ANNOTATIONS INCLUDE 181 N. C.

NORTH CAROLINA REPORTS

VOL. 116

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1895

ROBERT T. GRAY
REPORTER

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FEBRUARY TERM, 1895

A. D. PARKER v. J. N. BEASLEY ET AL.

Practice—Pleading—Equitable Relief—Mortgagor and Mortgagee—Mortgage Lien—Tender of Money Due—Refusal, Effect of.

1. Under The Code practice, whenever either party to an action, by his pleadings, sets up a ground for and prays equitable relief, the court will adjust all equities between the parties whatever be the form of the action.

2. In this State the mortgagee has the legal estate, and the mortgagor is the equitable owner, with the right, until the day of redemption is past, to pay the money according to the contract, and avoid the conveyance at law.

3. A plea of tender of money due is not available unless accompanied by a payment of the sum tendered into court.

4. The unaccepted tender of the amount due on a debt secured by a mortgage on land, and the costs, does not discharge the lien of the mortgage unless the tender be kept good and the money be paid into court. Its only effect is to stop interest and costs accruing after the tender.

(CLARK, J., dissents, *arguendo*, in which MONTGOMERY, J., concurs.)

ACTION tried at Spring Term, 1894, of HERTFORD, before *Armfield, J.*

The defendants, J. N. Beasley and wife, Mary A. Beasley, borrowed money and gave their promissory note for the same, (2) payable to R. E. Beale, on 1 January, 1890, and executed a mortgage, duly probated and recorded, on a certain tract of land belonging to said Mary to said R. E. Beale, to secure the payment of their said note, with the usual power of sale in case of default in such payment, and on 14 April, 1891, said Beale assigned the note to the plaintiff. On 28 October, 1891, Beale, the mortgagee, offered said land for sale under the

power and according to the provisions of said mortgage, when the plaintiff bid it off and offered to pay by surrendering his note and mortgage. The mortgagee declined to make a deed and the defendants did not pay the money. The defendant, on 27 October, 1891, or on the day of said sale, tendered to the plaintiff's authorized attorney the amount of principal, interest and cost then due, which was refused by said attorney. It was found by the jury that there was no sale under the power in said mortgage and that the tender was made as stated.

On 30 September, 1892, the plaintiff instituted this action:

1st. For possession of the land.

2d. For judgment against defendants for the amount of said note "to be discharged upon the surrender of the said land or sale thereof under an order of the court, and for costs and any other necessary relief."

The defendants filed an answer averring among other things that on said 27 October, 1891, the defendants legally tendered the amount, then due the plaintiff, to his attorney, which was refused. The defendants prayed, first, that plaintiff recover judgment only against the defendant J. N. Beasley, and for the amount due on 27 October, 1891, the date of said tender; second, that said land be discharged from any lia-
(3) bility for the payment of said note and that said mortgage be declared satisfied.

At the trial the plaintiff had judgment for the amount of his note, with interest and costs which were due on the said day of tender, and declaring said judgments to be a lien upon said mortgaged land, with an order that after ninety days the said land be sold to satisfy said judgment and to pay over any balance to defendants. To this judgment the defendants excepted, "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed.

L. L. Smith for plaintiff.
B. B. Winborne for defendants.

FAIRCLOTH, C. J. A makes a promissory note to B for borrowed money payable on a day certain, and to secure it he and his wife give B a mortgage on land, duly registered, and the money is used in improving the mortgaged premises. After maturity of the debt and before any sale or foreclosure proceedings begun, the mortgagor tenders to the mortgagee the amount then due principal, interest and costs then incurred, and the mortgagee refuses to accept the tender and surrender his note and mortgage. Does this tender discharge the lien on the mortgaged land? The above statement discloses the only question presented in the record in the present action. It does not appear that the money tendered was deposited anywhere, nor that it was kept ready for the plaintiff in case

of demand, nor that it was tendered at the trial. The plaintiff instituted this action for possession of the land and to recover a judgment on the note, and for a decree condemning and ordering said land to be sold to satisfy his judgment. The defendant pleaded his tender among other things and relied on it as a discharge of the mortgage lien. At the trial the plaintiff had judgment for the principal money and interest and cost, prior to the day of tender, and also in order to sell the (4) land to satisfy the judgment. The defendant Beasley excepted "because the court declined to hold that the tender discharged the lien of the mortgage on the land," and appealed. The effect of a legal tender, in case the security had been wholly personal, is not presented, and we express no opinion on that question, nor is the effect of a tender made before or at maturity, called the law-day, in case of a mortgage security, presented.

We are not aware that the question now before us has ever been directly presented to this Court. In some of our sister states, either by statute or judicial ruling, the mortgage lien is held to be only a mere security or pledge, with the title remaining in the mortgagor, and that a tender kept intact discharges the lien, and in some that the debt is discharged, because the condition of the mortgage contract is performed and that the title of the mortgagor is complete without reconveyance or other equivalent act. This is the result of the harsh rule of the common law. But in those states, if the mortgagor should call on the court of chancery to remove the cloud on his title or to work out any other object, he is required to pay the debt on the principle that he must do equity if he asks for it.

In New York, after several cases much considered, it was finally settled by a divided court in *Kortright v. Cady,* 21 N. Y., 343, that a tender, although not kept good, made after the law-day at any time before foreclosure, discharges the lien. In a few other states the same doctrine prevails, but they all rest on the holding that the mortgage is a mere security or pledge without any legal title in the mortgagee. The several decisions in such states present various phases of the question. In New York, in *Tuthil v. Morris,* 81 N. Y., 99, which was an action to restrain a sale and to have the mortgage canceled of (5) record, on the ground that the amount of the mortgage had been duly tendered and refused, the Court say "a party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage and the costs and interest, at least up to the time of the tender. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have

kept his tender good from the time it was made." And there are many similar decisions in those states.

But it is claimed that the present action is not one for equitable relief. We think this is a misapprehension. It is true that it is an action for possession, for judgment for the amount of the debt "to be discharged upon the surrender of the said land, or the sale thereof under an order of the court, and for costs and any other necessary relief," and the defendant after pleading tender and refusal prays the court "that said land be discharged from any liability for the payment of said note and that said mortgage be declared satisfied." Here, both parties are asking the court to do things which a court of law could not do. Before the Constitution of 1868, neither party could get any equitable relief except by a bill in equity, but under that Constitution and The Code either party can assert and obtain his equitable relief in any action at law by the other party, thus expediting business and saving costs. And the moment either party by his pleadings sets out and asks equitable relief, the court of Equity acquires jurisdiction, clears the deck, and adjusts all equities between the parties, and this view clearly embraces the present case.

In a much larger number of the states, we think the rule is different from that in New York. In North Carolina the mortgagee has
(6) the legal estate and the mortgagor is the equitable owner. Until the day of redemption is past, he may pay the money according to the proviso in the contract and avoid the conveyance at law, and this is termed his legal right of redemption. After the day of redemption is past, he has still an equity of redemption which is a continuance of his old estate. *Hemphill v. Ross,* 66 N. C., 477. Colebrook on Collateral Securities, sec. 157, says there are few states where the mortgage is regarded as merely subsidiary to the debt, an incident to the principal, the shadow which follows and depends upon the substance. "This is not the view taken in this State of these relations, nor is it in harmony with the general course of adjudications elsewhere. The note is the personal obligation of the debtor; the mortgage is a direct appropriation of property to its security and payment." *Capehart v. Dettrick,* 91 N. C., 344 and 353.

The mortgagee may at any time take or recover possession of the mortgaged land, unless expressly forbidden by the terms of the deed or by necessary implication. 1 Jones on Mortgages, sec. 58.

With this view of the mortgagee's estate and its incidents, what is the effect of the tender relied on in this case? Does it discharge the lien? The burden of showing tender and refusal is on the party pleading it. The defendant can derive no benefit from his plea of a tender, because

it is not accompanied by a payment into court of the amount admitted to be due. *S. v. Briggs,* 65 N. C., 159. We have also omitted to notice that a plea of tender is incomplete unless accompanied by a payment of the sum tendered into court. *Terrell v. Walker,* 65 N. C., 91. It was insisted that in the opinion of *Pearson, C. J.,* in *Capehart v. Biggs,* 77 N. C., 261, the expression, "The plaintiff might invalidate a sale made under the power by proof that before the sale, or even (7) on the day of sale, he tendered the balance due with the expenses incurred." We must assume that he meant a tender kept good by payment into court; especially as, in *Cope v. Bryson,* 60 N. C., 112, he had already said that defendant must plead "tender and refusal and 'always ready,' and pay the money into court and take a rule on the plaintiff to take it or proceed further at his peril."

In *Shields v. Lazear,* 34 N. J. Law, 496, it is held, "but an unaccepted tender of the mortgage money, made after the day prescribed in the mortgage, will not affect the lien of the mortgage on the land. It is neither performance of the condition nor payment or satisfaction of the debt. Its only effect will be to stop the running of interest and to subject the mortgagee to the costs of a redemption by bill in Equity. In *Bilzell v. Hayward,* 96 U. S., 580, it is stated that "To have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have the effect when the money is used by the debtor for other purposes." A plea of tender, not accompanied by *profert in curia,* is bad. *Saper v. Jones,* 56 Md., 503. A tender, after default, does not discharge the lien of a mortgage, although sufficient in amount. When a tender is made after the day, it should be kept good. *Crain v. McGoon,* 18 Am. Law Register, 178 (Ill.); *Merritt v. Lambert,* 7 Paige, 344; *Maynard v. Hunt,* 5 Pick., 240; *Matthews v. Lindsay,* 20 Fla., 973. A tender, to prevent the running of interest, must be continuing. Using the money after refusal by the creditor to receive it, destroys this attribute of a legal tender. *Gray v. Angier,* 62 Ga., 596. In tender, where the money is brought into court and deposited and left with the plaintiff, he is entitled to cost only. *Shiver v. Johnson,* 62 Ala., 37. A tender of payment, to be effectual, must be kept good and be ready at any time. To get the benefit of a tender, the money must be placed in the (8) custody of the court, so that it may be awarded to the party to whom it rightfully belongs. *Frank v. Pickens,* 69 Ala., 369. The general rule is that in a plea of tender, it must be accompanied with an averment that the defendant was, and still is, ready to pay it, and that the money is produced in court. 2 Greenleaf, Ev., 589, Part IV. The payment of money into court is an admission of indebtedness to the amount paid in, and whatever may be the result of the trial the money

belongs to the plaintiff, and the party paying it in loses all right to it. 25 A. & E., 943. It is seldom that a case of absolute refusal after tender is made out, for it is generally attended with circumstances that explain the refusal.

Upon the weight of current authorities and upon general reasoning and a due regard for fair dealing, we are of opinion that the defendant's plea of tender was not available, except to stop interest and save him costs after the tender, which was accorded to him at the trial. To decide otherwise might be to let the defendant keep his money, discharge the security and the plaintiff get nothing from any quarter. This would be monstrous.

The law contemplates the payment of just debts. We see no error in the judgment below.

Affirmed.

CLARK, J., dissenting: The defendant, whose land was advertised for sale under a mortgage, tendered the creditor's attorney "all that was due and all costs." The attorney refused to take this unless the mortgagor would in addition pay his fee. This not being done, he sold the land the plaintiff bought and brings this action for ejectment.

The question presented is whether this tender discharged the lien—not the debt—for if it did not discharge the mortgage a purchaser at a sale thus made under it would acquire a good title, and mortgagors in (9) such cases would be at the mercy of the exaction of the creditor or his counsel. This not only would subject mortgagors to a liability to be thus squeezed rather than bear the annoyance and additional cost of a sale under the mortgage with payment of the commission to the trustee for selling—of itself often a considerable burden—but frequently the exaction would be submitted to, rather than lose the opportunity of a private sale to a party who might buy the land if disencumbered.

If a tender by the mortgagor of the full amount due will not discharge the lien but the acceptance thereof by the mortgagee is necessary to have that effect, then the mortgagor, by declining to receive the payment, can (as in this case) add to the lien, by his own wrongful act, the costs of the sale and the commission for selling, unless he is minded to waive an actual sale by receiving payment of the sum the commissions would amount to, in addition to the sum justly due. As the parties can stipulate for the rate of commission for selling, this would simply repeal the usury law and give the mortgagee a safe and sure mode of collecting his illegal rate of interest.

It is true that in the present case the purchaser at the sale was the holder of the mortgage, and recognizing that he could not recover in ejectment under a purchase at a sale made under these circumstances, he

changed front on the trial and asked for a decree of foreclosure instead of a judgment for possession. But the principle involved is the same, and the single question presented is whether a tender of the full amount due on the mortgage, with all cost, is a discharge of the lien. The hardship which would result from holding that it would not, is such as must be apparent to a court of Equity which looks to all possibilities of oppression. There are no direct precedents in this State, but the overwhelming weight of authority elsewhere is that such tender in full would discharge the lien, leaving of course the debt still (10) valid. The carefully written American and English Encyclopedia which puts into its text the prevailing and better doctrine, citing the minority decisions in the note, thus states the generally accepted doctrine: "A tender of the full amount of a debt secured by a mortgage or pledge discharges the lien of the mortgage or pledge. According to the current of authority the lien is extinguished, though tender is not made until after default. It is not necessary, in order to effect a release, that the tender should be kept good or that the money should be paid into court." 25 A. & E., 927, 929. This is sustained in the notes by citation of a great number of authorities, especially from courts of such standing as those of New York, Michigan, Wisconsin, Massachusetts and others, citing also the very few decisions to the contrary. To the same purport is section 893, 1 Jones, Mortgages (5 Ed.), which says, citing authorities: "The rule in several states is that a tender of the amount due on a mortgage after the day fixed for payment is a discharge of the lien just as much as payment is, and in the same way that a tender at common law, made upon the day named in the condition, has this effect. The lien of the mortgage is thereby *ipso facto* discharged, and the holder of the mortgage can only look to the personal responsibility of the person liable for the mortgage debt. To have this effect it is not even necessary that the money should be brought into court or that it should be shown that the tender has ever since been kept good." It is not necesssary here to cite the authorities which are there quoted to sustain the text, but in *Kortwright v. Cady,* 21 N. Y., 343, will be found an unusually able and full opinion showing that this was the doctrine of the common law and that it is fully sustained by authority and reason.

Not only is the doctrine supported by the weight of precedent (11) and consideration of equity and public policy, but it is the actual contract between the parties. This, in the usual form, provides "if the said amount shall be paid, then this mortgage shall be null and void; otherwise it shall remain in full force and effect." When the mortgagor, as in this case, tenders the "full amount due with all cost" he has in equity done all that he can do and the mortgage lien becomes

null and void by the terms of the contract. By its very condition this is so. It is otherwise as to the debt itself. There is no condition as to that. That is absolutely due and remains due till the money is accepted. The tender can only, at most, stop the running of the interest. There is no hardship in this, as there would be in continuing in force a mortgage or other lien after tender made, with the effect of hampering any other disposition of the property or forcing the mortgagor to pay the commission and cost of a sale to prevent the property going into the hands of a purchaser who would acquire a good title at such sale if the tender does not discharge the lien. Of course ingenious reasons can be given by counsel, based upon subtle distinction, to the contrary, and some decisions can be found also to sustain that view, but when every cent due, principal and interest and costs, is tendered the mortgagee, he ought not in good conscience be allowed, against the very terms of his contract, to maintain his lien nevertheless in full force, with the opportunity this gives of exacting (as was demanded in this case) additional sums to buy that release which he is entitled to have upon tender of the full amount due.

So much of the judgment as adjudges recovery against the debtor for the principal money, with interest and costs up to the time of the tender should be affirmed. Neither party excepted to this. But so much of the judgment as directed a foreclosure and sale, notwithstanding
(12) the full tender made, should be reversed. By such tender the condition of the mortgage was fulfilled as fully as the mortgagor was permitted by the mortgagee to do so, and the lien was discharged by the terms of the mortgage.

MONTGOMERY, J., concurs in the dissenting opinion.

Cited: Howell v. Mfg. Co., post, 811; *Smith v. B. & L. Assn.,* 119 N. C., 260; *Hussey v. Hill,* 120 N. C., 316; *Russell v. Roberts,* 121 N. C., 324; *James v. R. R., ib.,* 526; *Carter v. Slocumb,* 122 N. C., 477; *Rhea v. Rawls,* 131 N. C., 454; *Dickerson v. Simmons,* 141 N. C., 330; *Lee v. Manley,* 154 N. C., 248; *DeBruhl v. Hood,* 156 N. C., 53; *Medicine Co. v. Davenport,* 163 N. C., 299; *Owens v. Ins. Co.,* 173 N. C., 376; *Debnam v. Watkins,* 178 N. C., 239.

S. W. AND E. D. SPRINGER v. W. M. SHAVENDER.

Void Judgment—Want of Jurisdiction—Collateral Attack—Sale of Land of Living Persons by Administrator Erroneously Appointed—Estoppel.

1. While mere irregularities in the conduct of a proceeding will not subject the decree therein to a collateral, or even, under some circumstances, to a direct attack, the rule is different when the allegations in the pleadings necessary to jurisdiction of the court are untrue, and where, if the truth had appeared on the record, it would have been the duty of the court on motion, or *ex mero motu*, to have dismissed the proceeding for want of jurisdiction; therefore,
2. Where the children of a person, under a misapprehension of the facts, admitted the allegation in a proceeding for the sale of their ancestor's land, that he was dead, and submitted to a decree for the sale of the land, they will be allowed in a collateral action to impeach such decree and to avoid the estoppel of title derived through it, by showing that their ancestor was in fact alive at the date of the decree and sale.
3. The appointment of an administrator upon the estate of a living man is void for all purposes, and everything that is founded upon it is a nullity, because there was no jurisdiction to appoint. (*Quere*, whether an administration granted, not upon false information as to a person's death, but upon a presumption of law arising from his absence without being heard from for seven years, does not make the acts of the administration valid.)
4. It is within the discretion of the trial judge to submit specific issues arising out of a general issue involved in the pleadings, instead of those that are more general.

ACTION for trespass in cutting trees and removing timber from (13) land, tried at Spring Term, 1894, of BEAUFORT, before *Armfield, J.* The issues submitted and the responses to them were as follows:

1. Was George W. Dixon dead at the time of the institution of the proceedings by his alleged administrator to sell his lands and at the time of the sale thereunder? Answer: Living.

2. Are the plaintiffs the owners of the timber standing upon the lands described in the complaint? Answer: No.

3. Did the defendants unlawfully take possession of the said timber and convert it to their own use? Answer: No.

4. What is the value of the said timber? Answer: _____

5. Did the defendants unlawfully take possession of the logs cut from the lands by plaintiffs? Answer: No.

6. If so, what damage has the plaintiff sustained thereby? Answer: None.

7. Is the defendant Wm. M. Shavender the owner of the lands described in the complaint? Answer: Yes, the Mallison land, not Sears' land.

8. Did the plaintiff trespass upon said land? Answer: No.

9. If so, what damage has the defendant sustained? Answer: ------

The plaintiffs offered to connect themselves with G. W. Dixon, and to connect the defendant with the same source of title the following deeds were offered in evidence:

1. A deed from R. C. Windley to plaintiffs, dated 24 March, 1886, and properly recorded.

2. A deed from W. G. Jarvis, administrator of George W. Dixon, to R. C. Windley, dated 17 May, 1882.

3. A record of special proceedings, No. 190, entitled "W. G.
(14) Jarvis, administrator of George W. Dixon, against George Ann Dixon and others."

4. A deed from Alfred Pilly to George W. Dixon, dated 10 August, 1869. This deed conveyed a tract of land claimed by the plaintiffs to be the Sears land.

5. A deed from M. Shaw, Clerk and Master, to Alfred Pilly, dated 19 November, 1867. This deed is claimed to convey the Sears land.

6. Record in a foreclosure suit of John L. Pilly against Duncan McLaughlin.

7. A mortgage by Duncan McLaughlin to John L. Pilly, dated 24 March, 1861. This mortgage is also claimed to cover the Sears land.

8. A deed from Samuel L. Snell to George W. Dixon, dated 27 February, 1869. This deed conveys a tract known as the "Franklin Mallison land."

9. A deed from Elizabeth Dixon, wife of George W. Dixon, and others, children of George W. Dixon, to Wm. M. Shavender, dated 14 November, 1887. This deed conveyed to the defendant Wm. M. Shavender two tracts of land, known as the "Franklin Mallison land and the William Sears land." The deed was offered to show under whom defendant Shavender claimed and to estop him.

As the case was made to depend upon the finding that G. W. Dixon was living at the time of the sale, at which Windley bought, it is not necessary to give more of the record. The other essential facts are stated in the opinion. The plaintiffs appealed.

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

(15) AVERY, J. The question that confronts us at the threshold of this investigation is one that, as we think, has been heretofore in effect, passed upon by this and other appellate courts, but one which requires careful consideration and discussion. Where the children of a person under a misapprehension of the facts admitted the

allegation of a petition that their ancestor was dead, and submitted to a decree for the sale of his land by his administrator for assets, will they be allowed collaterally to impeach such judgment and avoid the estoppel of title derived through it, by showing that the ancestor was at the date of the decree actually living? It is quite as important that courts of inferior jurisdiction should command the confidence of the public in the regularity and binding force of their decrees, upon which titles depend for their validity, as that appellate courts should be trusted to adhere to decisions upon the stability of which rights of property depend. But while mere irregularities in the conduct of a proceeding will not subject the decree rendered therein to a collateral, or even under some circumstances to a direct attack, the rule is different when the allegations in the pleadings that are essential to the jurisdiction of the court are untrue, and where, if the truth had appeared upon the record, it would have become the duty of the court on motion or *ex mero motu,* to declare the suit *coram non judice.* If, in the special proceeding under discussion, it had appeared that G. W. Dixon was alive or it had not been admitted that he was dead, the very basis of the jurisdiction would have been wanting and there would have been no serious controversy as to the duty of the court to pronounce the judgment a nullity, even when assailed collaterally only. Black, Judgments, secs. 215, 242, 278. The same effect must be given to proof *aliunde,* after the decree is entered, that the person supposed to be dead was in fact alive. *London v.* (16) *R. R.,* 88 N. C., 584; *S. v. White,* 29 N. C., 117; Book of Monographs (void judicial sales), 20; *Withers v. Patterson,* 27 Texas, 497; *Becket v. Seloven,* 7 Cal., 237; *Duncan v. Harper,* 25 Ala., 408; *Griffith v. Frasier,* 8 Cranch, 10 and 22; *Fisk v. Norvell,* 9 Tex., 13; I Herman, Executions, p. 378; *Jochumsen v. Bank,* 3 Allen (Mass.), 87; *Johnson v. Beazley,* 27 Am. Rep., 285; *Thomas v. People,* 107 Ill., 517; *Melin v. Simmons,* 30 Am. Rep., 746; *Morgan v. Dodge,* 44 N. H., 259; Black, *supra,* secs. 218, 219, 220.

In *Hyman v. Gaskins,* 27 N. C., 272 to 275, *Nash, J.,* discusses at length the distinction between such probate judgments as are declared merely voidable, because the court or ordinary had the right to act but did not comply with the requirements of the law, and such as are void, because the court had no authority to act. While the learned judge did not have occasion then to pass directly upon the effect as an estoppel of administering upon the estate of a person before his death, he cited the case of *Griffith v. Frasier, supra,* as one in which *Chief Justice Marshall* had "had occasion to examine the doctrine of void and voidable letters of administration in his usual clear and forcible manner." In the case referred to, the learned *Chief Justice* had said: "But suppose administration to have been granted on the estate of a person not

really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every case, in which letters of administration issue. Yet the decision of the ordinary that the person for whose estate he acts is dead, if the fact be otherwise, *does not invest* the person he may appoint with the charac- be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth was not one within his jurisdiction. It was one in which he had a right to deliberate. points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

But this Court in a later case (*S. v. White, supra*), held that an action could not be maintained upon an administrator's bond, where it was shown that the supposed decedent was in fact alive when administration was granted upon his estate. The decision rested upon the ground that the probate court had no authority, as the agent of the State, to take charge of the property of a person then living, or to take the bond sued upon. This case was cited *arguendo* and approved by *Smith, C. J.*, in *London v. R. R., supra.*

The Court, it is true, has held that where there is a decedent, the acts of an administrator who was not entitled to the appointment under the statute are valid, but that the order appointing such person is voidable in a direct proceeding instituted by those having a superior right. *Garrison v. Cox,* 95 N. C., 353; *Atkins v. McCormick,* 49 N. C., 274. This ruling rests upon the doctrine that in such cases the essential basis of jurisdiction exists, there being a decedent and an estate to be administered. The appointment of the wrong person is but an irregularity, subjecting the order of appointment to direct attack but not invalidating acts done in pursuance of the law, in the course of administration by him who has been inducted into the place by mistake. *McPherson v. Canlif,* 7 S. & R. (Penn.), 422; *Devlen v. Comm.,* 101 Pa. St., 273 (47 Am. Rep., 710); *Johnson v. Beazley,* 65 Mo., 250. In the case last cited the Supreme Court of Missouri quote the language of *Judge Redfield,* that the holding of the Court of Appeals of New York, in the case of *Rodrigas v. Ins. Co.,* 63 N. Y., 460, that the appointment of an administrator upon the estate of a living man could not be attacked collaterally,
(18) was "without precedent either in English or American jurisprudence." But it seems that in a later case, *Rodrigas v. Savings Bank,* 76 N. Y., 318, *Chief Justice Church,* admitting that the authorities at common law were uniformly in conflict with it, rested his apparently reluctant approval of the former case upon the ground that it was founded upon a construction of a statute. The appointment of an administrator upon the estate of a living man is void for all purposes, and

everything that is founded upon it is a nullity, because there was no jurisdiction. "It must always be remembered, says Black (2 Judgments, sec. 633), that in order to the conclusiveness of a probate decree, or in the case of sentence emanating from any other tribunal, it is absolutely necessary that the Court should have possessed jurisdiction." 1 Herman on Estoppel, sec. 411. The finding by the clerk in a proceeding that was *coram non judice* because it was founded upon the false basis of jurisdiction, that G. W. Dixon was dead, does not preclude the heirs at law from showing that he was alive. To make it conclusive, the judgment must be rendered by a court of competent jurisdiction (*Roulhac v. Brown,* 87 N. C., 1); and to give the court authority, its jurisdiction must extend both to the parties and the subject-matter. *Condry v. Cheshire,* 88 N. C., 375; *Morris v. Gentry,* 89 N. C., 248; 1 Black on Judgments, sec. 218. We know of no principle upon which the judgment, void as to G. W. Dixon if he were a party to this action, for want of jurisdiction of the subject-matter, could be held valid without jurisdiction either against the parties to the proceeding or those in privity with them. The court did not have jurisdiction of the estate of Dixon, if he was at the time living, and it was not error to submit this question to the jury. Should a case be presented where administration had been granted not upon false information of a person's death, but upon a presumption of law arising from his absence without (19) being heard from for seven years, a different question might be presented. Whether the acts of an administrator who proceeded honestly upon a presumption, to which the law gave the force of a fact, will not be held, because of such presumption, to be valid, as in some courts has been the decision, where an executor performed a part of his imposed trust under a will afterwards ascertained to be a forgery, we need not now determine. To exclude a conclusion, it may be best, however, to announce that should such a case arise, the question whether it is to be governed by or distinguished from the ruling in that before us, is an open one. Such a case would raise the point whether the presumption of law that one is dead does not confer jurisdiction over a living person's estate, when it could not possibly be acquired in the absence of such presumption.

It was admitted that Mrs. Matilda E. Dixon, wife of G. W. Dixon, was not a party to the proceeding, and it would of course follow that she was not bound by the decree upon other grounds than those relied upon by the heirs at law. *Condry v. Cheshire, supra.*

The court submitted an issue involving the question whether G. M. Dixon was living when the proceeding was instituted and when the decree therein was rendered, and it was answered by the jury in the affirmative. This was one of the questions that grew out of the general

issue of title raised in the pleadings, and it has been repeatedly decided by this Court, beginning with *Emry v. R. R.,* 102 N. C., 209, that it is within the discretion of the presiding judge to determine whether he will submit such specific issues or only those that are more general.

There was no exception to the competency of the testimony
(20) bearing on that issue, except the general one, made to the competency of Surats' deposition that the defendants were estopped by the decree in the special proceeding from denying the title under it, with the consequences, if the position had been well taken, that it would be immaterial whether he was in fact living, as Susan testified he was after the date of the sale under the decree, or dead. But now that we have held that neither the heirs at law, nor the defendant, if in privity with them, are concluded, it seems to us that the finding upon the first issue defeats the plaintiffs' right to recover in any aspect of the evidence. There was no evidence offered on either side tending to show a forcible trespass on the part of the defendants, and it was not error, therefore, to instruct the jury, as the court did without objection, that the ownership of the timber was dependent upon the title to the land entered upon. *Cohoon v. Simmons,* 29 N. C., 189; *McComac v. Monroe,* 46 N. C., 13; *Harris v. Sneeden,* 104 N. C., 369.

The plaintiffs proposed to show title, as the burden rested upon them to do, not by a regular chain from the State, but by making G. W. Dixon the source of title and connecting themselves through the sale and administrator's deed under the decree to R. C. Windley, and by a string of *mesne* conveyances with Dixon. They offered other deeds and evidence to connect the defendant with G. W. Dixon as a common source of title, with the view of insisting that plaintiffs' was the older and better title, and that under the established rule of evidence the defendants were precluded from denying that fact. If the plaintiffs had succeeded in proving that both derived title from the same source by means of the evidence offered, and that of the two chains so exhibited, their own was the better, it would have been as effectual proof of their right against the world,

as a chain extending back to the State, unless the defendants had
(21) connected themselves with some other older and better title.

But since it appears that the proceeding, decree, sale and deed, by which they propose to show title out of G. W. Dixon, are nullities the plaintiffs have failed to connect themselves with the alleged source of title and therefore have failed to establish their right to recover. The judge might have instructed the jury that if they should find in response to the first issue that Dixon was living at the time of sale under the decree, they would find in response to the second issue that plaintiffs were not the owners (as in that event they would fail to show themselves to be) of any of the land for which they brought suit. In that view of

the case, it is not material whether the description in either the plaintiffs' or defendants' deeds was sufficient or insufficient, or whether the testimony complained of was competent or incompetent or the charge was erroneous as to matters not involved in or essential to the determination of the controversy. The response to the first issue was necessarily decisive, therefore, of the first six issues. The remaining three grew out of the counterclaim, which the court held that the defendants could not maintain and the defendants did not appeal.

The plaintiffs have no reason therefore to complain of the charge which was more favorable than they had a right to expect, under the view we have taken of the law. Judgment

Affirmed.

Cited: Carr v. Coke, post, 260; *Springer v. Shavender,* 118 N. C., 41; *Shields v. Ins. Co.,* 119 N. C., 385; *Shober v. Wheeler,* 144 N. C., 408; *Rich v. Morisey,* 149 N. C., 41.

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(22)

J. L. HINTON v. LIFE INSURANCE COMPANY OF VIRGINIA.

Verification of Pleadings—Amendment of Judgment; Invalid When—Conditional Judgment Invalid—Practice—Fragmentary Appeal—Dismissal.

1. Inasmuch as section 633 of The Code gives to commissioners of affidavits full powers to take oaths in matters relating to causes pending in the courts of this State, and section 640 gives to clerks of courts of record in other states the same powers as are given to commissioners of affidavits, a verification of a pleading made before the clerk of the Hustings Court of Richmond, Virginia, and authenticated by his seal, is valid.

2. Courts take judicial notice of the seals of the courts of another state for the purpose of determining the validity of a verification of a pleading, just as they do of the seals of foreign courts of admiralty and notaries public.

3. An amendment of a judgment made by a judge after the last session of a court, in his room at a hotel, without the consent, and in the absence of the opposing counsel, is invalid.

4. A conditional judgment is invalid, and therefore, where a judgment permitting a defendant to verify his answer upon the condition that, if the ruling of the court giving judgment for plaintiff for want of a properly verified answer should be sustained, the defendant would submit to a judgment for a certain amount, the judgment is vitiated by the condition.

5. Fragmentary appeals are not allowed, and hence, when, in an action on an

insurance policy, the court declined to permit defendant to verify its answer unless it would submit to a judgment for a certain amount, and the condition was accepted and judgment rendered for such amount, without prejudice to the right of the plaintiff to claim a further sum, as to which the cause was continued: *Held*, that the judgment being only a partial one, an appeal does not lie.

ACTION, tried before *McIver, J.*, at Fall Term, 1894, of PASQUOTANK.

Upon the call of the case for trial, the plaintiff moved to strike out the answer of the defendant, because it was not verified according to
(23) the statute, and also moved for judgment upon the complaint.

The verification was made before the clerk of the Hustings Court of Richmond, Va. His Honor granted plaintiff's motion and gave judgment as follows:

This case coming now to be heard by the court upon the plaintiff's motion for judgment for default of an answer properly verified, and the court being of opinion that there was no verified answer, granted the motion. Before this judgment was entered defendants asked to be permitted, in the discretion of the court, to verify its answer, which the court granted upon the condition that if the ruling of the court is sustained on appeal the defendant would submit to a judgment for the sum of $456.80, the amount of premium actually paid by plaintiff, which the defendant accepted, but excepted to the ruling of the court and appealed. Thereupon, on motion of plaintiff it is ordered and adjudged by the court that the plaintiff recover of the defendant the sum of $456.80 with interest from 17 September, 1894, till paid, and the costs of this action to be taxed by the clerk. It is further ordered as a further consideration of the exercise of the above discretion in defendant's favor that this judgment shall not prejudice the balance of plaintiff's claim, but his right to same shall be held at a subsequent term and the cause is continued till the next court as to said balance.

Defendant appeals; bond in the sum of $25 adjudged sufficient; thirty days allowed defendant to make up case and thirty days thereafter allowed plaintiff to except. New verification filed as allowed by the court. JAMES D. MCIVER, Judge Presiding.

The words "that if the ruling of the court is sustained on appeal" interlined above were written by myself.

JAMES D. MCIVER, Judge, etc.

(24) Attached to the record is the following statement by his Honor:

The judgment in this cause was rendered and signed by me, except the words hereinafter named, in open court at the regular term,

counsel for both sides being present. After the last session of the court had been held, but before the court had formally adjourned for the term and after plaintiff's counsel had gone home, on Saturday in my room at the hotel without the knowledge or consent of plaintiff or his counsel, at the request of defendant's counsel, I inserted the following words in the judgment before signed by me: "That if the ruling of the court is sustained on appeal." The clerk of this court will send a copy of this statement up as part of the record.

JAMES D. MCIVER, Judge, etc.

Pruden & Vann for plaintiff.
MacRae & Day for defendant.

CLARK, J. The Code, 258, permits verification of pleadings to be made before "any judge, clerk of the Superior Court, notary public or justice of the peace." This refers to those officers in this State, and in *Benedict v. Hall,* 76 N. C., 113, it was held that a verification before a notary public out of the State was insufficient. Thereupon this section was amended (Laws 1891, ch. 140) by inserting after the word "notary public" the words "in or out of the State." The verification in the present instance would therefore have been insufficient under section 258. But The Code, section 633, gives to commissioners of affidavits full powers to take oaths or affirmations in matters "relating to any cause depending in the courts of this State," and every such "affirmation made before him shall be as valid as if taken before any proper officer in this State." And section 640 gives to clerks of courts of record in other states the same powers as are given to commissioners of (25) affidavits.

The verification in this case was made before the clerk of the Hustings Court of Richmond, Va., and is authenticated by his signature and the seal of his court. We are constrained therefore to hold that the verification has been made before a properly authorized officer. For such purposes courts take judicial notice of the seal of the courts of other states, just as they do of the seals of foreign courts of admiralty and notaries public. 1 Greenl., Ev., sec. 479, note 4. The authorities cited to the contrary refer to the proof of the record of a court of another state under the Act of Congress of 1890 and do not apply as to the qualification of an officer of another state to take the verification of a pleading to be used in a court of this State.

The amendment made by the court in the judgment "after the last session of the court, in his room at the hotel, without the consent of the opposing counsel," who indeed was absent, was invalid. *Delafield v. Construction Co.,* 115 N. C., 21. Indeed, had this condition been in the

judgment originally, or been made by consent, or at a legal time and place, it would of itself have vitiated the judgment, since conditional judgments are invalid. *Strickland v. Cox,* 102 N. C., 411; *In re Deaton,* 105 N. C., 59; *Hopkins v. Bowers,* 111 N. C., 175.

An order allowing an amendment in the pleadings or process upon conditions or terms is valid. *Crump v. Thomas,* 89 N. C., 241. It is otherwise as to judgments which must be unconditional.

The judgment was only a partial one, not disposing of the whole matter. The Court has repeatedly held that "fragmentary appeals" will not lie. Clark's Code, 2 Ed., p. 563, and cases there collected. Though the appeal must be dismissed for the reason given, we have passed
(26) upon the point intended to be presented, as this Court has sometimes, though rarely, done. *Milling Co. v. Finlay,* 110 N. C., 411; *S. v. Wylde, ib.,* 500.

Appeal dismissed.

Cited: Walters v. Starnes, 118 N. C., 844; *Barcello v. Hapgood, ib.,* 727; *McGehee v. Tucker,* 122 N. C., 189; *Ex parte McCown,* 139 N. C., 124; *Richardson v. Express Co.,* 151 N. C., 61; *Griffin v. Cupp,* 167 N. C., 96; *Joyner v. Reflector Co.,* 176 N. C., 277.

M. F. WRIGHT v. C. M. BROWN.

Conditional Fee, Estate by Way of—Executory Devise, Assignability of—Estoppel.

A testator devised land to his daughter P., and her heirs, but in case of her death, without issue surviving, then to his daughter A.: *Held,* that P. takes a conditional fee simple in the land, liable to be determined upon her dying without surviving issue, and A. takes, by way of executory devise, a remainder or future estate or interest, which she may assign and convey by deed, which, with warranty, will be an estoppel upon her heirs.

CONTROVERSY submitted without action upon an agreed state of facts, and heard before *Boykin, J.,* at February Term, 1895, of BEAUFORT.

His Honor rendered judgment in favor of defendant, and plaintiff excepted and appealed, assigning as error the holding that the defendant had a good and perfect title in fee. The facts are succinctly stated in the opinion of *Associate Justice Furches.*

Chas. F. Warren for plaintiff.
W. B. Rodman for defendant.

FURCHES, J. James Ellison being the owner in fee simple of (27) the lands mentioned in the case agreed, devised the same to his granddaughter Polly Ann Allison "to be hers and her heirs and assigns. But in case my said granddaughter, Polly Ann, do die leaving no lawful issue at her death, then I devise and bequeath _____ to my daughter Augusta L. Ellison, her heirs and assigns," and died in 1865. That some time after the death of the testator, the said Polly Ann and Augusta L. sold and conveyed this land to Ida M. Swindell by deed with warranty. And by successive conveyances from Ida M. Swindell, the defendant became the owner thereof, and has contracted to sell the same to the plaintiff Wright. That since the date of the conveyance to Ida M. Swindell the said Augusta L. has died, leaving a son surviving her, who is her heir at law. But the said Polly Ann is still living, unmarried, and is about fifty years of age.

Upon these facts the plaintiff alleges that the defendant is unable to give him a good and indefeasible title to the lands, and for this reason refuses to pay defendant the purchase money.

And this presents the question for our consideration, whether the defendant can convey a good and clear title to plaintiff. If he can, plaintiff should not recover in this action; if he cannot, then he should recover.

By the terms of the will of James Ellison, Polly Ann took a conditional fee simple in the land, liable to be determined upon said Polly Ann's dying without leaving issue surviving her. And the said Augusta L. took the remainder, denominated an estate, or interest by way of executory devise. The defendant has a deed from Polly Ann, with warranty, and if it should turn out that she has the fee simple the difficulty would end, and the defendant would have a good title. Therefore, it is seen that the trouble lies in determining what estate or interest Augusta L. took in the land. All hands admit that she took (28) some interest; and defendant contends she took a present vested estate, though subject to be divested by the said Polly Ann leaving issue her surviving at her death; that this estate would pass by descent, and might be devised and assigned. This the plaintiff denies.

The estate of Augusta L., whatever it be, is clearly contingent, and in contemplation of law may never vest—this depends upon the fact whether Polly Ann dies without leaving issue. If it depended upon the death of Polly Ann alone, it would be a vested estate or interest, as it is certain that Polly Ann will die. But it does not do this. The other condition is added, that she must die "without leaving issue living." This in contemplation of law (whatever her age may be) is uncertain and will remain so until her death. But still under our decisions it would seem that Augusta L. had such an interest in these lands as might

be assigned and conveyed by deed, and, with warranty, would be an estoppel to her heirs.

It has been held, as far back as *McDonald v. McDonald,* 58 N. C., 211, followed by *Masten v. Marlow,* 65 N. C., 695, *Bodenhamer v. Welch,* 89 N. C., 78, and other cases, that an heir apparent may sell and assign his expectancy in the estate of his ancestors. And the courts of Equity will enforce such assignments, if they are fair and open, and a sufficient consideration appears. But these transactions, though by deed, are not considered as conveyances, but as executory contracts, which Equity will enforce.

But in this case Augusta had more than a bare expectancy. She had under the will of James Ellison, by way of executory devise, a future estate or interest in the land which might be assigned. *Watson v. Smith,* 110 N. C., 6. But this case falls more directly under the case of
(29) *Foster v. Hackett,* 112 N. C., 555. In that case Mildred Goforth willed the lands in controversy to two single daughters and the heirs of their bodies; and if they died without leaving such issue, then to the survivor; and then to the heirs of the devisor. During the lifetime of the two daughters (the first takers) one of the heirs at law of the devisor (Mildred) sold her interest to the defendant Hackett and conveyed the same by deed with warranty. And this Court held that the grantor (the heir of Mildred) had such an estate or interest in the lands as she might assign and convey to the defendant; and that her heirs (she being dead) were estopped to claim the same. In that case there was the uncertainty as to who would be heirs at law of the devisor Mildred, while in this case there is no such uncertainty. The second taker is fixed by the will, which makes this case stronger for the defendant Brown than that case was for the defendant Hackett. The case of *Starnes v. Hill,* 112 N. C., 1, is cited by plaintiff as authority to support his contention. But we do not think it conflicts with the view we have taken of this case. Indeed, we think it is in harmony with what we have said, and sustains this opinion. There is no error and the judgment is

Affirmed.

Cited: Brown v. Dail, 117 N. C., 43; *Peterson v. Ferrell,* 127 N. C., 170; *Boles v. Caudle,* 133 N. C., 534; *Kornegay v. Miller,* 137 N. C., 663; *Richardson v. Express Co.,* 151 N. C., 61; *Hobgood v. Hobgood,* 169 N. C., 490; *Lee v. Oates,* 171 N. C., 725; *Bourne v. Farrar,* 180 N. C., 137.

(30)

B. B. LATHAM v. W. R. ELLIS.

Parent and Child—Custody of Child.

1. A father is entitled to the custody of his children against the claims of every one, except those to whom he may have committed their custody and tuition by deed, or unless he is found to be unfitted for their care and custody.

2. Where the father of an infant, upon the death of its mother, told the grandparents of the child that the latter should always remain with them, but subsequently desired the custody of the child, and upon refusal brought *habeas corpus* proceedings, and it appeared that the father was of good moral character, industrious and kind, and in every way fitted to care for and educate the child, the custody was properly awarded to him.

PETITION for writ of *habeas corpus,* filed by B. B. Latham to obtain the custody and control of his infant daughter, Julia E. Latham, and heard before *McIver, J.,* Washington, N. C., on Wednesday, 5 December, 1894.

Upon the hearing of the writ the court awarded the custody of the infant, Julia E. Latham, to her father, B. B. Latham, and directed the clerk of the Superior Court of Beaufort to tax the cost of the proceedings against William R. Ellis, who detained the said Julia E. Latham. The court awarded the control and custody of the child to the father upon the following state of facts, to wit:

The father, B. B. Latham, is thirty-two years of age, and is a moral, temperate and industrious man, and is in every way qualified to care for, support and educate his children. That he owns woods land, and for a number of years has rented and cultivated lands. That he is a man in good credit with persons with whom he has business transactions, and his general reputation is excellent.

That on 24 December, 1895, B. B. Latham married Julia F. (31) Ellis, a daughter of Wm. R. Ellis. That there was born of this marriage two children, one boy now about eight years of age and living with the father, and the other, Julia E. Latham, born 10 January, 1889, and now with her grandfather, William R. Ellis. That Julia F. Latham, the wife of B. B. Latham, died ten days after the birth of a second child, the said Julia E. Latham. That at the time of his marriage the said B. B. Latham and wife went to live with the parents of the latter, and continued to live with them until the death of the wife. That the said B. B. Latham contributed to the support of the family, the common support of both families. That the said Latham is of a kind and affectionate disposition, and in every way endeavored to promote the welfare and happiness of his family.

That after the death of Julia F. Latham the said B. B. Latham still continued to live with the parents of his deceased wife, and to contribute to the common support of both families. That he employed and paid one Olivia Hill to wait upon William R. Ellis and his wife in order that the latter might have more time to devote to the children. That a part of the time since the death of his wife the said B. B. Latham assisted in cultivating the farm of the said W. R. Ellis. That on the day of the funeral of his wife the said B. B. Latham stated to his mother-in-law that he never would take the child Julia from them, and if she would take it he would assist all he could in raising it, and subsequently stated to others (among whom was an uncle) that he, Latham himself, never expected to leave the home of W. R. Ellis or take the child. That William R. Ellis is sixty-seven years of age and his wife is of a corresponding age. That they are people of good character and are attached to the child Julia, and would properly care for and support her. That they are kind to the child and their general reputa-
(32) tion is excellent. That William R. Ellis owns a farm containing about forty-five acres of cleared land, and, although he is a man of limited means, lives comfortably.

That the said W. R. Ellis has a daughter now living and married, who has several children, but who do not reside with the respondent. That on 23 November, 1892, B. B. Latham married a second time. That by the consent of the parents of his first wife, he and his second wife went to live with them, and remained with them until 22 November, 1893, when he moved, with his wife and eldest child, to a farm several miles distant. That since February, 1894, the said Latham has not had the custody or control of his child, although on several occasions he has sent for his child to visit him, and has gone for her on other occasions. That from the time the said Latham and wife removed from the home of the said W. R. Ellis the child, Julia, would visit the said B. B. Latham, and this continued until February, 1894. That since that time the said child has not visited her father, and the said W. R. Ellis and wife refuse to surrender the custody of the child to her father.

Upon this state of facts, the court being of the opinion that B. B. Latham, the father, is a suitable person, able and willing to support, educate and raise his child, decided, as a matter of law, that the father is entitled to the custody of the child Julia.

From this judgment the said W. R. Ellis prayed an appeal. Pending the appeal, the court declined to take said child from the said W. R. Ellis and to give her to the father.

Chas. F. Warren and B. B. Nicholson for plaintiff.
J. H. Small and W. B. Rodman for defendant.

MONTGOMERY, J. In contests between parents in respect to (33) the custody of their children, whether in suits for divorce or in *habeas corpus* proceedings where the husband and wife are living in a state of separation without being divorced, the court or judge before whom the suit or proceedings are heard may award the charge and custody of the child or children to either the husband or the wife, as may appear to be for the best interest and welfare of the child or children. Code, sections 1570 and 1661. But in the case before us the contest is not between husband and wife, but it is between the father of the child and her maternal grandparents. Under the common law, the father's claim to the custody of his minor children, under all circumstances, was paramount. The courts of chancery, however, upon assuming jurisdiction over the persons and estates of infants, overruled the common law in this particular, and have for a long time exercised the right to commit the custody and tuition of infant children to others than the father, in cases where he grossly and recklessly neglects their interests, or is guilty of coarse and brutal treatment of them. Chancellor Kent, in 2 Com. 205, writes: "The father, and on his death, the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But courts of justice may in their sound discretion and when the morals or safety of interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere."

In North Carolina the father has always been entitled to the custody of his children against the claims of every one except those to whom he may have committed their custody and tuition by deed (Section 1562 of The Code); or unless he is found to be unfitted to keep their charge and custody by reason of his brutal treatment of them, or his reckless neglect of their welfare and interests, when their care will be (34) committed to some proper person on application to the courts.

In our case, the respondents had no written contract or deed from the petitioner-father concerning the custody of the child. In the findings of fact by his Honor, the father was found to be a young man, moral, temperate and industrious, and in every way qualified to care for, support and educate his children, to be possessed of property and in good credit, and of excellent reputation.

There is no error in the ruling of the court below, in which the child was remanded to the custody of the father, and the ruling of his Honor is

Affirmed.

Cited: McDonald v. Morrow, 119 N. C., 674; *Newsome v. Bunch,* 144

N. C., 17; *In re Turner,* 151 N. C., 478; *In re Jones,* 153 N. C., 316; *Howell v. Solomon,* 167 N. C., 591; *Atkinson v. Downing,* 175 N. C., 246; *In re Means,* 176 N. C., 310; *In re Warren,* 178 N. C., 45.

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(35)

J. W. SPRUILL v. DAVENPORT & MORRIS.

Sale on Consignment—Commission Merchant—Factor, Duty of.

1. When fish are consigned to a factor for sale, with general instructions, it is proper and the duty of the factor to ascertain their condition and quality by having them inspected before putting them on the market. He has also a discretion as to the time and manner of selling, provided he acts in good faith and with ordinary diligence.

2. When a consignor gives a peremptory order for the sale of goods consigned, it becomes the factor's duty to sell at once, exercising due care and prudence, and if he cannot sell at any price he should report that fact and ask for instructions.

3. A factor or broker receiving express instructions must conform strictly thereto, and if loss result from his disobedience, he is responsible to his principal in damages.

4. The fact that a commission merchant has made advances to a consignor on goods consigned for sale does not relieve him from the duty of following express instructions concerning the sale, especially when it does not appear that the consignor is insolvent.

ACTION tried before *Graves, J.*, and a jury at Fall Term, 1893, of CHOWAN.

There was a verdict for the plaintiff, and judgment thereon for $749.62, and defendant appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

Spier Whitaker, J. H. Blount and W. M. Bond for plaintiff.
Battle & Mordecai and Pruden & Vann for defendants.

FAIRCLOTH, C. J. The summons was issued 3 December, 1892. It appears from the pleadings that in May, 1892, the plaintiff shipped from Edenton to the defendants in Richmond, Va., a certain quantity of fish in barrels and kegs to sell in that market on commission. The action is for damages by reason of defendants' failure to exercise due diligence and care in selling, and in failure to sell. Some of the fish had been sold and some were in defendants' hands when the summons

issued. At the trial the plaintiff had judgment and the defendants appealed.

The only exceptions are to the second, fifth and sixth sections of his Honor's charge to the jury.

The plaintiff introduced evidence to show that the fish were good and were "number one," and that the defendants were negligent and careless in selling and failing to sell. The defendants introduced evidence to show the contrary in each particular. On 6 June, 1892, the plaintiff wrote to defendants as follows: "Please sell fish shipped by me some time ago and now in your hands. Do so please at once, and oblige, Yours truly, J. W. Spruill." The whole evidence was (36) submitted to the jury and his Honor charged:

1. If defendant exercised proper care and diligence to sell the fish in the condition in which they were received, they performed their duty. The burden is upon the plaintiff to show a want of diligence, of which they must satisfy the jury.

2. That the defendants were bound to sell the fish of the plaintiff within a reasonable time after they were received and for the best market prices they would bring in the Richmond market, and after the plaintiff's letter of 6 June, 1892, it was the duty of defendants to sell at once for the best market price.

5. If, however, they were instructed to sell at once by the plaintiff, it was their duty to sell as soon as they could sell, although they may have thought better prices could be obtained by waiting.

6. As to the proper care and handling of the goods intrusted to them for sale, for their own protection in business they had the right to know the quality and condition of the goods (the fish) before offering them for sale. Although not bound by law to have the fish inspected, they had the right to do so; but in having the inspection made, it was their duty to use every reasonable care, such as men of ordinary prudence in their lines of business would use in the management of their own goods, their own fish, but they did not have the right to procure a careless or incompetent inspector, or make a careless inspection and to make an untrue report of the condition of the fish; and if they employed such a careless or incompetent inspector, and he made a careless and untrue report, and carelessly or corruptly made a wrong classification of the plaintiff's fish, reporting fish as second class, which ought to have been reported as first class, and thereby the sale of the plaintiff's fish was injured and they were made unsalable, the defendants would (37) be liable for such damages as the plaintiff sustained thereby.

The defendants' exception to sections 2 and 5 are in effect that the charge in said sections takes no account of the state of accounts between the parties, nor of the defendants' interest because of their advance-

ments; and to section 6 that there was no evidence that the inspection and report classifying some of the fish as "number two" nor of carelessness or negligence in selling or not selling, on the part of the defendants.

The issue was for the jury under proper instruction. The defendants examined witnesses to show that the fish were not in good condition and that some were classed "number two" by the inspector chosen by them.

The plaintiff testified that the goods were in good condition when shipped, and introduced one witness who said that on 28 September, 1892, at request of plaintiff, he examined some of the fish and found them in good condition, and that he told defendants they were number one and that he could sell them to a Petersburg broker. Plaintiff also introduced two witnesses, who testified that in September after the fish had been inspected, they received some of the fish at Suffolk, Va., and sold and used some of them, and that they were in good condition. We think there was evidence on both sides fit to go to the jury, and we think that plaintiff's evidence by strong implication tended to show undue attention on the part of the defendants, and we see no error in the charge in the sections to which exceptions were filed. When the fish were received by defendants for sale with general instructions, it was proper and their duty to ascertain the condition and quality of
(38) the goods before putting them on the market. They were also invested with a discretion as to the time and manner of selling, provided they acted in good faith and with ordinary diligence.

The defendants' duty, however, was materially changed after 8 June, 1892, when they received an order to sell "at once." They were then bound to sell at once, exercising still due care and prudence in doing so, and if they could not sell on any terms, it was their duty to report that fact to their principal and receive directions. When a factor or broker has received express instructions, he must pursue those instructions strictly, and if he does not, he is responsible to his principal in damages for any loss arising from such disobedience. Russell on Factors and Brokers, Law Lib., vol. 48, marg. page 18. The making the advances was not a condition precedent to the duty of selling under the instruction, 6 June, 1892. Besides, there is no suggestion that plaintiff was insolvent and *non constat* that the defendants could not have collected any balance due them on their account.

Affirmed.

JOHN FUTRELL ET AL. v. LUCY C. DEANES ET AL.

Practice—Appeal from Judgment for Costs.

Where it appears from the record on appeal that the only question involved is one relating to the payment of costs, the appeal will be dismissed.

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

There was no objection to the rulings or charge of the court, or to the issues submitted. The jury found that the plaintiffs were the owners of and entitled to the possession of the land and to $600 (39) damages, and that the defendants were entitled to receive $1,191 for betterments, etc. His Honor rendered judgment for the possession of the land by the plaintiffs after payment to the defendants the amount adjudged. The judgment further declared:

"It is further adjudged and decreed that upon the verdict of the jury the defendants are entitled to the sum of five hundred and ninety-one dollars ($591) over and above the amount allowed to plaintiffs for damages, and that the said sum, less the costs of the action, is and is hereby adjudged to be a charge upon the said land in favor of the defendants with interest from 16 April, 1894.

"It is further ordered and adjudged that if the said sum, with interest, less the costs of the action, is not paid on or before Monday of the next term of this court the said land be sold on that day by L. J. Lawrence and L. L. Smith, who are hereby appointed commissioners for that purpose, and who are ordered, after due advertisement according to law, to sell the same at public outcry at the courthouse door in Winton for cash, and that after report of said sale and confirmation they distribute the net proceeds as follows: First, to the payment of the costs of this action; second, to the payment of the sum of five hundred and ninety-one dollars ($591) and interest (less the amount paid for costs) to the defendants as adjudged; third, the balance to be distributed to the plaintiffs according to their respective interests therein.

"It is further adjudged that when the plaintiffs shall have paid to the defendants the amount adjudged to be due them, writ of possession may be issued to the plaintiffs for the immediate possession of the land."

The defendants excepted to so much of the judgment as taxed them with costs. (40)

L. L. Smith for plaintiffs.
Winborne & Lawrence for defendants.

FAIRCLOTH, C. J. It appears from the record that the only question was, which party should pay the costs. Such questions are not considered in this Court. *S. v. R. R.*, 74 N. C., 287; *Hasty v. Funderburk*, 89 N. C., 93.

Appeal dismissed.

Cited: Elliott v. Tyson, post, 184; *Monroe v. Angel, post,* 847; *Elliott v. Tyson,* 117 N. C., 115; *Herring v. Pugh,* 125 N. C., 438; *Van Dyke v. Ins. Co.,* 174 N. C., 81.

W. H. MORRIS & SONS v. J. J. BURGESS ET AL.

Foreign Judgment; Competency of, in Evidence—Estoppel.

1. The same effect is given to a judgment rendered in a court of one state when offered in evidence in this State, as an exemplification of it would have in another court of the state in which it was rendered.
2. Whether or not the record of a judgment rendered in one state must be specially pleaded in order to give it a conclusive effect upon an opposing party in a suit in another state, yet a former judgment is both competent and conclusive as to the merits in case it was rendered after issue joined in the action in which it is offered as evidence; therefore,
3. Where, after action begun in this State on a note, judgment was rendered in another state in an action on the same note, and plaintiff was refused permission to amend the complaint so as to declare on the judgment instead of the note, such judgment was competent and conclusive evidence to show the amount due on the note.

(41) ACTION tried before *Armfield, J.*, and a jury, at Spring Term, 1894, PERQUIMANS.

L. L. Smith for plaintiff.
J. H. Blount for defendants.

AVERY, J. The action was brought for judgment upon a note under seal and for foreclosure of a mortgage upon land executed to secure the debt. The court had in its discretion refused to allow an amendment, declaring on a judgment rendered on the bond in a court of competent jurisdiction of the State of Virginia, instead of upon the bond itself.

The plaintiff offered on the trial a properly certified copy of the (42) judgment to prove that the defendants still owed the debt, for which the note was given. The defendants excepted to its admission as evidence of the debt and also to the instruction subsequently

given by the court to the jury, that it concluded the defendants from showing any payment upon the debt.

It was held by this Court in *Peebles v. Guano Co.*, 77 N. C., 233, that a judgment in proceeding of attachment was "conclusive evidence that the debt sued on was due to the plaintiff in it to the value of the property attached but of nothing more." The court in that proceeding *in rem* acquired no jurisdiction of the person, and the judgment could be used to show nothing except the right of recovery to the value of the property proceeded against. Herman on Estoppel, section 322; *Winfree v. Bagley,* 102 N. C., 545. But for that purpose and to that extent it was competent. Here the action upon the note in the same state was *in personam,* but is admissible upon the same principle as in the other case, when it was offered, not to prove the debt sued on but to show the amount of damage the plaintiff was entitled to recover. Bigelow on Estoppel, p. 48 (5 Ed.).

The Constitution of the United States, Art. IV, sec. 1, and the Act of Congress passed in pursuance of it (U. S. Rev. Stat., sec. 509) were construed at an early day as giving to a judgment of a sister state the same effect as an exemplification of it would have in another court of the same state in which it was rendered. *Mills v. Daryes,* 7 Cranch, 481; *Hampton v. McDonnell,* 3 Wheat., 234. When such judgment is made the basis of an action, it is conclusive on the merits in every other state, if it appear that the court in which it was rendered had jurisdiction of the parties and the subject-matter. 2 Black, Judgments, sec. 857 and 859. The rule is that the judgment "if valid at home" is valid in any other state, and when sued on is conclusive on the (43) merits, even though under the laws of the state in which suit is brought to enforce it, such a judgment would have been void on account of the manner or form of entering it. *Ritter v. Hoffman,* 35 Kans., 215; 2 Black, *supra,* sec. 859.

The authorities in this country are conflicting upon the question whether one party must plead the record of a judgment of a sister state in order to give it a conclusive effect upon the opposing party. 2 Black, Judgments, sec. 783. Even where it is conceded to be the general rule, however, that a record is available as an estoppel only when specially pleaded, a former judgment, whether domestic or foreign, is both competent and conclusive as to the merits in case it was rendered after issue was joined in the action in which it is offered as evidence. A. & E., 33, and note 3; 2 Black, Judgments, sec. 784, and note. The judgment under consideration was rendered after the Fall Term of the Superior Court of Perquimans, when the pleadings were filed and the plaintiff could not have made it the basis of an action begun before it was in existence. He had had no opportunity to avail himself of it till the trial.

For the reasons given and upon the authorities we feel no hesitation in holding that the exemplification of the judgment of a sister state was admissible in evidence. Without entering into a discussion of the general doctrine of pleading specially records, deeds or matters *in pais,* relied on to work an estoppel, there can be no question about the right to offer the evidence constituting the alleged estoppel, where it appears that there has been no opportunity afforded a party to specially plead it. In our case not only was the judgment obtained after this suit was at issue, but the plaintiff took the doubtful precaution of asking to be allowed
(44) to declare upon a cause of action which might have been contended did not exist when the action was brought. There was No error.

W. S. CARTER ET AL. v. S. A. LONG, ADMINISTRATOR OF CALEB SPENCER, DECEASED.

Practice—Judgment According to Prayer of Complaint.

Where the statement and prayer of a complaint clearly and with certainty fix the amount to which plaintiff is entitled to judgment, and this Court, on appeal, decides that the plaintiff is entitled to recover the amount demanded in the complaint, and, upon the case being certified to the court below, a judgment following the words of the prayer of the complaint was rendered, it will not be disturbed.

WHEN the opinion of this Court (114 N. C., 187) was certified to the Superior Court of HYDE, the plaintiffs, at Spring Term, 1894, before *Armfield, J.,* moved for judgment as follows:

1. For the sum of $3,000, being the purchase money paid by Carter to Spencer for the 50 acres of land, with interest on the same from 10 December, 1851, the date of the conveyance; or,

2. For the said sum with interest on the same from 25 April, 1882, the date of the death of James W. Borden, the life tenant; or,

3. For the sum of $3,000, with interest from the first of said dates, subject to credit of $1,250, with interest from 1 September, 1847,
(45) the date of the conveyance by Carter to Spencer.

The court declined to render each of the said judgments asked in the order named, and rendered judgment for $750 and interest from 12 November, 1888, at 8 per cent per annum. To the refusal of the

court to render either of the judgments prayed for as above, the plaintiffs excepted and appealed.

Chas. F. Warren for plaintiffs.
No counsel contra.

FURCHES, J. This case was before this Court on the appeal of plaintiffs at February Term, 1894, when the Court decided that "There should have been judgment for plaintiffs for the sum demanded in the complaint, this being much less than the purchase-money paid by Carter to Spencer." 114 N. C., 187. This opinion was certified to the court below, and at Fall Term, 1894, the plaintiffs moved for judgment upon the opinion so certified. The court granted this motion and gave the plaintiffs judgment for "$750 with interest thereon at 8 per cent per annum from 12 November, '1888, and the further sum of $8.57 as demanded in the complaint." The plaintiffs being dissatisfied with this judgment appealed again to this Court, and contend that plaintiffs are entitled to judgment for $2,500, with interest thereon from 25 April, 1882. So there is nothing for the Court to decide upon this appeal except as to the amount of the judgment, and this is to be determined by ascertaining "the amount demanded in the complaint."

Upon an examination of plaintiffs' complaint, paragraph 4, we find the following allegation: "Plaintiffs therein (referring to the action of *Borden v. Carter*) elected to take the unimproved value of the land, which was ascertained by the jury to be $1,500, which sum (46) was declared to be a lien upon the said tract of 100 acres, of which the tract conveyed by Spencer to Carter formed one-half." "That, by reason of the breach of warranty and the eviction of defendants under a paramount title, the plaintiffs in this action are entitled to recover of the defendant S. A. Long, administrator of Caleb Spencer, one-half the amount paid by them under said judgment, in said suit brought by Henry V. Borden and others, to wit, the sum of $750 with interest thereon at 8 per cent from 12 November, 1888, and the sum of -------- dollars, one-half of the cost of said action."

This statement of plaintiffs' complaint seems to fix the amount to which plaintiffs were entitled to judgment, under the decision of this Court at February Term, 1894, so clearly and with so much certainty that we cannot conceive how there can be any misunderstanding about the matter. We therefore hold that the judgment of the court below, appealed from, gave plaintiffs all they are entitled to have. There is

No error.

(47)

W. S. CARTER ET AL. v. S. A. LONG.

Practice—Appeal—Dismissal for Failure to Print Record—Motion to Reinstate.

1. A motion to reinstate an appeal which has been dismissed for failure to print the record will not be allowed except for good cause shown.

2. The fact that an appellant requested the clerk of the court below to ask the clerk of this Court to have the record printed and send him the bill, which he would pay, but sent no money and concerned himself no further about it, will not entitle him to have his appeal, which has been dismissed, reinstated.

C. F. Warren for plaintiff.
W. B. Rodman for defendant.

CLARK, J. This is a motion to reinstate this appeal, which was dismissed at this term for failure to print, as required by Rules 28 and 29. The motion to reinstate in such cases is allowed only for good cause shown. *Horton v. Green,* 104 N. C., 400; *Whitehurst v. Pettifer,* 105 N. C., 39. In the present case no affidavit was filed. Counsel filed a written statement, upon information, that the appellant had requested the clerk of the court of his county to request the clerk of this Court to have the record printed and send him the bill, which he would pay. This is not controverted, and taking it to be true, still no money was sent, nor does it appear that the appellant ever took the trouble to ascertain whether his request had been complied with or not, though he had received no bill for the printing. As has often been said, this rule was adopted to expedite the trial of appeals, and appellants will not be permitted to obtain delay by neglecting to observe it. *Edwards v. Henderson,* 109 N. C., 83; *Pipkin v. Green,* 112 N. C., 355. Pointed notice was given in *Hunt v. R. R.,* 107 N. C., 447, that the Court would feel compelled thereafter to enforce the rule rigidly. As was said in *Paine v. Cureton,* 114 N. C., 606, "an appellant cannot simply take an appeal, pay the clerk's fees for transcript and thereafter leave the appeal to take care of itself like a log floating down a river or corn put in the hopper of a mill. The appeal requires attention." The appellant has
(48) not shown such attention as entitles him to have the appeal reinstated.

Motion denied.

Cited: Wiley v. Mining Co., 117 N. C., 490.

WITZ, BIEDLER & CO. v. S. A. AND J. M. GRAY.

Practice—Application for Receiver—Ancillary Remedy Not Allowed When Plaintiff is Not Entitled to Main Relief—Principal and Agent —Husband and Wife.

1. To entitle a party to an ancillary remedy he must show that he is entitled to the main relief demanded in the complaint.

2. A judgment cannot be recovered against a *feme covert* on a note alleged to have been executed by her unless the complaint names and describes separate estate belonging to her chargeable with the debts.

3. A judgment cannot be recovered against a married woman in an action against her and her husband when the complaint alleges that the husband is the debtor.

4. Where a receiver is applied for upon the ground that, by reason of fraud practiced upon the plaintiff by defendants in the purchase of goods, and that the title never vested in defendants, it is necessary to allege and prove that the goods for which the receiver is applied for are identically the same goods so fraudulently obtained.

5. A husband who, with the wife's consent, acts as the general manager of her store, has no implied authority to execute in her name a note in payment for goods previously purchased.

MOTION for a receiver, heard before *Brown, J.*, at chambers, in an action pending in BEAUFORT Superior Court.

The motion was refused and plaintiff appealed. The complaint was as follows:

Plaintiffs, for cause of complaint, say:

1. That plaintiffs are partners doing business in the city of (49) Baltimore and State of Maryland.

2. That the defendant S. A. Gray is justly indebted to the plaintiffs in the sum of $735.85, with interest from October 18, 1893, until paid, evidenced by a promissory note, a copy of which is attached, marked Exhibit A, the original of which plaintiffs have and are ready to produce when required.

II. For a second cause of action plaintiffs say:

1. That J. M. Gray was during the year 1893 engaged in conducting the business of a merchant in the town of Washington, county of Beaufort and State of North Carolina, under the name of S. A. Gray, his wife.

2. That said business had been theretofore conducted in Dare County.

3. That during said year defendants ordered goods, wares and merchandise to the value of $735.85; that said goods were ordered under the

name of S. A. Gray by J. M. Gray and were shipped to S. A. Gray, and were duly received by J. M. Gray under the name of S. A. Gray.

4. That on 6 June defendants gave to the plaintiffs the paper-writing, a copy of which is hereto attached, marked Exhibit A. That said paper-writing was given by J. M. Gray under the name of S. A. Gray. That the said mercantile business was owned and conducted by J. M. Gray under the name of S. A. Gray, and there is now due plaintiffs the sum of $735.85 with interest from 18 October, 1893, until paid.

III. For a third cause of action plaintiffs say:

1. That S. A. Gray is a *feme covert* and the wife of J. M. Gray, and that as such she is possessed of a separate personal estate, to wit, a stock of goods in the brick store on Main Street in the town of Wash-
(50) ington, between the stores of E. W. Ayers and S. T. Nicholson.

2. That the said S. A. Gray carries on a mercantile business in the town of Washington, buying goods from northern merchants and retailing them out again. That J. M. Gray, her husband, is the active business manager of the said business and the same is carried on with his consent.

3. That during the year 1893 said S. A. Gray, by and with the written consent of her said husband, bought from plaintiffs large quantities of goods which in the aggregate amounted to $735.85. That said goods were ordered by letters and in person in the house, which letters were written by J. M. Gray.

4. That on 6 June, 1893, in consideration of the said goods having been shipped, said S. A. Gray, by and with the written consent of her said husband, executed to plaintiffs her promissory note for $735.85, a copy of which is attached as Exhibit A, and that the said J. M. Gray signed said note as agent for his wife and the consideration inured to the benefit of said S. A. Gray's separate estate.

5. That there is now due on said note the sum of $735.85, with interest from 18 October, 1893, until paid, which said sum is in equity a charge upon said S. A. Gray's separate estate.

IV. For a fourth cause of action plaintiffs say:

1. That during 1893 the defendants, J. M. Gray and S. A. Gray, fraudulently contriving and intending to cheat and defraud plaintiffs and others, falsely, fraudulently, and without any intention of paying therefor, ordered from plaintiffs large quantities of goods, to the value of $735.85.

2. That the said goods were ordered in the name of S. A. Gray, a *feme covert,* the defendants well knowing that said defendant
(51) would not be bound by any contract S. A. Gray might make.

3. That in pursuance of said plan, as aforesaid, defendants ordered (especially J. M. Gray) said goods to S. A. Gray, and they

were shipped to S. A. Gray under the belief that she was capable of contracting.

4. That said goods were received by defendants, and in pursuance of their said plan and scheme, they fraudulently converted the same to their own use. That there is due plaintiffs on account of said purchase $735.85.

Then follows the prayer for judgment.

Exhibit A was as follows:

$735.85. WASHINGTON, N. C., 6 June, 1893.

One hundred and thirty-one days after date I promise to pay to the order of Witz, Biedler & Co., seven hundred and thirty-five 85-100 dollars, at Bank of Washington, Washington, N. C., without offset, for value received. MRS. S. A. GRAY.

Per J. M. GRAY.

The answer of S. A. Gray was as follows:

FIRST CAUSE OF ACTION.

1. That she believes section 1 to be true.

2. That she denies section 2 as alleged, and expressly denies that she, or any one by her authority, executed for her any promissory note to plaintiffs.

SECOND CAUSE OF ACTION.

1. That she admits she was engaged in conducting a mercantile business in the town of Washington during 1893, and that J. M. Gray, her husband, acted as salesman in such business; otherwise section 1 is denied.

2. That she admits having conducted a mercantile business in (52) the county of Dare prior to removing to Washington.

3. That she admits that she purchased a bill of goods from plaintiffs on or about the ____ day of _____, 1893; that said goods were purchased by verbal order, and not by written order, and that plaintiffs charged for the same the sum of $735.85; and otherwise section 3 is denied.

4. That she denies that she gave or executed to plaintiffs the paper-writing referred to in section 4, and she avers she had no knowledge of the same, nor did she consent to the execution thereof, nor has she since ratified the same, and she did not request her said husband to signify his consent in writing that she might charge her separate estate, and he had no authority from her to do so. She denies that the consideration of

said alleged paper-writing was the shipping of any merchandise by plaintiffs to her. She denies, again, that her husband, J. M. Gray, owned or had any interest in her said mercantile business. She denies that she is indebted to plaintiffs in any sum in law, or that her separate estate, if any, is liable to be charged with the payment of any alleged indebtedness to plaintiffs.

THIRD CAUSE OF ACTION.

1. That she admits that she is a *feme covert* and the wife of J. M. Gray. She admits that she conducts a small mercantile business in the town of Washington on Main Street as described and owns the small stock of merchandise therein, and if such be deemed a separate estate, otherwise not; and she admits she is insolvent.

2. That she admits that she employs her husband, J. M. Gray, as retail salesman, but she avers that she controls and directs the business, and that she submits that as a *feme covert* she can legally buy merchandise and personal property, and sell the same, with or without the
(53) consent of her said husband.

3. That sections 3, 4 and 5 are denied.

FOURTH CAUSE OF ACTION.

1. That sections 1, 2, 3 and 4 are denied.

For a further defense this defendant says:

1. That for several years prior to 1893 she had purchased merchandise from plaintiffs, that plaintiffs well knew that she was a married woman, and also her legal disability as such.

2. That she denies that she ever executed any executory contract or promissory note to plaintiffs by and with the written consent of her husband, or that she ever authorized her husband to do so in her name; and she avers that she never at any time requested her said husband to give his written consent thereto, and if it was attempted to be done it was without her knowledge or consent or ratification.

3. That, if the defendant had any separate estate in the way of a stock of merchandise, as alleged, in the year 1893, she has not the identical separate estate at this time, the same having been disposed of in the course of trade. That she denies that the purchase of merchandise, as alleged, was for the benefit of her separate estate.

The motion for a receiver was declined, and plaintiffs excepted and appealed to the Supreme Court.

