence and does not come within the principle of *S. v. Warren,* 92 N. C., 825.

3. If the court couples with a judgment for the payment of costs any judgment that might constitute a part of a sentence, the power of the court is exhausted in its rendition, and the suspension of judgment will be deemed to have been ordered on condition of the performance of such requirements.
4. Where, upon a verdict of guilty, the court pronounces judgment that the defendant pay a fine and stand committed until it be paid, the imprisonment is no part of the punishment. Likewise, when a defendant is committed during a term of court for nonpayment of costs and is brought before the judge during the same term on the prayer of the solicitor for judgment.
5. Where judgment was suspended against two convicted persons on the condition that one of them pay all the costs of the prosecution, and such person pays only part thereof, the presiding judge may impose the suspended sentence, though such defendant has already been committed to jail for default of payment of such costs.

(761) INDICTMENT for an affray with deadly weapons, tried before *Bynum, J.*, February Term, 1892, of UNION.

The defendant Crook pleaded guilty, and the defendant Gurley stated in open court that he would no longer contend against the State, and upon the motion of the solicitor the court made the following order: "Judgment suspended against both defendants upon the payment by the defendant Crook of all the costs of the case, to be taxed by the clerk of this court." The defendant Crook was given time to pay the costs, and was required to give bond for his personal appearance at the next term of the court, the bond being renewed from time to time in order that the defendant Crook could the more easily pay said costs, which was a very large amount. The defendant so appeared at the said term of said Superior Court and so renewed his bond from time to time until August Term, 1894—the present term of said court, began and held on 20 August, 1894, to and including 1 September, 1894—when the defendant Crook came into court on the first day of the term, it being 20 August, 1894, and stated to the court that he had paid part of said bill

(762) of costs, some $60 or $70, none of the court costs of State's witnesses, except solicitor's fee of $8, which was paid by defendant Crook. Thereupon his Honor, *Winston, J.*, upon motion of the solicitor, placed the defendant Crook in the custody of the sheriff, who committed him to the common jail of said county, where he remained until Saturday, 1 September, 1894, the same being the last day of the two weeks' term of said Superior Court, and the twelfth day that said Crook had been in jail, when his Honor, *Winston, J.*, just before court adjourned for the term, had the defendant Crook brought into court and adjudged that he be confined in the common jail of said county for six months with leave to the commissioners to hire him out, he not having paid or arranged the said costs.

To which judgment the defendant Crook excepted and appealed, assigning as error the ruling of his Honor and the judgment of said court:

"1. That the former order or judgment of the court made in February, 1892, that the defendant Crook pay all costs in this case, including the costs of his codefendant Gurley, was a judgment of the court against the defendant Crook, and the judgment having been performed in part, to wit, a payment of a part of the costs, it was no longer in the power of the court to change said judgment and imprison the defendant.

"2. That the defendant having stated to the court that he was unable to pay the balance of said bill of costs, and the court having ordered the defendant into the custody of the sheriff, that said order was, by implication, a judgment of the court and an order to the sheriff to imprison the defendant until the cost was paid or he be discharged, according to law, and the defendant Crook having been in jail twelve days of the twenty or thirty days necessary to remain in jail to be discharged under the insolvent debtor's law, had thereby executed a part of this (763) judgment, and it was no longer in the power of the court to change the judgment in a manner to make it more harsh."

Attorney-General for the State.
F. H. Whitaker, Jr., for defendant.

AVERY, J. The practice of making an order, where defendants are convicted or submit on a criminal charge, that the judgment be suspended upon the payment of the costs, is one that seems to be somewhat peculiar to our own courts; but it must be admitted that its adoption has proven very salutary, both in bringing about the reformation of petty offenders and in the suppression especially of certain classes of offenses. The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the judges and the people.

We search in vain for direct authority emanating from the courts of other States to aid us in determining the precise meaning of such orders, because it has not been the practice to make them elsewhere in the same way. The order is in effect a final judgment for the whole or a certain proportion of the costs incurred in the prosecution of the charge, but a suspension of the sentence of fine or imprisonment, either generally and indefinitely or till some specified term of the court. We cannot understand how the rights of a defendant are infringed or his interests prejudiced by allowing him to escape for the present upon a partial judgment for the costs, and suspending the motion or prayer for further punishment, instead of subjecting him immediately to such fine or imprison-

ment as his own criminal conduct has made him liable to suffer. In civil causes this Court has approved the practice of granting a writ of restitution on appeal to one wrongfully dispossessed of land under a justice's judgment, and by the same order retaining the case till (764) witnesses could be summoned and the damages growing out of the wrongful ejection assessed. *Lane v. Morton,* 81 N. C., 38. We might adduce other instances in which one branch of a controversy has been finally disposed of, while other matters in dispute have been retained to await further investigation preliminary to judgment, but it is needless to do so.

It is familiar learning that a court may suspend the judgment over a criminal *in toto* until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment and reserving the right to punish under another count at a subsequent term, or by imposing a fine and at a later term superadding imprisonment. *S. v. Ray,* 50 Iowa, 520; *S. v. Miller,* 6 Baxter (Tenn.), 513; *S. v. Watson,* 95 Mo., 411; *People v. Felix,* 45 Cal., 163; *Thurman v. State,* 54 Ark., 120; Wharton Cr. Pl. and Prac., sec. 913; *Whitney v. State,* 6 Lea (Tenn.), 247. The judgments, orders and decrees of a court as a general rule are under its control and subject to modification during the term at which they are entered; but where a defendant has undergone a part of the punishment, the sentence cannot be revoked and another, except in diminution or mitigation, substituted for it, because he would be twice placed in jeopardy and twice subjected to punishment for the same offense. *S. v. Warren,* 92 N. C., 825; *Ex parte Lange,* 18 Wall., 163.

The punishment which the courts are prohibited from inflicting twice is usually fine or imprisonment, now that corporal punishment is inflicted only for a few offenses of a character more serious than that of which the defendant was convicted. *S. v. Burton,* 113 N. C., 655; 1 Bishop Cr. Law, sec. 940. But costs neither constitute a part of the relief in civil actions (4 A. & E., 313, and note) nor of the punishment in criminal prosecutions, though the payment of them, or a proposition to (765) pay, may be considered in mitigation of sentence by the court. The payment of costs is regulated by our statute (The Code, sec. 1211), which provides that every person convicted, or confessing himself guilty, or submitting to the court, shall pay the costs of the prosecution, and the legal effect of a conviction and judgment is to vest the right to the costs in those entitled to them; but where a fine is imposed, it is due to the State and is remitted by a pardon granted by the Governor. *S. v. Mooney,* 74 N. C., 98.

The right of the officers to recover costs in the name of the State is a mere incidental one arising out of the conviction under the provisions

of our statute, and the judgment for them, as we have seen, vests the claim in the officers to whom they are due. The order for the payment of them is no more a part of the punishment proper than that to pay an allowance and cost on conviction in bastardy, but in both cases the Legislature, in the exercise of the police powers of the State, has provided for the protection of the public by making a defendant liable to imprisonment as an inducement to the payment of such costs or allowance. *S. v. Burton, supra,* at p. 659; *Myers v. Stafford,* 114 N. C., 234; *S. v. Parsons, ante,* 730.

In *Commonwealth v. Dowdican,* 115 Mass., 136, we find a recognition of the principle we have stated in the long-continued practice of the courts of that State, which eventually (in 1865 and 1869) received the sanction of the Legislature. The Court said: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that by reason of extenuating circumstances or the pendency of a question of law in a like case before a higher court, *or other sufficient cause,* public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file. . . . (766) Such an order is not equivalent to a final judgment or to a *nolle prosequi* or discontinuance by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or *judgment thereon.* Neither the order laying the judgment on file nor the *payment* of costs, therefore, entitled the defendant to be finally discharged." It thus appears that under the name of laying the indictment on file the courts of that State accomplished the same result attained here by suspending judgment.

Such orders are not prejudicial but favorable to defendants, in that punishment is postponed, with the possibility of escaping it altogether; and it is presumed that the party adjudged guilty is present and assenting to if not asking for such orders. *Gibson v. State,* 68 Miss., 241. If the payment of the costs constitutes no part of the punishment, as was held by the Supreme Court of Massachusetts, and by the Court of Mississippi in *Gibson's case, supra,* as well as by the Supreme Court of Florida in *Ex parte Williams,* 26 Fla., 310, then the payment of a portion of it by the defendant is not undergoing or performing a part of the sentence, and does not bring this case within the principle announced in *S. v. Warren,* and *Ex parte Lange, supra; Easterling v. State,* 35 Miss., 210.

It is conceded that when the court couples with the payment of the

costs any judgment that might have constituted a part of a sentence, as that a public nuisance be abated, in case of conviction for creating it, the power of the court is exhausted in its rendition, and the suspension of judgment is deemed to have been ordered on condition of the performance of such requirement. *S. v. Addy,* 43 N. J., 113; *Gibson v.* (767) *State, supra.* But the suspension of the judgment upon the payment of the whole of the costs by one of the two defendants in this case, including the solicitor's fee due from his codefendant, and the actual payment of both fees taxed for the prosecuting officer, fails to bring it within the principle announced in *S. v. Addy, supra,* since the adjudication that such codefendant pay his own fee as a part of the costs would have constituted no part of his punishment, and when added as a part of the costs to defendant's bill inflicts no punishment on him. The court merely suspended judgment on the condition of paying the costs of the other defendant, as well as his own, as a part of the terms upon which the favor of the postponement was granted, as it is the practice to do on conviction in such cases. *Gibson's case, supra.*

It has always been the practice in our courts, so far as we can ascertain, where the judgment for costs is rendered in the same order of the court which imposes the sentence, to leave the exact amount of the costs to be taxed by the clerk, and under the act of 1879 to be revised by the judge. The practice under that act was to revise the bills of costs, at chambers, and it seems neither to have been contemplated by the courts nor by the Legislature that costs in a criminal action constituted a part of the punishment for the offense, and that the party convicted might consequently claim the right to such notice as would enable him to be present when the court should adjudge what amount was due.

"Where the defendant is found guilty, and the court pronounces judgment that he pay a fine and stand committed until it be paid, the imprisonment is no part of the punishment, but only a mode of enforcing payment of the fine." 1 Arch. Cr. Pr. and Pl. (Pomeroy's Ed.), p. 580; *Son v. People,* 12 Wend., 344. The same principle applies where he is committed during a term for a non-payment of a judgment for costs, like that in this case, and is brought before the judge during the same (768) term on the prayer of the solicitor for judgment. The court in such cases orders the defendant to be committed by way of inducement to pay the costs. If the order prove ineffectual, it becomes optional with the court whether he shall be allowed to remain in prison and rid himself of responsibility for cost by taking at the proper time the insolvent debtor's oath, or whether he shall be brought to the bar of the court and subjected to the sentence which still remains suspended over him. An order of commitment, whether for nonpayment of fine and cost or cost only, can be modified during the term at which it is entered

(*S. v. Burton, supra*), because where there is a sentence to pay a fine, "its execution" does not begin in contemplation of law till the power of modification by the court ends, and the committal or failure to discharge costs is treated as an effort to enforce the payment till the same period. The rule is different where the court sentences a prisoner as a part or the whole of its judgment, to a term of imprisonment in the common jail, and he is immediately committed to prison. In such cases he is not incarcerated for failure to pay, or to enforce payment of fine and costs, but is deemed from the day of his commitment to the expiration of the term to be undergoing his sentence. Upon the expiration of his term he may still pay fine and costs imposed in addition to imprisonment, but on his failure to do so the law holds him to be still committed for the statutory period, and until he shall comply with the requirements of the statute. *S. v. Parsons, ante,* 730.

We think, therefore, that there was no error in the ruling of the court below, and its judgment is

Affirmed.

Cited: S. v. Griffis, 117 N. C., 710-712; *S. v. White, ib.,* 807, 808; *S. v. Hilton,* 151 N. C., 691, 692, 693; *S. v. Everitt,* 164 N. C., 402, 405; *S. v. Tripp,* 168 N. C., 152; *S. v. Burnette,* 173 N. C., 736, 738.

(769)

STATE v. P. C. McINTIRE.

Indictment for Libel—Publication.

Where one in this State wrote a libelous letter and procured another in this State to copy, read and mail it to the prosecutor in another State: *Held,* that it was a publication in this State of the libelous letter.

INDICTMENT for libel, tried before *Jones, J.,* at May Term, 1894, of BUNCOMBE.

At the close of the evidence for the State, defendant stated (771) that the only ground upon which he resisted a verdict of guilty was that there was no evidence, or not sufficient evidence, of publication in this State to justify a verdict of guilty, and asked the Court, in writing, to give the following instruction to the jury:

"The defendant asks the court to charge the jury that, taking the evidence of the State as true, there is no evidence, or not sufficient evi-

dence, of a publication by the defendant of the libelous matter alleged in this State to justify a verdict of guilty."

The court declined to give the instruction prayed for. Exception by defendant.

The court then charged the jury that, if they believed the evidence for the State, there was a publication; and the defendant having admitted all the other ingredients of libel, they should return a verdict of guilty. Exception by the defendant.

The jury returned a verdict of guilty, and defendant appealed.

Attorney-General for the State.
H. C. Carter for defendant.

SHEPHERD, C. J. The only question before this Court is, whether there was any evidence of the publication of the libelous letter in this State. Richard Knebler testified, on behalf of the State, as fol-
(772) lows:

"The defendant told me to mail the letter. I addressed it to the Armour Packing Company, Kansas City, Mo., and mailed it here at the postoffice. I read the letter over to him after I wrote it for him to see if it was all right. I copied it from a letter he had written. . . . I sealed it and put it in the postoffice."

It appears that the letter reached the company to which it was addressed, and was afterwards brought to Asheville and read there by several persons. These last-mentioned facts, however, do not seem to be necessary to be considered, as it is settled by reason, as well as authority, that according to Knebler's testimony the letter was published in this State.

"Publication in the law of libel is the communication of the defamatory matter to some third person or persons." Odgers Libel and S., 150. In this case the contents of the letter were communicated to Knebler, a third person, and that this was a sufficient publication is apparent from the authorities. Odgers, *supra,* 151; Newell on Defamation and Slander, 229.

In *Delacrox v. Thevenot,* 2 Stark, 63, the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libelous letter addressed to the plaintiff, which was opened by the plaintiff's clerk and lawfully read in the usual course of business. It was held a publication by the defendant to the plaintiff's clerk.

In *Snyder v. Andrews,* 6 Barbour, 43, the defendant wrote a letter to the plaintiff himself, but read it to a friend before posting it. It was held a publication. See also *McCombs v. Tuttle,* 5 Black. (Ind.), 431.

In *Keene v. Ruff*, 1 Clarke (Iowa), 482, the defendant before posting the letter to the plaintiff, had copied it. It was held a publication by the defendant to his own clerk who copied it.

We think these authorities are decisive of the case.

No error.

(773)

STATE v. M. SHERMAN.

Indictment for Libel—Juror, Qualification of—Payment of Taxes—Evidence.

1. A tales juror must have the same qualification as a regular juror, with the additional one of being a freeholder.
2. Under section 1722 of The Code, as amended by chapter 559, Acts of 1889, the county commissioners were required, on the first Monday in September, 1892, and every four years thereafter, to put on the jury list such persons only as had paid their taxes for the preceding year. Hence, a tales juror called on a trial in April, 1894, was not disqualified because he had not paid his taxes for the year 1893, he having paid them for 1892.
3. In the trial of a defendant for libel in charging that the prosecutor was a negro living in adultery with a white woman as his wife, testimony that the prosecutor had associated with white men as a white man was competent to be submitted to the jury to prove that he was a white man, either as corroborative of other evidence or as substantive evidence in itself for the consideration of the jury.

INDICTMENT for libel, tried before *Jones, J.*, and a jury, at April Term, 1894, of the Criminal Court of BUNCOMBE.

During the impaneling of the jury the defendant had challenged peremptorily three jurors. The fourth was presented and challenged for cause. The said juror was a tales juror. The cause assigned, the failure to pay his taxes for the previous year. The evidence was that he had paid his taxes for 1892, but not for 1893. The court held him competent. Defendant excepted, and exhausted his final challenge. Another juror was called and challenged by the defendant, but disallowed by the court upon the ground that they had exhausted their four peremptory challenges. To which ruling the defendant excepted, and said juryman was placed on the jury.

One of the charges in the bill of indictment and the allegations (774) contained in the letter said to have been written by the defendant was that Hill, the prosecutor, was a negro living in adultery with a white woman as his wife. The State, in order to show that said Hill was a white man, offered witnesses to prove that he had associated with white

people as a white man. To this testimony the defendant excepted. Objection overruled, and said testimony given by the witnesses.

The jury found the defendant guilty. Judgment, imprisonment in the county jail, to be worked on public roads for one year. Defendant appealed.

Attorney-General for the State.
H. B. Carter for defendant.

MACRAE, J. This case was tried at April Term, 1894. The tales juror who was challenged for failure to pay his taxes for the previous year had paid his taxes for 1892. By the provisions of section 1722 of The Code, as amended by Laws 1889, chapter 559, the county commissioners were required on the first Monday of September, 1892, to select from the tax returns of the preceding year the names of such persons only as had paid tax for the preceding year, and are of good moral character and of sufficient intelligence. Previous to the amendment this duty was to be performed on the first Monday in September in each year; now it is to be done on the first Monday in September, 1892, and every four years thereafter. The qualification of a regular juror then was that his name should have been on the tax return for the year preceding the first Monday in September, 1892, and that he should be of good character, etc. A tales juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder.

(775) *S. v. Carland,* 90 N. C., 668; *S. v. Whitley,* 88 N. C., 691. So it was not necessary that the talesman should have paid his tax for 1893.

We can see no merit in the second exception. The case does not purport to set out all of the testimony. The one circumstance that Hill had associated with white men, offered to prove that he himself was a white man, while standing alone, might have little weight, but was competent either as corroborative of other evidence or as substantive evidence in itself, to be submitted to the jury. *Hopkins v. Bowers,* 111 N. C., 175.

No error.

STATE v. WILLIAM ADAMS ET AL.

Larceny—Intent—Connivance by the Owner of the Property.

1. Where one forms the intent to steal, and carries out such previously formed design, he is guilty of larceny, notwithstanding the owner of the property is advised of the intended larceny, appoints agents to watch him and, with a view of having him subsequently punished, does not prevent the commission of the theft.
2. Although the intent to steal certain property is formed and carried out, the perpetrator is not guilty of larceny if he has been persuaded by a servant of the owner, at the latter's instance, to commit the theft.
3. Larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though such consent is given for the purpose of apprehending the felon.
4. Larceny cannot be committed unless the property be taken against the will of the owner; the object of the law being to prevent larceny by punishing it, and not to procure the commission of the crime in order that the offender may be punished.
5. An exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing.
6. When a demurrer to evidence is overruled the defendant should not introduce evidence. If he has evidence which he intends to introduce he should take advantage of the failure of the plaintiff to make out a case by a prayer to instruct the jury.

THE defendants, William Adams and Susan Adams, his wife, (776) were indicted for larceny of cotton, the property of one Palmer, and were tried before *Meares, J.*, and a jury, at February Term, 1894, of the Criminal Court of MECKLENBURG. The facts are sufficiently adverted to in the opinion.

On the trial the first witness introduced by the State was one T. J. Wilson. This witness testified, in substance, that one Abram Palmer conducted a farm near to his (witness') place of residence, and situated one mile and one-half from Charlotte, and that he had some cotton stored in his barn on this farm, and that at the time of the alleged larceny Palmer was living in Charlotte, and confined to his house by sickness. That the witness, while concealed in a thicket of bushes, overheard a conversation between Charles Lindsay and one Lee Sims in which they discussed a raid which was to be made on Abram Palmer's cotton barn. In consequence of hearing this conversation, and also receiving a message from Palmer, the witness called to see Palmer in Charlotte on the following Monday and told him about the conversation he had heard between the aforesaid Lindsay and Sims. Abram Palmer then requested the witness to watch out for the thieves, and do whatever he might think

advisable to detect them, as he was too sick to protect his property. Palmer also told the witness that Julia Harris, a hired servant on his farm, had been to see him and told him that she had gone to the house of the defendant Sue Adams to obtain some thread, and that Sue Adams's husband, William Adams (the other defendant), was not at home, and that the defendant Sue Adams conducted her (Julia) into a back room and asked her (Julia) if she could not make a raise. That at first she thought that Sue Adams was alluding to corn, because on a former occasion Sue had proposed to her to steal some corn from Abram Palmer, but Susan told her that she did not want corn, but that she wanted cotton, and that Julia then said that she had no cotton, and then
(777) Sue Adams said to her that Abram Palmer had cotton in his cotton house, "and you can get it." That Palmer also said he had instructed Julia to exert herself to give all the assistance in her power in catching the thieves, and also to request him (the witness) to come and see him about it. The witness had accordingly gone that (Monday) night to Abram Palmer's farm to watch for the thieves, and he told Julia Harris what he had come for, and told her also what Abram Palmer had told him, and Julia Harris then said when she left Abram Palmer's house that morning she saw the defendant (Sue Adams) and told her she could get the cotton; it was all right. The witness watched all that (Monday) night until 3 o'clock, but no one came to the cotton house. The witness had gone back to watch the cotton house on Tuesday night, and Julia Harris told him that after he (witness) had left on Monday night the defendant William Adams came to get some cotton, but that she would not let him have it, because he (witness) had gone away. The witness testified that he again returned and watched until it was very late on Wednesday night and no one came, and he then filled up a couple of sacks with cotton, and leaving one of those sacks of cotton in the cotton house, he gave the other sack to Julia Harris, and told her to go to the defendant William Adams's house and to give it to him and to tell him that he could get some more cotton. The defendant's house is situated about three hundred yards from Palmer's cotton house. Witness saw Julia Harris take the sack of cotton as he had told her to do to the defendant's house, and in a little while Julia Harris and the defendant William Adams came to the house and Julia stepped outside and the defendant William Adams entered the cotton house and then came out of it with the sack of cotton, weighing about seventy pounds, and went home with it on his shoulder. Witness was secreted near the cotton house, looked at his watch immediately after defendant left with the
(778) sack of cotton, and it was 3 o'clock Thursday morning. On Thursday night the witness filled another sack of cotton and told Julia Harris to take it to a certain place about fifty yards from the

cotton house where he could see it, and to go and tell the defendant, Sue Adams, that it was there. He saw Julia carry the sack to the place, and in a little while the defendant Sue Adams came and picked it up and carried it home. This was done five minutes before 7 o'clock, and it was after dark. The witness heard Julia Harris testify in this case at the magistrate's trial. She swore that witness had promised her five dollars for assisting him in catching up with the defendant William Adams, which witness denied. She also swore that Abram Palmer authorized her to sell the cotton.

Julia Harris (a State's witness) testified that she lived on Abram Palmer's place and worked for him. That on Monday evening she went to the defendant Sue Adams's house to get some thread. Her husband, the defendant William Adams, was not at home, and Sue Adams carried her into a back room and asked witness if she could not make a raise. The witness thought at first that defendant Sue Adams alluded to corn, because defendant had proposed to her to steal corn from Abram Palmer last summer, and replied to her that she had no corn. Sue Adams then said that it was not corn but cotton that she wanted. Witness then told her that she had no cotton. Then Sue Adams said to witness that Abram Palmer had cotton in his cotton house, and that she (witness) could get it. The witness did not make any agreement with her. Abram Palmer was sick at his house in Charlotte. Witness went to his house and told Palmer what defendant Sue Adams had said, and that she wanted witness to steal his cotton. Palmer told her to tell Mr. Wilson to come and see him, that he wanted him to watch the cotton house and try and catch the thieves. Witness then went to the defendant Sue Adams and told her they could get the cotton. The witness Wilson came (779) to the cotton house Monday night, and she told him what she had said to Sue Adams, and he watched till 3 o'clock and then went away. After Wilson had left the cotton house where he had been watching, the defendant William Adams came and wanted to get some cotton, but she would not let him have it, because Mr. Wilson had left. Mr. Wilson came back on Tuesday night and witness told him that the defendant William Adams had come for cotton after he (Wilson) had left on Monday night. Wilson watched the cotton house on Tuesday night, but no one came. Wilson came to watch the cotton house on Wednesday night, and watched till a late hour, and then he filled up two sacks with cotton. He left one of these sacks in the cotton house and gave her (Julia) the other sack and told her to take it to the house of William Adams and tell him (William Adams) that he could get more cotton. That she then took the sack of cotton to the house of the defendant William Adams and delivered it to him and told him that he could get more cotton. He said he could not pay for it until he weighed it and

sold it; that he wanted to make out a bale. That the defendant William Adams then went back with her to the cotton house, and that she remained on the outside while the defendant William Adams entered the cotton house and took the sack of cotton which the witness Wilson had left there, and carried it off to his house. The defendant Adams promised to pay her one dollar for the cotton. It was between 5 and 6 o'clock Thursday morning when she carried the sack to defendant Adams's house, and they returned together to the cotton house. That the witness Wilson came back Thursday night and filled up a sack of cotton and told her where to put it, in a place where he could see it, and then to go and tell Susan Adams (defendant) that she could get it, and accordingly she did carry the sack of cotton to the designated place, about fifty yards distant from the cotton house on Palmer's land, and then she went to the
(780) house of defendant Susan Adams and told her where she could find the sack of cotton, and then the defendant Sue Adams went to the place and took the sack of cotton and carried it to her home. This witness admitted on the cross-examination that she did swear on the magistrate's trial that the State's witness, Wilson, had promised to pay her five dollars to help catch up with the thieves, but that the statement was not true; that she had never been in court before that time, and there was a large number of people present, and that she was much frightened, and did not know what she was saying. That the truth was that the witness Wilson did not promise to pay her five dollars, and also that she did not swear before the magistrate that Abram Palmer had given her authority to sell the cotton, and that Palmer had never given her permission to sell the cotton.

Abram Palmer testified that he owned a farm situated about one and one-half miles from Charlotte, and at the time of the alleged larceny he was sick and was living in Charlotte, and that the witness Julia Harris worked for him on his farm. That on the evening of the Monday spoken of, she (Julia) came to his house in Charlotte and told him she had been to see the defendant Susan Adams that day to get some thread, and that Susan Adams had taken her into a back room and asked her if she could not make a raise, and that she (Julia), thinking that Susan Adams meant corn, for the reason that Susan had proposed to her last summer to steal some corn from him (Palmer), replied to Susan that she (Julia) had no corn. That Sue Adams then said that she did not want corn, but that she wanted cotton; and that she (Julia) answered that she had no cotton. Then Sue Adams said to witness: "Abram Palmer has cotton in his cotton house, and you can get it." She told him that Susan Adams wanted her (Julia) to steal his cotton. That she had made no
(781) agreement with Susan Adams up to that time about it. The witness told the witness Julia Harris to tell the witness T. J. Wilson

to come to see him, that he wanted him to watch the cotton house and do whatever he might think was necessary to catch the thieves, and that she must assist him. That soon after she had left, the State's witness T. J. Wilson came to his house to see him. Charles Lindsay was with him. That Wilson told him about a conversation between one Sims and Lindsay, which he overheard, about a raid to be made on his cotton house. He then told Wilson what Julia Harris had just told him, and requested Wilson to watch his cotton house, and to do everything he might think best and was in his power to do in order to catch the thieves. That he was sick and unable to protect his property.

The counsel for the defendant now asked the court to require the State to elect which one of the alleged larcenies they would rely upon to convict, the one by William Adams on Wednesday night, or the one by Susan Adams on Thursday night; and, after some discussion by counsel, and the court intimating that the State should elect, the prosecution announced that they would rely upon the taking by William Adams on Thursday morning.

The counsel for defendant now demurred to the evidence as being insufficient to convict, and asked the court to instruct the jury that there was no evidence of a conspiracy, and that the evidence was not sufficient to convict either of the defendants.

The court refused to give the instructions asked for, and the defendants' counsel excepted. The defendants were convicted, and appealed.

Attorney-General for the State.
Clarkson & Duls and Maxwell & Keerans for defendants.

CLARK, J. The court correctly told the jury that "if there was the guilty intent previously formed by the defendant to steal certain property, and he carried out such design previously formed, he is (782) guilty, notwithstanding the owner of the property was advised of the intended larceny, appointed agents to watch him and could have prevented the theft, but did not do so, and allowed him to commit the theft, with a view of having him subsequently punished." It was error, however, further to tell them that if there was the previous intent to steal, the defendant would be guilty, notwithstanding the owner's agent had told a servant to go to the defendant's house and persuade him to come and steal the sack. *Dodd v. Hamilton,* 4 N. C., 471; *S. v. Jernagan,* 4 N. C., 483. It was also error to refuse the fifth prayer for instruction, "That larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of apprehending the felon," and likewise the sixth prayer, "That larceny cannot be committed unless the thing be

taken against the will of the owner." The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the defendant may be punished. The evidence for the State was that the owner's agent (Wilson), having information of an intended theft of cotton by the defendants, watched the cotton house Monday and Tuesday nights without any one coming. That he returned Wednesday night and watched till very late, and, no one coming, he filled up a couple of sacks with cotton, and leaving one of the sacks in the cotton house, he gave the other sack to one Julia Harris, and told her to go to the defendant's house, three hundred yards distant, and give it to him and tell him that he could get some more cotton. Julia did as directed, and in a little while she returned with the defendant, who entered the cotton house, took the other sack of cotton upon his shoulder and carried it home. The court should have sustained the demurrer to the evidence. It is not necessary to consider the evidence as to the wife, for the election
(783) of this transaction discards the consideration of the evidence as to the taking by her Thursday night. It is also unnecessary to consider the other points raised. We may note, however, that if, as it would seem from the case, the judge, notwithstanding the prayer at the close of the evidence to put his charge in writing, "also fully explained and instructed the jury as to the application of the propositions of law laid down in his *written charge* and instructions given as to the different phases of the evidence in the case, and pointed out to the jury the grounds upon which the defendants rested their defense, and explained such phases of the case arising from the evidence introduced by the State and the defendants," there was manifest error. When there is a prayer to put the charge in writing (The Code, sec. 414), all the instructions as to the law must be reduced to writing (though not the recapitulation of the evidence). *Dupree v. Insurance Co.*, 92 N. C., 417; *Lowe v. Elliott*, 107 N. C., 718. If this were not so, section 414 would be nugatory. We can only incidentally refer to the point and not declare error in that regard, as there is no exception for a refusal or failure to put the charge in writing. *Taylor v. Plummer*, 105 N. C., 54; *Lowe v. Elliott, supra.*

The exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. If the proper exception on that ground had been made, the case should, and doubtless would, have contained the written charge, and, if any oral charge had been given, it should have been set forth that this Court might see that it was mere repetition of the written charge. It is only out of deference to the authority of *Currie v. Clark*, 90 N. C., 355, that the Court will permit even that, and will not extend the exception. It

may be noted that the headnote in *S. v. Young,* 111 N. C., 715, goes beyond the opinion of the Court.

When the demurrer to evidence is overruled, the defendant should not introduce evidence. Starkie on Ev., 797-8; 2 Tidd Pr., 865-6; Whar. Cr. Pl. and Pr. (9 Ed.), secs. 407, 706; *Hutchins v. Com-* (784) *missioners,* 82 Pa. St., 472.

If the defendant has evidence which he intends to introduce, he should take advantage of the failure of plaintiff to make out a case by a prayer to instruct the jury after all the evidence is in.

In failing to sustain the demurrer to the evidence, and also for refusing to instruct the jury that there was no evidence to go to them, there was error. But this does not necessarily dispose of the case. *Non constat* that the State may not, in some cases, produce more evidence on the next trial. *S. v. Rhodes,* 112 N. C., 857.

Error.

Cited: S. v. Groves, 119 N. C., 824; *S. v. Hagan,* 131 N. C., 803; *Prevatt v. Harrelson,* 132 N. C., 253; *Hollingsworth v. Skelding,* 142 N. C., 255; *S. v. Gaffney,* 157 N. C., 626.

STATE v. D. D. SUTTLE.

Indictment for Destroying Milldam—Reservation in Deed—Right to Raise Milldam—Easement—Adverse Possession—Nuisance.

1. Where, in a deed conveying land, the grantor reserves the right to raise and rebuild a milldam on a stream below the land so granted, the reservation is of the right to raise as well as to rebuild the dam.
2. Where a grantor of land reserves an easement therein, and subsequent conveyances do not mention such reservation, the easement is not affected by such omission.
3. Where a grantor of land reserves the right to back water upon it from his milldam, the mere cultivation of the soil by the grantee is not an act of possession adverse to the owner of the easement.
4. The right to an easement may be acquired or lost by an adverse user, but in either case the user must be of such a nature as to expose the claimant under it to an action at any time for twenty years.
5. The mere erection of the frame of a dam which, when completed by further work thereon, will pond water back and create a nuisance, does not of itself constitute a nuisance before injury ensues.

THIS was an indictment under section 1087 of The Code, charging the defendant with cutting away and destroying a certain mill-
(785) dam, the property of John Hildebrand, tried in the Criminal Court of BUNCOMBE, before *Jones, J.*

The defendant pleaded not guilty. The counsel contended, among other things, that if he did destroy so much of the dam as would bring it down to the height of the original dam before Hildebrand rebuilt and raised it, he did it in the exercise of his right to abate the public nuisance. The prosecutor conveyed a tract of land to three persons in 1886 by deed containing the following clause: "Reserving and excepting to the parties of the first part, their heirs and assigns, the perpetual right and privilege of backing water from their milldam on the land herein conveyed, and of raising and rebuilding the dam, in case it washed away, at their pleasure, and all without cost, charge or expense to said parties of the first part, their heirs and assigns, on account of land damaged thereby or on any account; the parties of the second part, their heirs and assigns, being allowed to take all the ice that may be in the pond, and the right also of hauling out the mud that may accumulate in said pond."

On 18 June, 1891, the said J. R., M. J. and R. H. Zachary conveyed the said seventy-three acres of land to D. Augusta Bean, and said Bean, on 8 June, 1892, conveyed the said land to the defendant D. D. Suttle. Neither of the two last-mentioned deeds contained the provision above quoted from the deed of Hildebrand and wife to the Zacharys.

There was evidence on behalf of the defendant tending to show that the Hildebrands, in raising and rebuilding the said milldam, raised it to a height greater, by from four to six feet, than it was at the time of the conveyance by Hildebrand and wife to the Zacharys, or had been at any time between said conveyance and said raising and rebuilding. There was also evidence tending to show that the defendant did not cut the dam away so as to make it lower than it was when said Hildebrand and wife conveyed the land on which the dam was situated to said
(786) Zacharys, but the dam was left by the defendant higher by one foot than it was when said last-mentioned conveyance was made, or had been at any time between the execution of said last-mentioned conveyance and the time of raising and rebuilding said dam. There was also evidence tending to show that said Hildebrand had neglected said milldam—had permitted the dam to fill to a depth of five or six feet with mud, and the woodwork to go to decay and ruin. There was evidence to show that the wheel to be turned by the water from said dam was an overshot wheel, about twenty-three feet in diameter; was situated ____ yards below said dam; had not been changed from the place where it was originally fixed about twelve years ago, but had sunk or settled down about one foot. It was also in evidence that after the

defendant had cut away the portion of the top of the woodwork of the dam, the water stood in the dam four feet above the top of the wheel.