W. B. Rodman for plaintiffs.

J. H. Small and Shepherd & Busbee for defendants.

FURCHES, J. This is an action of Witz, Biedler & Co. against J. M. Gray and S. A. Gray, husband and wife, to recover $735.85 for goods sold to defendants, for which note, marked Exhibit A, was afterwards given to plaintiffs, and is brought to this Court upon a motion for a receiver before *Brown, J.*, which was refused, and plaintiffs (54) appealed.

This motion is made then in aid of the main relief demanded, and to entitle plaintiffs to this relief, they must allege and show that they are entitled to the main relief, that is, that they are entitled to recover a personal judgment against S. A. Gray, if she were a *feme sole.* And then they must show their equity to entitle them to this ancillary relief in aid of their main relief.

Plaintiffs cannot have this ancillary relief under the first count in their complaint, for the reason that they have failed to name and describe any separate estate as belonging to the *feme* defendant. *Jones v. Craigmiles,* 114 N. C., 613.

Plaintiffs cannot have this relief under the second count in their complaint for the same reason assigned above (*Jones v. Craigmiles, supra*), and for the further reason that in this count they allege that they sold the goods to J. M. Gray and that he is their debtor, and not S. A. Gray, the wife.

Nor can plaintiffs have this relief under the fourth count in their complaint, for the reasons given why they are not entitled to relief under the first count (*Jones v. Craigmiles, supra*), and for the further reason that if they are entitled to recover on this count in their complaint, it would be upon the grounds of fraud practiced on plaintiffs by defendants in the purchase of the goods shipped to them, and that the title never vested in defendants, but is still in plaintiffs. But it is not alleged that the goods now in the store of defendants are the same shipped to them in 1893, which it would be necessary to allege and show to entitle plaintiffs to their motion under this count. In fact it was conceded by the learned counsel for plaintiffs that they were not entitled to this motion under either of these three counts; but he insisted that he is entitled to have a receiver appointed on the third count in his (55) complaint. And this brings us to one of the questions to be considered and determined in this appeal. And we are of the opinion that plaintiffs are not entitled to a receiver under this count. We have said that plaintiffs are not entitled to have this ancillary relief unless they are entitled to the main relief demanded in their complaint; that is, unless they are entitled to a personal judgment against Mrs. Gray, were she a *feme sole.* It is not alleged that Mrs. Gray signed the note declared on, but that J. M. Gray, the husband, signed the note, and that he was the agent of his wife and as such agent was authorized to do so.

The allegation of the complaint that plaintiffs insist constituted the husband the agent of his wife and authorized him to execute the note sued on, marked Exhibit A, is as follows: "That J. M. Gray, her husband, is the active business manager of the said business and the same is carried on with his consent." Defendants admit that J. M. Gray is the husband of S. A. Gray, and that he is her clerk in said store, selling the goods therein, and that he is the general manager of the same, and that all this is by the wife's consent. But defendants deny that J. M. Gray was the agent of S. A. Gray to sign said note, and Mrs. Gray denies that she had any knowledge of the fact that her husband had given such a note, or that she has in any way ratified the same; that her husband in signing said note acted without any authority from her to do so, and without her knowledge or consent.

This presents the question as to the validity of the note, and involves the question of principal and agent. It was admitted on the argument that a husband may be the agent of his wife; and it is admitted in the answer of defendant that J. M. Gray is the clerk and general manager of his wife's store, and in these respects may be considered her agent.

(56) But did this make him her agent to sign her name to a promissory note, such as Exhibit A, for goods bought sometime before, without her knowledge or consent? An agent to bind his principal must act within the scope of the power given by the principal. He may be an agent for one or several things, and no agent for many other things. "An agent authorized to attend to and manage a grocery store, a mere clerk employed in a merchant's store, has no implied power to bind his principal by the execution of negotiable paper." Meacham on Agency, sec. 391, p. 235. "An agent, authorized to buy goods and pay for them, is not thereby authorized to draw, accept or indorse negotiable paper, must see to it that his authority is adequate, and both they and the agent must keep strictly within the limits fixed to the agent's authority, or the principal will not be bound." Meacham, *supra,* see 393, p. 236.

It therefore seems to us that the execution of the note sued on by J. M. Gray was outside of his agency and in excess of any authority alleged or shown by plaintiffs. And if the defendant S. A. Gray was a single woman, plaintiffs would not be entitled to a personal judgment against her on said note; and plaintiffs are certainly not entitled to more than they would be if she were unmarried.

We are of opinion that plaintiffs have failed to establish their main relief—the right to a personal judgment on this note against Mrs. Gray, if she were a single woman; and that being so, they cannot have the ancillary relief asked in this motion in aid of a relief they are not entitled to.

Plaintiffs' counsel contended it would be a great hardship to his

clients to deny them this relief. If this were true, it would not authorize the Court to grant the order unless plaintiffs had made a case entitling them to the relief sought under the law and practice of the courts. But the Court fails to see the great hardship complained (57) of, and we do not mean to say by this that plaintiffs should not have pay for their goods. But it does not appear that there was any fraud practiced on plaintiffs. They knew Mrs. Gray was a married woman, and it is not alleged that she or her husband represented her as a free trader; in fact, the knowledge that she was a married woman, doing business in her name, and her husband acting the part of a clerk, would have been sufficient to put the most prudent business men on guard. But the plaintiffs, knowing all these facts, sold her their goods (probably at a very good profit), took the chances, and are now having trouble to collect their money, as most business men would have expected; and, though costly, it may be a valuable lesson. There is no error in the judgment appealed from.

Affirmed.

Cited: Bazemore v. Mountain, 121 N. C., 61; *Bank v. Drug Co.,* 152 N. C., 146; *Stout v. Perry, ib.,* 313.

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(58)

H. B. PEEBLES v. JAMES D. BOONE ET AL.

Superior Court Clerk—Duty of to Successor in Office—Misjoinder of Causes of Action, What is Not.

1. The right of a clerk of the Superior Court to bring an action against his predecessor on the latter's official bond to recover the records, moneys, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law (section 81 of The Code) requires that each successive clerk shall receive from his predecessor all the records, moneys, and property of his office.

2. Section 1883 of The Code is not repugnant to the provisions of section 81, but only gives an additional remedy for the benefit of individuals who have cause of complaint against an unfaithful clerk of the Superior Court.

3. A person duly elected clerk of the Superior Court by the people needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring Superior Court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the office.

4. There is no misjoinder of causes of action where, in a suit by a clerk of a

Superior Court against his predecessor to recover the funds of the office, the complaint alleges separate and distinct causes of action for the benefit of separate and distinct persons or classes of persons.

ACTION heard before *Armfield, J.,* on complaint and demurrer, at August Term, 1894, of NORTHAMPTON.

His Honor overruled the demurrer on all the grounds specified and defendants appealed. The facts are stated in the opinion of *Associate Justice Montgomery.*

R. B. Peebles for plaintiff.
B. S. Gay for defendants.

MONTGOMERY, J. James D. Boone, having been clerk of the Superior Court of Northampton County, resigned his said office about 7 December, 1883. On the next day the judge of the district appointed H. B. Peebles Boone's successor for the unexpired term, ending first Monday of December, 1886, Peebles on the day of his appointment giving bond according to law and entering upon the discharge of his duties as clerk aforesaid. Peebles at once, after qualification as clerk, demanded of Boone that he pay over to him all moneys which the said Boone held by virtue or under color of his office, and all other effects which went into his hands as such clerk. Boone refused to do so. Peebles as relator of the State brought this action in the Superior Court of Northampton County against Boone and the sureties on his official bonds, the complaint alleging breaches of the bonds, charging that the said
(59) Boone as clerk had received from his predecessor in office, upon his retirement, large sums of money belonging to different persons (naming them), and bonds and notes for large amounts payable to his predecessor in office, and his successors and to different individuals, and had neglected to collect a great deal of money which he ought to have collected. Since the commencement of this action the term of the office of Peebles has expired, and J. F. Buxton has been elected clerk of the Superior Court of Northampton County and has been made party plaintiff in this case in the place of Peebles. An account against Boone is asked for as to the matters set out in the complaint. The defendants demurred to the complaint and assigned six special grounds therefor. His Honor overruled all the grounds of demurrer and allowed the defendants to answer over, from which judgment the defendants appealed.

The first ground is, "that the complaint fails to show that the relator of the plaintiff has been damaged or injured by the failure of the defendant J. B. Boone to collect or pay over the amounts mentioned in sections six, seven, nine, ten and twelve of the complaint to said relator." These sections, six, seven, nine, ten and twelve of the complaint, contain the charges of the defendants having received large amounts of money,

valuable bonds, and neglecting to collect others that were collectible. Injury to the incoming clerk, Peebles, had nothing to do with the right of that officer through the State to bring this suit. Section 81 of The Code required Peebles, the new clerk, immediately after giving bond and qualification, to receive from the late clerk, the defendant, all the records, books, papers, moneys and property of his office; and this same section provides that if any (late) clerk shall refuse or fail within a reasonable time after demand to deliver to the clerk said things demanded of him, he shall be liable on his official bond for the (60) value thereof. The right of the clerk, Peebles, to bring this action therefore does not rest on any injury done to him, but on the ground that the law requires that each successive clerk shall receive from the retiring clerk all the records, books, papers, moneys and property of his office, in order that the business of the clerk of the Superior Court may be conducted intelligently, systematically and economically. Section 1883 of The Code, to which our attention was particularly directed by the attorney of the defendant, is only an additional remedy for the benefit of individuals who think they have suffered at the hands of unfaithful clerks, and is not repugnant to section 81 of The Code. This ground of demurrer is overruled.

The second ground is "that the complaint fails to state a cause of action, in that it fails to show that there was any proper order of the court requiring the former clerk, N. R. Odom, to pay over the funds mentioned in section 6 of the complaint to the defendant James D. Boone as clerk of said court." No such order was necessary in this case. Section 14 of chapter 19 of The Revised Code is brought forward into The Code, and is section 124 thereof. This section concerns forfeitures only in case of the refusal of the clerk to do what is required to be done in section 81 of The Code. Its proper construction is that former clerks, for whatever cause retiring, shall transfer and deliver to their successors in office all the things personal which were in their hands upon retirement from office, under a forfeiture of one thousand dollars; and no order from a judge is necessary to compel the former clerk to make this transfer to the new clerk. If, however, in vacancies in this office of clerk, the judge, before he makes the appointment of a new clerk, sees fit to temporarily put some person in charge of the office until the regular appointment is made, it is then in such a case necessary (61) for the new clerk to have an order from the judge, directed to the person temporarily in charge of the office, to deliver the possessions of the office to the new clerk. A person duly elected clerk of the Superior Court by the people needs no order from any power or authority to demand from the old clerk the property of all kinds belonging to the office. This ground of demurrer is overruled.

The third ground is "that the complaint fails to state a cause of action, in that it fails to show that James D. Boone as clerk of said court was required by any proper order of said court to pay over said funds or any of them to the relator." For the reasons stated in overruling the second cause of demurrer, this ground is overruled.

The fourth ground is "that it fails to state a cause of action, for that it fails to show that the relator is the owner or entitled to receive the funds." This is overruled for the reasons given in overruling the first ground of demurrer.

The fifth ground is "that there is a misjoinder of causes of action, for that the several causes of action in sections six, seven, nine, ten and twelve are improperly united, the same and each being separate and distinct causes of action, and for the benefit of separate and distinct persons." This is overruled for the same reasons given in overruling the first ground of demurrer.

The sixth ground is "for that the former clerk, the defendant J. B. Boone and his sureties, the other defendants, cannot be sued on the relation of his successor in office for the causes of action alleged in the complaint, or any of them." This is overruled for the reasons set forth in overruling the other five grounds of demurrer.

There are no errors in the rulings of his Honor in overruling
(62) the several grounds of demurrer, and the judgment is affirmed.

The case will be remanded to the Superior Court of Northampton to be proceeded in according to law.

Affirmed.

Cited: Lacy v. Webb, 130 N. C., 546; *Rodwell v. Rowland,* 137 N. C., 645.

B. R. BROWNING v. J. R. PORTER.

Claim and Delivery—Chattel Mortgage—Lien—Payment of Note by Surety—Discharge of Debt and Lien Securing it.

1. Payment of a note by a surety without having it transferred to a trustee for his benefit is a discharge of the debt and an extinguishment of a lien by which it was secured; therefore,

2. Where V., a surety on a purchase-money note for a horse, retaining title and duly recorded, paid it and did not have it transferred to a trustee for his benefit, and the principal debtor, after mortgaging the horse to another person, delivered it to V., the mortgagee has a first lien and is entitled to possession.

BROWNING *v.* PORTER.

CLAIM AND DELIVERY, tried at March Term, 1894, of HALIFAX, before *Graves, J.*, on an agreed statement of facts as follows:

"On 19 November, 1887, one P. G. Solomon purchased a bay mare from W. M. Perkins, Jr., for the sum of one hundred dollars. Said mare was named "Sally Morgan," and in payment therefor he executed his note under seal, with one L. Vinson as surety for said amount, payable 1 November, 1888, bearing interest at 8 per cent from date. Said note retained title to the mare until the whole of the purchase-money was paid, and was duly recorded in the office of the register of deeds on 30 March, 1888, in Book 81, p. 231.

"On 7 December, 1888, the surety Vinson upon a demand from said Perkins, paid Perkins $50, and the same is credited upon (63) the note.

"Thereafter Perkins transferred the note to C. W. Garrett & Co., and on 9 November, 1889, Garrett & Co. transferred the note without recourse to Vinson, the surety. Said Solomon paid nothing on the note.

"Solomon failed to pay Vinson anything whatever on the note, and afterwards delivered to him the said mare under said note, retaining title, and thereafter he sold the mare to one G. F. Matthews for the sum of $45, and Matthews sold her to the defendant for $50, and she is now in the possession of the defendant.

"On 6 February, 1889, the said Solomon, to secure certain advances to be made to him by the plaintiff to the amount of $80, to be made during 1889, executed to said plaintiff a lien and chattel mortgage, conveying one red cow, one single horse-cart, one bay mare, white face, named "Sally Morgan," valued at $50. No part of said advances has been paid. The mortgage was duly recorded on 14 February, 1889, in Book 85, page 377, in the office of the register of deeds.

"At the time of the execution of said chattel mortgage to the plaintiff said Solomon had the possession of the said mare."

The court adjudged that the plaintiff recover of the defendant the possession of one bay mare, "Sally Morgan," and in case possession of said mare could not be had, then for the sum of $50, with interest from 27 December, 1893, till paid, and for costs of action.

From this judgment the defendant appealed.

S. G. Daniel and McRae & Day for plaintiff.
No counsel for the defendant.

AVERY, J. When the surety Vinson paid the note in full on (64) 9 November, 1897, and failed to have it assigned to a trustee for his benefit, the debt was discharged. *Peebles v. Gay,* 115 N. C., 38; *Lyles v. Rogers,* 113 N. C., 197, and authorities there cited. The satisfaction of the debt extinguished the vendor's lien, and the legal es-

tate in the horse, at the time in the possession of Solomon, vested in his mortgagee, who had then a first lien on it, and, on breach of the condition, the right to recover the possession of the horse, as he seeks to do in this action. The judgment of the court below is

Affirmed.

Cited: Dunn v. Beaman, 126 N. C., 766; *Burnett v. Sledge,* 129 N. C., 120.

C. T. JOHNSON ET AL. v. J. T. GOOCH ET AL.

Will, Construction of—Trust—Payment of Debts—Vesting of Estate—Evidence.

1. Where property was given by a will to a trustee to be held in trust for A., free from liability for certain debts owing by the latter to others, but to vest in him absolutely in case he should in any manner discharge such debts: *Held,* that such property did not vest unless all of such debts were paid in the lifetime of A.

2. Where the vesting of an absolute estate depended upon the payment of certain debts by the devisee, and, in the trial of an issue whether all such debts had been paid, a note was produced, signed by him, uncanceled, and found among the effects of another decedent: *Held,* that the production of such note raised the presumption that the note had not been paid, and, in such case, it is immaterial when the statute of limitations began to run.

ACTION tried before *Armfield, J.,* and a jury, at Fall Term, 1894, of NORTHAMPTON.

The action was originally commenced by Catherine T. Johnson,
(65) Camilla A. Johnson and Lula Johnson as plaintiffs, against J. T. Gooch as administrator *de bonis non,* with the will annexed, of Virginia A. Johnson as defendant, on 28 August, 1882. W. W. Peebles and R. B. Peebles were afterwards made parties defendants in 1883.

The following issue was submitted to the jury:

"Were there anté-nuptial debts of James Johnson subsisting and owing at the time of his death?"

J. T. Gooch, one of the defendants, was introduced as a witness by the plaintiffs against the objection of the defendants W. W. Peebles and R. B. Peebles. He testified that he was administrator *de bonis non,* with the will annexed, of Virginia A. Johnson, and also administrator *de bonis non* of J. J. Long. Defendants objected. Objections overruled, and defendants W. W. and R. B. Peebles excepted. Against the objection of the defendants W. W. and R. B. Peebles, this witness stated that

he received the note hereafter described from Robert O. Burton, who was administrator of Andrew Coniglan, who had been the administrator of J. J. Long. Burton said he found the notes among the papers of J. J. Long. Defendants W. W. and R. B. Peebles excepted. Said note was for $1,490, and under seal, dated 31 July, 1858, payable one day after date to Tamlin Avent, and purported to be signed by James Johnson and J. M. Moody.

W. H. Hughes was introduced as a witness by the plaintiffs, and stated that he knew the signature of James Johnson and the signature of J. M. Moody, and that said note of $1,490, payable one day after date, and dated 31 July, 1858, was signed by the said James Johnson and J. M. Moody. This witness further stated on cross-examination that the said J. M. Moody was a man of large estate, and had eight or ten thousand acres of land in Northampton County, and a large estate in the State of Mississippi. Said note of $1,490 was then offered in evidence by the plaintiffs. W. W. and R. B. Peebles objected. (66) Objection overruled, and said defendants excepted.

It was admitted that James Johnson died intestate 16 March, 1876, and that he and Virginia A. Johnson were married unto each other 30 August, 1859. C. A. and Lula Johnson were the only unmarried daughters of Dr. James Johnson at the death of said James and said Virginia A. Johnson. The defendants in apt time, and in writing, asked his Honor to charge the jury that upon the evidence they should answer the issue "No." His Honor refused this prayer, and the defendants W. W. and R. B. Peebles excepted. His Honor charged the jury that if they believed the evidence, they should answer the issue "Yes; the note for $1,490." To this instruction the defendants W. W. and R. B. Peebles excepted. The jury answered the issue "Yes; the note for $1,490."

Judgment for plaintiffs according to the record, and the defendants W. W. Peebles and R. B. Peebles appealed.

The defendants assigned the following errors:

1. For that J. T. Gooch was not a competent witness.
2. For that such of his evidence as objected to above was not competent.
3. For that said note of $1,490 was not competent evidence.
4. For error in refusing the prayer of defendants.
5. For error in charging the jury that if they believed the evidence they should answer the issue "Yes; the note of $1,490."

T. W. Mason for plaintiffs.
McRae & Day and R. B. Peebles for defendants.

(67) FAIRCLOTH, C. J. The defendants W. W. and R. B. Peebles claim the surplus money in the hands of defendant Gooch as administrator *de bonis non, c. t. a.,* of Virginia A. Johnson by an alleged sale of the land devised in said Virginia's last will and testament, under an execution against her husband, James Johnson. The plaintiffs claim said surplus money which arose from a sale of said devised lands by a proper petition to raise assets to pay debts, and they claim it as devisees of Virginia A. Johnson, in whose will are the following clauses: "I devise and bequeath my whole estate to Catharine Johnson (the plaintiff), my sister-in-law, in trust to hold and preserve the same from all liability to the debts of my husband, James Johnson, which were contracted by him prior to our intermarriage."

"Sixthly. In case the said James Johnson should fully pay off or discharge by any means all and every of the debts contracted by him prior to my marriage with him, then and in that case I declare that he shall take and receive all my aforesaid estate free and discharged from all the trusts in the premises declared, and shall hold the same absolutely for his own sole use and benefit."

James Johnson died 16 March, 1876, and the note of said Johnson was dated 31 July, 1858, which day was prior to said intermarriage.

The important question presented is whether James Johnson fully paid or by any means discharged said note during his lifetime. The payment or discharge of this note during the life of James Johnson was a condition precedent to the vesting of the title to said lands in James Johnson, and it could not vest unless the condition was performed in his lifetime. To create a condition, no particular form of words need be used, for if a corresponding purpose be read in the will, that purpose takes effect. Schouler on Wills, 598.

(68) The possession of an unindorsed negotiable note or bond raises a presumption that the person producing it on the trial is the real and rightful owner, and this presumption is not repelled or altered by a denial of the defendant in his answer of such ownership. *Jackson v. Love,* 82 N. C., 405. It is *prima facie* evidence of ownership, and nothing short of fraud, not even gross negligence, is sufficient to overcome the presumption. *Commissioners v. Clark,* 94 U. S., 62 (4 Otto, 278). This is so between the holder and the maker, but not between the holder and the payee. *Holly v. Holly,* 94 N. C., 670. And the burden of proof to rebut this presumption is on him who alleges any defect in the title, unless proof of fraud or illegality be offered, and then the burden of proof is shifted to the holder, and he must show that he received it *bona fide* for value. *Pugh v. Grant,* 86 N. C., 39.

This is not an action founded on the note for its collection. In the course of the trial the question of payment, as before stated, was an inde-

pendent and separate fact to be ascertained without any regard to the principles of law, such as would apply in an action on the note between the payor and the payee and their representatives, and when the plaintiffs or defendant Gooch, as administrator of V. A. Johnson the devisor, on the trial produced said note uncanceled, the presumption of ownership and that the note had not been paid at once arose, and without other proof it was proper and it was the duty of his Honor to instruct the jury to find the issue as they did. If the note had been in the possession of James Johnson or his representative, the presumption of payment or discharge would have been equally strong in favor of the defendants.

The defendants excepted because the witness Gooch stated that Mr. Burton said he found the note among the papers of J. J. Long. This exception is without force, because without that statement it was the duty of the court, as above pointed out, to instruct the jury (69) to answer the issue "yes" on the production of the note uncanceled. This was so unless the defendants had shown something to avoid that conclusion. The statement of Burton's declaration was not useful to the jury and could not have influenced their verdict. It was the possession of the note uncanceled that entitled the plaintiffs to have the issue found in their favor without regard to anything else on this aspect of the case.

The defendants did not offer any evidence of actual payment, but relied solely on the presumption of payment from the lapse of time, which presumption had not arisen at James Johnson's death.

It is therefore immaterial when the statute began to run. We understood the defendants to abandon their exception to the competency of the witness Gooch to testify. There is no error, and the judgment is

Affirmed.

Cited: Davison v. Gregory, 132 N. C., 396.

J. F. HEATH v. W. F. LANCASTER.

Practice—Appeal—Case on Appeal—Laches.

Where appellant, after a failure to agree on the case on appeal, does not "immediately" request the trial judge to settle the same, but delays for several weeks, and in the meantime the judge dies, and no excuse is shown for the appellant's laches, the judgment below will be affirmed.

MOTION of plaintiff for writ of *certiorari.* Affidavits were filed in

support of and in opposition to the motion. There was also a motion of defendant to affirm the judgment below.

(70) *W. W. Clark for plaintiff.*
No counsel contra.

CLARK, J. The record proper was filed in this Court at the first term after the trial below and a *certiorari* asked for, as the case had not been settled by the judge. This was the proper course, and if the appellant was not in laches, the *certiorari* would issue. *Owens v. Phelps,* 91 N. C., 253; *Pittman v. Kimberly,* 92 N. C., 562. In such case, as the trial judge (his Honor *Judge Graves*) has since died, a new trial would be ordered. *S. v. Parks,* 107 N. C., 821; *Brendle v. Reese,* 115 N. C., 552. But in the present case the appellant does not negative laches. It appears that after the disagreement about settling the case, the appellant did not immediately request the judge to settle the case as required by section 550 of The Code, but delayed for several weeks to do so. This forfeits his claim to a *certiorari* for the reasons given in *Simmons v. Andrews,* 106 N. C., 201. An inspection of the record shows no errors of which the appellant can complain, and the judgment must be

Affirmed.

Cited: McGowan v. Harris, 120 N. C., 140.

JOHN I. TAYLOR v. GEORGE W. SIMMONS.

Practice—Certiorari—Failure to Settle Case on Appeal—Death of Trial Judge—New Trial.

Where an appellant in apt time docketed the record proper and applied for a *certiorari*, the case on appeal not having been settled by the trial judge, though case and countercase had been duly served, and in the meanwhile the judge died, a new trial will be ordered.

MOTION of defendant for a writ of *certiorari.*

(71) *W. W. Clark for plaintiff.*
No counsel contra.

CLARK, J. At the last term of this Court, being the first term of this Court after the trial below, the appellant docketed the record proper and

applied for a *certiorari* as the case had not been settled by the judge. *Pittman v. Kimberly,* 92 N. C., 562. By consent the motion was continued to this term. It appears that the case and countercase were served in time and that the appellant immediately applied to the judge to settle the case. The appellant would be entitled to his *certiorari,* but as the trial judge (his Honor *Judge Graves*) has since died, the Court must order a new trial. *S. v. Parks,* 107 N. C., 821.

New trial.

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(72)

W. H. PARKER v. JAMES A. COGGINS.

Practice—Appeal—Death of Judge Before Settling Case on Appeal—New Trial—Failure to Print Record, When Not Laches.

1. Where an appellant, having failed without laches on his part to get the case on appeal settled, docketed the record proper in this Court in apt time at the first term after the trial below, and instead of applying for a *certiorari* agreed with the appellee that the judge should settle the case at a subsequent time, and the judge died before the case was so settled, a new trial will be allowed the appellant.

2. In such case, the only alternative would be the withdrawal by the appellant of his case on appeal, or, by the appellee, of his countercase, and the hearing of the appeal on the remaining case, as was done respectively in *Drake v. Connelly,* 107 N. C., 463, and in *Ridley v. R. R.,* 923, *post.*

3. In such case, it was not laches in the appellant to fail to print the record, since the appeal could not have been heard without the case settled, unless the appellee had given proper notice to the appellant that he would withdraw his countercase and have the appeal heard on appellant's case.

R. B. Peebles for plaintiff.
T. W. Mason for defendant.

CLARK, J. At the call of the district to which this case belongs, in October of last term, being the first term of this Court which began after the trial below, the appellant had docketed the record proper. It also appears that the lack of a "case settled on appeal" was without laches on appellant's part, the appellant's case and the countercase having been served in due time and the judge promptly notified so that he might name a time and place for settlement. Regularly, a *certiorari* should then have been asked for, but it was rendered unnecessary by the agreement of counsel in writing that the case on appeal should be settled by the judge at Vance Court, which time was afterwards, by another agree-

ment of counsel, which is admitted, continued to Nash Court, which began 19 November. The judge (*Graves*) died during the second week of the time allotted by law for said court, during which term, by the agreement, the case was to be settled. But if the judge had died after said term, an application for a *certiorari* was at no time necessary, since it appears in the affidavit of appellant and is admitted by appellee that the judge was unable at any time after the beginning of Nash Court to discharge any of his duties on account of his mortal illness. Under these circumstances the appellant has used all due diligence. As it is impossible now to procure the case to be settled, the plaintiff is entitled to a new trial (*S. v. Parks,* 107 N. C., 821), unless the appellee
(73) had asked, as in *Drake v. Connelly,* 107 N. C., 463, to withdraw his countercase and try the appeal on the appellant's statement of case on appeal, or the appellant had asked to withdraw his case and try the appeal on appellee's countercase. *Ridley v. R. R., post,* 923.

It was not laches to fail to print the record, since the appeal could not be heard without the case settled, unless the appellee had notified the appellant in time that he should withdraw his countercase and ask to have the appeal heard upon appellant's statement of the case on appeal.

The case must be remanded to the end that there may be a new trial.

New trial.

ISAAC SMITH v. EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE.

Action for Malicious Prosecution—Probable Cause—Burden of Proof—Malice.

1. The discharge of a person arrested on a warrant by a justice of the peace, for want of sufficient proof, casts the burden of showing probable cause for his arrest upon the person who instigated the criminal proceeding.

2. Where, in the trial of an action for malicious prosecution, it appeared that the defendant had in good faith consulted a lawyer of good standing, who, upon a frank and full statement of the alleged facts by one conversant with them, advised the prosecution, whereupon the defendant, without personal malice, caused the plaintiff to be arrested, it was error in the trial judge to instruct the jury that such circumstances constituted probable cause. The instruction should have been that such circumstances did not rebut the *prima facie* case of plaintiff, but should only be considered by the jury as evidence to rebut the implication of malice.

(74) ACTION for damages for malicious prosecution, tried before *Brown, J.,* and a jury, at Fall Term, 1894, of CRAVEN.

There was a verdict for the defendant and refusal of a motion for a new trial. The plaintiff appealed. The facts and errors complained of appear in the opinion of *Associate Justice Montgomery.*

W. W. Clark for plaintiff.
M. DeW. Stevenson for defendants.

MONTGOMERY, J. The plaintiff was arrested by the defendants on a warrant issued by a justice of the peace which charged him with forgery, and upon examination was discharged for want of probable cause. The plaintiff thereupon brought this action against the defendant to recover damages for a malicious prosecution of him. Upon the second issue, "Was there probable cause for the prosecution?" the court told the jury "that if they believed that L. J. Moore was a lawyer and counselor of good standing, which is not disputed in the argument in this case, and Reynolds, the general manager of the defendant, went to Mr. Moore with Ward, and then and there Reynolds made a full, clear and frank statement of the matter, Ward's statement was taken after careful examination by the attorney, and they had reason to place confidence and trust in what Ward said and honestly believed it to be true, and that without any express malice upon the part of Reynolds towards Smith, but under Moore's advice the warrant was made out upon Ward's affidavit, that would be probable cause; the *prima facie* case resulting from the dismissal of the warrant would be rebutted, and it would be your duty to answer the issue yes." To this instruction the plaintiff excepted. The discharge of the plaintiff in the said criminal proceeding against him by the defendants made a *prima facie* case for the plaintiff, he standing after his discharge without even a suspicion against him strong enough to bind him over to court, and the dismissal by the justice (75) proving a presumption in favor of plaintiff's innocence. This being so, the *onus* of proving the existence of probable cause was thrown on the defendants and his Honor should have so instructed the jury. His Honor should also have charged the jury that the employment by the defendant of an attorney before the warrant was issued and their following his advice, did not have the effect of rebutting the *prima facie* case of the plaintiff, but that it should be considered by them only as evidence to rebut the implication of malice (*Davenport v. Lynch,* 51 N. C., 545), leaving that question, as well as the one of probable cause to be heard on all the facts and circumstances properly submitted to them.

There was error in the instruction complained of, and the plaintiff is entitled to a

New trial.

Cited: Jones v. R. R., 131 N. C., 137; *R. R. v. Hardware Co.*, 143 N. C., 58; *Thurber v. B. & L. Assn., post*, 76; *Downing v. Stone*, 152 N. C., 530; *Foster v. Davis*, 175 N. C., 544; *Whisnant v. Price, ib.*, 614.

(76)

HENRY THURBER v. EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE.

Action for Malicious Prosecution—Probable Cause—Advice of Counsel—Malice.

1. In the trial of an action for malicious prosecution, it appeared that the plaintiff had been arrested on a charge of forging the owner's name to a transfer of a certificate of stock, and that the only testimony as to the alleged forgery was that of the owner of the stock, to the effect that he assigned the stock to a third person on his false representations, and that the name of the plaintiff, whose name appeared as assignee, was not mentioned, and that he, the owner, did not know that he was transferring the stock to him: *Held*, that an arrest for forgery was not justified by the facts testified to.

2. That a prosecution for forgery was instituted upon the advice of counsel is only evidence to rebut the presumption of malice, and it should be left to the jury to find whether malice, which might be inferred from want of probable cause, has been rebutted by the other evidence.

ACTION to recover damages for malicious prosecution, tried before *Brown, J.*, and a jury, at the Fall Term, 1894, of CRAVEN.

Upon an intimation by the court that there was not sufficient evidence to go to the jury of the want of probable cause for the prosecution or to entitle the plaintiff to recover, the plaintiff submitted to a nonsuit and appealed. The facts sufficiently appear in the opinion of *Associate Justice Clark*.

W. W. Clark for plaintiff.
M. DeW. Stevenson for defendant.

CLARK, J. The only evidence upon which the plaintiff was arrested for forgery was that the plaintiff was assignee of a certificate of stock which Latham testified he had assigned to one Smith on the false representations of Smith, and that Thurber's name was not mentioned and he did not know at the time that he was transferring the stock to Thurber, though it so appears now on the back of the certificate. This was certainly not sufficient to justify a warrant for forgery being sued out against Thurber. The warrant was sued out by counsel acting on

behalf of this defendant. That criminal proceeding was instituted on such advice of counsel was only evidence to go to the jury to rebut the presumption of malice. *Davenport v. Lynch,* 51 N. C., 545; *Smith v. B. & L. Association, ante,* 73. The court should have left it to the jury on the evidence to say whether the malice, which might be inferred from the want of probable cause, was rebutted by the other evidence.

Error.

Cited: S. c., 118 N. C., 130; *Fleming v. McPhail,* 121 N. C., 183; *Smith v. Montague, ib.,* 94.

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(77)

BRITISH AND AMERICAN MORTGAGE COMPANY v. LONG ET AL.

Practice—Appeal—Dismissal—Motion to Reinstate.

1. Where a motion is made to docket and dismiss an appeal, under Rule 17, for failure of the appellant to docket the same, the excuses for such failure should then be made.

2. In the absence of a request from or an agreement with the appellee that an appeal should not be docketed, the fact that negotiations were pending for a compromise is no good excuse for appellant's failure to docket the appeal, and a motion to reinstate will not be allowed.

ACTION heard at May Term, 1894, of HALIFAX Superior Court, before *Graves, J.*

There was judgment for the plaintiff and defendants appealed, but the appeal having been dismissed under Rule 17, for failure to docket same, a motion to reinstate the appeal was made at September Term, 1894, of this Court and continued to this term.

R. O. Burton for plaintiff.
J. B. Batchelor for defendants.

CLARK, J. This is a motion to reinstate the case, which was docketed and dismissed by appellee at last term under Rule 17. A motion was made at that time by appellants for a *certiorari,* but it appearing to the Court, by affidavit of the clerk below, which was not controverted, that the appeal had not been sent up because the clerk had repeatedly demanded his fees for the transcript, which appellants had failed to pay, the *certiorari* was refused. *Bailey v. Brown,* 105 N. C., 127; *Andrews v. Whisnant,* 83 N. C., 446; *Sanders v. Thompson,* 114 N. C., 282. If in fact the fees had been tendered, or if there was other good excuse, it

(78) should have been shown at the time the motion to docket and dismiss was made. *Paine v. Cureton,* 114 N. C., 606.

The appellants later, at the same term, moved to reinstate (the motion being continued to this term) on the ground that negotiations were pending for a compromise when the appeal was dismissed. But, in the absence of any request from, or agreement by, appellee that the appeal should not be docketed, this was no excuse for a failure to docket in proper time. The negotiations could have gone on as well after docketing the appeal as before. In fact, however, the correspondence between the parties shows that the offer to compromise had been made and rejected before the call at last term of the district to which the appeal belonged.

Motion denied.

Cited: Vivian v. Mitchell, 144 N. C., 475; *Hawkins v. Tel. Co.,* 166 N. C., 214; *Transportation Co. v. Lumber Co.,* 168 N. C., 61.

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(79)

J. C. STONEBURNER ET AL. v. C. W. JEFFREYS ET AL.

Assignment for Benefit of Creditors—Validity—Fraudulent in Law—Power to Replenish Stock.

1. A deed of assignment for benefit of creditors which directed the trustee, with all reasonable diligence, to sell and dispose of the property conveyed, including stock of goods, in such manner as he should deem most beneficial to the interest of all concerned, is not void on its face, because it does not in express terms restrict the trustee as to the time or manner of disposing of the property.

2. The insertion in a deed of assignment of a power to replenish a stock of goods with money arising from the sales of assigned property, is not proof conclusive of a fraudulent intent or purpose to hinder and delay creditors when it is manifest from the whole deed that the maker's purpose and design was that the trustee should manage the property for the benefit of all and not for ease, benefit, or comfort of the debtor.

3. A deed of assignment will be declared void in law only where the debtor appears in express terms to be providing for his own ease, comfort, or benefit, to the possible detriment or delay of his creditors.

4. Even where *prima facie* the deed appears to reserve an unconscionable benefit or to subject the creditors to unjust hindrance or delay, yet if it also appear that the language of the deed is susceptible of explanation by evidence *aliunde,* that will make it consistent with good faith, the issue of fraud must be submitted to the jury to determine whether such ex-

trinsic evidence is sufficient to rebut the presumption of *mala fides* raised by the deed.

5. The omission by a copyist in the copy of a deed of assignment of a single creditor's name and claim, when it was included in the original draft and in the deed as recorded in another county, is not sufficient to shift the burden of proof on the issue of fraud, it being, at most, only competent as a circumstance to be considered with other evidence tending to show bad faith.

ACTION to set aside the deed in trust, and tried before *Armfield, J.*, and a jury at Fall Term, 1894, of EDGECOMBE.

The plaintiffs offered in evidence the deed of trust; a note admitted to be owing to one of the plaintiffs, Carhart & Bros., by the said Jeffreys for the sum of $302.00, and not paid and not named in the trust or assignment. The plaintiffs then rested their case, insisting that the trust or assignment was fraudulent in law.

It was admitted that the preferred debts in the assignment were *bona fide*. The defendants then offered testimony tending to show and prove the circumstances under which the deed of trust was made, the purpose for which it was made, and that there was no actual fraud intended or committed. The plaintiffs objected to the introduction of this testimony; objection overruled, and plaintiffs excepted. The defendants then offered evidence tending to prove that the omission of the debt of Carhart & Bros. from the assignment was an accident, as it was embraced in the original draft of the assignment, the circum- (80) stances under which the assignment was made. The defendant showed in evidence the original draft of the deed of assignment, containing a provision directing the payment out of the assets of any other debts that might be owing by the assignor not named therein, upon proof of their validity.

The assignment was executed in duplicate, one being recorded in Martin County, containing said provision; the other without the knowledge of the assignor, and by mistake of the copyist, omitting said provision. The duplicate registered in Martin was executed and registered first. The assignment included property in Edgecombe and Martin counties; the high business character and capacity of the trustee. No goods were purchased by the assignee, nor was the assignor employed as a clerk.

The plaintiff requested the court to instruct the jury as follows:

1. That the deed of assignment upon its face hinders and delays creditors and is therefore fraudulent and void, and you are instructed to answer the issue "Yes."

2. That the authority in said deed to employ servants and clerks to replenish by purchases the said stores of merchandise, to pay for the

same out of sales and collections, is a delay and hindrance of creditors and renders the deed of assignment fraudulent and void, and you should answer the issue "Yes."

3. That the power and authority given the trustee is, in substance, power and authority to continue the business and renders the deed of assignment fraudulent and void.

4. The court instructs you, if you believe the evidence, that in law the deed is fraudulent and void, and that you will answer the issue "Yes."

5. The plaintiffs are not required, at all hazards, to prove that
(81) there was actual fraud, or that the defendant intended fraud at the time he made the deed. If the effect of the deed is to hinder, delay or embarrass the creditors or any one of them in the pursuit of their legal remedies against the defendant debtor to collect their debts, though there be no intent to commit fraud, and there was none committed, yet in law the deed would be fraudulent and void as against the creditors. The question whether in law the effect of the deed is to hinder, delay or embarrass the creditors as I have just stated to you, is one of law and is to be determined by the court. The court instructs you that, if you believe the evidence, the effect of the deed is to defeat, hinder and embarrass the creditors in the pursuit of their legal remedies against the defendant debtor to collect their debts, and you will find the issue in favor of the plaintiffs.

His Honor charged the jury:

"That the plaintiffs have offered in evidence the assignment executed by the defendant Jeffreys and recorded in Edgecombe County, and a note for $302 due by Jeffreys and not named in said trust.

"The defendants have put in evidence the duplicate of the assignment recorded in Martin and the original unsigned draft of assignment, and the testimony of the defendant Jeffreys, and the evidence of the witnesses as to the character and business capacity, etc., of defendant Staton, trustee, tending to show that same was good and he was competent.

"There are two kinds of fraud: fraud in law and fraud in fact.

"There is nothing upon the face of this assignment that renders it fraudulent in law; if there was, the court would so declare without submitting it to the jury. Not being fraudulent in law on its face, the court submits the issue to the jury whether it is so as a matter of fact.

"In the consideration of that question the court charges you
(82) that the fact that the assignment provides for sales on time is evidence of fraud; that the power to replenish the stock is also evidence of fraud; and in connection with this may consider any other

provision of the assignment tending to raise a suspicion of fraudulent intent in its execution.

"You will also consider the evidence of the defendant Jeffreys as to the circumstances under which he executed the assignment and the intent with which it was executed by him, and the evidence as to the character of the trustee, which you will consider as evidence tending to show the *bona fides* of the assignment.

"And if upon the whole of the evidence you find that the assignment was executed with the intent to hinder, delay or defraud his creditors, or any one of them, you will answer the issue 'Yes,' but if you find it was not executed with such intent, then you will answer it 'No.' "

The issue was found by the jury in favor of the defendants, and it was ordered and adjudged that the plaintiffs recover judgment against the defendant Jeffreys for their several debts, and that said deed of assignment is not fraudulent and void, and that the defendant Staton, the assignee, is adjudged to recover his costs of the plaintiffs, and go without day. From which judgment the plaintiffs appealed.

John L. Bridgers and Jas. F. Moore for plaintiffs.
H. G. Connor and H. L. Staton for defendants.

AVERY, J. The contention of the plaintiffs' counsel upon which he mainly rested his argument was that the court below erred in refusing to charge the jury that the deed of assignment was fraudulent in law. It is like threshing over old straw to draw at length the distinctions between an assignment that is void upon its face—one, the language of which raises a presumption of fraud, and one of the third class, when, there being nothing in the instrument itself to so suggest fraud as to demand explanation, the presumption of law in favor of good (83) faith sustains the instrument till proof is offered to rebut it. *Bobbitt v. Rodwell,* 105 N. C., 236; *Woodruff v. Bowles,* 104 N. C., 197; *Brown v. Mitchell,* 102 N. C., 368. It was insisted the deed should be declared void upon its face, first, because the trustee was not in express terms restricted as to the time or manner of disposing of the property committed to his care, but was left to "sell and dispose of the same in such manner as he may deem most beneficial to the interests of all concerned." Where the deed is silent as to the manner or terms of sale, the law presumes until the contrary appears that the fiduciary will act in good faith, will be guided by the paramount desire to promote and protect the interests of the creditors, and with that end in view will exercise his best judgment in determining whether it is advisable to sell publicly or privately or to extend or withhold credit. *Bobbitt v. Rodwell, supra.*

The language of the instrument which gives rise to the contention of

the plaintiff can be most safely construed by considering the connection in which it is used, and by giving weight to every word or clause that may qualify or explain it. The words upon which the plaintiff relies to sustain his view of the meaning and proper construction of the assignment will be found embodied in the following paragraph of it: "In special trust nevertheless, and to and for the uses, interest and purposes following, viz.: that the said party of the second part shall at once take possession of the property hereby assigned, and with all reasonable diligence sell and dispose of the same in such manner as he may deem most beneficial to the interest of all concerned and convert the same into money, and shall also with all convenient speed collect, get in and recover all the said debts, dues, bills, bonds, judgments, mort-
(84) gages, claims and demands hereby assigned, and with the proceeds of said sales and collections, that the said party of the second part shall first pay all just and reasonable expenses, costs and charges attending the drawing and due execution of this instrument, all legal and clerical services which the execution of the same may require, and the carrying into effect the trust hereby created; and to this end the party of the second part shall have authority to employ such clerks and servants as may be required to replenish by purchase the said stocks of merchandise, to pay for the same out of the said sales and collections, if the party of the second part shall deem such to be for the best interest of the creditors herein," etc.

The next question presented in the well considered and exhaustive argument of counsel was, whether the insertion in a deed of assignment of the power to replenish a stock of goods with the money arising from the sales of the property conveyed, is proof conclusive of a fraudulent intent, or, what is equivalent, of a plain purpose to hinder or delay the creditors in the collection of their claims. Authority is given to the trustee to employ clerks and servants, and to replenish by purchase, etc. (if he "shall deem such to be for the best interest of the creditors herein"), the stock of goods, and this grant of power is preceded by the qualification that it is to be exercised with a certain end in view ("and to this end"). Looking to the language that precedes these words, for an interpretation of their meaning, it is manifest that the maker of the deed has given expression not to a purpose or desire that the trustee should manage the property for the benefit, ease or comfort of the debtor, but to the wish and direction that the trust should be executed for the benefit of all, for whom the trustee should act as fiduciary, by selling the property in the way best calculated to promote their interests, and collecting and disbursing the proceeds of sale as speedily as
(85) possible. Such deeds have been pronounced void in law only

where the debtor appeared in express terms to be providing for his own ease, comfort or benefit to the possible detriment or delay of creditors. And even where *prima facie* the deed must be construed as reserving to the debtor some unconscionable benefit or as subjecting the creditor to some unjust hindrance or delay, if it appear upon the face of the instrument that the language of the deed is susceptible of such explanation, by evidence *aliunde*, as will make it consistent with good faith, it is held that the issue of fraud must be submitted to the jury to determine whether such extrinsic testimony as may be offered is sufficient to rebut the presumption of *mala fides* raised by the deed. *Hardy v. Skinner*, 31 N. C., 191; *Cannon v. Peebles*, 24 N. C., 449; *Young v. Booe*, 33 N. C., 347. The instruction asked by the plaintiff did not suggest the question whether the deed was *prima facie* fraudulent, but we are of opinion that upon its face there is nothing to destroy the usual intendment in favor of honesty in its execution. We can conceive of many cases in which it might be advisable, and in some in which it would be essential in order to achieve the best results in the disposition of the trust property to make new purchases. The maintenance of something like a full stock of merchandise must tend sometimes to hold the trade of customers, while it may often become essential to the fulfillment of contracts to supply farmers, who have given agricultural liens to the assignor, that the trustee should keep a supply of such articles as the trustor had agreed to furnish. Burwell on Assignment, sec. 182, p. 242; *De Woffe v. Mining Co.*, 49 Conn., 282, 326. The grant of powers to a trustee, which, if exercised honestly and with good judgment, must often prove a boon both to creditor and debtor, is neither fraudulent *per se* nor does it raise a presumption which shifts the onus of (86) sustaining the deed on the maker. Where there is evidence of the incompetency or dishonesty of the trustee or of injury caused by his negligence, the remedy, as suggested in *Bobbitt v. Rodwell, supra,* is an application to the court for his removal. Not only is there no sufficient internal evidence of bad faith to raise even a presumption against the validity of the instrument, but it is somewhat exceptional in that the assignor appears to have turned over all his property, reserving neither homestead nor personal property exemptions, which he might lawfully have done. *Egerton v. Smith*, 98 N. C., 207; *Adams v. Smith, supra, Bobbitt v. Rodwell, supra.*

The omission by the copyist of the claim of a single creditor in the copy of the deed registered in Edgecombe County falls far short of sufficiency to shift the burden of proof on the issue of fraud. At most it was only competent as a circumstance to be considered with other evidence tending to show bad faith. The burden of proof is sometimes

shifted in the progress of the trial, but it is only by the introduction of testimony which the law has declared to be *prima facie* proof of fraud but which may be rebutted by evidence deemed by the jury sufficient to explain such suspicious circumstances and thereby overcome the artificial weight that the law has attached to them as evidence. *McLeod v. Bullard,* 84 N. C., 515; *Lee v. Pearce,* 68 N. C., 77.

The issue of fraud was properly submitted to the jury. To have pursued any other course would have been an invasion of the province of the jury. *Beasley v. Bray,* 98 N. C., 266. There was no error, and the judgment is

Affirmed.

Cited: Bank v. Gilmer, post, 704; *Redmond v. Chandley,* 119 N. C., 579; *Commission Co. v. Porter,* 122 N. C., 697.

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(87)

J. W. RIGGAN v. PATTIE A. SLEDGE.

Practice—Appeal—Case on Appeal—Application to Amend—Affidavit —Mortgage Alleged to Have Been Procured by Fraud—Participation in by Mortgagor.

1. Where an affidavit in an application to this Court for leave to apply to the trial judge to amend the case on appeal by including evidence alleged to have been omitted therefrom, merely states the belief of the appellant that said judge would make the amendment, but does not set out the grounds for such belief, the application will be denied unless it appears that the omission was made by mistake or inadvertence.

2. In such application it is usual to append the letter of the trial judge, showing his willingness to amend the case on appeal.

3. A suggestion that an appellant believes that the trial judge will amend the case is not sufficient to justify a continuance in order that a letter may be procured from the judge, especially when appellant has had ample time to procure it.

4. Where, in an action for the possession of land sold under mortgage and bought by the mortgagee, the defense was that the mortgage was void for the reason that its execution by the owner was procured through the fraud and deceit of her husband, it was not error to refuse to charge that if the defendant was ignorant of the contents of the mortgage, and was induced to sign the same by the fraud and deceit of her husband, then the said mortgage was void, for such instruction omits any reference to the participation in such alleged fraud by the mortgagor.

MONTGOMERY, J., having been of counsel, did not sit on the hearing of this appeal.

RIGGAN *v.* SLEDGE.

ACTION for the recovery of land, tried before *Winston, J.*, and a jury, at Fall Term, 1894, of WARREN.

C. A. Cook for plaintiff. (92)
M. H. Palmer for defendant.

CLARK, J. The appellant avers in the affidavit an omission of the trial judge to include in the case settled by him certain evidence deemed material by appellant and further his belief that his Honor will make the correction if given an opportunity.

It has been repeatedly held by this Court that the application is insufficient unless it also sets out the ground of such belief, that the Court may judge of its reasonableness. *Porter v. R. R.*, 97 N. C., 63; *Lowe v. Elliott*, 107 N. C., 718, and other cases cited in Clark's Code (2d Ed.), 549. It is usual to append the judge's letter to that effect to the affidavit that the Court may pass upon it. It must also appear that the omission complained of was made by mistake or inadvertence. *Bank v. Bridgers*, 114 N. C., 107; *S. v. Sloan*, 97 N. C., 107.

Nor is a suggestion of this kind sufficient to sustain a motion for a continuance in order that the judge may be applied to for such letter. The appeal has already been docketed several days and there has certainly been ample time since the "case settled" was accessible to appellant in which to apply to his Honor for such statement in writing. *Vigilantibus, non dormientibus leges subveniunt.*

The defendant requested the judge to charge that if she was ignorant of the contents of the two mortgages and was induced to sign the same by the fraud and deceit practiced on her by her husband, (93) then said mortages are void and plaintiff cannot recover possession of the land. This omits any reference to the participation in or knowledge of such alleged fraud and deceit on the part of the plaintiff, and was properly refused. The privy examination is properly certified. There is no evidence tending to show that the plaintiff participated in or had notice of any fraud or deceit practiced by the husband, if any there was, but there was evidence to the contrary and also evidence that the mortgages were read over to defendant before being signed by her. Indeed, this being a civil case, upon the evidence his Honor might have directed the jury to return the verdict on the first issue in favor of the plaintiff, as there was no evidence to the contrary. *S. v. Riley*, 113 N. C., 648; *S. v. Shule*, 32 N. C., 153.

Affirmed.

Cited: Bank v. Ireland, 122 N. C., 575; *Benedict v. Jones*, 129 N. C., 474; *Marsh v. Griffin*, 136 N. C., 334; *Davis v. Davis*, 146 N. C., 165; *Calvert v. Alvey*, 152 N. C., 613.

J. T. GAY ET AL. v. WM. GRANT, ADMINISTRATOR, ET AL.

Referee's Report—Modification Under Order of Superior Court—Exception.

Where this Court remanded a cause with an order that the referee modify his report in certain particulars so as to conform to the rulings of this Court on appeal, the duties of the referee were simply those of an accountant instructed to alter and modify the account already stated, and not to open the account and take additional testimony; and hence it was not necessary for the referee to give notice to the parties of the time and place, when and where he would make the corrections ordered to be made.

(94) *R. B. Peebles for plaintiffs.*
Thos. N. Hill and Thos. W. Mason for defendant.

(100) MONTGOMERY, J., after stating the facts: There was no error in his Honor's overruling each and every one of the plaintiffs' exceptions to the reformed report (2d) of the referee. As to the first exception, it was not necessary for the referee to have given any notice to any party to the suit as to when or where he intended to make the corrections which this Court had instructed him to make, at its September Term, 1888. The account was not opened for the taking of additional testimony. As to the second exception to the report of the referee, it is only necessary to say that the plaintiffs made no demand for any such sums as those therein set forth in their complaint or replication, nor did they offer any proof claiming them. They ignored the said judgment, and sought and had an account of the administration from the beginning. Besides, it appears from the records in the case, *Judge Shepherd's* judgment of June, 1886, and affirmed by this Court at its September Term, 1888 (*Gay v. Grant,* 101 N. C., 206), that these sums were not due. As to the third exception to the referee's report, it is nowhere to be met with in the pleadings or evidence. It must have got into the exceptions through mistake. No mention of it was made by plaintiff's attorney in his argument before this Court.

After a comparison of the first report of the referee with that of the second or reformed one, it is apparent that the referee has made the corrections which he was instructed to make by this Court, and that it is in all respects proper and in conformity with the ruling of this Court in this case reported in 101 N. C., 206. The second assignment of error is without force. The case was remanded by this Court at its (101) September Term, 1888, with an order that the referee be instructed to modify the account which he had filed with his report, in accordance with the opinion of this Court. No additional testimony was asked to be taken by the plaintiffs and none ordered by the Court.

The duties imposed upon the referee were simply those of an accountant instructed to alter and modify, in certain stated particulars, an account already stated, and to make it conform to the rulings of this Court in certain specified items. It was in no sense a new trial of the whole matter, and the referee properly rejected the offer to take other testimony.

It is to be observed that if the matters, which the plaintiffs complain they were not allowed to make proof of, were material and pertinent, they have themselves to blame for not putting them in evidence in the original taking of proof by the referee, because the plaintiffs admit that "said evidence could have been procured and used before the referee on the original hearing." The third assignment of error is not sustained. We think the judgment of his Honor, *Judge Whitaker,* was correct, and in conformity to the ruling of this Court, made at its September Term, 1888, in this case. There is no error in the judgment of the court below and the same is

Affirmed.

(102)

ISAAC H. SMITH v. EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE.

Action for Breach of Contract—Pleading and Proof—Variance.

1. A recovery cannot be had on the allegation of one cause of action and the proof of another, for the reason that the defendant, however diligent, cannot prepare his defense to meet surprises.

2. Plaintiff brought action on a contract whereby he agreed to act as agent of a building and loan association and to pay his own expenses, in consideration of being paid commissions for stock sold by him with renewal interest in monthly installments, alleging certain amounts to be due him on each, and alleged a wrongful repudiation of the contract by defendant. The defendant pleaded payment of the amounts earned on the renewal interest, and on the trial plaintiff abandoned his claim as to the commissions and as to the breach of contract: *Held,* that plaintiff cannot recover the expenses incurred by him in behalf of defendant in rendering the services under the contract, that cause of action not having been pleaded.

ACTION tried before *Brown, J.,* and a jury, at Fall Term, 1894, of CRAVEN.

W. W. Clark for plaintiff. (109)
M. DeW. Stevenson and W. S. Pearson for defendant.

AVERY, J. It is a well settled legal principle, repeatedly recognized

by this Court, that a recovery cannot be had upon proof without corresponding allegations. *McLaurin v. Cronly,* 90 N. C., 50; *Abernathy v. Seagle,* 98 N. C., 553; *Greer v. Herren,* 99 N. C., 492. The plaintiff in the progress of the trial abandoned his second cause of action entirely, as well as that founded on the breach of contract alleged in
(110) sections 5 and 6, and the repudiation of it declared upon in the 11th section of his first cause of action, while the defendant conceded the justice of the demand embodied in sections 7 and 8, but pleaded and offered evidence to prove payment in full of that claim. After erasing all that is no longer insisted upon, there is no other allegation upon which a recovery can be asked, unless it be in the general averment contained in the third section of the complaint, construed in connection with the contract, a copy of which was filed as an exhibit. After abandoning the claims of two dollars per share on paid-up stock and of 95 per cent on membership fees, and after his demand of 1½ per cent on monthly installments paid upon stock had been admitted, the plaintiff was allowed to testify, the defendant objecting, that "from December, 1891, to December, 1892," he had "spent $5,000 out of his own pocket in and about work for the association."

Was he entitled to recover back from the defendant any part or all the money expended, as designated by him, in the face of the fact that the two demands abandoned and that conceded to him in the answer, were by express stipulations of the contract to be paid, if at all, in consideration of duties performed, or caused to be performed by said second party, at his own cost or expense? If it were possible to maintain an action founded upon the alleged expenditure in the conduct of the business, because in furtherance of the purposes in contemplation of the parties in entering into the written agreement, the defendant would be entitled to a more definite understanding of what he proposed to prove than can be gathered from the portions of the complaint left intact, or all of it probably with the exhibit added.

But the contract is one involving mutual considerations,—that on the part of the plaintiff to do certain things at his own expense, and
(111) that on the part of the defendant to pay him at a given rate for certain services if performed. Now that plaintiff, by abandoning his grounds of action, has admitted his inability to prove that he performed two kinds of service, for which he was to receive payment, and the defendant has conceded his remaining claim, it would be manifestly wrong to allow him to recover in consideration of working at his own expense for the only service rendered, and then to permit him to recover back the consideration on his part. The case bears no analogy to that class of cases where a plaintiff is held to have declared in his complaint both upon a special contract and a *quantum meruit* or a *quantum valebat*

(though often inartificially drawn) and afterwards directs his proof to the second ground of action only. Here the plaintiff declares upon the stipulations of the defendant, makes good his claim to have performed one of them, and then demands under a general count the repayment of the consideration in money paid by him in the performance of what he had engaged in the written instrument to do.

A plaintiff is not allowed to declare on one cause of action and prove another, because if such variances are tolerated, however diligent the defendant may be, he cannot so prepare his defense as to meet surprises. *Willis v. Branch,* 94 N. C., 142; *Conly v. R. R.,* 109 N. C., 692. For the reasons given we think there was

No error.

Cited: Roberson v. Morgan, 118 N. C., 994; *Christmas v. Haywood,* 119 N. C., 134; *Harris v. Quarry Co.,* 131 N. C., 555; *Foster v. Davis,* 175 N. C., 544.

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(112)

THOMSON-HOUSTON ELECTRIC LIGHT COMPANY v. HENDERSON ELECTRIC LIGHT COMPANY.

Corporation—Creditor and Debtor—Trust Fund—Equitable Relief—Counterclaim—Exceptions Filed After Adjournment of Court.

1. As between itself and its creditors, a corporation is simply a debtor, and the relation of trustee and *cestui que trust* does not exist so as to create a lien upon the assets of the corporation in favor of the creditor in any other sense than applies to an individual debtor; therefore,

2. A creditor has no equitable title to assets of a corporation, whether solvent or insolvent, in the hands of its treasurer, and the courts will not interfere with their equitable jurisdiction to enforce the payment of a judgment in favor of the creditor against the corporation.

3. A counterclaim embracing a transaction not connected with the subject of the action and with which the plaintiffs had no connection, but which was for an alleged tort against parties other than the plaintiff, was properly disallowed.

4. Exceptions to the findings of fact by the trial judge, filed after the adjournment of the court for the term, will not be entertained.

ACTION heard at May Term, 1894, of VANCE, before *Battle, J.,* on the report of referees.

The action was instituted to recover of the defendant corporation the sum of $2,006.30, and interest, for goods sold and delivered, and the

directors and stockholders of the defendant corporation were made parties to obtain injunctive relief against the threatened conversion of the assets, and to enable plaintiff to follow the fund if converted.

(119) *T. T. Hicks and T. M. Pittman for plaintiff.*
J. W. Hinsdale for defendants.

MONTGOMERY, J. The theory upon which the plaintiffs, in their complaint, seek equitable relief, rests upon the idea that the directors of the defendant corporation are trustees, in the most comprehensive sense, for them, that the assets of the corporation are a trust fund in the hands of the directors for their benefit, and that therefore in this action they can have an order against the defendant Burgwyn for a payment into court of funds in his hands as treasurer, to be applied to such judgment as the plaintiffs may recover against the defendant corporation. The argument of Mr. Hicks for the plaintiffs was able and ingenious, but it failed to satisfy us of the correctness of the plaintiff's position. The relation between a creditor and a corporation, solvent or insolvent, is simply that of creditor and debtor, and where the law-writers and the courts have used the words "trust fund" in connection with the assets of an insolvent corporation, it has not been intended to mean that there is a direct and express trust attached to the property. The assets are not in any true and complete sense trusts. 1 Pomeroy Eq. Jur., sec. 1046. In *Hill v. Lumber Co.,* 113 N. C., 173, this Court decided that a director of the insolvent defendant corporation, who was also a creditor, could not take advantage of the information which he had of the affairs of the corporation to protect himself by a judgment confessed by the corporation in his favor to the injury of other creditors who did not have the same means of information; and that the assets of the corporation were a trust fund, and that general creditors were entitled to come in on equal
(120) terms with directors who were *bona fide* creditors. It is true, too, that in that case the Court used the word "lien" in reference to the claims of creditors upon the assets of the company, but the word was afterwards explained in *Bank v. Cotton Mills,* 115 N. C., 507, to mean simply a right of priority of payment over stockholders of the corporation. It did not undertake to decide that these priorities were such a trust as attached to the property and placed the right thereto in the creditors. In *Hollers v. Brierfield,* 150 U. S., 371, these words are used: "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 his 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 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." *Curram v. Arkansas,* 15 How., 304. So it appears from the authorities that the plaintiffs have no equitable title to the assets of the corporation in the hands of Burgwyn, the treasurer of the defendant company. The relations of trustee and *cestuis que trust* between him and the creditors, for the purposes of this action, do not exist, and the plaintiffs cannot invoke the aid of the court, in its equitable jurisdiction, to enforce the payment of the judgment recovered against the defendant in this action by an order of the court, on pain of attachment for contempt. In *Daniel v. Owen,* 72 N. C., 340, where the relation of trustee and (121) *cestui que trust* did not exist, the court below made an order that the judgment debtor should pay into court on a certain day the amount of the judgment. This Court held that the order was void because of the want of power to make it. In that case the Court said: "Under the old equity system the chancellor had power to order one who held the legal title in trust for another to execute a deed. So he had power to order a defendant who held a fund in trust, whether it consisted of bonds or money, to pay 'the funds' into court to the end that the fund should be put under the protection of the court. This power the court still has under the new system in all cases where there is the relation of trustee and *cestui que trust,* and the land or the fund is in contemplation of a court of equity the property of the plaintiff in an action brought to enforce the equity, and an order made for the execution of a deed on the payment of the fund into court, is a lawful order within the meaning of Battle's Revisal, ch. 24, sec. 1, subdivision 4." Code, sec. 648, subdivision 4.

The judge below properly overruled the second conclusion of law of the referee allowing the counterclaim of the defendants set up in their amended answer. Upon the facts found by the referee the defendant, as a matter of law, was not entitled to it. According to the referee's finding, the counterclaim embraced a transaction not connected with the subject of the action, the plaintiff had no connection with it, nor ever had, and it was for a tort against other persons than the plaintiffs.

All of the exceptions filed by the defendants to the findings of fact by his Honor were filed too late. They were not put in until after the court had adjourned for the term. *Battle v. Mayo,* 102 N. C., 413;

(122) *Lowe v. Elliott,* 107 N. C., 718. The judgment of the court below is affirmed, except that part of it which adjudges "that the said W. H. S. Burgwyn, treasurer, be and he is hereby ordered and directed to satisfy the plaintiff's said recovery and the costs by paying the same out of the said assets." The plaintiffs may however at once examine, as under the chapter of The Code entitled Proceedings Supplementary to the Execution, W. H. S. Burgwyn and the other directors of defendant corporation, or any other persons who may have any assets of defendant corporation in their hands or under their control, without any further proceedings, as it appears from the complaint and answer in this case and the proof, that the defendant company, through Burgwyn, its treasurer, either received or ought to have received, at the time of the sale of the defendant corporation's property and franchise, an amount from that sale more than the judgment recovered in this action, and that there is no other creditor, nor is there any other property of the defendant corporation.

Modified and affirmed.

Cited: Howard v. Warehouse Co., 123 N. C., 92; *McIver v. Hardware Co.,* 144 N. C., 484; *Edwards Supply Co.,* 150 N. C., 172; *Powell v. Lumber Co.,* 153 N. C., 56.

COMMERCIAL BANK OF DANVILLE v. W. H. S. BURGWYN.

Practice—Evidence—Exceptions to Depositions—Waiver—Variance Immaterial.

1. Exceptions made, on a trial, to depositions which had been offered on two former trials without objection, and to which depositions no objection was made either at the time of taking or opening them, properly overruled.

2. A variance between the allegation and proof, which is immaterial and does not mislead the defendant, will be disregarded.

3. Where, in an action on notes by the purchaser from the payee, the plaintiff admitted the allegation of defendant's answer that the notes were obtained by the fraudulent representations of the payees, the burden was thrown upon plaintiff to show that he was a *bona fide* purchaser for value and without notice of the fraudulent representations of payee, but having offered testimony to that effect, the burden was again shifted and the *prima facie* case of plaintiff restored. Where, in such case, the defendant offered no sufficient testimony to establish knowledge on the part of the plaintiff, at the time of the purchase of the note, of the alleged fraud of the payee, it was proper for the trial judge to instruct the jury, if they believed plaintiff's testimony, to find their verdict accordingly.

BANK *v.* BURGWYN.

ACTION tried before *Shuford, J.*, and a jury, at September (123) Term, 1893, of VANCE.

There was judgment for the plaintiff, and defendant appealed. The facts appear in the report of a former appeal (110 N. C., 267) and in the opinion of *Associate Justice Montgomery.*

J. B. Batchelor and A. W. Graham for plaintiff.
Pittman & Snow, R. B. Peebles and John W. Hinsdale for defendant.

MONTGOMERY, J. After hearing thorough argument and making a painstaking examination of the pleadings and the testimony, we are unable to discover any material difference in any aspect between the case presented at this term of the Court and the one heard and determined at February Term, 1892, and reported in 110 N. C., 267. The opinion delivered in that case for the Court by *Justice Shepherd* renders it unnecessary for us to go over the ground again. It is true, however, that when the case was last tried at Vance Superior Court objection was made (for the first time) by the defendant to each and every question in the depositions in the case which went to connect the (124) Southern Electric Light Company with the notes, either as indorser or indorsee. But these depositions had been offered in evidence by the plaintiff on two former trials of this action and no objection was made on said first two trials, and no objection was made and noted at the time said depositions were taken, nor at the time they were opened by the clerk. The court properly overruled the exceptions. *Carroll v. Hodges,* 98 N. C., 418. Also, at the last trial there was suggestion of a variance between the complaint and the evidence. In the two former trials this suggestion was not made, and upon inspection the variance in its nature is immaterial and did not mislead the defendant. Clark's Code, section 269, and cases thereunder cited. Upon a close inspection of the additional testimony for the defendant, introduced on the last trial of the case, we do not find anything that adds in value to the testimony offered in the former trials. The court below charged the jury in these words: "That the defendant having pleaded that the notes sued on were obtained by the fraudulent representations of the payees, and the plaintiff having admitted that allegation, and consented for the second issue to be answered in the affirmative, the burden was on the plaintiff to show that it was a *bona fide* purchaser for value and without notice of such fraudulent representations. That the plaintiff had offered testimony tending to show that it had acquired the notes *bona fide* for value, in the usual course of business and while they were still current, and if the jury believed this evidence the *prima facie* case of the plaintiff was restored, the burden of proof was then upon the defendants to establish

knowledge on the part of the plaintiff, at the time of its purchase, of the alleged fraudulent representation, and that the defendants had
(125) offered no sufficient evidence for that purpose, and hence if the jury believed the testimony offered by the plaintiff they should answer the first and third issues in the affirmative."

We think that the court took a correct view of the character and weight of the testimony, properly instructed the jury thereupon and applied the law thereto. There is no error and the judgment of the court below is

Affirmed.

Cited: Watkins v. Mfg. Co., 131 N. C., 539; *Morgan v. Fraternal Assn.,* 170 N. C., 81; *Steel Co. v. Ford,* 173 N. C., 196.

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(126)

S. H. BOYER ET AL. v. C. A. GARNER.

Practice—Certiorari—Perfecting Appeal—Negligence of Counsel Imputable to Client—Execution of Judgment in Action for Recovery of Land—Claim for Betterments.

1. Where, upon an appeal being taken from a judgment, an entry was made upon the docket allowing time to file bond and prepare case on appeal, and it was understood between the two attorneys for the appellant that one of them should attend to the matter, and he neglected on account of sickness to file the bond and prepare and serve the case on appeal: *Held,* that no grounds exist for a *certiorari.*

2. The giving of an appeal bond is no part of the duties of an attorney; if the attorney assumes the duty, he does so as agent of the appellant, who is answerable for the negligence of his attorney.

3. An agreement between the counsel for a party that one of them should perform duties incumbent upon them both equally is a matter personal between them, and a failure to discharge the assigned duty is negligence in both for which their client is answerable.

4. When the defendant, in the trial of an action for the recovery of land, sets up no claim for betterments made or taxes paid, and judgment is rendered against him for possession and damages for detention, his petition (under section 473 of The Code) to be allowed betterments, etc., must be made before the judgment is executed.

5. Where a writ of possession on a judgment in an action at law is executed by placing the defendant out of and the plaintiff into possession, the judgment is executed within the meaning of section 473 of The Code, notwith-

standing the judgment for the damages received in said action is not satisfied.

MOTION heard upon notice and affidavits, before his Honor, *Battle, J.*, holding the court of the Third District, by exchange with *Bynum, J.*, at chambers in Henderson, Vance County, on 21 May, 1894, in which the defendant, against whom judgment had been rendered in action to recover land, tried at January Term, 1894, of FRANKLIN, petitioned to be allowed betterments, etc., not having set up the claim on the trial. The motion was not allowed and defendant appealed. In this Court a *certiorari* was applied for upon the grounds fully stated in the opinion of *Associate Justice Montgomery.*

F. S. Spruill for plaintiffs, specially on motion for certiorari.
N. Y. Gulley for defendant.

MONTGOMERY, J. In this action the plaintiffs at January Term, 1894, of FRANKLIN, obtained judgment against the defendant for the recovery of a tract of land, from which judgment the defendant gave notice of appeal to this Court. The appeal was not perfected, and the defendant in apt time applied for a *certiorari* as a substitute for the appeal, to bring the record up, that the errors therein assigned might be examined into by this Court. The affidavit in support of the petition sets out the following facts: (127)

I. That the affiant and N. Y. Gulley, Esq., as associate counsel, represented the defendant in the trial of the cause in the court below.

II. That the defendant gave notice of appeal through his said counsel and had an entry made on the minutes of "time allowed to file bond and prepare case on appeal."

III. That before the appeal had been perfected and before the time allowed had passed, the affiant (W. M. Person) was taken sick and was for some time too unwell to attend to the duties of his office.

IV. That by agreement between himself and his associate counsel, N. Y. Gulley, the affiant was to attend to this matter, the said Gulley being engaged for a great portion of his time in work outside of the county; and that under these circumstances, through the misfortune and sickness of his counsel, the defendant lost his right of appeal.

V. That the defendant fully intended to perfect his appeal and so instructed his counsel, and the failure to do so was due to no negligence of the defendant, but to the cause set forth.

An answer to the petition was filed by plaintiff, and in the affidavit of Messrs. E. W. Timberlake and F. S. Spruill, used in support of it, the following statements appear:

1. That when the defendant excepted and gave notice of appeal to the Supreme Court, notice was waived, bond fixed at $25, and twenty days given to serve statement of case and perfect appeal.

2. That to these affiants' best knowledge and recollection Mr. Person did not absent himself from his office during the twenty days allowed for perfecting his appeal and that his associate, N. Y. Gulley, was well and strong, mentally and physically, during the entire period.

3. That a partial and incomplete statement of the case on
(128) appeal was made out and filed in the office of the clerk of the Superior Court, but the same was never served on the plaintiffs or their attorneys, and this was done several months after the trial was held, and that no appeal bond accompanied these proceedings.

We do not find from the foregoing facts any ground for the interposition of this Court, nor any sufficient legal excuse for the failure of the defendant to perfect his appeal. The giving of the appeal bond is not one of the duties of an attorney, and when an attorney assumes this duty he does it as agent, and his neglect is that of the principal. *Churchill v. Ins. Co.*, 92 N. C., 485. The agreement between the two attorneys in this case that Mr. Person should attend to this appeal was a matter personal between them. In law both were compelled to give the appeal their attention, and leaving out of consideration Mr. Person's sickness, his associate, Mr. Gulley, was in perfect health the whole time allowed for perfecting the appeal. The motion for a *certiorari* is denied.

The following proceedings were had in another branch of this case: Notice of a motion was given to the plaintiff on 9 May, 1894, that the defendant would move before *Bynum, J.*, holding the courts of the Third Judicial District, at Henderson, on 21 May, 1894, or as soon thereafter as practicable, for an order "suspending the execution of said judgment in the court below and to allow the defendant pay for the improvements made by him on the tract of land in controversy, the amount to be ascertained by a jury." At the hearing the defendant filed his petition and affidavits, and that portion of them deemed necessary for the settlement of this case is as follows:

1. That in the trial of the case the defendant set up no claim for betterments or taxes paid, although he had been in the possession of
(129) the land for many years and had made improvements enhancing its value, and paid a considerable sum in the shape of taxes upon it; and that the said judgment had not been executed. Wherefore, the petitioner prayed for an order staying the execution on said judgment and for the clerk of the Superior Court of Franklin County to place this cause on the civil issue docket in order that the question of damages and improvements might be passed upon by a jury. It appears that on the

hearing before *Battle, J.*, a writ of possession and execution, regular in all respects, was issued by the clerk of the Superior Court of Franklin County to the sheriff of said county. The sheriff of Franklin County returned said writ into the clerk's office on 15 March, 1894, with the following indorsement on it:

MRS. S. H. BROWER ET AL.
against
C. A. GARNER.
} WRIT OF POSSESSION AND EXECUTION.