His Honor charged the jury, among other things, as follows:

"That the reservation in the deed gave to Hildebrand the following rights: If the dam washed away he had the right to rebuild it, and in doing so he had the right to build it to a height sufficient and necessary to enable him to use the water of the pond for the purpose of running his mill and machinery; and if in so building he did build it or raise it higher than it was at the date of the deed containing the reservation, and such increased height was necessary for the purpose just mentioned, he had a right to do so; and if the water backed on the land further than it was at the date of said deed, this gave the defendant no right to destroy the dam, or even to cut it down to the original height. The reservation did not give Hildebrand the right to raise the dam, unless it was necessary for the purposes already mentioned, and if he raised the dam to a greater height than it was at the date of the deed unnecessarily, and in consequence thereof the land of Suttle was damaged, then Suttle had the right to cut the dam down to the original height, but no lower, and you could not convict him. The question is not whether, at (787) the time the defendant cut the dam, the water was higher than it was four years ago, but whether it was higher than it was at the date of the deed from Hildebrand to Suttle, to wit, 16 September, 1886. He had a right to rebuild it to such a height as was necessary for the purpose of running that mill. If it was necessary for him to raise it higher than it was at the date of that deed, he had that right, and if in consequence the water backed on Suttle's land, there is a provision in this reservation that he should do this without damage or loss to himself, and Suttle had no right to go there and cut it down. On the other hand, this right in Hildebrand was one of necessity, and he had no right to raise the dam unnecessarily, or to raise it to any height he might please, but only in the way and for the purposes that I have described to you. If he went there and raised it in order to injure Suttle, or to annoy him, and to pond his land, then Suttle would have the right to go there and cut it down.

"Now there is another thing you must remember, and that is that you must fix the date in your mind. A good many of the witnesses said they were familiar with the heights of that water four and six years ago, and that after Hildebrand rebuilt the dam it was higher than it was then. The date that you must keep in your mind is the date of the deed in 1886, and the question before you is not whether it was higher than it was in 1889 or 1890, but whether it was higher than it was in 1886. The question is not whether, when the defendant cut the dam, it was higher than it was three or four years ago, but whether it was higher at that time than it was in 1886."

There were various exceptions to the charge by the defendant. There was a verdict of guilty, and from the judgment thereon the defendant appealed.

(788) *Attorney-General and Locke Craig for the State.*
No counsel contra.

AVERY, J. The right was reserved in the original deed in clear and unmistakable terms to raise as well as to rebuild the dam. Those who took title to the land subject to the servitude had no just ground to complain of the exercise of this right, and were in no better condition before the court when indicted under section 1087 of The Code than any other person who ventures to take the law in his own hands and seeks redress for an imaginary injury by destroying another's milldam. When the prosecutor reserved the right of raising as well as rebuilding the dam, we cannot agree that both words were used to mean the same thing, because, giving to the language its ordinary import, the parties obviously had in view the possibility that the grantor, his heirs or assigns, might deem it best for their own interests to do just what it appears was done by them, in case the old dam should be swept away.

It seems to us that the defendant has no ground to object to the construction placed upon this clause by the court, nor of the instruction as to the application of the facts to it. It was suggested that the defendant, who holds through the *mesne* conveyances from the grantees under the deed from Hildebrand, in neither of which is any mention made of the reservation by Hildebrand, may hold discharged of the servitude. But Hildebrand, having reserved the easement, the right to it could not be divested out of him except by a conveyance or by adverse possession for the necessary period. The mere cultivation of the soil being no interference with the enjoyment or right to use the easement, does not expose the occupant to an action of trespass by the dominant owner, and therefore does not constitute a possession adverse to him. *Osborne v. Johnston,* 65 N. C., 22; *Boomer v. Gibbs,* 114 N. C., 76; *Hamilton v. Icard, ib.,* 532. The right to an easement may be acquired by pre-
(789) scription or lost by an adverse user, but in either case the user must be of such a nature as to expose the claimant under it to an action at any time for twenty years. *Emry v. R. R.,* 102 N. C., 209.

The owner of the agricultural interests may become a trespasser as to the reserved mineral interest, but only by engaging in mining for the mineral or minerals reserved (*Ashmore v. Taylor,* 12 Atl., 74), and so he can, by direct interference, indicating an unequivocal claim to the easement as distinguished from the right to cultivate, subject himself to liability to the dominant owner of the easement to build or raise a dam.

The defendant had no reasonable ground to object to the instruction that his right was not infringed unless the water was actually ponded back further than Hildebrand was authorized to throw it back. The mere erection of the frame of a dam, which by further work in putting on grooving planks or boards would so pond the water back and create a nuisance, does not constitute a nuisance before any injury ensues.

We deem it unnecessary to mention in detail the several assignments of error. What we have said meets the reason of all the exceptions.

No error.

Cited: Shaffer v. Gaynor, 117 N. C., 21; *Everett v. Newton,* 118 N. C., 923.

STATE v. ELLA NORWOOD.

Murder—Deadly Weapon—Putting Pins in Child's Mouth, Causing Death—Presumption of Malice.

1. The question whether an instrument with which a personal injury has been inflicted is a deadly weapon often depends more upon the manner of its use than upon the intrinsic character of the instrument itself.
2. The pushing of a pin down an infant's throat, whereby death ensues, is killing with a deadly weapon, and if done deliberately and with the purpose of killing, is murder in the first degree.
3. Matters of extenuation and excuse, or discharge by reason of insanity, must be shown by him who sets it up, and where no testimony is offered by one on trial for murder to show insanity, the presumption of sanity is unrebutted.

INDICTMENT for murder, tried before *Shuford, J.,* and a jury, (790) at March Term, 1894, of DURHAM.

It appeared in evidence that the defendant pushed two pins down the throat of her infant bastard child, and thus caused its death. One of the pins was a black pin, worn by defendant in her hair, the other worn in her dress.

The mother of the defendant testified that after the autopsy the physicians gave her the two pins taken from the body of the child, which she recognized as pins worn by the defendant. "Next morning," the witness said, "I asked Ella about the pin she wore in her hair. She began feeling about the bed for it, as if it had been lost in the bed. I said to her, 'What did you murder that baby for?' She said, 'Do you

know who did it?' I told her 'Yes.' She then asked if anybody else knew it. I asked her what made her do it. She said: 'I had been thinking how I could get rid of the boy. Then he began to cry, and I stuck one of the pins down his throat, and he strangled so that I sent Mattie after Miss Bell.'" Witness further said that Ella told her that she wanted to get the boy out of the way because it would be such a bother to her in the spring, when she wanted to run around and have some fun.

Dr. J. M. Manning, who, with Dr. Cheatham, made an autopsy, testified: "We found in the stomach of the child this dress-pin, and in one lung, which was very much congested, we found the black pin. In my opinion, this black pin caused the death of the child. The baby was either crying or laughing when the pin was swallowed and it was thus caused to go into the lungs. The windpipe was very much con-
(791) gested."

His Honor, after fully defining the crime of murder in the first and second degrees, among other things, charged the jury as follows:

"The generally accepted meaning of the word premeditated is a prior determination to do the act in question; but it is not essential that this intention should exist for any considerable period of time before it is carried out. If the determination is formed deliberately, and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried into execution. If the defendant in this indictment, while lying on her bed with her baby by her side, conceived the thought of getting rid of her child, and concluded to destroy or kill it by putting the pins, which have been shown in evidence, in its throat for the purpose of strangling or killing it, and immediately thereafter carried out this resolve by sticking the pins down its throat, and thereby strangling and killing the child, the defendant would be guilty of murder in the first degree—malice would be presumed, and the determination and premeditation contemplated by the statute would be shown, if the jury find the facts so to be."

To this charge the defendant excepted.

His Honor also instructed the jury as to the burden of proof, stating to the jury that the burden was on the State to prove, beyond a reasonable doubt, the intentional killing of the child by the defendant, and told the jury that if they had any reasonable doubt that the defendant intentionally put the pins in the child's mouth or throat with the view of killing it, or had any reasonable doubt that the pins caused the death of the child, then they should acquit.

The court did not submit to the jury any view of murder in the second degree, or manslaughter, though requested so to do by counsel for the defendant, and for this omission counsel for defendant excepted.

There was a verdict of guilty, and from the judgment thereon the defendant appealed, assigning error in the charge, and error (792) in refusing various instructions asked for.

Attorney-General for the State.
C. F. Turner and F. A. Green for the prisoner.

AVERY, J. If the prisoner did not put the pins in the child's mouth, or if, though she placed them there, they were not the instrumental cause of its death, she was not guilty, and so the court told the jury. If the jury found, as they must have done under the instructions of the court, that she brought about its death, it was a killing with a deadly weapon. The question whether an instrument, with which a personal injury has been inflicted, is a deadly weapon, depends not infrequently more upon the manner of its use than upon the intrinsic character of the instrument itself. *S. v. Huntley,* 91 N. C., 617. We may expect death to ensue from pushing such a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings, or at a particular person. The intentional killing with a deadly weapon, when proved or admitted, raises a presumption of malice, and such evidence would, before the enactment of the recent statute establishing and defining the two grades of that crime, have amounted to *prima facie* proof of murder. But now, though the fact of such killing still gives rise to the presumption of malice, and is *prima facie* evidence of murder in the second degree, it does not show that the act was done deliberately or after premeditation. *S. v. Fuller,* 114 N. C., 885; 2 Bishop Cr. Law, sec. 703; *S. v. Dunn,* 38 Pa. St., 9; *People v. Cox,* 76 Cal., 285. In order to conviction of murder in the first degree, as the judge below properly instructed the jury, it was necessary that the State should show that the prisoner deliberately determined to take the child's life by putting the pin or pins into (793) its mouth, and thereupon, it being immaterial how soon after resolving to do so, carried her purpose into execution and thereby caused its death. As to the *quantum* of proof necessary to conviction of murder in the first degree, the court adopted the language of the prayer submitted for the prisoner, and, of course, left no ground for objection.

We cannot conceive how the jury was misled by the failure of the court to state, in terms, that the pins used in the manner described by the witnesses would be deadly weapons, or by the general instruction that the unlawful killing, if done, would, in this case, have raised a presumption of malice, since the jury were explicitly made to understand that the prisoner was not guilty of any offense, unless the death of the infant was caused by her pushing the pins into its mouth. So it was impossible

under the instructions given and upon the evidence to find that there was an unlawful killing, unless it was effected by such use by her of the pin or pins.

"By our decisions," said the Court in *S. v. Vann,* 82 N. C., 631, "matters of extenuation and excuse, or discharge by reason of insanity, must be shown by him who sets it up." The prisoner offered no testimony tending to show insanity, and the presumption in favor of sanity was therefore unrebutted.

We concur with the judge below in the view that there was no aspect of the evidence in which the offense of killing, if done by the prisoner in the manner described by the witnesses (and so it must have been done if at all), could be mitigated to manslaughter. It is possible that in such a case there might have been testimony tending to show that the killing was done by putting pins into the mouth of an infant carelessly, not purposely, and if any such evidence had been offered it would have been proper to have submitted to the jury, with suitable instructions, the question whether the mitigating circumstances relied on were proved.

After considering the carefully prepared arguments of counsel
(794) upon the assignments of error, we feel constrained to hold that there is

No error.

Cited: S. v. McCormac, 116 N. C., 1034; *S. v. Covington,* 117 N. C., 862; *S. v. Thomas,* 118 N. C., 1118; *S. v. Dowden, ib.,* 1153; *S. v. Rhyne,* 124 N. C., 854, 857; *S. v. Truesdale,* 125 N. C., 698; *S. v. Smith, ib.,* 621; *S. v. Archbell,* 139 N. C., 539; *S. v. Hunt,* 134 N. C., 688; *S. v. Lipscomb, ib.,* 693; *S. v. Bishop,* 131 N. C., 761; *S. v. Matthews,* 142 N. C., 624; *S. v. Hancock,* 151 N. C., 701; *S. v. Spivey, ib.,* 686; *S. v. Stackhouse,* 152 N. C., 808; *S. v. Beal,* 170 N. C., 767.

STATE v. SAM CALDWELL.

Indictment for Murder—Jurisdiction—Constitutional Law—Blow Inflicted in Another State Resulting in Death in this State—Dying Declarations—Evidence.

1. The act of 1891, chapter 68, providing that "if a mortal wound is given or other violence or injury inflicted, or poison is administered, on the high seas or land, either within or without the limits of this State, by means whereof death ensues in any county thereof, said offense may be prose-

cuted and punished in the county where the death happens," is constitutional and applies to foreigners as well as to citizens of this State who have inflicted mortal wounds elsewhere.

2. Section 2 of Article III of the Constitution of the United States, providing that the trial shall be held in the State where the crime was committed, applies to United States Court proceedings only, relating only to prosecutions for offenses against the United States.

3. Where, in a trial for murder, it appeared that the deceased, before making his declaration as to the circumstances under which the mortal blow was given, told his physician that he knew he was going to die, such declaration is not rendered inadmissible by the fact that the physician told him that he thought deceased would die, but hoped that he would not, and that another person told him that his physician had hopes for him.

4. Where, in a trial of a prisoner for murder, it does not appear that any judicial investigation was had before a justice of the peace, a statement made by the prisoner before such justice is admissible as evidence against him.

INDICTMENT for murder, tried before *Meares, J.*, at August Term, 1894, of the Criminal Court of MECKLENBURG.

The defendant was charged with the murder of one Bob Nelson, (795) upon the following bill of indictment, viz.:

"The jurors for the State, upon their oath, present that Sam Caldwell, late of Mecklenburg County, at and in said county, on 10 May, 1894, with force and arms, did feloniously, wilfully, and of his malice aforethought, kill and murder Bob Nelson, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Before the plea of not guilty was entered the defendant offered the following affidavit, viz.:

"Sam Caldwell, being duly sworn, says that he is informed and believes that the alleged homicide, for which he stands indicted in the Criminal Court, was committed, if anywhere, in the county of York, and State of South Carolina, and not in the county of Mecklenburg, and State of North Carolina, as alleged in the bill of indictment in the case above named."

Having introduced the foregoing affidavit, the defendant entered a plea in abatement, on the ground that the court did not have jurisdiction. The plea in abatement was overruled by the court and the case was ordered to proceed to trial. The defendant excepted to the ruling of the court in overruling the plea in abatement. The defendant pleaded not guilty, and the State introduced as a witness, Dr. J. J. Rone, who testified as follows, viz.:

"About 15 May, 1894, I saw Bob Nelson, since deceased, two and a half miles below Pineville, lying in some bushes near the railroad track.

His head was badly injured by some dull instrument. There were three blows upon his head—one scalp wound upon the back of his head and one blow upon each side of the head, near the temple bone. He was carried to Pineville about an hour afterwards. He lived ten days. The bone was crushed on the right and left temple, and an abscess
(796) formed on the brain under the left temple, which was the immediate cause of his death. Either of the wounds on the sides of his head would have produced death. He was unconscious when I found him, near a little path leading from the railroad about twenty steps from the railroad track. There were signs in the path of a struggle, and the body had been dragged to the place where I found it." Here the State proposed to ask the witness what the deceased told him as to how the difficulty between the prisoner and deceased took place. Defendant objected, and the witness testified as to the condition of deceased when he (deceased) made the statements, as follows, viz.: "On the third day (after the deceased was stricken) deceased was conscious and his mind seemed brighter. I told him that I thought he would die, but that his recovery was possible, but not probable. That I had heard of men's brains being partly knocked out and then recovering, and that I hoped he would get well. He said he thought he would die. I had two other conversations with him of the same purport. On the fifth day he walked to the door with me and said he wanted to talk to me again about the matter, and he went through the particulars as to how the affair had happened. In this conversation he again said that he would have to die, that he could not live with his head crushed in that way. I told him I thought he would die, but hoped he would get well."

The defendant objected to the admission of the declaration of the deceased, and at defendant's request E. W. Russell was put upon the stand and said that he saw the deceased just before the doctor did, and told him (deceased) that the doctor had hope for him. (Russell being a State's witness, the defendant objected to the admission of declarations of deceased.) The court overruled the objection, and the defendant excepted. The witness Russell proceeded to testify as follows, viz.: "The deceased said he was looking for prisoner; that he came across
(797) prisoner on the railroad; that he and the prisoner walked down the railroad till they came to a path, and went a little ways up the path, and prisoner asked him what he was doing. He told him he was squirrel hunting. Prisoner said: 'Yes, I know what squirrels you are hunting,' and then to allay the suspicions of the prisoner, he (deceased) fired off his gun, one barrel. Then we (prisoner and deceased) sat down and were talking, when prisoner said: 'Look yonder, what a fire!' and as deceased turned his head to look, the prisoner struck him (deceased) on the head with a rock, and he (deceased) could not remem-

ber anything more. The place where the assault occurred is between a mile and a mile and a half beyond the South Carolina line, in South Carolina. Deceased said when he met prisoner he asked who he was, and prisoner replied: 'Sam Caldwell.' He (deceased) said he did not attempt to arrest prisoner; that he had no papers, and he wanted to fool him back over the line, so that some one could arrest him who had authority. That both the prisoner and deceased were citizens of Mecklenburg County in this State."

The State rested here, tendering the other witnesses to the defendant for examination. Whereupon William Keener was called, and testified as follows, viz.:

"I waited on deceased. He would ask me to do something for his head, saying he would die if I did not. He often would say that he would die, but I told him that he would get well, to encourage him. He (deceased) said he was hunting prisoner. That he first came suddenly on prisoner, who was up a tree. To show prisoner that he had no intention of molesting him, he fired off his gun. Prisoner told him if he was a friend of his (prisoner's) to shoot off his gun, and then he shot it off. Prisoner called his attention to a fire, and as he looked prisoner struck him."

The prisoner Sam Caldwell was then introduced in his own behalf, and testified as follows, viz.:

"I was walking down the railroad and the deceased overtook (798) me, walking fast and holding his gun half raised. Just before deceased overtook me, not knowing the man, and judging from his manner that he had some intentions toward me, I asked him if he was hunting, in order to get a word out of him. He did not answer, but asked me my name. I answered, 'Sam Caldwell.' He then pulled his gun on me and said, 'Get before me,' and as I turned to get before him the gun fired; then I seized the gun, having squatted under him. Then the struggle commenced. After we had struggled some little time, I snatched the gun from his hands. He seized me. I threw the gun down and the struggle continued, his efforts seeming to be to recover the gun. We were partly down on our knees. Deceased got my finger in his mouth and I could not free myself. I picked up a rock and struck deceased on the back of the head. This blow had no effect on him and I struck him again on the left side of the head. This blow released my finger, but he continued to struggle, and I struck him on the right side of the head. This blow weakened him and I did not strike him any more. I did not know the man and had no harm against him. After the difficulty I went my way."

State resumed, and introduced E. L. Yandle and proposed to show by him a statement made by the prisoner before a magistrate the day after

the difficulty. Defendant objected. On examination by the solicitor the witness, in order to qualify himself, testified as follows, viz.: "After the prisoner was arrested he asked to see a magistrate. We went before a magistrate, and he told the magistrate that he wanted to make a statement, and the magistrate told him he could do as he pleased, and warned him that it might be used against him. I do not know whether prisoner was sworn or not, nor do I know whether his testimony was taken down in writing or not." The defendant's objection was overruled, and he excepted. The witness said: "We went to the magistrate to get a
(799) *mittimus*, and prisoner insisted on making a statement. It was substantially as here, except that he said there that deceased fired one shot before there was any struggle and fired a second shot when the scuffle began."

The evidence here closed. The defendant asked the court to charge the jury that there was a fatal variance between the allegation and the proof, in that the bill of indictment alleged a murder committed in the county of Mecklenburg, and State of North Carolina, whereas the proof showed that the murder, if any, was committed in the county of York, and State of South Carolina. The court refused to give this instruction, and the defendant excepted.

Verdict of manslaughter. There was a motion for a new trial, which was refused and defendant appealed, assigning the following errors, viz.:

"1. That the court erred in overruling the plea in abatement to the jurisdiction.

"2. That the court erred in admitting the dying declarations of the deceased.

"3. That the court erred in admitting the statement of the prisoner made before the magistrate.

"4. That the court erred in charging that there was no evidence to go to the jury.

"5. That the court erred in refusing to charge that there was a fatal variance between the allegation and the proof."

Motion for new trial overruled. Defendant excepted. Judgment. Defendant appeals.

Attorney-General for the State.
James A. Bell and H. N. Pharr for defendant.

SHEPHERD, C. J. There are several exceptions in the record, but the only one argued by counsel in this Court involves the validity of the act of 1891, ch. 68, which provides that "if a mortal wound is
(800) given, or other violence or injury inflicted, or poison is administered on the high seas or land, either within or without the

limits of this State, by means whereof death ensues in any county thereof, said offense may be prosecuted and punished in the county where the death happens." This statute is the same, *in totiden verbis,* as the acts of Massachusetts and Michigan, and is substantially similar to the Act of 2 George II, and of many of the States of this Union. In sustaining the validity of this legislation the Supreme Court of Massachusetts in *Commissioners v. McLoon,* 101 Mass. (*Gray, J.*), remarked that "this statute is founded upon the general power of the Legislature, except so far as restrained by the Constitution of the Commonwealth and of the United States, to declare any wilful or negligent act which causes an injury to persons or property within its territory to be a crime, and to provide for the punishment of the offender upon being apprehended within its jurisdiction. Whenever any act, which if committed wholly within one jurisdiction would be criminal, is committed partly in and partly out of that jurisdiction, the question is whether so much of the act as operates in the county or State in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction." Kerr Homicide, 225; *S. v. Hall,* 114 N. C., 909. The statutes referred to, and those providing that the offender may be indicted in the State where the assault is committed, although the death occurs in another State (The Code, sec. 1197), were evidently intended, among other reasons, to solve the much-debated question whether at common law the offender could be tried at all, that is, in either jurisdiction, the doubt suggested being that the offense was complete in neither. This uncertainty led to the enactment of 2 and 3 Edward VI, which provided that the offender might be tried in the county of the death, although the blow was inflicted in another county. This statute, either as a part of the common law or by reënactment, is in force in many of the States of the Union. The validity of such legislation does not (801) seem to have been questioned, but where the principle has been extended to cases in which the blow is in another State or county, it has been very vigorously assailed. It is insisted that the crime was complete where the blow was inflicted and that such legislation is therefore contrary to Article III, section 2, of the Constitution of the United States, which provides that the trial "shall be held in the State where the said crime shall have been committed." In *Tyler v. People,* 8 Mich., 319, the Court in sustaining the statute used the following language: "The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder; and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They

followed Jones into Michigan, where they continued to operate until the crime was consummated in his death."

This reasoning is quoted with entire approval in *Commissioners v. McLoon, supra,* and the Court, in speaking of the dissenting opinion in the foregoing case, said that it "proceeds upon the ground that no part of the criminal act of the defendant was done at the place of the death, a position which seems to us to be untenable, for the reasons already stated, and the ingenious arguments and illustrations adduced in support of which will not stand a critical examination." Mr. Bishop (1 Criminal Law, 112, 161) takes the opposite view, that death is but a consequence of the unlawful blow, and that the offender has committed no breach of the law in the jurisdiction where the death occurred.

We deem it unnecessary to enter into an elaborate discussion of this question, as it is exhaustively treated by *Justice Gray* in *McLoon's case, supra,* and by *Justice Brandon,* in the recent decision in *Ex parte*
(802) *McNeely,* 36 W. Va., 84. In both of these cases, as in *Tyler's case, supra,* the validity of this legislation is sustained.

In *Hunter v. State,* 40 N. J., 495, *Chief Justice Beasley* says that the contrary view indicated by the Justice in delivering the opinion in *S. v. Carter,* 27 N. J., 499 (cited by counsel), was "entirely extrajudicial," and he commends the courts sustaining statutes of this character as entitled to the highest respect. See also the authorities cited in *S. v. Hall, supra.*

In the *United States v. Guiteau,* 47 Am. Rep., 261, *Mr. Justice Bradley* said: "There is no doubt that the Legislature might have enacted, in so many words, that if either the mortal stroke should be given or the consequent death should happen within the territory, it should be deemed a murder committed here." The cases from Michigan and Massachusetts are directly in point against the position that the offense was wholly committed in the State where the blow was stricken. There are other cases which lead to a similar conclusion, though the precise question was not distinctly presented.

This view would, of course, take the case out of the supposed constitutional limitation, but it must be borne in mind that the provision of the Constitution referred to is not a limitation upon the power of the State. Even Mr. Bishop concedes that it is not a question of constitutional law. In *McNeely's case, supra,* while the learned Justice seemed to be of the opinion that the place of the blow was the place of the crime, he nevertheless came to the conclusion that there was no constitutional restriction upon the State to enact the law in question. He remarks: "Mr. Bishop, the great author, while resisting such statutes with reasoning which seems to me to be very strong and satisfactory, yet says that the question is not one of constitutional law, but one of international law, and prop-

erly admits that if a Legislature command a court to violate international law it is bound to do so. See Endlich Interpretation of Statutes, 175. If, then, he be right in the question not being one of constitutional law, this Court could not, on his theory, refuse to execute this law. . . . In none but a case of very plain infraction of the Constitution, where there is no escape, will or ought a court to declare a statute unconstitutional. To doubt is only to affirm the validity of the law." After stating that there are no cases directly declaring such statutes unconstitutional, and instancing the cases of *McLoon* and *Tyler,* in which they were distinctly upheld, and other cases which concede their validity, the Court continues: "As to the contention that the statute before us violates Article II, section 3, of the United States Constitution, we need only say that it applies to the United States Court proceedings relating only to proceedings for offenses against the United States. So does Amendment 6; *Fox v. Ohio,* 46 U. S., 410; *Cook v. United States,* 138 U. S., 157; *Baron v. Baltimore,* 32 U. S., 243; *Spies v. Illinois,* 123 U. S., 131."

We are not inadvertent to the possible inconveniences attending the administration of this law, in cases where the blow is inflicted in distant places, but, as was said in *Tyler's case,* "the expediency or policy of the statute has nothing to do with its constitutionality." It is argued that the statute should be construed in reference to international law, and that it should be confined to citizens of this State who have inflicted mortal wounds elsewhere. It is sufficient to say that we have no authority to so restrict the plain and broad language of the law, and such was the ruling in the cases of *McLoon* and *Tyler, supra.*

After a careful consideration of the able brief of counsel, we must conclude that these authorities are sufficient to warrant us in sustaining the statute under consideration. It may be observed that *S. v. Cutshall,* 110 N. C., 538 (cited on the argument), expressly refrains from passing upon this question, and impliedly recognizes the validity of such legislation in cases of homicide. In that case it was clear that the (804) crime of bigamy was fully completed in South Carolina.

The other exceptions growing out of the provisions of the statute, such as variance and the like, must, under the view we have taken, be overruled. What the indictment should charge as to the place, etc., is satisfactorily discussed in *McLoon's case* and sustains the ruling of his Honor. The other exceptions were not pressed on the argument, but should be noticed. We can see no error in admitting the dying declarations of the deceased, as testified to by Dr. Rone. Under the circumstances stated by this witness, and especially the conversation at the time of the declaration (in which deceased said he would have to die, that he could not live with his head crushed in that way, the witness

telling him that he thought he would die, but hoped he would get well), we think the court was warranted in admitting the testimony. The fact that another witness had told the deceased, just before the doctor saw him, that the doctor had hopes of him, cannot alter the result. This was subsequently corrected by the doctor himself.

Neither is there any merit in the objection to the statement of the prisoner before the justice of the peace. It does not appear that there was any judicial investigation before him.

The plea in abatement was also properly overruled. *S. v. Merritt,* 83 N. C., 677.

After a careful examination of all the exceptions in the record, we see no reason for disturbing the judgment of the court below.

No error.

Cited: S. v. Patterson, 134 N. C., 617, 618; *S. v. Alexander,* 179 N. C., 764.

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(805)

STATE v. BIRD SCRUGGS ET AL.

Indictment for Murder—Practice in Criminal Cases—Withdrawing Jurors—Mistrial—Jury.

1. No appeal lies in a criminal action until after the rendition of final judgment.
2. In the trial of a capital felony the judge may, for sufficient cause, discharge the jury and hold the prisoner for a new trial.
3. A less number than twelve men is not a lawful jury for the trial of an indictment, and a trial by jury in a criminal action cannot be waived by the accused.
4. Where, after the impaneling of a jury in the trial of an indictment for murder and the beginning of testimony, a juror became too ill to continue as such, and the defendant offered to proceed with a jury of eleven men, or to select another juror either from the special venire, which had not been exhausted, but had been discharged, or from the bystanders, and the solicitor declined all the suggestions, it was the duty of the judge to direct a mistrial and hold the prisoner.
5. *Semble,* it might in such case have been permissible for the judge to call a new juror and begin the trial anew, but whether he should do so was entirely within his discretion.

INDICTMENT for murder, tried before *Boykin, J.,* and a jury, at Spring Term, 1894, of RUTHERFORD.

A special venire was returned by order of the court, and a jury selected and impaneled. The State's witnesses had been sworn and one of them had begun to testify. He was interrupted by one of the jurors, who stated that he was sick and unable to continue to serve as a juror.

He was examined at length by the court touching his physical condition. He declared that he had been attacked by sickness; that he could not sit on the case as a juror by reason of his illness, and that it was necessary that he be excused. The court therefore found as a fact that the juror was unable by reason of his sickness to continue to serve as a juror in the case. (806)

The prisoners' counsel offered to proceed with eleven jurors. The solicitor for the State refused to so proceed. The prisoners' counsel then proposed to select another juror from the special venire, which had not been exhausted. The solicitor declined the proposition, the said venire having been discharged and their names having become confused and commingled with those already passed on. Then the prisoners' counsel offered that the sheriff should call from the bystanders and a juror be selected from them; but the State did not accept the suggestion.

Thereupon, the court excused the sick juror and ordered a mistrial and a new trial. The prisoners moved for their discharge. The court refused to discharge them. Prisoners excepted and appealed.

Attorney-General for the State.
Justice & Justice for defendants.

MACRAE, J. No appeal lies in a criminal action until after the rendition of final judgment in the cause. *S. v. Twiggs,* 90 N. C., 685. If the case were properly before us, as on an application for a *certiorari,* we should find no ground for granting the writ, for it has long been settled that, in a trial for a capital felony, for sufficient cause the judge may discharge the jury and hold the prisoner for another trial. In which case it is his duty to find the facts and set them out in the record, so that his conclusion as to the matter of law arising from the facts may be reviewed by this Court. *S. v. Jefferson,* 74 N. C., 309. All this his Honor did, and it will serve no good purpose for us to do more than to say that, upon the facts found, it was the duty of his Honor to direct a mistrial and hold the prisoner. The jury provided by law for the trial of indictments is composed of twelve men; a less number is not a jury, and a trial by jury in a criminal action cannot be waived (807) by the accused. *S. v. Stewart,* 89 N. C., 563. While it might have been permissible to call another juror in place of the one who was sick, and begin the trial anew, it was a matter in the control of the

presiding judge, who we doubt not for good reasons pursued the regular course.

Appeal dismissed.

Cited: Hall v. Hall, 131 N. C., 187; *S. v. Tyson,* 138 N. C., 629; *S. v. Dry,* 152 N. C., 814; *S. v. Rogers,* 162 N. C., 659, 665; *S. v. Ford,* 168 N. C., 167.

STATE v. BILLY McDANIEL ET AL.

Indictment for Murder—Instructions to the Jury—Murder in the First Degree—Intoxication as a Defense.

1. A charge to the jury, on the trial of defendants for murder, that "the question of the lives and deaths of the defendants is in your hands; you must act honestly, conscientiously and *fearlessly*," is not erroneous.
2. On the trial of defendant for murder, it appeared that on the night of the killing defendant declared that if deceased should go home with H. he would kill deceased; that, in company with another, he went to the house of H., where deceased was, drew his pistol and informed H. that he intended to kill deceased as soon as he opened the door; that he then told his companion to "do what he told him," whereupon the latter opened the door and defendant shot the deceased twice, inflicting wounds from which he died: *Held,* that an instruction to the jury that defendant was guilty of murder in the first or second degree, or not guilty, and that the killing was not excusable, justifiable, accidental or manslaughter, was not erroneous.
3. An instruction that if one charged with murder had deliberately formed the intention to kill the deceased, and did so, the fact that defendant was drunk will not make the crime murder in the second degree.
4. On a trial for murder, an instruction that, notwithstanding the intoxication of defendant at the time of the killing, "if you (the jury) are satisfied beyond a reasonable doubt that the defendant had mind sufficient to plan or form a design to kill the deceased, that he deliberated and premeditated upon the killing in consequence of his formed design, then the fact of the intoxication of the defendant would not justify him, but your verdict should be murder in the first degree," was not erroneous.

(808) INDICTMENT for murder, tried before *Jones, J.,* and a jury, at October Term, 1894, of the Criminal Court of BUNCOMBE, and the following are the defendant McDaniel's exceptions to his Honor's charge to the jury:

1. His Honor charged the jury, among other things, as follows: "The question of their lives and deaths is in your hands. You must act honestly, conscientiously and *fearlessly.*" To which the defendant McDaniel excepted.

2. His Honor charged the jury, among other things, as follows: "As in my *opinion* there are no facts in this case from which you can infer that the killing was excusable, justifiable, accidental or manslaughter, I shall not define the law in regard to said offenses or give you the definitions. So, according as you shall find the facts to be, the prisoners are either guilty of murder in the first degree, murder in the second degree, or not guilty." To which the defendant McDaniel excepted.

3. His Honor charged the jury as follows: "A man may be intoxicated, and still have mind enough to plan, deliberate and premeditate. If the intention to kill is deliberately formed, is premeditated, then the mere fact that the defendant was drunk will not make the crime murder in the second degree." To which the defendant McDaniel excepted.

4. His Honor charged the jury as follows: "The court charges you that if any of the evidence is sufficient to raise in your minds a reasonable doubt as to whether the defendant Billy McDaniel formed a deliberate, premeditated design to kill the deceased, then it is your duty to give him the benefit of such reasonable doubt, and he cannot be convicted of murder in the first degree, but only in the second degree, and your verdict should so be." To which the defendant McDaniel excepted.

5. His Honor charged the jury as follows: "If, notwithstanding the fact that you may believe that the defendant was intoxicated, you are satisfied beyond a reasonable doubt that he had mind sufficient to plan a formed design to kill the deceased, that he deliberated and (809) premeditated upon the killing in consequence of his formed design, deliberation and premeditation, then the fact of the intoxication of the defendant would not even then justify him, but your verdict should be murder in the first degree." To which the defendant McDaniel excepted.

Attorney-General for the State.
No counsel contra.

SHEPHERD, C. J. Both of the prisoners were convicted of murder in the first degree, but as no exceptions were taken or errors assigned by the prisoner Webb, and no error appearing on the face of the record, the judgment below must, as a matter of course, be affirmed as to him.

We need, therefore, only consider the exceptions of the prisoner McDaniel.

1. His Honor, among other things, charged the jury: "That the question of their (the prisoners') lives and deaths is in your hands. You must act honestly, conscientiously and fearlessly." We are at a loss to understand how these remarks could have prejudiced the prisoners, as they declare a standard of duty which every person on trial is interested in having impressed upon the jury.

2. Equally untenable is the objection to the instruction that there was no evidence warranting a verdict "that the killing was excusable, justifiable, accidental or manslaughter," and that the prisoners were either not guilty or were guilty of murder in the first or second degree. It appears that on the night of the homicide, and a short while before it occurred, the prisoner McDaniel declared that if the deceased went home with Hannah Winters he would kill him; that, accompanied by the prisoner Webb, he went to the house where the deceased was, and that he drew his pistol and informed "her" (we suppose the said Hannah) that he intended to kill the deceased as soon as he opened
(810) the door. It further appears that he then told Webb to "do what he told him to do," whereupon Webb opened the door and McDaniel shot the deceased twice, inflicting the wounds of which he died. It is too plain for argument that, under this testimony, the prisoner McDaniel was guilty of murder in the first or second degree, as charged by the court.