Received 27 February, 1894. H. C. Kearney, Sheriff. Writ of possession executed 15 March, 1894, by putting the defendant C. A. Garner out of possession of the land described in the within writ of possession, and delivering the said possession by direction of the plaintiffs to H. R. Perry as agent of the plaintiffs. H. C. KEARNEY, Sheriff.

The $125 damages awarded by the jury in the trial of the original action had not been paid when the notice of betterment was given. The question for our determination is whether the said judgment had been executed by the sheriff of Franklin County before notice for the motion for betterments was given to the plaintiff. The return of the sheriff states that on 15 March, 1894, he put the defendant out of possession of the land and delivered possession of the land to the agent of the plaintiff. The notice of the motion for betterments was given nearly a month later. Section 473 of The Code declares, "That any defendant against whom a judgment shall be rendered for land may at any (130) time before the execution of said judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title believed by him, or them, to be good, have made permanent improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegations, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements." We think that the sheriff's return of the writ with the indorsement thereon was such an execution of the judgment as is contemplated by the said section of The Code. If not so, judgment might be had for land and for damages greater in amount than the defendant could pay, and though the plaintiff may have been put into possession of the land, yet so long as the damages might remain unpaid, the claim for betterments would still subsist, and if allowed would be a lien on the land, though

the same might belong to a purchaser for value and without notice. There is no error in the ruling of his Honor and the judgment is Affirmed.

Cited: Ice Co. v. R. R., 125 N. C., 22; *Luton v. Badham*, 127 N. C., 109.

(131)

SARAH COX v. J. B. McGOWAN.

Deed—Inconsistent Descriptions—Intention of Grantor.

1. All rules adopted for the construction of deeds embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties at the time of the delivery of the deed; hence, course and distance, or even what is considered in law a more certain or controlling call, must yield to the evidence, if believed, that the parties at the time of the execution of the deed actually ran and located a different line from that called for, such evidence being admitted to show the description of the line to be a mistake.

2. Where a deed contains two irreconcilable descriptions of the entire boundaries of a tract of land or of a single line, calls for more stable monuments, such as the lines of other tracts or well known natural objects, will be adopted rather than course and distance.

3. Where there are inconsistent descriptions in a deed, although in doubtful cases the custom most favorable to the grantee will prevail, on the rule that the first description is presumed to express the true intention of the parties, yet a specific description will prevail over a general one whether it comes before or after the latter.

ACTION for the recovery of land, tried before *Bynum, J.*, at April Term, 1891, of PITT.

There was judgment for the defendant, and plaintiff appealed. The facts appear in the opinion of *Associate Justice Avery.*

Jarvis & Blow for plaintiff.
Jas. E. Moore for defendant.

AVERY, J. The plaintiff, Sarah Cox, claims through a purchaser at a foreclosure sale under a mortgage deed executed by the defendant,
(132) J. B. McGowan, to one W. H. Cox, wherein the land conveyed is described as "a certain tract of land in the county of Pitt, bounded on the north by the land of S. F. Worthington, on the east by the lands of T. A. McGowan, and on the south and west by the lands of Henry

Carey, being the part of the Burton McGowan land conveyed by him to James H. McGowan, and containing eighty-seven acres, more or less." The action is brought for possession, and the land declared for in the complaint is described in the same way as in the deed, except that the second description after the words "and conveyed" is omitted. Prior to the execution of the mortgage, Henry Carey, whose name is mentioned as adjacent owner in the deed, had aliened one and a half acres of his original tract to James B. McGowan, who had conveyed, in exchange, that for the same amount of the land previously conveyed to him by Burton McGowan. This had been done in order to straighten the division line between the two, the result being that the line of J. B. McGowan on the south was not the same, when the mortgage deed was executed in March, 1891, as when Burton McGowan had previously conveyed to him. Carey was not twenty-one years of age when he executed the deed to the acre and a half in 1889, but executed another deed for the same in fulfillment of a promise then made to ratify on arriving at full age in October, 1891, but after the execution of the mortgage. The deed, being a voidable executed conveyance, might have been ratified without the execution of another deed (*Turner v. Gaither,* 83 N. C., 357 *et seq.*), but that, as an act of affirmance, when done, had relation back, so as to make the original deed valid *ab initio* instead of void. 10 A. & E., 647 and 648; Note 1, *McCormac v. Leggett,* 53 N. C., 425.

The plaintiff contended that under the first of the two descriptions, the one acre and a half on which W. H. Cox had erected his improvements, passed by the mortgage deed in March, 1891, the (133) line of Henry Carey at that time having been so altered by the exchange as to run south of it. The defendant insisted that the reference to the Burton McGowan deed was equivalent to inserting its calls as a second description in the mortgage deed, and, if that were not so, that the two descriptive clauses might be construed together so as to give effect to both and make the two consistent by adopting the Carey line described in the Burton McGowan deed instead of the division line established by the exchange.

All rules adopted for the construction of deeds tend towards one objective point. They embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties. 3 Washburn, 428 and 429. The intention, of course, relates to the time when the deed is delivered, hence course and distance, or even what is considered in law a more certain or controlling call, must yield to evidence, if believed, that the parties at the time of the execution of a deed actually ran and located a different line from that called for, such evidence being admissible to show the description of the line to be

a mistake. *Buckner v. Anderson,* 11 N. C., 572; *Cherry v. Slade,* 7 N. C., 82; *Baxter v. Wilson,* 95 N. C., 137; *Stanly v. Green,* 12 Cal., 148; 3 Washburn, 435.

In support of the position stated, we find that Tiedeman, in his exhaustive work on Real Property, sec. 828, lays down the rule as follows: *"Contemporanea expositio est optima et fortissima in lege.* In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed. For in describing the property parties are presumed to refer to its condition at that time, and the meaning (134) of their terms of expression can only be properly understood by a knowledge of their position and that of the property conveyed." The familiar rule that the course of a stream called for as a boundary is to be determined by showing the location at the date of the conveyance is referred to as one illustration of the practical operation of the rule.

While there was no proof of a survey or actual marking out of the boundary at the date of the mortgage deed, the foregoing authorities have been cited to show the recognition of the principle that parties are considered in law as intending that whatever is understood to be the true line at the date of the deed shall govern. 3 Washburn, 435. In March, 1891, J. B. McGowan was bound by his deed till it should appear whether Carey would repudiate his on arriving at full age. Carey's conveyance was then voidable, but when ratified in October, 1891, the exchange made in 1889, to all intents and purposes became valid. The new south line created by the exchange was the true line referred to as a boundary in the first of the two descriptions, and therefore the second description, which was inconsistent, could not govern. Where a deed contains two irreconcilable descriptions of the entire boundaries of a tract of land or a single line, calls for more stable monuments, such as the lines of other tracts or well known natural objects, will be adopted rather than course and distance. 3 Washburn, 424. *Buckner v. Anderson,* 111 N. C., 572; *Proctor v. Pool,* 15 N. C., 370; *Shaffer v. Hahn,* 111 N. C., 1.

In doubtful cases the rule that the construction must be favorable to the grantee will prevail, or the maxim that the first description in a deed is presumed to express the true intention of the parties, may be invoked to tip the nodding beam. *Vance v. Fore,* 24 Cal., 436. But whether a specific description comes before or after a general designation, it must prevail, upon the underlying principle that the law will always (135) demand the production of the highest evidence, and as between two descriptions will prefer that which is most certain. In *Carter v. White,* 101 N. C., 30, the Court held that the first description "known as Walker's Island" must yield to a more specific one by metes

and bounds, which did not include the whole island. The boundaries, as set forth in the first description in the mortgage, are the lines of the three adjacent tracts which it was admitted completely surrounded W. H. Cox's place. As we have seen, the parties are presumed to have contracted with reference to the then existing boundaries. After laying down the rules that the true line originally run, old marked lines, or the lines of adjacent tracts, may be proved to vary course or extend or diminish distance, *Chief Justice Taylor,* in commenting upon them in *Cherry v. Slade, supra,* said that all of the rules were founded "upon the same reason—the design of all being to ascertain the location originally made." The location originally made must have conformed to the true boundaries then existing. Carey did not then own the one acre and a half, but had conveyed it by a deed, since made valid, so as to remove his line to the south of it, and make the first specific description include it within the J. B. McGowan tract.

Looking beyond our own adjudications, we find that in *Dana v. Bank,* 10 Dana, 250, where under the first description the land was completely surrounded by a street, lines of adjacent tracts and a river, the Supreme Court of Massachusetts held (as did this Court in *Carter v. White, supra*) that such a specific description prevailed over a more general one, because it was more definite, not because it was first given in the deed. But that case is more completely in point here, since the second description there set forth was "being the same set off to the representatives of the late Wm. S. Crook, deceased, in the division of the estate of Enoch Crook, deceased, recorded with Middlesex Probate (136) Records, b. 177, p. 97," etc., while in our case it is admitted that the Burton McGowan deed did not include the acre and a half in controversy, the calls of that deed are not given in the statement of the case, nor is any reference made to the registry or directly to the deed for a more perfect description. But in *Dana v. Bank, supra,* the more general description refers to the book and page of the record as exhibiting the whole deed. The description, which calls for lines of other tracts, we can see fixes the boundaries by what are considered stable and certain monuments, then existing, and is to be preferred to one that is more general, even where the more general designation of the lines can by reference to other deeds be made more specific. It is true that in numerous cases which we need not cite, it has been held that the reference in one deed to another makes it competent to introduce the conveyance referred to in evidence for the purpose of showing that the original instrument offered is not void for vagueness in the descriptive clause, but it does not follow that there is any conflict between that rule and the one invoked in the decision of this case, that the general designations, such as "known as the Brown place," or "known as the Mt. Vernon

place," though susceptible of location by proof *aliunde,* must yield to a more specific description, which marks out the boundaries as lines of adjoining tracts, streets or rivers or designated corners with course and distance either preceding or following that which is less definite in the same instrument. The parties are presumed to have intended to be governed by the description which they make specific where it is in conflict with another. We think that there was error in the ruling of the court below. The judgment is

(137) Reversed.

Cited: Peebles v. Graham, 128 N. C., 221; *Murphy v. Murphy,* 132 N. C., 362; *Weeks v. Wilkins,* 134 N. C., 521; *Modlin v. R. R.,* 145 N. C., 230; *Gaylord v. McCoy,* 158 N. C., 327; *Clarke v. Aldridge,* 162 N. C., 331; *S. v. Jenkins,* 164 N. C., 529; *Potter v. Bonner,* 174 N. C., 21; *Patrick v. Ins. Co.,* 176 N. C., 670; *Bourne v. Farrar,* 180 N. C., 138.

R. J. COBB, ASSIGNEE, ET AL. v. S. S. RASBERRY ET AL.

Husband and Wife—Mortgage by Husband of Crops on Wife's Land—Curtesy.

1. The act of 1849 (section 1840 of The Code) only prohibited the husband from selling or leasing the real estate of his wife without her consent, and prevented the sale of the land under execution against the husband, but his rights as tenant by the curtesy initiate to the rents and profits were not impaired thereby.

2. Where the marriage and seizin of the wife in the lands took place before the adoption of the Constitution of 1868, the husband has the right to the crops on his wife's lands, and may sell, lease, or mortgage them.

ACTION, tried before *Bynum, J.,* and a jury, at April Term, 1894, of PITT.

The action was brought for the recovery of the possession of certain personal property, including, among other things, cotton, corn and other crops, all of which were raised on a tract of land described in the complaint, and were embraced and conveyed in a certain agricultural lien or mortgage, executed by the defendant S. S. Rasberry to one W. H. Cox to secure payment of a debt already due, and future advances to enable said Rasberry to cultivate the said land, amounting in all to one hundred and ninety dollars. After the execution of the said mortgage the same had been assigned to plaintiff Cobb, and the account for the

said advances had become, by sale of the same, the property of (138) plaintiff Sarah Cox. The *feme* defendant, who had been allowed to come in and make herself a party and plead to the action, set up as a defense in her answer that the crops specified were raised on her land and were her separate property.

In addition to the proving of the said preëxisting debt and the advances, the value of the property seized, the execution, probate and registration of said mortgage, the assignment, etc., the plaintiffs established in evidence that the marriage of the defendant S. S. Rasberry to the *feme* defendant, and the vesting in the *feme* defendant of the title to the land on which the said crops were raised, took place before the adoption of the Constitution of 1868, the said marriage having occurred in 1864, and the said land (which descended to *feme* defendant from her father) having been divided and allotted to her by proper proceedings for that purpose in 1865. Plaintiffs also proved that several children, the issue of said marriage, had been born and were yet living, but at what time any of said children were born did not appear in the evidence. There was no evidence on behalf of defendants.

His Honor ruled, that notwithstanding the evidence as to the date of the marriage of the defendants, and the time of the descent and vesting of the said title, the *feme* defendant's right of property in the said crops was not affected by those facts, and for that reason plaintiffs were not entitled to recover said crops, and he so charged the jury. Exception and appeal by plaintiffs.

J. B. Batchlor and Jas. E. Moore for plaintiffs.
No counsel contra.

MONTGOMERY, J. The matter set up in the answer of the *feme* (139) defendant cannot avail her. At common law the husband, when by birth of issue he became tenant by the curtesy initiate, was the owner of the crops grown on the wife's land, and even in case of his death before hers his personal representatives were entitled to them. *Williams v. Lanier,* 44 N. C., 30. The Act of 1849, Code, sec. 1840, only prohibited the husband from selling or leasing, for the term of his life or any less term of years, the real estate of his wife when the marriage had taken place since the third Monday of November, 1848, without her consent by deed and privy examination; nor would that act suffer his estate in the land to be sold under execution against him. His rights however to the profits and rents were not impaired or disturbed. In *Houston v. Brown,* 52 N. C., 163, this Court said, in referring to that Act: "The sole object was to provide a home for her (the wife) of which

she could not be deprived by the husband or the creditors." The marriage and seizin of the wife in the lands took place before the adoption of the Constitution of 1868; and article X, sec. 6, of that instrument, and the laws made in pursuance thereof, apply only to cases where the marriage has been contracted or the property acquired since the adoption of the Constitution. *Morris v. Morris,* 94 N. C., 613; *Thompson v. Wiggins,* 109 N. C., 508.

There was error in the instruction which his Honor gave to the jury, and the plaintiff is entitled to a

New trial.

(140)

CLAUDIA REDMOND v. H. L. STATON.

Action for Damages Against Clerk for Failure to Index Judgment—Chose in Action—Assignment of Judgment—Right of Assignee of Judgment to Damages for Clerk's Default.

1. The right of action which the plaintiff in a judgment has against a clerk of the Superior Court for not properly indexing the judgment is assignable.

2. The simple assignment of a judgment does not carry with it the right of action which the plaintiff has against a clerk of the Superior Court for failure to properly index it; therefore,

3. Where R. bought from F. a judgment which the clerk of the Superior Court had failed to properly index, and by reason of such negligence lost a lien upon land, and it did not appear that, in taking an assignment of the judgment, R. contracted with F. for anything but the judgment: *Held,* that R. acquired only the right to enforce the judgment and to enjoy its fruits, and not the right, which F. had, to sue the clerk for his failure to properly index it.

ACTION tried before *Armfield, J.,* at Fall Term of EDGECOMBE.

There was judgment for the defendant and plaintiff appealed. The facts appear in the opinion of *Associate Justice Furches.*

John L. Bridgers for plaintiff.
H. G. Connor for defendant.

FURCHES, J. At April Term, 1886, of Edgecombe, O. H. Farrar recovered a judgment against B. Bryan and Joshua Killebrew, which was duly placed on the judgment docket of said court, but was not indexed and cross-indexed as required by law, to constitute it a lien on the land of the defendant Killebrew in Edgecombe County.

Farrar, soon thereafter, sold and assigned said judgment to the (141) plaintiff who did not know of the defective condition of the

index. Killebrew, at the date of this judgment and at the date of the assignment to plaintiff, was the owner of sufficient real estate in Edgecombe County to have satisfied said judgment, and upon which said judgment would have been a lien, if it had been properly indexed; but being indebted to other parties, on the ____ day of February, 1889, and after the rendition of the judgment assigned to plaintiff, he executed a deed in trust to Jacob Battle to secure other indebtedness, in which he conveyed all his lands. Said Battle as trustee has since sold said land, and the purchaser thereof in an action to remove the cloud produced by plaintiff's judgment, in which she was a party, has recovered said lands, the Court holding that owing to the defective indexing of plaintiff's judgment it created no lien, and plaintiff has thereby lost her debt. *Dewey v. Sugg,* 109 N. C., 328.

At April Term, 1886, of Edgecombe Superior Court, and for some time thereafter, the defendant, H. L. Staton, was the clerk of said court, and plaintiff has brought this action against him (not on his official bond) to recover damages for the loss of her money caused by his negligence in not properly indexing said judgment.

The assignment is not set out in the record, but it is admitted by plaintiff that, in form, it only assigns the judgment to plaintiff.

Defendant, without controverting these facts, denies plaintiff's right to recover, as he says, for two reasons: First, that plaintiff has shown no cause of action against him; and, secondly, that if she has, it is barred by the lapse of time and the statute of limitations, plaintiff's action not having been commenced until 1883 (the precise date not shown, as the summons does not appear in the record).

It was admitted on the argument by the learned counsel repre- (142) senting plaintiff and defendant, that this is a case of first impression in our courts and that they have been unable to find any decided case like this in the other courts. This being the case, the Court has given it careful investigation, and as much reflection as we were able to bring to bear upon the questions presented; and after doing so we are of the opinion that Farrar had a chose in action against the defendant (*Holman v. Miller,* 103 N. C., 118; *Kivett v. Young,* 106 N. C., 567), and that under our statutes this chose might have been assigned. But that it was not assigned seems to be true, unless the assignment of the judgment carried with it this right or chose which Farrar had against the defendant. The fact that it was assignable under The Code, does not help the plaintiff if it was not assigned. The Code did not create causes of action, but only enlarged the power of assignment. Plaintiff's rights, then, stand as they did before The Code. And this brings us to a consideration of plaintiff's rights at common law and in

equity. At common law choses in action were not assignable, and did not pass from the bargainor to the bargainee, unless they were such contracts, covenants, as attached to the estate and ran with the estate, such as warranty and quiet enjoyment in conveyances of land. So the plaintiff is not benefited by this principle, as there is neither covenant, contract or land. And it is not always in a sale of land that these choses pass. For instance, A sells to B the lands of C, stating in the deed that C has the title, but A executes a deed to B with full covenants of warranty and quiet enjoyment, and B is afterwards turned out by C. B has a cause of action against A. But B sells to D with full covenants, and C turns D out of possession, and B has become insolvent. D has no right of action against A at law, for the reason that there was no estate passed from A to B, and as no estate passed to B, no covenants
(143) passed, as they were not assignable, and only ran with the estate. *Nesbit v. Nesbit,* 1 N. C., 490.

But in this case D might bring his suit in equity against A and recover, equity holding that B had the right to sue and that he had conveyed to D with full covenants. Therefore equity would treat B as a trustee of D, and in that way give D relief against A. *Nesbit v. Brown,* 16 N. C., 30.

A buys a non-negotiable note, which gives him the equitable but not the legal title to the note. The note is not paid, and A brings suit in the name of the assignor, who is the legal owner, obtains judgment, puts execution in the hands of the sheriff for collection, telling the sheriff that the money will be his when collected, as he had bought the note before suit, which he had to bring in the name of the payee, as he had not indorsed the note. The sheriff collects the money and pays it to the legal owner in whose name the suit was brought. A brings his action for the money against the sheriff and the Court sustains his action upon the ground that when the money was collected it was his. *Hoke v. Carter,* 34 N. C., 324.

We are now in a court of Equity as well as a court of law, and we admit that at the first view of these cases they seemed to support plaintiff's contention. But upon examination we think they are distinguishable from the case now before the Court.

In *Hoke v. Carter, supra,* the money collected by the sheriff was the fruit of the judgment, which in equity belonged to Hoke.

In *Nesbit v. Brown, supra,* there was the covenant, the contract, the chose in action, and though it did not pass from A to B with the estate, the reason that no estate in the land passed, and it was not assignable at law, yet there was a contract, and equity enforced it.

And the trouble with plaintiff's case is that she failed to show
(144) she contracted with Farrar for anything but the judgment, and

therefore she got nothing but the judgment, with the rights that Farrar had to enforce it and have the benefits of *its* fruits.

The case of *Timberlake v. Powell,* 99 N. C., 233, though not a case directly in point, involves very much the same principles and the same considerations as this case, and tends strongly to sustain defendant's first contention and the view we have taken of the case.

We therefore hold that plaintiff has failed to show that she has a cause of action against the defendant, and the judgment appealed from must be affirmed.

This relieves us from the consideration of the interesting question of the statute of limitations, which has grown to be one of the most troublesome subjects our courts have to deal with.

Affirmed.

Cited: Hahn v. Moseley, 119 N. C., 76; *Bank v. School Committee,* 121 N. C., 110; *Darden v. Blount,* 126 N. C., 249.

W. W. GREEN, ADMINISTRATOR OF W. W. GREEN, v. E. A. BALLARD ET AL.

Married Woman—Void Judgment—Coverture Appearing in Pleadings.

When the facts of the coverture of a woman appears in the complaint or other pleadings in an action on a promise to pay money, she not being a free trader, nor having specifically bound her separate estate for its payment, a personal judgment rendered therein against her is a nullity and will be set aside on motion.

MOTION by the defendant, Mrs. E. A. Ballard, to set aside a judgment against her, heard before *Battle, J.,* at chambers, by consent, as of April Term, 1894, of FRANKLIN. The motion was refused and the defendant appealed. The facts appear in the opinion of (145) *Chief Justice Faircloth.*

F. S. Spruill for plaintiff.
Shepherd & Busbee and N. Y. Gulley for defendants.

FAIRCLOTH, C. J. Prior to 1889 a special proceeding was instituted in FRANKLIN by the administrator of W. W. Green against his heirs at law, including the defendant, E. A. Ballard and her husband, W. H. Ballard, to sell land for assets. A sale was ordered and commissioners to sell

were appointed, who sold, and the defendant E. A. Ballard bought a part of the land and gave her personal note to the commissioners for the purchase price with the written consent of her husband, and said sale was confirmed. The purchaser having defaulted in payment of said note, the commissioners caused a notice, treated as a complaint in this branch of the case, to issue to E. A. Ballard and her husband that said commissioners would ask the court for an order to resell the land and for judgment against them on said note for the balance due thereon after a credit for her share of the proceeds of the sale, and E. A. Ballard and her husband accepted service of the notice without waiver of legal rights. E. A. Ballard and her husband failed to appear or make any defense to said motion, and at November Term, 1889, a decree to resell the land and a judgment was entered for the balance on the note against defendant E. A. Ballard and her husband in favor of said commissioners, and W. H. Ballard, the husband, died in March, 1890. In 1892, and within one year after she had actual knowledge of the terms and provisions of the last named judgment, she instituted this proceeding to set aside the judgment rendered against her at November Term,

(146) 1889, which was refused, and she appealed.

It sufficiently appears from the notice, treated as a complaint, on which the judgment at November Term, 1889, was entered, that the defendant E. A. Ballard was then a *feme covert,* and the question is presented whether the judgment against her on the note was a nullity and void, and can now be set aside on her motion. At common law a married woman has no capacity *pleni juris* to enter into contracts binding on her personally or to affect her separate estate, and can only do so in cases declared by the Courts of Chancery and by the provisions of our Constitution of 1868 and the marriage act, under certain conditions, none of which are present in this case. The principle was well stated in *Pippen v. Wesson,* 74 N. C., 437, and the instances and requisites for subjecting a married woman's separate estate to satisfy her contracts were pointed out and have been followed in numerous decided cases in this State. See *Dougherty v. Sprinkle,* 88 N. C., 300. If the defendant had pleaded her coverture by answer or otherwise, it is conceded that no personal judgment could have been entered against her, and the plaintiffs insist, as no such plea was filed, that the judgment is valid, and rely on *Vick v. Pope,* 81 N. C., 22, and *Neville v. Pope,* 95 N. C., 346, in support of their contention, as the court refused, on motion of the *feme covert* defendant, to set aside the judgment, but on inspection we find that no complaint or other pleading was filed in either case, so that the coverture did not appear to the court.

Where the fact of coverture appears in the complaint, or notice, as in our case treated as a complaint, it is expressly and directly held in

the following cases that a personal judgment is a nullity and void, and may be set aside at any time by motion of the *feme* defendant, although no plea or answer was filed. *Griffith v. Clarke,* 18 Md., 457; *Higgins v. Peltzer,* 49 Mo., 152; *Swayne v. Lyon,* 67 Pa. St., 436. (147) In *Baker v. Garris,* 108 N. C., 218, the coverture appeared from the complaint and answer also, and the judgment was refused, and it was insisted, upon the authority of *Vick v. Pope, supra,* that coverture must be pleaded and the Court said: "This is undoubtedly true, for when the disability does not appear upon the face of the complaint the plea must, of course, be by way of answer, as otherwise the fact of coverture can never be known."

It is the fact of coverture, appearing to he court in the record, that will not permit a personal judgment to be entered against the *feme covert* on her simple contract to pay money, and we can see no reason why it should not have the same effect, whether it appeared in the complaint or in the answer, and we are of opinion that his Honor erred, and that he should have set aside the personal judgment against E. A. Ballard, and it is so ordered.

This disposition of defendant's second exception renders it unnecessary to consider her first and third exceptions.

Reversed.

Cited: Bank v. Howell, 118 N. C., 274; *McCauley v. McCauley,* 122 N. C., 292; *McLeod v. Williams, ib.,* 453, 458; *Moore v. Wolfe, ib.,* 713; *Cansler v. Penland,* 125 N. C., 581; *Rutherford v. Ray,* 147 N. C., 256; *Windley v. Swain,* 150 N. C., 360.

(148)

T. J. JARVIS v. J. H. VANDERFORD ET AL.

Evidence—Presumption—Handwriting—Declarations Against Title.

1. The fact that in the trial of an action A. was shown to have been clerk of a court at a certain date does not create a presumption that he was such clerk several years prior to that date.

2. A witness who has not qualified himself as an expert as to handwriting, and who has never seen a certain person write, and has never corresponded with him, is incompetent to testify as to such person's handwriting by comparing it with other writing alleged but not known to be the latter's.

3. In an action to recover land, brought by the purchaser at a mortgage sale,

a declaration against title made by the mortgagor after the execution of the mortgage is not competent evidence against the plaintiff.

ACTION for the recovery of the possession of land, tried before *Bynum, J.*, and a jury, at the April Term, 1894, of PITT.

It was admitted that the title to the land in controversy was in one David Averett, who was long since dead.

(149) The defendants offered evidence tending to show that the court-house in Greenville, with all of the records of the clerk's office, both County Court and Superior Court, all of the records of wills were destroyed by fire in 1858, and the destruction of the same was admitted.

The defendants then offered in evidence a paper-writing purporting to be a copy of the will of David Averett. Objection by plaintiff. Objection sustained. Defendants excepted.

The court states for the benefit of the Supreme Court that the alleged copy introduced appeared to be old and faded.

The defendants then introduced a witness who testified that he had some old papers at home which were signed "Alexander Evans, Clerk," one an order of sale. "I don't know that he was clerk or that he signed them. Don't remember the dates; they are very old papers and much worn. I have seen some handwriting said to be Alexander Evans'. Don't know it myself." Defendants propose to hand to the witness the paper-writing "A" and ask him if the signature of Alexander Evans is in the same handwriting he has at home, and if it is the same he has seen and which was said to be the handwriting of Evans. Objection. Sus-

(150) tained. Excepted.

The witness further testified that he had seen the paper-writing, purporting to be a copy of the will of David Averett, before. "It was in the possession of W. H. Burnett. He asked me to read it and tell him whose hand it was. He told me it was the will of David Averett, and said that if the devisee in that will were to come he would not dispute the title of said devisee at all. The next I saw of that copy of David Averett's will was after Burnett's death. It was among Burnett's valuable papers. The next time I saw it the defendant had it. Defendant set up claim to the land during the life of Burnett, and as soon as they learned of the said copy of the will of David Averett. I told them of the copy of the will a month or so after Burnett showed it to me and told me what it was."

One of the defendants testified that he got the paper-writing purporting to be the will of David Averett from the administrator of W. H. Burnett; said that it was among Burnett's valuable papers. Was in a trunk with the deed of David Averett for the land.

Defendants put in evidence books of the register's office containing

the records of deeds, among others one probated in May, 1818, showing that Alexander Evans was clerk and Richard Evans was deputy clerk.

The plaintiffs then introduced in evidence books of the register's office containing the records of deeds, among others one probated at February Term, 1808, showing that George Evans was clerk.

It was admitted that Alexander Evans and Richard Evans were long since dead.

Upon the above evidence the defendants offered in evidence the paper-writing purporting to be a copy of the will of David Averett. Objection by plaintiff sustained, and exception by defendants.

There was verdict and judgment for plaintiff, and defendants (151) appealed. As grounds for appeal, the defendants assign as error:

1. The exclusion of the evidence as to the handwriting of Alexander Evans.

2. The refusal to permit defendants to put in evidence the paper-writing purporting to be a copy of the will of David Averett.

Shepherd & Busbee for plaintiff.
James E. Moore for defendants.

FURCHES, J. This is an action for the possession of land, in which there was a verdict and judgment for plaintiff, and defendant appealed. The record presents but two exceptions: First, the exclusion of the evidence as to the handwriting of Alexander Evans; second, the refusal to permit defendant to put in evidence a paper-writing purporting to be a copy of the will of David Averett. We do not think either one of these exceptions can be sustained.

It was not shown that Alexander Evans was clerk or that Richard Evans was deputy clerk of the Court of Pleas and Quarter Sessions in 1808. And although there was evidence tending to show that Alexander Evans was clerk and Richard Evans was deputy clerk in 1818, this did not create a presumption that they were such officers in 1808, ten years before that time. Lawson, Presumptive Ev., p. 190. But the paper produced purported to have been signed by "Richard Evans, Assistant Clerk," and not by Alexander Evans. And why it was that defendant wanted to offer evidence to prove the handwriting of Alexander Evans, we do not exactly see. But, be that as it may, we think the evidence offered was clearly incompetent. The witness offered had never (152) seen Alexander Evans write, had never had any business correspondence with him, but "that he had seen some old papers at home which were signed by Alexander Evans, Clerk, one an order of sale. I don't know that he was clerk or that he signed them. Don't remember the dates; they are very old papers and very much worn. I

have seen some handwriting said to be Alexander Evans'; don't know it myself."

Defendants proposed to hand to the witness the paper-writing "A," and ask him if the signature of Alexander Evans is in the same handwriting he has at home, and if it is the same he has seen, and which was said to be the handwriting of Alexander Evans. As the witness had never seen Alexander Evans write, and had not had any correspondence with him, the only way he could testify was as an expert. And it seems clear to us that he had not qualified himself to do this, even by a comparison of handwritings. But he had no standard to compare this paper with; the papers he had at home were not admitted to be in the handwriting of Alexander Evans, nor did they appear in the case or in any other way, so as to estop the plaintiff. *Tunstall v. Cobb,* 109 N. C., 316; *S. v. Allen,* 8 N. C., 6.

This disposes of defendant's first exception, and also of the second exception, so far as we can see. It could not be introduced as a certified copy under the statute (Code, sec. 1342); nor can it be introduced as color of title, as an ancient document, as an unregistered deed could be. *Brown v. Brown,* 106 N. C., 451; *Davis v. Higgins,* 91 N. C., 382. And although there was evidence tending to show that Burnett, through whom plaintiff derives his title, at some time said that "A" was a copy of David Averett's will, that would not make it competent evidence against the plaintiff; and certainly not unless it was shown that it was
(153) made before he mortgaged to James. *Headen v. Womack,* 88 N. C., 468.

There is no error, and the judgment is

Affirmed.

Cited: Ratliff v. Ratliff, 131 N. C., 431.

L. FLEMING v. J. R. DAVENPORT.

Agricultural Lien—Landlord's Lien for Advances—Priority of Landlord's Lien Over Advances of Others—Attaches Only on Crop of Current Year.

Although, under sections 1754, 1799, and 1800 of The Code, the lien of a landlord for advances is superior to that of a third party making advances to the tenant, nevertheless such priority exists only for advances made during the year in which the crops were made, and not for a balance due for an antecedent year.

FLEMING *v.* DAVENPORT.

ACTION tried before *Bynum, J., at* March Term, 1894, of PITT, on appeal from a justice of the peace.

It was in evidence that Fleming got from the defendant Daven- (154) port nearly all his supplies to run his tenants for 1892, including the tenant Lazarus Daniel. That said Joseph Fleming gave orders on said Davenport to his tenants, and that Davenport furnished the supplies to the tenants on these orders and charged the same to said Joseph Fleming, and that they have not been paid for.

The plaintiff introduced evidence tending to show that there was a verbal agreement between the landlord and tenant that the account of 1891 should be a lien on the crop of 1892. This was disputed by the tenant.

Defendant asked for following instructions, among others: (155)

"In no event can the landlord call upon Davenport to pay out of the cotton which came into his possession more than the actual advances made by Fleming to his tenant in 1892 to enable him to make his crop of that year, and the court charges you that the balance of the tenant's account for 1891 is not a lien on the tenant's interest in the cotton of 1892 superior to Davenport's lien, and you cannot charge this against him in this proceeding."

His Honor refused to charge the jury as requested, but in lieu of that gave the following instructions, to wit:

"If you find the fact to be that Daniel was a tenant of Fleming for the year 1891, and again for 1892, and Daniel owed Fleming anything for the year 1891 as advancements, and there was no special contract between them in the renting for 1892 that the amount due for 1891 should be a charge or lien on the 1892 crops, then plaintiff, as assignee in this case, was not entitled to recover that amount in this case. If you find that Daniel rented for 1892, then Fleming had a lien upon all the crops raised for the rents and for any sum advanced that year, and if he thought proper to let Daniel take the corn and fodder and other crops, and to hold to the cotton for the amount due him, he (156) had a right to do that, and although the defendant had a mortgage on it, the plaintiff's lien was superior to his, and he had a right to recover it out of this cotton. If you find that Fleming and Daniel made a special contract in 1892 that the amount due for 1891 should be a lien on the crop of 1892, then that also became a lien as against any debt to another not secured by a mortgage, and as the mortgage of the defendant was not made until after the assignment, his lien is inferior to that of plaintiff, as assignee of Fleming, and the plaintiff is also entitled to recover that sum. So, if you find that there was a special contract between Fleming and Daniel in writing in 1892 that the amount due from

Daniel to Fleming for 1891 should be a lien on the 1892 crop, the answer to the issue will be the amount due from 1891 and 1892, whatever you may find that to be. If you find the special contract for the account of 1891 to be a lien on the 1892 crop was not made, the answer will be the amount advanced by Joe Fleming for the year 1892."

The issue submitted to the jury was:

"Is defendant indebted to the plaintiff, and if so, in what amount?"

To which the jury responded, under the instructions given by his Honor, "Yes, in the sum of $64.87, with interest at 6 per cent from date of sale of cotton."

His Honor thereupon rendered the judgment for the plaintiff, and defendant appealed.

Jarvis & Blow for defendant.
No counsel contra.

FURCHES, J. This case is controlled by *Ballard v. Johnson,* 114 N. C., 141, and is so fully discussed there we see no reason for discussing it in this case.

The defendant was entitled to his prayer for instructions to the (157) jury.

The court declined to give these instructions, and this entitles the defendant to a new trial. And, as this substantially disposes of the matters controverted, we do not consider the other questions presented by the appeal. There is error.

New trial.

OSCAR HOOKER v. NELSON NICHOLS ET AL.

"Connor's Act"—Registration of Deeds—Priorities—"At Law," Meaning of.

1. Under chapter 147, Acts of 1885 ("Connor's Act"), which provides that no conveyance of land shall be valid against innocent purchasers for a valuable consideration from the donor, bargainor or lessor, etc., a sheriff's deed for land duly registered takes precedence of a similar deed which, though dated first and made in pursuance of a prior sale, was registered later.
2. The expression "at law," as used in statutes, does not mean merely a legal tribunal, as distinguished from equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable.

ACTION to try title to land, tried before *Bynum, J.* (who by consent

of parties, found the following facts, a jury trial being waived), at March Term, 1894, of PITT:

(It is admitted that title was out of the State and in William Whitehead at the date of the respective sales hereinafter set out.)

"1. That A. J. Tucker, by virtue of certain executions against the said William Whitehead, which executions are admitted to be regular in all things, on the first day of December, 1890, exposed (158) to public sale at the courthouse door in Greenville the land in controversy, the sale admitted to be regular and after due notice as required by law. That at said sale the plaintiff, through I. A. Sugg, his agent, purchased the lands in controversy, including other lands, designated as Lot 37 in the schedule of said Whitehead's property, for the sum of $225. That on the day of sale the plaintiff paid to said sheriff a sum of money more than sufficient to pay the purchase money for said land; that some time in March, 1891, he executed to the said plaintiff a deed for the said Lot 37, dating the deed 3 December, 1890, which said deed was registered on the _____ day of March, 1891.

"2. That on 1 December, 1890, and immediately after the sale of Lot 37, the said sheriff, by virtue of said execution, sold as Lot No. 38 a part of the land sold as Lot No. 37, which was bid off by the defendants. On 9 December, 1890, the defendants paid said sheriff the purchase money, to wit, $39, and the sheriff executed a deed for the same on that day, which said deed was duly probated and registered on 13 December, 1890; that Nelson Nichols bid off the land for the defendants.

"3. That after the purchase by Nelson Nichols he was informed by I. A. Sugg, agent of the plaintiff, that Lot No. 38 bid off by him was covered by Lot No. 37 as bid off by Hooker, and that he could not hold. That this conversation was had before 9 December; that Nelson Nichols paid the purchase money, $39, and the deed was executed to the defendant."

Upon the above facts the court intimated to the plaintiff that he could not recover, in deference to which intimation the plaintiff took a nonsuit and appealed.

J. E. Moore for plaintiff. (159)
No counsel contra.

FAIRCLOTH, C. J. The lappage of lots Nos. 37 and 38 in the schedule of William Whitehead is the land in controversy, it being admitted that Whitehead's title was good, who was the judgment debtor. On 1 December, 1890, the sheriff under executions against Whitehead, sold lot No.

37 and the plaintiff purchased, and immediately on the same day he sold lot No. 38 and the defendant purchased. Each purchaser paid the amount of his bid and the sheriff subsequently executed to each a deed for the lot purchased by him. The defendant's deed was registered 13 December, 1890, and plaintiff's deed was registered March, 1891. After the sale and before the defendant paid the sheriff, he, the defendant, was duly notified by plaintiff that lot No. 37, bought by plaintiff, covered lot No. 38, "and that he could not hold." It does not appear that the sheriff or either of the parties to this action had knowledge of the lappage at the sale. Upon these facts found by the court, by consent, his Honor held that plaintiff could not recover and he took a nonsuit and appealed.

So we have a clear-cut case of two innocent purchasers of the same land on the same day, for value, and without any notice, at the sale, of any defect of title or otherwise, with the second purchaser's deed first probated and registered. At common law and until recent legislation, the first purchaser at a sheriff's sale acquired the title, and his deed when registered related to the day of sale, and the priority of liens among the creditors did not affect his title. *Woodley v. Gilliam,* 67 N. C., 237; *Ricks v. Blount,* 15 N. C., 128. The proceeds of the sale were applied according to the creditor's right. *Coughlan v. White,* 66 N. C., 102.

(160) At an early day in our State history, registration laws in many respects became necessary, and in *Leggett v. Bullock,* 44 N. C., 283, will be found a brief recital of all such acts, until recently. Laws 1829, ch. 20, provided that "No mortgage or deed of trust shall be valid at law to pass any property as against creditors and purchasers for valuable consideration but from the registration of such mortgage or deed of trust." The words "at law" in said act do not mean in a court of law only, but in all courts. "At law" is an expression in a statute which does not mean merely a legal tribunal as distinguished from an equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable.

This act of 1829 has been now in force more than sixty years, and has been well understood by lawyers and laymen, and was intended to uproot all secret liens, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration. *Robinson v. Willoughby,* 70 N. C., 358; see Code, sec. 1254, and the numerous cases there cited.

The present case turns on the construction of Laws 1885, ch. 147, which says, after repealing The Code, sec. 1245, that: "No conveyance of land, nor contract to convey, or lease of land for more than three years, shall be valid to pass any property, as against creditors or

purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth," etc. It will be noted that the effective words of this act are identical in substance with section 1254 of The Code, and we are driven to the conclusion that the Legislature, with full knowledge of the meaning and effect of the said act of 1829, intended to apply the same rule to all conveyances of land, as declared in the late Act of 1885, ch. 147, and we must give the same effect to it. (161)

This view has been held and recognized by this Court in *Maddox v. Arp,* 114 N. C., 585; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Allen v. Bolen, ib.,* 560; and in *Barber v. Wadsworth,* 115 N. C., 29. In support of the above conclusions is the rule that when the equities are equal, the legal title controls. His Honor's intimation that the plaintiff could not recover was agreeable to law.

No error.

Cited: Patterson v. Mills, 121 N. C., 267; *Collins v. Davis,* 132 N. C., 109; *Woods v. Tinsley,* 138 N. C., 510; *Piano Co. v. Spruill,* 150 N. C., 169; *Sills v. Ford,* 171 N. C., 741.

THOMAS H. BATTLE, EXECUTOR OF S. E. WESTRAY, v. W. S. BATTLE.

Statute of Limitations—Partial Payment by Trustee of Debtor.

1. Partial payment on a note arrests the running of the statute of limitations only when it is made under such circumstances as will warrant the inference that the debtor recognizes the debt as then existing and his willingness, or at least his obligation, to pay the balance.

2. Where an assignment for benefit of creditors confers no power on the trustee, as agent of the debtor, to do any act to waive the statute, or to express a willingness or intention to pay the debt after it becomes otherwise barred, a partial payment made by the trustee on a note of the debtor will not arrest the running or remove the bar of the statute of limitations.

ACTION heard before *Mebane, J.,* at Fall Term, 1894, of NASH on a case agreed as follows:

1. That on January, 1880, the defendant William S. Battle executed his note under seal to the testator of the plaintiff, with James S. Battle and Kemp P. Battle as sureties, whereby he promised to pay one day after date the sum of fifty thousand dollars, and delivered said note to said testator, S. E. Westray. (162)

2. That on 3 February, 1883, the defendant William S. Battle executed a deed of trust to Geo. Howard and Richard H. Battle, trustees, whereby he conveyed without reservation all of his property of every kind and description, consisting of real and personal property, for and upon certain purposes and trusts in said deed declared. A copy of the said deed of trust is hereto attached and made a part of this agreed statement of facts. The said deed of trust was recorded in the public registry of Edgecombe and Nash counties and the trustees at once entered upon the discharge of their duties.

3. That the above-mentioned note for $50,000 is the same indebtedness as that recited in said deed of trust as "about forty-eight thousand dollars," the defendant having made sundry payments on said note prior to 3 February, 1883, and being of the opinion that the amount recited in said deed was the true amount due thereon.

4. That value of said $50,000 note on 14 December, 1884, was $54,450, and that the said George Howard and R. H. Battle, trustees of said W. S. Battle, as aforesaid, by virtue of the authority and discretion contained in said deed, and out of the assets held by them as said trustees, paid to S. E. Westray the sum of $5,445 on said 15 December, 1884, which was the earliest moment that they could make said assets available, and which said sum was then credited upon said note upon demand of said Howard and Battle, trustees, and by and with the consent of the said S. E. Westray, leaving thereon a balance of $49,005 due on said note.

5. That no other payment has since been made thereon, and that said note was left in the hands of B. H. Bunn, attorney for said S. E.
(163) Westray, and consumed by fire when his office was burned 1 August, 1891.

6. That said S. E. Westray died domiciled in the State and county aforesaid on 15 February, 1894, leaving a last will and testament, which has been duly proven and recorded in the county of Nash, of which he appointed Thos. H. Battle executor, who at once qualified and entered upon the discharge of his duties.

7. That the plaintiff was at the commencement of this action and is now the owner of said note.

8. That summons in this action was issued on 5 March, 1894.

It is agreed between the parties to this action that the same shall be heard and determined on the foregoing facts, and that if the court shall be of opinion that the plaintiff's right of action on said note is barred by the statute of limitations judgment shall be rendered accordingly, and if the court shall be of the contrary opinion judgment shall be rendered in favor of the plaintiff and against the defendant for the amount specified above with interest and cost.

Upon the "case agreed" the court was of the opinion that the plaintiff's right of action was not barred by the statute of limitation and judgment was rendered against the defendant, who appealed.

H. G. Connor for plaintiff.
Don Gilliam and Shepherd & Busbee for defendant.

CLARK, J. The Code, Section 172, requiring an acknowledgment or new promise to be in writing left to the effect of a partial payment in removing the bar of the statute of limitations as it was before the Code of Civil Procedure. *Bank v. Harris,* 96 N. C., 118. The effect of partial payment in stopping the running of the statute is not by virtue of any statutory provision. It was not in the statute of (164) James I, but was an exception allowed by the courts, and its application depends upon the reasoning in such decisions. The Act of 9 Geo. IV, C 14, in a similar way to our statute, merely recognizes the exception as existing. Partial payment is allowed this effect only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing and his willingness, or at least his obligation, to pay the balance. *Hewlett v. Schenck,* 82 N. C., 234; *Pickett v. King,* 34 Barb., 193; *Richardson v. Thomas,* 13 Gray, 381; 1 Wood on Limitations, sec. 99.

In the present case there was no payment by the debtor on the bond within ten years before action brought. The assignment conferred no power on the trustee, as agent of the debtor, to do any act to waive the statute or express a willingness or intention of the debtor to pay the debt after it should otherwise become barred. His agency was strictly limited to the duties marked out in the instrument, of paying out the assets in the manner stated, and bound the assignor by no implied agreement to pay more or to waive the statute. *Chancellor Kent* in *Roosefelt v. Marks,* 6 John, Ch. 266. Indeed, the assignment indicates an inability to pay anything more on the debts secured therein, and it would be a contradiction of its plain meaning to hold that the *pro rata* distribution of the assets thereunder by the assignee was an authorized expression of a willingness and intention to pay the balance and therefore a waiver of the statute. It is settled that a payment by assignees in bankruptcy and for the benefit of creditors does not take the case out of the statute of limitations. 13 A. & E., 760; Burrill on Assignment (6 Ed.), sec. 399, and cases there cited. *Belo v. Spach,* 85 N. C., 122, held that a payment by the assignee repelled the statute of (165) presumptions. That might well be, for to repel the presumption it is only necessary to show that the debt was still existing and unpaid,

and the payment of the assignee in bankruptcy is some evidence of that fact, but the statute of limitations is an absolute bar. To remove it, there is necessary some act of the debtor or by his authority, such as a written promise or a payment under such circumstances as implies an obligation to pay the balance.

Error.

Cited: *Cone v. Hyatt,* 132 N. C., 818; *Robinson v. McDowell,* 133 N. C., 185; *Supply Co. v. Dowd,* 146 N. C., 196; *Bank v. Hamrick,* 162 N. C., 217; *Bank v. King,* 164 N. C., 307, 308; *Barfield v. Carr,* 169 N. C., 576.

HENRY KIRBY v. ALEXANDER BOYETTE et al.

Married Woman—Deed of Settlement—Trust—Power of Disposal, by Cestui Que Trust, of Land.

1. The power of a married woman to dispose of land held by her under a deed of settlement is not absolute, but limited to the mode and manner pointed out in the instrument.

2. Where land was conveyed to a trustee for the sole and separate use of a married woman, to be free from any debts of her husband, a mortgage executed by her and her husband, without the joinder of the trustee, is void, and the fact that the trustee becomes the owner of the note secured by the mortgage and seeks to foreclose the latter gives it no validity.

3. The power conferred upon married women by Article X, section 6, to dispose of her property is subject to such limitations as her grantor or devisor may prescribe in a deed or will.

ACTION heard in a case agreed at November Term, 1893, of WILSON, before *Hoke, J.,* who held the mortgage sought to be foreclosed to be valid. The cause was referred to a referee to ascertain the amount due, and at June Term, 1894, judgment of foreclosure was rendered by *Bynum, J.,* and defendants appealed. The material facts of the (166) case agreed are set out in the opinion of *Associate Justice Avery.*

Shepherd & Busbee for plaintiff.
H. G. Connor and E. W. Pou for defendants.

AVERY, J. Isaac Boyette, intending to provide for his son's wife, on 4 May, 1867, conveyed a tract of land to Henry Kirby (to use the language of the instrument itself) "upon the express trust and undertak-

ings however that he shall hold the said land and improvements for the sole and separate use of Louisa V. Boyette, a married woman and her heirs, as a *feme sole* free from any debts or contracts of her present husband or any future husband she may hereafter marry." On 8 December, 1880, the *cestui que trust* Louisa and her husband executed, with privy examination and all of the usual legal formalities, a deed conveying the same land to Rountree, Barnes & Co., to secure payment of the note of the husband, Nathan Boyette, for $702.84, and advances for agricultural purposes made to him. The trustee, Henry Kirby, did not join in the mortgage deed to Rountree, Barnes & Co., but has since become by assignment the owner of the note, and has brought an action against the heirs of Louisa, *cestui que trust,* who are her children by the marriage with Nathan Boyette, to foreclose for default in the payment of the said note of Nathan, whose administrator is also a party defendant.

The question presented is whether the deed of husband and wife, without the joinder of the trustee, passed the wife's interest.

It is settled by repeated rulings of this Court that the power of a married woman to dispose of land held by her under a deed of settlement is "not absolute, but limited to the mode and manner pointed out in the instrument." She "is to be deemed a *feme sole* only to (167) the extent of the power expressly given her in the deed of settlement." *Hardy v. Holly,* 84 N. C., 661; *Kemp v. Kemp,* 85 N. C., 491; *Mayo v. Farrar,* 112 N. C., 68; *Monroe v. Trenholm, ib.,* 634; *Broughton v. Lane,* 113 N. C., 161. This Court has acted upon the theory that the wife derives her power of disposition of the property solely from a strict construction of the permissive provisions of the instrument creating the estate. *Mayo v. Farrar, supra;* 3 Pomeroy Eq. Jur., sec. 1105.

It is apparent that it was the intention of the grantor that the trustee should hold the land for the sole and separate use of the married woman, and that it should be as free from liability for any debt or contract of the husband as it would have been had she been a *feme sole.* In the case at bar the trustee, claiming in his individual right by assignment, seeks to subject the land by foreclosure of a deed which was executed without his assent, signified by joining as a grantor. It is manifest that if the Court should lend its sanction to the validity of this conveyance the result would be not only to subject the land to the payment of the husband's debt contrary to the express intent of the grantor in the deed of assignment, but without the assent and at the instance of the trustee standing in the antagonistic attitude of holder of the husband's note. In *Clayton v. Rose,* 87 N. C., 106, the Court said: "The argument, which seeks to deduce from adjudicated cases elsewhere a capacity in a *feme covert* to dispose of her equitable estate in land when not restricted by

the provisions of the instrument creating it as if she were *sole* and unmarried, overlooks the case of *Hardy v. Holly,* 84 N. C., 661. We must take it to be the settled law of this State, at least, that a married woman, as to her separate property, is to be deemed a *feme sole* only to the extent of the power expressly given her in the deed of settle-
(168) ment." We find therefore in the opinion in that case no support for the theory of the learned counsel for the plaintiff that the rule which the Court intended to lay down in *Hardy v. Holly, supra,* was that a *feme covert,* where a mode of alienation was pointed out in the deed of settlement, was subject to its express provisions, but in the absence of such restrictions, was under no restraint as to her power of disposition, except such as are imposed by Article X of the Constitution.

It must be conceded that the headnote in *Norris v. Luther,* 101 N. C., 196, is misleading, but a critical examination of the case will disclose the fact that a decree of sale was vacated, a sale set aside, and a deed canceled, because the decree had been rendered without proper service on a *feme covert,* and that ultimately some doubt was expressed by the Court as to the title that would pass by the sale under the later decree. At all events, if the opinion is susceptible of the construction placed upon it by counsel, it is in conflict with the older as well as the later cases which we have cited.

We are not prepared to admit that the provisions of Article X of the Constitution shall be construed not only as an enabling act as to the power of disposition of a *feme sole* over her separate real estate, but as a restriction upon the power of the person who transmits it to her by deed or devise to place any limit upon her authority to alien in the manner therein prescribed. Before the Constitution of 1868 was adopted, the right to devise or convey land to a trustee for the sole and separate use of a married woman and to restrict the power of alienation to a particular mode, as we have seen, existed and was often exercised to protect females against the improvidence or extravagance of their husbands.

We would be taking a long stride in a new direction were we to
(169) admit that the power of disposition of real estate, with all of the incidental rights to impose limitations, was taken away by implication in conferring a restricted right of alienation upon married women. *Hughes v. Hodges,* 102 N. C., 236; *Bruce v. Strickland,* 81 N. C., 267. It would seem more reasonable to hold that the Constitution should not be construed, when it fails to expressly so provide, as operating in derogation of common right, and that the power conferred upon married women should be deemed subject both to the restrictions (as to privy examination and consent of the husband) prescribed in Article X and to such limitations, as it is lawful for a grantor or devisor to prescribe in a deed or will. But we mention this question merely to prevent

any misapprehension, and will not further discuss or decide it here, since it is not directly raised in this case. The deed of settlement was executed on 4 May, 1867—not in contemplation of the provision of the Constitution of 1868—and according to its terms was intended to protect the land against liability for the husband's debt. It is needless to cite authorities to sustain the proposition that the power, subsequently conferred upon married women by the Constitution, was at all events subject to the constitutional right of disposition which had theretofore been exercised as inherent in the title acquired.

For the reasons given we think that the judgment of the court below was erroneous. The court should have held upon the case agreed that the deed of Nathan Boyette and wife Louisa was ineffectual to convey the land without the joinder of the trustee. There was error.

Reversed.

Cited: S. c., 118 N. C., 244, 254; *Narron v. R. R.,* 122 N. C., 859; *Shannon v. Lamb,* 126 N. C., 44; *Dunlap v. Hill,* 145 N. C., 314.

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(170)

PATTIE D. B. ARRINGTON ET AL. v. J. P. ARRINGTON, EXECUTOR, ET AL.

Attorney and Client—Appearance for Both Parties—Invalid Judgment.

1. The law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably, and, in general, will not permit a judgment or decree so affected to stand if excepted to in due time; therefore,

2. Where the attorney for certain executors and devisees, in a proceeding against the estate of the deceased person to sell land for the payment of debts, also represents a claimant and procures judgment for the latter, such judgment will not be allowed to stand, even though no fraud was intended or practiced.

ACTION heard at May Term, 1893, of VANCE, before *Shuford, J.* The action was by Pattie D. B. Arrington and husband against J. P. Arrington, executor, and others, as the devisees of A. H. Arrington, and the administrator and heirs of T. J. A. Cooper, to secure the payment of a judgment. In response to an order of court directing him to report the entire amount of the outstanding liabilities of the estates of A. H. Arrington and Cooper, the referee reported the proportion of the judgment due by the Cooper estate to plaintiffs as the only liability against the Cooper estate, and the proportion of plaintiff's judgment due by the

Arrington estate to plaintiffs, and the amount of a judgment in favor of Mrs. Nancy Bunn, as the only liabilities against that estate. By subsequent orders and judgments of court in the action, the claims, as reported, were recognized, and finally judgment was rendered ordering the payment of plaintiffs and Nancy Bunn's judgment by defendants. Defendants S. L. and J. C. Arrington thereupon made a motion to have the judgments rendered in the action, so far as they recognized the
(171) Nancy Bunn judgment, set aside, and from a judgment denying that motion those defendants appealed. From a judgment setting aside a judgment in reference to the judgment of Nancy Bunn, she and others appealed.

The other facts fully appear in the opinion of *Associate Justice Montgomery.*

Battle & Mordecai for respondents.
R. B. Peebles contra.

MONTGOMERY, J. This case was begun in the name of Pattie D. B. Arrington and her husband, in NASH in 1879, upon a judgment against the executor of A. H. Arrington and the administrator and heirs of T. J. A. Cooper for an account and payment of said judgment, and against the devisees of A. H. Arrington, deceased, to subject the devised lands to the payment of said judgment. The questions before this Court arise upon a motion made in the case by the defendants the said S. L., A. H. and J. C. Arrington, children and devisees of A. H. Arrington, "to set aside so much of the judgments rendered in this action as establishes or recognizes a judgment in favor of Nancy Bunn against the executors and devisees of A. H. Arrington, deceased (other than W. L. Thorpe and wife), to wit, the judgment rendered by *Judge Shepherd,* at June Term, 1885, the judgment signed by *Judge Shipp* as of October Term, 1887; the judgment of May Term, 1889; the judgment of Fall Term, 1890; the judgment at May Term, 1891, and all other judgments rendered in this action prior to May Term, 1891, relating to said claim or judgment of Nancy Bunn."

The motion was heard by *Judge Shuford,* at May Term, 1893, of Vance, and the following facts were found by the court:

1. This action was commenced in the name of Pattie D. B.
(172) Arrington and husband as plaintiffs, returnable to the Fall Term, 1879, of Nash Superior Court, not as a creditor's bill, but as an action upon a judgment against the executor of A. H. Arrington and the administrator and heirs of T. J. A. Cooper, for an account and payment of said judgment, and against the devisees of A. H. Arrington,

deceased, to subject the devised lands to the payment of so much of said judgment as the personal assets were insufficient to pay.

2. The summons was duly served on all of the defendants. The defendant T. M. Arrington was represented by Jacob Battle, Esq., and John P. Arrington, as executor, by Messrs. Connor and Woodard. None of the other defendants were represented by counsel until at the June Term, 1885, when the said Jacob Battle appeared as counsel for the said executor and all the devisees of A. H. Arrington, deceased.

3. At Fall Term, 1883, an order of reference was made to R. A. P. Cooley, Esq., on motion of plaintiff P. D. B. Arrington, directing said referee, among other things, to ascertain and report the entire amount of the outstanding liabilities of the estates of A. H. Arrington and Cooper, list of all claims unsatisfied against the two estates to be given. At June Term, 1885, of VANCE (the action having in 1882 been removed to Vance) the referee filed his report, stating, among other things, that there is due on the judgment in favor of the plaintiff $9,247.44 December 1, 1884, and that of this there is due from Cooper's estate, the only liability against the same ---------- $3,489.13½
And from Arrington's estate ---------- 5,758.30½

$9,247.44

And that the only liability against the latter estate was "the (173) amount due on judgment in favor of Mrs. Nancy Bunn" ---------- $ 853.84
5,785.30½

$6,612.14½

The referee states in his report that the cause was heard before him at his office in Nashville, 22 September, 1884, "all necessary parties being present or represented by counsel."

4. That there is on file in the cause no evidence other than this statement of the referee that any notice of the taking, etc., of said accounts was given to any of the defendants; and upon the affidavit of S. L. Arrington the court finds that no notice was given to the defendants other than John P. Arrington and T. M. Arrington.

5. That prior to May Term, 1891, none of the defendants except John P. Arrington attended court in Vance County in person, and that the defendants other than John P. Arrington and T. M. Arrington did not consent to the order of reference made at Fall Term, 1883, before mentioned, and that at that time no one was authorized to consent thereto

for them, and to that extent said order of reference does not speak the truth.

6. That the defendants other than John P. Arrington and T. M. Arrington had no knowledge of the Nancy Bunn claim until May Term, 1891.

7. Before the referee, Cooley, B. H. Bunn, of counsel for Nancy Bunn, presented the claim of Nancy Bunn and no objection was made to it. Jacob Battle, representing T. M. Arrington, did not object to it, because he knew of no legal defense to it, and no information was given him on the subject by T. M. Arrington or any one else. There was no evidence returned with Cooley's report on which said claim was based.

8. That no notice had been given to creditors to come in and
(174) make themselves parties to said action, and no motion had been made by Nancy Bunn asking to be made a party.

9. At the June Term, 1885, Jacob Battle was counsel of record for the executors of A. H. Arrington and the devisees of said Arrington. B. H. Bunn, being engaged at home, asked said Jacob Battle, just before June Term, 1885 (he having been his law-partner since 1 January, 1880), to ask all of the parties to agree that the Nancy Bunn claim should be paid at once. Said Battle said nothing to the parties on the subject. At said June Term, 1885, B. H. Bunn was not present, and the judgment in favor of Nancy Bunn was rendered, on motion of Jacob Battle, as appears of record, and was in his handwriting. This judgment was written and signed after said Battle had made a motion to be allowed to file an amended answer for the personal and real representatives of the two estates, which was allowed, the court stating that all matters must be closed except the matters raised in the amended answer for the first time.

10. That all other judgments rendered in this action, in which the Nancy Bunn judgment is mentioned, are in the handwriting of Jacob Battle, except the judgment at Fall Term, 1887, signed by *W. M. Shipp, J.*, which is in the handwriting of Spier Whitaker, Esq., except the last eleven lines of the modified judgment, which is in the handwriting of said Jacob Battle, Esq. Some of said judgments were countersigned by some of the parties as appears of record.

11. There was no adjudication of said Nancy Bunn's claim in either of said judgments signed by *Judge Shipp*. The only reference to it in the modified judgment is as follows: "It having been suggested that the amount hereinbefore stated to be due on the judgment of Mrs.
(175) Nancy Bunn may be incorrect, the commissioners, Whitaker and Battle, will pay to her any less sum which they may find to be due on said judgment."

12. That at May Term, 1891, said Jacob Battle represented the said

Nancy Bunn and the executors and devisees of A. H. Arrington. Three of the latter, Samuel L., A. H. and J. C. Arrington were also represented by R. B. Peebles. At said term, after examining the records of the case at Vance Court, said Peebles stated to said Jacob Battle that the Nancy Bunn judgments on the record at Vance Court were irregularly entered, and that he would, on behalf of his clients, have to move to set them aside. That thereupon said Jacob Battle told said Peebles that Nancy Bunn had in Nash County a judgment regularly rendered against A. H. Arrington. The said Peebles had no opportunity to examine the records in Nash County, and relying upon this statement, said Peebles signed the judgment at May Term, 1891, as of counsel for S. L., A. H. and J. C. Arrington. That in making this statement the said Jacob Battle honestly thought that the Nash County Nancy Bunn judgment was in all respects regular.

13. That from the affidavits and other evidence filed, there is reasonable ground for believing that the Nancy Bunn judgment in Nash County was irregularly entered up, and that defendants in good faith claim to have a good and valid defense to said claim. All of the entries of record touching said judgment are here attached as part of this finding.

14. That in the motion to set aside the Nancy Bunn judgments, the said R. B. Peebles appears of counsel for the executors and all the living devisees of A. H. Arrington.

15. That the motion to set aside the judgment in favor of John P. Arrington, and the one in favor of Jacob Battle for his (176) fees and expenses, are abandoned.

16. That Jacob Battle has never obtained permission from the court to retire as counsel for the executors and devisees of A. H. Arrington or either of them.

17. That the Nancy Bunn judgment in Nash County was alleged to have been obtained by W. T. Dortch as counsel for said Nancy, on a bond against H. G. Williams and S. S. Cooper as principals, and A. H. Arrington as surety, but the judgment is not signed and was written by the clerk's son at the dictation of the clerk, but it does not appear to the satisfaction of the court when said judgment was taken or written up, in vacation or at term-time.

18. That the law copartnership of B. H. Bunn and Jacob Battle was formed 1 January, 1880, and it did not embrace any business or cases either had at that time. According to the best recollection of B. H. Bunn, Esq., he represented the said Nancy Bunn as to her judgment in Nash County prior to 1 January, 1880. That Jacob Battle did not, until May Term, 1891, represent Nancy Bunn as her counsel, only as his acts and conduct in reference to judgments rendered prior to that

term in this action as herein found constitute him her attorney. And upon the foregoing facts, it is considered and adjudged that the judgments rendered in this action at the May Term, 1891, so far as it relates to the judgment of Nancy Bunn, be and the same is hereby vacated and set aside, for the reason that the same was signed by counsel, and Jacob Battle, Esq., was representing the said Nancy Bunn, and also the real and personal representatives of A. H. Arrington, deceased. It is further considered by the court that the acts and conduct of said Jacob Battle, prior to said May Term, 1891, did not constitute him the attorney of Nancy Bunn, and that the personal and real representatives of A. H. Arrington's estate are bound by his acts, and the motion to set
(177) aside so much of the judgments rendered prior to May Term, 1891, as relates to the said Nancy Bunn judgment, is refused.

Upon the foregoing facts the court rendered judgment vacating and setting aside the judgment obtained in this action at May Term, 1891, so far as it related to the judgment of Nancy Bunn, for the reason that same was signed by counsel and Jacob Battle was representing the said Nancy Bunn, and also the real and personal representatives of A. H. Arrington, deceased. The court declared at the same time "that Jacob Battle did not until May Term, 1891, represent Nancy Bunn as her counsel, only as his act and conduct in reference to judgment rendered prior to that term in this action as herein found constituted him her attorney"; that the personal and real representative of A. H. Arrington's estate was bound by his acts and deeds, and the motion to set aside the said judgments as set out in the motion other than the one of May, 1891, was refused. The respondents appealed to this Court from so much of the judgment as set aside the judgment of May Term, 1891, so far as it affected the Nancy Bunn judgment, filing the following exceptions to his Honor's findings:

1. For that the respondents requested the court to find fully the facts as to Nancy J. Bunn's transferring her judgment debt on 16 May, 1891, as stated in her affidavit and the affidavit of Jacob Battle, and the court failed to do so.

2. For that the court failed to declare, as a matter of law, that this consent judgment of May Term, 1891, could not be set aside save for fraud or mutual mistake, and that there was no evidence to show either.

3. For that the court failed to find fully the circumstances of the rendition of the judgment in favor of Nancy J. Bunn, and
(178) especially that it was rendered at a regular term of the court.

4. For that the court failed to declare, as a matter of law, that the judgment aforesaid (to wit, the said judgment in favor of Nancy Bunn) was not so irregular that it could be set aside after so many years.

5. For that the court failed to find that the judgment of May Term, 1891, was made after the question in relation to the Nancy Bunn debt or claim had arisen, and that in respect to that question the said Jacob Battle and the said A. H., S. L. and J. C. Arrington, acting through their attorney, R. B. Peebles, were dealing at arm's length.

6. For that the court failed to rule that the claim of payment set up in S. L. Arrington's affidavit, dated 1 June, 1892, was unreasonable and completely negatived by counter affidavits filed by the petitioners.

7. For that the court failed to rule that there was presumption of law that when the judgment in favor of Nancy Bunn was rendered, the bond on which it is alleged the same was rendered was canceled and filed with the clerk, and that such presumption is not repelled by the fact that the bond cannot now be found in the clerk's office of Nash Superior Court.

Such of the above exceptions as relate simply to the findings of fact by his Honor are not reviewable here. Upon the facts found, and especially upon the one that at May Term, 1891, Jacob Battle represented Nancy Bunn and the executors and devisees of A. H. Arrington, his Honor rendered judgment vacating and setting aside that part of the judgment of May, 1891, which related to the Nancy Bunn judgment, and from which the respondents appealed. As we find no error in that part of the judgment of the court, rendered by *Judge Shuford,* setting aside and vacating the judgment of May Term, 1891, so far as it relates to the Nancy Bunn judgment, it is not necessary to pass upon the (179) exceptions of the respondents to the other findings of law by the court. It was not necessary for the court to have found actual fraud intended or perpetrated, in rendering its judgment. Indeed, in *Moore v. Gidney,* 76 N. C., 33, where it appeared that the attorney for an administrator, in proceedings against the widow and heirs at law of the intestate to sell land to make assets for the payment of debts, also drew the answer in the cause, and that without fee, and a sale took place under the proceedings which were afterwards set aside on account of this action of the attorney, this Court said: "But it is denied that the counsel of the plaintiff acted as the defendant's counsel further than in drawing up her answer; and we are satisfied that no improper influence was intended. Yet the law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, even colorably; and in general will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured thereby. The presumption in such cases is that the party was unduly influenced by that relation, and the opposite party cannot take the benefit of it." As to that part of the judgment of the court below setting aside and vacating the judgment of 1891, so far as it relates to the Nancy Bunn judgment, the same is affirmed.

In the appeal of S. L. and J. C. Arrington, defendants:

MONTGOMERY, J. From so much of the judgment overruling the exceptions filed to the report of J. M. Mullen, referee, at October Term, 1891, by the defendants, which exceptions are as follows:

2. For that he finds that said estate is indebted to Nancy Bunn $1,035.89, and interest $12.68.

4. For that he finds that in April, 1869, H. G. Williams, S. S.
(180) Cooper and A. H. Arrington confessed judgment to Nancy Bunn, before the clerk of the Superior Court for Nash County, for $1,182.32, of which $1,100 is principal.

5. For that he finds that the so-called Nancy Bunn judgment was revived, as stated in said report; and also from that part of said judgment refusing to vacate and set aside all the aforesaid judgments named in defendant's motion and rendered in this action, in so far as they relate to said judgment in favor of Nancy Bunn, the executors of A. H. Arrington and the devisees of A. H. Arrington, other than W. L. Thorpe and wife, appealed to this Court, assigning as errors in the rulings and judgment of the court below the following:

1. In overruling said exception No. 2.
2. In overruling said exception No. 4.
3. In overruling said exception No. 5.
4. In receiving evidence of Jacob Battle to contradict the record of the judgment rendered at June Term, 1885, which shows upon its face that said judgment in favor of Nancy Bunn was obtained on the motion of said Jacob Battle, and was signed by him as attorney, and by Bunn & Battle, attorneys for Spier Whitaker, trustee.
5. In holding that upon the facts found Jacob Battle never acted as counsel for Nancy Bunn in this action prior to the May Term, 1891.
6. In holding that the facts found and the acts shown by the records did not constitute Jacob Battle Nancy Bunn's attorney in obtaining said judgment for her in this action.
7. In refusing to set aside the judgment rendered in Nancy Bunn's favor in this action at June Term, 1885, upon the facts found.
8. In refusing to set aside the last-named judgment upon the facts found, and those appearing upon the face of the record.

(181) 9. In refusing to set aside the other judgments complained of upon the facts found.

10. In refusing to set aside said judgments upon the facts found, and those appearing upon the face of the record.
11. In refusing to set aside said judgments as fraudulent and void.
12. In refusing to set aside said judgments as being rendered without process and without a day in court.

13. In holding that the defendants, represented by R. B. Peebles, were bound by the acts of Jacob Battle, at June Term, 1885, in regard to the Nancy Bunn claim.

14. All other errors appearing upon the record.

It is unnecessary to pass *seriatim* upon all of the exceptions. Upon all the facts which his Honor found, and especially upon his findings 4, 5, 6, 9, 10, 12, 13, 16, 17, we are satisfied that he erred when he refused to set aside and vacate all the judgments rendered in this case and named in defendant's motion, in so far as they concern the Nancy Bunn judgment. (It appears in the respondent's appeal that the judgment of May, 1891, was set aside in so far as it affected the Nancy Bunn judgment.) These findings of fact, when summarized, appear to be:

1. That at June Term, 1885, Jacob Battle was counsel of record for the executors of A. H. Arrington and the devisees of said Arrington, including these defendants, and that at that term the judgment in favor of Nancy Bunn was rendered on motion of Jacob Battle, as appears of record and was in his handwriting.

2. That all other judgments rendered in this action in which the Nancy Bunn judgment is mentioned are in the handwriting of Jacob Battle, except the judgment at Fall Term, 1887, which is in the handwriting of Spier Whitaker, except the last eleven lines of the modified judgment, which is in the handwriting of said (182) Jacob Battle.

3. That at May Term, 1891, Jacob Battle represented Nancy Bunn and the executors and devisees of A. H. Arrington.

4. That there was reasonable ground for believing that the Nancy Bunn judgment in Nash County was irregularly entered up and that defendants in good faith claim to have a good and valid defense to said claim.

5. That Jacob Battle had never obtained, up to May Term, 1893, permission from the court to retire as counsel for the executors and devisees of A. H. Arrington, or either of them.

6. That the Nancy Bunn judgment in Nash County was alleged to have been obtained by a lawyer of good standing for said Nancy, is not signed, and was written by the clerk's son at the dictation of the clerk, but it does not appear to the satisfaction of the court when said judgment was taken or written up, in vacation or in term-time.

7. That the defendants appellants had no knowledge of the Nancy Bunn judgment until May Term, 1891, and had no notice given them of the reference to R. A. P. Cooley at Fall Term, 1883. This Court cannot go behind the facts found by the court below, but the last sentence of finding 10 of the court more than authorizes us to look at the records referred to, and in doing so we find that the judgment of May, 1885,

was signed "Jacob Battle, Attorney," and "Bunn & Battle, attorneys for Spier Whitaker, trustee." It appears also from the findings of the judge that there is reasonable ground for believing that the Nancy Bunn judgment in Nash County was irregularly entered up and that defendants in good faith claimed to have a good and valid defense to said claim. There is therefore danger of loss to the defendants
(183) by reason of the judgments in Vance Superior Court in this case so far as those judgments relate to the Nancy Bunn judgment. The court found as a fact that the said Jacob Battle honestly thought that the Nash County judgment (Nancy Bunn judgment) was in all respects regular. As we said in the respondents' appeal, it is not necessary that there should have been actual fraud in the procurement of those judgments, in order that they might be set aside by motion, but that the rule which forbids the same attorney for representing both parties in adversary proceedings rests upon the broad principle of public policy, which precludes persons occupying these fiduciary relations from representing conflicting interests that may tempt them to disregard duty and lead to injury on one side or the other. The law will not permit its licensed attorneys to assume relations that will subject them to temptation, upon grounds of public policy; and it is for this reason that an attorney will not be permitted to represent both sides in any litigated matter. *Gooch v. Peebles,* 105 N. C., 411.