3, 4 and 5. The remaining three exceptions are addressed to the instruction relating to the element of intoxication as affecting the degree of murder under our recent statute. There surely can be no objection to the instruction that if the jury had a reasonable doubt as to whether McDaniel formed a deliberate, premeditated design to kill the deceased, it was their duty to give the prisoner the benefit of such doubt, and to convict only in the second degree. Neither can there be any question as to the correctness of the following instruction: "A man may be intoxicated and still have mind enough to plan, deliberate and premeditate. If the intention to kill is deliberately formed, is premeditated, then the mere fact that defendant was drunk will not make the crime murder in the second degree." His Honor was therefore correct in charging that, notwithstanding intoxication, "if you are satisfied beyond a reasonable doubt that he had mind sufficient to plan a formed design to kill the deceased, that he deliberated and premeditated upon the killing in consequence of his formed design, deliberation and premeditation, then the fact of the intoxication of the defendant would not even then justify him, but your verdict should be murder in the first degree." We regard the principles embodied in the instruction as so well settled as to dispense with the necessity of discussion. We will refer, however, to Wharton Homicide, 369-371, in which the charge of the court is fully sustained. We have scrutinized the record with the care which the gravity of the offense demands, and we are of the opinion that the
(811) judgment must be

Affirmed.

Cited: S. v. Kale, 124 N. C., 819.

(811)

STATE v. WILLIAM HALL AND JOHN DOCKERY.

Fugitive from Justice—Interstate Extradition—Authority of Governor.

1. A prisoner arrested and held under the provisions of section 1165 of The Code cannot be lawfully detained unless it be made to appear that he is liable to extradition under the Act of Congress passed in pursuance of clause 2, section 2 of Article IV of the Constitution of the United States.
2. No one can in any sense be alleged to have fled from the justice of a State in the domain of whose territorial jurisdiction he has never been corporally present since the commission of the crime.
3. A fugitive from justice is one who, having committed a crime in one jurisdiction, flees therefrom in order to evade the law and escape punishment.
4. Where one has been only constructively present in a State by being deemed by a legal fiction to have followed an agency or instrumentality put in motion by him to accomplish a criminal purpose, he is not a fugitive from justice of such State so as to warrant the Executive of this State to deliver him to the authorities of such State upon the requisition of the Governor of the demanding State.
5. It is competent for the Legislature of a State, in the exercise of its reserved sovereign powers, and as an act of courtesy to a sister State, to provide by statute for the surrender, upon requisition, of persons indictable for murder in such State, although they have never "fled from justice."

CLARK and MACRAE, JJ., dissent.

PROCEEDINGS in habeas corpus, tried before *McIver, J.*

The petitioners Hall and Dockery were incarcerated in the jail of Cherokee County, on a warrant issued by a justice of the peace, charging them with being fugitives from justice from Tennessee for killing in said State one Andrew Bryson.

The judge refused to discharge the prisoners, and recommitted them to jail to await the warrant of extradition, and they (812) appealed.

After setting out the affidavit and the warrant of the justice of the peace, and their arrest thereunder, they show that "at Fall Term, 1892, they were indicted for the murder of Andrew Bryson, and at Spring Term, 1893, were tried and convicted and appealed to the Supreme Court and obtained a new trial (setting out the judgment of the last-mentioned Court, as reported in 114 N. C., 909).

"They further show that at Spring Term, 1894, the judgment and opinion of the Supreme Court were filed in the said Superior Court, and they, being brought to the bar of the court, demanded a trial by jury, whereupon the judge informed the solicitor that he must either try the prisoners or they would be entitled to their discharge, and thereupon the solicitor entered a *nol. pros.*, and the prisoners were discharged.

"They further show that immediately thereafter they were arrested and taken into custody by the sheriff, upon the warrant of the justice of the peace, and that they are advised and believe that, under the Constitution and laws of the State and United States, they are entitled to a jury trial upon said indictment in the State of North Carolina, and that they still stand charged with the murder of said Bryson in the courts of this State, and cannot, whilst so charged, be committed or extradited to the State of Tennessee for trial for the same offense.

"The petitioners further show that at the time of the alleged killing of Bryson they were not in Tennessee, nor have they been in said State since the alleged killing, and they are not fugitives from justice from Tennessee, and they are and ever have been citizens of North Carolina, and at the time of the alleged killing of Bryson were actually in North Carolina, and have not since been in Tennessee.

"They further show that they are not guilty of the alleged
(813) murder in the State of Tennessee or elsewhere, and pray that the writ of *habeas corpus* may issue, directed to the sheriff, or to whomsoever may hold your petitioners in custody, commanding him or them to have your petitioners before your Honor immediately for the purpose of inquiring into the cause of their commitment and detention, and that they be discharged from custody."

His Honor refused to discharge the prisoners, and recommitted them to jail to await the warrant of extradition, and petitioners appealed.

G. S. Ferguson for petitioners.
Attorney-General for the State.

AVERY, J. The defendants were arrested, and are now held under the statute (The Code, sec. 1165), which provides that any one of certain judicial officers therein named, "on satisfactory information laid before him that any fugitive in the State has committed, out of the State and within the United States, any offense which by the law of the State in which the offense was committed is punishable, either capitally or by imprisonment for one year or upwards in any State prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive, and commit him to jail within the State for the space of six months, unless sooner demanded by the authorities of the State wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided," etc. It is manifest that the prisoners cannot be lawfully detained, under the unmistakable language of the law, unless it has been made to appear that they are liable to extradition under the act of Congress, passed in pursuance of Article IV, section 2, clause 2, of the Constitution of the United States, in order

to provide for the surrender of persons charged with criminal offenses "who shall flee from justice and be found in another (814) State."

The prisoners were tried for murder in Cherokee County, and, upon appeal, it was held (114 N. C., 909) that if the deceased, at the time of receiving the fatal injury, was in the State of Tennessee, and the prisoners were in the State of North Carolina, the courts of the former Commonwealth alone had jurisdiction of the offense. The prisoners, if such were the facts, were deemed by the law to have accompanied the deadly missile sent by them across the border, and to have been constructively present when the fatal wound was actually inflicted. As our statute confers no power to detain in custody, or to surrender at the demand of the Executive of another State, any person who does not fall within the definition of a fugitive from justice according to the interpretation given by the courts of the United States to the clause of the Federal Constitution providing for interstate extradition, and the act of Congress passed in pursuance of it, the only question before us is, whether a person can, in contemplation of law, "flee from justice" in the State of Tennessee when he has never been actually but only constructively within its territorial limits. Upon this question there is abundant authority, emanating not only from the foremost text-writers and some of the ablest jurists of the most respectable State courts, but from the Supreme Court of the United States, whose peculiar province it is to declare what interpretation shall be given to the Federal Constitution and the statutes enacted by Congress in pursuance of its provisions, which are declared by that instrument to be the supreme law of the land. If we can surrender under our statute only fugitives within the meaning of the act of Congress, it would seem sufficient to cite *Ex parte Reggel,* where it is held that a person arrested as a fugitive has a right "to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and consequently withdrew from her jurisdiction so that he could not be reached by her criminal (815) process." It is admitted that the prisoners have never withdrawn from the jurisdiction of the courts of Tennessee, and have never been, either at the time when the homicide was committed, or since, exposed to arrest under process issuing from them.

But in a case involving so important a principle, and calculated to excite general interest on the part, especially, of the legal profession, we feel warranted in not only citing but quoting from other authorities. Where a person is charged with cheating by false pretenses by means of a misrepresentation in writing, sent to another State, whereby he procures something of value in the State to which such writing goes, he is deemed to be constructively present where the false pretense is success-

fully used and where the money or property is obtained, and is consequently liable to be indicted and punished there, if he comes within the reach of the process of its courts. *People v. Adams,* 3 Denio (N. Y.), 190. But the Supreme Court of Alabama, in a case exactly in point (*In re Mohr.,* 73 Ala., 63), state the principle applicable here with great clearness and force. The defendant was charged with cheating, by false pretense, a prosecutor in the State of Pennsylvania, though it was admitted that he had never actually gone within the limits of that State. The Court said: "It is clear to our minds that crimes which are not actually but are only constructively committed within the jurisdiction of the demanding State do not fall within the class of cases intended to be embraced by the Constitution or act of Congress. Such, at least, is the rule, unless the criminal afterwards goes into such State and departs from it, thus subjecting himself to the sovereignty of its jurisdiction. The reason is, not that the jurisdiction to try the crime is lacking, but that no one can, in any sense, be alleged to have fled the State in the domain of whose territorial jurisdiction he has never been cor-
(816) porally present since the commission of the crime." That Court cited, to sustain this view, among other authorities, Wharton's Criminal Pleading (8 Ed.), 231; *Kingsbury's case,* 106 Mass., 223; *Ex parte Smith,* 3 McLean, 121, and *Wilcox v. Noyle,* 34 Ohio St., 520. Bouvier (Law Dict., 551) defines a fugitive from justice as "one who, having committed a crime within one jurisdiction, goes into another in order to evade the law and avoid punishment." The same writer says also that the Executive of a State cannot be called upon to deliver up a person charged with a criminal offense in another State, unless it appear that such person "is a fugitive from justice." Rapalje (Law Dict., 555) defines a fugitive from justice as "one who, having committed a crime in one jurisdiction, flees therefrom into another jurisdiction in order to escape punishment." See, also, 1 Abbott's Law Dict., 508, for definition of "fleeing."

To hold that a person, who is liable to indictment only by reason of his constructive presence, is a fugitive from the justice of a State within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still and never ventured within the reach of another has fled from him to avoid injury. One who has never fled cannot be a fugitive. *Jones v. Leonard,* 50 Iowa, 106; 7 A. & E., 646, and note 1, and 647. 2 Moore Extradition, sec. 582, *et seq.,* after quoting the extract already given from *Reggel's case,* cites a number of other cases wherein Governors of States, under well-considered opinions of their legal advisers, have recognized and acted upon the principle that a person cannot be said to flee from a place where he has never actually been, but to which, by legal fiction,

he is deemed to have followed an agency or instrumentality, put in motion by him, to accomplish a criminal purpose. Spear (Extradition, pp. 396 to 400) cites and discusses the authorities bearing upon the question whether a person can be a fugitive from a State into which he has never entered, and not only reaches the same con- (817) clusion at which we have arrived, but maintains *arguendo* that a person who has been extradited as a fugitive cannot be sent back from the demanding State on requisition of the Executive who surrendered him, to answer a crime committed while he was a fugitive, because one who is forcibly taken away does not, in contemplation of law or in fact, flee from justice. The author says that, to assume that an abduction by force, though under legal process, is fleeing, "is a gross absurdity, quite as bad as the theory of fugitives by construction."

Had it not been provided by the Constitution of the United States (Art. IV, sec. 2, clause 2) that "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the Executive authority of the State from which he has fled, be delivered up," etc., the States, as to the right to demand and the power to surrender fugitives from justice, would have sustained relations to each other analogous to those existing between independent nations. *S. v. Cutshall,* 110 N. C., 538. If no stipulation by treaty were now in force requiring the Government of the United States to surrender, on requisition of the authorities of Canada, persons charged with murder in that Dominion, those guilty of such crimes would find this country a safe asylum. In the absence of any provision of law imposing upon the Executive of the State of North Carolina the duty of surrendering, on requisition of the Governors of other States, any person charged with a criminal offense in the demanding States, except such as shall be shown to have fled from justice within the meaning of the Federal Constitution, the Governor must search in vain for authority to issue a warrant of extradition in a case like this before us, as was in effect conceded in *In re Sultan, ante,* 57.

While a statute passed now, and making it murder to wilfully put in motion within the State of North Carolina any force which should kill a human being in a neighboring State, might not be (818) amenable to such constitutional objection as that discussed in *S. v. Knight,* 1 N. C., 143, it would, as to this case, be an *ex post facto* law. But in the exercise of its reserved sovereign powers the State may, as an act of comity to a sister State, provide by statute for the surrender, upon requisition, of persons who, like the prisoners, are indictable for murder in another State, though they have never fled from justice. If it shall be proved that the prisoners were in fact in North Carolina and the deceased in Tennessee when the fatal wound was inflicted, a law may

still be enacted giving the Governor the authority to issue his warrant and deliver them on requisition. Meantime, it may be asked, what can be done to provide for this *casus omissus?* We may answer, in the language of Spear, *supra,* p. 400: "Nothing, by any extradition process, until there is some authority of law for it. . . . State statutes may be enacted to furnish a remedy not now supplied by either Federal or State law." Were the courts, without any semblance of right, to supply the legislative omission, it would be a criminal usurpation of authority, more pernicious to the public interests than the escape of, not two, but scores of criminals. Appellate courts cannot deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation.

The Attorney-General, with commendable frankness, admitted that he could find no authority to sustain his contention. It is not pretended that a single appellate court, Federal or State, or a respectable law-writer, has given any other interpretation to the law than that adopted by us. Courts cannot amend or override constitutions and statutes, and, upon the higher-law idea, anticipate dilatory Legislatures by providing for the safety of the public in the event that anarchists should (819) project deadly missiles across a State border. Mobs can be suppressed under the common law, wherever they may assemble for an unlawful purpose and attempt to put such purpose into execution. But if they could not, it would be the duty of the Legislature, not of the courts, to provide for their suppression. If there is any foundation for apprehending that the disorderly elements of society are watching for opportunity to take life and destroy property, provided they can see a way of escape through the loopholes of defective laws, the representatives of the people must be trusted to meet, if not anticipate, emergencies as they arise. Neither actual nor possible consequences should deter judges from executing the law as it is plainly written. The *argumentum ab inconvenienti,* when used to bring about a modification of a well-established principle of law, should be addressed to the lawmaker, whose province it is to provide a remedy for any evils growing out of its enforcement. Addressed to judges, under such circumstances, it is an invitation or a temptation offered to violate their sacred obligations in order to appease the public.

In *S. v. Spier,* 12 N. C., 491, the Supreme Court declared the prisoner entitled to his discharge upon a writ of *habeas corpus,* where the term of the court expired pending his trial for murder, because he could not be again put in jeopardy for that offense. The defect in the law was subsequently remedied by statute, allowing the court to continue into the next week if a felony were being tried when the week expired. But the Court, composed of *Taylor, Hall,* and *Henderson,* did not hesitate for a

moment because a guilty man might escape. On the contrary, *Judge Hall* said: "The guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be, when it is brought before this Court on a collateral question of law." Courts enforce laws not simply to punish the guilty, but as well to protect the innocent. The law which fails to provide for the extradition of a guilty man must be understood and adhered to, because it may be invoked as (820) a protection to the innocent who are prosecuted without cause, against the annoyance, expense and invasion of personal liberty involved in being extradited. There was error. The prisoners should have been discharged.

Error.

CLARK, J., dissenting: It is a fact agreed in this petition that the defendants being in this State slew the deceased who was over the line in Tennessee. The defendants were indicted in this State for the murder, and convicted. On appeal, the conviction was reversed, this Court holding (*S. v. Hall,* 114 N. C., 909) that there was a defect of jurisdiction because the offense was committed in Tennessee, and that in legal contemplation the parties committing the crime were in Tennessee. If they were in Tennessee when they committed the crime, they are now in North Carolina, and in legal contemplation are necessarily fugitives from justice. If they were not in Tennessee, but in North Carolina, when they committed the crime, then it was error to hold that the defendants could not be convicted in North Carolina. They should be tried in the jurisdiction in which they were when the offense was perpetrated. That has been held to be in Tennessee. If that is sound law, and the defendants were then, in law, in Tennessee, and now, in fact, are in North Carolina, they are, in legal contemplation and within the language and purport of the extradition law, "fugitives from justice." This term is intended to embrace those who, having committed a crime in one State, endeavor to evade justice by being in another State whither the ordinary process of the State where the crime was committed will not reach them. That is the situation of these defendants. They are sheltering themselves from process by being in another State. They are charged with murder in Tennessee and are now where the ordinary process of the courts of that State cannot reach them. They can only be had for trial in the State of the commission of the crime, (821) by application to the Governor of the State where they are to be found. They are proper subjects of extradition.

If a mob, occupying the Jersey side of the Hudson, should shell the city of New York, or from the opposite shore of the Delaware should cannonade the city of Philadelphia, its members would be liable to no

punishment in New Jersey, under the decisions of the courts, because, "in contemplation of law," the mobs are in New York and Pennsylvania. But if it is true, as is contended by the defendants, that the members of the mob cannot be extradited because the mob never was in those cities, it would be a singular state of things. This ruling would also place Savannah, Memphis, St. Louis, Cincinnati, Louisville and hundreds of other cities and towns at the mercy of any mob which might assemble, with weapons of long range, across the State line.

The preamble to the Constitution of these States recites that it was ordained "to form a more perfect union and insure domestic tranquillity." Article IV, section 2, clause 2, provides: "That any person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." It would be a restricted construction, and little calculated to "form a more perfect union and establish domestic tranquillity," to hold that a "fugitive from justice," in the purview of this provision, applies only to persons who, being actually, as well as potentially, in the State where the crime was committed, afterwards departed the same. A person who places himself outside the limits of the State from thence to commit the crime within said State, and ever afterwards avoids going into said State to avoid arrest, as truly "flees from justice" as he who, having committed a crime, flees from the State subsequently.

(822) If an infernal machine sent by mail or express from a distant State explodes and kills the receiver, it is murder committed in the latter State. The sender, skulking in another State to avoid arrest, is as truly a fugitive from justice as if he had accompanied the machine to its destination and then fled. The constitutional provision for extradition, and the laws passed in pursuance thereof, it should be remembered, are not criminal, but remedial provisions. They should therefore be liberally construed to effect the purpose intended to be served, which is to extend into another State, through the medium of its Executive, the process of the State whose laws have been violated. This process having no validity beyond its borders, can only be made available to arrest the person charged with crime by virtue of the Governor of the State, where such person is to be found, acting under the extradition just as a magistrate of one county may indorse a summons issued by a justice of the peace in another county, under The Code.

Civilized man must recoil from the practical ruling that the territory adjacent to State boundaries is a "no man's land," and that murder is privileged if committed across a State line. It may be safely said that the judge who first laid down a ruling from which such result practically

follows did not foresee the purport and effect of his decision. We are called upon to correct, not to perpetrate, his errors, though others have since followed him. It is true that this restricted construction has been placed on this clause by several courts and text-writers. But their opinions are merely of "persuasive authority," as we have often held, and entitled only to the weight due to the reasons they give.

Years ago *Chancellor Kent* (1 Com., 477) said that it would not do "to press too strongly the rule of *stare decisis,* when it is recollected that over one thousand cases in the English and American books have been overruled. Even a series of decisions are not always conclusive, and the revision of a decision often resolves itself into a mere question of expediency." His remark has received added force since by the (823) fact that overruled cases now number several thousand. Especially a constitutional provision cannot be nullified or rendered of no effect by the erroneous ruling of a judge. When the choice is presented us, it is his error, and not the Constitution, which must be disregarded. This is clearly so if the Constitution is superior to the power of a court to amend it by erroneous interpretation.

Courts do not yet claim infallibility and are not above correcting errors, especially in a matter so clearly against the very intent and meaning of the Federal Constitution as a ruling that, though a murder has been committed in the United States, yet a State may be powerless either to try the murderer when found in its borders or to surrender him to another State, where he may be tried.

There is no authority or precedent in this State, and this being with us a case "of novel impression," we are not hampered from giving such construction to the clause as is most consonant to our views of its true intent and purport. It is true the several States might pass statutes broader than the clause quoted from the Federal Constitution, but it is also true that some of them might fail to do so. The Federal Constitution does not contemplate leaving the security of so many cities and towns, lying near State boundaries, dependent upon the inadvertence or unwillingness of the Legislature of a neighboring State to pass an extradition law more liberal than the Federal Constitution. Besides, our statute (Code, sec. 1165) is broader, and authorizes the arrest of "any fugitive" who has committed the crime therein specified "out of the State and within the United States." A fugitive from justice is simply one who, having committed a crime within a State, keeps himself beyond the ordinary process of the courts of such State. The two cases cited from the Supreme Court of the United States, *Ex parte Reggel,* 114 U. S., 642, and *Roberts v. Reily,* 116 U. S., 80, read according to the (824) spirit instead of the letter, sustain rather than militate against

this view. In which case he can be demanded of the Executive of any State in which he may be found.

Even if there had been no constitutional provision and no statute, the comity existing between States in a Federal Union would authorize and require the surrender to another State of a person who has committed murder in that State while standing in this State. Should a man on French soil fire and kill a man across the line on German territory, and the French Government, while declaring its own courts incompetent to try the slayer, should at the same time refuse, as is here done, to deliver him to Germany to be tried, would not war promptly follow? Yet, certainly, the protection to the criminal should be less and the comity greater, between States in the same Union. This comity between States recognizes corporations chartered in other States. It should certainly recognize that murder is a high offense at common law against a sister State, and we should refuse to shelter the perpetrator when demanded for trial.

In refusing to discharge the prisoner, I think there was no error.

MACRAE, J. I join in the above dissent.

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(825)

ROWLAND v. OLD DOMINION BUILDING AND LOAN ASSOCIATION ET AL.

Building and Loan Associations—Foreclosure of Mortgage—Credit for Payments on Stock.

1. A contract by which the stock taken out by a borrower and assigned to the association when the mortgage is executed is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable and, though upheld by the laws of the association's own State, will not be enforced in North Carolina.
2. When the foreclosure has realized enough to pay the sum borrowed, with interest at the rate stipulated on the face of the mortgage, and expenses, and the association has allowed nothing for payments made by the borrower on his stock, which he assigned to the association when he made the mortgage, such assignment is to be treated as merely a pledge of additional security for the loan, and the borrower is entitled to a return of the stock.
3. When the mortgagor and his land were in North Carolina, and he there applied for a loan to a Virginia association having a local board of managers and treasurer, and there executed the mortgage, the North Carolina usury laws apply, though the application was sent to the home office and the money remitted from there, and the bond is payable there, and the local board and treasurer are styled agents, not of the association, but of the local members.

APPEAL from VANCE; *Bryan, J.* Action by W. H. Rowland against the Old Dominion Building and Loan Association, a Virginia corporation, and T. M. Pittman, for an accounting. From the judgment on report of referee, Pittman appealed.

Pittman & Shaw for appellant.
H. T. Watkins for defendant association.

BURWELL, J. The defendant association is a corporation of the State of Virginia. Its home or principal office is in Richmond, in that State. It organized a branch of its business at Henderson, in (826) this State, and there had what is styled a "local board" of officers or managers. One Noell of Vance County applied, through the local board, to the home office, for a loan of $1,000, on 31 May, 1890, "upon bond and mortgage of the property" mentioned and described in his application. He stated in his said application that he understood he was to pay, if he secured the loan, the necessary expenses of securing the repayment of the money, including the charges of counsel for examining title and preparing securities, and that he would furnish an abstract of title. This application was accompanied by a certificate of the local board that the property offered as security was worth $1,500, and that the loan was one which it was desirable for the association to make. In order that he might have the privilege of borrowing money from this association it was necessary that he should become one of its stockholders; and it seems that, at this stage of the business, it was required of those who would be borrowers that they should subscribe for stock whose par value was double the sum proposed to be borrowed. And so Noell subscribed for twenty shares of the stock, par value $2,000, in order to get a loan of $1,000. He then received the sum loaned him ($1,000), and secured its repayment to the association, with 6 per cent interest thereon, and also the payment of installments due on the stock subscribed for (sixty cents per share each month till the stock was worth par), by a deed of trust on his property mentioned in his aforesaid application, and worth $1,500. At the same time, and as a part of the same transaction, he executed the following paper:

"For value received, I hereby assign to Old Dominion Building and Loan Association twenty shares capital stock therein, this day redeemed at $50 per share.

"Witness my hand, this 7 July, 1890. "T. A. NOELL."

We gather from the record that this Virginia corporation (827) insists that, by virtue of these contracts and this conveyance in

trust, it has the right to exact from this borrower, in return for the $1,000 loaned him, payments on twenty shares of stock, at $12 per month, until the stock reached the par value of $2,000, and also $5 per month interest on the sum borrowed until the same time, and also fines for lack of the promptness prescribed in the by-laws of the association for the payment of these dues. Considered apart from all questions about expected profits, the contention of this association is that this borrower has agreed to pay back the money borrowed, with 6 per cent interest, and then to give it, in addition, a bonus of $1,000 for making the loan, and when this is done it will call the game over, and quit. Upon such a settlement, the account would stand thus:

The association loans		$1,000
It receives entrance fees	$ 20.00	
Appraisers' and attorney's fee	15.00	
Interest on $1,000 at 6 per cent, $5 per month for 166⅔ months	833.33	
Dues at 60 cents per share per month till they amount to $100 per share	2,000.00	
Total receipts	$2,868.33	
To which should be added as a proper debit 6 per cent interest on $2,000 for one-half of 166⅔ months	833.33	
	$3,701.66	

In other words, the borrower assumed, it says, a liability to pay $3,701.66 for $1,000 and its use for 166 2-3 months, or about 20 per cent for money. And against this liability is held up the hope that the business of the association will be immensely profitable, so that by reason of such profits the shares will arrive at their par value in a much (828) shorter period than 166 2-3 months. The foundation of such a hope is not easily discerned. Profits, if any come, must come from the pockets of the members alone. They must feed upon one another—the borrowing members on the non-borrowing members, or *vice versa*—for no other victims are in reach. Expenses must be met. Losses, inevitable in every business, will occur. And expenses and losses may not only destroy all hope of profits, but may bring the deluded borrower to the necessity of paying back for the benefit of creditors of the association the money he borrowed after he had settled the debt, as he thought, by the payment of his monthly dues through all the tedious years of his bondage to the association; for, however valid between the borrowing members or stockholders and the association may be their agreement that his debt shall be considered extinguished when he has paid in $100 per share, creditors of the association might rise up and

object to the consummation of this arrangement, upon the very plausible theory that the assets of a corporation should not be applied to the use of the stockholders until the creditors are paid in full. This would be a rude awakening from the pleasant dream that he had borrowed money at 6 per cent and knew an easy way to pay it back. But it is an awakening that may come to all those who have entered into contracts such as that set out in this record, if the contention of the association is sustained.

We have examined the charter of this association to ascertain from what source it obtains capital to be thus invested. Section 7 provides that "paid-up stock may be issued and sold at the price of fifty dollars per share," and that a dividend of $1.50 per share shall be paid semi-annually on such stock, and that when such favored stock matures the holders shall be entitled to draw out $100 per share. Thus, it appears that what it takes from one stockholder, under the pretense that it is lending money at 6 per cent, it gives to another with lavish hand. It is both a taker and a giver of usury. (829)

It appears that the trustees named in the deed of trust have sold the property thereby conveyed to them, and out of the proceeds of that sale there has been repaid to the association all of the debt—principal and interest—due from Noell on account of money borrowed by him. In the settlement made, the borrower got no credit for what dues he had paid on his stock. According to the rules which govern the making of such settlements, as prescribed by the decisions of this Court in *Mills v. Association,* 75 N. C., 292, and other cases, if credit had been allowed for those payments no complaint could be made by the borrowing stockholder or his assignee. *Overby v. Association,* 81 N. C., 56. Such a settlement would have justly and equitably adjusted the account between the association and the borrowing stockholder, and would have terminated his connection with it. But, when the association chose not to give such credit, it decided to maintain Noell's relation to it as a stockholder. Indeed, in its answer, which was filed after the sale of the mortgaged property, it expressly alleged that he "is a stockholder in the defendant association for twenty shares of stock," and "claims the right to enforce a fine of ten cents on each share of stock if monthly payments are not made when due." This allegation would seem to put an end to the controversy, if coupled with the fact that it is now conceded by all parties that out of the proceeds of the sale the debt for borrowed money was paid in full. If a "stockholder for twenty shares of stock," he must own that stock. If he owes the association nothing, it has no lien on the stock. If he owned it, as appears to be granted, he assigned it to the defendant Pittman, who here claims it, and is entitled to take it with its privileges and burdens.

But, apart from this allegation of the defendant that Noell is a stockholder, we think that a careful consideration of all the various
(830) transactions between the parties will lead to the conclusion that the legal effect of the assignment of the stock heretofore set out was merely to place it in the hands of the association as additional collateral security for the loan that day made to the stockholder. The sole consideration for that assignment was the loan. The only charge for that loan was interest at 6 per cent. It was clearly expressed. The association has received back its loan and all the interest it charged. To give it the stock now would be to allow it to keep what it has paid nothing for, and what it has no warrant to claim as a gift.

It has been strenuously argued before us that the decisions of the Court of Appeals of the State of Virginia must be allowed to control us in our construction of the contract between this association and its borrowing stockholder, and our determination of his rights thereunder. It was said by that Court, in the case of *White v. Association*, 22 Grat., 233, when considering an arrangement between the parties then before it, similar to that we are here considering, that "if the transactions and dealings of this association with its members are warranted by the statute, and that statute is warranted by the Constitution, though they may operate harshly and oppressively, it is not the province of the Court to relieve. The fault is in the law, which the Legislature alone can alter, or in the improvidence of the party, which neither the Court nor the Legislature can relieve." We feel no such constraint. We cannot allow such a bargain as this association says it made with the borrowing stockholder to be enforced in the courts of this State. It is unconscionable. It violates the law of this Commonwealth, as construed by repeated decisions of this Court. The rights of the parties must be settled here, where the contract was made. It is in no true sense a Virginia contract. The labored efforts of the association to make it so appear but add to the conviction that it is not so in fact.

Where a party litigant in the courts of this State asserts that
(831) his rights are to be adjudicated, not by the laws of this State, but by those of another; that a contract illegal here shall be enforced because it is legal under the laws of another forum, he must be able to show clearly and conclusively that his case is one that entitles him to make such a demand. In this case the borrower was in this State; he applied for the loan here; there was a local board of managers here; it had a treasurer; the money was paid to the borrower here; he secured its repayment by a mortgage on land situated here; and the mortgage was executed here. Calling it a Virginia contract does not make it one. Sending the application to the "home office," as it is called; remitting the money from Richmond; calling the local board and its

treasurer the agents, not of the corporation, but of the members who live in that locality; providing in the bond that it shall be paid in Virginia—all these things cannot enable the foreign corporation to evade the usury laws of this State.

Under the laws of this State and the decisions of this Court, what a borrowing stockholder of a building and loan association pays into the treasury of the association on stock account is a fund to be applied to the extinguishment of his debt. He has drawn out money in bulk. He pays back by littles. *Mills v. Association, supra.*

The proper method of stating the account between the borrower, Noell, and the association would require that the former should have had credit for what he had paid in on his stock. Had this been done the stock would have been extinguished. It was not done. The stock, therefore, by the act of the corporation, still exists, and belongs, we think, to the assignee, Pittman. The judgment should be modified in conformity to this opinion.

Modified.

Cited: Rowland v. Loan Assn., 116 N. C., 878, 880; *Meroney v. Loan Assn., ib.,* 920; *Strauss v. Loan Assn.,* 117 N. C., 314; *Rowland v. Loan Assn.,* 118 N. C., 178; *Hollowell v. Loan Assn.,* 120 N. C., 287; *MacRackan v. Bank,* 164 N. C., 27; *Tineman v. Faulkner,* 174 N. C., 15.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND ADOPTED

AT FEBRUARY TERM, 1895.

Applicants for License.

1. When Examined.

Applicants for license to practice law will be examined on the first Monday of each term, and at no other time.

2. Requirements and Course of Study.

Each applicant must have attained the age of twenty-one years, and must have read the Constitution of this State and of the United States.

Ewell's Essentials (Vol. I), Cooley's Constitutional Law (Student's edition), or Black on Constitutional Law, and Browne's Domestic Relations.

Williams on Real Property (Ewell's Essentials, Vol. II), with the decisions of the Supreme Court of North Carolina relating to real property, and the statutes altering the common law.

Smith on Contracts (Ewell's Essentials, Vol. II), with cognate decisions of this Court.

Pollock (Ewell's Essentials, Vol. III), Bigelow or Cooley on Torts (Student's edition), with the decisions of this Court on the Law of Master and Servant, Negligence, and Fellow-servants.

Angell, or some other work on Corporations generally, with chapters 16 and 49 of The Code, and the decisions construing them.

Clark's Code of Civil Procedure and Heard on Pleading.

Best (Ewell's Essentials, Vol. III), with North Carolina decisions, or 1 Greenleaf on Evidence.

Toller (or some other good work) on Executors, with chapters 33 and 54 of The Code, in connection with decisions relating thereto, or Shuler on Executors.

Adams's Equity (Ewell's Essentials, Vol. II), or Fetter's Equity Jurisprudence, or Bispham's Principles of Equity.

Browne on Criminal Law, or Ewell's Essentials, Vol. I, Book 4, in connection with chapters 25 and 26 of The Code, and the decisions of this Court relating to them.

The Code of North Carolina, especially the Code of Civil Procedure. It is advisable that all students should read Creasy on the English Constitution. Instructors may excuse students from the study of the law governing advowsons, tithes and other incorporeal hereditaments, not known to the law of this country; of special customs or prerogatives, and of such portions of the law as to prescriptions and forfeiture as are not applicable in the United States.

Each applicant must have read law for twelve months at least, and shall file with the Clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court.

3. Deposit.

Each applicant shall deposit with the Clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

APPEALS—WHEN HEARD.

4. Docketing.

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the Clerk.

Pittman v. Kimberly, 92—562; Avery v. Pritchard, 93—266; Rollins v. Love, 97—210; Greenville v. Steamship Co., 98—163; Porter v. R. R., 106—478; S. v. James, 108—792.

5. When Heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before the completion of the call of the docket of the district to which it belongs and stands for argument in its order. The transcript of the record on appeal from a court in a county in which the Court shall be held during a term of this Court may be filed at such term or at the next succeeding term. If filed before the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless, by consent, it is submitted upon printed argument under Rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless, for cause or by consent it is continued.

Norman v. Shaw, 94—431; Commissioner v. Steamship Co., 98—163; Walker v. Scott, 102—487; Porter v. R. R., 106—478; *In re* Berry, 107—326; Hinton v. Pritchard, 108—412.

6. Appeals in Criminal Actions.

Appeals in criminal cases, docketed before the perusal of the criminal docket for any district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the perusal of the district to which they belong, shall be called immediately at the close of argument of appeals from the Twelfth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. Call of each Judicial District.

Causes from the First District will be called on Tuesday of the first week of each term of the Court; from the Second District, on Tuesday of the second week; from the Third District, on Tuesday of the third week; from the Fourth District, on Tuesday of the fourth week; from the Fifth District, on Tuesday of the fifth week; from the Sixth District, on Tuesday of the sixth week; from the Seventh District, on Tuesday of the seventh week; from the Eighth District, on Tuesday of the eighth week; from the Ninth District, on Tuesday of the ninth week; from the Tenth District, on Tuesday of the tenth week; from the Eleventh District, on Tuesday of the eleventh week, and from the Twelfth District, on Tuesday of the twelfth week.