After a careful review of each and all of the findings of his Honor, we have no difficulty in arriving at the conclusion that those findings constituted, in law, Jacob Battle the attorney of Nancy Bunn at the times of the rendition of all the judgments named in the defendant's motion in this case, in her favor; and we are of the opinion that the judge below erred in not so finding as matter of law, and that he also erred in not setting aside and vacating each and all of the judgments in Vance Superior Court, named in defendants' motion in this case. The said exceptions by the defendants to the report of J. M. Mullen, referee, at October Term, 1891, ought to have been sustained for the reason that there was no proof offered to the said referee except the record pertaining
(184) to the said judgments, and that was not sufficient.

The judgment below is

Reversed.

Cited: Cotton Mills v. Cotton Mills, post, 652; *Henry v. Hilliard,* 120 N. C., 483; *Ellis v. Massenburg,* 126 N. C., 134; *Holt v. Ziglar,* 159 N. C., 279; *Gardiner v. May,* 172 N. C., 198.

L. P. ELLIOT v. G. T. TYSON.

Practice—Appeal from Judgment for Costs.

Where nothing is involved except costs, an appeal will not be allowed.

PROCEEDINGS under section 1756 of The Code, commenced before the clerk of the Superior Court of PITT, to settle a controversy between a landlord and a tenant, and heard on appeal before *Bynum, J.*, and a jury, at March Term, 1894, of Pitt Superior Court. The defendant appealed.

J. B. Batchelor and T. J. Jarvis for plaintiff.
Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. In this action the parties settled their matters by paying and receiving from each other, according to the contract. At the conclusion of the trial the court rendered a judgment in favor of the plaintiff and against the defendant for costs only, and the defendant appealed. When nothing is involved except costs, an appeal will not be allowed. Clark's Code, 560; *Futrell v. Deans, ante,* 38. When the subject matter of the action has been lost, destroyed or adjusted between the parties, an appeal will not be allowed for costs only. (185) *S. v. Byrd,* 93 N. C., 624.

Cited: S. c., 117 N. C., 114; *Herring v. Pugh,* 125 N. C., 438.

T. B. HOLDEN v. B. P. STRICKLAND.

Practice—Issues—Assets of Decedent—Resulting Trust—Lien for Money Advanced to Pay for Land—Discharge of Trust—Subrogation.

1. This Court will not consider the objection that there was no evidence, or not sufficient evidence, to submit certain issues to the jury, unless the point was raised before such issues were submitted.
2. The real or personal assets of a deceased person cannot be applied to the payment of his debts, where there is no lien, except by or through his personal representative.
3. Where land is bought with the money of one person and is conveyed to another, the latter is a trustee for the lender to the extent of the money so paid, without any express agreement to that effect.

4. Where H. held land in trust, first to pay a debt for money advanced for its purchase, and then for the benefit of another, the creditor has an equitable lien thereon until the debt is paid, and this is not destroyed by his surrendering the note of H., representing such debt for the notes of the resulting *cestui que trust* and others given in settlement of the original debt.

5. Where land is held in trust for the payment of a debt, a third person, who is compelled by law to pay it, is subrogated to the rights of the creditor, and may collect the amount so paid from the land.

ACTION heard before *Shuford, J.*, at April Term, 1893, of FRANKLIN.

There was judgment for the plaintiff and defendants appealed.

(186) The facts appear in the opinion of *Associate Justice Furches.*

C. M. Cooke for plaintiff.

N. Y. Gulley for defendant.

FURCHES, J. It appears that Richard Holden, Sr., father of the plaintiff and of the *feme* defendant, was the owner of a considerable body of land, but was in debt, upon which judgments have been recovered against him for more than $1,600, and in March, 1872, the sheriff of Franklin County sold said land under execution, then in his hands issuing on the judgments. At the sale these lands were bid off by Richard Holden, Jr., at the price of $1,629.00, an amount sufficient to satisfy the judgments. Young Holden did not have the money to make this purchase, but bid them off under an arrangement made between himself, his father Richard Holden, Sr., and F. L. B. Harris. Harris was to furnish the money to pay for the land, and Richard Holden, Jr., gave his note to Harris for the same, and was to take a deed for the land and hold it, first in trust to pay Harris back his money, and then in trust for his father, Richard Holden, Sr. This was all done, and the Holdens, it seems, commenced to pay Harris his money. But in 1874, and before Harris had been paid in full, Richard Holden, Jr., died, the legal title of the land still being in him. That not long after the death of Richard Holden, Jr., his father, Richard Holden, Sr., commenced an action against his widow and heirs at law in the Superior Court of Franklin County, alleging the facts above stated and demanding a judgment declaring the defendants (the widow and heirs at law of Richard Holden, Jr.) trustees of said land and that they be required to convey to him. And the court so adjudged, and under the decree of the court the legal title to the land was made to Richard Holden, Sr. Harris was

(187) not a party to this action and not bound by the judgment therein, nor the conveyance made thereunder. That after this, in may, 1888, the debt to Harris then being reduced to $409.38, Harris surren-

ders the note given him in 1872 by Richard Holden, Jr.; and Richard Holden, Sr., Bryant M. Holden, F. C. Holden and T. B. Holden execute their note to the said F. L. D. Harris for the amount still remaining due on the note of Richard Holden, Jr., (B. M. Holden, F. C. Holden and T. C. Holden, being sons of Richard Holden, Sr.). That after this last note was given, there was paid on it the sum of $182.50 and some time after this the said Richard Holden, Sr., died, leaving the remainder of the Harris debt unpaid. At the time of the execution of this last note to Harris, Richard Holden, Sr., was still the legal owner of 450 acres of the land originally bought by Richard Holden, Jr., which he divided into three lots and executed separate deeds therefor, conveying one of the said lots to the plaintiff T. B. Holden, one lot to F. C. Holden and the other lot to his daughter, Dora C. Strickland, then the wife of Frank Green, and the consideration expressed in all these deeds is natural love and affection. But the plaintiff alleges that there was another consideration for all these deeds in addition to that of natural love and affection; and that was that the grantees should each pay one-third of the Harris debt, then unpaid, and that the deeds were executed with this understanding, and that the defendant Dora took her lot under this agreement, which plaintiff says was a parol trust. He then alleges that after the death of his father, Richard Holden, Sr., Harris brought a suit in the Superior Court of Franklin County on the note given him by Richard Holden, Sr., and B. M. Holden, F. C. Holden and himself, in which he set up the trust of 1872 when the land was purchased by Richard Holden, Jr. That in this action Harris recovered judgment on his note, and had the trust of 1872 declared, and decree and order (188) to sell said land to satisfy his judgment. That plaintiff was one of the signers of said note and a defendant in said action, and, as Harris was proceeding to sell his land under said judgment and to prevent his lands from being sold, he paid off and satisfied the Harris judgment, and now asks that the lot conveyed to the defendant Dora be subjected to the payment of one-third of the amount he paid said Harris.

Defendants in their answer admit that the land was bought by Richard Holden, Jr., as alleged; that Harris furnished the money and that said Richard took an absolute deed for the land, but in trust, first to pay Harris back the purchase money, and then in trust for his father Richard Holden, Sr., and that Richard, Sr., is dead and that Harris brought suit and recovered judgment as alleged. But they say that the defendants were not parties to this action and not bound by the judgment, and they deny that the defendant Dora agreed to pay anything on the Harris debt, or that she took her lot under any parol trust from her father. But on the contrary she took it free from any trust whatever and is now

the absolute owner thereof, free from any claim of the plaintiff thereon, and denies the plaintiff's right to recover.

The court submitted the following issues to the jury:

1. Did Richard Holden leave any personal property applicable to the debt of F. L. B. Harris? Answer: No.

2. If so, what was the value? Answer: None.

3. What was the proportion in value of the tract conveyed to defendant Dora to the whole tract of 450 acres as conveyed? Answer: One-third.

4. Did Richard Holden at the time of his conveyance of the land to defendant Dora Strickland retain sufficient property to pay his (189) debts and available for that purpose? Answer: No.

5. Did Richard Holden, Sr., convey the land to defendant Dora in trust to pay its proportion of the Harris debt as alleged in the complaint? Answer: Yes.

6. Did Harris abandon his original trust on the land before the conveyance of the land to the *feme* defendant? Answer: No.

The case on appeal appears to set out the whole evidence. F. C. Holden, a witness for plaintiff, among other things testified under objection of defendants, as follows: "I have settled my part of the Harris debt with my brother T. B. Holden. I paid him in land to the amount of $150. There was no money passed. When my father divided up the land he told me and T. B. Holden and Frank Green, who was then my sister's husband, that the Harris debt had not been paid; that he wished to divide his land, and we must help him pay that debt. He said he would do what he could, but if he could not pay it all we would have to pay the balance. This was the day the land was being run out for division. Mine was run out before that time. Frank Green was my sister's husband and was there to see how the lines were run. My sister was not there. I went home after the land was surveyed and was not present when the deeds were written;" and defendants excepted. This is the only exception presented by the record, and the evidence above quoted and objected to seems to be all the evidence as to a parol trust, as between Richard Holden, Sr., and the defendant Dora, except the testimony of W. R. Martin, in which he says: "I went over there to take probate of some deeds, and Richard Holden, Sr., in the course of a conversation said something about he had divided up his lands and his children would have to pay the Harris debt."

We do not think this evidence competent or sufficient to au- (190) thorize the court to submit the fourth issue to the jury, and if the defendants had asked the court so to instruct the jury, we would have sustained their prayer. But as no such prayer was made,

we cannot consider this question as to whether there was any evidence, or any such evidence as should have been submitted to the jury. *S. v. Kiger,* 115 N. C., 746. And we prefer to put our opinion upon facts admitted or not disputed rather than upon the exception to evidence which seems to have been immaterial and to have proved so little, if anything.

It is contended that the judgment below should be sustained upon the doctrine of contribution, and *Badger v. Daniel,* 79 N. C., 372, is cited as authority for this position. But we do not think so. Nor do we think *Badger v. Daniel* supports this position. In that case the personal representative of Joyner, the debtor, as well as his devisees were made parties to the action. This being so—that is, the estate of Joyner being represented—the matter of contribution was worked out. But our case differs from *Badger v. Daniel* in several important and, we think, essential respects. The first is, as we have stated, in that case the personal representative of the debtor's estate was a party, and in this case the personal representative is not a party. And we think it a well settled rule in this State that no assets of a deceased person can be applied to the payment of debts (where there is no lien) except by or through the personal representative, whether lands or personal effects. *Tuck v. Walker,* 106 N. C., 285; *Mauney v. Holmes,* 87 N. C., 428; *Murchison v. Williams,* 71 N. C., 135. Another distinction is that in *Badger v. Daniel,* the lands there subjected to the payment of the debts of the testator were willed to the defendants, other than the executor, and under the law they were subject to the payment of debts; while in this case the lands of the defendant were not willed to her by the debtor, but were conveyed to her by deed during the lifetime of the debtor, and (191) were not like the lands devised in *Badger v. Daniel,* subject to the payment of any debt due by Richard Holden, Sr., at the time of his death, unless the conveyance was made in fraud of such debt. They are not void as contended, but only voidable under the statute of 13th Elizabeth, if conveyed in fraud of creditors. And this under our law can only be determined by or through the personal representative. *Murchison v. Williams* and *Tuck v. Walker, supra.*

But it is admitted that Richard Holden, Jr., bought the land and that Harris' money paid for it, and that Holden took a deed for the same under the express agreement to hold it in trust, first to repay Harris the purchase money, and then in trust for his father, Richard Holden, Sr.

The fact that the land was bought and paid for with the money of Harris constituted Holden a trustee for Harris' benefit to the extent of the money paid, without the express agreement that he was to hold it in trust for Harris. *York v. Landis,* 65 N. C., 535; *Stallings v. Lane,* 88

N. C., 214. And the equitable estate would have been in Harris by operation of law. But in this case there was not only the trust the law created, but there was an express trust that Richard Holden, Jr., should hold it, first to pay Harris' debt and then for his father. This being so, the equitable estate in said land was in Harris until his debt was paid. *Shelton v. Shelton,* 58 N. C., 292; *Shields v. Whitaker,* 82 N. C., 516. And the fact that he surrendered the note given him by Richard Holden, Jr., and took the note of Richard Holden, Sr., and his three sons B. M. Holden, F. C. Holden and T. B. Holden, did not discharge the trust to him. *Hyman v. Devereux,* 63 N. C., 624; *Ijames v. Gaither,* 93 N. C., 358. But it did change the evidence of debt, and give him other additional security therefor. Before this note was executed, neither
(192) was Richard Holden, Sr., B. M. Holden, T. B. Holden or F. C. Holden bound to Harris for the debt. But after that, they were all bound for the debt, and he might collect it out of either of them if it became necessary to do so. And though the case does not say so in so many words, we think sufficient appears to show that this new note was given by Richard Holden, Sr., as principal, and his sons, as sureties. This being so, Richard, Sr., and then the lands were bound for this debt first; the sureties to the note were only bound as sureties, both to Richard, Sr., and to the land, which had already been dedicated to the payment of this debt. In other words, B. M. Holden, F. C. Holden and T. B. Holden were sureties to both Richard Holden, Sr., and also to the land. And Richard Holden, Sr., and the land were both principal debtors as to these sureties. And this being so, it would seem that as T. B. Holden had paid the debt of his principal, he would have the right to be reimbursed out of the principal—the land. *York v. Landis, supra; Nelson v. Williams,* 22 N. C., 118; *Bank v. Jenkins,* 64 N. C., 719; *Matthews v. Joyce,* 85 N. C., 258.

But there is another view presented by the facts in this case, which seems to us to sustain the plaintiff's right to recover as against the defendants, and that is, the whole of the 450 acres of land was dedicated to the payment of the Harris debt. He had the right to collect one-third of his debt out of the lot given to defendant Dora. And when the plaintiff was compelled by judgment to pay Harris, he was subrogated to the rights of Harris. *Bell v. Jasper,* 37 N. C., 597; *Fox v. Alexander,* 36 N. C., 340; *Harris v. Harrison,* 78 N. C., 202; *Heron v. Marshall,* 42 Am. Dec., 447, and note; *Ins. Co. v. Middleport,* 124 U. S., 534. This being so, it seems to us the judgment below should be sustained.

Affirmed.

AVERY, J., concurring: The only testimony offered to subject
(193) the land conveyed by the father to his daughter (now Mrs.

Strickland, then Mrs. Green) by deed absolute upon its face, with the burden of the trust, is that of the grantee's brother, and is as follows: "When my father divided up the land he told me and T. B. Holden and Frank Green, who was then my sister's husband, that the Harris debt had not been paid; that he wished to divide up his land and we must help to pay that debt. He said he would do what he could, but if he could not pay it all we would have to pay the balance. This was the day the land was being run out for division. Mine had been run out before that time. Frank Green was my sister's husband and was there. My sister was not present. I went home after the land was surveyed, and was not present when the deeds were written."

It is an established rule of law that, in order to the creation of a parol trust thereby, the declaration of a grantor must be made either prior to, or cotemporaneously with the execution of the deed, and must be sufficiently explicit and definite to indicate clearly what is the subject-matter of the trust, the extent of the charge or burden imposed and the purpose for which it is imposed. 1 Perry, Trusts, sec. 77. This principle arises out of the very nature of a trust, which is an unexecuted use, and which, when created before the enactment of the statute of uses, by a declaration accompanying or preceding a feoffment, must have been so certain that the witnesses could bear in their memories such a clear and determinate recollection of the conscientious duty devolved upon the feoffee, as would enable the ecclesiastical court to enforce it, had simply said, when erecting monuments to indicate division boundaries, that unless he should meantime discharge a certain debt, his children, who would be enfeoffed by him of shares unequal in quantity and value of his land, must pay it, without indicating in what pro- (194) portion, no court of conscience would have assumed to declare that his purpose was to require them to pay equal portions of the debt out of unequal bounties bestowed by him. This is but an illustration of the necessity for the rule that, while trusts attending the transmission of the legal estate by deed may be created by oral declarations, and while the proof need not be supported by testimony such as is required to convert an absolute deed into a mortgage (*Shields v. Whitaker,* 82 N. C., 516), the courts will not attempt to enforce them unless the purpose of the grantor be clearly expressed. 1 Perry, *supra,* sec. 83. "Indeed (says Perry in the section cited), courts require demonstration on the latter point, and the trust will not be executed if the precise nature of it (the subject-matter of the trust) and the particular persons who are to take as *cestuis que trust,* and the proportions in which they are to take, cannot be ascertained." The same rule as to ascertaining from the terms of the trust the certainty of the subject-matter and the manner

of disposition of the trust fund among those who are to receive it, obtains, whether the trust be declared orally or in writing, and whether by devise or other writing, or by oral declarations made prior to, or accompanying the execution of a deed, and whether the trust is created for the benefit of children or in favor of creditors. It is competent to create a charge upon land to pay debts by declarations made at the same time and subject to the same limitations, as where the trust is raised to provide for children. 3 Pom. Eq. Jur., sec. 1244 to 1248. In either case the declaration, in order to its enforcement, ought to show or in some way enable the court to ascertain either in what proportion the burden is to be borne by several holders of the legal estate, or in what ratio benefits are to be apportioned between *cestuis que trust,* as the case may be. Speaking of this subject, Lewin (Vol. 1, star page
(195) 56 of his work on Trusts) says that a trust will not "be executed if the precise nature of the trust cannot be ascertained." Has the exact nature of the trust been determined in this case? *Id certum est quod certum reddi potest.* It has been found by the jury that the tract of land conveyed to the *feme* defendant was one-third in value of the whole landed estate of her father. The purpose of the father therefore to impose a charge of one-third of whatever debt was still due at the time of his death, may be fairly implied from his language. This conclusion is not reached without difficulty, but it is probably safe to rest the decision upon the principle that it was the expressed intention of Richard Holden, Sr., to charge all of the tracts of land conveyed to his children by voluntary deed with the debt for the purchase money unpaid at his death, and that he could so charge it by declaration preceding or accompanying the execution of the deed. 3 Pomeroy, *supra.* If her share is one-third, as the jury found, it is not inequitable to subject it to one-third of the debt still due, in furtherance of what appeared to be her father's purpose. If the amount of the charge in favor of the original creditor was one-third of the debt, then when her brother discharged the lien, was he not subrogated *pro tanto* to the rights of the creditor against her? It must be admitted, as already stated, that Richard Holden, Sr., could create and did create by his declaration a charge upon the whole of the land in favor of the creditor, and that charge could have been enforced by the creditor or his representatives. 2 Story Eq. Jur., p. 589, sec. 1244.

If T. B. Holden was his father's surety and as such paid the whole of the debt, then the statute (Code, sec. 2093 to 2096) gives him a right of action against cosureties at law, and also such priority as the creditor would have had as a claimant against his father's estate. The creditor had a priority as an incumbrance, holding a claim that
(196) must have been satisfied out of the land before it could have been

subjected to pay any claim against the grantee and before her title could be perfected. 19 A. & E., 84; Abbott's Law Dictionary—Priority. If by virtue of the declaration a charge was created in favor of Harris, the creditor, then T. B. Holden, on payment of that debt, constituting the charge and having priority over other claims, was, as surety, subrogated in equity to the rights of the creditor, arising either out of any prior lien or indemnity in his favor, against the land conveyed to the *feme* defendant (*Peebles v. Gay,* 115 N. C., 38) and was entitled to recover one-third of the debt, which he paid as surety of his father, from the *feme* defendant as the holder, subject to the charge imposed by her father upon the one-third in value of the land burdened with the debt, which he conveyed to her. It seems to have been conceded, if it did not appear positively, that T. B. Holden was, though nominally a principal, in reality the surety of his father. *Welfare v. Thompson,* 83 N. C., 276. For the reasons given, I think the judgment should be affirmed.

CLARK, J., concurring: Richard Holden died leaving an indebtedness or the balance due on purchase money for land and no personal property applicable to his debts. Prior to his death he had divided this land, the sole property he had, among his three children, one of whom is the defendant, and conveyed it to them by deed. The jury find that Richard Holden at the time of these conveyances by him did not retain sufficient property to pay his debts and available for that purpose and that the defendant received one-third of the land in value. The deeds on their face express that they are made in consideration of natural love and affection and it is admitted that there was no valuable consideration. (197)

Harris brought an action on the bond for the purchase money against the executor of Richard Holden and obtained judgment for the amount due. with a decree that the one-third of the land conveyed by Richard Holden to the plaintiff should be subject to payment of the debts because it was a voluntary deed and void as to creditors. The plaintiff paid off said judgment and his brother has repaid him one-third, and this is a proceeding to subject that third of the land which is in possession of the defendant to the repayment of the other third.

The jury find as a fact that when Richard Holden conveyed this third of the land to the defendant it was expressly charged with the duty of paying its one-third of the Harris debt. This should be conclusive. But if we put that entirely on one side, this would still be so by operation of law without any agreement, on two grounds:

First. It is alleged in the complaint and is submitted in the answer that the indebtedness to Harris was secured by the conveyance of the land to a trustee to pay the purchase money and afterwards to convey

to Richard Holden. The trustee having died, a decree was made in an action brought by Richard Holden against the widow and heirs at law of the trustee for a conveyance to Richard Holden, but the creditor Harris was not a party to that proceeding and was unaffected by it. His Honor also correctly instructed the jury that the trust in favor of the creditor was not abandoned. His taking a new note for the balance due and unpaid on the purchase money, in the absence of evidence to show such an intention, was not an abandonment of the security. *Hyman v. Devereux,* 63 N. C., 624. One part of the trust property having paid the debt, this part which passed without any consideration to the defendant is chargeable to contribute its *pro rata.* Adams (198) Eq., 570; *Stanly v. Stocks,* 16 N. C., 318.

Secondly. The conveyances to the three children being entirely voluntary, were void as to creditors, since property sufficient and available to pay his debts was not retained by the father. Each share so conveyed is liable for its proportionate part of the debt, and as the plaintiff's share has by decree of a court been subjected to the payment of the whole debt, he is clearly entitled to be reimbursed by a decree subjecting the one-third of the land conveyed to the defendants to an order of sale for the repayment of the one-third of the debt for which the defendant's share was chargeable and which plaintiff has been heretofore forced to pay under the orders of the court. This would be so if the defendant had been a devisee. *Badger v. Daniel,* 79 N. C., 372, 382; *Green v. Green,* 69 N. C., 25; 4 A. & E., 11; *Taylor v. Taylor,* 48 Am. Dec., 400; *Schermerhorn v. Barhgdt,* 9 Paige, 28; *Clowes v. Dickerson,* 5 Johns. Ch., 235. And she is in no better position as one of the grantees of the father under a deed void as to creditors. This view renders the exceptions taken immaterial, and if there was error, as to which it is unnecessary to intimate any opinion, such error was harmless.

Affirmed.

Cited: Cobb v. Edwards, 117 N. C., 247; *Turner v. Lumber Co.,* 119 N. C., 400; *S. v. Moore,* 120 N. C., 578; *S. v. Wilson,* 121 N. C., 657; *Owens v. Williams,* 130 N. C., 168; *Davison v. Gregory,* 132 N. C., 396; *Pharr v. R. R., ib.,* 422; *Gaylord v. Gaylord,* 150 N. C., 237; *Hobbs v. Cashwell,* 152 N. C., 190; *McWhirter v. McWhirter,* 155 N. C., 147; *Liverman v. Cahoon,* 156 N. C., 207; *Anderson v. Harrington,* 163 N. C., 143; *Barnes v. Fort,* 169 N. C., 434.

(199)

IN RE R. M. FREEMAN.

Mortgage of Wife's Land for Improvement of Land—Curtesy.

Where a *feme covert*, with the consent of her husband, mortgaged her separate real estate to secure money borrowed upon the joint note of herself and husband to improve the land, and upon the death of the wife the land is sold upon the petition of the surviving husband and the heir of the wife, the curtesy interest should not be charged with the debt, but the debt should first be paid out of the entire proceeds, and the curtesy interest ascertained and paid from the surplus.

Ex parte petition for the sale of land, heard before the clerk of the Superior Court of WAYNE.

It appeared that Lilly W. Freeman, being the owner of a lot in Goldsboro, executed a mortgage with her husband to recover a note for $1,000 for money borrowed to improve the lot which, upon her death, descended to her only child, the infant petitioner. It appearing to the interest of the parties that a sale should be made at $2,750 it was so ordered, and *Bynum, J.*, at chambers, rendered the following judgment:

It appearing to the court that Lilly W. Freeman died leaving her surviving R. M. Freeman, Jr., her son and only heir at law, and R. M. Freeman, her husband, and that during her life she and her said husband executed the note and mortgage set out in the petition; that the debt had not been paid, but was due and owing at the time of her death, and it appearing that the said R. M. Freeman is tenant by the curtesy, it is therefore adjudged:

1. That the debt and mortgage is a lien on the entire property.

2. That the curtesy interest of the said R. M. Freeman is liable (200) first to pay the indebtedness.

3. The clerk will therefore ascertain what is the cash value of the interest of the said R. M. Freeman in the said house and lot at the date of the decree for sale and apply so much of the money due him as tenant by the curtesy as may be necessary to pay off and discharge said debt and interest, the balance to be paid to him.

4. If there be not enough found to be due him as tenant by the curtesy to pay said debt, then the balance necessary to pay the same to be paid out of the amount due to R. M. Freeman, Jr., as heir at law of Lilly W. Freeman.

From this judgment the petitioner (R. M. Freeman) appealed.

Aycock & Daniels for R. M. Freeman.
No counsel contra.

AVERY, J. The note being in form a joint contract of husband and

wife was, within the meaning of the statute, executed with his written consent. *Farthing v. Shields,* 106 N. C., 289; *Flaum v. Wallace,* 103 N. C., 296. While she did not specifically charge her separate personal estate or enter into a contract in any way inforceable against her by merely signing such a note as is described in the record sent up, she did afterwards bind the land conveyed in the mortgage deed executed by her husband and herself. *Farthing v. Shields, supra,* at p. 299; *Thurber v. LaRoque,* 105 N. C., 301; *Williams v. Walker,* 111 N. C., 604. She might have so encumbered her own land to secure a debt of the husband created for and inuring solely to his benefit. *Shinn v. Smith,* 79 N. C., 310; *Newhart v. Peters,* 80 N. C., 166.

Here however it is found as a fact that the money which was
(201) the consideration of the note, was paid to her and was expended by her in building a house which, of course, enhanced the value of the land sold. It was competent and pertinent as between the parties interested to inquire into the consideration. *Flaum v. Wallace, supra; Jeffries v. Green,* 79 N. C., 330.

The wife died, leaving as her only heir at law the infant petitioner, R. M. Freeman, Jr., who, with his next friend appointed by the court, joins his father, R. M. Freeman, tenant by the curtesy, in the petition to sell the land. The sole question presented by the appeal is whether the mortgage debt, which is a lien upon the land, is to be first discharged out of the purchase-money arising from the sale of the land, and then the present value of the husband's life estate in the residue ascertained and paid to him, or whether the present value of his life estate in the whole fund is to be first determined and the whole, or so much of it as may be necessary, applied to the payment of the debt in exoneration of the interest of the heir at law. The wife was not surety for the husband and her infant heir at law cannot invoke the aid of the principle approved in *Weil v. Thomas,* 114 N. C., 197, for the reason that his mother did not mortgage her land to secure a debt created by the husband for his own benefit, but to procure money to be expended on the improvement of her separate real estate. The right of the wife to secure the payment of money expended in the improvement of her own land by conveying it by a mortgage deed, in which the husband joins and with privy examination of herself, cannot be questioned, as was said by the present *Chief Justice* in *Jeffries v. Green, supra,* "except upon the theory that a *feme covert* cannot sell or charge her separate estate for her own benefit or the improvement of her own property."

The consideration of the debt having inured to the enhance-
(202) ment in value of the very tract of land now sold, it would be inequitable, when the purchase-money comes into court for division between her husband, as tenant by the curtesy, and her heirs at

law, to devote so much of it as is due him in lieu of his life estate to the payment of the unpaid balances on the note, on the ground that she, as surety, had pledged her property for his debt. *Atkinson v. Richardson,* 74 N. C., 455. Such a ruling would be founded upon a theory clearly contradictory of the facts explicitly found by the court as the basis of the decree.

For the reasons given the judgment must be reversed and judgment entered below in accordance with this opinion.

Reversed.

Cited: B. & L. Asso. v. Black, 119 N. C., 327; *Harrington v. Rawls,* 136 N. C., 68.

GOLDSBORO STORAGE AND WAREHOUSE COMPANY v. B. L. DUKE ET AL.

Landlord and Tenant—Lessor and Lessee—Notice of Intention to Cancel Lease—Withdrawal.

Where a lessor, under a power contained in the lease, gives notice to lessee of his intention to cancel the lease and take possession at the end of thirty days, for nonpayment of rent, such notice is not an offer which may be accepted by the tenant and thus made irrevocable, but the lessor may withdraw it and sue for the rent.

ACTION tried at October Term, 1894, of WAYNE, before *Bynum, J.,* and a jury.

The action was brought to recover installments of rent reserved on a lease of certain warehouse property in Goldsboro by the plaintiff to the defendant B. L. Duke, which became due 1 December, 1893, (203) and 20 January, 1894.

The clause of the lease upon which the controversy arose is as follows: "On failure of said B. L. Duke to pay said rents when due, said Storage and Warehouse Company shall have power to terminate this lease, and shall have a right of entry and possession to said leased property at the expiration of thirty days after a notification of said B. L. Duke of such neglect to pay any semi-annual payment."

On 1 December, 1893, the plaintiff notified the defendant B. L. Duke and the other defendants to whom he had made a general assignment for the benefit of creditors, that the installment of rent due 1 December,

1893, was due and unpaid, and that unless the same should be paid on or before 20 January, 1894, the plaintiff would under the powers reserved in the lease enter upon the property and take possession of the same.

On 26 December, 1893, the defendant trustees sent to the plaintiff their reply as follows:

"Your agent, Mr. Peterson, was in this city 19 December and made us a proposition in regard to the warehouse which we cannot accept. We at the same time recognize your right to enter and take possession of the property and terminate the lease."

On 30 December, 1893, the plaintiff wrote to defendants withdrawing the notice of 19 December, 1893, and notifying them that it would not insist upon a forfeiture of the lease nor reënter upon the property, but would insist upon the payment of the rent accrued and accruing.

It was in evidence that no offer to surrender possession of the property to plaintiff or tender of the keys was made to plaintiff until after 30 December, 1893. It was also in evidence that the plaintiff has never been in possession of the property since the execution of the lease.

(204) There was evidence that defendants used the leased property for storage of cotton after January, 1894, and until June, 1894.

The following issues were submitted to the jury:

1. Was the lease mentioned in the complaint terminated?
2. If so, when?
3. What amount is plaintiff entitled to recover?

His Honor charged the jury that upon the whole evidence, if they believed it they should find the first issue "Yes," the second "20 December, 1893," and the third "From the defendant Duke $702.90, with interest," etc. Plaintiff excepted to the instructions and appealed from the judgment which was given on the verdict rendered in accordance therewith.

Aycock & Daniels for plaintiff.
Fuller, Winston & Fuller for defendant.

CLARK, J. This case is governed by *Patrick v. R. R.*, 93 N. C., 422. The notice is not an offer which the lessee could accept and thereby make irrevocable. It was a notice of proposed action under the contract which by its terms the lessee could avoid by payment in 30 days of the rent due. The recall of the notice is not an attempted renewal of an ended contract by the withdrawal of a notice in pursuance of which it might soon have ended. *Patrick v. R. R., supra,* p. 428.

It is not necessary to repeat the strong reasoning of *Smith, C. J.*, in that case. The notice could have been withdrawn at any time before the day named for it to take effect. It was *vox emissa sed non irrevocabilis.*

Error.

(205)

DANIEL LANGSTON AND WIFE v. H. WEIL & BRO.

Practice—Judgment, Appeal from Not Perfected—Res Judicata.

Where the court below affirmed on appeal a judgment of the clerk in a proceeding before the latter to set aside a special proceeding for the sale of land, and an appeal was taken from said judgment of affirmance but was not perfected, a subsequent motion to divide the action was properly overruled, the matters involved being *res judicata.*

ACTION instituted before the clerk of the Superior Court of WAYNE to set aside the decree in a special proceeding under which lands of the *feme* plaintiff's ancestor had been sold, and heard at January Term, 1895, of WAYNE, before *Winston, J.*

Allen & Dortch for defendants. (208)
No counsel contra.

PER CURIAM: Special proceeding in which defendants demurred to complaint filed before the clerk. The clerk sustained the demurrer and ordered that the proceeding be dismissed. On appeal *Judge Bynum* on 3 July, 1894, sustained the ruling of the clerk. From this last judgment the plaintiffs appealed to the Supreme Court, but did not perfect the appeal. At September Term, 1894, of WAYNE plaintiff moved, before *Winston, J.*, for leave to divide the action into two. The court refused the motion on the ground that the matters involved in the controversy were *res adjudicata.*

The judgment of the court below is

Affirmed.

(209)

S. A. SALMON TO USE OF J. T. ROGERS v. D. H. McLEAN.

Justice's Judgment—Rehearing—Statute of Limitations.

1. While a new trial cannot be granted by a justice of the peace, a rehearing may be allowed in certain cases mentioned in section 845 of The Code.
2. Where a judgment was rendered by a justice of the peace, and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the latter, the first judgment having been vacated.

APPEAL from a justice's judgment, tried before *Bynum, J.,* and a jury, at the November Term, 1894, of HARNETT.

Long, a witness for the plaintiff, testified that he was a justice of the peace during the year 1887. That on 12 April, 1887, he rendered a judgment in favor of S. A. Salmon against defendant D. H. McLean, on a note for the sum of $171.67; that he had a rehearing of the case on 2 May, 1887, and again gave the same judgment.

Upon his cross-examination, witness testified that he did not remember whether the application for the rehearing was made by the defendant within ten days after 12 April or not. Rehearing was on 2 May, and the judgment rendered that day.

S. A. Salmon testified that he transferred the judgment to plaintiff J. T. Rogers and that he was the owner of it.

Plaintiff then introduced the docket of Long, the justice of the peace, which showed the judgment rendered against D. H. McLean in favor of S. A. Salmon on 12 April, 1887, with a rehearing granted 2 May, 1887, and a judgment for same amount on 2 May, 1887; that the judgment was on a bond for money, and it also showed a transfer of the judgment to J. T. Rogers.

The defendant introduced the summons in the case, which was (210) dated on 30 April, 1894.

1. Plaintiff insisted that the date of the judgment was 2 May, and that he was not bound by the statute of limitations.

2. That if the judgment of 12 April was the judgment, there was a suspension of the judgment by the order to rehear, and that that time should not be counted against him, and that that would not make the seven years.

The court instructed the jury that a justice's judgment was barred by a lapse of seven years, and that the true date of the judgment was 12 April, 1887; that the statute of limitations began to run then, and that if they found more than seven years had elapsed from that time

until this suit was begun, which was 30 April, 1894, they should answer the issue as to the bar of the statute "Yes," otherwise "No."

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

L. B. Chapin for plaintiff.
T. M. Argo and F. P. Jones for defendant.

CLARK, J. A new trial cannot be granted by a justice of the peace (The Code, 865), but in the cases mentioned in The Code, 845, a rehearing may be allowed. *Froneberger v. Lee,* 66 N. C., 333; *Gambill v. Gambill,* 89 N. C., 201; *Guano Company v. Bridgers,* 93 N. C., 439. Though the judgment was first rendered 12 April, 1887, a rehearing was granted and the new judgment was rendered 2 May, 1887. The statute ran from the 2 May because the first judgment was vacated by the rehearing. This action was begun 30 April, 1894, which was within the seven years limited by statute. Code, sec. 153 (1). The defendant has no ground to complain, for the rehearing was granted on his motion. In instructing the jury that the judgment was (211) barred, there was

Error.

R. E. LEAVELL v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Companies—Telegraph Commission—Illegal Rates of Charge for Service—Discrimination.

1. Where a telegraph company has a continuous line between two points in this State, the fact that, in transmitting it, it sent the message over the lines of another company does not excuse its violation of the rate prescribed by the Railroad Commissioners for the transmission of a message sent over the lines of one company.

2. It is the duty of a telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices, since it is not a mere private duty but a public duty which its franchise authorizes it to perform.

3. A contract whereby a telegraph company gives to a railroad company a preference of business over its line to the exclusion of others is an illegal discrimination and cannot excuse the telegraph company for using the line of another company in the transmission of a message between two points in this State between which it has a continuous line.

COMPLAINT heard before the Railroad Commission, in Raleigh, on 13 November, 1894.

The complaint was filed 21 August, 1894, alleging a violation of the tariff rate prescribed by the Commission for the transmission of telegraphic messages.

The plaintiff alleged that 17 August, 1894, he delivered a ten-word message to the defendant at Wilson, N. C., to be transmitted to
(212) Edenton, N. C., and was required by the defendant to pay fifty cents for the transmission of the message, and that this was a violation of the rate prescribed by the Railroad Commission of North Carolina.

The defendant answered the complaint on 31 August, 1894, through its General Superintendent, J. B. Tree, alleging that the "telegraphic tolls from Wilson, N. C., to Norfolk, Va., are twenty-five cents for ten words, and the rate from Norfolk, Va., to Edenton, N. C., is twenty-five cents, making a total of fifty cents. The message was sent via Norfolk because it is the only telegraph route by which the business addressed to Edenton can be handled and turned over to the Elizabeth City and Norfolk Telegraph Company, at Norfolk, Va., as the Western Union Telegraph Company has no commercial office at Edenton, N. C."

The Commission found the facts and adjudged:

(217) 1. That the telegraphic office at Edenton, on the line of the Norfolk Southern Railroad, is under the control of the defendant, and that the operator in said office, although employed by the said railroad company, is the agent and operator of the defendant.

2. The telegraphic message transmitted by the defendant over said line of the Norfolk Southern Railway Company from or to Edenton, to or from Wilson, or any other point in North Carolina, does not constitute commerce between the states, although traversing another state in the route, and is subject to the rates prescribed by the Commission.

3. That defendant cannot be heard to say that it did not send
(218) the message mentioned in this case over its own line from Norfolk to Edenton.

4. That the charge of fifty cents mentioned in this case was in violation of the rates prescribed by the Commission.

Wherefore, it is adjudged by the Commission, and so ordered, that defendant refund to plaintiff the sum of twenty-five cents, the excess above the rates allowed by law, and that said defendant desist from further violation of the rates prescribed by the Commission for transmission of messages from Wilson to Edenton.

From this judgment defendant prayed an appeal to the Supreme Court.

(220) *Attorney-General for plaintiff.*
Robert Stiles for defendant.

CLARK, J. In *Express Co. v. R. R.*, 111 N. C., 463, this Court affirmed the constitutionality of the act (chapter 320, Acts 1891) establishing the Railroad and Telegraph Commission. In *Mayo v. Telegraph Co.*, 112 N. C., 343, it sustained the power of such Commission under section 26 of said act, to establish rates for telegraph companies. In *R. R. Commission v. Telegraph Co.* (*Albea's case*), 113 N. C., 213, the Court held that telegraphic messages transmitted by a company from and to points in this State, although traversing another state in the route, do not constitute interstate commerce, and are subject to the tariff regulation of the commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by *Fuller, C. J.*, in *R. R. v. Pennsylvania,* 145 U. S., 192. To the same purport is *Campbell v. R. R.*, 86 Iowa, 587.

In the present case the Commission find as a fact that "the defendant has a continuous line by which messages may be transmitted from Wilson to Edenton and other adjacent points in North Carolina (221) but this line traverses a part of the State of Virginia, passing through the city of Norfolk;" and it properly holds upon the evidence "that the telegraph office at Edenton is under the control of the defendant, and the operator, though employed by the railroad company, is the agent and operator of the defendant." It necessarily follows from this state of facts that as the defendant could have sent the message the whole distance over its own line, it cannot be heard to say that it did not do what it ought to have done and thus collect 50 cents for the message instead of 25, as allowed by the commission tariff. The defense set up, that in fact it only carried the message to Norfolk and then paid another company to forward it to Edenton, cannot be regarded when it might itself have completed the delivery of the message. The defendant seeks to excuse itself on the plea that it has only one wire to Edenton, and that this is fully occupied at that office by the work it does for the railroad company. But it is the duty of the telegraph company to have sufficient facilities to transact all the business offered to it for all points at which it has offices. If the press of business offered is so great that one wire or one operator at a point is not sufficient it is the duty of the company to add another wire or an additional employee. It is not a mere private business, but a public duty which the defendants by their franchise are authorized to discharge. It is further to be noted that in giving to the railroad company the preference in the use of their line to Edenton, while at other points, as Moyock, Centreville and Hertford on the same line, the public is admitted to the use of the wire, the defendant is making a forbidden and illegal discrimination in favor of one customer and against the public at large, as was intimated in *Albea's case, supra,* 113 N. C., on page 226. The findings of fact and evi-

(222) dence are fuller, and present a somewhat different and stronger case against the defendant than in *Albea's case.* By section 11 of the defendant's contract with the railroad company the defendant remains owner of the telegraph line to Edenton, N. C., and its belongings which are to remain "part of its general telegraph system" and "to be controlled and regulated by the telegraph company." Section 3 of the contract gives the railroad messages precedence over commercial business, but stipulates that when railroad business shall require the exclusive use of one wire the telegraph company shall on sixty days notice furnish material for a second wire, which second wire shall be used for railroad business exclusively, and such commercial business as can be done without interfering with railroad business. Section 6 provides that where the railroad company shall open offices, the operators "acting as agents of the telegraph company" shall receive such commercial and public telegrams as may be offered, collecting rates prescribed by the telegraph company, and render monthly statements and pay over the receipts to the telegraph company. Section 7 provides that whenever the volume of business at any point justifies it, the telegraph company shall put in an additional operator. It will be thus seen that the line to Edenton is an integral part of the defendant's general telegraph system. It is only by virtue of its franchise as a telegraph company that it can operate its line to Edenton at all. It cannot discriminate at that point in favor of or against any customer. It cannot subtract itself from obedience to the rates prescribed by the authority of the State, acting through the Commission, by a contract giving one customer, the railroad, preference in business and pleading that such business occupies the only wire it has. The discrimination is itself illegal. Besides, if it were not, the small cost of an additional wire, which it is common knowledge does not exceed ten dollars per mile, furnishes no ground to
(223) exempt the defendant from furnishing the additional facility to do the business for all. The charge of a double rate between Edenton and other points in North Carolina is a far heavier imposition upon the public than the cost of the additional wire to defendant, and is just the kind of burden and discrimination which the Commission was established to prevent. In *Albea's case, supra,* no commercial message was tendered, and the point now decided was not presented by the record. The ruling of the Commission is in all respects

Affirmed.

Cited: Caldwell v. Wilson, 121 N. C., 474; *Pate v. R. R.,* 122 N. C., 881; *Corporation Commission,* 127 N. C., 288; *Telephone Co. v. Telephone Co.,* 159 N. C., 14; *Speight v. Tel. Co.,* 178 N. C., 150.

ELIAS CARR v. OCTAVIUS COKE, SECRETARY OF STATE.

Statutes—Enactment—Ratification—Presiding Officers' Signatures Fraudulently Procured or Affixed Through Mistake.

When it appears that a bill has been duly signed by the presiding officers of the two Houses of the General Assembly, declaring it to have been read three times in each House, the courts cannot go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had been passed after the requisite readings by each House, although the Journals do not show that it was so passed.

AVERY and CLARK, JJ., dissent, *arguendo.*

ACTION by Elias Carr against Octavius Coke, Secretary of State, for a mandamus, etc., heard before *Starbuck, J.,* at April Term, 1895, of WAKE.

Complaint was as follows:

The plaintiff, in behalf of himself and all other citizens of the (224) State of North Carolina, complaining, alleges:

1. That defendant is Secretary of State of North Carolina, and by virtue of his office has the custody of all the acts passed by the Legislature of 1895, or which purport to have been passed by it.

2. That it becomes his duty by law to deliver certified copies of said acts to the Public Printer of said State for printing and publication.

3. When so printed and published, they become presumptive evidence that they are laws duly and constitutionally enacted.

4. On 13 March, *Anno Domini* 1895, a bill was signed by the President of the Senate and Speaker of the House of Representatives in the Legislature of North Carolina at its last session, in the presence of each House, and purports to have been ratified upon that day, which reads as follows:

AN ACT TO REGULATE ASSIGNMENTS AND OTHER CONVEYANCES OF LIKE NATURE IN NORTH CAROLINA.

The General Assembly of North Carolina do enact:

SECTION 1. That all conditional sales, assignments, mortgages or deeds of trust, which are executed to secure any debt, obligation, note or bond which gives preferences to any creditor of the maker, shall be absolutely void as to existing creditors.

SEC. 2. That all laws in conflict with this act are hereby repealed.

SEC. 3. That this act shall be in force from and after its ratification.

Ratified 13 March, 1895.

5. The said bill, as this plaintiff is informed and believes, was

(225) not enacted a law in accordance with the provisions of the Constitution of this State.

6. The Journals of both Houses of the Legislature show that it was not read three times in either House.

7. The Journal of the Senate shows that it was never read before that body and never passed any reading in it.

8. The Journal of the House of Representatives shows that it was introduced in that body and referred to a committee. The said committee reported it back to the House with an amendment and is silent as to its passage; the bill was laid on the table on its second reading in that body on 12 March, *Anno Domini* 1895. This appears also in the entries upon the calendar of bills of the House.

9. The bill is marked and stamped "Tabled 12 March, *Anno Domini* 1895." The affidavits of Ellington are hereto attached and prayed to be taken as a part hereof.

10. It is now deposited among the tabled bills in their proper receptacle in what is known as the old State Library in the Capitol.

11. By some means unknown to this plaintiff, but which he is informed and believes to be fraudulent, the said bill was enrolled by some person to this plaintiff unknown, in the office of the Enrolling Clerk and signed by mistake by the President of the Senate and Speaker of the House of Representatives upon the day upon which it purports to have been ratified.

12. The copy of the enrolled bill purporting to have been ratified, as above stated, is now in the custody of the defendant, the Secretary of the State of North Carolina.

13. The said defendant, in performance of the duty by law imposed upon him, is compelled to deliver for printing and publication to the Public Printer of this State a certified copy of said fraudulent act to be published and printed as an act of the Legislature of 1895, unless
(226) restrained from so doing by order of this court.

14. The said defendant now threatens and declares his intention to so deliver a certified copy of the said fraudulent act to the Public Printer to be published and printed as aforesaid.

15. The act when so printed and published becomes presumptively an act of the Legislature, duly enacted and a valid law of the State.

16. This plaintiff is informed and believes that after such printing and publication there is no legal method by which such presumption can be rebutted in the courts of this State, as long as said act remains in the custody of the Secretary of said State, filed with the acts of the Legislature legally passed by it.

17. The plaintiff is a resident and citizen of the State of North Caro-

lina and owns property within said State over and above his homestead and personal property exemptions; he proposes to reside in said State hereafter, and he in common with many other citizens will be injured in his right of alienation of his property if said fraudulent act of the Legislature is printed and published in the manner above stated or remains in the custody of the said Secretary of State, filed with acts of the Legislature as above set forth; that he is a creditor of debtors who are indebted to others, and will be deprived by the said act of the right to secure debts so due him by mortgage, conditional sales, deeds of trust or assignments, unless the relief prayed for in this complaint is granted.

18. That a summons, together with a copy of this complaint, has been served on defendant in this action.

Wherefore, the plaintiff prays that an order be made by this court directing said defendant Secretary of State to show cause why a peremptory mandamus shall not be issued against him to compel him to remove the said act from the files of the law required to be kept (227) by him, and why he should not be enjoined from delivering a certified copy of said act to the Public Printer of this State to be printed and published as a law of this State. And the plaintiff further prays that the said defendant may be restrained in the meantime from delivering a certified copy of said act to the Public Printer to be printed and published as aforesaid, and demands such other and further relief as the court may adjudge that he is entitled to in the premises, and asks that this complaint may be treated as an affidavit for the purpose of obtaining the temporary restraining order for which he prays.

The following affidavit was attached to the complaint:

J. C. Ellington makes oath that he is State Librarian of the State of North Carolina and was such at the time of the searches mentioned below.

That on or about the ____ day of March, 1895, after the Legislature adjourned, and several times thereafter, he made most diligent and thorough search in the office of Enrolling Clerk of the last General Assembly of North Carolina for the document from which the paper now in the office of the Secretary of said State was copied, which purports to be an act to regulate assignments and other like conveyances in North Carolina and to have been ratified on 13 March, 1895, and that the same could not be found and has not since been found therein.

He further maketh oath that he has carefully examined the calendar of the Senate of the last General Assembly of North Carolina for the entire session and it contains no reference to, or mention of said bill or act, either by number or title of any similar bill.

He further maketh oath that he has most carefully examined the Journal of the proceedings of the House of Representatives of
(228) the said General Assembly from 20 February, 1895, to 13 March, 1895, both inclusive, said Journals being deposited in the office of, and now in the custody of, the Secretary of State of North Carolina, and that he found the following entries on the Journal of the proceedings of the said 20 February (see page 12, House Journal, 20 February, 1895):

INTRODUCTION OF BILLS.

By Mr. Smith, of Stanly, H. B. 1018: A bill to be entitled an act to regulate assignments. Referred to the Finance Committee.

That he finds nothing else on said Journal of that day touching the said bill or act, or any similar bill or act.

He further maketh oath that he found on the Journal of the proceedings of said House on 21 February, 1895, the following entries (see page 8, House Journal, 21 February, 1895):

REPORTS OF COMMITTEES.

By Mr. Hileman, from the Committee on Finance: H. B. 1018. A bill to be entitled an act to regulate assignments, with a favorable report.

That he finds nothing else on said Journal of that day touching the said bill or act, or any similar bill.

He further maketh oath that he found on the Journal of the proceedings of said House on 28 February, 1895, the following entries (see House Journal, 28 February, 1895):

On motion of Mr. Smith, of Stanly: H. B. 1018. A bill to regulate assignments is made the special order for 8:30 p.m. Friday.

That he found nothing else on the Journal of that day touching said bill or act, or any similar bill or act.

He further maketh oath that there is no entry on said Journal
(229) of any act concerning the said bill or any similar bill on the Friday for which it was made a "special order."

He further maketh oath that he found on the Journal of the proceedings of said House on 13 March, 1895, being the day of final adjournment, the following entry:

Mr. _____, from the Committee on Enrolled Bills, reports the following bills and resolutions as properly enrolled, which were duly

ratified and sent to the office of the Secretary of State: "An Act to Regulate Assignments."

That there are no other entries on the days referred to nor on any other day between 20 February and 13 March, 1895, except those mentioned, touching said bill or act, or any similar bill or act.

He further maketh oath that he has carefully examined the Journal of the Senate of the last General Assembly for the corresponding dates, and that he finds no reference to said bill or any similar bill either by number or title, and that the same doth not appear on said Journal among the bills reported as "enrolled and ratified."

That he found the bill, a copy of which, with *fac simile* copy of endorsements, is appended to and made a part of this affidavit, among the tabled bills in the old library room of the capitol, where legislative documents are filed. J. C. ELLINGTON.

Sworn to and subscribed before me this 29 April, 1895.

W. T. SMITH, (230)
(Seal) Notary Public.

AN ACT ENTITLED AN ACT TO REGULATE ASSIGNMENTS AND OTHER CONVEYANCES OF LIKE NATURE IN NORTH CAROLINA.

The General Assembly of North Carolina do enact:

SECTION 1. That all conditional sales, assignments, mortgages, or deeds in trust which are executed to secure any debt, obligation, note or bond which gives preference to any creditor of the maker, shall be absolutely void as to existing creditors, except those given to secure cash advanced at the time of the execution of the same or to secure advancements for farming purposes.

SEC. 2. That all laws in conflict with this act are hereby repealed.

SEC. 3. This act shall be in force from and after its ratification.

The Finance Committee report this bill favorably with the following amendment, recommended by the committee.

HILEMAN.

Amended by striking out in section one all after the word "creditors" in line five of said section.

On the back of said act is indorsed the following:

H. B. No. 1018. S. B. No._____

By R. L. Smith.

A bill to be entitled an act to regulate assignments.

Passed first reading 20 February, 1895. Committee on Finance.

Passed House _____, 189__
Favorable report 21 February, 1895.
Engrossed _____
Tabled 12 March, 1895.

_____
(231) Engrossing Clerk.

Special Order Friday evening 8:30.
Sent to Senate _____, 189__

_____
Clerk of House.

Defendant moved to dismiss the action on the ground that the court had no jurisdiction to grant the relief asked by plaintiff.

His Honor rendered the following judgment:

This action coming on for further orders and being argued by counsel and considered by the court, it is, on motion of attorneys for defendant, ordered and adjudged by the court that this action be dismissed for want of jurisdiction of the court to grant the relief prayed for in the complaint, on the ground that the court cannot go behind the ratification of the act as the same appeared in the office of the Secretary of State, and the defendant recover his costs, to be taxed by the clerk, of the plaintiff and his surety for costs.

The plaintiff excepted to the ruling and judgment of the court, assigning error as follows:

1. For that his Honor ruled that the court did not have jurisdiction of the subject-matter of the controversy.

2. For that his Honor ruled that the complaint did not set forth the facts sufficient to constitute a cause of action.

3. Because his Honor did not rule that it was the duty of the court to inform itself by any legitimate source of information within its reach, especially by the Journals of both Houses of the General Assembly, of the existence and passage of the act in controversy.

4. For that his Honor erred in not continuing the injunction until the hearing, and in not hearing any evidence upon the question of the passage of the act.

5. For that his Honor erred in deciding that the mere presence of the act in the office of the Secretary of State, signed by the presiding
(232) officers of both houses, was absolutely conclusive upon the judicial department, and that the courts could not look behind the ratification of the said act.

F. H. Busbee and Graham, Boone & Boone for plaintiff.
J. B. Batchelor and Armistead Jones for defendant.

FAIRCLOTH, C. J. The plaintiff, as a citizen and taxpayer of the State, brings this action against the defendant as Secretary of State, who by virtue of his office is the custodian of all acts passed by the Legislature, or which purports to have been passed, whose duty it is to deliver certified copies of said acts to the Public Printer for publication.

The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act under consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the Public Printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified 13 March, 1895, is the one under consideration.

The complaint alleges that the act was signed by the President of the Senate and the Speaker of the House of Representatives on the said 13 March in the presence of each House, and purports to have been ratified upon that day; that, upon information and belief the act did not become law according to the Constitution of the State. That the Journals of both houses show that it was not read three times in either; that it was never read in the Senate, and was tabled in the House on its second reading, and that by some unknown fraudulent means the bill was enrolled by some person, unknown to the plaintiff, and signed by the said President and Speaker by mistake.

The defendant answered denying the material allegations.

At the hearing the defendant moved to dismiss the action on (233) the ground that the court had no jurisdiction to grant the relief prayed for by the plaintiff. The motion was heard and his Honor dismissed the action for want of jurisdiction to grant the relief on the ground that the court cannot go behind the ratification of the act as the same appeared in the office of the Secretary of State. With the act before us, on its face regular and in due form, ratified by the genuine signatures of the President of the Senate and Speaker of the House, the question is presented, Can the court, as a coördinate branch of the government, look behind this record and investigate by inquiry and proof the manner in which this record was established by the legislative branch of the government, for any of the causes alleged in the complaint?

It may be stated in the outset that it is an important question and one that has not been heretofore presented directly to this Court.

The Court cannot be blind to the consequences that will flow from a decision either way. On the one hand, if we cannot look behind the record, then, paid and corrupt men, lobbyists and other interested ones

in and around the legislative halls, will feel more confident and safer in their disreputable work. On the other hand, if we can open the door and permit every act of the Legislature to be inquired into, behind the record, for any of the causes alleged in the complaint, then the State will be plagued with all the evils of a veritable Pandora's box. By an examination of the decisions of the courts of the different States, we find some diversity among the decisions and the opinions of eminent jurists. Those courts, holding the affirmative of the question, as a rule have done so by reason of some provision in their state constitu-
(234) tions or some preëxisting statutes. In one or more states the negative was held, and after a change in their constitutions the reverse was held by reason of some new clause in the organic law.

We find in no state constitution the exact wording as it is in ours. We are therefore left to reason with ourselves, and construe the true meaning of our organic law, aided by the best authorities at our command.

Let it now be understood that it is not a question of fraud or wrongdoing in the legislative halls, as alleged in the complaint, with which we are confronted, but simply a question of power. It cannot be said that this Court from it origin until now has ever failed to lay its hands upon fraud or any wrongdoing, whenever authorized by law and requested to do so. If crimes are perpetrated in legislation, the authors are liable and can be punished as other violators of the law, and possibly a reasonable and honest effort by the proper authorities would bring to light the authors of the wrong, if any has been done. There is now before the Court in this proceeding no one who is in the slightest degree alleged or supposed to be connected with wrongdoing in this matter. So, then, we are considering a question of power, and not of investigation behind the record of a coordinate branch of the State government.

Our Constitution, Art. II, sec. 16, declares that: "Each House shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly," and in section 23, "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws, and shall be signed by the presiding officers of both Houses." What shall be the entries on the Journals is not indicated by the Constitution, except as above. It is the province and duty of the Court to construe and interpret legislative acts, and see if they disregard or violate any provision
(235) of the Constitution, and if so found, to declare them invalid, and this is done upon the face of the act itself. Beyond this duty arises the question of power in the Court to look behind the legislative record and inquire into its proceedings for any cause set out in the complaint. Our decision upon this question is based upon the "reason of

the thing," upon public policy for the best interests of the State, and upon the decisions of other courts and our own, which commend themselves to our minds, some of which are now cited.

At common law the ratification and approval of an act of Parliament was conclusive and unimpeachable, etc. "An Act of Parliament, thus made, is the exercise of the highest authority that this Kingdom acknowledges upon earth." "And it cannot be altered, amended, dispensed with, suspended or repealed, but in the same forms and by the same authority of Parliament; for it is a maxim in law that it requires the same strength to dissolve, as to create an obligation." 1 Blackstone Com., 185-6. "The journal is of good use for the intercourses between the two Houses, and the like, but when the act is passed the Journal is expired. The Journals of Parliament are not records, and cannot weaken or control a statute, which is a record and to be tried only by itself." *Rex v. Arundel,* Hobart, 109-111, Trinity Term, 14 Jac. *Broadnax v. Groom,* 64 N. C., 244, was a question upon a private act requiring 30 days notice of application, required by Article II, section 4 (now section 12) of the Constitution, and the motion was to prove that the notice had not been given. *Pearson, C. J.,* said: "We are of opinion that the ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record until reversed importeth verity.' There can be no doubt that acts of the Legislature, like judgments of courts, are matters of record, and (236) the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim, *'Omnia presumuntur,'* etc. Suppose an act of Congress is returned by the President with his objection, and the Vice-President and Speaker of the House certify that it is passed afterwards by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary?"

In *Scarborough v. Robinson,* 81 N. C., 409, in which this question was not directly before the Court, *Smith, C. J.,* in the discussion uses this language on page 426: "The Constitution declares that the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other. Art. I, sec. 8. And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory order demanded in the action would be an interference with the legitimate exercise of the law-making power and an obstruction to the harmonious working of the separate and distinct coördinate departments of the government, and must consequently be

denied." We quote this extract in order to show the trend of the judicial mind of the Court as then constituted. In *Field v. Clark,* 143 U. S., 649 (1891) the question was elaborately argued and considered in an able opinion. The allegation was that an important section in the bill as it passed was not in the enrolled bill authenticated by the signatures of the Speakers and deposited in the office of the Secretary of State. After full consideration of the numerous points argued, the Court held as follows: "The signing by the Speaker and by the President (237) of the Senate, in open session, of an enrolled bill is an official attestation by the two Houses of such bill as one that has passed Congress; and when the bill thus attested receives the approval of the President and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable. It is not competent to show from the Journals of either House of Congress that an act so authenticated, approved and deposited, did not pass in the precise form in which it was signed by the presiding officers of the two Houses and approved by the President."

The argument was pressed that a bill signed by the Speakers and approved by the President and deposited with the Secretary, as an act, does not become a law if it had not in fact been passed by Congress. The Court said, in view of the express requirements of the Constitution, the correctness of this general principle cannot be doubted. "But," said the Court, "this concession of the general principle does not determine the precise question before the Court, for it remains to inquire as to the nature of the evidence upon which a court may act, when the issue is made as to whether a bill, asserted to have become a law, was or was not passed by Congress. This question is now presented for the first time in this Court."

"We cannot be unmindful of the consequences that must result if this Court should feel obliged to declare that an enrolled bill, on which depend public and private interests of vast magnitude, which has been duly authenticated by the presiding officers and deposited in the archives as an act of Congress was not in fact passed, and therefore did not become a law." Page 670. Although the Constitution does not require that Acts of Congress shall be authenticated by the Speakers' signatures, the Court said that "Usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since (238) the organization of the government, require that mode of authentication," and when a bill is so authenticated "it carries on its face a solemn assurance by the legislative and executive departments that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act on that assurance, leaving the courts to determine whether the act so authenti-

cated is in conformity with the Constitution." Page 372. "It is admitted that an enrolled act thus authenticated is sufficient evidence of itself, nothing to the contrary appearing upon its face, that it passed Congress." Page 672.

In *Pangborn v. Young,* 32 N. J. Law, 29, *Beasley, C. J.,* delivered a strong opinion against the affirmative of the present question, and *Judge Harlan* says: "The conclusion was that upon grounds of public policy as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two Houses and in custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode" (page 674, and other cases).

In *ex parte Wren,* 63 Miss., 512, is found a case much in point, in which *Campbell, J.,* in an able and vigorous opinion, said that an enrolled act, such as we are considering, "is the sole exposition of its contents and the conclusive evidence of its existence according to its purport, and it is not allowable to look further to discover the history of the act or ascertain its provisions. Every other view subordinates the Legislature and disregards that coequal position in our system of the three departments of government." He then shows that, if such a rule should prevail, a justice of the peace and all other judicial officers would be compellable and would have the right to investigate the question whether any legislative act was passed according (239) to the requirements of the constitution and whether it was procured by mistake, fraud or otherwise, and upon the complaint of any resident taxpayer.

With these authorities we are content. There are numerous others, but it would be useless to pursue them. We are considering the main and important question which we understand the plaintiff intended to bring to the attention of the Court, without any remarks on the pleadings. It seems to be conceded that the main allegation cannot be established by the Journals as evidence, and that consequently it must be done by some other kind of proof. It is urged that fraud vitiates everything, but if we can go behind the record, would not mistake, bribery, etc., serve equally as well? It is also argued that the fraud alleged is admitted and is therefore to be taken as a fact for the purposes of this action. Admitted by whom? The respondent does not admit it in his answer. The motion was to dismiss for want of jurisdiction, and the court rendered its decision expressly on that ground. The defendant is a mere ministerial State officer who was not a member of the Legislature, and has no authority from it to plead or admit anything for it. Is he authorized by the Speakers of the two Houses to admit that they signed the bill by mistake? They have made no such admission so far

as this record discloses, and they have no opportunity to admit or deny anything. Is the defendant authorized to admit that by some unknown and fraudulent means the bill was enrolled? If so, who authorized him to admit it? The defendant might have ignored this proceeding entirely without the slightest dereliction of duty. Who then defends the Legislature or its Speakers when this grave question is under consideration?

The Executive does not feel it his duty to defend in the matter,
(240) presumably because he is not authorized by any one to do so.

Then, is there such admission of fraud or any other wrong as to enable the Court to treat the allegations of the complaint as facts? But, however these matters are, we have seen that we have no power to make the order asked for by the plaintiff, and that the remedy, if any is needed, is with the legislative branch of the State government.

We are of opinion that his Honor committed no error, and his judgment is

Affirmed.

MONTGOMERY, J., concurring: The single question for decision is, Can this Court inquire into and pass upon the history of a paper-writing which purports to be an act of the General Assembly and which is authenticated by the undisputed and genuine signatures of the President of the Senate and the Speaker of the House of Representatives? It is to be always kept in mind that the point is not as to the powers of the Supreme Court to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, when the Legislature has solemnly certified to a fact, that is, to the passage and ratification of an act which is within its own sphere, will the judiciary be permitted to inquire into or dispute that certification? The case is of the very first impression, and it ought to be settled upon the principles of sound reason and well considered authority. This is a strictly legal question and ought to be settled according to the principles of the law. The Court is aware that its judgment in this case may be attended with dangers in the future, but it is not our province to provide against dangers to the Commonwealth further than to con-
(241) strue honestly and as intelligently as we can, the laws which the legislative department of the government has enacted. It may be said however, in this connection that, if policy ought to have governed the Court in this matter—if results ought to have been anticipated—we feel that in the decision of the Court we have chosen the lesser of the two evils to be dreaded.

The question at issue brought to the light the more than possibilities of two most serious menaces to popular government. The first one, that

of the power of a corruptible or incompetent clerical force or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the Legislature and have that certified to be law which was never in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery or through the ignorance or carelessness of the oath-maker. By the decision of the Court the latter danger, the far most to be dreaded, is avoided. The presiding officers of the two Houses may, by taking a sufficiency of time and by close scrutiny and rigid examination of the bills and wrappers, prevent fraud and error in ratification, if such a thing be attempted; while for the latter danger no limit or restraint can be found except in the conscience of men who have never cultivated a sense of either generosity or justice. The motives and purposes of the plaintiffs in this action are not intended to be reflected on, neither is the character or official conduct of any officer or clerk of the last General Assembly. No testimony has been heard in the case, and this Court knows nothing of the facts or motives. (242) We have simply discussed dangers in the future in this connection. In the conclusions to which I have arrived I have tried to keep before me the great importance of the legal question involved, and to keep out of mind, as an utterly insignificant feature of the case, the wretched creatures who would commit such a detestable piece of meanness as the complaint charges. They, when detected, will receive the execration of all good men and most richly will they deserve it. It would have been well for the people and for the cause of good government if they had, or could have been ferreted out and named in the complaint, that they might have been pilloried in an indignant public sentiment. But to the law in the case:

Of the three coequal departments of our government, the legislative is of the most importance. It is sovereign as long as it keeps within the bounds of the Constitution. The powers of the judicial department are clearly defined and limited in the Constitution. Except to hear claims against the State (and then only to recommend action to the General Assembly) the whole power of this Court is embraced in these words: "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference." Const., Art. IV, sec. 8. This means, in plain English, that this Court can construe the laws when their meaning is a matter of contention between litigants, and that it can determine in cases properly before it

whether or not statutory enactments are constitutional. The writer of this knows of no other instances in which this Court can directly or indirectly pass upon the conduct of the General Assembly. As to the formulae that are necessary to convert a bill into a law, we cannot inquire if the ratification in proper form appears and the signatures of the proper officers are duly attached. However, in the case
(243) before us, the plaintiff alleges that what he styles the pretended act is not a law because it was not read three times in each House before it received the signatures of the presiding officers of both, as the Constitution requires. That instrument certainly does require that "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses," and it is as equally certain under the decisions of this Court that the certificate of ratification attested by the signatures of the presiding officers carries with it the presumption conclusive, that all such bills and resolutions have been duly passed by the bodies and cannot be questioned by the courts. Suppose, as individuals, we admit, which the answer does not, that this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who upon ratification attach their signatures to a bill do it in open session, calling the attention of the members to the fact that the same is about to be signed and reading the title of the bill. When it is signed, ratification is thereupon made of it by the body through their agent, the presiding officer. It is their act and deed, and nothing, not even the Journal itself, can contradict it or be used as evidence against it. Ratification is of higher dignity and of more authority than the Journals kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the Legislature according to the requirements of the Constitution, and the courts of law—the Judicial Department—a coequal department—are not allowed to go behind or question them. We have
(244) clear authority for this in our own reports. In *Broadnax v. Groom,* 64 N. C., 244, certain taxpayers in Rockingham County, in their complaint, sought an injunction against the collection of a tax levied by the commissioners under an act of the General Assembly on the ground that the act was private and was passed without the thirty days notice of application required by the Constitution. That case presented the very question which we have before us now. Could the plaintiffs in that case be allowed to go behind the ratification of the act and show by any kind of proof—by the Journals or otherwise—that the constitutional requirement had not been complied with? The Constitu-

tion provides that "The General Assembly shall not pass any Private Law unless it shall be made to appear that thirty days notice of application to pass such a law shall have been given." The Constitution provides that "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws." The constitutional requirement in both these instances is specific and definite and positive; and yet this Court held in the *Broadnax case, supra*, that the act having been certified by the presiding officers of both houses as duly ratified, it was not competent for the judiciary to go behind the ratification. *Chief Justice Pearson,* who delivered the opinion of the Court in that case, said: "We do not think it necessary to enter into the question whether this is a public act or a private one, in regard to which thirty days notice of the application must be given; for taking it to be a mere private act, we are of the opinion that the ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives makes it a matter of record which cannot be impeached before the courts in a collateral way. *Lord Coke* says, 'A record until reversed importeth verity.' There can be no doubt that acts of the General Assembly, like judgments of courts, are matters of record, and (245) the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim *'omnia presumuntur.'* Suppose an Act of Congress is returned by the President with his objections, and the Vice-President and the Speaker of the House certify that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record and hear proof to the contrary?" It is clear from the above that the meaning of the *Chief Justice,* when he said, "We are of opinion that the ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives makes it a matter of record which cannot be impeached before the courts in a collateral way," was, that all attacks in the courts upon legislation which appeared to be ratified and had the signatures of the presiding officers attached, were collateral attacks, and that any direct impeachment of such acts must arise in, and be conducted by, that jurisdiction which has power in the matter—the Legislative Department. If he only meant to say that the Court could afford a remedy in such matters, but that they would not do so in the case then before the Court, because the attack was collateral, then it would have to be admitted that he expressed himself most confusedly in one of the most important questions ever brought before the Court. That would be a bold assertion to make of *Judge Pearson.* And besides, if the proceeding in that case was not direct, but only collateral, then it is not saying too much to declare that no direct method of attacking an act of the Legislature through the courts can be devised. Cer-

tainly that was a more direct impeachment than the one now before the Court. We are not without direct authorities from other courts than our own.

In *ex parte Wren,* 63 Miss., 512, this same question is discussed and decided upon the same principle as was *Broadnax v. Groom,*
(246) *supra,* that Court holding that an enrolled act of the Legislature, having been signed by the presiding officers of the two Houses and the Governor, is the sole expositor of its contents and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two Houses. And the Journals of those Houses cannot be resorted to to show that such act does not contain amendments to the bill which were adopted by the two branches of the Legislature. The Court said, "Every other view subordinates the Legislature and disregards the coequal position in our system of the three departments of government." The opinion in *Wren's case* is comparatively of recent date, is a very able one, and reviews the decisions of many of the state courts on this question. It mentions that the courts of many of the states, including that of North Carolina in the case of *Broadnax v. Groom,* held the same opinion as did the Supreme Court of Mississippi.

In *Pangborn v. Young,* 32 N. J., 29, the principle laid down in the *Broadnax case* is more than indorsed. The Supreme Court of New Jersey in that case decided, first, that when an act had been passed by the Legislature and signed by the Speaker of each house, approved by the Governor, and filed in the office of the Secretary of State, an exemplification of it under the Great Seal is conclusive evidence of its existence and contents; second, that it is not competent for the Court to go behind this attestation or to admit evidence to show that the law, as actually voted on and passed and approved by the Governor, was variant from that filed in the office of the Secretary of State; third, the minutes of the two Houses or either of them, although kept under the requirements of the Constitution, cannot be received as evidence for such purpose. In that case the Court said: "The body which
(247) passes a law must of necessity promulgate it in some form. In point of fact the legislative power over the certification of its own laws is of necessity almost unlimited, as will appear from the circumstance that, with regard to the body of an act there is no evidence of any kind but that which the Legislature itself furnishes in the copy deposited in the State archives. We are also to reflect that it is the power which passes the law which can best determine what the law is, which itself has created. The Legislature in this case has certified to this Court by the hands of its two principal officers that the act now before us is the identical statute which it approved, and in my opinion

it is not competent for the Court to institute an inquiry into the truth of the fact thus solemnly attested."

The above cited authorities seem to me to be founded on experience and the law, and on a wise public policy; and as *Justice Avery* well said, in substance, in *Logan v. R. R.*, 940, *post*, we ought to be influenced, when looking for assistance from the decisions of other courts, by those opinions which embody sound principles and just reasoning rather than by a simple numerical array of decided cases.

I have tried to show that the decision of the Court in this case is in harmony with its former decisions, and that the Court is sustained by the opinions of some of the ablest courts of other states. *S. v. Glasgow*, 1 N. C., 176, was not even cited as an authority by the counsel for plaintiff in the argument before us. It has no bearing that I can see on this case as a law authority, though interesting as a bit of early official corruption. No legislative act or power was questioned. It was simply the case where a former Secretary of State himself fraudulently issued a land warrant, was indicted and convicted of the (248) offense and stripped of his official honors.

In addition, there is to my mind another insuperable objection to the adoption by the Court of the plaintiff's view of this case. It is this: There could in that event be no unity of decision even in our own Courts. If the certificate of ratification can be inquired into by the courts, then the trial courts, with the same matter in issue, that is whether an act properly certified as having been ratified had duly passed its several readings, might and could arrive at different verdicts and judgments, as the proof varied in each trial. Today a statute might be declared void because a jury had determined that it had not passed its several readings, and tomorrow the same statute in a new trial with additional testimony, or in a different court, might be declared good and valid. And, again, if ratification be not conclusive, how are the stability and integrity of our statutory laws to be maintained in other states and abroad?