8. End of Docket.

The call of causes not reached and disposed of during the period allotted to each district, and those put to the end of the docket, shall begin at the close of argument of appeals from the Twelfth District, and each cause, in its order, tried or continued, subject to Rule 6; but at the term of the Court held next preceding the end of the year, no civil cause will be called and tried after the expiration of the twelve weeks designated, unless by consent of parties and the assent of the Court.

9. Call of the Docket.

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the end of the district, by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; except by consent or for cause shown, the first call shall be peremptory. At the first term of the Court in the year a cause may, by consent of the Court, be put to the end of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties, and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on Printed Argument.

When, by consent of counsel, it is desired to submit a case without oral argument, the Court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the Clerk shall make a note thereof on the docket; but the Court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. If Orally Argued.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued, or submitted, except upon leave granted in open Court, after notice to opposing counsel.

12. If Brief Filed by Either Party.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel.

Dibbrell v. Insurance Co., 109—314.

13. Cases Heard Out of their Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or a matter of great public interest, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the Court to discharge him, may make the like assignment in respect to it.

14. Cases Heard Together.

Two or more cases involving the same question may, by leave of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of the argument.

King v. Railroad, 112—318.

WHEN DISMISSED.

15. If Appeal not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the

same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Brantly v. Jordan, 92—291; Avery v. Pritchard, 93—266; Briggs v. Jervis, 98—454; Bryan v. Moring, 99—16; Wiseman v. Commissioners, 104—330; Cox v. Jones, 113—276; Aaron v. Lumber Co., 112—189.

16. Motion to Dismiss.

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or waiver thereof appear therein, or such compliance is dispensed with by a writing, signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

Hutchinson v. Rumfelt, 82—425; Barbee v. Green, 91—158; Cross v. Williams, 91—491; Rollins v. Love, 97—210; Bryan v. Moring, 99—16; Rose v. Baker, 99—323; Hughes v. Boone, 100—347; Walker v. Scott, 102—487; Simmons v. Andrews, 106—201; Porter v. R. R., 106—478; Hinton v. Pritchard, 108—412.

17. Dismissed by Appellee.

If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded, during the week appropriated to the district, at a term of this Court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the Clerk of the Court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been filed, and filing said certificate or a certified transcript of the record in this Court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

Sever v. McLaughlin, 82—332; Wilson v. Seagle, 84—110; Cross v. Williams, 91—496; Avery v. Pritchard, 93—266; Rollins v. Love, 97—220; Bowen v. Fox, 99—127; Walker v. Scott, 102—487; *ib.*, 104—481; Rose v. Shaw, 105—126; Bailey v. Brown, 105—127; Davenport v. Grissom, 113—38; Paine v. Cureton, 114—606.

18. When Appeals Dismissed.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the

case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

Bowen v. Fox, 99—127.

TRANSCRIPTS.

19. Transcript of the Record.

(1) THE RECORD.—In every record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

Green v. Collins, 28—139; S. v. Jones, 82—691; Howell v. Ray, 83—553; S. v. Butts, 91—524; Broadfoot v. McKethan, 92—561; Spence v. Tapscott, 92—576; Bethea v. Byrd, 93—141; Perry v. Adams, 96—347; Smith v. Fite, 98—517; Jones v. Hoggard, 107—349; Drake v. Connelly, 107—463; Mitchell v. Tedder, 108—266; Durham v. R. R., 108—399; Branch v. Bobbitt, 108—525.

(2) PAGES NUMBERED.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(3) INDEX.—On some paper attached to the record there shall be an index thereto, in the following or some equivalent form:

Summons—date ..... page 1
Complaint—First cause of action ..... " 2
Complaint—Second cause of action ..... " 3
Affidavit for attachment, etc. ..... " 4

S. v. Butts, 91—524.

20. Insufficient Transcript.

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the Clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

Green v. Collins, 28—139; S. v. Jones, 82—691; Gordon v. Sanderson, 83—1; Howell v. Ray, 83—558; Moore v. Vanderburg, 90—10; Buie v. Simmons, 90—9; Spencer v. Tapscott, 92—576; Bethea v. Byrd, 93—141; S. v. Preston, 104—733.

21. Marginal References.

A case will not be heard until there shall be put in the margin of the record, as required in Rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. Of Unnecessary Records.

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the Court taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

Grant v. Reese, 82—72; Clayton v. Johnston, 82—423; Tobacco Co. v. McElwee, 96—71; Durham v. R. R., 108—399.

PLEADINGS.

23. Memoranda of.

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Rowland v. Mitchell, 90—649; Daniel v. Rogers, 95—134; Wyatt v. R. R., 109—306.

24. Assigning Two or More Causes of Action.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. When Scandalous.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed, and for this purpose the Court may refer it to the Clerk, or some member of the bar, to examine and report the character of the same.

26. Amendments.

The Court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe." The Code, sec. 965.

Justices v. Simmons, 48—187; Wade v. New Bern, 73—318; Horne v. Horne, 75—101; Wiley v. Logan, 94—564; Grant v. Rogers, 94—755; Walton v. McKesson, 101—428; Wilson v. Pearson, 102—290; Hodge v. R. R., 108—24.

EXCEPTIONS.

27. How Assigned.

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, rulings or judgment of the Court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the Court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the Clerk's office. No other exceptions than those so set out, or filed, and made part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

Swepson v. Summey, 74—551; McNeil v. Chadbourn, 79—149; Lampson v. R. R., 79—404; Turner v. Foard, 83—683; King v. Page, 86—275; McDaniel v. Pollock, 87—503; Neal v. Mace, 89—171; Davenport v. Leary, 95—203; Thornton v. Brady, 100—38; McKinnon v. Morrison, 104—354 (and cases there cited); Pollock v. Warwick, 104—638; Whitehurst v. Pettipher, 105—40; Taylor v. Plummer, 105—36; Helms v. Green, 105—251; Taylor v. Navigation Co., 105—484; Robeson v. Hodges, 105—49; Walker v. Scott, 106—56; Sutherland v. R. R., 106—100; Simmons v. Andrews, 106—201; McMillan v. Gambill, 106—359; Boyer v. Teague, 106—571; Allen v. R. R., 106—515; S. v. Parker, 106—711; Everett v. Williamson, 107—204; Thompson v. Telegraph Co., 107—449; Lowe v. Elliott, 107—718; S. v. McDuffie, 107—885; Smith v. Smith, 108—365; S. v. Brabham, 108—793; Marriner v. Lumber Co., 113—52; McLean v. Bruce, 113—390; Harper v. Pinkston, 112—293; S. v. Caldwell, 112—854.

PRINTING RECORDS.

28. What to be Printed.

Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned, as appear in the record in each action, shall be printed. Such printed matter shall consist of the statement of the case on appeal, and of the exceptions appearing in the record to be reviewed by the Court; or, in case of a demurrer, of such demurrer and the pleadings to which it is entered. If the jury passed upon issues, the issues and findings thereon shall be printed, as likewise all exhibits and pleadings, or parts of pleadings, referred to in the case on appeal as necessary to show the contention of the parties. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it incidental to the argument.

Rencher v. Anderson, 93—105; Witt v. Long, 93—388; Smith v. Fite, 98—517; Bowen v. Fox, 99—127; Horton v. Green, 104—400; Griffin v. Nelson, 106—235; Hunt v. R. R., 107—447; Edwards v. Henderson, 109—83; Finlayson v. Am. Acc. Co., 109—196; Turner v. Tate, 112—457.

29. How Designated.

The counsel for the appellant shall designate such parts of the record as are required to be printed and have the same copied for the printer; if he shall fail to do so, the Clerk of this Court shall cause the same to be done if the appellant shall request it and deposit the cost thereof.

Witt v. Long, 93—388; Briggs v. Jervis, 98—454; Turner v. Tate, 112—457.

30. If not Printed.

If the record in an appeal shall not be printed, as required by this and the next preceding paragraph, at the time it shall be called in its order for argument, the appeal shall, on motion of the appellee, be dismissed; but the Court may, after five days' notice at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals: *Provided, nevertheless,* that this and the next preceding paragraph shall not apply to appeals *in forma pauperis,* but in all such cases the Clerk shall make five typewritten copies of such parts of the record as otherwise would be printed, and furnish same for use of the Court on the argument. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as part of the cost on appeal.

Witt v. Long, 83—388; Rencher v. Anderson, 94—661; Briggs v. Jervis, 98—454; Walker v. Scott, 102—487; Horton v. Green, 104—300; Whitehurst v. Pettipher, 105—39; Griffin v. Nelson, 106—235; Stephens v. Koonce, 106—255; Smith v. Summerfield, 107—580; Edwards v. Henderson, 109—83.

31. Costs of Printing.

Costs for printing the record shall be allowed to the successful party in the case, at the rate of sixty cents per page of the size of the page in the North Carolina Reports, for each page of one copy of the record printed, not exceeding twenty pages, unless otherwise specially allowed by the Court, to be taxed in the bill of costs, and if the Clerk of this Court shall prepare the manuscript copy of the parts of the record to be printed in any appeal, he shall be allowed ten cents per copy sheet for such service, such allowance to be taxed and paid as other fees and charges allowed to the Clerk by law.

Durham v. R. R., 108—399; Roberts v. Lewald, *ib.*, 405.

32. If Record Insufficiently Printed.

If, after a case shall be called for argument, it shall be made to appear to the Court that it cannot be heard intelligently until additional parts of the record be printed, the Court may, on motion of appellee's counsel, continue the cause to the end of the district to give appellant time to print such additional portions, and dismiss the appeal if such order be not complied with.

After argument the Court may, *ex mero motu,* if it appear that required portions of the record have not been printed, suspend the further consideration of the questions raised by the appeal, and cause the Clerk to notify appellant or his counsel to furnish within a reasonable time a sufficient sum to pay for said printing, or the appeal will be continued or dismissed, at the discretion of the Court.

Bethea v. Byrd, 93—141; Hunt v. R. R., 107—447.

ARGUMENT.

33. Oral Arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour and a half, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour and a half.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the Court in a case requiring it; but application for such extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

34. Printed Argument or Briefs.

When the cause is submitted on printed argument under Rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon classified under each assignment, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

35. Copies of Brief to be Furnished.

Fifteen copies shall be delivered to the Clerk of the Court, one of which shall be filed with the transcript of the record, one handed to each

of the *Justices* at the time the argument shall begin, one to the Reporter, and one to the opposing counsel, when he shall call for the same.

36. Brief of Appellee.

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. Cost of Briefs.

The actual cost of printing his brief, not exceeding sixty cents per page of the size of the page in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

Emry v. R. R., 105—44.

38. Reargument.

The Court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

Lenoir v. Mining Co., 104—490; Emry v. R. R., 105—44.

39. Agreement of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

Adams v. Reeves, 74—106; Rouse v. Quinn, 75—354; Walton v. Pearson, 82—464; Scroggs v. Alexander, 88—64; Holmes v. Holmes, 88—833; Office v. Bland, 91—1; McCanless v. Reynolds, 91—244; Short v. Sparrow, 96—348; Manufacturing Co. v. Simmons, 97—89; Graves v. Hines, 106—323; Sondley v. Asheville, 112—694; Hemphill v. Morrison, 112—758; LeDuc v. Moore, 113—275; Graham v. Edwards, 114—228.

40. Entry of Appearance.

An attorney shall not be recognized as appearing in any case unless he shall first sign a printed or written request by him, in his own proper handwriting, addressed to the Clerk of the Court, that he be entered as counsel of record in the case mentioned therein, and such request shall be attached to, and filed with, the transcript of the record in such case; and, upon filing such request, the Clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

Walton v. Sugg, 61—98; Suiter v. Brittle, 90—19.

CERTIORARI AND SUPERSEDEAS.

41. When Applied for.

Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Court below. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

McDaniel v. Pollock, 87—503; Suiter v. Brittle, 92—53; Pittman v. Kimberly, 92—53; S. v. McDowell, 93—541; S. v. Johnston, 93—559; Turner v. Powell, 93—341; Mayo v. Leggett, 96—237; Porter v. R. R., 97—63; S. v. Sloan, 97—499; Briggs v. Jervis, 98—454; Boyer v. Teague, 100—571; Peebles v. Braswell, 107—68; Lowe v. Elliott, 107—718; Guilford v. Georgia Co., 109—310; S. v. Black, 109—856.

42. How applied for.

The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

Currie v. Clark, 90—17; Cheek v. Watson, 90—302; Ware v. Nisbett, 92—202; Spence v. Tapscott, 92—576; Mayo v. Leggett, 96—237; Porter v. R. R., 97—63; State v. Sloan, 97—499; Briggs v. Jervis, 98—454; Bryan v. Moring, 99—16; Williamson v. Boykin, 99—238; Walker v. Scott, 106—56; Graves v. Hines, 106—323.

43. Notice of.

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time of such notice.

Sanders v. Thompson, 114—282.

ADDITIONAL ISSUES.

44. If Other Issues Necessary.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the court below for trial, and the case will be retained for that purpose.

MOTIONS.

45. In Writing.

All motions made to the Court shall be reduced to writing and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the sessions of the Court.

McCoy v. Lassiter, 94—131.

ABATEMENT AND REVIVOR.

46. Death of Party.

Whenever, pending an appeal in this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the cases, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other cases, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined, according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

47. When Appeal Abates.

When the death of the party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. When Certified Down.

"The Clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the Clerks of the Superior Courts, certificates of the decisions of the Supreme Court, which shall have been on file ten days, in cases sent from said Court." Acts 1887, ch. 41.

Cook v. Moore, 100—294; Summerlin v. Cowles, 107—459; S. v. Herndon, 107—934; Scroggs v. Stevenson, 108-260.

THE JUDGMENT DOCKET.

49. How Kept.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each

judgment was entered. On this docket the Clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money—stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and, when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the Clerk at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.

50. Teste of Executions.

When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

Rhyne v. McKee, 75—259.

51. Issuing and Return of.

Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and, thereafter, successive executions will only be issued from said Superior Court, and, when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

PETITION TO REHEAR.

52. When Filed.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the *Justice* to whom it is submitted under Rule 53, such *Justice* may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or

the collection and payment of the same, until the next term of said Court, or until the petition to rehear shall have been determined.

Etheridge v. Vernoy, 71—184; Williams v. Williams, 71—216; Neal v. Cowles, 71—266; Watson v. Dodd, 72—240; Hicks v. Skinner, 72—1; Haywood v. Davis, 81—8; Devereux v. Devereux, 81—12; Earp v. Richardson, 81—5; Smith v. Lyon, 82—2; Young v. Greenlee, 85—593; Grant v. Edwards, 90—31; Strickland v. Draughan, 91—103; Barcroft v. Roberts, 92—249; Emry v. R. R., 102—234.

53. What to Contain.

The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the Clerk of this Court, who shall indorse thereon the time when it was received, and deliver the same to the *Justice* designated by the petitioner, who shall be a *Justice* who did not dissent from the opinion; but the petition shall not be docketed unless such *Justice* shall indorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the Clerk of this Court.

The rehearing may be granted as to the whole case or restricted to specified points, as may be directed by the *Justice* who grants the application.

Kincaid v. Conly, 62—270; *ib.*, 64—387; Bledsoe v. Nixon, 69—81; Holmes v. Godwin, 69—467; Etheridge v. Vernoy, 71—184; Neal v. Cowles, 71—266; Williams v. Williams, 71—216; Hicks v. Skinner, 72—1; Shehan v. Malone, 72—59; Watson v. Dodd, 72—240; Blackwell v. Wright, 74—733; Mason v. Pelletier, 80—66; Haywood v. Davis, 81—8; Devereux v. Devereux, 81—12; Earp v. Richardson, 81—5; Lewis v. Rountree, 81—20; Smith v. Lyon, 82—1; Matthews v. Joyce, 85—258; Mauney v. Gidney, 86—717; Grant v. Edwards, 88—246; Wilson v. Lineberger, 90—180; Carson v. Dellinger, 90—226; Lockhart v. Bell, 90—499; Ruffin v. Harrison, 91—76; Strickland v. Draughan, 91—103; Barcroft v. Roberts, 92—250; White v. Jones, 92—388; Simmons v. Mason, 92—12; University v. Harrison, 93—84; Dupree v. Ins. Co., 93—237; S. v. Starnes, 94—973; S. v. Gooch, 94—987; McDonald v. Carson, 95—377; Fisher v. Mining Co., 97—95; Weathersbee v. Farrar, 98—255; Davenport v. McKee, 98—500; S. v. Rowe, 98—629; Bowen v. Fox, 99—127; Harrison v. Grizzard, 99—161; Farrar v. Staton, 101—78; Clark v. Currie, 103—203; Emry v. R. R., 105—45; Gay v. Grant, 105—478; Morrisey v. Swinson, 106—221; Worthy v. Brady, 108—440.

54. Notice of.

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be given

the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The Court may, however, grant a temporary restraining order without notice.

Ruffin v. Harrison, 91—76.

CLERKS AND COMMISSIONERS.

55. Report in Hand of.

The Clerk and every Commissioner of this Court who, by virtue or color of any order, judgment or decree of the Supreme Court in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the Clerk or such Commissioner professes to act, was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. Report Recorded.

The reports required by the preceding paragraph shall be examined by the Court, or some member thereof, and, their or his approval indorsed, shall be recorded in a well-bound book, kept for the purpose, in the office of the Clerk of the Supreme Court, entitled *Record of Funds,* and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. Books Taken Out.

No book belonging to the Supreme Court Library shall be taken therefrom except into the Supreme Court chamber, unless by the *Justices* of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such case the

Marshal shall enter in a book kept for the purpose, the name of the officer requiring the same, the name and number of the volume taken, when taken and when returned.

CLERK.

58. Minute Book.

The Clerk shall keep a *Permanent Minute Book,* containing a brief summary of the proceedings of this Court in each appeal disposed of.

59. Clerk to have Opinions Typewritten and Sent to Judges.

After the Court has decided a cause, the *Judge* assigned to write it shall hand the opinion, when written, to the Clerk, who shall cause five typewritten copies to be at once made and a copy sent to each member of the Court, to the end that the same may be more carefully examined and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

LIBRARIAN.