From the position I have taken in this concurring opinion, it is not necessary for me to discuss the other allegations of the complaint that the signatures of the presiding officers were procured by fraud. If the certificate of ratification cannot be impeached in a court of law, even by the Journals themselves as evidence, it is certain that by all the rules of evidence parol proof cannot be introduced for that purpose.

In conclusion I desire to emphasize that the Court has not made a decision upon a mere matter of fraud. It is a question of jurisdiction, of power, whether one coequal department of the government can invade the province of another and question or dispute the solemn act of the

latter attested by the genuine signatures of those officers who are empowered and required to attest and certify those acts. I insist
(249) that the decision of the Court in this case upholds the integrity and independence of one of the coequal departments of the government, and preserves the power and jurisdiction of the two, involved in this suit. It is better for us, and will be better for posterity, if in cases where fraud and deceit have been or shall be practiced upon the presiding officers of the Senate and House, by means of which their signatures to spurious bills have been obtained, for the Legislature to be convened (if an adjournment was had before discovery) and allowed to correct such errors or mistakes, than that the Court should assume a jurisdiction which does not belong to it, and thereby begin an encroachment upon the rights of the legislative department, to end possibly in judicial tyranny, the basest and the most detestable species of oppression.

AVERY, J., dissenting: The plaintiff alleges on behalf of the people of North Carolina, that a forged paper, purporting to be an enrolled bill, that had passed both Houses of the General Assembly, was placed before the presiding officers of the Senate and House of Representatives, and that, being misled by fraudulent misrepresentations, they were induced to attach their official signatures to it and give it the force and effect of a law. Upon these facts the plaintiff, as a citizen and in the name of the people of the State, prays the Court to declare that this paper which by such covinous trickery has been placed upon the files in the office of the Secretary of State, is not a part of the statute law and to restrain that officer from furnishing it for publication among the acts of the Legislature. The judge who presided in the court below holds that, admitting the paper ratified in this way to have been a forgery, the courts are powerless to remedy this great wrong, and the people can have no relief till the Legislature shall again assemble. If it be asked how this admission was made, I answer that it was made by the judge who
(250) heard the case below, when he held, on motion of defendant's counsel, that the plaintiff was not entitled to the relief demanded upon the face of the complaint unanswered, or, in other words, if there were no denial by answer of the allegation that the enrollment of the bill was procured by fraud and the signatures made by mistake, the court had no authority to remedy the wrong done to the public. If authority be demanded to sustain this proposition, then I refer, as the last of an indefinite line of decisions sustaining this familiar doctrine, to *Bank v. Adrian,* decided at this term, in which the present *Chief Justice,* in a very elaborate opinion declared that, when a plaintiff insisted that the answer did not state facts sufficient to constitute a defense, just as the defendant contends here that the complaint fails to

state facts constituting a cause of action, it was a case "in which one party alleged fraud and the other admitted it."

In my opinion, to admit that an adroit forger can fraudulently convert his own handiwork into a statute which the courts, with full knowledge of its character must enforce as law, is to confess before the world that government of the people and by the people is an egregious failure. I am not prepared to admit that courts of Equity, which have dealt death blows to fraud wherever it has reared its hydra head, for hundreds of years, must desist from unearthing and undoing such iniquity because the perpetrator attempts to take refuge in the purlieus of the temple where a coördinate department of the government is in council. The arm of the law is not so shortened that it cannot right such wrong wherever done. No precincts are too sacred to be invaded by its process when such an end is in view. We cannot forget the fact that this is a case of the first impression. The judicial annals of the states of this Union have been searched in vain to find a parallel for it, and any argument founded upon the authorities cited is misleading in (251) that it assumes an analogy where none exists.

As this is the first case in the history of the Anglo-Saxon civilization where a forger has attempted to play the role of law-maker, it seems to me a fitting opportunity to vindicate the truth of the axiom that our system of jurisprudence affords an adequate remedy for every wrong done to a citizen, either as individual or as a representative of the public. Courts of Equity, says a leading law-writer, have been confidently resorted to in order to sift the consciences of men and trace out fraud, so that titles founded upon it might be declared void. When the plaintiff comes into court to demand this probing of the consciences of those who know the history of this admitted fraud and forgery, counsel for the defense meet him with the objection that the clause of the Constitution, which guarantees the independence of three coördinate branches of the State government, is an insuperable barrier to any action on the part of the courts. Section 8, of Article I, of the Constitution, provides that "The legislative, executive and supreme judicial powers of the State ought to be forever separate and distinct." Is it an invasion of the domain of either of the other two departments to draw in question before the courts the validity of an instrument only attested by the chief officers of either of them? The organic law, it will be observed, couples the Executive with the Legislative Department. Where a private citizen of North Carolina records an entry upon the entry-taker's books, containing a specific description of a tract of land, or by a survey makes an indefinite description certain, before his neighbor makes an entry of the same land, though the latter may procure an older grant signed by the

Governor of the State, the courts in the exercise of their equitable jurisdiction have never hesitated, upon application of the senior
(252) enterer, to declare the older grant issued by the head of the Executive Department null and void, and to compel the junior enterer to convey the legal title to him who has the better right, because with notice that his neighbor had expended his money for an entry of the same land the junior enterer is guilty of fraud in procuring the first title from the State. *Johnston v. Shelton,* 39 N. C., 85; *Harris v. Ewing,* 18 N. C., 374; *Currie v. Gibson,* 57 N. C., 25; *Munroe v. McCormick,* 41 N. C., 85; *Grayson v. English,* 115 N. C., 358. Though grants for land are signed by the chief officer of a coördinate branch of the government, it has never been suggested during the century in which the courts have been setting aside these solemn patents, under the great seal of the State, on the ground that they were procured by fraud, that the courts were invading the independent domain of the Governor, as the head of the Executive Department.

This being a case of the first impression here, the issue must not be obscured by remote analogies, drawn from precedents not in point. If section 8, Article I, of the Constitution, is invoked to prevent the investigation demanded by the people through that one of their number whom they have chosen as their Chief Executive, it will be seen at a glance by layman as well as lawyer that the Constitution affords the same protection to the independence of the executive as of the legislative and judicial departments. If it is an impenetrable shield, behind which fraud may stalk secure and mock with ghoulish glee the anger of an injured people, when suit is brought to show that the signatures of the two presiding officers of the two branches of the Legislature were procured by fraud and attached by mistake to an instrument affecting the rights of the whole body of the people, how is it that it has never
(253) occurred to the long line of illustrious men who have preceded us in this Court, that it was an invasion of the distinct power of the Executive Department to set aside its great seal, which above all things imports verity at home and abroad, and the signature of its chief officer, where a single citizen complains that another procured that solemn attestation in fraud of the complainant's individual right?

The single issue of law presented by this appeal is whether a forged paper purporting to be an enrolled bill that had passed both houses, when presented to the presiding officers and signed by them under the mistaken belief that it is genuine, is open to attack for fraud like a grant signed by the Governor. The gravamen of the complaint is embodied in section 11, where it is alleged that "By some means unknown to this plaintiff, but which he is informed and believes to be

fraudulent, the said bill was enrolled by some person to the plaintiff unknown, in the office of the enrolling clerk, and signed by mistake by the President of the Senate and Speaker of the House of Representatives upon the day upon which it purports to have been ratified."

Equity vacates a patent which the Governor signs, not by mistake, but in accordance with the requirements of law, because it is procured in fraud of the superior rights of a single citizen. Why then shall the same tribunal declare itself powerless to rectify a fraud upon the rights of the whole people of the State, accomplished by imposition practiced in the most specious way, directly upon the chiefs of the two branches of the Legislative Department?

When the people met in convention and framed a Constitution they expressly delegated certain powers to each of the three departments, and prohibited one or all of these agencies, for the most part, in Article I, in terms quite as clear, from exercising certain other sovereign authority. The result was, that while the Legislature, as the representative of the popular will, is still clothed with the residuary power, or (254) that which is not expressly granted to either of the other departments, and that does not fall within the prohibitions mentioned, it is in the exercise of its own delegated authority, coequal, not superior, to the other coördinate branches acting within the purview of their powers. All three are mere agents of the people, acting under an express power of attorney. When, therefore, it is provided in section 16, Article III, of the Constitution, that "All grants and commissions shall be issued in the name and by authority of the State of North Carolina, sealed with the great seal of the State, signed by the Governor and countersigned by the Secretary of State," and in section 23, Article II, that "All bills, etc., shall be signed by the presiding officers of the two houses," the one clause is hedged about with no more of the divinity of sovereignty than the other.

Battle, J., says in *S. v. Glen,* 52 N. C., 321, "Our predecessors were the first of any judges in any state in the Union, to assume and exercise the jurisdiction of deciding that a legislative enactment was forbidden by the Constitution and was therefore null and void. See *Bayard v. Singleton,* 1 N. C., 5, decided in November, 1789, which was four or five years anterior to the earliest case on the subject referred to by *Chancellor Kent.* 1 Kent's Com., 450." Since that early day this Court has never hesitated to assume this authority to pronounce a statute passed by the Legislature with all of the forms of law, null and void because repugnant to the Constitution. Indeed, at this term an act which had not been published in the laws, but which was regularly passed at the last session of the Legislature, has been in effect declared unconstitu-

(255) tional, because the right of exacting more than six per cent as interest allowed therein was held to fall within the constitutional inhibition against granting special privileges.

No one questions the right of this Court in a proper case to pronounce an act, which is admitted to embody the true sentiment of the Legislature, void on the ground that it had no right to pass it, yet, if what now purports to be the statute before us had provided that the lawful rate of interest in this State should be three per cent a month, or thirty-six per annum, and its passage had been procured by speculators and note-shavers, it would nevertheless be contended, if the opinion of the Court is founded upon the correct interpretation of the organic law, that the people would be placed in the dreadful dilemma of groaning under such a burden, until another General Assembly should meet, or of asking the Governor to call an extra session, at a heavy expense, of the same Legislature, that according to the admissions in the pleadings failed at its last session to close some of its clerk's rooms against forgery and fraud. I do not believe that the law properly interpreted reduces us to this dire extremity.

There would be a prospect of a much more economical and satisfactory settlement of this controversy by the trial before a jury of an issue of fraud, as demanded by the plaintiff, than by inviting the same bodies with the same lobbyists lurking around them, to remedy the great wrong that the public have suffered through some agency that was, at its last session, able to reach its employees. With due deference for the views of others, I am of opinion that we ought on this question, which has been presented to us first of all the courts of America, to follow the example of our predecessors more than a century ago, and assert for the courts the power to unravel fraud, even if the tangled skein should take us behind the solemn act of ratification by presiding officers, as did the determination of the early judges to prevent violations of the
(256) sacred instrument which they had sworn to support.

The clear-cut issue of law raised by admitting the truth of the charge of fraud must not be obscured by discussing the preceding allegations in reference to a bill, in the same words, the legislative history of which is traced till it is found tabled in the House and turned over to the State Librarian, who is the custodian of bills, which are thus strangled in the earlier stages of their existence. These allegations are, at most, but an attempt to negative the idea in advance, that the forged paper had a legislative history leading up to its ratification, which the defendant might contend could not be contradicted. It does not seem to me bad pleading to have inserted these allegations, when the relief demanded was a perpetual restraining order against the defendant,

although the plaintiff relied solely upon the ground that the paper presented to the presiding officers was falsely and fraudulently represented to them to be an enrolled bill and its ratification procured in that way. Counsel for the defendant cannot be allowed "to blow hot and cold" to induce the court, on motion, to hold that it cannot hear proof of the allegation of fraud, if true, and then to say by way of breaking the force of the ruling invoked that they could disprove the charges of forgery and fraud, if they would. The fact that the bill was enrolled without authority and signed by mistake, is not, for the purposes of this appeal, denied by any one. That it is fraudulently enrolled and presented for signature is alleged in the complaint, and his Honor holds that even though all this is true, the court has no jurisdiction to hear evidence to show its truth.

The argument deduced from supposed future inconvenience is always the most specious and unsatisfactory kind of reasoning. To the suggestion that possible evils may ensue from sustaining the power of the courts to impeach the validity of a statute, it may be answered (257) that the announcement that the Constitution is a shield for manufacturers of forged law will indeed open a Pandora's box, out of which will issue invitations to those who are capable of such a crime, to throng the lobbies of our legislative halls and make, by bribery, forgery and other fraudulent practices, the laws which should be framed to afford remedies for the grievances and protection to the rights of the people.

A free government like ours must always be dependent for its stability more upon the virtue and integrity than upon the intelligence of its citizens. As well might we insist that the statute, which allows any person in the State to make affidavit that any other person has, as he is informed and believes, committed murder, and demand a warrant for his arrest, should be repealed because it opens a way for the arrest of every innocent man in the State, as that to permit investigation of the allegation that what purports to be a law regularly ratified is not in reality an expression of the will of the people through their representatives, but the work of a forger, would raise a doubt as to the validity of every statute passed by the Legislature. Where the plaintiff asks, on behalf of the people, an order restraining the Secretary of State from publishing a ratified act on file in his office he is required to make an oath, which if made falsely and without probable cause subjects him to punishment for perjury. It is not to be supposed that such risks will be taken inconsiderately, and, if the perpetrators of this disgraceful crime could be impaled before the world and held up to public execration, it is to be hoped that another century of our history would glide by without such a flagrant instance of corrupt interference with legislation.

I understand my brethren to concede, what cannot be denied, that not one of these cases cited to sustain the opinion of the Court is
(258) exactly in point here, for the reason that it has never before been charged, much less proved, that the ratification of a forged bill was fraudulently procured, when it had not in fact passed. The question raised in the cases relied upon by the majority of the Court to sustain their position, was whether the Journals of the two legislative Houses could be used to show that an enrolled bill did not pass. No such thing is proposed by the plaintiff here. In the complaint he says that a paper purporting to be an act of the Legislature was fraudulently enrolled and signed by mistake, and, as introductory to this allegation, he avers in substance that the Journals not only do not contradict, but tend to confirm it. A similar bill passed its first reading in the House of Representatives, was tabled on its second reading, and can now be adduced in evidence from the office of the lawful custodian of such papers. The Journal of the Senate fails to show that any such bill was ever before that body. So that the record of the one body, as far as it goes, tends to corroborate, while there is no recorded history of any such bill in the Journals of the other to contradict what is relied upon by the plaintiff as the basis of his action, the fact that a forged paper, signed by the presiding officers by mistake, is now being enforced to restrict the right of the citizen, in the interest of the procurers of this monumental fraud. Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the question whether the ratification can be contradicted by the Journals, which would be found in the notes on pages 661-667, 143 U. S., that, in 28 of the states the courts have held that it is competent to impeach the ratification by the Journals directly, while it is held to the contrary in but nine states. The conceded fact that in some of those states there are constitutional
(259) amendments providing that the ratification may be contradicted by the Journal shows conclusively that we have no reason to fear the threatened ills which are prophesied as probable results of going behind the ratification of an act to show that it did not pass and that its enrollment was procured by fraud, when 28 states still afford good government to their citizens, after permitting the Journals to be used to show, not fraud, but that the ratified bill did not pass. Indeed, it is worthy of special notice that the forgery of what purports to be an enrolled bill has been first attempted where the people had never been permitted to go behind the ratification and when it was hoped by the perpetrators of the fraud that their covinous work would prove, as it has done, effectual. When the courts of more than three-fourths of the States have ventured to go behind the ratification of statutes to call in

question the regularity of the successive steps preceding the signing by the presiding officers, it seems to me that we may venture, when the first attempt is made to impeach for fraud instead of irregularity, to look for an analogy to govern us rather to the views of the 28 than to the opinions of the nine courts.

The position of the Court, in my opinion, finds no support in *Broadnax v. Groom,* 64 N. C., 244, where *Chief Justice Pearson,* speaking for the Court, holds that "The ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives makes it a matter of record, which cannot be impeached before the courts in a collateral way." But the plaintiff is making not a collateral, but a direct attack, and the Court in that opinion concedes that even a record can be successfully avoided and reversed, where it is directly attacked for fraud or irregularity. It is true that where there is a want of jurisdiction apparent upon the face of a record, it may be impeached without (260) any direct proceeding, just as the validity of ratified statute may be questioned for repugnance to the Constitution. *Springer v. Shavender, ante,* 12. If the Constitution does not forbid, why should public policy prohibit a citizen on behalf of the whole people from impeaching a statute for fraud, when for his own protection he may attack a judgment regular upon its face? It was said *obiter* in *Scarborough v. Robinson,* 81 N. C., 409, that the Journals could not be introduced to attack the existence and validity of a statute regularly filed among the records in the office of the Secretary of State. If that doctrine is conceded to have the force of law, it in no wise affects a case where the plaintiff relies upon proving that the enrollment of the bill was procured by fraud, and where, if the defendant resorts to the Journals to disprove it, he finds that they tend rather to corroborate than to contradict the allegation. The opinion of the majority of the Court, in *Cook v. Meares, post,* 582, intimates very broadly that the opinion in *Scarborough v. Robinson* ought to be overruled upon the point really involved, because it conceded to the presiding officers, if corrupt or unmindful of their duty, the power by refusing to sign to in reality veto bills regularly passed by the representatives of the people. Should we, then, standing in a position to make a precedent for the courts of America, hesitate to declare invalid an act which, we must assume, both of these officials would declare to have been done by mistake on their part, and to have been procured by fraud on the part of others?

I deeply regret that the majority of the Court have deemed it their duty to hold that the courts have no power to investigate and remedy the great wrong which has been done to the public. I regret it because it gives immunity to the wrongdoers in this case, and, in (261)

my judgment, encouragement to others to attempt like frauds in the future.

CLARK, J., dissenting: A demurrer *ore tenus* was entered and the action dismissed because a cause of action was not stated. For the purpose of this proceeding, therefore, the allegations of the complaint are admitted to be true. It is thereby admitted that a bill was introduced into the lower House of the General Assembly; that this bill on its second reading was voted down by the representatives of the people; that the Journal also shows that fact, and the bill itself was stamped "tabled" and placed in the package of "tabled" bills, where it still remains. It is further admitted that the bill was not introduced in the Senate at all but, that notwithstanding the bill was defeated in one House and never presented for consideration in the other, a fraudulent copy of a bill of similar tenor was procured to be made by a sub-copyist of the enrolling clerk, and by mistake on the part of the two Speakers who were made to believe that it was a bill which had been duly read three times in each house, it was signed by them. The purport of the bill is to prohibit debtors from preferring any creditor in making assignments.

The plaintiff alleges that as a taxpayer he has a right to be protected from paying the expenses of printing the fraudulent bill and distributing it among the laws of the State; that as a citizen he has a right to be excused from including it among the laws which as a voter he was sworn to support, and that as a creditor the right he has had by our laws, time out of time, to have his debtors prefer him, should they see fit, should not be taken away from him against the will of the people, as expressed by their representatives in this Legislature, as likewise in many previous ones.

(262) The Constitution under which we live, and which every officer of the State, from the highest to the least, and every registered voter has sworn to support, provides that "All bills shall be read three times in each House before they pass into laws." It is admitted here that this pretended law has not been read three times in each House. It is admitted that it has not been read three times in either house. It is admitted that it was read in only one House, and in that the people, through their representatives, defeated it and refused to let it pass. It is admitted that subsequently the Speakers were imposed upon and erroneously certified that the bill had passed three readings in each house.

It is contended, however, that we cannot go behind the signatures of the Speakers. But the signatures of the Speakers, procured by fraud,

are not their signatures. Fraud vitiates them as it vitiates everything it touches. It is urged, however, that it is dangerous to open up the acts of the Legislature to be set aside for fraud, and that this would unsettle the laws. The fraud alleged is not in procuring the passage of an act, but in procuring an untrue certificate that it has been passed. If the alleged statute is not the will of the people, expressed in a constitutional way by three readings in each house of the General Assembly, there is no power to make it a law, and no consideration of danger should prevent a declaration that the laws heretofore made by the people, in the constitutional mode, cannot be repealed, revoked and set aside in this mode. If there could be any danger in refusing to admit as a law a bill which, without having been passed, is untruly certified as having been passed, it is to be remembered that among a free people, no other danger is comparable to that of substituting in the enactment of laws for the will of the people the power of money in securing, by (263) shifty devices, a false certificate of the passage of an act, and a holding by the courts that such villainy is conclusive and above the power of the people to correct through their courts. Deeds signed, sealed and delivered bind the parties, but it has never been considered that land titles would be unsettled if deeds procured by fraud were set aside. This rather tends to avoid land troubles. So, rejecting from the statute book a surreptitious bill which admittedly was not enacted by the votes of the people's representatives is not to unsettle the laws, but to establish them "broad-based upon the people's will." If a judgment of this or any other court under seal should be procured by mistake or fraud, it can be set aside.

It is urged, however, that this touches a coördinate department of the government. But the Judiciary is the only body authorized to investigate and ascertain whether it is the act of the General Assembly, or a measure which, rejected by the body, has nevertheless been fraudulently palmed off on the Speakers and their signatures thereto procured by fraud practiced on them. The Executive is also a coördinate department. It is a matter of history that towards the close of the last century certain land warrants were fraudulently issued by the Secretary of State, the broad seal of the State was affixed, and the Governor, being misled, honestly affixed his signature (as the Speakers did here), but the Court went behind the great seal, behind the admittedly genuine signature of the Governor, set the fraudulent land warrants aside, and jailed the agent of the fraud, and the next Legislature changed the name of the county (Glasgow) which had been named in honor of the dishonest Secretary of State.

The Supreme Court of this State had its origin in the organization by law of a temporary tribunal created to investigate and set aside

(264) this fraud perpetrated on the Executive Department, and indeed, by one of its heads and to punish its perpetrators. *S. v. Glasgow,* 1 N. C., 176. It would be singular if after the lapse of nearly a century the developed Court, with larger powers and chosen by the people, should be powerless to set aside and annul a greater fraud upon popular rights perpetrated by simulating the people's *imprimatur* in passing off, as a law of the State, a bill which their Representatives rejected, and which some corrupt hireling of interested parties procured to be falsely certified as an act of the General Assembly by the officers of that body, who were deceived, in the rush and hurry of the closing hours of the session, into believing it was a genuine bill. Failing for many sessions to procure the passage of the act from the popular assembly, the interested parties fraudulently procured this bill to be certified as having been passed. To give it currency as law, is to pass off "the buzzard in the eagle's nest" as the imperial eagle itself. We acknowledge as laws only the legal expression of the people's will. This bill is not the people's will. It is what their representatives have declared by a vote was not their will. It is not such as this that the men of North Carolina have sworn to support as "laws." It is such as this which we have sworn not to support as laws, by our oath to a constitution which says nothing shall be a law till it has been adopted by having received the assent of our representatives on three several occasions in each House of the General Assembly. This has not only not received such assent, but has received their refusal.

(265) The power to construe a law necessarily carries with it the power to investigate whether a pretended law is really a law duly enacted or a fraudulent simulation which in fact was never enacted into law.

In the presence of so vital and so plain a principle, precedents are not needed, but we have them. The Constitution provides that, before becoming laws, bills shall be read three times in each house *and* shall be signed by the Speakers. In *Scarborough v. Robinson,* 81 N. C., 409, it was held that if the latter requirement was lacking, the bill was not a law, even though it had the other and far more important requirement of having been passed three times in each House. *A fortiori,* if the bill has not received the assent of the three constitutional readings, it cannot be the will of the General Assembly. To hold otherwise would be to sacrifice form to substance, and to say that the certificate of the Speaker is sufficient without a vote of the General Assembly, and (as in this case) in spite of an adverse vote of that body. Again, the Constitution requires that the style of an act shall be, "The General Assembly of North Carolina do enact." In *S. v. Patterson,* 98 N. C., 660, it was held that

although the Speakers had signed and certified a bill as ratified, yet, if this formula was omitted therefrom, it was a nullity, because the Constitution required it.

But we are in the presence of a greater and more important constitutional requirement than the formula which begins an act, or the certificate of the Speakers. These are matters of form and essential only because required by the Constitution. We are now face to face with the constitutional requirement that the bill shall three times receive the assent of each House "before it shall become a law," and the principle, greater than the Constitution itself, that the lawmaking power resides in the sovereign people to be exercised by their representatives, and that nothing shall be law unless voted by them, and especially nothing shall be law which (as in this case) has been refused by their vote. Even the common law itself is law in this State only by (266) virtue of an enactment of the General Assembly.

In other states questions have come up as to the power to go behind the certificate of ratification signed by the Speakers, in cases of mere irregularities, and it has been held in 28 states that this can be done, as this Court has already held in *S. v. Patterson, supra.* in nine States only, it has been held that the certificate of ratification is conclusive against irregularities. These cases need not be here recited and reviewed. They are easily accessible in the 23 A. & E., 196 *et seq.* But in none of these cases have we the bold and glaring and admitted fraud upon popular sovereignty which is here presented.

The requirement that thirty days notice must be given of a private law is a condition precedent which the Legislature passes upon, but a constitutional provision that the bill must be read three times in each House before it passes into law goes into the essential matter which a court must determine in passing upon the question whether a printed piece of paper laid before it is a legislative enactment. The certificate of the Speaker is certainly *prima facie* and very strong presumption that it is, but when the very matter at issue is the allegation that the certificate of the Speaker was procured by fraud (and this is admitted by the demurrer), then it is begging the question to say that such piece of paper is conclusively the law of the land without the vote, nay, against the votes, of the law-making power. It is also begging the question to say that the Legislature certifies to us, over the signatures of their two principal officers, that this act was passed. The very issue is, did the two officers so certify, or were their signatures procured by fraud? If so, it is in law not their signatures and this is admitted by the (267) demurrer which admits the allegations that in truth the bill did not pass, but was defeated, and that the certificate of the presiding officers is false and was procured by fraud practiced on them, an allega-

tion which those officers in justice to themselves should have been permitted to prove by their own testimony in court.

The people are the source of all power, but if there is fraud in certifying untruly to the declaration of their will at the ballot box, the courts can and will right the wrong and declare the true result. Whence comes it that the legislative department is so superior, or so inferior, that a certificate, fraudulently procured, which falsely certifies that it has passed a bill, cannot be set aside on proof that, in truth, the opposite result was declared. The courts have the same power to investigate in one case as in the other.

It is not the declaration of the result of a vote by the Legislature itself which is in question, for that would be conclusive, but the false certificate that it had so declared, when it is admitted that the Legislature declared just the opposite by tabling the bill.

In this proceeding, if the jury found that the certificate was false and was fraudulently procured, the judgment would be to strike the fraudulent bill out of the files and out of the printed laws and to declare it, what it is, a nullity, as to all the world. This being an equitable jurisdiction, the action can only be maintained in the Superior Court and one action is conclusive. It is not open to the objection that such proceedings might, if allowed, be brought before a justice of the peace, nor that there might be different verdicts before different juries. That might be urged against a proceeding, as in *Wyatt v. Mfg. Co., post,* 271, where the invalidity of an act is attempted to be set up, collaterally as (268) it were, in litigation between parties. But it cannot apply where the proceeding is brought against the Secretary of State directly to have the act, which is fraudulently procured to be certified, struck out of the files of enrolled bills in his office and declared a nullity. In *Cook v. Meares, post,* 582, *Furches, J.,* speaking for the Court, animadverted upon the holding in *Scarborough v. Robinson* that the signatures of the Speakers were essential to the validity of an act on the ground that this is to give them an unrevisable veto power. For a stronger reason, then, to give to their signatures the effect of law, without, or contrary to, the vote of the Legislature is to give them far more than an unrevisable negative power of veto. It gives them the unrevisable postive legislative power. In this case, there is even more, for this vast power, without revision by any authority, is vested in their signatures when procured by fraud if the courts cannot reject a pretended act, even when it is offered to be proved by the verdict of a jury that such act did not pass the Legislature and was not intentionally signed by the Speakers and the Speakers are not allowed to testify that their signatures were procured by fraud.

The Constitution does not require that the presiding officers shall sign

bills in the presence of the Houses or with their assent, and neither the certificate itself nor the complaint indicates that this was done. It may be the usual practice, but it is not required, nor does it appear to have been done; hence, there is no presumption that it was done, upon which an argument can be based. The signing has no law-making power in itself, but is a mere certification of what the law-making body has decided, and like all certificates may be impeached for fraud or mistake; otherwise, the certificate is more powerful than the authority doing the act which is certified.

If we could conceive that the two presiding officers of any (269) Legislature should purposely certify that a bill has passed, which had in fact been defeated, this could not nullify the action of the two Houses. If it could, then, they and not the General Assembly, are the law-making power. Certainly, for a stronger reason, when the signatures of the presiding officers are procured by a trick and fraud practiced on them, there cannot be such virtue therein as to make a law against the vote of the body.

The case most strongly relied on by the defendant is *Field v. Clark*, 143 U. S., 295, but in that case it was admitted that the act had passed both Houses and had been approved by the President, and the point decided by the Court was that the act would not be vitiated because a section, which was in it when passed by the House, was omitted in the enrolled act on file. It must be noted also that the United States Constitution does not contain the essential provision which is in our Constitution that "Each bill must be read three times in each House before it becomes a law," and that in addition to the signatures of the Speakers there is the further safeguard that the bill is subject to the supervision and approval of the President, which the bill there in question had. Notwithstanding these vital differences in the two constitutions and the remote bearing the actual point there decided has upon this case, the Court nevertheless takes occasion to say (*Harlan, J.*), in that very opinion: "A bill signed by the Speaker of the House of Representatives and by the President of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted." An enunciation more (270) exactly in point in its application to the controversy before us cannot be found.

Here, the bill was not voted in either House, but was expressly negatived by a vote, and this fact appears by the Journals (which are required by the Constitution to be kept), and is also admittedly beyond

controversy. The certificate of ratification was not purposely and knowingly appended by the Speakers. They never knowingly intended to certify that this bill had been read three times in each house. Their signatures were inadvertently appended and were procured by gross fraud. They, in law, are not their signatures. This is not the "signing" which the Constitution requires to bills which have, three times before such signing, been read with the approval of each House.

The conflicting decisions from other states as to whether the signatures of the Speakers can be contradicted by the Journals have no application to this case where the allegation is of fraud in procuring their signatures.

The facts of this great fraud are admitted for the purpose of this appeal, for, though the complaint makes these allegations, the action is dismissed "because a cause of action is not stated." It must be lawful to allege and to prove such fraud if "government by the people and for the people" is to continue. Otherwise, government by fraud has begun, the sure and unfailing sign in all history that the end of representative government is at hand. The judgment below should be reversed.

Cited: Wyatt v. Mfg. Co., post, 272; *Stanford v. Ellington,* 117 N. C., 160; *Range Co. v. Carver,* 118 N. C., 337; *Bank v. Comrs.,* 119 N. C., 222; *Russell v. Ayer,* 120 N. C., 187, 211; *Comrs. v. Snuggs,* 121 N. C., 400, 404, 407; *Charlotte v. Shepard,* 122 N. C., 607; *Smathers v. Comrs.,* 125 N. C., 486; *Black v. Comrs.,* 129 N. C., 126; *Comrs. v. DeRossett, ib.,* 279; *Cotton Mills v. Waxhaw,* 130 N. C., 294; *Jackson v. Commission, ib.,* 415; *Wilson v. Markley,* 133 N. C., 620; *Graves v. Comrs.,* 135 N. C., 54; *Comrs. v. Packing Co., ib.,* 66; *Bickett v. Tax Com.,* 177 N. C., 443.

(271)

L. R. WYATT ET AL. v. WHEELER & WILSON MANUFACTURING COMPANY ET AL.

Statutes—Enactment—Ratification—Signatures of Presiding Officers Fraudulently Procured or Affixed by Mistake.

(For syllabus, see *Carr v. Coke, ante.*)

ON 14 March, 1895, the plaintiff L. R. Wyatt executed to the plaintiffs Job P. Wyatt and J. N. Holding the deed of assignment attached to the complaint conveying the large real and personal estate embraced therein and making preference of certain creditors named therein.

Thereupon sundry creditors alleging said deed to be void under the "Act to Regulate Assignments and Other Like Conveyances in North Carolina," purporting to have been passed by the last General Assembly of this State and to have been ratified 13 March, 1895, obtained judgments against the said L. R. Wyatt in Wake Superior Court, and placed executions thereon in the hands of the sheriff of Wake County, who levied the same upon the tangible property embraced in said deed of assignment and was proceeding to sell the same, when the said trustor and trustees in behalf of themselves and all the creditors of the said L. R. Wyatt who should come in and make themselves parties plaintiff and contribute to the costs and expense of this action, instituted this action against the said judgment creditors, asking for an injunction against said sale and such other relief as they might be entitled to. An order was made requiring the defendants to show cause before his Honor *Judge Starbuck,* holding the April Term of WAKE, why the injunction should not be granted and that the defendants be restrained in the meanwhile. (272)

The cause coming on to be heard at said term and having been fully argued, his Honor rendered the judgment dismissing this action and vacating the injunction. The plaintiffs excepted to said judgment in that:

First. It adjudged that the validity of the act in question could not be impeached by evidence of non-compliance with the parliamentary requisites and forms of enactment.

Second. That the court had no jurisdiction to hear such impeaching evidence.

Third. It adjudged that the action be dismissed for want of jurisdiction.

Fourth. That the plaintiffs and their sureties pay the costs of the action.

Fifth. That the injunction be dissolved.

Plaintiff appealed.

Strong & Strong and J. N. Holding for plaintiffs.
Argo & Snow for defendants.

FAIRCLOTH, C. J. For the reasons assigned in *Carr v. Coke, ante,* 223, the judgment of the court below is

Affirmed.

CLARK, J., dissenting: This case resembles much that of *Carr v. Coke, ante,* 223, an investigation of the same fraud being asked, and it is un-

necessary to repeat the reasons given in the dissenting opinions filed in that case. In this case the plaintiffs claim under an assignment executed in accordance with the laws heretofore in force in this State, which in this respect Legislature after Legislature, including the present one, has declined to alter. The plaintiffs contend that such assignment is valid, and that their rights are not affected by the pretended
(273) "assignment law" which, after being defeated on its passage in the present General Assembly, was surreptitiously and fraudulently procured to be signed by a deception practiced on the Speakers. The action was dismissed below on the ground that, taking the allegations to be true—and indeed they were not seriously controverted on the argument—the court had no jurisdiction to right this great wrong and fraud.

Without passing upon the doubtful question whether the validity of the statute can be properly questioned in the somewhat collateral way in which it is presented in this case, I cannot concur in the reasons given for the decision by the Court. It would seem that certainly the Speakers of the two Houses should have been allowed to testify that this fraud had been practiced on them and that their signatures had not been knowingly and intentionally placed to a bill which they knew had not been passed, but which had been defeated. This was due to them, to the Legislature and to the people. The people are entitled, as a sacred and inviolable right, to be governed by no laws save those enacted by their representatives duly and legally assembled. The act of a corrupt and hired villain, whose proper place is the penitentiary, should by no process of reasoning or refinement of logic be imposed on the people, in express contradiction to a vote of their General Assembly. The power of consolidated wealth, acting through the channel of a purchased and hireling lobby, is a growing evil in all American legislation. The solemn and unmistakable issue in this case, brushing aside all technicalities, is simply this: Shall the law be what the representatives of the people declare it shall be, or shall the will of powerful and menacing combinations of capital, acting through the lobbyists, with which they everywhere assail legislative action, override and be substituted for the popu-
lar will? To a fearful extent this has been the result in Congress
(274) and in many State Legislatures, but by more devious methods.

This is the first instance in which one of these combinations, failing to secure its end by influencing legislation in the usual mode, has boldly and cynically defied the action of the General Assembly and set aside its negative vote by fraudulently substituting the defeated bill as a genuine one, and procuring the unintentional signatures of the Speakers. For the first time in American history accumulated capital and its hirelings have dared to take so bold a step.

We are asked to say that such action is beyond the power of the courts. The plaintiffs have no power to call the Legislature together, and they may be unable to satisfy the Governor that their wrongs, great as they are, are sufficient to tax the public with the expensive precedent of resummoning the Legislature whenever the fraud of a lobbyist is discovered. There is an easy, a cheap and speedy remedy by setting aside the signatures, as fraudulent, upon the testimony of the Speakers to that effect and the verdict of a jury. Upon the verdict of a jury, every man is dependent for the protection of his property, his reputation, his liberty and his life. Surely it is a competent tribunal to decide whether the signatures to a piece of paper were knowingly and intentionally affixed by the Speakers with the assent of their respective Houses, or whether the bill had been defeated on its attempted passage and notwithstanding such defeat the signatures and certificates of the Speakers had been thereafter procured by a bold and shameless fraud. Reduced to its last analysis, the question is simply whether Legislatures shall legislate, and whether the time-honored institution of "twelve good men and true" shall be trusted to declare, upon the testimony of the presiding officers of the two Houses, that a gross fraud was perpetrated on them in procuring their signatures to a bill which had not been (275) enacted by the two Houses, but had been tabled.

This is not a conflict of authority between the Legislature and the Court, nor is the Court asked to go behind the authenticated declaration by the Legislature of any action it has taken. The very question to be investigated is whether the Legislature authorized such authentication. The demurrer admits that it did not. The Court is simply asked to say which it will regard as valid, the action of the Legislature itself in voting down this bill, or that of a lobbyist in afterwards, by fraud, procuring the unintentional and untrue certificate of the Speakers that it had passed.

This is not an occasion when public policy or individual rights can tolerate the suppression of an investigation. The investigation should be full, free and searching. "The lights should be turned on"—not off. No one who is honest and pure and of good repute need fear an investigation. Others have no claim to be protected from it.

MONTGOMERY, J., concurring: This case presents the same question that was heard in *Carr v. Coke, ante,* 223, i. e., Can the courts go behind the records of the General Assembly to consider the method by which an act was passed, when the act, on its face, is in due form ratified by the genuine signatures of the presiding officers in the presence of their respective Houses assembled, and filed with the Secretary of State, as the custodian of all the legislative acts?

In *Carr v. Coke, supra,* there was no allegation of forgery whatever, and any argument based on such ground is misleading, unjust to his Honor below and aside from the legal question involved. It was stated in that case that the question was one of jurisdiction, and that
(276) was the sole question under review and the reasoning and the authorities are there to be found.

A suggestion has been made and followed up by elaborate arguments, to the effect that in numerous instances in the cases of grants by the State of the same land to two parties, at different dates, this Court has gone behind the great seal of the State attached to the grants issued by the Executive—a coördinate branch of the State government—and it is concluded that if the Court can go behind the great seal of the State and declare the act of the Executive in issuing a grant to the junior enterer to be void because the second entry was obtained in fraud and with notice of first entry, therefore the Court can well go behind the legislative record and declare the act void because it was procured by fraud and the like. There is no room for this suggestion, and the argument based on it, I think, finds no support in the Reports of this Court. The whole is based, I think, on a misapprehension of the facts in this case as well as of the law laid down by this Court in cases heretofore decided. No case decided by this Court can be found in which it is held that any grant of land by the State with its seal affixed by the Executive is void or invalid (except when the entry or grant is so defective that the land cannot be located) for the reason that the grant was obtained by fraud upon the rights of the first enterer, who was the junior grantee, nor any case in which it is held, as stated in the argument, that "Equity vacates a patent which the Governor signs"—"because it is procured in fraud of the superior right of a single citizen." On the contrary this Court has uniformly held that the grant or patent issued to the second enterer (first grantee) passes the legal title to the grantee and declares that he holds it in trust for the first enterer (second grantee) for the reason that he obtained his grant with notice of the equity of the first
(277) enterer and in fraud of his rights, and the Court orders the said grantee to convey the legal title to the equitable owner; and so these coördinate departments work in harmony. And in case of future litigation in which the title was involved the owner would have to invoke this grant, obtained by fraudulent conduct of the first grantee, in order to establish his title. In the late case of *Grayson v. English,* 115 N. C., 358, his Honor below adjudged that the plaintiffs "hold the legal title to 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," and this Court affirmed the judg-

ment below on numerous authorities, *Associate Justice Avery* delivering the opinion of the Court and saying "The junior enterer being affected by it (notice) 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." So we find upon the authorities that this Court has not declared the "older grant issued by the head of the Executive Department null and void," but has allowed it to stand, and adjusted the equities between interested parties. In this case if his Honor had empaneled a jury and had the pleadings read in the usual manner, and when evidence was offered for the plaintiff's purpose, had held the evidence incompetent, the same question as the present would have been presented; and a useless formality can have but little bearing upon the important question intended to be presented by the plaintiff. There is no error.

AVERY, J., dissenting: But for the direct answer in the concurring opinion filed in this case to my argument in *Carr v. Coke,* I should be content to concur in the clear and concise presentation (278) of the points made by *Justice Clark.*

Dr. Wharton, one of the most eminent authorities on criminal law, says: "Forgery at common law is defined by Sir William Blackstone as the fraudulent making or altering of a writing to the prejudice of another's rights, and by Mr. East as the false making, *malo animo,* of any written instrument." The plaintiff alleged, first, that a written enrolled bill was fraudulently made; second, that it was used to the prejudice of the rights of all the people of North Carolina, in that it restricted the debtor in his right to dispose of his property and in that it deprived the creditor of the means of securing what was due him.

The judge below holds that, admitting all this, the court has no power to remedy the great wrong to which the people are reluctantly submitting. The act of the hireling, who was instrumental in perpetrating a fraud so prejudicial to the public, certainly had all of the turpitude of the most heinous of technical forgeries, and it is needless to discuss the question whether an indictment would lie for that offense. Society can better afford to condone the crime of the ignorant negro, who so clumsily signed the name of Major Vass to an order for ten pounds of bacon (*S. v. Collins,* 115 N. C., 716) than the great wrong of procuring the enrollment and ratification, as a law, of an instrument prepared by an expert agent of foreign capitalists. Yet the perpetrator of the petty offense is sentenced to hard labor in the penitentiary, while the instrument as well as the authors of the most gigantic fraud known to history are safely entrenched behind a constitutional quibble.

Under the circumstances I fail to comprehend how I have been unjust to the learned judge who heard the case below in characterizing
(279) the conduct, for which he held that the law afforded no redress, as morally if not legally a forgery. In the presence of a great danger, which threatens the very security of popular government, it seems to me little less than trifling to waste time in discussing the speculative question, whether an indictment would lie against wrongdoers, if discovered, when the burning question before us is whether the courts can or will first incidentally lend their aid in the detection of the guilty parties by ferreting out the fraud and vacating the covinous instrument.

It is earnestly maintained that there is no room for the suggestion that the courts had ever gone behind a grant for land issued by the Governor, and that "the argument based on it finds no support in the Reports of this Court." Is it true or untrue that equity has vacated patents signed by the Chief Executive for an hundred years? It is conceded that the courts have ordered a senior grantee holding under a junior entry to convey to the junior grantee whose right was founded upon an older entry, because the latter was "the equitable owner." If the claimant under the younger grant holds the equitable estate, it follows of necessity that the prior grant by the Governor, under the great seal of the State, was ineffectual to convey, what it purported to pass, the beneficial ownership in the land, and, when the courts in the exercise of their equitable jurisdiction required the holder of the legal title to convey to the true owner, they gave precisely the same redress that was afforded in all other cases where a deed for land had been successfully impeached for fraud.

A gives to B a thousand dollars to buy for him a tract of land that is to be sold by the clerk of the court at public auction. B purchases the land, pays for it with A's money and causes the clerk to convey to him instead of A. The only remedy that A has now is to file a com-
(280) plaint in the nature of a bill in equity and ask that B be compelled to convey the legal title, which he has procured by fraud, to the rightful owner. Would it be misapprehension of the law in such a case to say that equity vacated the deed which the clerk signs, because it has been procured in fraud of the superior right of the man who furnished the money to pay for the land? It is familiar learning that parties were, under the former practice, compelled to resort to a court of Equity for remedy in a vast majority of cases of fraud, and, even where courts of law could take cognizance, there was generally a concurrent jurisdiction in the Courts of Chancery. 8 A. & E., p. 651. It is equally familiar learning that where parties were compelled to invoke the aid of a court of Equity to avoid the operation of a conveyance of land, it was because in court of law the grantee in the deed which they sought to

impeach was deemed to be the owner, and to hold the legal estate, but subject to the right of the true owner to resort to equity and force him to convey. In all such cases the deed is declared ineffectual to pass the beneficial interest, and, when its operative force is destroyed, it is properly said to be vacated. The grant is vacated for fraud, whether a decree for cancellation be made or a reconveyance ordered to the party having the right to assert an equity. In either case the Court exercises its equitable jurisdiction to vacate or set aside a conveyance. Adams Eq., 174. In the supposed case of constructive trust, which has been used for illustration, the conveyance is set aside or vacated by compelling the fraudulent grantee from the clerk or commissioners to convey the legal estate to the rightful equitable owner, just as the senior grantee is compelled to convey to the junior grantee, who has the right to claim equitable ownership. In either case the holder of the legal estate is in law the owner, and will hold the property unless the true owner (281) invoke the aid of equity to undo the fraud. The parallel may be extended by calling attention to the fact that neither the clerk nor the Governor is a necessary party to the proceeding to vacate the deed or grant. It is equally unnecessary to make the two presiding officers, who have appended their signatures to the forged bill, parties to the suit brought by an interested party to set aside or vacate what purports to be a ratified act and have it declared inoperative as a law. It is no misapprehension of fact or law to state that they have merely appended their signatures as the representative heads of the Legislative Department (in accordance with the requirements of Article II, section 23, of the Constitution) to a bill, just as the Governor signs and attaches the seal of the State to a grant, in compliance with Article III, section 16. With all of the additional light that has been thrown upon the issues of law involved, I am still unable to comprehend why the courts are prohibited from declaring that a paper signed by the heads of the legislative branches is inoperative because the attestation was obtained by fraud, while it is admitted to be competent for the same tribunals to adjudge that the Governor's grant does not pass the equitable interest, which is the true and rightful ownership of land. The only difference seems to be that the signatures to the one instrument are obtained in fraud of the rights of the whole body of the people of the State, while but a single individual is interested in setting aside the other.

But supposing, for the sake of argument, that when the judicial arm of the government declares that the grant of the Governor has failed to pass the equitable estate, which it purported to convey, it is not trenching upon the independent province of the Executive Department, because the Court concedes that the legal estate passes. What will be said to the suggestion, that under the act of 1798, which is (282)

still in force (The Code, secs. 2786 and 2787; Rev. Code, ch. 42, sec. 29; Rev. Stat., ch. 42, sec. 29) courts of law were empowered, where it was alleged that a grant had been issued since 4 July, 1776, by means of "false suggestion, surprise or fraud," to repeal and vacate the patent and that a copy of the decree may be filed in the office of the Secretary of State as notice that the Court has declared the grant of the Governor null and void? Does not this statute provide for vacating a patent, both as a conveyance of the legal and equitable estate because it has been issued "in fraud of the rights of a single citizen?" This proceeding (formerly a *scire facias,* now a petition) was allowed to be instituted in a court of law only by a senior against a junior grantee, the distinction being carefully drawn that the remedy of the senior enterer against the senior grantee of the same land for fraud in procuring his grant, was in chancery. *O'Kelly v. Clayton,* 19 N. C., 246; *Crow v. Holland,* 15 N. C., 417; *Carter v. White,* 101 N. C., 30. So that a grant, issued in fraud of the rights of an older grantee, on the birthday of American Independence, has been ever since its execution liable to be repealed and vacated by a common law court, and pronounced ineffectual to convey any interest either in law or equity, because it could be shown to have been obtained by fraud. If the courts can go back nearly 120 years to vacate for fraud a grant signed by the Governor and order its decree to be filed in the office of the Secretary of State as notice to the world, why should it imperil the independence of the Legislative Department to declare null and void and vacate for fraud a forged paper deposited in the very same office and purporting to be a statute, signed by the pre-
(283) siding officers, when it was, in fact, the covinous work of a forger?

It is suggested that, where a junior grantee causes a senior grant to be set aside for fraud, if future litigation should arise involving the title, the former "would have to invoke this grant, obtained by the fraudulent conduct of the first grantee, in order to establish his title." Is this a sound legal proposition? I think it very clearly untenable. When such junior grantee is compelled to eject a trespasser, he need offer, in order to establish his *prima facie* right to recover, nothing but the grant to himself from the State. *Mobley v. Griffin,* 104 N. C., 112. Should the trespasser, whether he should be the original senior grantee or his heirs, or another, set up the older grant in order to show a better outstanding title, it would only render it necessary to offer in reply the record of the suit in equity, in which the grant was vacated, in order to estop the grantee or his heirs, or to disprove the allegation of another that there was a better outstanding title. *Isler v. Harrison,* 71 N. C., 64; *Davis v. Higgins,* 87 N. C., 300, and cases cited. If the junior grantee, after obtaining his decree to set aside the senior grant, should attempt to use it in deraigning his title against a trespasser in posses-

sion, the latter could still compel him to rely upon the junior grant by offering in evidence the record of the same suit, showing that the grant relied on had been declared invalid.

I regret that it has become necessary to draw in question such plain elementary principles in order to sustain the soundness of the conclusion reached by the Court in these cases.

But, if it were conceded to be a correct legal proposition that a senior enterer would be compelled in all cases to use the senior grant in deraigning his title from the State, and that the senior grant is not therefore null and void, we must still confront the stubborn fact that this Court (in *O'Kelly v. Clayton, supra; Carter v. White, supra,* (284) and other cases) has repeatedly recognized the validity of the act of 1798 and the jurisdiction of the courts under its authority to vacate and repeal grants, both as conveyances of the legal and equitable estates.

I still confidently maintain upon the plain principles stated and the authorities cited that, when a grant from the Governor fails to pass the equitable estate as against a more meritorious claimant, the courts, in so declaring and decreeing a conveyance of the legal estate to the rightful owner, adjudge the grant ineffectual originally and void as a conveyance of the equitable or beneficial estate.

Cited: Carr v. Coke, ante, 267; *Miller v. Bank,* 176 N. C., 161.

VAN B. MOORE, EXECUTOR OF SALLIE L. GATLING, ET AL., v. JOHN T. PULLEN, ADMINISTRATOR OF M. A. MOREHEAD.

Judgment—Compromise Decree—Legacies—Interest.

1. Where, in a will contest, a compromise judgment was entered whereby legatees named in the will were to receive certain amounts in settlement of their legacies which were ordered to be paid by the administrator *cum testamento* thereafter to be appointed, the judgment was not such a judgment as, under section 530 of The Code, would draw interest from its date.
2. Pecuniary legacies draw interest from one year after the death of the testator.

IN A CONTROVERSY in WAKE, at October Term, 1891, concerning the probate of the last will and testament of Mary A. Smith, sometimes called Mary Ann Morehead, between the propounders and the caveators, by agreement between all parties interested, a trial by jury was waived,

(285) and the court found that a certain paper-writing of date 10 August, 1863, produced for probate as the last will and testament of Mary A. Smith, was her last will and testament; and in furtherance of a compromise and agreement made at the same time, the court adjudged that the administrator with the will annexed hereafter to be appointed (the executor named in said will being dead) should pay to the legatees or their assigns respectively, and that said legatees or said assigns should receive in full of their legacies certain sums of money named in the order. The present action was brought by the plaintiffs, some of the legatees, to recover interest on the said legacies from the date of said adjudication, and $100 each to Van B. Moore, executor, etc., and Lucy C. Henry, which defendant had tendered to them but which they declined to receive.

MONTGOMERY, J., after stating the case as above: By consent of all the parties this case was heard by the judge presiding at WAKE (a jury being waived), October Term, 1894, and judgment was rendered, as follows:

It is considered, ordered and adjudged by the court that interest does not begin to run on the legacies mentioned, described and set out in the complaint and in Exhibit A, until after two (2) years from the date of the qualification of the defendant John T. Pullen as administrator, with the will annexed of Mary Ann Smith, sometimes called Mary Ann Morehead, and that the plaintiffs or any of them are not entitled to interest on said legacies, or any of them, except from that date.

And it appearing to the court from the admissions of the pleadings that there remains the sum of one hundred dollars due and unpaid on the legacy bequeathed to Sallie L. Gatling, and the sum of one hundred dollars due and unpaid on the legacy bequeathed to Lucy C.
(286) Henry, which amount has heretofore been tendered to them and each of them by the defendant herein at the date of the last payment made to them as set out in the complaint—

It is considered, ordered and adjudged by the court that the plaintiff, Van B. Moore, executor of Sallie L. Gatling, and the plaintiff Lucy C. Henry, recover of the defendant herein the sum of one hundred dollars each with interest from the date of this judgment until paid, together with their costs of this action expended. And that the defendant recover of the plaintiff other than Van B. Moore, executor of Sallie L. Gatling and Lucy C. Henry, his costs in this action expended.

The plaintiffs excepted and appealed from the said judgment to this

Court, and assigned as error: "1. That the court erred in not awarding interest to the plaintiffs upon the several amounts due them from the date of the judgment mentioned in the pleadings. 2. That the court erred in not awarding such interest from one year after the death of said testatrix. 2½. That the court erred in not awarding such interest from two years after the death of the testatrix. 3. That the court erred in not awarding the plaintiffs Van B. Moore, executor, and Lucy C. Henry interest from two years after the death of the testatrix. 4. That the court erred in not awarding the said plaintiffs interest from two years after the letters of administration were issued to the defendant. 5. That the judgment should have been in favor of the plaintiffs for the amount claimed for them, and for costs."

John W. Hinsdale for plaintiffs.
Smith & Boyden for defendants.

MONTGOMERY, J., after stating the facts as above: The first exception is overruled. We cannot take the view that the adjudication made at October Term, 1891, was a judgment of the court for (287) money by virtue of the compromise and without reference to the future execution of the will, and therefore under section 530 of The Code to bear interest from its date. In the case of *Brewer v. University,* 110 N. C., 26, this Court, in speaking of one of the legacies under this very will, uses this language: "When the will of the testatrix was established by the proper orders and judgment of the court, the defendant became entitled to have the fund bequeathed therein to it, not by virtue of any compromise as suggested by the plaintiff, but by virtue of the will."

The second exception is sustained. The rule is that pecuniary legacies bear interest from one year after the death of the testator. *Hart v. Williams,* 77 N. C., 426; *Swann v. Swann,* 58 N. C., 297. This makes it unnecessary to look further into the exceptions.

There is error. The judgment below must be reversed, except as to the findings of the indebtedness due to Van B. Moore, executor, and to Lucy C. Henry, respectively, and they are entitled to interest on those sums because the tender was not a sufficient one in law—it was not for all that was due.

Let this be certified to the court below that judgment may be had in accordance with this opinion.

Error.

(288)

MARY E. CRAM v. WILLIAM C. CRAM.

Husband and Wife—Action by Deserted Wife for Allowance for Support—Jurisdiction—Province of Judge to Determine Amount of Allowance—Statutes, Construction of—Headings of Code Chapters.

1. A heading or title arranged by the compilers for a chapter or section of The Code in no way affects the construction of the language of the statute itself.
2. A wife who has been deserted by her husband and left unprovided for may, under section 1292 of The Code, sue him for support without asking for a divorce.
3. The fact that the summons, in a proceeding under section 1292 of The Code, of which a judge of the Superior Court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter.
4. Vague and indefinite allegations of infidelity on the part of a wife, made by a husband in his answer to her complaint in a proceeding for support and maintenance, under section 1292 of The Code, will not be allowed to affect the question of the husband's liability in such proceeding.
5. Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several installments, discontinued the payments, he cannot set up the agreement in bar of her action for a support under section 1292 of The Code, even though he discontinued the payments because she demanded that the allowance be increased.
6. In proceedings under section 1292 of The Code, it is the province and duty of the judge to determine what is a reasonable subsistence for the wife, either by hearing testimony himself or by reference to a referee to ascertain the facts as to the income of the husband, etc.

ACTION or proceeding under section 1292 of The Code, heard before *Bynum, J.*, at October Term, 1894, of WAKE.

The plaintiff, Mary E. Cram, commenced the action by a sum-
(289) mons against the defendant, William C. Cram, made returnable to October Term, 1894, of said court, and filed her complaint on 20 October, 1894, in which she alleged the marriage of herself and husband in New York, in October, 1871, the birth of a son, the defendant's subsequent infidelity and desertion, his removal to North Carolina, and his living with another as his wife. She further alleged that she had no means of support for herself and son, but was compelled for a long period to maintain herself and son by manual labor; that through negotiations she obtained from the defendant an agreement to pay her $10 per month, which he did not keep and perform. Subsequently, in

1892, she came to Raleigh, where he was living, and, after negotiations with the defendant, a written agreement was entered into between herself and her husband, by which he agreed to pay her $400 in cash at that time and $50 per month during her life, while she agreed on her part to leave the State and never return, from which agreement she claims to be absolved by the failure of the defendant to keep his promise as to the payment of the monthly allowance. The complaint further alleged that defendant was a man of considerable property and income; that his desertion of plaintiff was without excuse or any fault on her part, and that she had always demeaned herself as a faithful and affectionate wife, etc. The prayer is for an allowance from the property and income of the defendant and for an order restraining him from selling any of his property until the allowance be paid.

The defendant moved to dismiss the action on the ground (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) that the Superior Court in term has no jurisdiction of the action, but the same should be by special proceeding before the judges of said court; (3) that the plaintiff had not filed such affidavit as was required to be filed with such complaint by section 1287 (290) of The Code, stating that the complainant has been a resident of the State for two years next preceding the filing of the complaint, and that the verification of the complaint is insufficient in law to give the said action a status in this court. The court refused the motion, and defendant excepted.

The defendant then filed his answer, in which he alleged that when about 18 years of age he became acquainted with the plaintiff, who was then 25 or 30 years of age, and was then and had been years previous a woman of loose virtue and habits; that she exercised an artful influence over him, and that some ceremony, which he did not at the time regard as a marriage, took place, and thereafter they lived together; that he left the place at which they were residing to seek employment elsewhere at his trade, and subsequently refused to live with plaintiff on account of her character and alleged relations with other men; that he paid her the $10 per month so long as he knew where to send it, but discontinued it when she changed her address without informing him as to her whereabouts; that he kept the agreement made in 1892 until the plaintiff wrote to him that unless he paid her a larger amount she would come back to Raleigh, and he then declined to pay her any more. The answer denies that defendant is a man of property of any considerable income. The defendant avers that his abandonment of the plaintiff was caused by her lewd and vicious life and conduct before and after the marriage, and alleges that since his abandonment she has cohabited

with other men and had so admitted to him. The defendant also set up the agreement entered into between him and plaintiff as a contract for a separation for a valuable consideration, etc.

Thereupon the plaintiff moved for judgment against defendant upon complaint and answer for support and maintenance. The de-
(291) fendant objected to the hearing of this motion or any trial of the action at this, which was the appearance term of the court for this action. This objection was overruled by the court, and the defendant excepted. The court then heard the plaintiff's motion, and found the facts and rendered the judgment, as follows:

"This cause coming on to be heard upon the complaint and answer, the court finds as facts, upon the pleadings and admissions in the answer, that the plaintiff and the defendant were lawfully married; that they have never been divorced, and, therefore, the court considers and adjudges that the plaintiff is entitled to a support and maintenance out of the property of the defendant; that she recover the same and her costs of suit, and this cause is retained for inquiry by a jury as to the amount of maintenance to which the plaintiff is entitled."

The defendant objected to the finding of facts by the court. Objection overruled, and defendant excepted. The defendant excepted to the judgment rendered by the court, and prayed an appeal.

The defendant alleges as grounds of his appeal and errors in law: The several exceptions to rulings, proceedings and judgment of the court, as before stated; and more particularly, as it was stated by the counsel for the plaintiff, and was held by the court, that this was not an action for alimony under the statute, but an action for support and maintenance, the court could not find the facts and give judgment for support and maintenance at the appearance term of this action or at any other term.

T. M. Argo and J. H. Fleming for plaintiff.

Shepherd & Busbee, T. P. Devereux, and J. B. Batchelor for defendant.

(292) AVERY, J. The statute (The Code, sec. 1292) provides that, "if any husband shall separate himself from his wife and fail to provide her with the necessary subsistence, according to his means and condition in life, etc., the wife may apply for a special proceeding to the judge of the Superior Court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage, from the estate of the husband," etc.

Postponing for the present the discussion of the sufficiency of the reason offered by him for discontinuing the payment of an allowance to

her, and of the validity of the agreement under which it was paid, we deem it best to first pass upon the question that confronts us *in limine,* whether the plaintiff can, either under the statute or in the assertion of a right conceded to her by our courts of Equity and not destroyed by the latter marriage acts, maintain this action against her husband. It is admitted that the defendant was married to her; that he separated from her, and for some time before the action was brought had failed to provide for her support. It follows necessarily that if the court had jurisdiction of this proceeding, she had the right to recover, unless precluded by some matter set up in bar by the defendant. The plaintiff had the privilege of issuing a summons, returnable in vacation, as in other special proceedings, except that it was required to be heard before the judge, not the clerk of the court. The fact that she did not avail herself of that right, but fixed the return day during the term, when it would be presumably more agreeable to the court and suitors to have it determined, seems to us to furnish no sufficient reason for doubting the jurisdiction of the court. The preparation by the compilers of The Code of a heading for the section, printed in different type and intended to convey an idea of its contents without reading, and which was also a part of the index to the volume, in no way affects the construction of the language of the section itself, when its meaning is so perfectly (293) obvious. Were we at liberty to treat it as a preamble, its aid could not be invoked in ascertaining what was the legislative intent, unless that intent had been expressed in doubtful terms. *Randall v. R. R.,* 104 N. C., 410. Under the common-law rule, which left the husband at liberty always to contest the wife's agency, as well as the question whether supplies provided her were necessary and suitable to her station in life, the wife was often subjected to inconvenience, if not suffering, in providing for the support of herself and her children. It was because she was relieved of this hardship by being allowed to bring her action against her husband (at first by *prochein ami*) in a court of Equity, that the courts of Equity in some of the states assumed jurisdiction of the enforcement of this obligation, as well as of some contracts not recognized by courts of law, where her existence was deemed to be merged in that of the husband. 1 Bishop Marriage & D., secs. 1385, 1395, and 1397; 3 Pomeroy Eq. Jur., 1299; 1 Bishop Married Women, sec. 643; 1 Pomeroy Eq. Jur., sec. 171 (p. 196, 2 Ed.); Stewart Husband and Wife, sec. 74.

It is not necessary that we should determine whether this Court has aligned itself with those which sustain the exercise of this equitable jurisdiction, or with those holding the opposite view, since whatsoever may have been the rule before the enactment of the statute, there is no

room for doubt as to the intention of the Legislature. Whether it was passed in affirmance of an existing principle or by way of establishing a new doctrine is immaterial if by the terms of the statute the right to sue for a support without asking for a divorce is given to a wife who has been deserted and left unprovided for by her husband. Where the statute makes the proceeding plainly but a means of obtaining the reasonable subsistence, which the law makes it the duty of the hus-
(294) band to furnish to the wife, the headlines cannot be allowed the effect of uselessly cumbering it with the requirements as to form prescribed for applications for divorce and alimony by section 1287, for reasons which are inapplicable to a suit of this kind.

The allegations in the answer of infidelity on the part of the wife are too vague and indefinite to constitute the basis of an action for divorce, and are entitled to no consideration in determining the question of the husband's liability in this proceeding. *Sparks v. Sparks,* 69 N.C., 319. While it is conceded that the statute (The Code, sec. 1831) recognizes the validity of deeds and agreements of separation between husband and wife, where they are living apart at the time of execution (*Sparks v. Sparks,* 94 N. C., 527, and 1 Bishop M. and D., secs. 1251, 1269, 1270, and 1303), it is equally true that, while such contracts are tolerated, they have not been looked upon with favor by this Court. *Smith v. King,* 107 N. C., 273. If we concede that the plaintiff had the right to demand that the agreement mentioned in the answer be enforced, had she chosen to sue upon it, the defendant will not, nevertheless, be allowed, after repudiating it by ceasing to pay or offer to pay according to its provisions, to set it up as a bar to her recovery in this action, even though she may have demanded by letter a sum larger than that which she had stipulated in the agreement to take as a sufficient allowance. It is not the contract to pay a certain sum in lieu which quits the husband of his duty to furnish a support for the wife when he is discharged, but the actual payment or attempt or offer to pay in fulfillment of his agreement. Kelly's Contracts of Married Women, p. 75; 1 Cord's Legal and Eq. Rights of Married Women, secs. 144, 145. Having ceased to perform his agreement to pay the monthly allowance referred to in the pleadings, it will not avail him now as a defense to this proceed-
(295) ing for maintenance on the part of the plaintiff, to whom he admits that he was married, and whom it is conceded that he afterwards deserted. Whether her conduct, from other standpoints, has been commendable or not, looking at this case only in its legal aspect, we find no averment in his answer that is sufficient in law to discharge him from the duty which grows out of his admitted relations to her.

The only remaining question is whether the order of the court that

the plaintiff is entitled to a support and costs, and that the cause be retained for the jury to inquire as to the amount to be allowed for maintenance, was such a judgment as the court ought to have rendered. As we have said, this is denominated a special proceeding, with the special peculiarity that it is returnable before the judge, who is substituted for the clerk. When issues of fact are raised, therefore, it must have been the intention of the Legislature that the judge, like the clerk, shall enter the cause on the docket for trial by jury. The Code, secs. 116, 278, *et seq.* If, for instance, the marriage and subsequent separation had been denied by the defendant, it would have been the duty of the judge, whether the cause had come before him in vacation or during the term, to have ordered a trial by jury of the issues of fact so raised. But it is the province of the judge, not of the jury, to ascertain and adjudge what is a reasonable allowance for the maintenance of the wife. What are necessaries suitable to the station in life of an infant or a *feme covert* is a question for the jury; but where facts are found or admitted which entitle a wife to a statutory allowance for support, it becomes the duty of the judge, as in the case of fixing the amount of alimony, to either hear evidence himself or to order a reference to ascertain such facts as to the income of the husband, the value of his estate, etc., as will enable him to determine what is "a reasonable subsist- (296) ence, according to his (the husband's) condition and circumstances," as the statute declares "it shall be lawful for such judge" to do.

The judgment, therefore, must be modified, so as to leave the judge at liberty to ascertain the condition and circumstances of the defendant and make such allowance as he may deem just. Let the defendant pay the costs of the appeal.

Modified and affirmed.

Cited: *S. v. Woolard,* 119 N. C., 781; *Skittletharpe v. Skittletharpe,* 130 N. C., 75; *Ellett v. Ellett,* 157 N. C., 164; *Crews v. Crews,* 175 N. C., 171; *In re Chisholm,* 176 N. C., 213; *Walton v. Walton,* 178 N. C., 75; *Allen v. Allen,* 180 N. C., 467; *Morris v. Patterson, ib.,* 486.

E. H. LOVE v. THE CITY OF RALEIGH.

Cities—Municipal Liability for Acts of Agents—Negligence—Trial—Harmless Error.

1. A city, acting within the purview of its delegated authority, is not responsible for the acts of its agents done in the exercise of its judicial, discretionary, or legislative powers; but where the city is acting in its ministerial capacity, and in the exercise of powers conferred for its own benefit and assumed voluntarily, it is answerable for the torts of its agents, provided they are acting within the scope of their agency and of the municipal authority.
2. If an act complained of lies wholly outside of the general or special powers of a municipal corporation, the corporation is not liable in damages for such act, whether it was done by its express command or not.
3. A city has no implied authority to provide for a pyrotechnic display on a Fourth of July or anniversary celebration; therefore,
4. A city, not having the express power to provide for a display of fireworks, is not answerable in damages for the negligence of its agents in conducting such a display ordered by it.
5. Where, in the trial of an action, a plaintiff is not entitled to recover in any view of the evidence, whether admitted or excluded, the exclusion of evidence is not error of which plaintiff can complain.

MONTGOMERY, J., did not sit.

(297) ACTION tried before *Bynum, J.*, and a jury, at October Term, 1894, of WAKE.

The action was brought by Alice L. Love, through her next friend and father, E. H. Love, to recover damages for an injury inflicted upon her through the alleged negligence of the defendant's agents, who conducted a fireworks display during the celebration of the centennial anniversary of the City of Raleigh, in October, 1892. It was in evidence that the mayor and board of aldermen, in pursuance of a resolution adopted by the board of aldermen to fittingly celebrate the centennial anniversary of the City of Raleigh, appointed a committee of five aldermen to act in conjunction with a larger committee of citizens, to devise methods for and to superintend the celebration, and appropriated from the treasury of the city the sum of $2,000 towards defraying the expenses. The aldermen also tendered, by resolution, the use of Moore Square for fireworks display. An ordinance of the city was put in evidence which prohibited fireworks in the city, but provided that "nothing herein contained shall prohibit the exhibition of fireworks on occasions of public rejoicing, under the control of the mayor or chief of police."

It was admitted that on "the committee on pyrotechnics," appointed by the board of managers of the celebration, were three members of the board of aldermen.

There was evidence of unskillful management of the fireworks display, and that a stick from a discharged rocket fell among the onlookers and, striking the plaintiff (a child of 9 years of age) in the face, mangled the cheek and neck and so injured one eye that it had to be removed.

Battle & Mordecai for plaintiff. (304)
J. N. Holding and Strong & Strong for defendant.

AVERY, J. The principal questions presented by this appeal are: first, whether the City of Raleigh was empowered by any general or special statute to purchase fireworks and order a committee to direct the manner of making the display; second, whether, if no such authority had been delegated to the municipality, it would be answerable for the wrongful conduct of agents acting within the scope of its instruction to them, but in the exercise of authority not delegated to it by the Legislature.

It will possibly aid us in the elucidation of these questions to (305) lay down some general fundamental rules defining and fixing the limits of municipal powers. So long as a city keeps within the purview of its delegated authority, it is not responsible for any act of its agents, done in the exercise of its judicial, discretionary or legislative powers, except where subjected to such liability by some express provision of the Constitution or of a statute. *Moffitt v. Asheville,* 103 N. C., 237; *Hill v. Charlotte,* 72 N. C., 56; 1 Sherman & Redfield on Neg., sec. 262; *Robinson v. Greenville,* 42 Ohio, 625. But when such a corporation is acting in its ministerial capacity or its corporate as distinguished from its governmental character, in the exercise of powers conferred for its own benefit and assumed voluntarily, it is answerable for the torts of its authorized agent, subject to the limitation that such wrongful acts must not only be within the scope of the agency, but also within the limits of the municipal authority. *Moffitt v. Asheville, supra,* 254; 2 Dillon Mun. Corp. (4 Ed.), sec. 968 (766).

In the section cited above *Judge Dillon* says: "If the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred by its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." Referring especially to the wrongful acts of agents of municipalities, same author says in a subsequent section (969a): "As to torts or wrongful acts not resting upon contract, but which are *ultra vires* in the sense above explained (viz., wholly and

necessarily beyond the possible scope of the chartered powers of the municipality), we do not see on what principle they can (306) create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers?" Thompson on Neg., 737; *Smith v. Rochester,* 76 N. Y., 506; *Mayor v. Cundiffs,* 3 N. Y., 165.

It is not denied that if the agent, in the course of his employment, is guilty of negligence or commits even a wilful trespass with the belief and intention that the act will inure to the benefit of the principal, then not only does the doctrine of *respondeat superior* apply, but both principal and servant may be made to answer for the resulting damage. See authorities cited in *Tate v. Greensboro,* 114 N. C., on pp. 416 and 417, especially 2 Dillon Mun. Corp., secs. 979,980, *et seq.; Hewitt v. Swift,* 3 Allen, 420; *Johnson v. Barber,* 5 Gilman (Ill.), 425; *Wright v. Wilcox,* 19 Wendell, 343.

"Without express power," says *Judge Dillon* (1 Mun. Corp., sec. 149-100), "a public corporation cannot make a contract to provide for celebrating the Fourth of July or to provide an entertainment for its citizens or guests. Such contracts are void, and, although the plaintiff complies therewith on his part, he cannot recover of the corporation." *Hodges v. Buffalo,* 2 Denio (N. Y.), 110; 2 Dillon, sec. 916, *et seq.; Austin v. Coggeshall,* 12 R. I., 329.

It is needless to cite further authority in support of the proposition that if a city is not empowered to contract a debt for the purpose of making a display on a national holiday or on such occasion as the centennial anniversary of its existence as a municipality, it would follow, of necessity, that it could not, by empowering agents to supervise a display that it could not lawfully pay for, subject its taxpayers to liability for the wilful wrong or negligence of such agents, when they are acting entirely outside of the scope of any duty that the city is authorized to impose. Dillon Mun. Corp., sec. 969a. A municipality is not answerable for torts of a servant, except where the wrong complained of (307) is an act done in the course of his lawful employment, or an omission of a duty devolving upon him as an incident to such service.

Before entering upon the consideration of the sufficiency of the statutes relied upon to authorize the action of the mayor and aldermen of the city in making an appropriation and appointing a committee to purchase the necessary articles and to supervise the pyrotechnic display on the occasion referred to, it is perhaps best to recur to the rule that a municipality is clothed with those powers only which are granted in express terms, or necessarily or fairly implied from or incident to those expressly granted, and which it is essential to exercise in order to carry

out objects and purposes of creating the corporation. 1 Dillon Mun. Corp., sec. 89 (55); *S. v. Webber,* 107 N. C., 962.

In all of the cases relied upon by plaintiff's counsel it seems that the municipalities had the authority to pass an ordinance or make an order under color of authority. It has not been contended or alleged that the action is founded upon the creation of a nuisance by the city, nor can it be successfully maintained that the use of fireworks is analogous to the case of blocking up a public highway which it is the duty of the municipality to maintain in good condition.

The charter of the city (chapter 243, Laws 1891) grants to the mayor and aldermen, when assembled, the following powers:

"Sec. 31. That the aldermen, when convened, shall have power to make, and provide for the execution thereof, such ordinances, by-laws, rules and regulations for the better government of the city as they may deem necessary: Provided, the same be allowed by the provisions of this act and be consistent with the laws of the land.

"Sec. 32. The board of aldermen shall contract no debt of (308) any kind unless the money is in the treasury for its payment, except for the necessary expenses of the city government.

"Sec. 33. That among the powers hereby conferred on the board of aldermen, they may borrow money only by the consent of a majority of the qualified registered voters, which consent shall be obtained by a vote of the citizens of the corporation, after thirty days' public notice, at which time those who consent to the same shall vote 'approved,' and those who do not consent shall vote 'not approved.' They shall provide water and lights, provide for repairing and cleansing the streets, regulate the market, take all proper means to prevent and extinguish fires, make regulations to cause the due observance of Sunday, appoint and regulate city policemen, suppress and remove nuisances, regulate, control and tax the business of the junk shops and pawn-shop keepers or brokers, preserve the health of the city from contagious and infectious diseases; may provide a board of health for the City of Raleigh and prescribe their duties and powers; provide ways and means for the collection and preservation of vital statistics; appoint constables to execute such precepts as the mayor or other persons may lawfully issue to them to preserve the peace and order and execute the ordinances of the city; regulate the hours for sale of spirituous liquors by all persons required to be licensed by the board, and during periods of great public excitement may prohibit sales of spirituous liquor by all such persons for such time as the board may deem necessary; may pass ordinances imposing penalties for violations thereof not to exceed a fine of $50 or imprisonment for thirty days. . . . They shall have the right to regulate the

charge for the carriage of persons, baggage and freight by omnibus or other vehicle, and to issue license for omnibuses, hacks, drays or
(309) other vehicles used for the transportation of persons or things for hire. They may also provide for public schools and public-school facilities by purchasing land and erecting buildings thereon and equipping the same within the corporate limits of the city or within one-half mile thereof. They may also construct or contract for the construction of a system of sewerage for the city, and protect and regulate the same by adequate ordinance; and if it shall be necessary, in obtaining proper outlets for the said system, to extend the same beyond the corporate limits of the city, then in such case the board of aldermen shall have the power to so extend it, and, both within and without the corporate limits, to condemn land for the purposes of right of way or other requirements of the system; the proceedings for such condemnation to be the same as those prescribed in chapter 49, section 6, of the Private Laws 1862-63, or in the manner prescribed in chapter 49, Volume I of The Code."

In these provisions of the charter, and in sections 3800 to 3805, both inclusive, of The Code, will be found enumerated all of the powers granted to the city by general or special laws.

We do not think that the general power to pass ordinances can be held to carry with it by implication any such grant of authority as that to expend the public money for, and conduct under the auspices of the city officers, such a display as that described by the witnesses. We are aware that such authority has been assumed by cities and towns in many of the states, but where the exercise of it has been drawn in question in the courts it has been sustained only when some statute expressly conferred the power to make the appropriation for that particular purpose. As we understand the authorities cited, the Supreme Court of Massachusetts has given its sanction to the validity of
(310) expenditures for such purposes only where some express provision of law was shown to warrant it. In one of the cases cited from that state (*Tindley v. Salem,* 137 Mass., 171) the Court held that, even where a person was injured by the negligent use of fireworks by the servants of a city that had ordered the display for the gratuitous amusement of the people, under the authority of a statute, the city was not liable to answer in damages. In an earlier case it had been held that a city council must act strictly in pursuance of statutory power to make such displays to subject it to liability for injuries due to the negligence of its servants in the management of it. *Merriam v Lourevel,* 98 Mass., 219. Where no statutory authority is shown for a wrongful act, done under the direction of a municipality, the Supreme Court of Massachusetts lays down the general rule as to its liability substantially as we have stated it. *Cavanaugh v. Boston,* 139 Mass., 426; *Clafflin v.*

Hopkinson, 4 Gray, 502. If there is no authority conferred upon the mayor and aldermen by the statute mentioned, and we can discover none, after diligent search and examination, it is immaterial whether the persons in immediate control of the fireworks were servants, acting under the direction of the committee appointed by a resolution passed by the mayor and commissioners, and stood in the relation of agents to the city, or whether they were independent contractors. If the authorities of the city acted *ultra vires* in ordering the display, the question whether they employed expert pyrotechnists and acted upon their advice after securing their services, is equally as irrelevant. If, therefore, it were conceded that the chairman of the committee, appointed by the city for the purpose, supervised and directed the negligent management of the fireworks, and at such a place as it was evidence of a want of care to select, we think it was the duty of the court, neverthe- (311) less, to tell the jury that the mayor and aldermen were not authorized by law to make an appropriation for and direct the management of a display of fireworks, and that the city was not liable to respond in damages for the wrongful or negligent conduct of a servant acting under instructions given by the city, but without authority of law. For the reasons given, we think that the court should have instructed the jury that in no aspect of the evidence was the defendant corporation liable for the acts of its servants in the management of the fireworks. Whether the rulings of the court upon the admissibility of testimony were abstractly erroneous or not, is not material, since, whether excluded or admitted, it was manifest that the plaintiff was not in any view of the evidence entitled to recover. There was no error of which the plaintiff can justly complain, and the judgment must be Affirmed.

Cited: Willis v. New Bern, 118 N. C., 137.

SAMUEL T. SMITH ET AL. v. R. T. GRAY, EXECUTOR, ET AL.

Action to Recover Land—Service of Process—Irregular Judgment in Sale for Partition—Collateral Attack— Ratification by Minors.

1. Where, in a proceeding to sell land, an order of sale has been made and property sold and the sale confirmed, the judgment is final, and can only be set aside in a direct proceeding for that purpose.
2. Where infant defendants are served with a summons in proceedings for the partition of land and a guardian *ad litem* is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity.

3. Where infants, after reaching their majority, with knowledge of the facts rendering the sale of their land voidable for irregularity, receive the residue of the purchase price, they ratify the sale.
4. Section 387 of The Code cures irregularities in a partition sale of land of minors.

(312) ACTION to recover a half interest in a lot of land in Raleigh, N. C., alleged to have been irregularly sold in proceedings for partition, without proper service of the summons on minor owners, and now owned by and in the possession of the defendants, to whose testator it came, after several mesne conveyances, as a purchaser for value and without notice of any irregularity in the proceedings for its sale. The action was tried before *Bynum, J.*, at Fall Term, 1894, of WAKE, and from a judgment in favor of defendants the plaintiffs appealed.

The facts are stated in the opinion of *Associate Justice Montgomery.*

T. R. Purnell and T. M. Argo for plaintiffs.
R. O. Burton for defendants.

FURCHES, J. Though we may feel called upon to affirm the judgment of the court below, we cannot say, as the learned judge below did, that in our "opinion the proceeding 'B' was regular." And we fear that plaintiffs, while they were infants, did not receive the protection from the court they should have had.

We find from the transcript of record sent up that Andrew Syme, the administrator of J. J. Jackson, father of plaintiffs, commenced a proceeding in the Superior Court of Wake to subject the land in controversy to assets to pay debts and cost of administration, in which he states in his verified complaint that the property is worth $2,000. This proceeding went on to final judgment and order of sale, without any
(313) service on the plaintiffs in this action, except that a member of the bar, professing to act for the infant defendants, had accepted service of process, and although the defendants in this proceeding claimed their homestead the court proceeded to judgment.

In this proceeding Mason and Syme were appointed commissioners, and sold the land, when one McGee became the purchaser at $910, but refused to comply with the terms of sale, for the reasons that the infant defendants had not been served with process and that the homestead had been claimed. Whereupon, Thomas Wynne, who had married the oldest sister of plaintiffs, who was unfriendly with plaintiffs, commenced another proceeding in the same court to have this property sold for partition, making the present plaintiffs defendants. In this proceeding there seems to have been a service of the summons, as follows: "Served 5 February, 1880, by reading the within summons to all the defendants

named within." And there was a guardian *ad litem* appointed for the infant defendants, who filed an answer, admitting all the facts set out in the complaint. And a judgment and order of sale was made in this proceeding, and Andrew Syme and T. P. Devereux were appointed commissioners, sold the property for $800 and reported that it had brought "a fair and full price," and recommended a confirmation of the sale, which was made by the court. These commissioners seemed to have made this sale under the order of the court in the case of Syme, administrator, and also under the order in the case of Thomas Wynne against plaintiffs, in the proceeding to sell for partition. As they report said sale in both proceedings, the court confirms it in both proceedings, and their deed to Pinkston states that it is made under both proceedings.

It also appears that the same attorney who undertook to accept service in the case of Syme, administrator for the infant defendants, acted as the attorney of Thomas Wynne in his proceedings (314) against them to sell the property for partition.

This Court cannot say that such "proceedings are regular," or allow them to receive the sanction of this Court. And if the case stopped here we would most unhesitatingly set them aside, were this a direct proceeding for that purpose.

But, with all this irregularity, we cannot say they were *void,* and this is the turning point in the case in favor of the defendants.

Where there is no service of process, the court has no jurisdiction, and its judgment is *void. Bank v. Wilson,* 80 N. C., 200; *Stancill v. Gay,* 92 N. C., 462. Such judgments have no force and may be quashed on motion or *ex mero motu,* and will be treated everywhere as a nullity. *Carter v. Rountree,* 109 N. C., 29.

When a judgment is attacked for fraud, the remedy is by motion in the cause, if the proceeding is still pending. But if the proceeding has been ended by final judgment, an independent action must be brought. *Carter v. Rountree, supra.*

In a proceeding to sell lands, when an order of sale has been made and property sold, this is a final judgment; and while it may be set aside in a direct proceeding for that purpose, it cannot be attacked in a collateral proceeding. *McLaurin v. McLaurin,* 106 N. C., 331; *McGlawhorn v. Worthington,* 98 N. C., 199; *Sumner v. Sessoms,* 94 N. C., 371; *Hare v. Holloman,* 94 N. C., 14. But it seems that this is one of the cases intended to be provided for in the act of 1879 (section 387 of The Code), and the irregularities pointed out above are cured by this act. *Fowler v. Poor,* 93 N. C., 466; *Hare v. Holloman, supra; Cates v. Pickett,* 97 N. C., 21.

As this judgment was only irregular and not void, it would seem that the deed of the commissioners to Pinkston conveyed the legal title
(315) to the property now in dispute, and may be considered as a deed from plaintiffs while they were infants, which, though voidable, was not void, and might be ratified by them after they reached their majority. And if this is so, we hold the fact that, after they came of age and being in possession of all the facts, their receiving the residue of the purchase-money was a ratification of what had been done and of defendants' title. And they will not now be allowed to come into court and dispute the same.

It is not contended but what defendants are purchasers for a valuable consideration and without notice; and it may be that this would be another ground of defense. But as we have decided the case for defendants upon other grounds, we do not consider this.

Affirmed.

Cited: Rawles v. Carter, 119 N. C., 597; *Murray v. Southerland,* 125 N. C., 177; *Norwood v. Lassiter,* 132 N. C., 57; *Earp v. Minton,* 138 N. C., 204; *Credle v. Baugham,* 152 N. C., 20.

G. C. FARTHING v. W. T. CARRINGTON.

Practice—Controversy Without Action—Matter of Public Interest—Hearing on Appeal—Conditional Sales and Mortgages, Validity of—Present Consideration—Preëxisting Debts—Construction of Statute.

1. Where, under section 567 of The Code, a controversy is submitted which involves matters of great public concern and which is supported by an affidavit that a real case exists, and that the controversy is submitted in good faith to determine the rights of the parties, this Court will, upon appeal, determine the question of law thus raised, although the statement of facts is not full enough to render a judgment commanding or prohibiting a thing to be done.

2. Under rules 10 and 12, this Court will, by consent of parties, receive printed argument, without regard to the number of the case on the docket or date of docketing the appeal, and in a cause directly involving a matter of great public interest, will assign an earlier place on the calendar or fix a day for its hearing.

3. Chapter 466, Laws 1895, entitled "An act to regulate assignments and other conveyances of like nature in North Carolina," applies only to conveyances

made to secure preëxisting debts and not to those executed to secure a debt growing out of the transaction itself and for a present consideration.

AVERY and CLARK, JJ., dissenting.

CONTROVERSY submitted without action, heard before *Green,* (316) *J.,* at March Term, 1895, of DURHAM, and from the judgment rendered therein the plaintiff appealed.

The appeal was docketed in this Court on the____day of_____, 1895, after the cases from the Fifth District had been disposed of, and, by consent, was heard on the____day of April, 1895.

The submission to the court below was as follows:

To the Hon. L. L. Green, Judge Presiding at the March Term, 1895, of Durham Superior Court:

G. C. Farthing, Hiram Jones, and W. T. Carrington, being parties to a question in difference which might be the subject of a civil action, present a submission of the same to the court for its decision, as follows:

All said parties are residents of Durham County, North Carolina, except Jones, who lives in Chatham. All parties agree that the case may be tried in Durham County.

On 23 March, 1895, said Hiram Jones, desiring to borrow one hundred dollars, applied to W. T. Carrington, who loaned him said sum, which was attempted to be secured by the execution of a bond and mortgage, the following being a copy of said mortgage:

I, Hiram Jones, of the County of Chatham, of the State of North Carolina, am indebted to W. T. Carrington, of Durham County, in said State, in the sum of one hundred dollars, for which he (317) holds my note, to be due on 1 November, 1895, and to secure the payment of the same I do hereby convey to him these articles of personal property, to wit, one gray mare, name, Mollie, known as the Gaston Foard mare, about 6 years old; one bay horse mule, name John, known as the Dick Atwater mule, about 5 years old; one red no-horned cow, about 6 years; one brindle horned cow, about 5 years old; eight head of hogs, now on my farm where I now live; one 1-horse wagon; all my farming tools and gear; all the crop that I raise on my land or any other land that I tend in the year of 1895, such as wheat, corn, fodder, shucks, cotton, tobacco, etc.; all free from any encumbrance or lien.

But on this special trust, that if I fail to pay said debt and interest on or before 1 November, 1895, then he may sell said property or so much thereof as may be necessary, by public auction, for cash, first giving twenty days' notice at three public places, and apply the proceeds of

such sale to the discharge of said debt and interest on the same, and pay any surplus to me, after all cost and attorney, etc.

Given under my hand and seal, this 23 March, 1895.

HIRAM (his X mark) JONES. (Seal)

Witness: J. J. THAXTON.

$100. DURHAM, N. C., 23 March, 1895.

On or before 1 November, 1895, with interest from date at the rate of 8 per cent per annum, until paid, I promise to pay to the order of W. T. Carrington the sum of one hundred dollars for value received, (318) and secured by chattel mortgage with even date with this note.

HIRAM (his X mark) JONES. (Seal)

Witness: J. J. THAXTON.

That at the time of, and before the execution of said mortgage, said Hiram Jones was indebted by note to G. C. Farthing, above named, in the sum of $100, and said Farthing contends that said mortgage is void, for the reason that at the date of its execution he was a creditor of said Jones, as above stated; whereas said W. T. Carrington and Hiram Jones contend that neither the letter nor the spirit of the new anti-preference law embraces a case of this kind, in which one person, however much indebted at the time, creates a new debt and seeks to secure the same by mortgage, trust deed or other security. And so, desiring to save costs and trouble, they ask the decision of the court upon the state of facts.

W. T. CARRINGTON,
HIRAM JONES,
G. C. FARTHING.

W. T. Carrington and G. C. Farthing, being duly sworn, state that this controversy is real and the proceedings in good faith, to determine the rights of the parties. W. T. CARRINGTON.

Sworn to and subscribed before me, this 1 April, 1895.

Witness my hand and notarial seal.

CHAS. K. FAUCETTE,
Notary Public.

The following judgment was rendered:

"The court, having carefully read and considered this controversy without action, and after hearing argument of counsel, is of opinion, and so adjudges here and now, that G. C. Farthing is not entitled (319) to have the mortgage set out in the 'controversy submitted' de-

clared void, but, on the contrary, that said mortgage is as operative and effectual to pass title as it would have been prior to the passage of the anti-preference law by the recent Legislature."

Boone & Boone for plaintiff.
Fuller, Winston & Fuller for defendant.

MONTGOMERY, J. This case was submitted to the court below under section 567 of The Code, and is here by appeal. This section of The Code answers a most excellent and useful purpose, in that it enables parties to have their questions in difference settled upon an agreed state of facts, without delay and without the cost of witnesses and a trial below. It disregards forms, as such, and the perplexities of pleadings. It requires only that, by affidavit, it shall be made to appear that a real case exists, and that the controversy is submitted in good faith to determine the rights of the parties. One of the long-standing rules of practice of this Court (No. 10) provides that, "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 the docket, or date of docketing the appeal. . . . ." Rule 13, amongst other things, provides that the Court, at the instance of a party to a cause directly involving a matter of great public interest, may assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. Under these rules, we have felt it to be our duty to give an early hearing to the matters involved in the case before us, because of its public and general interest.

Upon examination of the proceeding before us, we are not satisfied that the facts are stated with sufficient fullness to entirely comply with the statute under which the matter is submitted; but the (320) question of law which is submitted is presented with entire distinctness. And while ordinarily we might dismiss the proceeding because the case is not full enough as to its statement of facts, yet where a matter involves a great public interest, as does this matter, we have concluded to follow a late precedent of this Court—"Treat the case as in the nature of a submission of the controversy without a formal action." The precedent to which we refer will be found in Appendix "A," 114 N. C. This controversy arises upon a state of facts which brings (323) before us the construction of the act of the General Assembly of 13 March, 1895, entitled "An act to regulate assignments and other conveyances of like nature in North Carolina." Section 1 is as follows: "That all conditional sales, assignments, mortgages or deeds in trust which are executed to secure any debt, obligation, note or bond which

gives preference to any creditor of the maker shall be absolutely void as to existing creditors." The plaintiff contends that the mortgage in this case is void under the provisions of the act. We are of the opinion that the mortgage is valid and that the act is limited to conditional sales, assignments, mortgages and deeds in trust made to secure preëxisting debts and obligations, and that mortgages of the nature of the one before the Court, growing out of the transaction itself and executed for a present consideration, do not come within the operation of the statute referred to, and that it (the statute) evidently refers to preëxisting debts, and was not intended to embrace transactions of this kind, where the debt grows out of the transaction itself and is for a present
(324) consideration. We are supported in this position by an opinion of this Court at its January Term, 1871, delivered by *Chief Justice Pearson,* in *McKay v. Gilliam,* 65 N. C., 130, construing Laws 1861, ch. 4, sec. 12, which act is substantially like the one now under consideration. The same principle of construction is also recognized in *Reeves v. Cole,* 93 N. C., 90, although that case arose on the construction of the statute concerning agricultural supplies. However, after deciding the point raised in that case, *Chief Justice Smith,* for the Court, further said: "A similar method of construction was pursued in ascertaining the meaning and giving effect to a section in the act of 11 September, 1861, which declared that 'all deeeds of trust and mortgages hereafter made and judgments confessed to secure debts shall be void as to creditors,' unless providing for the payment *pro rata* of all the debts and liabilities of the maker. It was held in *McKay v. Gilliam, supra,* that, notwithstanding the broad terms of the act, its purpose was 'to take from the debtors the right to give preference to some creditors to the exclusion of others,' and its operation was confined to preëxisting debts and did not include a loan contracted at the time of the execution of the deed and secured by it." We are, therefore, further of the opinion that the act before us is intended only to prevent a preference in favor of preëxisting creditors in the cases specified in the act itself. The appellant will pay the costs of this proceeding.

CLARK, J., concurring in the result: As the Court holds that the question of the construction of the act is properly raised by the record, I express my concurrence in the opinion that the act only applies to "assignments and other conveyances of like nature" as is stated in the title, and forbids preferences being given by such to existing
(325) creditors, and that it has no application to mortgages, crop liens or other conveyances which may be executed to secure a debt or loan created at the same time with the execution of such conveyance,

nor where the conveyance is executed to secure advances thereafter to be made. *McKay v. Gilliam,* 65 N. C., 130. But I regret I cannot concur with the majority of the Court that the question is properly before us in this proceeding. The submission of a "controversy without action" under The Code, sec. 567, is simply an inexpensive and prompt proceeding to obtain the decision of the Court as to the rights of the parties in a matter where the facts are not disputed. It dispenses with summons and pleadings, and can be submitted to the judge at chambers as well as at term. But it is not intended as a mode of propounding queries to the Court to settle abstract questions of law when no judgment can be rendered directing the defendant to do or not to do some particular act. *McKethan v. Ray,* 71 N. C., 165; *Little v. Thorne,* 93 N. C., 69; *Millikan v. Fox,* 84 N. C., 107. It is a substitute for a civil action, and must state facts sufficient to constitute a cause of action, and upon which the court could have rendered a judgment if presented by complaint and demurrer. The question here sought to be decided could, of course, be presented in this manner of proceeding, but only upon sufficient facts stated. In the present case all the facts agreed are that Carrington, being indebted to the plaintiff, executed a mortgage to his codefendant to secure a loan made at the time of the execution of the mortgage, and the plaintiff asks a decree that such mortgage be declared void as to him. Suppose the plaintiff had been correct in alleging that the mortgage was void, does the bare fact that a debtor executes a void mortgage entitle any creditor to obtain a decree that the mortgage is void? How is he hurt by it? The creditor, whose debt has not (326) been reduced to judgment, has no lien on any particular land of the debtor. He has no ground even to ask that the mortgage be removed as a cloud on his title. There is no allegation or agreement here that the defendant, Carrington, has included in this mortgage property above his homestead which would otherwise have been liable to execution for the plaintiff's debt, and that the defendant has none other property liable to the plaintiff's execution. Nor is it averred that the plaintiff has judgment and execution; and if he had, no reason is shown why he could not sell under it and buy the property embraced in the alleged mortgage, treating it as void. It does not appear even that the mortgage has been registered. It is true, the affidavit sets out that this is a *bona fide* action, but it does not appear that the plaintiff has suffered or will suffer any detriment, nor that the courts can render him any aid. Indeed, on the facts agreed, there is no judgment that the court could render, unless it is that of passing upon the abstract question of the construction of the act. Nor can I concur that the response of the Court (114 N. C., 923) to the inquiry of the Governor as to the tenure of

judicial office is a precedent in this case, which concerns merely the rights of parties litigant in a civil action of a private nature.

AVERY, J., dissenting: The statute (The Code, sec. 567) was enacted in order (said *Pearson, C. J.*, in *McKethan v. Ray,* 71 N. C., 165) "to dispense with the formality of summons, complaint and answer." It would manifestly lead to absurdity to hold that the "controversy without action" was intended to include any other than a legal controversy, if the statute did not relieve us of discussing the general principle by declaring in plain terms that it must be between "parties to a
(327) question in difference, which might be the subject of a civil action." It follows necessarily that, before the court can consider such a proceeding, it must be satisfied from the statement that a cause of action exists, and this can only appear when from the sworn statement, however informally or inartistically drawn, the court can gather facts sufficient to constitute "the subject of a civil action." Hence it has been held that, where the "case containing the facts" does not show that the court has jurisdiction, the proposed controversy must be dismissed. *Little v. Thorne,* 93 N. C., 69. Following numberless precedents, beginning with *Tucker v. Baker,* 86 N. C., 1, this Court has held, during the present term, in the case of *Webb v. Hicks, Justice Furches* delivering the opinion of the Court, that where facts cannot be gathered from the whole complaint that would, if true, entitle a plaintiff to recover, the action must be dismissed. *Lassiter v. Roper,* 114 N. C., 17. In the case at bar it is set forth in the sworn statement that Hiram Jones, one of the parties, borrowed $100 from another party, W. T. Carrington, on 23 March, 1895.

The mortgage, with the probate and certificate of registration, is set forth in full, and then follows the portion of the affidavit upon which the status of the case in court depends, which is as follows:

That at the time of and before the execution of said mortgage, said Hiram Jones was indebted, by note, to G. C. Farthing, above named, in the sum of $100, and said Farthing contends that said mortgage is void, for the reason that at the date of its execution he was a creditor of said Jones, as above stated; whereas said W. T. Carrington and Hiram Jones contend that neither the letter nor the spirit of the new anti-preference law embraces a case of this kind, in which one person, however much indebted at the time, creates a new debt and seeks to secure the
(328) same by mortgage, trust deed or other security. And so, desiring to save costs and trouble, they ask the decision of the court upon the state of facts.

W. T. CARRINGTON,
HIRAM JONES,
G. C. FARTHING.

W. T. Carrington and G. C. Farthing, being duly sworn, state that this controversy is real and the proceedings in good faith, to determine the rights of the parties. W. T. CARRINGTON.

Sworn to and subscribed before me, this 1 April, 1895.
Witness my hand and notarial seal.
CHAS. K. FAUCETTE, *Notary Public.*

The act of 13 March, 1895, provides that "All conditional sales, mortgages or deeds in trust which are executed to secure any debts, obligation, note or bond which gives preference to any creditor of the maker, shall be absolutely void as to existing creditors." The Statute of 13th Elizabeth (The Code, sec. 1545) declared all conveyances executed "to delay, hinder and defraud creditors and others of their just and lawful actions, etc. (only as to that person, his heirs, etc.) to be utterly void and of no effect." Before the enactment of that statute it was necessary to invoke the aid of a court of Equity to have a deed declared void for fraud; and where, by that or any other statute, deeds are pronounced void as against creditors, in order to secure a formal declaration of their invalidity the moving party must ask relief that would have been administered formerly solely in a court of Equity.

It does not appear that the creditor, Farthing, has sued upon (329) the note due him, or that, if he had obtained judgment and issued execution thereon, he could not have realized his debt by the sale of other property. Unless the creditor has the right, upon the state of facts presented, to demand a formal declaration of the court that the mortgage is void, no cause of action is stated upon which he can demand any judgment whatever. *Southerland v. Harper,* 83 N. C., 200. Farthing has shown no shadow of a claim to either the specific personal property or the land covered by the mortgage to Carrington, and there is not the slightest ground, therefore, for invoking the aid of the Court to remove a cloud from property to which he has shown no apparent right or title. *Browning v. Lavender,* 104 N. C., 69; *Peacock v. Stott, ib.,* 154. "A cause of action is generally held to be a union of the right of the plaintiff and its infringement by the defendant." 1 Enc. of Pl. and Pr., p. 116. The two elements are the right of the plaintiff and omission of duty or wrong on the part of the defendant. *Hayes v. Clinkscales,* 9 S. C., 441. Here the only right shown to be in Farthing, in whose favor an attempt is made to state a cause of action, if any exists, is that to sue for and recover the sum of $100 due him, but there is an utter failure to indicate how the mortgage, without further explanation, interferes with that right. There must be an allegation of a breach or of a neglect of duty, and a damage resulting, in order to

properly constitute the suit in court. *Cooley, J.,* in *Post v. Campam,* 42 Mich., 96. "The codes of civil procedure create no new causes of action. Rights are entirely independent of remedies. Whatever was a cause of action at law or a ground of relief in equity before codes, is now remediable in a civil action, and whatever was remediless
(330) before is now remediless under the codes. 1 Enc. of Pl. and Pr., p. 145."

There must be some limit to the exercise of jurisdiction under section 567. It is well settled that a respectful letter from the learned members of the bar who represent the parties to this proceeding, asking the court to advise them as to some controversy that had not, but might in the near future arise, would give the subject-matter of the communication no standing in the Superior Court or by appeal here.

I am at a loss to know how the line can be drawn so as to guide the legal profession and protect the courts against being forced to spend their time in deciding speculative questions between the rule that the statement of facts sufficient to constitute a cause of action shall be regarded as an essential prerequisite to the consideration of a controversy submitted without action, and the loose practice of allowing affidavits suggesting that a question of vital interest to the public is about to arise, and requesting the court to relieve the parties of the trouble and expense of proceeding in the prescribed way and to give it a proper status in court. I cannot concur with my brethren in the view that the letter of advice to the head of a coördinate branch of the government (114 N. C., 925) is a precedent for entertaining and deciding this case. There the Court followed a former precedent in advising a coördinate department (the Legislature) about a matter that confronted it at the moment, and involved a grave constitutional question, upon which that department was called upon to act immediately. There the Court gave advice, in order to point out the line of duty which was prescribed by the Constitution, and it was not necessary to render a judgment. Here we must either render a judgment or dismiss the case for want of jurisdiction; there is no middle ground. If we have no jurisdiction,
(331) as the modified opinion of the Court seems to concede, then our judgment is a nullity. It is familiar learning that a judgment, where the court has no jurisdiction, is not conclusive. It seems to me that where it is conceded that a case is *coram non judice* the Court can render no judgment, and it is manifestly our duty to dismiss, unless we mean to hold that any two private citizens have the same right to ask for advice about their differences that the Legislature or the Governor has to invoke our aid in acting upon a grave constitutional question upon which immediate action is inevitable. To this proposition I can-

not give my assent, and in my view of the case I cannot concur with my brethren without assenting to it.

The letter to the Governor, which is referred to, was not an adjudication as to the rights of the judicial officers whose terms were in question. But, feeling that they would voluntarily accept the advice as decisive, the Court simply endeavored to exhibit a proper appreciation of the rights of the judges and at the same time show courtesy to the Chief Executive of the State that had been considered due both departments when similar requests had been theretofore made. It has never been once suggested that the frequent designation of actions for possession, since feigned actions and forms of actions were abolished in 1868 as in the nature of actions of ejectments, warrants this Court in entertaining a suit begun by declaration instead of by summons, and thus disregarded the requirements of the statute (The Code, sec. 161). I see no more reason for attaching greater significance to the expression, "in the nature of a controversy without action." I cannot concur in the view that statutes enacted in derogation of general law, and heretofore construed strictly by this Court, shall be deemed modified, as a mere inference from the use of such illustrations. But the judgment of the court below that Jones' mortgage is not void is, as I understand the opinion of the Court, left undisturbed, and is allowed to conclude (332) the parties, though the court had no jurisdiction to try it.

Whatever may be the magnitude of the question involved, I deem it my duty to refrain from the expression of an opinion upon it, just as it would be proper to decline to respond to a written request accompanied by a solemn affidavit and sent in an informal way by some other highly respectable citizens of the State. I, therefore, dissent from the opinion of a majority of the Court that there is a properly constituted case before us.

If the majority of the Court had ordered that the appeal be dismissed for want of jurisdiction, thus vacating the judgment below, which will now remain conclusive on the parties, the question whether I should give expression to my opinion on the merits might have been considered, according to the precedents, one of propriety. But where the Court, as the conclusion deduced from an argument to sustain the jurisdiction, simply ordered that the appellant pay the costs, then, with great deference to the views of others, it seems to me that my course should be dictated by a sense of duty rather than of propriety. When the letter of advice, referred to in the opinion of the Court, was sent to the Governor, it must be remembered that there was no judgment appealed from, the validity of which depended upon the opinion of the Court, and the letter concluded no one as to his rights. It subserved the purpose of pointing out to the Executive Department the method of conducting the

approaching election—a matter upon which that department was required by law to take action forthwith.

FURCHES, J., concurring in the opinion of the Court, delivered by *Justice Montgomery:* I regret that there is any reason why any
(333) member of the Court should feel that he was not authorized in this proceeding to give his opinion as to the proper construction of the act of 13 March, 1895, as we are bound to see from the proceeding before us (if we close our eyes to all other sources of information) that it involves a matter of great interest to the business of the State.

The main question, and the one intended to be presented for our consideration, is the construction of the act of 13 March, 1895, and four members of the Court have given their opinion, construing this act to apply to preëxisting debts at the time of making the mortgage or other security, and not to debts made contemporaneous with and agreed at the time of their making, to be thus secured. The other member of the Court, for reasons which he assigns, declines to express any opinion as to the construction of the act. Then I take it that the construction of the act is settled, so far as the opinion of four of the justices of this Court can settle a question.

But while this is so, two of the justices are of the opinion that the question is not presented in such a way as to justify the Court in giving any opinion as to its construction, and this is the reason for my writing this opinion.

The majority of the Court were not inadvertent to the objections made by the minority, and for these reasons did not undertake to render a formal judgment affirming or overruling the judgment of the court below, but simply expressed their opinion as to the construction of the act. And in doing this we thought we were fully warranted by the precedents of this Court, and the matter of the tenure of the judges (114 N. C., 923) is cited in the opinion of the Court as authority for the action of the majority. The learned members of the Court (*Chief Justice Shepherd* and *Justices Avery* and *Burwell*) who rendered
(334) the opinion in that matter put it upon the ground that it was "in the nature of a submission of the controversy in reference to their terms of office, without a formal action." This seems to be authority for the action of the majority of the Court in this proceeding. But the minority say not, for the reason that it was in response to a letter from the Governor as to a grave constitutional question in which the public was interested; that it was not an adjudication as to the rights of the officers whose terms were in question, but the Court felt that they would voluntarily accept the advice as decisive.

It is true that the Governor's letter to the Court suggested an impor-

tant question for its decision, and, we think, one proper for them to act upon; but he, as Governor, had no interest in it. His election or term of office was in no way involved. He did not order the election or hold the election. These were provided for by the Legislature. He could not add or take one day from the terms of the judges, with or without the opinion of this Court. And it is conceded that the opinion of this Court in that proceeding could not do so. But the opinion was given because it involved a grave constitutional question in which the public was interested, and because the Court had reasons for thinking that the parties really interested wished the opinion of the Court and would be governed by it.

This was, as I have said, an important question, and one, as I think, proper to be decided by this Court. But it was not necessary to the administration of the courts. It is most probable there would have been elections held for these offices without this opinion, and if there had not been, and in this way a vacancy had occurred, the Governor was authorized by the Constitution to fill it; so the administration of justice would have gone on.

But, again, it is contended by the minority that section 567 of (335) The Code is only intended to do away with the formalities of pleading, and to properly constitute a case under this section it ought to contain sufficient averments to constitute a cause of action upon which the court could go to judgment. I agree to this proposition, but I do not agree that *Webb v. Hicks, post,* 598, is in conflict with the action of the majority of the Court in this case. In *Webb v. Hicks, supra,* the court below held that the plaintiffs were not entitled to recover, and this Court, in reviewing the appeal of plaintiffs, were of the opinion that plaintiffs' complaint did not state a cause of action, and "affirmed" the judgment of the court below. It is not in point in this case, as I think.

But, admitting, as I do, that there should be sufficient averments to enable the Court to proceed to judgment, this does not prevent the Court from giving its opinion in a case of such importance as this. And I think the Court is sustained in so doing, not only by the case in 114 N. C., 923, *supra,* but also by such cases as the following:

In *McBryde v. Patterson,* 78 N. C., 412, which was a contest between children of the same mother, some legitimate and some illegitimate, as to property, this Court, *Smith, C. J.,* delivering the opinion, discusses and decides the case upon its merits, and then held that the appeal was prematurely taken, and dismisses the appeal.

In *S. v. Divine,* 98 N. C., 778, in a case coming up by successive appeals from a justice's court to this Court, upon the construction of a statute changing the presumption of evidence, this Court fully discusses

the case upon the merits, and declared the act unconstitutional and void. *Smith, C. J.,* delivering the opinion of the Court, says: "We have gone into to the question in order to settle the question of the validity of the statute in its application to the case before us, and because it will (336) practically put an end to the litigation." The case was then dismissed, for the reason that the special verdict appealed from was not sufficient to found a judgment upon.

In *Guilford v. Georgia Co.,* 109 N. C., 310, which was before this Court simply upon a motion for a *certiorari* as a substitute for an appeal, the Court discussed and decided the case upon its merits, *Clark, J.,* delivering the opinion of the Court, and then refused the motion of defendant for the *certiorari* to bring the case to this Court.

In *S. v. Tyler,* 85 N. C., 569, a case involving the questions as to whether a solicitor was entitled to $4 or $10 tax fee, this Court went into a full discussion of the case upon its merits, *Ashe, J.,* delivering the opinion of the Court, and closing the opinion as follows: "But, as the State has no right to appeal in this case, and has no interest in the question, the case is dismissed."

In *Milling Co. v. Finley,* 110 N. C., 411, the Court, *Clark, J.,* delivering the opinion, discusses the case on its merits and sustains the judgment below, and then says the appeal is premature and cannot be sustained.

In *S. v. Wylde,* 110 N. C., 500, being an indictment for bigamy, the Court discusses and decides the case upon its merits, *Clark, J.,* delivering the opinion, and then dismisses the appeal upon the ground that the affidavit upon which defendant appealed was insufficient to bring the case to this Court.

In *S. v. Lockyear,* 95 N. C., 633, which was an indictment for selling liquor by the Capital Club, of the city of Raleigh, the Court thought it of sufficient public importance (*Smith, C. J.,* delivering the opinion) to discuss and decide the case upon its merits, in which he gives the following reason for deciding a case not properly before the Court: "The wish of the parties that it should be settled and the law declared, so that it might be observed in its integrity," and then proceeded to dis- (337) miss the case because there was no judgment in the court below, and none could be pronounced by this Court.

There was no difficulty in understanding the point intended to be presented to the Court by this case. No one has complained of it on that account. Then, I repeat, treating this case as in no better condition than it would have been in a regular action, with a complaint alleging all the facts contained in this submission, with a demurrer to the complaint, will not the case cited above justify the Court in giving its opinion upon the merits of the controversy? If it was of sufficient

importance to decide whether a solicitor was entitled to a $4 fee or a $10 fee to induce the Court to decide the case upon its merits, though it was before the Court on the appeal of the State, which, the Court say, had no interest in the question and no right to appeal, is not the question presented by this case of sufficient importance to justify the Court in giving its opinion upon the construction of this act? If the construction of an act of the Legislature changing the rule of evidence, as in *Davis' case, supra,* was of sufficient importance to justify the Court to pass upon it and declare an act of the Legislature unconstitutional "because it will practically put an end to the litigation," is not the matter now before the Court, which must seriously affect the whole business interest of the State, sufficient to justify the Court in giving its opinion as to the construction of the act of the 13th of March, 1895?

But, it is contended, these cases do not apply, for the reason that, although the Court gave its opinion when it had no case properly constituted before it, the Court, after giving the opinions in the cases referred to, then dismissed the appeals; and as to whether this was more consistent with the views of my brethren who differ with the majority, I will not pretend to say, as I am not dealing with that (338) question. But it is said the Court should have reversed or affirmed the judgment below; that there is no middle ground. Did the Court, in the cases cited above, reverse or affirm the judgment below? But supposing this may not be considered an answer to this position—that the Court should have reversed or affirmed the judgment in the court below—I wish to give my own answer to this proposition. It is contended by the minority that the case does not state facts sufficient to authorize a judgment, and the judgment pronounced thereon is a nullity. If they are correct in this position, then no judgment we could have pronounced here would have made it valid. There was no use in shooting at a dead duck. And if there is a sufficient statement of facts to authorize the judgment below, then their whole theory that the Court was wrong in passing upon the question fails and falls to the ground. Which horn do they take? But, again, if the Court had the right to consider it and then dismiss it, as in *Davis' case,* in *Taylor's case,* in *Lockyear's case, supra,* or in *Guilford v. Georgia Co., supra,* when it was only before the Court on an application for a *certiorari* to bring it to this Court, did not the Court have the right to consider this case without dismissing it? Does not the greater include the less, whether it is called middle ground or not?

I have not undertaken to argue the construction of the act as given by the Court. So far as I know, there is no difference of opinion as to this. I say, so far as I know, as I am not authorized to speak for *Justice*

Avery on this point. But I have only endeavored to show that the Court is justified by precedent in the action it has taken in this case.

But I will say, in passing from this case, that, in my opinion, (339) the act of 13 March, 1895, is so little like the Statute of 13 Eliz. (The Code, sec. 1545) that it would hardly be safe, to reason from the analogy of that statute, to construe the act of 13 March. The Statute of Elizabeth does not avoid any conveyance, unless there is an intent to defraud or delay the payment of the creditors of the maker, and then such creditors must be defrauded, hindered and delayed, or the conveyance is valid. This statute, without regard to intent or as to whether any one is damaged or not, declares the conveyance utterly void if the maker is indebted to any one else at the time of making the same.

Cited: *Stewart v. State,* 118 N. C., 630; *Wittkowsky v. Baruch,* 126 N. C., 750; *Rogerson v. Lumber Co.,* 136 N. C., 269.

(340)

UNION BANK OF RICHMOND, VA., v. BOARD OF COMMISSIONERS OF TOWN OF OXFORD.

Railroad Aid Bonds—Election to Authorize Issue—Compromise Decree—Estoppel—Nonsuit—Constitutional Law.

1. Where, in a suit by a railroad company to compel the issuance by a town of bonds in aid of the railroad, a compromise decree was rendered whereby the town was released from liability for one-half of its subscription in consideration of its issuing the other half, the town is estopped from denying the validity of the bonds issued in pursuance of such decree, and such estoppel is as effectual in favor of the purchaser of the bonds in a suit to compel the payment of coupons as it would be if the action were brought by the railroad company.

2. Since the statute (section 574 of The Code), and indeed, independent of it, where disputed claims have been preferred against a town, it may make a contract with the creditor whereby the latter agrees to discount or throw off a portion, and such an agreement is founded upon a sufficient consideration and will be enforced.

3. Where, in a suit by a railroad company against a town to compel the latter to issue bonds, a compromise decree was entered whereby the company was required to release the town from one-half of the issue upon the issuing by the town of the other half, the fact that such release has not been executed by the railroad (no demand for such release having been made) will not invalidate the bonds issued in pursuance of the decree and held by a *bona fide* purchaser.

4. While it is a prerequisite essential to the validity of bonds issued by a town in aid of a railroad that the Legislature shall grant the power to aid, and that a majority of the qualified voters shall signify their approval, yet the machinery for ascertaining the will of the electors is a secondary consideration; therefore,

5. Where an act of the Legislature authorized the issue of bonds by a town in aid of a railroad, and provided for their payment by taxation, but did not provide for an election on the question of their issuance, and the election was held in conformity to existing election laws relating to the borrowing of money by municipalities, the bonds issued pursuant to such election are valid in the hands of a *bona fide* owner.

6. An act of the Legislature authorizing towns to issue bonds in aid of a railroad, and providing for the mode of payment thereof, is not void under section 7, Article VII, of the Constitution, because it does not provide for a special election to ascertain the will of the people, since the general laws relating to such elections are applicable.

7. The records of a municipality showing that a proposition to allow it to issue bonds, authorized by the Legislature, was submitted after thirty days' notice, and that a majority of the qualified registered electors signified their assent by their affirmative ballots, are conclusive evidence that the will of the majority was so expressed.

8. In an action by the holder of bonds of a town to compel the town to pay them, an answer merely denying the complaint and setting up as a counterclaim, nonuser, failure to build and complete the road, and other facts which might enable the State to have the charter declared forfeited, and praying that the bonds should be delivered up and canceled, does not constitute such a counterclaim or demand for affirmative relief as will prevent the plaintiff from taking a nonsuit upon the holding by the judge that the bonds are void.

9. The *bona fide* purchaser of municipal bonds issued in aid of a railroad is required to look no further than to see whether those things essentially prerequisite to the issuing of a valid municipal bond have been done, and cannot be made to suffer because the town did not take proper and effective measures to secure the completion of the road in whose aid the bonds were issued.

PETITION for mandamus, heard before *Hoke, J.*, and a jury, at (341) November Term, 1894, of GRANVILLE.

J. S. Manning, Shepherd & Busbee, and W. J. Leake for plaintiff. (361)

W. A. Guthrie and Edwards & Royster for defendants.

AVERY, J. If an action had been brought by a taxpayer of the town of Oxford to enjoin the issue of bonds in payment of its subscription to the Oxford & Coast Line Railroad Company, any final judgment upon the merits would have operated as an estoppel, both upon other taxpayers of the town and the municipality itself. 2 Black Judgments, sec.

584. In two actions brought by that company against the mayor and commissioners of Oxford, asking for mandamus to compel the issuing of a subscription of $40,000 in bonds to the capital stock of the company, in which a controversy arose, among other matters, as to the authority to make such subscriptions, a compromise decree, drawn in pursuance of a previous agreement between the parties, was entered in the two suits, consolidated by order of the court into one, whereby the town was released from further liability upon the issue of $20,000 instead of $40,000 in its bonds, payable to the company, and upon surrendering its right to call for certificates of stock in the company to the amount of $40,000. If the decree concluded the town from ques-
(362) tioning the validity of the bonds, the estoppel would be as effectual in favor of the plaintiff, who sues upon past-due coupons, of which it is the owner, as if the action were brought by the railroad company. *Thompson v. Lee County,* 3 Wallace, 327. Prior to the passage of ch. 178, Laws 1874-75 (The Code, sec. 574) an agreement to receive a part in lieu of the whole of a debt due was held to be a *nudum pactum* as to all in excess of the sum actually paid. *Currie v. Canady,* 78 N. C., 91; *Hayes v. Davidson,* 70 N. C., 573; *Mitchell v. Sawyer,* 71 N. C., 70; *Love v. Johnston,* 72 N. C., 415. But where such agreements have been made since the act was passed, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. *Koonce v. Russell,* 103 N. C., 179. Indeed, independent of statutes, where disputed claims have been preferred against it, "a town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion, and such an agreement (says *Judge Dillon*) is founded upon a sufficient consideration, and will be enforced." 1 Dillon Mun. Corp., sec. 477; *Baskerville v. Tweed,* 20 Me., 178; *Amy v. Shelby County, etc.,* 114 U. S., 387. In our case there were mutual considerations which, it would seem, would have given vitality to the contract and made it enforcible even at common law. The town surrendered its claim to $40,000 in certificates of capital stock, in consideration of being released from its obligation to issue forty instead of twenty $1,000 bonds to the railroad company. We can see no force in the contention that the failure to deliver a release in accordance with the decree in any way affects its validity when it does not appear that the railroad company ever refused or neglected, on demand, to execute it. The town cannot take advantage of the laches of its authorities in failing to demand its execution,
(363) in order to repudiate their debt, if it is valid. The plaintiff was warranted in assuming that the town had demanded its execution and was not bound to look behind the decree to ascertain whether it had exercised common prudence in protecting itself. These twenty bonds

recite that they are issued in pursuance of the power and authority granted in chapter 49 of The Code, chapter 315, Laws 1891, and section 30, chapter 21, Laws 1885 (being the charter of the town), and also by virtue of an election held as provided for in the acts referred to, and in accordance with the compromise decree in the cases to which we have referred. It is conceded, without question, that no municipal corporation is authorized to issue bonds unless the power to do so is granted either in express terms or by necessary implication by the Legislature. The unavoidable implication arising from section 10, chapter 315, Laws 1891 (the charter of the company), is that it was the intention of the Legislature to empower "counties, cities, towns and townships" to issue bonds to aid in building the road, and to compel either corporate body that might lend its credit in that way to pay all such tax as it might collect on the franchise and property of the completed road, in payment of the interest accruing thereon. But it is insisted that the power cannot be exercised in the face of the prohibitory provision of the Constitution (Art. VII, sec. 7) unless the authority to loan its credit received the sanction of a majority of the qualified voters of the municipality, and that it is as essential to the validity of the bonds that the Legislature should in express terms authorize the election and require specifically a vote of a majority of the qualified voters, as that it should empower the town to aid. It is admitted to be an essential prerequisite to the validity of such bonds that the Legislature should grant the power to aid, and that the majority of the qualified voters should signify their approval by their ballots cast. The machinery for ascertaining the (364) will of the electors is a secondary consideration. The main purpose was to prohibit the imposition of a tax for certain objects without the assent of a majority of the qualified voters. The acts of 1891, in assuming that counties, towns and townships may subscribe, impliedly manifests a purpose on the part of the Legislature to allow municipalities "to issue bonds to aid in building" this railroad, and leaves them at liberty to aid as may seem to them best, and, by implication, to do what they were expressly allowed to do in the charter of the Oxford & Clarksville road—either make donations or subscriptions. The statute puts no restriction upon the town as to the manner of issuing its bonds in aid of the construction, leaving them to donate or subscribe at their option, with the approval of the requisite number of voters. In *Wood v. Oxford,* 97 N. C., 227, *Justice Merrimon,* speaking of the contention that the provision in the railroad charter, that if a majority of the votes cast were favorable the town would be authorized to issue the bonds, was unconstitutional, said: "It may be that the statute contemplated that if a simple majority of the qualified voters, voting, shall be in favor of such donation, this shall be sufficient to authorize it to be made. This is

questionable, but we need not decide whether it so provides or not, because the purpose to allow such donation to be made is manifest, and it appears in the case before us that a clear majority of all the qualified voters of the town of Oxford voted in favor of the proposed donation of $40,000 in question, thus certainly meeting the essential prerequisites provided by the statute, and observing the provisions of the Constitution (Art. VII, sec. 7) forbidding towns and other municipal corporations to make a debt, except, etc., unless by a vote of a majority of the (365) qualified voters therein, and likewise observing the requirements of the charter of the town." It is now well settled that, under the constitutional provision, a majority of the qualified voters is necessary, and, in the absence of proof to the contrary, a majority of the registered voters will be deemed a majority of the qualified voters. *Rigsbee v. Durham, supra.*

The purpose of the Legislature to authorize the issue in our case in order to aid in any way they might deem best is apparent. The fact that a majority of the qualified voters have cast their ballots in favor of extending aid by subscription is undisputed. If it is not admitted, the records of the town showing that a proposition to allow the municipality to lend its aid by the issue of bonds was submitted after thirty days' notice, and a majority of the qualified registered electors signified their assent by voting "approved," and it is settled that such a record is conclusive evidence that the will of the majority was so expressed. *Norment v. Charlotte,* 85 N. C., 387; *Cain v. Commissioners,* 86 N. C., 8; *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown, ib.,* 127; *McDowell v. Construction Co.,* 96 N. C., 514; *Rigsbee v. Durham,* 98 N. C., 81. In some of the cases which we have cited it is declared by the Court to be immaterial that the act providing the machinery for ascertaining the wishes of the qualified voters had provided, in direct conflict with the Constitution, as construed by the Court, that a majority of the votes cast should be sufficient. These decisions rest upon the ground that the two evils intended to be guarded against were the using of the credit of municipal corporations, first, without the assent of the Legislature clearly given, and, second, without the approval of a majority of the qualified voters fairly ascertained. It was this broad view which inspired the intimation that either section 30 of the charter of Oxford, a section of a railroad charter which was declared, in (366) part, unconstitutional, or the constitutional provision itself in connection with the general election law, would be sufficient to authorize an election to ascertain the will of the voters, where the assent of the Legislature that the municipality might create a debt had been clearly given. In *Wood v. Oxford* the Court said (after what has already been quoted from the opinion): "As the purpose of the Legisla-

ture to allow such donations to be made is clear and express, it is sufficient if the condition upon which it might be made has certainly, in the most adverse view of the proposition as to the vote, happened." In any aspect, it is beyond question that the requisite constitutional majority has approved of what the Legislature first clearly assented to—lending the aid of the town by issuing its bonds to the building of the railroad. With the legislative permission to so use its credit, we see no reason why the necessary implication should not follow that the town might ascertain the wishes of the voters in a way provided in the charter for the purpose of borrowing money in compliance with the same section of the organic law, or, in the absence of such special provision, under the general law governing elections held for municipalities, the natural inference being, when an election is authorized, that it is to be held in the usual, if some unusual mode is not provided. Where legislative sanction is given and the will of the majority of qualified voters is actually ascertained, it is certain that the danger line has not been crossed, so as to wrongfully subject municipalities to the burden of a debt for any purpose except necessary expenses. The imperative requirement of the Constitution is that there shall be a concurrence of the legislative and the popular will, the former evidenced by a grant of authority to vote, the latter by the record that a majority of the qualified voters have cast the ballots in favor of creating the debt. Whether the legislative purpose is expressed or may be fairly implied from (367) the language of the statute, is immaterial (1 Dillon, *supra,* sec. 89 (55); *Clark v. Des Moines,* 87 Am. Dec., 423), as is the question whether the election is conducted under statutes passed for the particular purpose, or, in the absence of such special provision, under the general election law enacted for the town or for counties generally, so that the sense of the voters is unquestionably and fairly ascertained. The power to subscribe being given, the fair implication was that the Legislature intended that the use of the machinery provided generally for taking a vote to authorize the borrowing of money might be used. The principle of strict construction is never "carried to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment." If the special provision for holding an election in a town or county fails to provide in detail the mode or what is in common parlance called the machinery for conducting it, it must be inferred that the Legislature intended that general election laws might be resorted to, to fill in the *hiatus,* and not that the legislative will should be thwarted or defeated by any such omission.

Brenan v. Bank, 144 U. S., 173, which was relied upon by the defendant, is clearly distinguishable from that at bar. If the only authority for issuing the bonds, that gave rise to this controversy, were the pro-

visions in the charter empowering the town to borrow money, it would be a case in point. But we have already adverted to the fact that the charter of the railroad company (section 9, chapter 315, Laws 1891) expressly contemplates and, by implication, authorizes the issuing of the bonds by the town to aid in the building of the road (not simply the borrowing of money by such towns for corporate purposes), and that, in accordance with a familiar rule of construction, all statutes bear-
(368) ing upon the subject must be construed *in pari materia.* Every doubt must be resolved in favor of the constitutionality of any act passed by the Legislature (*S. v. Moore,* 104 N. C., 743); and upon the same principle, where the assent of the Legislature to the creation of a municipal debt has been given by fair implication, it would be "sticking in the bark" to render such expression of its will nugatory by insisting that special election machinery should have been provided for ascertaining the popular feeling, when general laws can be made to subserve the purpose. It must be conceded that the result of the election cannot be drawn in question in this collateral proceeding if the law authorized the holding of it. *McDowell v. Construction Co., supra.*

Pretermitting the question, whether the Court could look beyond the compromise judgment for the purpose of determining whether the statute authorized the holding of the election, we have preferred to declare that the town was, in fact, authorized by fair implication of law to hold it. The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine the statutes referred to, and ascertain at his peril whether the essential prerequisites to the validity of the bonds have been met, both by legislative and popular action. We hold that, upon a fair construction of the organic law and pertinent statutes, and their application to the facts of this case, there has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the court erred in holding that the plaintiff was not entitled to recover, and the judgment of nonsuit must be set aside.

New trial.

DEFENDANT'S APPEAL.

(380) AVERY, J. The plaintiff had a right to insist upon a judgment of nonsuit at the close of the evidence, in deference to the intimation of the court, unless the defendant had set up in its answer a counterclaim, which, if made good by the proof, would entitle the town to affirmative relief. *Mfg. Co. v. Buxton,* 105 N. C., 74; *Pass v. Pass,* 109 N. C., 484. The defendant might have made the subscription to the capital stock of the company dependent upon the completion of its road to a certain point before a given time, and the failure to do so was

an oversight for which the plaintiff here, who was, at most, not bound to look further than to see whether those things that were essentially prerequisite as to the issuing of a valid municipal bond had been done, cannot be made to suffer. It was competent for the State to authorize the institution of a suit to dissolve the corporation for nonuser of its powers (*Bass v. Navigation Co.*, 111 N. C., 439), but the validity of the coupons sued upon cannot be drawn in question in any such indirect way as that relied upon in the answer. The mere prayer, at the conclusion of the answer, that the bonds and coupons, of which the plaintiff claimed to be the owner, should be surrendered up to be canceled, is not of itself such a demand for affirmative relief as would entitle the defendant to insist upon a verdict and judgment thereon instead of judgment of nonsuit. It is not the formal demand, but the preceding averments, that constitute the independent cause of action, which the defendant has elected to set up as a counterclaim when sued for any matter growing out of the same transaction, or to make the ground of a new suit. The defendant has failed to make any allegations which would entitle it to affirmative relief. The mere denials, which put at issue the allegations upon which the plaintiff bases its claim to relief, are plainly insufficient; and, for the reasons given, the averment of facts upon which the State might proceed for the forfeiture of the company's franchise, would not constitute an independent cause of action in favor of (381) the defendant.

We see no sufficient reason to take this case out of the general rule that the plaintiff may submit to judgment of nonsuit, and appeal, when the court makes an intimation adverse to him at the conclusion of the evidence.

The ruling of the court, in so far as it allowed the judgment of nonsuit to be entered, was

No error.

Cited: Claybrook v. Comrs., 117 N. C., 459; *Bank v. Comrs.*, 119 N. C., 215, 219; *Glenn v. Wray*, 126 N. C., 731, 732; *Ramsey v. Browder*, 136 N. C., 253; *Merrick v. Bedford*, 141 N. C., 506; *Bank v. McCaskill*, 174 N. C., 364.

THE DURHAM CONSOLIDATED LAND AND IMPROVEMENT COMPANY v. W. A. GUTHRIE ET AL.

Action to Recover Money Paid on Contract for Land—Sale of Land—Parol Contract—Statute of Frauds—Repudiation by Vendee.

1. The statute of frauds (section 1554 of The Code) only requires that a contract for the sale of land shall be in writing, signed by "the party to be charged therewith," and does not render void a contract that contains a defective description merely.
2. A contract concerning the sale of land, if signed by the vendor only, binds him but not the vendee.
3. If, under a parol contract for the sale of land, the vendor repudiates the sale, the vendee may recover back the money paid by him under the contract.
4. A parol contract for the sale of land is not void except at the instance of the party who is allowed to plead and does plead the statute of frauds, and neither party who repudiates it can take any advantage or benefit under it; hence,
5. Where the vendee in a parol contract for the sale of land repudiates the same, he cannot recover money which he has paid thereunder to the vendor, who is able and willing to perform his contract.
6. Where the vendee in a contract for the sale of land repudiates the same, after demand by the vendee for a compliance therewith, and thereafter the vendor disposes of the land, the vendee cannot, in an action brought more than twelve months after his refusal to comply, recover money paid by him under such contract to the vendor.
7. Uncertain and speculative profits will not be allowed to form a part of the recovery in an action for damages for breach of contract.

(382) ACTION, tried before *Green, J.*, and a jury, at January Term, 1895, of DURHAM. The action was brought by the plaintiff to recover money paid or "loaned" to the defendants. The defendants pleaded a counterclaim, and from a judgment in favor of the defendants for $330 on their counterclaim the plaintiff appealed.

The defendant had contracted with Fowler, Ferrell & Hicks for certain lands in Durham County, and held their bonds for title when the purchase-money was paid. In 1890 the plaintiffs and defendants entered into the following agreement marked Exhibit B concerning the same lands:

October 1, 1890—To The Durham Consolidated Land and Improvement Company: We will let you take the property at the actual cost to us, and on the same terms as we bought it, which are about as follows: Cash payments, $2500—$4275 in one year from date of our purchase—$1600 in eighteen months from date of our purchase. About $3000 of these time-payments is at 6 per cent interest, the balance at

8 per cent. You are to be at all expense of advertising and selling the property, and putting it in proper condition for sale to the best advantage, by opening streets and making whatever improvements is necessary to sell the property in one year from date, and after deducting the actual expenses only from the proceeds of sale, the remainder of the proceeds is to be equally divided between us and yourselves.

S. T. MORGAN,
For Guthrie, Carr and Morgan.

The plaintiffs accepted the above proposition, paid the cash sum of $2,500, took possession of the lands, cut and carried away (383) wood, trees, etc., received rents and remained in possession for more than twelve months. In March, 1892, the defendants notified the plaintiffs that they (defendants) were sued by Ferrell for his money then just due, and added: "We request you to comply with the terms of our contract with you, and make payment of the purchase-money and take title deeds for all property." Nothing more was paid or done by the plaintiffs, and in the spring of 1892 the defendants resumed possession of the lands. Afterwards, the plaintiffs demanded that the $2,500 be paid back, which was refused by defendants. In September, 1893, the plaintiffs commenced this action to recover the $2,500, and filed their complaint, which the defendants answered, and set up a counterclaim for the value of wood, timber, rent, etc., received during the plaintiff's possession. His Honor submitted these issues:

1. Are the defendants indebted to the plaintiffs; if so, in what sum? No.

2. What is the value of the timber and rents received by the plaintiffs from the lands described? $330.

The court rendered judgment in favor of the defendants according to the verdict, and each party appealed.

F. H. Busbee and Shepherd, Manning & Foushee for plaintiffs.
J. W. Graham and Boone & Boone for defendants.

FAIRCLOTH, C. J. We find from an examination of the record that the main question is, Can the plaintiffs recover back the $2,500 paid in part performance of the agreement set out in the statement of the case?

The action does not seek to enforce the contract, but to recover back the money paid, and the complaint alleges that the written agreement (384) is defective in its descriptive part, and is therefore void by the statute of frauds and cannot be enforced against the defendants by a bill for specific performance. The defendants answer and say, When you perform your agreement, we are ready, willing and able to

perform our part by giving you good fee simple deeds according to the true boundaries, which are well known to and recognized by you, by reason of your acceptance and possession of the lands for more than twelve months.

The plaintiff's position rests upon a misconception of the statute of frauds, sec. 1554. The statute only requires that the contract shall be in writing and signed by "the party to be charged therewith." So that if A contracts in writing to sell a tract of land to B, whose promise to pay is not in writing, A would be bound to perform, but B would not, if he saw proper to avail himself of the statute. *Love v. Welch,* 97 N. C., 200. If A and B contract for the sale of the land by parol, and the vendor elects to repudiate the contract, the vendee may recover back the amount he has paid under the contract. *Wilkie v. Womble,* 90 N. C., 254. A parol contract for land is not void, except at the instance of the party who is allowed and does plead the statute, and neither party who repudiates the contract can take any advantage or benefit under it. The repudiator is left in the condition in which he finds himself at the time of the abandonment. The plaintiffs cannot recover *in assumpsit,* because it is admitted that they had a special contract, and so long as it exists they cannot fall back on the common counts. The cases of *Green v. R. R.,* 77 N. C., 95, and *Foust v. Shoffner,* 62 N. C., 242, are on "all fours" with the case before us. In the first case, it was agreed verbally that defendant would convey a certain tract of land to the plaintiff as soon as he would deliver to defendant an agreed number (385) of cords of wood. Plaintiff delivered a part of the wood and quit, and sued defendant for the value of so much wood as he had delivered. Defendant said, I am ready and able to give you a good title to the land as soon as you perform your part of the contract, and the Court held that plaintiff could not recover.

It was conceded that defendants had otherwise disposed of the land before this action was begun, and it was urged by counsel that inasmuch as defendants were not in a position to convey the title to plaintiffs at that time, therefore the plaintiffs ought to recover. The argument is without force, because it ignores the fact that more than twelve months prior thereto the plaintiffs upon demand had failed to perform their obligation then past due, and it would have been unreasonable to require defendants to hold their property in an unproductive state until it suited the pleasure of the plaintiffs to make the first move.

We think it unnecessary to consider the numerous other points raised at the trial and on the argument, for assuming each and every one of them in favor of the plaintiffs, with the question above settled, as it is, the result would be the same.

Affirmed.

DEFENDANTS' APPEAL IN SAME CASE.

FAIRCLOTH, C. J. This appeal is dependent upon the same facts as are found in the plaintiffs' appeal. The defendants recovered, in the opinion of the jury, the value of the actual damages to their property, and asked for the profits which they thought would have been realized if the plaintiffs had pressed their speculations with more energy in accordance with the agreement. His Honor thought these were too uncertain and too near out of sight, and in this we agree with him.

Affirmed.

Cited: Land Co. v. Guthrie, 123 N. C., 185; *Brown v. Hobbs,* 154 N. C., 555; *Bateman v. Hopkins,* 157 N. C., 474.

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P. H. SMITH v. MAGGIE J. SMITH.

Trial—Witness—Criminating Evidence.

1. The true intent and meaning of section 11, Article I, of the Constitution of North Carolina, and of section 1354 of The Code is that a witness shall not be compelled to answer any question the answer to which will disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of a crime; therefore,
2. In a proceeding for divorce a witness cannot be compelled to answer whether he ever had criminal intercourse with the wife, for, although one such act is not a criminal offense, an admission of it might disclose other facts leading to proof of a crime which would not have been known but for the admission.

ACTION for absolute divorce, tried before *Winston, J.,* and a jury, at June Term, 1894, of DURHAM.

The jury found for their verdict that the plaintiff and defendant were never married, and the other issues were not responded to. Plaintiff appealed from the refusal of his motion for a new trial, assigning as error, among other things, his Honor's refusal to compel a witness to answer a question propounded to him, which is set out in the opinion of the *Chief Justice.*

J. S. Manning, Boone & Boone, Argo & Snow for plaintiff.
Fuller, Winston & Fuller for defendant.

FAIRCLOTH, C. J. On the trial a witness for the plaintiff was asked,

"Did you ever have criminal connection with the defendant; if so, when was the first time?" and other questions of a like tendency. The witness declined to answer, stating that his answer would tend to criminate him. His Honor found as a fact that an affirmative answer would tend to criminate the witness and declined to compel him to
(387) answer, and the plaintiff excepted.

The Constitution of the United States, fifth amendment, declares that "No person shall be compelled in any criminal case to be a witness against himself." The Constitution of North Carolina, Article I, section 11, declares that he shall "not be compelled to give evidence against himself." The Code, section 1354, says that no person shall be "compellable to answer any question tending to criminate himself."

We think the provisions of our Constitution ought to be liberally construed to preserve personal rights and to protect the citizen against self-incriminating evidence. It is conceded and settled that a single unlawful act of sexual intercourse is not a criminal offense, but the question presented is, would the admission by the witness of a single act tend to criminate him. Our opinion is that it does, and that the witness ought not to be compelled to answer the question, for the reason that the admission may be the connecting link of a chain of evidence, disclosing other facts and other circumstances leading to clear proof of a crime which would not have been known without the admission. The usual reply is that his admission cannot be used against him in any future prosecution, and that he is therefore protected.

This fails to reach the mark, for although it cannot be used against the witness it may be the means, the link, by which other sufficient evidence has been discovered, which could not have been done without the admission. No one knows what facts and secrets are locked up in the bosom of a witness, and we think the true intent of the Constitution is that the witness shall not be compelled to disclose anything that may lead to criminal conduct without absolute protection against future prosecution.

This question has been much discussed in England and in our
(388) sister states. It would be too tedious to enumerate all the decisions. We are content to refer to and quote from one or two. In Broom's Legal Maxims, p. 968, it is stated that "A witness is in general privileged from answering, not merely where his answer will criminate him directly, but where it may have a tendency to criminate him," citing many decided English cases. In 1 Burr's Trials, 245, *Chief Justice Marshall* says: "If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be

to furnish matter for that conviction." In *Counselman v. Hitchcock.* sufficient to convict him of any crime, he is not bound to answer it so as 142 U. S., 547, the question was fully argued and all the pertinent authorities were examined and reviewed. The Court held that "The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. It is a reasonable construction of the Constitutional provision that a witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which, or the means by which, evidence of its commission, or of his connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him." The rule may sometimes work hardship and possibly does in this instance. The trial seems to have turned on the admission or exclusion of the question put to the witness Cole, although there was other apparently strong evidence.

The policy of compelling witnesses to answer all questions, with a clause of absolute protection against future prosecution, is one for the legislative branch of the government and not for the (389) courts.

Affirmed.

Cited: In re Briggs, 135 N. C., 121, 131; *S. v. Medley,* 178 N. C., 712.

W. O. BLACKNALL v. W. H. ROWLAND ET AL.

Action for Deceit—Contract—Sale of Corporate Stock—Representations as to Financial Condition of Corporation and Value of Stock.

1. Where, in a written contract for the exchange of stock in a corporation for land, the instrument stated that certain representations therein as to the financial condition of the corporation and the value of the stock were the basis of the trade, and opportunity was allowed the purchaser of the stock for investigation as to its value, and subsequently a formal assignment of the stock was made by a writing which contained no representations: *Held,* (1) That the assignment was a part of the same transaction as the agreement for the sale, and was based upon it, and the fact that the assignment contained no representations as to the condition of the corporation or the value of the stock, will not prevent a recovery for the breach of the conditions contained in the contract of sale; (2) the fact that the purchaser of the stock had an opportunity to investigate the value of the stock, etc., will not relieve the sellers from liability for the

misrepresentations as to such value, etc., for the purchaser was not bound to make such investigations, but had the right to rely upon the representations of the sellers.

2. Expressions of opinion as to the value of the subject-matter of a trade do not render the seller liable if they are incorrect, unless both falsely and fraudulently made; it is otherwise when the representations are statements of facts of which the seller has peculiar means of knowledge and of which the purchaser is ignorant; hence,

3. Where, as the basis of a sale of stock, the seller makes representations as to the financial condition of a corporation and the value of the stock therein, such representations constitute a warranty of the truth thereof, and for a breach thereof the seller is liable to the purchaser.

(390) ACTION tried before *Shuford, J.*, and a jury, at January Term, 1894, of DURHAM. There was a verdict for the defendant, and from the judgment thereon plaintiff appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

J. S. Manning for plaintiff.
J. W. Graham and Boone & Boone for defendants.

MONTGOMERY, J. On 4 October, 1888, the plaintiff and the defendants entered into an agreement, which is in the following words and figures:

W. H. Rowland and W. R. Cooper propose to sell, and W. O. Blacknall agrees to buy the interest of said Rowland & Cooper in fifty shares of the capital stock of the Durham Sash, Door and Blind Manufacturing Co. As the basis of the proposition and acceptance it is represented and understood that said stock is of the par value of $50 a share; that fifty per cent of the par value of each share has been paid thereon in cash, and twenty-five per cent of the par value thereof has been paid by a declaration of dividends out of the net profits of the business and operations of the company, so that seventy-five per cent of the par value of the stock of said company is now legally paid up; that the company owes for machinery $2,000; for lumber about $_____, and floating debt of $600 to $700. That its assets are available and in good condition and exceed its liabilities by $3,000; that Rowland and Cooper will be able to legally assign said stock or interest and have the same duly transferred on the company's books to the said Blacknall. In exchange of
(391) said stock or interest said Blacknall is to convey to said Rowland and Cooper and their heirs, by good and sufficient deed in fee simple an unincumbered title to 28 acres of land in Durham County adjoining T. B. Lyon on the east, N. C. R. R. Co. on the south, W. O. Blacknall on the west, S. J. Hester on the north, it being just east of the 30 acres now under mortgage.

This trade is conditioned upon the representations above as to condition of business and stock of said company and other statements being verified upon examination of its affairs by an expert bookkeeper of Blacknall's selection and at his expense, and upon the condition that his title to the land named above is good. Witness the signature of W. H. Rowland and W. R. Cooper and W. O. Blacknall, 4 October, 1888.

ROWLAND & COOPER,
W. O. BLACKNALL.

Test: E. J. PARRISH.

Two weeks afterwards the defendants assigned and set over to the plaintiff the stock mentioned in the agreement by a paper-writing in these words:

For full value, and with consent of all the stockholders, we assign, set over and convey to W. O. Blacknall and his executors, administrators and assigns all our right, title and interest in and to fifty shares of stock in The Durham Sash, Door and Blind Manufacturing Company, and in the property, assets, franchises and effects of said company: And we hereby authorize a transfer upon the books of said company of all our said interests to said W. O. Blacknall, and we hereby assign the annexed receipts for payments upon said stock and our subscription thereto. Said receipts show the amounts paid by us on said subscription in cash, twenty-five per cent thereof in addition to cash having been credited to us in dividends declared by said company. (392)

Witness our hands and seals this 19 October, 1888.

WM. H. ROWLAND, [Seal.]
W. R. COOPER. [Seal.]

Witness: N. A. RAMSEY.

The plaintiff conveyed the land to the defendants on the same day the stock was assigned to him.

It is contended by the defendants that the two paper-writings executed by them have no connection one with the other, that the latter one constitutes in itself the sale of the stock, independent of the agreement, and being without representations or warranty the doctrine of *caveat emptor* applies. We do not take this view of the matter. The writing last executed by the defendants is not the whole of the transaction between the parties. It is simply the assignment of the stock under the agreement; was made, as an inference of law, under it, and had for its basis that instrument. But even if it is admitted that the assignment of the stock be the paper which passes title to the property and the principal instrument in the sale, yet the agreement would be a collateral undertak-

ing and form a part of the contract by its express terms, as set forth in these words:

"W. H. Rowland and W. R. Cooper propose to sell, and W. O. Blacknall agrees to buy the interest of said Rowland and Cooper in 50 shares of the capital stock of The Durham Sash, Door and Blind Manufacturing Company. As the basis of the proposition and acceptance it is represented and understood that said stock is," etc. The defendants further contend that whatever legal effect the agreement might have had when it was entered into, the opportunity which the plaintiff had in the
(393) interim between the agreement and the assignment of the stock to examine into the representations and statements made in the agreement, relieves the defendants of any liability which might have attached originally to them on account of such representations. We are not of this opinion. The plaintiff was not bound to make any examination into the facts stated in the agreement; he had a right to rely upon them. When this case was before this Court at February Term, 1891 (108 N. C., 554), *Chief Justice Merrimon,* in delivering the opinion, said on this point: "He (plaintiff) was not bound to verify the representations made: he might as a matter of caution have done so, but he might not reasonably believe, rely and act upon the plain, pertinent and material statements made by the defendants to him in the paper-writing and otherwise."

We will now consider the nature and legal effect of the agreement. If the representations are only expressions of opinion, then, to enable the plaintiff to recover, they must not only be false but fraudulent; not so, however, with the representations as facts. Are these representations merely expressions of opinion offered as inducements to the plaintiff to bring about the trade, or are they solemn statements of fact of which the defendants had peculiar means of knowledge and of which the plaintiff was ignorant? These statements, as to the value of the stock, indebtedness of the company and its assets, are not only specifically set out, but they are preceded by the words "as the basis of the proposition and acceptance it is represented and understod," etc. This is no "trade-talk," no "puffing of one's wares." They must mean that the defendants intended to say that they would make good to the plaintiff any damage he might sustain in the trade, if they turned out to be not true. There is therefore in the agreement a warranty of the facts stated therein as being true.

(394) His Honor below instructed the jury that the agreement of 4 October, 1892, was not a warranty. We are of the opinion that there was error in the instruction given. The plaintiff is entitled to a new trial.

New trial.

Cited: S. c., 118 N. C., 419; *Ferrell v. Hanes,* 119 N. C., 213; *May v. Loomis,* 140 N. C., 357; *Wrenn v. Morgan,* 148 N. C., 106; *Helms v. Holton,* 152 N. C., 592.