60. Reports by him.

The Librarian shall keep a correct catalogue of all books, periodicals and pamphlets in the library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added during the year next preceding his report, to the library, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. Sittings of the Court.

The Court will sit daily, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. Citation of Reports.

Inasmuch as many of the volumes of Reports prior to the 63d have been reprinted by the State with the number of the Report instead of the number of the Reporter, and still other volumes will be reprinted and numbered in like manner, counsel can cite the volumes prior to the 63d either as—

1 and 2 Martin Taylor & Conf.	or	1	N. C.	9 Iredell Law	or	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N.C.Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
1 Hawks	"	8	"	3 " "	"	38	"
2 "	"	9	"	4 " "	"	39	"
3 "	"	10	"	5 " "	"	40	"
4 "	"	11	"	6 " "	"	41	"
1 Devereux Law	"	12	"	7 " "	"	42	"
2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 and 4 Dev. & Bat. Law	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

RULES OF PRACTICE

IN THE

SUPERIOR COURTS OF NORTH CAROLINA

REVISED AND ADOPTED BY THE

JUSTICES OF THE SUPREME COURT

AT FEBRUARY TERM, 1895, BY VIRTUE OF THE CODE SECTION 961.

Barnes v. Easton, 98—116.

RULES.

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the Clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

Walton v. McKesson, 101—428.

2. Surety on Prosecution Bond and Bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, in the docket for the court, the names of the bail, if any, and security for the prosecution in each case, or upon appeal from a justice of the peace.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

Brooks v. Brooks, 90—142; Cheek v. Watson, 90—302.

4. Examination of Witnesses.

When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the court, in a prolonged examination of a single witness. When a

witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further unless by special leave of the court.

Olive v. Olive, 99—485; Dupree v. Ins. Co., 93—237.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the opposite party may file his counter-affidavit, whereupon the motion shall be decided without debate, unless permitted by the court.

(The above rules substantially prescribed by the Supreme Court at January Term, 1815, the last being amended by Acts 1885, chapter 394.)

6. Decision of Right to Conclude not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, except in the cases mentioned in Rule 3, the court shall decide who is so entitled, and its decision shall be final and not reviewable.

Brooks v. Brooks, 90—142; Cheek v. Watson, 90—302; Austin v. Secrest, 91—214; S. v. Keene, 100—509; S. v. Anderson, 101—758; Shober v. Wheeler, 113—370.

7. Issues.

Issues shall be made up as provided and directed in The Code, secs. 395 and 396.

Wright v. Cain, 93—206; McDonald v. Carson, 94—187; Carpenter v. Tucker, 98—396; Mining Co. v. Smelting Co., 99—445; Davidson v. Gifford, 100—18; Humphreys v. Trustees, 109—132; Carey v. Carey, 108—267; Perry v. Jackson, 88—103; Silver Valley Co. v. Baltimore S. Co., 99—445; McAdoo v. R. R., 105—140; Denmark v. R. R., 107—187; Leach v. Linde, 108—547.

8. Judgments.

Judgments shall be docketed as provided and directed in The Code, sec. 433.

9. Transcript of Judgments.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after

the expiration of the term of the court at which such judgments were rendered.

Norwood v. Thorp, 64—682; Farley v. Lea, 20—169.

10. Docketing Magistrates' Judgments.

Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

Johnson v. Sedberry, 65—1.

11. Transcript on Appeal to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes, or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On some paper attached to the transcript of the record there shall be an index to the record in the following, or some equivalent form:

Summons—Date ---------- page 1
Complaint—First cause of action---------- " 2
Complaint—Second cause of action---------- " 3
Affidavit for Attachment---------- " 4

and so on to the end.

12. Transcript on Appeal—When Sent up.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court.

Code, sec. 551; Walker v. Scott, 104—481; Bailey v. Brown, 105—127; S. v. Nash, 109—822; Griffin v. Nelson, 106—235; Roberts v. Lewald, 108—405; Avery v. Pritchard, 93—266.

13. Reports of Clerks and Commissioners.

Every clerk of Superior Court, and every commissioner appointed by such court, who, by virtue or color of any order, judgment or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order, or orders, under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine, or cause the same to be examined, and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by The Code, sec. 545. In such case, the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

See cases cited in Clark's Code (2 Ed.), pp. 554 and 555; Boing v. R. R., 88—62; Davenport v. Grissom, 113—38.

15. Judgment—When to Require Bonds to be Filed.

In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payment shall be directed only when such bonds as required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

McCormick v. High, 75—263; George v. High, 85—113; Young v. Young, 91—359; Tate v. Mott, 96—19; Smith v. Smith, 108—365.

17. Guardian ad Litem—How Appointed.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

Moore v. Gidney, 75—34; Young v. Young, 91—359.

18. Cases Put at Foot of Docket.

All civil actions that have been at issue for two years, and that may be continued, by consent, at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When the continuance shall be ordered, and when a civil action shall be continued, on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion is Certified.

When the opinion of the Supreme Court in any cause which has been appealed to that Court has been certified to the Superior Court, such

cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed.

Laws 1887, ch. 192, sec. 3; Calvert v. Peebles, 82—334; Murrill v. Murrill, 90—120; Spence v. Tapscott, 93—250; Williams v. Whiting, 94—481; White v. Butcher, 97—7; Stephens v. Koonce, 106—222; Cook v. Moore, 100—294.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar Under Control of Court.

The court will reserve the right to determine whether it is necessary to make a calendar, and also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Non-jury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from Justices of the Peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

S. v. Edwards, 110—511.

25. On Consent Continuance—Judgment for Costs.

When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

Mitchell v. Hoggard, 105—173; Seay v. Yarborough, 94—291; Delafield v. Cons. Co., 115—21.

27. Counsel not Sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at the term. Third—All presentments made at preceding terms undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. Books.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

PROCEEDINGS IN MEMORY

OF

HON. EDWIN GODWIN READE

The announcement of the death of Judge Reade, which occurred 18 October, 1894, was made by Mr. Thomas S. Kenan, and upon the adjournment of the Court a meeting of the Bar was held, Chief Justice Shepherd presiding, and Mr. Armistead Jones acting as secretary. A committee was appointed to draft resolutions, and, at an adjourned meeting held on 12 December, 1894, the committee made their report, through Mr. R. H. Battle, as follows:

"Edwin Godwin Reade, LL.D., who died in the city of Raleigh in the early morning of Thursday, 18 October, 1894, was the son of Robert R. Reade and his wife Judith (Gooch) Reade, and was born at Mount Tirzah, in Person County, 13 November, 1812, the same year in which the late Chief Justice W. N. H. Smith, who served with him on the Supreme Court Bench, and the late Justice Thomas S. Ashe, who succeeded him on that Bench, were born.

"His father died during Edwin's early infancy, leaving him to the care of an excellent mother, to whom he always attributed the best characteristics of his life—industry, integrity and Christian piety. From her, too, he probably inherited much of his vigorous mental powers. Her means were very limited, and he obtained his education at an humble school in the neighborhood of his birthplace, except for a year or two, when he was a pupil of Rev. Mr. Morrow, a Presbyterian minister who taught school at Oaks, in Orange County, and of that distinguished teacher, Rev. Alexander Wilson, D.D., then of Granville County, whose friendly counsel and encouragement were always gratefully remembered by him. In the meantime he had assisted in the support of his mother's family by manual labor on a farm, in a carriage shop, and in a tanyard. About the time he became of age he read law, mostly, if not entirely, without a teacher, and, being admitted to the bar, began the practice at Roxboro in 1835. Soon the people of his county, and then those of Granville and Orange, where he attended courts, recognized his faithfulness to business and his ability as an advocate, and his progress was onward and upward. His forensic skill in a few years became such that lawyers like William A. Graham and Hugh Waddell, of Orange; R. B. Gilliam and Mark Lanier, of Granville; William Eaton, Jr., of Warren, and William H. Haywood, Henry W. Miller and George E. Badger, of Raleigh, found him a foeman worthy of their

steel. In skill in the examination of witnesses and in ability to win the minds of juries to his side by persuasive eloquence, he has had few equals in the State.

"In 1855 he was elected to the United States Congress as the candidate of the Whig-American party, over the eloquent John Kerr, and served one term. In 1863 he was appointed Senator in the Congress of the Confederate States by Governor Vance, to fill the vacancy caused by the resignation of Hon. George Davis (to accept the position of Attorney-General of the Confederate States), and during the same year he was elected a judge of the Superior Courts of the State, and served until the end of the war. Under an appointment from Provisional Governor Holden he continued to ride the circuit until the winter of 1865, when he was elected to the Supreme Court with Chief Justice Pearson and Judge Battle. He was also elected President of the State Convention, called soon after the war, to adopt a new Constitution, having been elected a delegate by an almost unanimous vote of the people of his native county. In 1868, on the nomination of both political parties, he was elected Associate Justice of the Supreme Court under the present Constitution, and held the office until 1878, when his term expired. Soon thereafter he was made President of the Raleigh National Bank, and continued at its head and that of the National Bank of Raleigh, which was chartered to take its place, until his death. Successful in finance, as he had been as lawyer, statesman and jurist, the bank became, under his management, one of the most successful institutions of the kind in the South.

"After Mr. Reade's retirement from the United States Congress he served his people, to the great benefit of Person County, as Presiding Justice of the County Court for many years. In 1866 and 1867 he was Grand Master of the Freemasons in the State. He was a member of the Presbyterian Church from his youth, and one of its ruling elders for many years, at his old home and in Raleigh, which was his home since he became a member of the Supreme Court Bench. He received the degree of Doctor of Laws from our State University.

"Judge Reade was twice married—in early life to Miss Emily A. L. Moore, of Person; and she having died, in 1871 to Mrs. Mary E. Parmele, of the town of Washington, who survives him. He had no children. As a husband he was gentle, tender and affectionate; and to his relatives he was generous to munificence. In person he was tall, handsome and graceful, and always dressed in taste as became a gentleman. He was very dignified in his manners, but courteous to strangers and affable with his friends. His enemies, of whom he had but few, seldom returned a second time to excite the expression of his scathing indignation. His courage, moral and physical, was extraordinary, and his will very strong. Without such qualities, as well as great and varied talents, he

could never have attained the success which marked his career in life. His mind was of a very high order.

"As a speaker Judge Reade was not oratorical, but clear, forcible and logical, and so simple and persuasive that he generally captivated his hearers and led them unresisting to his own conclusions. He generally spoke in low tones, but with great distinctness, and his voice was as insinuating as his language.

"As a Judge he was diligent, able and faithful—not the equal of some in the learning of the books, but hardly inferior to the ablest of our jurists in ability to comprehend the principles involved in complicated causes, such as commanded the attention of the Supreme Court during the troublous times of his incumbency. His recorded opinions, to be found in our Reports, from Phillips' Reports to the 79th volume, inclusive, are ever perspicuous, direct and logical. There is no mistaking the points he made or the conclusions to which he came. Seeing clearly himself, he had the gift of making clear to others what he wished to say. His sympathies seemed ever to be on the side of the poor, and the legal profession considered him the special champion of the *homestead* and other exemptions of the debtor. He was for giving him all the protection that the most liberal construction of the Constitution and laws could possibly afford.

"In business dealings Judge Reade was straightforward, honest and particular; and as the material reward of his industry and sound judgment during a long life he amassed a handsome estate. Of his increasing means he proved a just steward, and his charities were wise and liberal, but free from ostentation.

"In a review of his life, with its honors and successes, the many high places he worthily filled, the noble words he spoke and wrote, and the kind deeds he did, the question arises in our minds, How many of the great men of our State, living or dead, have achieved more than Edwin G. Reade?

"The following resolutions are therefore recommended for adoption:

"*Resolved,* 1. That the life of Judge Reade affords an encouraging and stimulating example to the younger brethren of the Bar, ambitious to reap the rewards and honors of the profession, as showing what may be and has been accomplished by industry, integrity, moral courage and devotion to the interests of clients, in spite of many disadvantages.

"2. That the older members have cause for pride in that example and his many accomplishments, as illustrating the ability and high character of the leaders of the Bar during the second and third quarters of the century, in which he was a conspicuous figure.

"3. That we all mourn his loss to this community and the State at large, though he had lived to the age when the strength of man is but labor and sorrow, and died full of years as of honors.

"4. That a copy of these resolutions be sent to the widow of our deceased brother by the chairman.

"5. That a copy of this report and these resolutions be presented to the Supreme Court, with a request that they be entered on its minutes.

"JOSEPH B. BATCHELOR,
"C. M. BUSBEE,
"A. W. HAYWOOD,
"T. W. MASON,
"R. H. BATTLE,
Committee."

Remarks were made by Mr. Battle and Mr. J. B. Batchelor. The report of the committee was adopted, and the proceedings, subsequently presented to the Court by the Attorney-General, were received in the following remarks by CHIEF JUSTICE SHEPHERD:

"The Court is glad to unite with the members of the Bar in the resolutions in memory of the distinguished jurist which have just been presented. For many years he stood before the people of this State in the light that shines upon her public men. The light but served to make more manifest the virtues, the eminent ability and the high integrity of character that emphasized his life. During his entire public career he illustrated the sturdy qualities of mind and heart that win public confidence and ennoble human life. He was called to occupy high official station, judicial and political, and always filled it with honor to himself and to the satisfaction of the people. He lived a quiet, simple, unostentatious life, true to his supreme conviction of duty and blest with constant deeds of sympathy and benevolence.

"As a Judge of this Court he ranked among the ablest who have adorned it during its existence. His ever-unbending honesty of purpose, his individuality, and his strong legal mind constituted a positive force in its deliberations and are reflected in its opinions. His written opinions are a lasting memorial of his great intellectual attainments. He was a true North Carolinian, and as a Judge worthy to sit in her highest Court.

"The resolutions of the Bar will be properly entered upon the records of this Court and published in the Reports."

INDEX

COMMISSIONS OF AGENT.

1. Where plaintiff, who was entitled, under contract with defendant, to commissions on all goods sold within a certain territory, went beyond such territory, at the request of defendant, for the purpose of making sales, and obtained orders which were turned down by defendant, he is entitled to his expenses and reasonable compensation for his time. *McEwen v. Loucheim*, 348.

2. A contract between a commission merchant and a planter, whereby the former agrees to lend the latter a sum of money to draw eight per cent per annum, and the latter agrees to ship cotton in payment, the cotton to be sold by the lender at a commission of two and one-half per cent, is not usurious. *Elliott v. Sugg*, 236.

3. A provision in such contract for the payment of a penalty for failure to ship the cotton will not be adjudged usurious upon the face of the contract, but only upon proof *aliunde* of an intent to make the penalty a device for securing more than the legal rate of interest. *Ibid.*

COMMON CARRIER.

1. The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with a purpose of buying a ticket within a reasonable time, or after having purchased a ticket, and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. *Hansley v. R. R.*, 602.

2. The amount recoverable for a breach of contract of carriage is limited to the damage supposed to have been in contemplation of the parties and actually caused by such breach, and the measure of damage is ordinarily not materially different, whether the defendant fails to comply with the contract through inability or wilfully disregards it. *Ibid.*

3. The rule is that when a passenger is delayed or carried contrary to the agreement, so as to lead to a failure to accomplish the object of the trip, he is entitled to recover, in all cases, at least the sum paid for the ticket, with interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching his destination by means of some other conveyance. *Ibid.*

4. Such rule obtains whether the passenger sues for a breach of the contract or in tort for the disregard of the duty of the carrier to the

CROPS MADE ON WIFE'S LAND NOT SUBJECT TO HUSBAND'S MORTGAGE ON SAME—*Continued.*

crops grown on such land, given by the husband without the knowledge or consent of the wife, for supplies furnished the husband in cultivating the crops, gives the mortgagee no right to recover such crops. *Bray v. Carter*, 16.

CROPS, SEVERANCE OF.

1. A mortgagee of land is not the owner of the crops growing thereon, and if the latter be severed before entry by the mortgagor he cannot recover them except by charging them in equity in a suit between the parties only, upon the insolvency of the mortgagor and the inadequacy of the land as security. *Hinton v. Walston*, 7.

2. Where one in adverse possession of land severs the crops before recovery in an action by the owner of the land, the latter cannot assert any legal right to the crops, and an application for sequestration, in equity, of such crops will not be allowed to the prejudice of an agricultural lienor. *Ibid.*

DAMAGES, ACTION FOR.

1. In an action for damages to a dam and fish-trap caused by floating logs in a stream not "floatable," the plaintiff need not show that the defendant was negligent in handling the logs. *Gwaltney v. Timber Co.*, 579.

2. In an action for damages to a dam and fish-trap by floating logs on a nonfloatable stream, evidence of the value of the annual output of the fishery is competent to show the amount of the damage done. *Ibid.*

3. An action will lie for trespass and injury to property in favor of one who, while not the owner, is in possession, and the damages will be estimated according to his interest therein. *Ibid.*

DAMAGES, EXEMPLARY AND PUNITORY.

1. A father, being entitled to the services of his minor daughter, and it being incumbent on him to pay the expenses attendant upon her illness and death, has a right of action against her seducer for the loss of such services, etc., and the jury may add punitory damages for the injury to his affections and the destruction of his household. *Scarlett v. Norwood*, 284.

2. Exemplary or punitive damages are recoverable in actions of tort only when a bad motive is shown, and only for such acts of trespass on land as are committed through malice or accompanied by threats, oppression, or rudeness to the owner or occupant. *Waters v. Lumber Co.*, 648.

3. Where a contractor for a railroad company, engaged with an agent of the company in locating the right of way across plaintiff's land, asked plaintiff's tenant what kind of a man plaintiff was, whether he had money and could fight a lawsuit, and the agent of defendant said plaintiff was "only a halfway man": *Held*, in the trial of an action for damages for injury to the land that the language of the agent was