J. H. SHIELDS v. THE TOWN OF DURHAM.

Action for Damages—Injuries to Prisoner—Insufficient Protection from Cold—Liability of Town.

1. If the authorities of a town provide in its prison the necessaries to protect a prisoner from bodily suffering, but the custodians of the jail neglect or fail to supply him with such necessaries, the town is not liable in damages for injury caused to the prisoner by such neglect or failure of the custodians, provided it is not shown that the officers of the town were negligent in supervising the custodians.

2. Where, in the trial of an action for damages for injury to plaintiff's health, caused by the absence of window glass in a cell in which he was confined, it was not shown that the town authorities had notice of such defect or that they were negligent in supervising the jailer, etc., the plaintiff cannot recover.

ACTION to recover damages sustained by plaintiff, while incarcerated in the guardhouse of the town of Durham, tried before *Hoke, J.,* and a jury, at August Term, 1894, of DURHAM, having been removed to that court, on motion for a change of venue, from Orange County, where it was begun.

There was judgment for the plaintiff for $200, and defendant (406) appealed.

J. W. Graham and Manning & Foushee for plaintiff.
Boone & Boone for defendant.

MONTGOMERY, J. In actions of this nature this Court has (407) decided in *Moffit v. Asheville,* 103 N. C., 237, that cities and towns "are liable in damages only for a failure, either to so construct their prisons, or so provide them with fuel, bed-clothing, heating apparatus, attendants and other things necessary as to secure to the prisoners committed to them a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health." If the aldermen of the City built a reasonably comfortable police prison and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners

from excessive cold or heat or hunger and to protect their health, the City would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer, the policemen, or the attendants to keep the fires burning all night, or to give the plaintiff the necessary bed-clothing furnished to them. In *Moffitt's case, supra, Justice Avery,* who delivered the opinion of the Court, further says: "We think that where window-glass in the windows of a police prison has been broken, and the bed-clothing furnished for its inmates has been destroyed, but governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence as to subject the corporation to liability."

The facts in the case before us are almost identical with those developed on the trial in *Moffitt's case.* The plaintiffs in both testified to having been injured from cold blasts of air rushing through broken panes of window glass in the prison windows upon them in their cells, and for a want of blankets and bed-clothes and fires to protect
(408) them from the cold. The defendants in both cases introduced six or more witnesses, including the chief of police, the clerk of the board of commissioners and others connected with the city government, who testified that the governing authorities of the town had always furnished a plenty of warm blankets and had instructed the officers in immediate charge of the prison to keep a plenty on hand, and also to keep fuel and fires sufficient to make the prisoners comfortable, and had always furnished those officers with the means and credit to do so. In the present case, it was also put in evidence for the defendant that the chief of police had window panes put in as fast as drunken men broke them out. There was no evidence put in by the plaintiff to rebut this testimony of the defendant. No evidence was introduced by the plaintiff to show notice to the defendant of the broken panes of glass or of the want of blankets, bed-clothes or fire, or that the town authorities were negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition.

It is evident from the charge of his Honor that that part, and the only part of the complaint which made any allegation concerning the faulty construction of the guardhouse, to wit, "that the said guardhouse was a small room exposed, having glass in its windows broken out, and that by reason of, and in consequence of the bad condition of said guardhouse," was eliminated on the trial from the case, and that the case which his Honor submitted to the jury was upon the cause of action

for the defendant's failure to furnish the plaintiff with the proper bed-clothing and blankets and fires. His Honor in his instructions to the jury said: "If you shall find the prison to be as described by the plaintiff's testimony, and this arose because the town authorities had not made proper provision for the prisoner's comfort, and the (409) injury was caused by such failure, the jury will answer the issue Yes." If it should be thought that by these words the court submitted the question of the alleged faulty construction of the prison to the jury, the next sentences of the charge will show that that view of the case was not in his mind: "If the jury shall find that the defendant had provided fuel and blankets sufficient to make the plaintiff comfortable, the jury will answer the issue No; or if the injury to plaintiff arose because plaintiff did not take advantage of the provision that was made for his comfort, the jury will answer the issue No; or if plaintiff's injury arose because the policemen charged with the duty failed to give the plaintiff the benefit and protection of the provision made by the defendant, the jury will answer the issue No." If the matter of the construction of the guardhouse had been in his mind, he could not have given that portion of his charge last quoted, because the town might not have been negligent in the matter of furnishing blankets, bed-clothes and fires, and yet have been negligent in the building and construction of a guardhouse suitable for a prison. The instructions asked the court by the defendant numbered 8, 9, 10 should have been given to the jury. There is error, and the defendant is entitled to a

New trial.

Cited: *Shields v. Durham,* 118 N. C., 453; *Coley v. Statesville,* 121 N. C., 317; *Nichols v. Fountain,* 165 N. C., 169.

(410)

MOREHEAD BANKING COMPANY v. MRS. L. L. MOREHEAD, EXECUTRIX OF EUGENE MOREHEAD, ET AL.

Note of Executor to Pay Debts of Testator—Personal Liability of Executor—Knowledge of Creditor.

1. Where an executor executes a note in his representative capacity for money borrowed and used for the purpose of paying debts of the testator the estate is not liable, but the executor is personally liable therefor, and this is so notwithstanding the fact that the lender knows for what purpose the money was borrowed and how it was used.

2. In such case, the executor takes the risk of being reimbursed the amount of the note out of the assets of the estate on the final accounting.

ACTION tried at June Term, 1894, of DURHAM, before *Winston, J.*, and a jury.

The complaint alleged:

II. That some time in the year 1890 the plaintiff lent to the defendant, Mrs. L. L. Morehead, the sum of five thousand dollars, the said sum being borrowed by her, as plaintiff was then informed and believed, and still believes, to pay debts and thus relieve the estate of the said Eugene Morehead, and executed her negotiable promissory note to plaintiff for said five thousand dollars, which said promissory note she, the said Mrs. L. L. Morehead, signed identically as she signed the note set out in the next succeeding allegation, with B. L. Duke and Lucius Green as sureties thereto.

III. That said note so given for money so lent to and borrowed by the defendant, Mrs. L. L. Morehead, was from time to time renewed, and in renewal of said original indebtedness the defendants on the 16th day of March, 1893, executed to plaintiff their promissory note as follows, to wit:

(411) $5,000.00. DURHAM, N. C., 16 March, 1893.

Six months after date we, or either of us, L. L. Morehead, executrix of Eugene Morehead, B. L. Duke and Lucius Green, promise to pay to the order of Morehead Banking Company five thousand dollars, with interest at eight per cent per annum thereafter until paid, interest to be paid semi-annually in advance, negotiable and payable at Morehead Banking Company, Durham, N. C., for value received. The parties agree to take no advantage of any agreement for indulgence after maturity.

LUCY L. MOREHEAD,
Executrix of Eugene Morehead.
B. L. DUKE,
LUCIUS GREEN.

IV. That said note was at its maturity presented at the office of the Morehead Banking Company, in Durham, for payment and payment thereof refused. That said note and no part thereof has been paid, but the whole thereof is now due and owing to said Morehead Banking Company, the owner and holder of said note. That plaintiff is advised that the said note made the said Mrs. L. L. Morehead personally responsible,

as well as responsible as executrix, and that she owes said amount:

Wherefore, plaintiff demands judgment:

1. That it recover judgment against Mrs. L. L. Morehead, executrix of Eugene Morehead, and Mrs. L. L. Morehead, individually, as principals, and against B. L. Duke and Lucius Green as sureties, for the sum of five thousand dollars, with interest thereon from 19 September, 1893, until paid, at the rate of eight per cent per annum, and the costs of this action to be taxed by the clerk.

2. That it have such other judgments, orders and relief against either or all the defendants, whether in their personal or representative character, as it may be entitled to. (412)

The defendants, Mrs. L. L. Morehead, executrix of Eugene Morehead, deceased, and Mrs. L. L. Morehead, orally demurred to the complaint because the same did not state facts sufficient to constitute a cause of action against them, and for the same reason moved to dismiss the action as to them.

The demurrer was sustained as to Mrs. L. L. Morehead, executrix, but overruled as to Mrs. L. L. Morehead individually.

To this ruling and judgment plaintiff excepted, and insisted that the estate of Eugene Morehead was still liable, as the original debt had been contracted by him and the renewals thereof did not discharge his estate until the debt was paid, and from the refusal to hold said estate liable plaintiff appealed.

John W. Graham and Boone & Boone for plaintiff.
Fuller, Winston & Fuller for defendants.

AVERY, J. An executor cannot, by any contract of his, fasten upon the estate of his testator liability for a debt created by him and arising wholly out of matters occurring after the death of the testator. *Devane v. Royal,* 52 N. C., 426; *Hailey v. Wheeler,* 49 N. C., 157; *Beatty v. Gingles,* 53 N. C., 302; *Tyson v. Walston,* 83 N. C., 90; *McLean v. McLean,* 88 N. C., 394. Where an executor executed a promissory note as evidence of such debt and signs it, and renewals of it in his fiduciary capacity, the words "as executor" will be rejected as surplusage, and the contract interpreted as if made in terms by him individually. *Beatty v. Gingles, supra.* The rule is not modified by the fact that the note is given, as in this case, by an executrix for money which the creditor knows at the time is to be used in payment of the debts of (413) the testator; but the law assumes that she consents to incur the risk of reimbursement out of the assets on her final settlement. This is unquestionably a liability governed by this general principle. The *feme* defendant is answerable in her individual capacity.

Affirmed.

Cited: Alexander v. Alexander, 120 N. C., 474; *Mitchell v. Whitlock,* 121 N. C., 167; *Banking Co. v. Morehead,* 122 N. C., 319, 325; *S. c.,* 126 N. C., 279, 283.

MOREHEAD BANKING COMPANY v. LUCY L. MOREHEAD ET AL.

Contract—Action on Note—Note of Executor Given for Benefit of Decedent's Estate—Limitation of Individual Liability.

1. Contracting parties are not prohibited from inserting in a written agreement a provision that an implication, which the law would otherwise raise, shall not arise; therefore,

2. While an executrix who gives a note in her representative capacity for money borrowed to pay debts of the estate is personally liable, nothing else appearing, yet when it is so signed, but in the body of the note are inserted the words "L. L. M., Executrix, etc., but not personally," she is not personally liable.

ACTION heard before *Winston, J.,* at June Term, 1894, of DURHAM. The action was upon a note which had been given in renewal of a note on which the testator of defendant L. L. Morehead, executrix, was surety. The note sued on was as follows:

$4,000.00. DURHAM, N. C., August, 1892.

Six months after date, we or either of us, S. T. Morgan, J. S. Carr, W. W. Avery, and Mrs. L. L. Morehead, executrix of Eugene (414) Morehead, but not personally, promise to pay to the order of Morehead Banking Company four thousand dollars with interest at eight per cent per annum thereafter if unpaid, interest to be paid semiannually, negotiable and payable at Morehead Banking Company, of Durham, N. C., for value received.

MEBANE MILLS COMPANY,
By S. T. Morgan.
S. T. MORGAN,
J. S. CARR,
LUCY L. MOREHEAD,
Executrix of Eugene Morehead.
W. W. AVERY.

The plaintiff asked for judgment against Mrs. Morehead as executrix, as well as personally. She demurred orally to the complaint and moved to dismiss the action against her in both capacities. The de-

murrer was sustained as to her, personally, but was overruled as to her as executrix. To this ruling the plaintiff excepted and appealed, assigning the same as error, and insisting that the defendant could not limit her personal liability and that the words in the note did not have the effect of exempting her from personal liability.

J. W. Graham and Boone & Boone for plaintiff.
Fuller, Winston & Fuller for defendant.

AVERY, J. It is an elementary principle that every person who is not at the time laboring under some total or partial disability, such as infancy, insanity or coverture, has the legal capacity to enter into any agreement not prohibited by law, and that the lawful contracts of persons having the capacity to enter into them are binding upon and enforcible against the parties to them. It is equally familiar learning that all contracts between persons capable of entering into them, and (415) not in conflict with the State or Federal Constitution, in contravention of common or statutory law, or condemned as contrary to public policy or good morals, are lawful.

The plaintiff corporation and the defendant executrix both being capable of contracting, entered into an agreement, wherein it was especially stipulated that she, by signing a promissory note as executrix of her deceased husband, should not be held liable in her individual capacity. Such was the obvious purpose with which the words "Mrs. L. L. Morehead, executrix of Eugene Morehead, but not personally," were inserted in the body of the note, where the parties promising are named, and when she signed and the bank accepted the note both must have understood and assented to it, interpreted according to its plain meaning. 7 A. & E., 337, note 2. It was intended by the parties that she should incur no personal liability by signing in her representative capacity, and, if such a purpose can be carried into effect without running counter to any rule prescribed in furtherance of public policy, the plaintiff has no right to demand a personal judgment against her. The law does, for sufficient reason, sometimes restrict the right to limit one's liability by contract. As, for instance, where a railroad company attempts to stipulate against liability as a common carrier for injury due to its own negligence, this limitation is held to be void as against public policy. But on the other hand, where personal representatives, in the exercise of a power contained in a devise or acting under an order or decree of Court, have been required to execute conveyances of land, it has been the habit, in order to avoid raising the question of personal liability on the usual covenants of a deed, to specially stipulate that the executor or adminis-

(416) trator agrees to warrant and defend, etc., only in his representative capacity and to the extent to which he is empowered to do so. The doctrine under which the personal representative, who merely promises to pay by signing or by also inserting his name in the body of the instrument in his representative capacity, has been held personally liable was founded upon the old principle that he thereby acknowledged that he had assets of the estate in his hands and that the assets were the consideration of the note. *Sleighter v. Harrington,* 6 N. C., 332. "If," said *Judge Ruffin,* "such a promise were good, it made the debt personal. Whenever one becomes personally bound for the debt of another (no matter how) it becomes his own debt and must be paid out of his own estate. Nothing but satisfaction, or other matter which would discharge him from any other of his own personal debts, would discharge him from this. In *Bain's case, Lord Coke* is express that an executor can only show on the day of trial that he had no assets at the time of the promise." It would seem that the rule applicable to a personal representative, who signs in his fiduciary capacity, was founded upon a principle that can scarcely be said to have survived modern changes, but however it originated, it is a part of the law of this State repeatedly affirmed previously and last approved by us in a case between some of the same parties at this term. To hold the executrix bound by an implied promise in the face of an express stipulation, constituting a part of the common understanding that she should in no event be held personally liable, would be to allow a legal fiction to contradict a palpable fact. There is no principle of law which prohibits parties from inserting in a written agreement a provision that an implication, which the law would otherwise raise, shall not arise. The object of the courts in the interpreta-

(417) tion of contracts is to arrive at the intent of the parties, where they have not expressed it clearly, or to ascertain the precise terms of the agreement to which two or more minds assented. Where their meaning is unmistakable, there is no room for construction and nothing is implied, when everything intended is expressed with accuracy and certainty. Where the intention of the parties is plainly expressed and the agreement is not illegal, the law requires that the courts shall give effect to it. Rules of construction are resorted to in order to ascertain the meaning of uncertain or ambiguous language, but never to defeat a plainly expressed purpose. Such is the rule governing the interpretation of all other contracts, and there is no reason why the same test should not be applied to those made by personal representatives. *Christian v. Sugdom,* 21 N. Y., 182.

The point directly raised in this case is one of the first impression in this State, and we prefer to let our decision rest upon sound reason and

approved elementary principles, rather than to go out in search of analogous cases or authority from other courts. We have not, however, found any authority in conflict with the conclusion we have reached.

The appeal is from the refusal to give a personal judgment against the executrix. The judgment against the executrix in her representative capacity is not drawn in question. It is not material therefore to discuss the other question suggested on the argument, whether, as executrix, the *feme* defendant would be held liable, if the question were raised on this or the original note of her testator.

The judgment of the court to the effect that the executrix is not personally liable is affirmed.

Affirmed.

Cited: Mitchell v. Whitlock, 121 N. C., 167.

(418)

MARY L. HARGROVE v. HENRY P. HARRIS.

Action for Rent—Justice of the Peace—Jurisdiction—Claim and Delivery—Judgment Declaring Lien on Crop.

1. There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled, does not affect the action itself, which will go on if he is entitled to any other of the remedies.

2. Where plaintiff, in an action before a justice of the peace to recover $75 due for rent, alleged that defendant wrongfully detained the crop on which the rent was a lien, and incidentally asked for a delivery of the crop, which was not alleged to be worth "not more than fifty dollars," the justice of the peace was not deprived of jurisdiction by such allegation and prayer.

3. In such case the justice properly ignored the ancillary remedy, of which he had no jurisdiction, and rendered judgment for the amount found to be due for rent.

4. Inasmuch as the statute (section 1754 of The Code) makes a judgment for rent a lien on the crop, an adjudication by a justice of the peace that the judgment rendered by him in an action for rent was a lien on the crop does not invalidate the judgment, but will be treated as harmless surplusage.

ACTION heard before *Green, J.,* at January Term, 1895, of GRANVILLE, on defendant's appeal from a judgment of a justice of the peace.

The summons commanded the defendant "to answer the complaint of Mrs. Mary L. Hargrove, for the wrongful detention of a lot of tobacco.

corn, shucks, and fodder, value $75, due for rent, and demanded by said plaintiff."

The plaintiff complained before a justice that defendant was indebted to her in the sum of $60 and interest, due by note for rent of Ragland farm, and that she had the right to seize and sell the crops raised on said land under process of claim and delivery. The defendant
(419) moved to vacate and dismiss the claim and delivery proceedings for want of jurisdiction, which motion was overruled. The justice rendered judgment for $36.81 and costs, and the judgment proceeded as follows: "It is further adjudged that this judgment is a lien upon all the crops of every description raised in 1894 upon the plaintiff's land, known as the Ragland land."

On the hearing of the case on appeal his Honor granted the defendant's motion to dismiss on the ground that the justice of the peace had no jurisdiction, from which judgment the plaintiff appealed to this Court.

J. W. Graham and P. C. Graham for plaintiff.
A. J. Field for defendant.

CLARK, J. There is no such thing as an action for claim and delivery. Under our Constitution, Art. IV, sec. 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i.e., arrest and bail, claim and delivery, injunction, attachment, and appointment of receivers. These need not be asked, even if the party is entitled to them, *Wilson v. Hughes,* 94 N. C., 182, and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. *Deloatch v. Coman,* 90 N. C., 186; *Morris v. O'Briant,* 94 N. C., 72. This is the broad distinction between the present system of procedure and that formerly in force. Under the old system, all these were distinct forms of action, and so much regard was paid to the mode in which relief was asked that however meritorious the cause of action, a mistake in the exact manner of seeking the remedy sent the
(420) plaintiff out of court. The common sense of mankind and the intelligence of the age have caused the old system to be abrogated in the large majority of states and countries of the English-speaking race—indeed it was never in force in any other. It was abolished in this State over a quarter of a century since.

The gist of the present action is that the defendant was indebted to the plaintiff $75, due for rent. Incidentally the plaintiff asked, or might be construed as asking, for claim and delivery of the crop, which is not alleged to be worth "not more than fifty dollars." The justice of

the peace properly ignored the ancillary remedy of which he would have had no jurisdiction, and rendered judgment for the amount of rent found to be due, $36.87. *Starke v. Cotten,* 115 N. C., 81. In that case the action was for $70.80 for "damages for breach of a contract" as to the delivery of certain tobacco, and to subject the proceeds of the sale of tobacco. It was held that while the justice had no jurisdiction of the latter, "the damages for breach of contract" being *ex contractu,* the justice properly retained jurisdiction and rendered judgment for the debt. It is true that in the present case the summons recites that the defendant "wrongfully retains" the crop on which $75 is due for rent. The same words were used in *Deloatch v. Coman, supra,* and the Court held that this was the basis for claim and delivery, Code, sec. 322 (2), but that the justice retained jurisdiction to render judgment for the debt, less than two hundred dollars, though he did not have power to grant the claim and delivery for the property, which was in excess of $50.00.

In the present case the court below erred in dismissing the action, and that is the only point before us. To prevent misconception, however, we notice that the justice not only gave judgment for the debt and adjudged that it was due for rent—as he might have adjudged that it was due by open account, or on a bond, or on a promis- (421) sory note—but he went further and adjudged that it was a lien on the crop. This was unnecessary, and must be held mere harmless surplusage, as the statute made it a lien. Code, sec. 1754. The lien was the result, and no valid part, of the judgment declaring the amount of the indebtedness and that it was due for rent. Code, sec. 1754; *Wilson v. Respass,* 86 N. C., 112. There is analogy on the criminal side of the docket, where disfranchisement of one convicted of a felony is held to be the effect of the sentence, and no part of it. *S. v. Jones,* 82 N. C., 685. So here the lien on the crop is the effect, but no part of the judgment that the defendant is indebted in the amount named for rent. The plaintiff did not ask for a judgment declaring it a lien, and, if he had, it would not have destroyed the jurisdiction to grant the valid demand for judgment for the sum due. Because a judgment for the amount due for rent ascertains the extent of the lien on the crop, does not throw every petty dispute about rent into the Superior Court. This would virtually be a denial of justice in the majority of instances, for the amount would usually not justify seeking relief in that forum. In truth, the lien exists by virtue of the statute before and independent of the judgment, and even if no judgment is ever rendered. The judgment simply ascertains the amount of rent due.

Reversed.

Cited: Holden v. Warren, 118 N. C., 327; *McGehee v. Breedlove,* 122 N. C., 278; *Kiser v. Blanton,* 123 N. C., 403; *Patterson v. Freeman,* 132 N. C., 359.

(422)

W. H. HUNT, ADMINISTRATOR OF ELIZABETH GAY, v. W. T. WHEELER ET AL.

Will, Construction of—Legacy—Charge on Land—Statute of Limitations.

1. Where a testator devised land to a grandson, who was directed to pay to testator's daughter one-half of its value out of the rents or from any other source except by sale of the land, the daughter's share is a charge upon the land.

2. An action by an administrator to recover his intestate's share of an estate is governed by section 158 of The Code, which provides that actions not otherwise provided for shall be brought within ten years.

3. Where a devisee of land which was charged with the payment of half its value to a daughter of the testator agreed, by way of compromise, to pay within a certain time a less amount, and upon such payment he was to be released from all liability on account of the said charge upon the land, and he failed to pay the compromise sum within the time specified: *Held,* that the debt did not become merely a personal one, and the charge upon the land was not released by such agreement; and further, that the devisee cannot take any benefit from such agreement since he has failed to comply within its terms.

4. In such case, judgment will be given for one-half the value of the land, with interest from the date at which it was payable, and a receiver will be appointed to collect and apply the rents of the land to the payment of such judgment.

ACTION heard before *Green, J.,* at Spring Term, 1895, of GRANVILLE, on a case agreed, the material parts of which are stated in the opinion of *Montgomery, J.* The only other fact necessary to the proper understanding of the opinion is that the wife of the testator, upon whose death W. T. Wheeler was to come into the possession of the land and pay the sum charged thereon, died on 9 April, 1885.

His Honor rendered judgment as follows: "That the plaintiff, W. H. Hunt, administrator of Elizabeth Gay, recover judgment against
(423) the defendants for the sum of $640, and that the same is a charge on the land described in the complaint to be paid out of the rents of said land, and that the plaintiff is also entitled to interest on an amount of said debt equal to the rental value of said land from the 9th

day of April, 1885, to the present, the interest being on each amount from the end of the year in which it accrued, but as there is no statement in the case agreed as to the amount of rental no judgment for interest is given. A receiver, A. J. Field, is hereby appointed to take charge of the land. He is directed to rent the same annually for cash at public notice, and the same is directed to be applied to the payment of this judgment at the end of each year until discharged, with the cost of this action.

From this judgment both parties appealed.

A. J. Field for plaintiff.
Edwards & Royster for defendants.

MONTGOMERY, J. This case is presented upon agreed state of facts. From the judgment which was rendered in the court below both parties appealed. We will treat both appeals together.

The value of the tract of land devised by the testator Moses Wheeler to his grandson, William T. Wheeler, in remainder after the death of the widow of the testator, was ascertained, according to the manner prescribed by the will, to be $1,380. One-half of this amount was, under the will, to be paid to the daughter of the testator, Elizabeth Meadows, a married woman. The defendants contend that the land itself is not charged with the amount in favor of the daughter, and the plaintiff insists that it is. The solution of the question depends upon the true construction of the following clause of the will:

"Item First. I lend to my wife Elvira, during her natural life, (424) the tract of land lying near and adjoining the lands of my son Dudley, and at her death I give the said tract of land to my grandson William T. Wheeler, son of my said son Dudley, with this understanding, that at the death of my said wife the said tract of land is to be valued by three freeholders to be chosen by my executors; and my said grandson is to pay to my daughter Elizabeth Meadows one-half of said valuation, said one-half may be paid by and from the rent of the same, or from any other source, except by the sale of the same, as I do not wish it sold for division, being too small a tract for division between them, and my desire being to secure said tract of land to my said grandson."

We are of the opinion that the one-half value of the land (to wit, $690), the daughter's share under the will, is a charge upon the land. *Carter v. Worrell,* 96 N. C., 358; *Aston v. Galloway,* 38 N. C., 126; *Rice v. Rice,* 115 N. C., 43. The daughter, after having become a widow, married a second time, and died on 28 January, 1888, leaving her husband surviving her. The plaintiff qualified as her administrator

on 12 November, 1894, and on that day commenced this action against the defendants. The defendants insist that the statute of limitations (section 155 (1) of The Code) is applicable to the facts in the case and is a bar to the action. We are not of this opinion. Section 158 of The Code applies. The defendants insist again that the agreement made on 2 January, 1888, between the daughter and the grandson of the testator relieved the land of the charge upon it (if it ever existed) and made the compromise obligation on the part of the grandson purely a personal one against him. This cannot be so, for the agreement especially and particularly recites the contrary. The following is the agreement:

"I, Thomas P. Meadows, attorney in fact for Robert L. Gay
(425) and Elizabeth Gay (formerly Elizabeth Meadows) a daughter of Moses Wheeler, deceased, having been appointed by them attorney in fact to represent their interest in the settlement of the estate of said Moses Wheeler, having agreed with W. T. Wheeler to accept of him the sum of four hundred dollars in full satisfaction of the amount due from him to said Elizabeth Gay as a charge upon the land devised to W. T. Wheeler, in and by the last will of Moses Wheeler, provided the same shall be paid in two months from this date; and whereas he has paid me fifty dollars of the said four hundred, now I do hereby authorize John W. Hays as my attorney to receive from W. T. Wheeler the balance of said sum, to wit, $350, provided the same shall be paid within two months from this date, and when so paid the said Hays is authorized to execute to W. T. Wheeler such release and acquittance as shall fully discharge him from all further liability on account of said charge upon said land."

The defendants can take no benefit from the agreement of compromise, for although it appears that the daughter died before the time when the money agreed upon in the compromise should be paid, and that there was no personal representative to receive it when it fell due, yet, after the plaintiff was appointed administrator, no part of the same was paid or offered to be paid—the defendants all the time setting up the plea of the statute of limitations to defeat all recovery, and also relying upon the debt being a personal one against the grandson and not a charge upon the land. The judgment of the court below is affirmed in so far as it declares that the amount due to the plaintiff's intestate (the daughter of the testator) is a charge upon the land and to be paid by the rents from the same, and the appointment of a receiver to take charge of the land and rent it out.

The plaintiff however ought to have had judgment for the sum of
(426) $690, half the value of the land, less fifty dollars which was paid by the grandson on the 2d of January, 1888, with interest

from 9 April, 1885, until paid. The judgment is affirmed and modified as above.

Affirmed and modified.

Cited: Field v. Wheeler, 120 N. C., 269; *Parker v. Cobb,* 131 N. C., 28; *Ramsey v. Browder,* 136 N. C., 253; *Edwards v. Lemmonds, ib.,* 331; *Brown v. Wilson,* 174 N. C., 676.

ELIZABETHTOWN SHOE COMPANY v. JOHN K. HUGHES.

Action Against Sheriff—Attachment—Compromise—Pleading—Trustee—Acceptance of Trust.

1. In an action against a sheriff for his failure to turn over the proceeds of the sale of goods seized under an attachment which the plaintiff caused to be issued and levied in a suit to set aside an assignment for fraud, the complaint alleged that a compromise was effected whereby the goods were to remain in the possession of the defendant (sheriff), subject to the levy, and were to be sold by the trustee of the debtors as agent for the defendant, and the proceeds to be applied on the plaintiff's claim; that after paying over a part of the proceeds to plaintiff, defendant refused to apply other proceeds, and turned over to assignor firm goods of a value in excess of balance due plaintiff under the compromise: *Held,* on demurrer, that neither the assignors nor the assignee were necessary parties to the action since they were merely agents of the defendant sheriff.

2. In such case, the fact that the attachment suit against the debtors was still pending was no defense to the defendant sheriff, since he was not a party thereto; nor was it necessary for the plaintiff to allege that the assignors were entitled to their personal property exemptions since that fact was a matter of defense.

3. It is not necessary that a trustee shall sign an instrument conferring a trust upon him; if he takes possession of the property to which it relates, and acts under it, such conduct is equivalent to an acceptance signified by his signature.

ACTION heard on demurrer to the complaint, before *Hoke, J.,* (427) at Fall Term, 1894, of ORANGE.

From a judgment overruling the demurrer the defendant appealed.

The facts appear in the opinion of *Furches, J.*

Shepherd, Manning & Foushee, and C. D. Turner for plaintiffs.

J. W. Graham and P. C. Graham for defendant.

FURCHES, J. This action comes before us upon complaint and demurrer. It appears that certain parties doing business under the firm name of Ellen, Koplon & Bro., in the month of June, 1893, made a deed of assignment for the benefit of their creditors, in which they preferred Lena Ellen, wife of Isaac Ellen (one of the partners), to a large amount; that some time thereafter plaintiffs commenced an action to set aside the deed of assignment for fraud, in which they had the goods named in said deed of assignment attached, and the members of the firm Ellen, Koplon & Bro. arrested; that defendant, being the Sheriff of Orange County, acted as the officer in making these arrests and in serving said attachments.

Under this state of affairs the parties, by their attorneys, came to terms of compromise, in which it was agreed that the defendant should be discharged from custody, and that no sale should be made under said attachments, and that plaintiffs would accept 33⅓ cents on the $1 in satisfaction of their debts, which, they say, thus reduced, amounted to $1,051.60. And in consideration of these concessions on the part of plaintiffs, it was agreed on the part of defendants (Ellen, Koplon & Bro.) that the lien of the attachment should continue, and that T. A. Faucett, the assignee named in the deed of assignment, should continue to sell said goods as the agent of the defendant, Hughes, account-
(428) ing to Hughes for the goods sold, and the defendant was to apply the money thus raised to the payment of plaintiffs' claims, as reduced by the terms of said compromise; that under this arrangement defendants (the firm of Ellen, Koplon & Bro.), Faucett and the defendant sold goods, and defendant paid plaintiffs $200, reducing their claim to the sum of $851.60. Plaintiffs further allege that under this arrangement the goods belonging to the firm of Ellen, Koplon & Bro., to the amount of $3,158.03, went into the possession of the defendant, and, in addition to the goods above mentioned, on 1 January, 1894, the firm of Ellen, Koplon & Bro. moved goods they had in Rockingham to Hillsboro, to the amount of $1,500, and turned them over to the defendant Hughes to be sold by him and applied to the payment of plaintiffs' claim, and that defendant accepted them for that purpose and put them in the store with the other goods. Plaintiffs further allege that, on 27 January, 1894, all these goods were burned and destroyed, except $1,100 worth; and they further allege that, besides the $200 which the defendant paid to them under the terms of the compromise, he collected $700, which should be paid to them, but that he refuses to pay this to them or to sell the $1,100 worth of goods left from the fire, and pay their debt out of this; and, instead of doing so, he has turned them over to the members of the firm of Ellen, Koplon & Bro. Wherefore, they ask for judgment, etc.

To this complaint the defendant demurs, first, upon the ground that there is a defect in the parties—that the members of the firm of Ellen, Koplon & Bro. and T. A. Faucett should have been made parties; second, that the actions referred to in said agreement (Exhibit "B") are still pending; third, that the complaint does not state facts sufficient to constitute a cause of action.

1. That it was not shown that it was the duty of defendant to (429) insure the goods.

2. That complaint does not show that the members of the firm of Ellen, Koplon & Bro. were not entitled to the $1,100 as their exemptions.

3. That defendant was not a party to the agreement (the compromise and assignment above mentioned).

We do not think the demurrer can be sustained. We do not think the members of the firm of Ellen, Koplon & Bro., or Faucett, are necessary parties. The goods were not in their hands, except as the agents and employees of defendant. He was to control the matter, to receive the money, and to pay it to plaintiffs. Indeed, it seems from the complaint that the goods were in the possession of the defendant. And in considering this appeal we are bound by the allegations of the complaint, whether they are in fact true or not, as the legal effect of the defendant's demurrer is to admit them to be true. It cannot be sustained upon the second ground assigned.

First, for the reason that defendant is not a party to the "actions referred to" in the complaint (*Woody v. Jordan,* 69 N. C., 189); second, that this defense could only be taken advantage of by a plea in abatement, and not by demurrer. *Woody v. Jordan, supra.* It cannot be sustained upon the third ground, as it seems clear to us that plaintiffs have set up a cause of action. They allege that the firm of Ellen, Koplon & Bro. owed them $1,051.60; that this firm put $4,500 worth of property in the hands of the defendant to pay them; that defendant accepted this property under this trust and paid them $200, reducing their debt to $851.60; and that, although there has been a loss by fire, about which there might be some question as to defendant's liability, besides this, he has $700 in money collected and $1,100 worth of the goods saved from the fire. In other words, he has $1,800 or $2,000, out of which he should pay plaintiffs the $851.60 due (430) them.

But it is said in the demurrer that plaintiffs do not allege that the members of the firm of Ellen, Koplon & Bro. are not entitled to this fund as their personal property exemption and plaintiffs are not entitled to recover on that account. We do not think it was necessary that plaintiffs should allege this in their complaint, and whatever might be the

result if defendant had answered and set up this defense, is not now before us for our determination. But we do say that it is not such a defense as a trustee can make by way of demurrer against an action by his *cestui que trust* for withholding funds in his hands, as such trustee. It was not necessary that defendant should have signed the instrument of July, 1893, making him the trustee and placing the goods in his hands. His signature at most would have only amounted to an acceptenca of the trust. And this was afterwards signified by his accepting the trust and acting under it, as he did.

We leave out of consideration the matter of insurance.

Affirmed.

Cited: S. c., 122 N. C., 297.

DENNIS BURRELL v. JOHN K. HUGHES ET AL.

Action for Penalty—Party Plaintiff—Jurisdiction—Practice—Demurrer—Appeal.

1. A motion to dismiss an action for want of jurisdiction or because the complaint does not state a cause of action is not such a demurrer *ore tenus* as will permit an appeal from its refusal.
2. A discrepancy between a summons and a complaint, in respect to the title of the action, is not a material defect, and an amendment is permissible.
3. The person suing for a penalty is the proper party plaintiff and not the State, unless the statute so directs.
4. A party suing for several penalties against the same defendant may unite several such causes of action in the same complaint, and if they exceed $200 in the aggregate the Superior Court will have jurisdiction.

(431) ACTION to recover a penalty of one hundred dollars alleged to be due by reason of the failure of defendant sheriff to execute process in a criminal action, assigning four separate and distinct forfeitures by and because of said alleged failure (Code, sec. 1112), heard before *Hoke, J.,* upon demurrer to complaint, at October Term, 1894, of ORANGE.

It was adjudged that the demurrer be sustained and the action (436) dismissed, and the plaintiff appealed.

C. D. Turner for plaintiff.

J. W. Graham and P. C. Graham for defendant.

FAIRCLOTH, C. J. The plaintiff instituted this action on defendant's official bond for four penalties, in $100 each, for failing to serve process. The summons was issued in the name of the plaintiff "Dennis Burrell," and the amended complaint declared in the name of the "State on relation of Dennis Burrell," the plaintiff.

The defendant moved to dismiss the action and demurred because of the discrepancy in the summons and amended complaint and for want of jurisdiction in the Superior Court.

A motion to dismiss for want of jurisdiction or because the complaint does not state a cause of action is not such a demurrer *ore tenus* as will permit an appeal from its refusal. *Joyner v. Roberts,* 112 N. C., 111. (437)

The demurrer not only raises issues upon matters alleged in the complaint, but sets forth other matters which can only be presented by answer, and therefore cannot now be considered. The discrepancy in the summons and the amended complaint is not a material matter, and has been permitted. *Jackson v. Maultsby,* 78 N. C., 174; *Warrenton v. Arrington,* 101 N. C., 109. The person suing for a penalty is the proper party plaintiff, and not the State, unless so expressed in the statute. *Middleton v. R. R.,* 95 N. C., 67; *Sutton v. Phillips, post,* 502. A party suing for penalties against the same defendant may unite several such causes of action in the same complaint, and if they exceed $200 the Superior Court will have jurisdiction. *Maggett v. Roberts,* 108 N. C., 174. Our conclusion is that his Honor, in sustaining the demurrer, committed error.

Reversed.

Cited: Sutton v. Phillips, 117 N. C., 231; *Tillery v. Candler,* 118 N. C., 889; *Goodwin v. Fertilizer Co.,* 119 N. C., 122; *Sloan v. R. R.,* 126 N. C., 490; *Carter v. R. R., ib.,* 444; *S. v. Maultsby,* 139 N. C., 585; *Shelby v. R. R.,* 147 N. C., 539; *Chambers v. R. R.,* 172 N. C., 558; *Williams v Bailey,* 177 N. C., 40.

JOSIAH TURNER v. GUSTAV ROSENTHAL.

Res Judicata—Estoppel—Different Cause of Action.

Where, in an action by T. against Mrs. H. to recover certain bonds alleged to have been fraudulently transferred to her by a judgment debtor of T., it was adjudged that the judgment debtor was not the owner of the bonds, and T. afterwards brought suit against a receiver (who had been previously appointed to collect the judgment debt) for negligence and failure to collect: *Held*, that, the receiver not being a party to the suit first mentioned, the adjudication in that action does not bar the action by T. against the receiver.

ACTION heard before *Hoke, J.*, at Fall Term, 1894, of ORANGE.

It is an action for the recovery of damages against the defend-
(438) ant on account of his alleged negligent and willful failure to collect as receiver, appointed in supplementary proceedings commenced by G. W. Swepson and others against the plaintiff, a certain judgment which came into his hands as such receiver in favor of the plaintiff and against W. W. Holden. The plaintiff alleges in his complaint that the defendant could have made money on the judgment if he had used due diligence in the matter, and that the defendant combined and conspired with Swepson and Holden to prevent him from recovering anything on the judgment. The defendant in his answer admits the receivership and denies all the other allegations of the complaint. At a later term of the court the defendant by leave filed an amendment to his former answer, a part of which is as follows:

1. That there has been pending and was tried and finally determined at February Term, 1894, of the Superior Court of Wake County in said State, a civil action wherein Josiah Turner was plaintiff and Mrs. L. V. Holden and C. A. Sherwood, administrator of W. W. Holden, were defendants, in which said action all the matters of fact, and issues as well of law as of fact, involved in this present action, were heard and determined, and more especially was it determined "that there was a gift and transfer of $5,000 of United States bonds from W. W. Holden to L. V. Holden on 27 October, 1869, and of $25,000 of United States bonds on 6 November, 1869, and that at the time of such transfer W. W. Holden did retain property fully sufficient and available to satisfy his then existing creditors, and that there are no claims which were then outstanding which are now valid and existent debts against said estate, and that the gift and transfer of said bonds was not made with the actual intent to hinder, delay and defraud the then creditors of W. W.
(439) Holden, and that the gift and transfer of such bonds was not made with design and intent to delay, hinder and defraud the

plaintiff and any subsequent creditors of said W. W. Holden; and it was adjudged that the plaintiff take nothing by his action, and that the defendants go without day.

2. That in said action the plaintiff relied upon the allegation that there had been a fraudulent gift and transfer of the United States bonds in 1869, and that the same were still liable to satisfy his judgment for $8,000 obtained against W. W. Holden in Chatham County and renewed in Wake County, and which he insists upon in this action and seeks to hold the defendant Rosenthal, as receiver, responsible, because he did not collect the said judgment of $8,000 out of the proceeds of the United States bonds to the amount of $30,000 alleged to have been fraudulently transferred in 1869 by W. W. Holden to L. V. Holden, the same being in fact the very matter he relies upon to support his present action; and all these matters in relation to the gift and transfer of said bonds were passed upon and determined.

The defendant also set up a duly certified copy of the record of the case tried in Wake County, in his amended answer, and submitted "that the present plaintiff ought not to be admitted or received to urge his present action against the defendant, for the reason hereinbefore set forth, and the defendant verifies this his amended answer, and prays judgment whether the plaintiff ought to be admitted or denied, against the said record now plead in this action by leave of the court, to urge his said action against the defendant, and more especially that the defendant as receiver ought to have collected the $8,000 out of the United States bonds, or their proceeds found by the jury to have been lawfully transferred in 1869 by W. W. Holden to L. V. Holden, which is the negligence complained of; and this defendant de- (440) mands judgment that he go without day and recover his costs."

The plaintiff demurred to the defendant's amended answer upon which the court rendered the following judgment: "Upon consideration it is adjudged that the demurrer be sustained in so far as to decide that the matter set up in the amended answer does not constitute an estoppel or bar upon the plaintiff to further prosecute this action, but that the amended answer shall constitute and be considered a part of the pleadings in the cause. Defendant takes an appeal from the judgment sustaining the demurrer. Plaintiff then moved for judgment by default of inquiry on the pleadings, which was denied and plaintiff excepted.

C. D. Turner and Frank Nash for plaintiff.
J. W. Graham for defendant.

MONTGOMERY, J. We find no error in the ruling of his Honor. The defendant in this action was not a party to the suit in Wake County

between the plaintiff and Mrs. Holden and Sherwood, the administrator of Holden. And also, while it appears from the complaint and answer that the plaintiff in this action still alleges as a matter of liability against the defendant, his negligent and willful failure to subject the United States bonds mentioned in the suit in Wake County to the satisfaction of the plaintiff's judgment against Holden, yet he does not confine himself to that allegation. When his complaint is examined from the most liberal view under the Code practice, it will appear most probably that he alleges in substance that there was other property of the judgment debtor, besides the bonds, that could have been reached by the defendant as receiver. *Temple v. Williams,* 91 N. C., 82; *Wil-*
(441) *liams v. Clouse, ib.,* 322. It was in this light, no doubt, that his Honor viewed the pleadings and refused to allow the plea of estoppel set up by the defendant in his amended answer; for if it be admitted that the only material matter involved in the action in Wake Superior Court, and in the present one, was as to the title of the United States bonds mentioned in the amended answer, and whether or not the defendant should have subjected them to the satisfaction of the plaintiff's judgment, why, then, the plaintiff is estopped, because in an action wherein he was a party the title to the bonds was held to have been in Mrs. Holden and not in her deceased husband, the judgment debtor. *McElwee v. Blackwell,* 101 N. C., last paragraph on page 192. In this last mentioned case the Court suggest the best way to make the defense of another judgment, for the same cause of action available. There is no merit in the plaintiff's exception.

The judgment below is

Affirmed.

Cited: Scott v. Life Asso., 137 N. C., 520.

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(442)

BOARD OF COMMISSIONERS OF DURHAM COUNTY v. BLACKWELL DURHAM TOBACCO COMPANY.

Taxation—Capital Stock—Shares of Stock—Double Taxation.

1. It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously: (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative.

2. "Capital stock" is a distinct subject of taxation from "shares of capital stock," the former representing the entire property, business, goodwill, etc., of the corporation, and belongs to it, while the latter belong to the individual stockholders and are taxable *ad valorem* like other property.

3. The imposition upon a corporation of a tax on its "capital stock," in addition to a requirement that it shall list for taxation and pay the taxes assessed on the shares of its stockholders, does not make "double taxation."

4. It is competent for the Legislature to tax the whole of the capital stock of a corporation, although, to the extent of the value of its real and personal property (which must be taxed), it is double taxation, but under section 39 of chapter 296, Acts 1893, providing for the taxation of the capital stock of corporations, such double taxation is avoided by taxing only the value of the capital stock in excess of the value of its real and personal property listed for taxation in this State.

5. Where the value of the capital stock of a corporation was agreed to be equal to the aggregate value of its real and personal property in this and another State, the proper method of determining the "capital stock" required to be listed under section 39, chapter 296, Acts 1893, is to deduct from such agreed value the value of the real and personal property listed for taxation in this State only, and not the value of that located in the foreign states.

CONTROVERSY without action, heard before *Hoke, J.*, at October Term, 1894, of DURHAM. The case agreed was as follows:

"Blackwell Durham Tobacco Company" is a corporation created, organized and existing under and by virtue of the laws of the State of North Carolina, having its location and principal place of business in the county of Durham, in the State of North Carolina. It has listed for taxation in said county of Durham for the year 1894 real and personal property belonging to the company of the aggregate assessment valuation of $509,334.

It has a branch office and place of business in Philadelphia, (443) Pa., and it lists for taxation there, personal property belonging to the company there and which is used in its business in said city, of the aggregate assessed valuation of $300,000.

The aggregate capital stock of this company is $4,000,000, divided into 160,000 shares of the par value of $25 each.

The stock of this company has no market value and its actual value is equal to the value of its aggregate real and personal property.

This company claims that its capital stock of $4,000,000, having the actual value of $809,334, and its assessed valuation of its real and personal property in Durham, North Carolina, and in said city of Philadelphia, being as aforesaid $809,334, the assessed valuation of all its real and personal property, both in Durham County, N. C., and in Philadelphia, Pa., should be deducted from the actual value of its aggre-

gate shares of capital stock and nothing ought to be assessed against its capital stock for taxation under section 39, chapter 296, Laws 1893. On the contrary it is contended by the Board of County Commissioners of Durham County, N. C., plaintiff, that the defendant is only entitled under section 39, chapter 296, Laws 1893, to deduct from the actual value of its capital stock the aforesaid amount of $509,334, and the remainder, to wit, $300,000, should be listed by the defendant for
(444) taxation as capital stock under section 39, chapter 296, Laws 1893.

The following judgment was rendered:

This cause coming on to be decided on case agreed and the court being of the opinion that, under the Revenue Act, 1893, the capital stock of defendant corporation was not made or intended to be an item of taxation unless same exceeded in value the corporate property assessed for taxation and on which taxes are paid, it is thereupon considered and adjudged by the court that on the facts stated in case agreed, the defendant company is not required to list or pay taxes on any amount as capital stock, and that they go without day and plaintiffs and sureties pay the cost to be taxed by the clerk.

J. S. Manning for plaintiff.

W. A. Guthrie and Fuller, Winston & Fuller for defendant.

CLARK, J. Laws 1893, ch. 296, sec. 39, provides that all corporations therein named, "in addition to the other property required by this act to be listed" shall pay a tax on its capital stock. As the mode of ascertaining the amount which shall be taxed as capital stock, sub-sections 3, 4 and 5, provide that the market value, or if no market value, the actual value of the aggregate shares of the company shall be taken as a basis, and from that sum the amount of the assessed value of its real and personal property, listed for taxation, shall be deducted and the difference, if any, shall be taxed as capital stock. It is stated in the "case agreed" that the actual value of the aggregate shares of stock of the defendant corporation is $809,334, and that the assessed value of its real and personal property is $509.334. Upon the plain, explicit
(445) provision of the statute the defendant is liable to tax upon the difference ($300,000) as the taxable part of its capital stock. It is true the case agreed sets out that the defendant has $300,000 of personal and real property which is not listed for taxation in this State because located in Pennsylvania. But that has nothing to do with the taxation of the capital stock, the whole of which without any deduction the Legislature might in its discretion have taxed here in addition to the tax upon the real and personal property. It is a legislative concession to deduct from the capital stock the amount of real and personal prop-

erty which pays tax. It also appears that the total capital stock is $4,000,000. If, as the defendant contends, tax is to be paid on only $500,000, this would be to pay tax on barely one-eighth of the sum at which the property is capitalized. It would seem from the case that this capital stock is by agreement of counsel valued at $809,334, which is about one-fifth of the nominal capital, and is the exact value of the real and personal property, because the stock "has no market value." If so, it is a misconception of the statute applicable to the valuation of the capital stock under this act, and is important enough not to pass unnoticed. Shares may have no market value because too valuable to put on the market, or because the owners do not wish to part with it, or for many other reasons. While the value of the capital stock cannot be less than the value of the aggregate of the real and personal property held by the corporation unless the latter is in debt, the good will of the business or trademark and the rate of dividend will ordinarily make the capital stock more valuable than the mere aggregate of the real and personal property owned by the company. In any corporation reasonably prosperous, the capital stock is worth much more than the bare real and personal property which is the value of the dead body, so to speak, of the corporation, should it cease to live and move. As (446) to corporations, by all authorities, it is in the power of the Legislature to lay the following taxes, two or more of them in its discretion, at the same time: 1. To tax the franchise (including in this the power to tax also the corporate dividends). 2. The capital stock. 3. The real and personal property of the corporation. This tax is imperative and not discretionary under the *ad valorem* feature of the Constitution. 4. The shares of stock in the hands of the stockholder. This is also imperative and not discretionary.

The power to levy these distinct taxes simultaneously is laid down in 1 Cook on Stock and Stockholders, sec. 561, and cases there cited; 2 Redfield Railways (3 Ed.), p. 453, cited and approved by this Court (*Smith, C. J.*) in *Belo v. Comrs.*, 82 N. C., 415; *Worth v. R. R.* (*Ashe, J.*),89 N. C., 301, 305; 1 Desty Tax, 348; 2 Thomp. Corp., 2810; *Jones v. Davis,* 35 Ohio St., 474, 476; *People v. Coleman,* 126 N. Y., 433, 437; *S. v. Petway,* 55 N. C., 396, 406. "Especially is it important to distinguish a tax on shares of stock from tax on the capital stock," says 1 Cook, *supra,* section 563, citing *Porter v. Rockford,* 95 Ill., 561, and numerous cases in note 2 to that section. In *Belo v. Comrs., supra,* on page 418, the same distinction is clearly laid down and additional authorities given by *Smith, C. J.*

Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Buie v. Comrs.,* 79 N. C., 267. But under that method many shares failed to be listed

for taxation. Besides the shares of nonresident owners, except those of national banks, escaped taxation in this State under the ruling in *R. R. v. Comrs.*, 91 N. C., 454. To remedy this, the provision
(447) was passed, which is section 14 of chapter 296, Laws 1893, and which requires the list of shares to be given in by the proper officer of the corporation which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the State in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Comrs.*, 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks. U. S. Rev. St., sec. 5219.

From this summary it will be seen that the State is within its taxing power in the provisions of chapter 296 of the Acts of 1893. It levies: 1. A tax upon the real and personal property of corporations. 2. Upon the shares which are the personal property of the shareholders, but requires them to be listed and collected through the agency of the corporation. 3. It levies no tax upon franchises and dividends. 4. It does not tax the entire capital stock, but only the excess of its total value above the value of the real and personal property which the corporation lists for taxation.

The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed *ad valorem* like other "property belonging to the holder, independently of the taxation upon the corporation, its franchises, etc." *Smith, C. J.*, in *Belo v. Comrs.*, 82 N. C., on page 419, citing Cooley Const. Lim., 169, and Field on Corporations, 521, *etc.* He further says that the relation of
(448) stockholders to the corporation "is very analogous to that of a creditor towards his debtor. The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits, but the stockholder cannot, any more than the creditor, claim exemption on this account for his stock as distinct and separate property in his own hands." *Worth v. Comrs.*, 82 N. C., 420.

To tax only the real and personal property of the corporation would leave, as we have said, untaxed that large part of its capital stock which represents its good will, its trademark, the profitableness of its business, all of which are property, as much protected by the law and as capable of being turned into money as the real and personal property which the corporation owns. To tax the whole of the capital stock, in addition to the tax upon the real and personal property, would be, to the extent of

the tax on the latter, double taxation, of the same kind as the tax on mortgaged property and a tax at the same time on the mortgagor's notes in the hands of the mortgagee, but there is nothing in either case to restrict the legislative power to so decree. Here, however, there is no double tax, but simply a tax on so much of the real and personal property of the corporation as is located in this State and a tax on the value of its capital stock in excess of the amount of realty and personalty which is listed for taxation here. The tax on the shares is a separate matter, and is a tax on the shareholders on their property, whether they reside in or out of the State, collected through the medium of a *quasi* statutory garnishment on the corporation. "It has long been the common, if not the only mode in many states, and indeed is the only mode to collect taxes on the shares of nonresident shareholders." *Bank v. Commonwealth*, 9 Wall., 353, 361, approved in Delaware R. R. Tax, 18 Wall., 206, 230; 2 Thomp. Corp., 2849.

We conclude therefore that the defendant upon the case agreed (449) is liable to tax on the $300,000, which is the agreed value of its total capital stock in excess of the real and personal property which is listed for taxation; and this, irrespective of the fact that the defendant lists for them the shares of the individual shareholders under the provisions of section 14 of said chapter 296, Laws 1893.

Reversed.

Cited: Comrs. v. Steamship Co., 128 N. C., 559; *Lacy v. Packing Co.*, 134 N. C., 571; *S. v. Wheeler*, 141 N. C., 775; *Land Co. v. Smith*, 151 N. C., 72; *Pullen v. Corp. Com.*, 152 N. C., 554; *Brown v. Jackson*, 179 N. C., 368.

W. S. FORBES v. R. H. MCGUIRE.

Justice of the Peace—Jurisdiction—Appeal—Practice.

1. After a justice of the peace has transmitted an appeal from his judgment and all the papers to the Superior Court he has no power to grant a motion to set aside his judgment for want of jurisdiction.

2. Leave to plead at the trial term of the Superior Court on an appeal from a justice of the peace is discretionary with the trial judge.

3. Where, in an appeal from a justice's judgment, the defendant's motion to quash the proceedings was denied and the trial judge adjudged that "the matter could be better determined upon the trial *de novo* upon the original appeal, when the evidence and facts should be before the court": *Held*, that such adjudication was simply a continuance of the whole mat-

ter to the next term of the Superior Court, and did not give the defendant, who had not before pleaded, the right to plead to the jurisdiction.

4. On the hearing of defendant's appeal from a justice's judgment, the defendant not having entered any defense or made any plea in the justice's court, and no error appearing on the record, it was not error to deny defendant's motion to dismiss or to allow him to plead the want of jurisdiction of the justice.

ACTION heard before *Shuford, J.*, at January Term, 1894, of GRANVILLE, on defendant's appeal from a judgment of a justice of the
(450) peace, which was affirmed and defendant appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

Fuller, Winston & Fuller for plaintiff.
J. W. Graham and J. B. Batchelor for defendant.

FAIRCLOTH, C. J. The plaintiff instituted this action before a justice of the peace for $195.33, due by account, and at the trial in December, 1892, the defendant was present and admitted the debt. Judgment was entered and defendant appealed, and on 10 December, 1892, the justice transmitted the appeal and all the papers to the Superior Court. Afterwards, on 25 April, 1893, upon notice, defendant moved before the justice to set aside his judgment on the ground that he had no jurisdiction of the subject-matter, which was refused on the ground that he had no power to do so pending the appeal in the Superior Court, and defendant prayed an appeal. At July Term, 1893, a motion to dismiss and quash the proceedings was denied, and his Honor adjudged that "The matter could be better determined upon the trial *de novo* upon the original appeal when the evidence and facts should be before the court." At January Term, 1894, the cause came on regularly to be heard upon defendant's appeal, when defendant moved to dismiss for want of jurisdiction in the justice of the peace, and for leave to plead defenses to the jurisdiction, which motions were refused, and plaintiff's motion for judgment was allowed and the defendant appealed.

Leave to plead at the trial term was discretionary with his Honor and his decision is not reviewable here. Clark's Code, 228. It was conceded here that the defendant had no defense, unless the order of
(451) *Brown, J.*, at July Term, 1893, gave him the right to plead to the jurisdiction. We construe that order to be simply a continuance of the whole matter to the next regular term of the Superior Court. It was no adjudication upon the rights of either party. In April, 1893, it was not in the power of the justice to make any order in the matter for the reason that the action was then pending in the Superior Court.

It is true that his docket contained the record of what he had previously done, but he could do no more, except to further certify at the instance of the appellant or in obedience to an order of the court, in order to perfect or make the record above speak the truth. He could not make a new record.

Then, as no plea was entered anywhere, and as we do not discover in the record any want of jurisdiction, we see no error below.

Judgment affirmed.

Cited: Howland v. Marshall, 127 N. C., 432; *Cauley v. Dunn,* 167 N. C., 33.

MARY A. GLENN ET AL. v. C. S. WINSTEAD.

Action to Recover Land—Internal Revenue—Illicit Distilling—Forfeiture—Mortgagee.

1. A sale of the premises on which a distillery is located under a decree of the Circuit Court of the United States, in a proceeding *in rem* for a forfeiture incurred under the provisions of section 3281, U. S. Revised Statutes, does not pass the title of a mortgagee without whose knowledge or connivance the illicit distillery was maintained.

2. The law does not impute to a mortgagee, without any proof whatever, a guilty participation in the fraud of a mortgagor and declare his interest in the mortgaged premises, upon which an illicit distillery has been maintained, forfeited because the Collector of Internal Revenue may have failed to secure his assent, as a holder of a lien, to the use of the premises for the purposes of a distillery, as the collector is required by law to do

3. The mere erection of a house on land and its use as a distillery is not, as a matter of law, notice to a mortgagee that a distillery is being maintained thereon so as to render his interest liable to a forfeiture for violation, by the distiller, of the revenue laws.

ACTION to recover possession of a tract of land, tried before (452) *Hoke, J.,* and a jury, at November Term, 1894, of PERSON.

The ordinary issues in ejectment except damages for use and occupation were not passed upon in the action. Plaintiff claimed title and showed forth in evidence a deed to *feme* plaintiff from Green B. Raum, Commissioner of Internal Revenue, conveying the land in controversy, dated 11 April, 1883, duly registered. Also an order of the Treasury Department, certified from proper office, for said commissioner to make said deed. Plaintiff also showed in evidence a proceeding and decree of forfeiture, properly certified from the United States Court, October

Term, 1881, condemning the land in controversy as forfeited to the United States.

(455) There was verdict for the defendant. Plaintiff moved for new trial for errors on part of court:

1. In not holding the decree and proceedings of forfeiture, a proceeding *in rem* and absolute conveyance of title to Government and plaintiff.

2. Because court did not hold as a matter of law that if the building for a distillery was on the property at time of mortgage, the mortgagee was affected with notice of the existence and the purpose contemplated.

Motion for new trial overruled. Plaintiff excepted and appealed from the judgment on verdict for defendant.

Shepherd & Busbee and Merritt & Bryant for plaintiffs.
J. W. Graham, W. W. Kitchin and A. L. Brooks for defendant.

AVERY, J. Whether a distiller incurs liability to forfeiture by failure to pay taxes to the Government, by carrying on the business without bond or with intent to defraud the Government, or by conducting a licensed business contrary to law or to the regulations prescribed by the Government, it seems to be settled that in none of these instances does the sale of the premises, on which the distillery is located, under a decree

(456) of a Circuit Court of the United States in a proceeding *in rem,* pass the title of a mortgagee under a mortgage previously made, who has not permitted or connived at the illicit distillery. *U. S. v. Stowell,* 133 U. S., 1; *Mansfield v. Excelsior Co.,* 135 U. S., 326. As a rule only the mortgagor's equity of redemption passes by such a sale under a judgment *in rem,* or by virtue of any decree rendered in a proceeding in which there were no parties other than the mortgagor. *Mansfield v. Excelsior Co., supra.* But the court instructed the jury in effect that the purchaser under the decree of the Circuit Court acquired the interest of the mortgagor and of all other claimants "who had knowingly permitted a distillery to be operated when they had the right to control the matter," and it seems to us that the instruction given is in strict accord with the rule laid down in *U. S. v. Stowell, supra,* pp. 14 and 15. After referring to the statutes, *Justice Gray,* delivering the opinion of the Court, said: "Congress has thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title and interest of the distiller or of such other persons as have consented to the carrying on of the business of a distiller upon the premises. The intention of Congress, that no interest in land and business shall be forfeited which does not belong to some one who has participated in or consented to the carrying on of the business of distilling therein, is fur-

ther manifested in the provision of section 3262 of the Revised Statutes, which directs that no bond of a distiller shall be approved unless he is the owner in fee unincumbered by any mortgage, judgment or other lien of the lot of land on which the distillery is located, or unless he files with the collector, in connection with his notice, the written consent of the owner of the fee or any mortgage or judgment creditor or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits subject to the pro- (457) visions, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises or any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance."

The section clearly indicates that the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated, would not otherwise be included in a forfeiture for acts of the owner only.

The Court in the same opinion subsequently construe section 3258 (making it a criminal offense to have "in possession any still, etc., set up") and section 3205 (in reference to sales of land for taxes) in connection with section 3281, to mean that the sale in either case passes to the purchaser only the right, title and interest of the offender. The law does not impute to a mortgagee, without any proof whatever, a guilty participation in the fraud of a mortgagor and declare his interest forfeited because the collector may have failed to secure the assent of all holders of liens, as he is required by law to do, before permitting the distiller to begin operations on the land. Where this precautionary requirement of the statute has not for any reason been complied with, and where at the same time there has been a connivance at or a less formal assent to the operations of the distiller on the part of the holder of the lien, it would seem to have been the purpose of Congress that the rights of the Government should be protected by the proceeding in equity, provided for in section 3208 of the Revised Statutes, whereby all persons, other than distillers, whose interests have been subjected by their conduct to forfeiture, might be concluded by the decree of con- (458) demnation. Whatever may be the rule where proceedings *in rem* are instituted against a vessel, the proceeding applicable to seizures of land for violation of the Internal Revenue laws is embodied in the statutes, and the Supreme Court of the United States have declared the intent of Congress to have been as we have already stated. The question presented is one of construction only, and we have been anticipated,

in passing upon it, by the Court that is the final arbiter in all controversies as to the meaning of the acts of Congress.

If the authorities cited did not warrant us in holding that there was no error in the instructions given or the rulings made by the court below (as to the effect of the judgment *in rem*) of which plaintiff can justly complain, we might add that, upon reasoning which by analogy supports that view of the law, it has been repeatedly held that sales of land, under the acts providing for the confiscation of property for participation in the Rebellion, passed only the right, title and interest of the offender for his life and not that acquired by any person under a mortgage executed "previously to his offense." *U. S. v. Dunnington,* 146 U. S., 346; Shields *v. Sciff,* 124 U. S., 351; *Avegno v. Scharnedt,* 113 U. S., 293. Conceding that the second assignment of error was taken in apt time, we cannot conceive how it can affect this controversy. According to the testimony offered for the plaintiff, the building for the distillery "was commenced on the stillhouse lot in the fall of 1878 and the spring of 1879." The defendant offered testimony tending to show that it was completed in the summer of 1879 and no distilling was done until late in the summer of 1879. While it was declared in *U. S. v. Stowell, supra,* that the government was not embarrassed by any rule requiring revenue laws imposing forfeitures to be construed like other penal statutes, it (459) was not intended to go to the other extreme and construe them, in the face of the express provisions referred to in that case, to mean that the mere erection of a house upon a tract of land or its use for the purpose of distilling should be constructive notice to the owner or to any subsequent purchaser of the superior right of the United States to insist upon its forfeiture and condemnation by a proceeding *in rem,* without actual notice to the owner. There is no principle upon which we would be prepared to admit that the connivance or guilty participation of an owner or mortgagee in a fraud upon the government, should be inferred from any testimony that constituted sufficient notice to a subsequent purchaser of an equitable claim. But the Supreme Court of the United States, in the case last cited, manifestly meant to construe the statutes as bringing under the same condemnation as the distiller only those holders of liens who have actual notice of the commission of the offense, and refrain from suppressing the illicit conduct, when they have the power to do so.

For the reasons given we hold that the judgment of the court below must be

Affirmed.

Cited: S. v. Jones, 175 N. C., 712.

(460)

THOMAS D. WRIGHT v. JESSE HARRIS.

Ejectment—Justice of the Peace—Jurisdiction.

Where, under a will devising all of testator's land to his wife, remainder to his nephew (the plaintiff) in fee, except 50 acres in some suitable place and on certain conditions to defendant, and defendant, who was a tenant of the wife, during her life, of 50 acres on which testator had settled him, claims title thereto as being in a suitable place and on conditions performed, an action by plaintiff for possession involves the title to land and is not within the jurisdiction of a justice of the peace.

ACTION heard before *Hoke, J.*, at November Term, 1894, of PERSON, on appeal from a judgment of a justice of the peace.

It was admitted in open court by the parties that J. H. Harris died in the county of Person leaving a last will and testament which contained the following provisions:

"I give and bequeath to my beloved wife, Elizabeth H. Harris, all my estate, both real and personal, during her natural life, and request my nephew, Thomas D. Wright, to remain with and manage for my wife until her death; then I further will that all of the property that is in her possession, coming from and through me, to go to Thos. D. Wright and his heirs.

"However, I request that Jesse and Henry Harris, former slaves of mine, remain with my wife and nephew until the death of my wife, and if they shall remain with them during that time, that they (Jesse and Henry) shall have, at some suitable place, fifty acres of land each."

It was also admitted that testator was seized and possessed, at the time of his death, of a tract of land containing about 1200 acres; that after his death the defendant rented by the year and cultivated parts of said tract, and paid annually his rent to Mrs. Elizabeth Harris, the widow of Jas. H. Harris; that since her death he has paid no rents to the plaintiff, but has declined and refused to do so, (461) claiming title to the said 50 acres; that the year of renting expired about 15 October of each year; that Elizabeth Harris died 22 December, 1892; that defendant remained on said land after the death of Jas. H. Harris, and was faithful to his widow.

Upon the foregoing admitted facts and the chain of title set up by the defendant, his Honor rendered judgment as follows:

"It is now adjudged, on motion of W. W. Kitchin, attorney for the defendant, that in this action the title to land is in controversy, and that the judgment of the justice of the peace be affirmed and the action dismissed at the cost of the plaintiff, to be taxed by the clerk of this court."

Shepherd, Manning & Foushee for plaintiff.
W. W. Kitchin for defendant.

CLARK, J. The defense pleaded was not a mere claim or bare assertion that the title to real estate was in issue. But upon its face the clause of the will set out as the foundation of the defendant's plea, showed a *bona fide* controversy which involved the title to real estate. *Parker v. Allen,* 84 N. C., 466; Code, sec. 836. The defendant had not entered into possession and did not hold under the plaintiff, hence there was no estoppel. On the death of the life tenant, the tenancy under her ceased, if his right then accrued, and the defendant claimed adversely to the plaintiff as owner of an unallotted 50 acres in the tract, and to that extent, as tenant in common with the plaintiff, while the plaintiff claimed that sole seizin of the whole tract had developed on him at the death of the life tenant, and denied the defendant's claim to the 50 acres. His Honor properly affirmed the ruling of the justice of
(462) the peace that the justice did not have jurisdiction to decide such controversy, and dismissed the action. Code, sec. 837.

Affirmed.

THOMAS D. WRIGHT v. JESSE HARRIS.

Will—Devise—Tenancy in Common.

A testator in his life settled H., an old family servant and former slave, upon 50 acres of land, and by his will devised all his land (including the 50 acres) to his widow for life with remainder to his nephew, with a provision that if H. should remain with his wife and nephew until the death of the former he should have, at some suitable place, 50 acres of land. H. remained on the place where testator had settled him and served the widow until her death: *Held,* (1) that H. is a tenant in common with the nephew, who ought to have recognized H's right, under the will, to 50 acres, and to have had the same allotted to him in some proper manner; (2) that H. is entitled to remain in possession of the 50 acres and to receive the rents and profits thereof until 50 acres out of the land devised shall be allotted to him by proper proceedings.

ACTION to recover land, heard before *Hoke, J.,* at November Term, 1894, of PERSON, on pleadings and facts admitted, a jury trial being waived. The facts appear in the judgment of his Honor and in the opinion of *Associate Justice Montgomery.*

Upon the facts and pleadings the plaintiff requested his Honor to hold that in the will of Jas. H. Harris no title, interest or estate was vested in the defendant, Jesse Harris; that the attempted devise to the

defendant was void for uncertainty in the property described; that the devise to Jesse Harris, the defendant, was not imperative or legatory, because the testator had in his will theretofore devised the remainder in fee of all his estate, real and personal, to the plaintiff, (463) and the said devise to Jesse Harris, the defendant, created no trust and did not create plaintiff and defendant tenants in common; that the plaintiff was not estopped by the action set up by the defendant; that plaintiff was entitled to recover the land described in the complaint and to recover the sum of $76.67 rent from December 22, 1892, to November 22, 1894, at $40 per year. His Honor declined to so instruct and plaintiff excepted. His Honor rendered the following judgment:

This cause coming on to be heard at the Fall Term of PERSON, 1894, before *Hoke, J.*, and a jury, and a jury trial being waived and the facts agreed upon in open court; that plaintiff and defendant claim their interest in the land under the will of Jas. H. Harris, deceased; that the defendant remained upon the land, and with Elizabeth Harris, widow of testator under the will, until the death of said widow, and occupied at the time of widow's death 50 acres of said land, which had been indicated to him as a suitable place by said testator during his life; that plaintiff and defendant were unable to agree upon which 50 acres should be allotted to defendant under said will, and plaintiff claimed that the devise, under said will of Jas. H. Harris, was too indefinite to pass an interest against defendant; and no evidence being offered that plaintiff had offered defendant any portion of said land, at any point in said land, the court does find, consider and adjudge, that the possession and occupation of defendant, in the boundary of said testator's land, is not wrongful.

And that the defendant, Jesse Harris, is entitled to fifty acres of land to be allotted to him by metes and bounds out of the tract of land of which the late Jas. H. Harris died seized and possessed, the said fifty acres to be allotted to said defendant in some suitable place, (464) under the last will and testament of said Jas. H. Harris, deceased.

It is further ordered that W. E. Webb, John H. Burch and James Buchanan be, and they are hereby appointed, commissioners to allot and lay off by metes and bounds, in some suitable place, the said fifty acres of land to the said Jesse Harris, and report their proceedings to the next term of this court; and the said commissioners are empowered to call to their aid a competent surveyor, if they shall deem the same necessary.

And it is further ordered and adjudged that the said Jesse Harris shall remain in the possession of the land now occupied by him and described in the complaint, until the report of said commissioners hereinbefore directed to be made, is confirmed by the court; and when the same is

confirmed, the defendant, Jesse Harris, is directed to occupy and possess the land so allotted him, and it is adjudged that this cause be retained for further orders.

From this judgment the plaintiff appealed.

Shepherd, Manning & Foushee for plaintiff.

W. W. Kitchin for defendant.

MONTGOMERY, J. The defendant, Jesse Harris, was a former slave of the testator, and the latter, in his will and testament, bore witness to the old servant's character and devotion, in requesting him to remain with his (testator's) widow until after her death. There are services and kindnesses which these old family servants can and do render to their former owners which none other can, or will render, and the testator understood this as no one else can who never occupied such a relation. The widow survived her husband some years, and when the (465) end came to her on 23 December, 1894, this old family servant, the defendant, was present, faithful to the end; in fact, from the record, it seems that he had never left the old plantation. The testator appears to have been a just man, appreciative of the defendant's services, and in his lifetime had settled him on 50 acres of his land, and in his will made provision for him in compensation for past services and for those to be rendered by him in future to his widow. He devised his tract of land of 1,200 acres to his widow, for her life, with remainder to his nephew, the plaintiff, but charged it with an interest in favor of the defendant in the following language: "However, I request that Jesse Harris and Henry Harris, former slaves of mine, remain with my wife and nephew until the death of my wife, and if they shall remain with them during that time, that they, Jesse and Henry, shall have, at some suitable place, 50 acres of land each." The defendant remained with the widow till her death and was faithful to her, and therefore upon her death, under the will, he became entitled to 50 acres of the 1,200-acre tract of the testator (which was the only land he owned). He is a tenant in common with the plaintiff of the tract of land as to the 50 acres devised to him in the will, and is entitled to partition. *Harvey v. Harvey,* 72 N. C., 570; *Grubb v. Foust,* 99 N. C., 286. The plaintiff ought to have recognized the right of the defendant, under the will, to 50 acres of land in the tract of 1,200, and to have had the same alloted to him in some proper manner. Not having done so, he will not be allowed to eject the defendant from that particular 50 acres of land which he occupies, and which was indicated by the testator during his lifetime as a suitable home for the defendant, and the defendant will be

allowed to remain in the possession of it, until, in the manner prescribed by the judgment of the court below, 50 acres of the 1,200-acre tract shal be alloted by commissioners to him. Redfield Wills, (466) 390. The defendant is entitled to such of the crops or proceeds of sale of same as are now in the hands of the receiver, and which were grown on the 50 acres which the defendant has heretofore cultivated.

His Honor committed no error in refusing the instructions asked by the plaintiff, and the judgment of the court below is

Affirmed.

Cited: Harris v. Wright, 118 N. C., 423; *Caudle v. Caudle,* 159 N. C., 55.

A. D. WEBSTER v. J. P. SHARPE.

Action for Slander—Statute of Limitations—Issue of Summons.

1. A summons is issued when it passes from the hands of the clerk for the purpose of being delivered to the sheriff for service; it is not issued when filled up and signed and held for a prosecution bond to be given.
2. Words spoken to a person or in his presence which, from the rest of the conversation as a whole, amount to a charge of a crime to the apprehension of the person hearing them, are slanderous and defamatory although they do not, in terms, charge the crime.

ACTION for slander, tried before *Hoke, J.,* and a jury, at July Term, 1894, of ALAMANCE.

The court charged the jury that the action was commenced by issuing the summons and the summons was issued whenever it (469) was put out from the clerk's office by direction and under sanction and authority of the clerk and handed to the officer for the purpose of being served; that if it was sent out and handed to some one else to give to the officer for the purpose of being served this would be an issuing of the summons, but it must leave the office for this purpose by the direction or under the sanction or authority of the clerk. (470) Plaintiff excepted.

That the burden of this issue was on the plaintiff to show by the greater weight of evidence that the action was commenced within six months from the last utterance of defamatory words. That if the plaintiff failed in this, or the minds of the jury were left in doubt about the matter so that they were unable to determine it from the evidence, verdict should be for the defendant. Plaintiff excepted.

On first issue court charged the jury that if the words used to Trogden intentionally charged plaintiff with robbing store or the words used to him or in his presence by reasonable intendment and from the rest of his conversation amounted to such charge to the apprehension of Trogden or of any one who heard them, they would be slanderous and defamatory even though they did not make charge in express terms. Plaintiff excepted. There was no exception to any other portion of the charge on statute of limitations, nor to any other portion of the charge except as before noted. There was verdict and judgment for defendant.

E. S. Parker for defendant.
No counsel contra.

FURCHES, J. This is an action of slander in which plaintiff alleges that defendant falsely charged him with breaking into defendant's store and taking his goods. Defendant answered denying the allegations in plaintiff's complaint, and pleaded the statute of limitations. On the trial three issues were submitted to the jury—one as to whether defendant uttered the slanderous words as alleged, another as to the statute of limitations, and the third as to the amount of damages.

All the evidence tended to show that defendant's store was broken into on the night of 31 December, 1892, and the summons bears date
(471) 30 May, 1893. But it was contended by defendant that in fact it was not issued until 10 July, 1893.

If the summons was issued at the time it bears date, it was in time. But if it was not issued until 10 July, it was not in time, and the statute of limitations was a bar.

The presumption is that it issued at the time it bears date, and the burden is on defendant to show that it did not. To do this defendant introduced the clerk and the sheriff, and their testimony tended to show that the summons did not issue at the time it bears date, and that as a matter of fact it was not issued until 10 July, 1893.

An action is commenced by issuing a summons. Code, sec. 199. And an action is commenced when a summons is issued against a defendant. Code, sec. 161. This involves the question as to what is meant by the word "issue," and we are of the opinion that it means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is often the case, if the summons is filled out by the attorney of plaintiff, and put in the hands of the sheriff. This is done by the implied consent of the clerk, and in our opinion constitutes an issuance from the time it is

placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney would not constitute an issuing of the summons, as provided for in The Code. Nor would the fact that a summons was filled up and held by the clerk for a prosecution bond (as the evidence in this case tends to show was the fact) constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose (472) of being served on the defendant. This being so, we see no error in the judge's charge on the question as to when the summons issued and the statute of limitations.

The jury finds the first issue for the defendant—that he did not utter the defamatory words as alleged by plaintiff. And plaintiff excepts to the judge's charge on this issue. But no error is pointed out in the exception, and we see none.

Judgment affirmed.

Cited: Currie v. Hawkins, 118 N. C., 600; *Houston v. Thornton,* 122 N. C., 375; *McClure v. Fellows,* 131 N. C., 511; *Smith v. Lumber Co.,* 142 N. C., 31; *Grocery Co. v. Bag Co., ib.,* 181; *Emry v. Chappell,* 148 N. C., 330; *McKeithen v. Blue,* 149 N. C., 98; *McCall v. Sustair,* 157 N. C., 183; *Carson v. Woodrow,* 160 N. C., 146; *Cotten v. Fisher's Co.,* 177 N. C., 60.

T. E. BALSLEY, EXECUTOR OF J. B. BALSLEY, v. W. G. BALSLEY ET AL.

Will, Suit for Construction of—Jurisdiction—Further Relief Granted—Indebtedness of Devisee.

1. Where an executor seeks the advice of the court and a construction of the will, only such questions will be determined as it is necessary to settle in order to protect the fiduciary in the discharge of his present duty.

2. The courts will not assume jurisdiction except where there is a present existing question of right to be acted upon, capable of being made the subject-matter of a decree, nor will they advise as to the past conduct of an executor nor as to the future and contingent rights of legatees.

3. A trustee seeking advice as to the disposition of property or the distribution of a fund must, as a rule, have it in his possession so that the order of the court may be carried out.

4. The courts have jurisdiction of a suit by an executor for the construction of a will when he has personal assets in his hands ready for distribution, and where the will, while providing for an equal distribution, does not

show whether the debts due to the estate are to be released or treated as advancements and added to the estate before distribution.

5. Where a court has properly taken jurisdiction of a suit to construe a will, it may order a valuation of the real estate if necessary in order to afford complete relief, though the relief thus granted is ordinarily granted in a special proceeding.
6. Where a will provides for the equal distribution of the testator's estate and one of the devisees is indebted to the testator it is proper to add the amount of such indebtedness to the value of the personal and real estate and after ascertaining the share of each, to deduct from the share of the one so indebted the amount of his indebtedness.

(473) ACTION tried before Hoke, J., at December Term, 1894, of GUILFORD, brought by T. E. Balsley, executor of J. B. Balsley, for the purpose of obtaining a construction of the last will and testament of said J. B. Balsley, and for sale of the real estate of said testator, and a distribution of the proceeds thereof and of the personal estate of the testator.

(476) *Dillard & King and Shepherd & Busbee for plaintiff.*
MacRae & Day for defendants.

AVERY, J. The frequent filing of bills under the old, and institutions of actions in the nature of bills in equity under the new practice, by executors and trustees against those entitled to the beneficial interests, for the purpose of obtaining a construction of wills, have led to the thorough crystalization of the leading principles governing causes of this kind.

1. Only such questions will be determined by the court as it is necessary to settle in order to protect the fiduciary in the discharge of his present duty. *Tyson v. Tyson,* 100 N. C., 360; *Tayloe v. Bond,* 45 N. C., 5.

2. The courts will not assume jurisdiction, except where there is a present existing question of right to be acted upon, the determination of which can now be made the subject matter of a decree. They will not advise as to the past conduct of an executor, nor as to the future and contingent rights of legatees. *Tayloe v. Bond, supra; Little v. Thorne,* 93 N. C., 69.

3. The trustee who seeks advice as to the disposition of prop-
(477) erty or the distribution of a fund, must as a rule have it in his possession, so that the order of the court may be carried out. *Perkins v. Caldwell,* 77 N. C., 433.

While the advisory jurisdiction of the courts cannot be invoked to

elicit an opinion on an abstract question, yet where the court has properly taken cognizance of a case for the settlement of another controverted point, for the proper determination of which it incidentally becomes necessary to place a construction on a will, the courts acting upon a familiar rule of equity practice make an exception to the general rule. *Little v. Thorne, supra.* The executor had in hand the sum of $5,727.47 arising from the sale of the personal property after paying the debts of the testator and the cost of administration. The leading purpose of the testator to make an equal division of all of his estate, real and personal, except a specific legacy of $500, left in trust for his granddaughter, Mary B. Atkinson, is clearly expressed in the will and must be carried out if it is in the power of the court to do so. *Lassiter v. Wood,* 63 N. C., 360; *King v. Lynch,* 74 N. C., 364; *Alexander v. Summey,* 66 N. C., 577. There was no intent expressed to treat as advancements the indebtedness of his children nor on the other hand to have any such debt left out of an account of advancements or released.

The defendant Charles T. Balsley, one of the sons of the testator, was indebted to the estate in the aggregate sum of $2,885.87, with interest on various smaller sums, making up that aggregate from various dates. His creditors, who are defendants and who appealed from the judgment of the court, contended that the indebtedness of Charles ought not to be added, in order to arrive at the aggregate value of the real and personal property and make an equal division of the same; but that leaving his indebtedness out of the estimated value of the whole estate, Charles was entitled to receive one-fourth. The executor was (478) advised that the amount of this indebtedness should be added to ascertain the value of the estate, and deducted from the one-fourth thereof in determining the amount, if anything, coming to Charles. When the executor sought to distribute the trust fund arising from the sale of the personalty and left after the payment of debts and expenses, he was confronted with some controverted questions, about which he had a right to ask the advice of the court for his own present protection.

But if the indebtedness of Charles was to be charged against him as an advancement, the executor could not determine without some authoritative valuation of the entire real estate whether after deducting the debt from one-fourth of the aggregate sum ascertained by adding together the balance in hand arising from the sale of the personalty, the sums due from the heirs and distributees and the estimated value of the real estate, there would be any excess on hand due to Charles. Then, if there should be any excess, it would become necessary to know what portion, if any, should be exempt from his debts, and if treated as a homestead, how the fund should be disposed of for the benefit of Charles and his creditors.

But the defendants assign as error the order that the land be sold for the purpose of making an equal distribution under the will. It is declared by the court in express terms however that it was made by "consent of parties" and it is manifest therefore that no exception can be taken to the sale at this late day.

So the whole fund is now in hand, and it remains to determine what interest Charles, or such of the defendants as are his creditors, have in its distribution.

We think that the motion to dismiss for want of jurisdiction was properly refused. The executor set forth facts sufficient to show that he had a right to ask the advice of the court as to the distribution (479) of the fund already in hand, and when it was made to appear that the advice could not be given without first ascertaining and determining the value of the real estate, the court having, in the exercise of its equitable jurisdiction, once taken rightful cognizance was empowered and required to afford complete relief, even though it incidentally involved the granting of a remedy ordinarily administered by the court in a special proceeding. We have seen that where the court takes cognizance for a different purpose, it will incidentally construe a will in order to afford the relief to which a party is entitled, so in the case at bar the court, finding it necessary to determine the value of the land, was authorized to have it ascertained in the way provided by law. We are relieved from the necessity of determining whether the heirs could have insisted on an actual partition of the land by commissioners instructed to ascertain the aggregate value of it, and if it should become apparent that the debt of Charles would amount to more than the value of a share, to divide it as near as might be practicable into three equal shares to the other heirs entitled under the will. The court by consent of all parties ordered in the progress of this litigation that the land be sold, and the fund, which stands in place of it, is now subject to the order of the court just as the residue of the proceeds of the sale of personalty has been from the filing of the complaint. The voluntary consent of all parties interested, to the order of sale likewise dispenses with the necessity for considering or discusing the question whether the terms of the will are such as to give the executor, by implication, power to sell. It is immaterial, in view of the assent of the parties to the sale, whether in the face of objection the executor would have been deemed authorized, by implication, to sell in order to carry out the leading purpose (480) of the testator to make all of the four devisees equal, or whether, in the way indicated, some of the devisees might have demanded actual partition.

If Charles Balsley's indebtedness exceeds his share of the estate, it

would seem that the court provided for the disposition of the fund, in the manner pointed out as proper in *Vanstory v. Thornton,* 112 N. C., 196, and the cases cited by the Justice who delivered that opinion. We think there was

No error.

Cited: *Bowden v. Lynch,* 173 N. C., 206; *Perry v. Perry,* 175 N. C., 145.

LAURENCE S. HOLT v SOUTHERN FINISHING AND WAREHOUSE COMPANY et al.

Certiorari—Practice—Premature Appeal—Examination of Adverse Party before Trial—Corporation—Right of Stockholder to Inspect Books of Corporation.

1. In an action by a stock holder of a Corporation to set aside as fraudulent an assignment of a contract by the corporation, the directors may, under sect. 580 *et seuq.* of The Code be compelled to disclose information to enable plaintiff to frame his complaint even though their evidence may result in pecuniary injury.
2. In an action by a stock holder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff is entitled under sec. 580 *et seq.* of The Code to inspect the books of the corporation in order to obtain information upon which to frame his complaint.
3. An appeal does not lie (being premature) from an order directing the examination of directors of a corporation under the provisions of 580 *et seq.* of The Code, in an action by a stock holder against the corporation, or from a refusal to discharge such order

PETITION of the defendant for a writ of *Certiorari,* an appeal having been refused.

Fuller, Winston & Fuller for plaintiff.
Dillard & King, L. M. Ccott and Shepherd & Busbee (487) *for defendant.*

MONTGOMERY, J. This is an application for a writ of *certiorari* as a substitute for an appeal, alleged to have been denied to the defendant by the Judge below. The record presents a most unusal condition of affairs. Five members constitute the board of directors of the defendant company, of which number the defendant Cone, his brother and his brother-in-law constitute a majority. The plaintiff, one of the largest stockholders in the company, is denied the right to inspect the books

of the company, and that too after he has made known to the directors his belief that the books contain evidence of matters deeply prejudical to his interests, both as a stockholder and as an individual, and which a majority of the directors have corruptly and secretly entered therein. Very cogent reasons must be shown this Court before it will conclude that such a right does not belong to the plaintiff. The plaintiff has commenced a civil action in the Superior Court of Alamance against the defendant for the purpose of setting aside an alleged pretended transfer by the defendant corporation to Moses H. Cone of a cause in action, arising out of an alleged contract, and also an alleged contract executed 9 September, 1892, by the plaintiff with the defendant company, for the reasons set out in the affidavit of the plaintiff of 13 April, 1895, as appears in the statement of facts in the case. To enable him to draw his complaint with greater certainty, the plaintiff desires to examine Neil Ellington, E. T. Garsed and J. W. Lindau, stockholders and
(488) directors of the company, under Sections 580 and 581 of The Code. He has as much right to examine Ellington and Garsed and Lindau before the trial as at the trial, and they are subject to the same rules of examination as prevail in the examination of witnesses on the trial of actions before the Courts and they are compelled to answer all pertinent and material questions put ot them, except such as the Constitution and Laws relieve them from answering. We know of no such exemption except a man may not be compelled to give evidence against himself, which is found in Article I, Section II, of the constitution, which section, by judicial construction,has been extended to witnesses in civil actions. *Fertilizer Co. v. Taylor,* 112 N. C., 141. It makes no difference whether the answer will result in pecuniary injury to the witness or not, they must answer the questions as they would be required to do before the Courts.

In the case before us, the matters about which the ulaintiff wishes to exaamine the defendants appear to be most material to the plaintiff and are in no sense inquisitoial. The plaintiff appears deeply interested as a stockholder in the business of the company,.and he alleges that he is being injured by the acts of the company, because he is not allowed to inspcet the books; and he wishes to examine the defendants, who, he declares under oath, can furnish him with evidence necessary and material.

It seems idle under the facts of the case, as brought out by the plaintiff's affidavit, to talk about inquisitorial powers being given to the commissioner by the Judge who made the order of examination. The affidavits of the defendants offered on the hearing before *Judge Green* to vacate his order allowing an examination of the defendants, furnish nothing which goes to show any reason why they should be excused from

being examined. They simply deny the plaintiff's right to have the examination without furnishing any legal excuse for such a denial.

The papers filed in the matter bring up, and there was argued (489) before us by counsel on both sides, a certain order made in a proceeding concerning this matter by *Judge Green,* at Durham, on 1 April, 1895, which is as follows: "This matter coming on to be heard and being heard in chambers, in Durham, on 1 April, 1895, the plaintiff and defendant being represented by counsel, the defendant Cone not being represented, upon reading and considering the affidavit of the plaintiff and the answer of defendant company, made through its president, Neil Ellington, and duly verified, and the affidavits of E. T. Garsed and J. W. Lindau, and a part of what purports to be a copy of an affidavit made by Moses H. Cone in an action pending in the State of New York between this plaintiff and said Cone, which was offered by plaintiff as well as his own affidavit in reply, the court adjudges and declares that under section 578 of The Code, the granting or refusal of plaintiff's motion is a matter purely within the discretion of the court; and that it is unnecessary that the court should find any facts; and in the exercise of this discretion, the court adjudges that the defendant company permit the plaintiff, L. S. Holt, to inspect the books in its possession, or under its control, which contain entries of the acts and doings of the directors and stockholders of the defendant company at the annual meeting, or an adjourned meeting of said directors and stockholders in January, 1895, and that plaintiff may inspect and copy such entries above described in such books as he deems material, or containing evidence relative to the merits of the action, at any time, during business hours within the next ten days, and said inspection and copy may be made by the plaintiff in person, or by his attorneys, *Fuller, Winston & Fuller,* or any one of them. Let the clerk issue a copy of this order to be served on the defendant company." (490)

The defendant treated this order and the application upon which it was made a bill of discovery in Equity. They denyon affidavits, that the books sought to be inspected by the plaintiff contained any entry about the matters, of which the plaintiff wished to have knowledge. There was no other reason given why the inspection should not be had. Sections 580 and 581 of The Code are a substitute for the old bill of discovery, and only a substitute. In fact section 579 of The Code declares that "No action to obtain discovery under oath, in aid of the prosecution or defence of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter."

Upon the whole matters brought before us and argued on the motion

for the writ of *certiorari* we are of the opinion that the appeal from the order of his Honor *Judge Green,* made 1 April, 1895, was premature and ought not to have been allowed, as was also the appeal from his other order of 24 April, 1895; and that his Honor committed no error in making either one of said orders, and they are affirmed. *Helms v. Green,* 105 N. C., 251; *Vann v. Lawrence,* 111 N. C., 32; *Fertilizer Co. v. Taylor, supra.* The defendants will pay the costs of this proceeding.

Affirmed.

Cited: *Pender v. Mallett,* 122 N. C., 164; *S. c.,* 123 N. C., 60; *Ward v. Martin,* 175 N. C., 289; *Smith v. Wooding,* 177 N. C., 549; *Jones v. Guano Co.,* 180 N. C., 320.

(491)

M. PRETZFELDER & CO. v. MERCHANTS INSURANCE COMPANY ET AL.

Practice—Joinder of Actions—Action Against Several Insurance Companies—Arbitration—Failure of Arbitrators to Agree.

1. Where plaintiff's property was insured in several insurance companies, the contract with each containing the provision that plaintiff's right of recovery against each should be limited to the proportion of the loss which the amount of the policy issued by each company bore to the total amount of insurance, it was no misjoinder, but essentially proper, that all the companies should be made parties defendant in one and the same action to recover for the destruction of such property by fire.
2. In such case the verdict "affects all parties to the action" and the joinder is permissible under Section 267 of The Code.
3. Where arbitrators, or a majority of them, fail to agree upon an award, and the parties cannot agree upon other arbitrators, they are relegated to their legal rights and an action may be maintained.

ACTION, heard before *Hoke, J.,* at August Term, 1894, of GUILFORD, on demurrer to the complaint.

The action was brought against several insurance companies whose policies the plaintiff held, to recover for the damage done to his stock of goods by fire.

(495) The demurrer was overruled and defendants appealed.

Dillard & King and Jas. E. Boyd for plaintiff.
McRae & Day and J. W. Hinsdale for defendants.

CLARK, J. The plaintiff was insured in several companies the con-

tract with each containing the provision that the plaintiff's right of recovery against each was limited to the proportion of the loss which the amount named in the policy of each company should (496) bear to the whole amount insured. It is not only no misjoinder, but essentially proper that all the companies should be made parties defendant. If each company should be sued separately, not only would the same proposition of law arise and the same evidence be gone over in five different actions at an expense of five times the amount of court costs, and much needless consumption of the time of the courts, but as the trial would be before five different juries the loss might be assessed at five different amounts. There is no method to gauge accurately the *pro rata* loss of each company so readily as by one verdict and one apportionment, according to the varying amount of risk taken by each company. By their stipulation to apportion the loss the companies have, to that extent at least, made the five policies one contract, the amount of damages accruing upon which should be assessed and apportioned in one joint action. Adams' Eq., 200; 1 Pomeroy Eq. Jur., section 245, 274; *Black v. Shreeve,* 3 Hals, ch. 440, 456. The verdict necessarily "affects all parties to the action." The joinder is therefore within the purview of The Code, sec. 267. *Hamlin v. Tucker,* 72 N. C., 502; *Young v. Young,* 81 N. C., 91; *Heggie v. Hill,* 95 N. C., 303. Where there is a misjoinder of causes of action, the court may allow the action to be divided (Code, sec. 272; *Hodges v. R. R.,* 105 N. C., 170); or, where there is a misjoinder of parties, the court in its discretion can do the same (Code, sec. 407; *Bryan v. Spivey,* 106 N. C., 95); but, here, there is neither misjoinder of parties, nor of causes of action.

The arbitrators were appointed but disagreed and refused to go on, and finally broke up without making an award. Subsequent attempts to agree upon another board failed. The parties were thus relegated to their legal rights, and the action can be main- (497) tained. *Brady v. Ins. Co.,* 115 N. C., 354. Indeed, as intimated in that case, we think the proper rule is laid down in *Ins. Co. v. Holking,* 115 Pa., 416, that where the arbitrators, or a majority of them, failed to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts.

No error.

Cited: *Blackburn v. Ins. Co., post,* 824; *Cook v. Smith,* 119 N. C., 355; *Daniels v. Fowler,* 120 N. C., 17; *Pretzfelder v. Ins. Co.,* 123

N. C., 166; *Weeks v. McPhail,* 128 N. C., 138; *Fisher v. Trust Co.,* 138 N. C., 242; *Ayers v. Bailey,* 162 N. C., 211; *Lee v. Thornton,* 171 N. C., 214.

O. H. CAUSEY v. W. H. SNOW.

Practice—Appeal—Certiorari—Laches.

Where an appellant neglected to docket his appeal or apply for a *certiorari* at the next term of this Court after the cause was determined in the court below, the writ will not be granted.

Petition of defendant for writ of *certiorari.*

F. H. Busbee for petitioner.
L. M. Scott contra.

CLARK, J. This cause having been determined below at February Term, 1894, should have been docketed here before the completion of the call of the docket of the district to which it belonged at Fall Term, 1894. Rule 5 of this Court. If for any good reason it was not docketed the appellant should at that time have applied for a *certiorari* (Rule 41), otherwise the appellant might have docketed a certificate and had the appeal dismissed. Rule 17. Though as the appellee did not do this, the appellant could have docketed the appeal at any time during said Fall Term. All this was summarized in *Porter v. R. R.,* 106 N. C., 478, and has been repeatedly affirmed (498) since. *Hinton v. Pritchard,* 108 N. C., 412; *Graham v. Edwards,* 114 N. C., 228; *Paine v. Cureton, ib.,* 606. Not having done this, it is too late to docket or ask for a *certiorari* at this term. *S. v. Freeman,* 114 N. C., 872, and cases there cited. Besides at the term of the court held below after the expiration of the Fall Term of this Court, the appellant, on proper notice, procured a judgment of the court below that the appeal had been abandoned. This he had a right to do. *Avery v. Pritchard,* 93 N. C., 266; *Porter v. R. R., supra.*

This is not like *Arrington v. Arrington,* 114 N. C., 113 and 115. There the papers were sent to the officer in time and the failure to serve in due time was by no neglect of the appellant. Nor is it like the case of *Walker v. Scott,* 104 N. C., 481, in which the transcript failed to reach here in time by reason of the delay in the mails. But here the appellant had ample opportunity to learn whether the trans-

cript had been sent up. He made no inquiry and offered no fees. When he learned on the call of the district that it had not been sent up even then he took no steps. Appellees have rights which would be seriously infringed by permitting such negligence to procure further delay for the appellant.

Certiorari denied.

Cited: *Haynes v. Coward, post,* 842; *Burrell v. Hughes,* 120 N. C., 278; *Parker v. R. R.,* 121 N. C., 504; *Mirror Co. v. Casualty Co.,* 157 N. C., 30.

(499)

ARMSTRONG, CATOR & CO. v. O. W. CARR, TRUSTEE.

Co-partnership—Assignment by Firm—Preference of Creditors of Individual Members of Firm.

1. The creditors of a co-partnership have no lien upon the partnership property as against individual creditors.

2. With the assent of the members of a firm any one of them is free to dispose of the partnership property for his individual use and a creditor cannot intervene to prevent the application.

3. An assignment of partnership property by members of an insolvent firm is not rendered fraudulent as to the firm creditors by a clause therein preferring over partnership creditor's debts due to creditors of the individual partners.

ACTION instituted by the partnership creditors of Powell and Wharton to set aside an assignment for fraud, tried before *Hoke, J.,* and a jury at December Term, 1894, of GUILFORD.

It appeared from the pleadings and admissions of defendants and the evidence, that the assignment provided for the payment of certain individual indebtedness of each of the co-partners, to wit: A debt of two thousand dollars due one W. D. Wharton as the individual debt of the defendant W. C. Wharton, and two debts, to wit: For one thousand and five hundred, and seven hundred and fifty dollars due the wife of the defendant Powell.

The debt due W. D. Wharton was admitted to be *bona fide* and was money borrowed by defendant W. C. Wharton to be used by him in the partnership business. And the debts due Mrs. Powell were found by the jury to be genuine *bona fide* debts.

(500) There were also partnership debts in the first-class, to wit: The debt to Dr. Lampman and to Mrs. Powell both found by the jury to be *bona fide* debts, and which were more than sufficient to exhaust the assets.

The defendants, the partners, were proved and admitted to be insolvent. They assigned all the property they owned by the deed of assignment, not reserving any exemptions. And the property so assigned was partnership property when conveyed except perhaps the furniture of the defendant Powell, mentioned and conveyed in the deed.

The deed of assignment will be copied and constitute a part of the case.

The action is instituted by the plaintiffs' creditors of the defendant firm whose debts are admitted to be justly due, and which said debts were provided for in the deed of assignment but were postponed to the individual debts of the partners above mentioned.

The only two partners being W. C. Wharton and O. N. Powell.

The plaintiffs prayed the court to instruct the jury that as a matter of law the preference of individual to partnership debts rendered the deed of assignment void, and that the deed for that reason was void and hat the court so instruct the jury.

This was declined and plaintiffs excepted.

Verdict for defendant as set out in the Record. Motion for new trial—for errors in refusing above prayer for instructions—overruled, and plaintiffs excepted.

Judgment on the verdict for defendants. Appeal taken by plaintiffs.

L. M. Scott and Shaw & Scales for plaintiffs.
Dillard & King contra.

(501)

MONTGOMERY, J. If upon the face of a deed of assignment it appears manifestly that its execution was for the purpose of hindering and delaying creditors, and for the ease and advantage of the debtor, the court may declare it void without the aid of a jury. The plaintiffs in this action insist that because, in the assignment made by the partners of the partnership property, there was a clause which secured certain debts due to creditors of the individuals composing the partnership, this Court should declare the deed void. That is, the only relief which the plaintiffs seek rests upon the idea that they have a lien upon the partnership property as against individual creditors, and that it is a fraud apparent on the face of the deed for the partners to apply the same to their individual debts instead of to

their partnership liabilities. There is not only no fraud on the face of this assignment, but such provisions as the plaintiffs object to in this deed have received the sanction of our judicial decisions. In the case of *Allen v. Grissom,* 90 N. C., 90, *Chief Justice Smith,* for the Court, treats fully the questions of the rights of creditors, and also of those of the partners in the partnership property. In that opinion he says: "With the assent of the partners, any one of them is free to dispose of the company's effects for his individual use, and a creditor cannot intervene to prevent the application." This is the doctrine established by repeated recognitions in this Court, from which, whatever may have been the decisions elsewhere, we are not at liberty to depart, and it commends itself to our approval. In *Davis v. Smith,* 113 N. C., 94, this Court, *Justice Avery* delivering the opinion, approved, with citations from *Allen v. Grissom, supra,* the law set forth in that case. (502)

There is no error in the ruling of the court below, and the judgment is

Affirmed.

JAMES O. SUTTON v. JOHN R. PHILLIPS.

Fines and Penalties—Qui Tam Actions—Proceeds—Selling by Unlawful Weights and Measures—Constitutionality of Statute.

1. The courts will not declare a statute unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers. If any doubt exists it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.
2. Former adjudication by the courts, immemorial usage and considerations of public policy justify the allowance of *qui tam* actions in the absence of clear and express prohibition thereof by the Constitution.
3. Sections 3840 and 3842 of The Code, providing that private parties may recover penalties of any person selling and delivering provisions by unauthorized weights and measures, are not in conflict with sec. 5, Art. 9 of the Constitution, which provides that the net proceeds of all penalties, etc. shall go to the school fund.
4. In an action to recover under sections 3841 and 3842, providing for a penalty for selling by unauthorized weights and measures, and for selling by other measures than the standard; a finding for plaintiff on the second ground is error where the article sold was meat.

FAIRCLOTH, C. J., AND AVERY J., *dissent.*

THREE actions were brought by the plaintiff, James O. Sutton, against John R. Phillips, the defendant, to recover eighty dollars in each case for two penalties of forty dollars each, given by sec. 3842 of

(503) The Code: "for selling and delivering by weights and measures not tried by the standard, and for selling and delivering by less measure than the standard" certain meats sold to the plaintiff; tried by a justice of the peace. There was no written complaint or answer further than the summons and the justice's return. The justice rendered judgment in each case for $40 in favor of plaintiff, and the defendant appealed to the Superior Court from the judgments. When the cases came up for trial in the Superior Court before *Boykin, J.*, the three cases were consolidated by agreement and tried together.

The defendant's counsel moved that the plaintiff be required to elect which penalty he would contend for, the defendant contending that only one penalty for forty dollars was given in said sec. 3842 for the same transaction.

The court overruled the motion and the defendant excepted.

After the conclusion of the testimony the following issues were submitted by the court to the jury:

Did the defendant sell meat to the plaintiff on the——day of April, 1893, on the——day of May, 1893, and on the——day of June, 1893, by weights that had not been examined and adjusted by the standard keeper as required by the statute?

Answer—Yes.

Did the defendant sell meat on the dates above named by less measure than the standard?

Answer—Yes.

On return of the verdict into court by the jury, the plaintiff moved for judgment thereon against the defendant for $80 in each case.

The defendant moved

1st—That judgment be rendered against the plaintiff for cost, (504) and the action be dismissed as to the defendant—the defendant contending that the amendment of sec. 3841 by Laws 1893, chapter 100 repealed the penalty in sec. 3842, except in case he was called on by the standard keeper and refused to allow and permit him to adjust the scales.

It was admitted the defendant had not been called on by the standard keeper for that purpose.

In case the court should be against the defendant on this motion, he moved that judgment be rendered against him for only $40 in each case. After reserving the case for consideration, his Honor overruled both motions of the defendant and rendered judgment against the defendant for $80 in each case, from which the defendant appealed.

N. J. Rouse for plaintiff.

R. O. Burton for defendant.

CLARK, J. While the courts have the power, and it is their duty in proper cases to declare an act of the legislature unconstitutional it is a well recognized principle that the courts will not declare that this coordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

For several reasons it is not clear that the act in question, which was not only reënacted since the Constitution of 1875 by The Code of 1883 (sec. 3841, 3842), but which has been recognized as valid and amended three times by the General Assembly, first in 1889 (ch. 404) and again by the General Assembly of 1893 (ch. 100 and 207), is unconstitutional and invalid. Among these reasons are:

1. This Court has heretofore recognized that acts like this, giving the penalty prescribed for a violation of the statute, to any one (as to some designated person) who shall sue for the same, (505) are constitutional. *Ashe, J.,* for the Court, in *Katzenstein v. R. R.,* 84 N. C., 688, expressly passes upon the point and holds that such acts are not in contravention of Art. IX, sec. 5, of the Constitution. In *Hodge v. R. R.,* 108 N. C., *Merrimon, C. J.,* elucidates the point and in his concurring opinion on pp. 30, 31, 32 gives strong reasons for adhering to the former opinion of the Court as rendered by *Ashe, J.* The Constitution of Missouri (Art. XI, sec. 8) contains a clause almost identical with that of this State and the Supreme Court of that state has uniformly held that it was not an inhibition upon the Legislature to give the penalties to any person whom the act imposing the penalties might provide and that the object of the Constitutional provision was not to prohibit *qui tam* actions in future, but simply to provide that all penalties inuring to the state should go to the school fund. In view of these authorities in our State and elsewhere upholding the constitutionality of such acts which had been customarily passed, time out of mind, it can not be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly. In addition to these cases directly in point, acts of the Legislature giving the penalty in whole or in part to the person suing for the same, have been recognized as valid in numerous cases since the amended Constitution of 1875, thus in effect approving the direct decisions. *Branch v. R. R.,* 77 N. C., 347; *Keeter v. R. R.,* 86 N. C., 346; *Whitehead v. R. R.,* 87 N. C., 255; *Branch v. R. R.,* 88 N. C., 570; *Middleton v. R. R.,* 95 N. C., 167; *McGowan v. R. R., ib.,* 417; *McGwigan v. R. R., ib.,* 428; *Hines v. R. R., ib.,* 434; *Williams v. Hodges,* 101 N. C., 300; *Cole v. Laws,* 104 N. C., 651; and there are more than twice as many more. All of these

(506) were erroneously decided and must be overruled if the plaintiffs in them were now, by a new construction of the Constitution, held not to have had a cause of action, a defect which must have been noticed, in this Court, without exception below, if such defect had existed. Indeed *Katzenstein v. R. R.,* in which this Court expressly held that the amendment to the Constitution was not a restriction upon the Legislature prohibiting *qui tam,* or popular actions as they are sometimes termed, has been cited as authority in no less than twelve cases. *Middleton v. R. R.,* 95 N. C., 167, citing numerous precedents, not only recognizes the power of the Legislature to authorize the penalty to be given to "any one who shall sue for the same" but that the action can be brought in the name of such party alone without joining the State as relator. This is cited and approved in *Maggett v. Roberts,* 108 N. C., 174. The judicial construction of this provision has been uniform and frequently repeated. The legislative construction has been no less so. In the reply of the Court to the Governor as to the "judicial term of office, 114 N. C., 922, on page 927, the Court says, "We rest our opinion of the construction of the Constitutional provision upon the duty and propriety of adhering to the settled legislative construction, acquiesced in until a very recent period by the people acting in public and private capacities." By the same reasoning, the construction of this constitutional provision has had ten times over "a settled legislative construction" which should be adhered to. Scarcely a single Legislature since the Convention of 1875, has passed which did not recognize the power and duty of the Legislature in this particular by enacting or amending statutes conferring the whole or a part of penalties upon persons suing for the same. This has
(507) been acted on without question in that department of the government. So universally has it been "acquiesced in by the people in public and private capacities" that only once is it known to have been questioned by the pleadings in all the actions brought to collect penalties, *Katzenstein v. R. R., supra,* and then by an exceptionally able Court—*Smith, Ashe and Ruffin*—the legislative construction was unanimously sustained, and has been repeatedly and uniformly recognized since as the law in numerous cases, many of them above cited. It has thus twenty years' uniform construction by both the legislative and judicial departments, and should be deemed settled, if anything can be. The Act of 1889 (ch. 199, sec. 36), requiring solicitors to prosecute and collect penalties and forfeitures, applies only to judgments entered incidentally in due course of procedure. It does not extend to those cases where no judgment has been rendered but an action is simply authorized to be brought for a penalty. The words "penalties, forfeitures and fines" in Art. IX, sec. 5, contemplate

primarily only those imposed incidentally in the course of legal procedure but are broad enough to embrace those for which due action must be brought provided the State is empowered to sue for them.

2. From time immemorial in the English law, it has been found that *qui tam* actions, actions in which the penalty goes in whole or in part to the person suing for the same, were an efficient, and indeed sometimes an indispensable means of enforcing the law in many cases, as for the breach or neglect of duty by officers and corporations, and Parliment in England and legislative bodies in this country have freely enacted statutes for the enforcement of laws by such actions. There has been no agitation for the repeal of such statutes, and if there had been a radical departure intended by the amendment of 1875 by which the General Assembly would have been deprived of its power to authorize *qui tam* actions, such inhibition would have been clear and unmistakable and would have been placed in the chapter re- (508) lating to the legislative department, among the restrictions upon the exercise of legislative power. Art. 2, secs. 10, 11, 12, and 14. Instead of that this provision is found in Article IX, upon Education, and in the section transferring to the school fund certain sources of revenue, and among others is incidentally mentioned "also the clear proceeds of all forfeitures and penalties." It would be a strange construction that this incidental reference in the article on Education was a reversal of the policy of hundreds of years, and a clear, distinct inhibition upon the Legislature against permitting *qui tam* actions any longer, and an enactment that hereafter the State alone should recover penalties in civil actions. On the contrary, as already held by our Court and also by the Missouri Court upon an almost identical Constitutional provision, the purport and true meaning of this clause of the Constitution is not to vest the sole right to collect penalties in the State, but to vest in the school fund the clear proceeds of all penalties which by authority of law should be collected for the benefit of the State. It is best to stand *super vias antiquas.*

3. If the constitutional provision were clear that the General Assembly was prohibited from any longer permitting *qui tam* actions or the collection of penalties by any one except the State, public policy could not be considered. But when such restriction is not clearly shown, considerations of public policy may be invoked on the ground that there was no great recognized evil or public agitation which called for so radical a departure as depriving the law-making power of its immemorial discretion to authorize the recovery of penalties by private persons, as it has done in section 3842 of The Code, or by official persons, as in Section 3844 of The Code, as well as in divers and sundry other statutes. Not only would this restriction upon the Legis-

lature virtually repeal the penalties prescribed for breaches of
(509) duty in these and similar cases, but it would virtually repeal all statutes providing penalties for delay in shipping freight, and other penalties for breach of duty by corporations, since penalties will be rarely sued for if there is no benefit to accrue to the party bringing the action. It would indeed be a virtual repeal of this long recognized and efficient mode of enforcing the law, and would leave its enforcement in eyect solely to the criminal side of the docket, with its official prosecutors and the benefit to the defendant of the preponderance of challenges, the protection of the doctrine of reasonable doubt and the other advantages with which the law favors a defendant on trial for crime. Such change not being called for by public policy, and such restriction upon the Legislature being against the experience and the public policy of centuries, if made, should appear clearly and unmistakably and not by inference from a mere provision assigning sundry funds for the support of education.

The Code, section 3842, defines (as does section 1090) two distinct violations of the law. The first (in Sec. 3842) for buying, selling or bartering by any weight or measure which has not been stamped or sealed as required by section 3841, and secondly for selling and delivering by less measure than the standard. For each offence a penalty of $40 is prescribed and the same act may be a violation of both provisions or of one only. A party could sell by unstamped measure or weights and violate the first clause and yet not sell by measure less than the standard, in which case he would not be liable to the second penalty. In the present case the defendant is not liable to the second penalty but on a dicerent ground, which is that the second penalty is restricted to articles sold and delivered by measure less than the standard
(the word "weight" which appears in the first clause being
(510) omitted), and the defendant is not liable to the second penalty because meat is an article which is not sold by measure. An English case under a similar statute and exactly in point is *Hughes v. Humphries,* 3, E. & B., 954. If it be objected that the jury has so found, inspection of the second issue shows that it does not come up to the statute, which imposes the penalty on any one who shall "sell and deliver" and the issue and response thereto does not find that there was any *delivery* which is an essential, to constitute the penalty. As to the first clause, we concur with the learned counsel for the defendant that the words "sealed and stamped *as aforesaid*" refer to section 3841 as amended by chapter 100, Acts 1893, and that there is a violation of the statute only when the defendant has bought, sold or bartered by weights or measures which he did not "allow and permit" the standard keeper, who visited him for that purpose, to seal or stamp.

But the jury find in response to the first issue that the defendant sold meat to the plaintiff by "weights that had not been examined and adjusted by the standard keeper *as required by the statute.*" These words "as required by the statute" in the verdict have the same reference to the amended section 3841 as the words "as aforesaid" in the statute, and can only mean that the defendant not having complied "as required" with the duty of "allowing and permitting" his weights and measures to be stamped and sealed, did sell meat by them. Upon the verdict the plaintiff was entitled to recover the forty-dollar penalty in each case upon the offense stated in the first clause of section 3842, but it was error to render judgment against him, for reason above stated, for any penalty in regard to the second clause of said section. (511)

The costs of the appeal will be divided between the parties.

FAIRCLOTH, C. J. (dissenting): I agree that in England the subject of penalties is controlled by the legislative branch of the Government because there is no constitutional restriction. I agree that in North Carolina, prior to 1868, the subject was entirely under the control of the legislature and that the early statutes on the subject have been allowed to continue on our statute books, by inadvertence I think, as now appears in The Code, section 3842, and others. After the late war, however, when the State was confronted with new conditions, when the subject of general education and a general system of public instruction became an important question of State policy, the Convention 1868-69 adopted a Constitution with a provision (Art. IX, sec. 4) which declared that "The net proceeds that may accrue to the State from sales of estrays or from fines, penalties and forfeitures shall be sacredly preserved as a school fund and for no other purposes whatsoever." Again, the Constitutional Convention of 1875, amending the State Constitution in several respects, after providing for a general and uniform system of public schools, and setting apart the sources of means for maintaining the same, declared in Art. IX, sec. 5, "That all moneys, also the net proceeds from the sales of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the State. Provided that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction."

Again, the Legislature, 1881, Ch. 200, sec. 16, enacted in the identical words of the Constitution of 1875, that the "Net proceeds from sales of estrays, also the clear proceeds of all penalties and for- (512)

feitures, and of all fines, etc., shall belong to and remain in the several counties and shall be faithfully appropriated for establishing and maintaining free public schools in the several Counties as established in pursuance of the Constitution: Provided the amount collected in each county shall be reported annually to the State Superintendent of Public Instruction," which statute was reënacted in to The Code in 1883. Code, section 2544.

Thus we have, on the one hand, the constitutional provisions of 1868 and 1875 and the Act of Assembly, 1881, ch. 200, sec. 14; Code, sec. 2544, declaring in plain terms, that the clear and net (synonymous terms) proceeds of fines, forfeitures, penalties, etc., shall be faithfully applied to maintain public schools, and, on the other hand, the Act of 1741, secs. 4, 5, Code, sec. 3842, giving the entire penalty to any person suing therefor, and so for other penalties, and the question is, which shall control. The Constitution does not impose penalties but only directs the application of the net proceeds thereof when collected. It leaves with the legislature the power to impose penalties, to provide the machinery for collecting them, the designation of suitable persons to collect them and the right to make reasonable compensation to the collectors for services and expenses. The State has made the County Board of Education a corporate body, with power to sue and be sued, to recover school property, real and personal, and to see that the school law is enforced. I should regret to know that the State is compelled to appeal to the selfish motives of common informers to have its laws enforced, and would prefer that it, the State, would select its own suitable agents to perform this labor with reasonable compensation, and I see no reason why the County Board of Education in a case like the present, may not make the collection and place the net pro-
(513) ceeds to the school fund, and so on with other penalties, etc.

For illustration: Laws 1889, ch. 199, sec. 36, requires the solicitors of the several judicial districts to prosecute all penalties and forfeited recognizances entered in their respective courts and collect by execution if necessary, and allows them to receive as compensation for their services, a sum to be fixed by the court not less than five per cent. on the amount collected, and act is amendatory of The Code, sec. 2544, requiring the net collection to be applied to the school fund as above stated. Will it be suggested that the solicitors, County Boards of Education and such others as the Legislatures has or may designate as collectors of all penalties, are not patriotic enough to perform their sworn duties in this behalf with reasonable compensation? By this method the school fund is increased, but if any person who may choose to sue is allowed to recover the whole penalty to his own use as is attempted in this case, then the school fund suffers and the

Constitution, Art. IX, sec. 5, is a "dead letter." It is seldom that we find an express and positive restraint upon legislative power in the Constitution, but when we see a positive direction therein, it carries with it a necessary implication against everything contrary to it, which would frustrate or disappoint the purpose of the provision.

I must assume that these constitutional provisions and laws 1881, ch. 200, were enacted after due deliberation and not incidentally or by mere accident.

In two cases this question has been discussed by this Court, *First, Katzenstein v. R. R.,* 84 N. C., 688. In that case the Court took a middle ground, by distinguishing between those penalties with an express provision that any person could sue and recover to his own use and those without any such provision, holding that the latter only belonged to the school fund. I respectfully submit that this (514) was a *petitio principii,* as the Constitution says "all penalties," etc., which must include all or none, subject to the deduction which the Legislature may deem a *reasonable* allowance for service and expenses of collection.

Second, Hodge v. R. R., 108 N. C., 24: In this case the same question was discussed by a divided Court but it was left as an open question as it was not necessary to decide it in that case.

With the highest regard for the decisions of the Court as constituted when Katzenstein's case, *supra,* was decided, and knowingly that it is important that the law should be fixed and steady, still I feel that the organic law must be preserved according to its true intent and that the law should be "reasonable and right"—that it cannot be settled until it is settled right and that if an error is committed by this Court it should be corrected, and the sooner the better, before it is followed by a list of decided cases, spreading in so many ways that to eradicate the error would do more harm than good.

I am of opinion that the judgment below should be reversed and the action as now constituted dismissed.

AVERY, J., dissents.

Cited: *Burrell v. Hughes, ante,* 437; *Sutton v. Phillips,* 117 N. C., 230; *Goodwin v. Fertilizer Co.,* 119 N. C., 122; *McDonald v. Morrow, ib.,* 674; *Malloy v. Fayetteville,* 122 N., 483; *Day's case,* 124 N. C., 394; *Hutton v. Webb, ib.,* 758; *S. v. White,* 125 N. C., 688; *White, v. Murray,* 126 N. C., 158; *Carter v. R. R., Ib.,* 442; *Board Education v. Henderson, ib.,* 694; *Mott v. Comrs., ib.,* 883; *S. v. Hay, ib.,* 1003; *S. v. Shuford,* 128 N. C., 593; *Mial v. Ellington,* 134 N. C., 180; *Brooks v. Tripp,* 135 N. C., 160; *School Directors,* 137 N. C., 508; *S. v. Lytle,* 138 N. C., 741; *Daniels v. Homer,* 139 N. C., 228; *S. v. Maultsby, ib.,* 584; *S. v. Baskerville,* 141 N. C., 818; *S. v. Williams,* 146 N. C., 637;

S. v. Ray, 151 N. C., 714; *S. v. Oil Co.,* 154 N. C., 638; *In re Watson,* 157 N. C., 342; *S. v. Doster, ib.,* 636; *S. v. Knight,* 169 N. C., 352; *Faison v. Comrs.,* 171 N. C., 415; *R. R. v. Cherokee,* 177 N. C., 88.

SAMUEL v J. H. WESTBROOK.

Action to Foreclose Mortgage—Mortgage—Non-Joinder of Wife—Judgment.

In an action to foreclose a mortgage on land given by the husband, in which his wife did not join, to gain time for and to secure the payment of a judgemtn against the husband, it was not error to give judgment for the debt only and refuse an order for the sale of the land.

(515) ACTION tried before *Boykin, J.,* and a jury at Fall Term, 1894, of PENDER.

The Plaintiff brough suit to foreclose a mortgage made to him by the defendant to secure the debt mentioned, which mortgage is in these words:

"I, Joseph H. Westbrook, of the county of Pender and State of North Carolina, am indebted to Samuel Blossom, of New Hanover County, in the sum of Fifty-five Dollars, with interest thereon at 8 per cent, from 1 February, 1886, due by judgment of Superior Court, rendered at March Term, 1887, and the further sum of Eleven and 81-100 Dollars, cost of said action, as doth fully appear from the judgment roll of Pender County, and whereas, execution has been issued upon said judgment, and I desire indulgence of time till the first day of January, 1888, for the payment of said judgment, which is agreed to by said Blossom, upon giving additional security.

"Now, therefore, in order to obtain the extension of time for the payment of said judgment until 1 January, 1888, and in order to secure the payment of said judgment and costs on 1 January, 1888, I do hereby convey unto him my Grist Mill, including Rocks and Fixtures, and Steam Engine used in running my said Mill and Cotton Gin, run by same Engine, all of which is situate on my premises at Rocky Point, in said county of Pender.

"To have and to hold the said property unto said Blossom, his executors, administrators and assigns, forever. But on this special trust, that if I shall well and truly pay the said judgment and cost, with interest on the same, at 8 per cent, on or before 1 January, 1888, then this conveyance to be void.

"But if I shall fail to pay to the said judgment, cost and interest by 1 January, 188, then it shall be lawful for the said Blossom and his assigns to enter in and take possession of said property, (516) and after advertising the same for twenty days at three public places in said county, to sell the same at public auction for cash, and out of the proceeds of sale to pay said judgment, cost and interest, and all costs of making said sale, including five per cent commission on sale, and to pay any surplus to me.

"Witness my hand and seal, this 15 June, 1887.

J. H. WESTBROOK (Seal.)"

"Witness:

"J. T. BLAND."

Upon the trial it was found that the property described in the mortgage was fixtures attached to the freehold, also that the defendant at the time of the execution of the mortgage, was a married man.

The court submitted the following issues to the jury:

"1. Has the debt sued for been paid?"

"2. Has the plaintiff's cause of action been heretofore determined?"

To both of which issues the jury responded "No."

The plaintiff tendered to the court a judgment directing the recovery of the sum due and ordering a sale of the property.

The court refused to sign the judgment so tendered and gave judgment for the debt only. From the refusal of his Honor, to give a judgment ordering the sale of the property, the plaintiff appealed.

A. D. Ward for plaintiff.

No counsel contra.

MONTGOMERY, J. In *Hughes v. Hodges,* 102 N. C., 262, this Court held that the husband alone might make a conveyance (517) of his lands by way of mortgage free from all homestead rights unless one or more of three conditions named in that case existed. One of those conditions was that there must be "an unsatisfied judgment, or judgments, that constituted a lien upon the land when conveyed and upon which execution might still issue and make it necessary to have his homestead allotted." In the case before us it appears that at the time of the execution of the mortgage by the defendant he was a married man and that his wife did not join him in its execution; and also that at that time there was a judgment against him procured at the March Term, 1887, of PENDER in favor of the plaintiff upon which execution had already been issued. The plaintiff's counsel in his argument before this Court laid great stress on the case of

Hughes v. Hodges and on the silence of the record as to whether or not the judgment had been *docketed.* This is "sticking in the bark." The Court, in *Hughes v. Hodges,* had in mind fore the question as to whether there might be a necessity to allot a debtor his homestead under execution, than whether the judgment against him was docketed or simply filed away in the judgment roll. The execution in this case, whether issued upon the judgment roll or upon the entry of it upon the judgment docket, was in the sheriff's hands and he was compelled to proceed under it, and first of all to allot the debtor his homestead, and this meets substantially the ruling in *Hughes v. Hodges,* The mortgage on its face shows that the defendant was unable to pay off the execution, and he made it to get time and for the purpose of securing the *payment* of said judgment and costs on the first day of January, 1888. If the real estate of the defendant was worth the judgment debt or over and above the homestead, why was any additional security required in the way of the mortgage, seeing that the plaintiff had a judgment, either docketed or which he (518) could have had docketed any minute at no other expense and trouble than the costs attendant upon the execution of the mortgage?

The Judge below gave judgment simply for the debt, and refused to make an order for foreclosure, in which there is no error, and the judgment is

Affirmed.

W. W. FRANCKS v. T. C. WHITAKER ET AL

Will—Construction of—Devise.

1. In the construction of a will, the predominant and controlling purpose of the testator must prevail when ascertained from the general provisions of the will over particular and apparently inconsistent expressions to which, unexplained, a technical force is given.

2. Where a testratrix devised land to her son for life and after his death to his lawful heir or heirs, if any, and, if none, to the children of another son, the words "heir or heirs" will be construed to mean his issue and not his heirs generally, and upon his death without issue the land goes to the children of the other son, all of whom were living at the date of the will.

ACTION heard before *Brown, J.,* at Fall Term, 1894, of JONES, on complaint and answer. The action was brought by the plaintiff against the defendants to declare certain deeds made to his children by the defendants a cloud upon plaintiff's title and to have them cancelled, and himself, the plaintiff, adjudged to be the owner of the lands described in the complaint. His Honor being of the opinion that the plaintiff acquired no title to the land under the clause of the will of

his mother referred to in the complaint, dismissed the action (519) and plaintiff appealed. The material facts appear in the opinion of *Associate Justice Montgomery:*

O. H. Guion and W. W. Clark for plaintiff.
Simmons, Gibbs & Pearsall for defendants.

MONTGOMERY, J. The courts in interpreting wills, make it their first duty to find out and give effect to the intention of the testator. Even where a testator makes use of technical, legal phrases and expressions which have, in law, fixed and definite legal meaning, yet if he so explain and qualify their use as to show an intention different from the meaning which the law puts upon the technical words, the will must receive that construction which the testator intended. So, as the predominant and controlling purpose of the testator must prevail when ascertained from the general provisions of the will over particular and apparently inconsistent expressions to which unexplained, a technical force is given, we may inquire and find out in what sense such expressions were used and what the testator meant in using them." Under this test we will look into the will which is before us for construction. Its date is 11 July, 1885, and the section before the Court is in these words: "I give and devise (real estate) to my beloved son E. S. Francks, during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him, but should he not have any lawful heir or heirs surviving him, then I give and devise the same to the children of my beloved son W. W. Francks." The word "lawful" may be stricken out as meaningless, for there is no such anomaly in the law as *unlawful* heir. At the time of the date of the will W. W. Francks, the brother of E. S. Francks, and the plaintiff in this action, and the children of W. W. Francks were living. The testatrix knew that if E. S. Francks died after the will was published, the very gran-children to whom the estate was devised would have been his heirs if their father had been dead. If she meant (520) heirs general, why say "But should he not leave any lawful heir or heirs surviving him," knowing at the time there were living persons who were his lawful heirs and that he must continue to have heirs as long as those to whom the land was limited in remainder should live? It is plain that this is so, and therefore the proper construction of the will is as if it read, "I give and devise to my beloved son E. S. Francks, during his natural life, and after his death to his issue, should he leave any surviving him, but should he not leave issue then I give and devise the same to the children of my beloved son W. W. Francks." *Rollins v. Keel,* 115 N. C., 68.

Affirmed.

Cited: Hooker v. Montague, 123 N. C., 158; *Harrell v. Hagan,* 147 N. C., 115; *Puckett v. Morgan,* 158 N. C., 347; *Albright v. Albright,* 172 N. C., 353; *Bowden v. Lynch,* 173 N. C., 206; *Pugh v. Allen,* 179 N. C., 309; *Blackledge v. Simmons,* 180 N. C., 542.

W. E. SPRINGER & CO. v. D. F. COLWELL.

Homestead, Assignment of—Lands in Different Counties—Judgment Debtor—Cancellation of Deed.

1. Where a judgment debtor has lands allotted to him as a homestead exemption of less value than $1,000, in the county of his residence (being all of his lands therein) and causes a transcript of the allotment to be recorded in and delivered to the sheriff of another county where he has lands, it is the duty of such sheriff, upon the receipt of an execution against the debtor, to assign to the latter a quantity of said lands sufficient in value, when added to the value of the lands allotted in the county of the debtor's residence, to make up the full exemption of $1,000, and this is so notwithstanding no exceptions were filed by the debtor to the allotment made and recorded in the county of his residence. (*Whiteheid v. Spivey,* 103 N. C., 66, cited and distinguished.)

2. In such case, a sale by the sheriff without assigning the homestead is void and the deed made thereunder will be cancelled on motion in the cause.

MOTION to set aside a sale and cancel a deed, heard before *Hoke, J.,* at Fall Term, 1894, of SAMPSON.

(521) The plaintiffs and the defendant, D. F. Colwell, agreed upon the following as the facts upon which the motion to set aside the sale mentioned in the notice and the cancellation and setting aside of the deed mentioned in said notice depend:

1. That judgment was duly rendered in favor of the plaintiffs and against the defendant at the May Term, 1894, of said county, for the debt and costs set out in the execution, which is hereinafter made a part of this statement, a transcript of which said judgment was duly docketed on the docket of the Superior Court of Duplin County, on the . . . . day of May, 1894.

2. That on 13 June, 1894, an executioi was duly issued on said judgment to the Sheriff of Sampson County, under which was assigned to the defendant, D. F. Colwell, as a real estate exemption, land to the value of $625, including the lands whereon the said defendant resided at the time, as appears from the return of the appraisers,

which was filed in the office of the Clerk of the Superior Court of Sampson County, on 19 June, 1894, and duly recorded according to law.

3. That on 29 June, 1894, execution was duly issued to the Sheriff of Duplin County which was received by him on 2 July, 1894, with the following endorsement thereon, to wit:

Homestead returns filed in my office 19 June, 1894.

J. S. BIZZELL, C. S. C.

4. That about 20 July, 1894, before the sale under said execution, the defendant D. F. Colwell, through his attorney J. L. Stewart, caused a transcript of said homestead returns to be filed with the Clerk of the Superior Court of the County of Duplin, and had the last-mentioned Clerk to deliver a copy to James G. Kenan, Sheriff of the County of Duplin, and demanded of him that he assign to the said defendant, out of the lands in controversy, which are situated (522) in Duplin County and occupied by the tenant of said defendant, a quantity of said land sufficient in value to make up, with the $625 worth assigned in Sampson County, $1,000 worth, which the said Sheriff declined to do, and on the contrary, without assigning any additional lands to make the said balance of $375, sold, on 7 August, 1894, the said land to the said plaintiffs in said execution for the sum of $100, and made deed therefor to the said plaintiffs, which said deed is duly registered in the office of the Register of Deeds of Duplin County, in Book 51, pages 23 and 24, and which said deed is dated 7 August, 1894, and was probated and registered on 29 August, 1894; that the land therein mentioned belonged to the defendant D. F. Colwell prior to 1 May, 1894.

5. That no exceptions were filed to the said homestead returns and none to the assignment of homestead, excepting those hereinbefore mentioned. That said returns, giving the said defendant land to the value of $625, are duly registered in the office of the Register of Deeds of Sampson County.

6. That the defendant D. F. Colwell, with his wife and children, was and now is a resident of said county of Sampson, and the debt upon which said judgment was rendered was contracted about 1891.

Upon these facts his Honor granted the motion to cancel and set aside the deed, and plaintiffs appealed.

A. D. Ward for plaintiffs.
No counsel contra.

MONTGOMERY, J. Except for sale for taxes and for payment of obligations for the purchase of the premises, every homestead owned and

(523) occupied by any resident of this State and not exceeding the value of one thousand dollars shall be exempt from sale under execution or other final process obtained on any debt. Art. X, sec. 2, of the Constitution.

Section 519 of The Code provides that if the judgment debtor entitled to homestead shall be dissatisfied with the valuation and allotment of the appraisers, he, within ten days thereafter and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and "file with the clerk of the Superior Court of the county where the said allotment shall be made a transcript of the return of the appraisers; and thereupon the said clerk shall put the same on the civil issue docket of said Superior Court for trial at the next term thereof as other civil actions." It was decided by this Court in the case of *Whitehead v. Spivey,* 103 N. C., 66, that an allotment of homestead to the debtor of lands of value less than one thousand dollars, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. That opinion followed in the line of *Burton v. Spiers,* 87 N. C., 87, and *Spoon v. Reid,* 78 N. C., 244. In all of these cases, however, the several judgment debtors at the time of the allotment owned no lands outside of the counties in which they resided. In the case before us the defendant owned land in Sampson County, where he resided, valued by the appraisers at $625, and he also owned other land in Duplin County.

Now the question is, does the law applied to the facts in *Whitehead v. Spivey* fit the facts of the present case? We do not think that it does. Neither the Sheriff nor the appraisers had the right to go out of Sampson into Duplin County to allot to the defendant any part of his homestead in lands situated in the latter county, and they gave him *all* the real estate he owned in Sampson County. What then did he (524) have to object to, except to the over-valuation of the land, about which he made no question? Then, too, what would the objection have amounted to if he had made it? Suppose he had objected that the Sheriff and appraisers did not go into Duplin and allot to him the balance of his homestead in lands belonging to him in that county, would not the objection have been a vain thing, seeing that they had no power to do so?

But, there is another view which is conclusive of the matter. If the defendant, as the plaintiff contends, was required to make some sort of exception or statement and give notice of it to the adverse party and to the Sheriff to the effect that he had other lands in Duplin County which he wished to have allotted to him to complete his home-

stead, and the clerk of the Superior Court had put the same on the civil docket of the Superior Court for trial at the next term, the defendant would have been met by the objection of wrong *venue*. Section 190 of The Code declares that actions for the recovery of real property, or of any estate or interest in them, *or for the determination in any form of such right or interest,* and for injuries to real property, must be tried in the county where the real estate is situated. The defendant, it seems, took the precaution to have a copy of the homestead proceedings, under the certificate and seal of the Clerk of the Superior Court of Sampson, filed with the Clerk of the Superior Court of Duplin, and had also a copy served on the Sheriff of the last named county, before he made the sale, accompanying the service of the paper on the Sheriff with the request to have allotted to him enough of his lands in Duplin County to make up the full amount of his homestead.

There is no error in the judgment of the court below and the same is Affirmed.

Cited: *Baruch v. Long,* 117 N. C., 511; *Marshburn v. Lashlie,* 122 N. C., 241.

(525)

W. A. DUNN, RECEIVER OF CLINTON LOAN ASSOCIATION, v. D. D. UNDERWOOD.

Practice—Appeal—Failure to Print Record—Dismissal—Negligence of Counsel—Motion to Reinstate.

The printing of a record on appeal as required by Rule 30, requires no legal skill and, hence, the negligence of counsel is no excuse for the failure to print and where an appeal has been dismissed for such failure a motion to reinstate will not be allowed.

MOTION to reinstate an appeal, dismissed on motion of appellee for failure of appellant to print the record. The grounds of the motion appear in the opinion of *Associate Justice Clark.*

R. O. Burton for plaintiff.
John D. Kerr for defendant.

CLARK, J. The appeal was dismissed at last Term for failure to print the record. The appellant moved at the same term to reinstate, as required by rule 30. The reason assigned was that the neglect to print was the negligence of counsel. The Court has repeatedly held that having the record printed requires no legal skill, and that, if an appel-

lant entrusts it to counsel, his negligence in such regard is the negligence of an agent merely, not that of counsel. *Griffin v. Nelson,* 106 N. C., 235; *Stephens v. Koonce, ib.,* 255; *Edwards v. Henderson,* 109 N. C., 83; *Turner v. Tate,* 112 N. C., 457; *Neal v. Land Co., ib.,* 841.

As the late Chief Justice PEARSON expressed it: "There is no use in having a scribe unless you cut up to it." A rule so repeatedly enunciated must be deemed settled. In *Edwards v. Henderson, supra,* the Court observed: "To permit an appellant to obtain a delay of six months by his negligence in not complying with this requirement (526) would convert a rule, which was adopted as a means for the speedier and better consideration of causes, into a fruitful source of delay. Rather than that, appellees would prefer to argue their causes without the printed record, which the Court in justice to itself and to litigants cannot permit. Appellants might as well fail to send up the transcript as not to have it in a condition to be heard by failing to have the 'case and exceptions printed.'"

Indeed, in the present case, the appellee agreed that, notwithstanding the dismissal, the case might be reinstated if submitted on printed briefs, under Rule 10, so as to be disposed of at last term. This offer the appellant accepted, but was again negligent and failed to do so during that term.

It is too late to make the motion anew to reinstate at this term. Rule 30. Appellees have rights, though appellants are singularly prone to forget it, and among them is the right guaranteed by *Magna Carta* to all, that justice shall "neither be denied nor delayed." Const. of N. C., Art. 1, sec. 35. A delay of justice is often a denial of justice.

Motion denied.

Cited: Haynes v. Coward, post, 842; *Wiley v. Minning Co.,* 117 N. C., 490; *Kendrick v. Dllinger, ib.,* 491; *Stainback v. Harris,* 119 N. C., 109; *Ice Co. v. R. R.,* 125 N. C., 22; *Colvert v. Carstarphen,* 133 N. C., 26.

MARY E. COWAN ET AL v. JOHN T. LAYBURN.

Action to Recover Land—Evidence, Competency of—Transactions with Deceased Person.

Testimony that a witness carried supplies to a decedent during her sickness, is not such evidence of a conversation or transaction as to make the witness incompetent under section 590 of The Code.

COWAN *v.* LAYBURN.

ACTION for the cancellation of a deed and to recover land, (527) tried before *Boykin, J.,* and a jury, at September Term, 1894, of PENDER.

The complaint alleged that the plaintiffs were the heirs-at-law of one Annie J. Cowan, who died intestate having, about a year before her death, executed to the defendant certain lands upon the conditions that he should support her and provide for her sufficient food and raiment during her natural life and a decent burial at her death, and that in case the conditions were not complied with, the deed should be void and the land should revert to her or her heirs; that as soon as defendant received the deed, he abandoned all care of the deceased (who at that time was a needy, infirm and helpless old lady of 70 years of age) and in every particular failed to comply with the conditions of the deed.

The defendant denied the allegations as to his failure to perform the conditions of the deed.

On the trial certain witnesses for the plaintiffs were allowed to testify that they had carried supplies to the deceased. The defendant excepted to the testimony upon the ground that it was incompetent under sec. 590 of The Code, and, after verdict and judgment for the plaintiff's appealed.

A. D. Ward for defendant.
No counsel contra.

FAIRCLOTH, C. J. The only exceptions were to the competency of the evidence of Thad Cowan and Catharine Cowan, under The Code, sec. 590. The former testified that "I carried food there to her," meaning to Ann Jane Croom; the latter, that "I went to carry her supplies. She was sickly. I was there every day. I carried her supplies. She was sickly. She had no food except what we carried. She was bad off for clothes."

We see no "conversation" or "transaction" in this evidence such as is inhibited by section 590. In fact it does not appear (528) whether the old lady accepted or refused the food and supplies.

Affirmed.

Cited: Johnson v. Rich, 118 N. C., 270; *Moore v. Palmer,* 132 N. C., 976; *Davidson v. Bardin,* 139 N. C., 2.

BRUCE & COOK ET AL. v. C. W. CRABTREE.

Practice—Supplemental Proceedings—Examination of Assignee of Judgment Debtor—Interlocutory Order—Appeal.

1. The assignee of a judgment debtor may be examined in supplementary proceedings to ascertain what sum, if any, remains in his hands due and belonging to the judgment debtor after discharging the trust, and as to his administration of the trust generally.

2. An order for the examination of a person in supplementary proceedings is interlocutory and not final and no appeal lies from it.

SUPPLEMENTARY proceedings, heard before *Brown, J., at Chambers,* on appeal from an order of the Clerk of the Superior Court of Lenoir, directing the examination of J. L. Hartsfield, assignee of the defendant.

The plaintiffs made affidavit before the Clerk as follows (after setting out the rendition of judgment in issuing and return unsatisfied of execution, etc.):

IV. That the said C. W. Crabtree, as this affiant is informed, advised and believes, has property, *choses* in action and other things of value unaffected by any lien and incapable of levy which ought to be subjected to the payment of said judgments but that said defendant has no property which can be reached by execution.

V. That this affiant is informed and believes that one J. L.
(529) Hartsfield, assignee of C. W. Crabtree, has property of the said C. W. Crabtree which exceeds in amount and value ten dollars which should be applied in payment of the judgment.

The Clerk made an order directing the examination of the defendant and J. L. Hartsfield and forbidding the transfer, etc., of any property belonging to the defendant.

On the trial counsel for J. L. Hartsfield, assignee, moved to vacate the order as to said J. L. Hartsfield, assignee, upon the grounds

I. Of the insufficiency of the affidavit, in that it fails to allege that the said Hartsfield has individually in his hands any property belonging to the judgment debtor, C. W. Crabtree, or that he is indebted to said judgment debtor C. W. Crabtree, in any amount. The allegation in the affidavit being that the Hartsfield holds the property as assignee of said judgment debtor and there being no allegation in the said affidavit that said judgment debtor has any interest in the said property.

II. That said clerk had no authority to gran said restraining order at *the time* against said Hartsfield, assignee, he not being a party to this action and having no notice of this proceeding.

III. The insufficiency of the affidavit under section 490 of The Code of N. C.

IV. That the affidavit fails to allege such facts as would authorize the judgment debtor to demand from the said Hartsfield any property or money.

After hearing the argument of counsel for plaintiffs and Hartsfield, assignee, the motion was allowed and judgment was duly entered vacating and discharging said restraining order as to said assignee.

From said judgment plaintiffs appealed to *Judge Brown, at Chambers,* who reserved the order of the Clerk and Hartsfield ap-
appealed. (530)

George Rountree for plaintiff.
J. B. Batchelor for J. L. Hartsfield, assignee.

FURCHES, J. This is a proceeding supplemental to execution, commenced before the clerk of Lenoir County, an appeal from his order to *Brown, J.,* and an appeal by J. L. Hartsfield from the order of *Judge Brown,* which is as follows:

"I am of opinion that under the affidavit filed it is perfectly competent for the plaintiff to examine J. L. Hartsfield in the proceeding to ascertain what sum, if any, remains in his hands and what may be due and belonging to C. W. Crabtree, after discharging the trust, and to ascertain that it is competent to examine said Hartsfield concerning his administration of the trust, what he received, what he has paid out and to whom, etc.

"This cause is remanded to the clerk to proceed with in accordance with this opinion. The cost of the appeal is taxed against the appellees and appellant equally. *Brown, J.*"

We see no error in the order appealed from, nor do we see what right J. L. Hartsfield had to take an appeal, nor do we see what interest he has in this controversy. But this is not a final judgment, but only an interlocutory order from which no appeal lies. *Clement v. Foster,* 99 N. C., 255.

Appeal dismissed.

Cited: Ledford v. Emerson, 143 N. C., 537.

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(531)

G. W. TAYLOR, ADMINISTRATOR, v. ADDIE O. SMITH.

Contract—Agreement Between Joint Owners of Note—Survivorship—Gift—Conflicting Findings of Jury—"Living Heir."

1. In a contract between two owners of a note providing that, should either

of them die before the other without "a living heir," the suryivor should become sole owner of the note, the words "living heir" should be construed to mean "issue."

2. A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid.

3. The Statute, sec. 1326 of The Code, abolishing survivorship in estates held in joint tenancy, does not prohibit contracts making the rights of the parties dependent on survivorship.

4. Where in response to one issue a jury found that a contract existed between two sisters, whereby the survivor should have the whole of a certain note belonging to them jointly, a finding in response to another issue that one of its parties at a later date made a gift of her share in such note, is not inconsistent with the first finding.

ACTION, tried at February Term, 1894, of GREENE, before *Brown, J.*,

(534) *J. B. Batchelor for plaintiff.*
Geo. M. Lindsay for defendant.

AVERY, J. Two sisters, the plaintiff's intestate and the defendant, "agreed with each other that should either of them die before the other without a living heir, the survivor should have" a note in which both were payees and each had an equal undivided interest, "and that during the life of both of them, they should collect the interest together in equal shares." About twelve months afterwards one of the sisters married and subsequently died leaving the defendant, her unmarried sister, surviving her, but no issue. In the connection in which they appear, the words "living heir" were manifestly intended to mean issue and we will so interpret hem in construing the agreement. *Howell v. Knight,* 100 N. C., 254; *Patrick v. Morehead,* 85 N. C., 62. To say that one sister died "without a living heir" and at the same time leaving a surviving sister, would be palpably absurd, unless we construe "heir" to mean "issue."

The first question suggested upon the argument was whether the agreement was a contract upon mutual considerations, or a *nudum pactum.* Counsel contended that it could not be enforced because it was a gambling agreement and therefore void, as in contravention of public policy. It is settled law in North Carolina that a *bona fide* assignment of a contingent interest in land for a valuable consideration will be enforced as an equity. *Bodenhamer v. Welch,* 89 N. C., 78; *McDonald v. McDonald,* 58 N. C., 211; *Watson v. Smith,* 110 N. C., 6; *Foster v. Hackett,* 112 N. C., 546. If the equitable right to such contingent interest can be assigned for money or anything of value, it follows of course that the equitable right to two such interests could

be lawfully exchanged, the one in consideration of the other, like all other assignable interests in land. Upon the same principle, one of two joint owners of a fund may sell *bona fide* for a valu- (535) able consideration the contingent equitable right to the whole fund, where it is so limited as to depend upon survivorship. When the two sisters agreed with each other to hold the note, in which each had an individual moiety as joint tenants subject to the right of survivorship, these mutual rights of survivorship, when once created, were assignable equities, constituting mutual considerations sufficient to support the agreement. The Act of 1784 (Code, sec. 1326) abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. It would seem needless to cite authority in support of the proposition that mutual prospective benefits are sufficient to support mutual stipulations between parties. The right to the fund in case of survivorship was a valuable assignable interest, and the two sisters therefore entered into a valid contract, which secured to each the benefit, like that provided often by an insurance policy, of the ownership of the whole fund in case she should survive the other. The jury have found that such was the contract entered into by the defendant and her deceased sister, the plaintiff's intestate and former wife.

The mother of the two sisters, Mrs. Smith, deposed further that at the time of making the contract the plaintiff's intestate handed the note to the defendant, saying, "Keep it until I call on you for it, if I ever do, and if I never do, you keep it." Upon her testimony, together with that of another witness (who was obligor in the note) to the effect that he paid the whole of the interest to the defendant after her sister's mar- riage and eventually all of the principal, the court, submitted (536) two other issues, in response to which the jury found the plaintiff's intestate, about twelve months before her marriage with the plaintiff and prior to her engagement of marriage with him, made a gift of her interest in the note to her sister. It is insisted for the plaintiff that the finding that a gift was subsequently made, is inconsistent with the contract as to the right of each in case of survival. We do not think so. Plaintiff's intestate might, after making the contracts, have made the gift, but if she did not subsequently give her interest in the note to her sister, the contract of course remained in full force. So that if it be conceded, as was contended by plaintiff's counsel, that the testimony was insufficient in its most favorable aspect to show a valid gift, the only result would be to leave the contract in full force. Nothing but a subsequent valid gift by the intestate of her interest to the de-

fendant would have altered or impaired the validity of the contract, and either the contract or such gift would warrant the rendition of the judgment. If the court erred in telling the jury that the testimony of Mrs. Zeletha Smith, if believed by them, was sufficient to justify them in responding to the second issue in the affirmative, it was not erroneous to tell them that hers was the only evidence relied on by the defendant, and, if believed, was sufficient to show the mutual agreement. As the jury found separately on the specific issues and they are in no wise dependent on each other, we think that any error in defining indirect terms, or inferentially what constituted in law a gift, was harmless. The evidence of the mutual agreement, which was entered into before the alleged gift, was to be considered distinct from that relating to the gift, and the finding upon it, having established the contract will support the judgment of the court even if the other findings should be set aside for error. The specific reference to the testimony of (537) Zeletha Smith as the only evidence upon which the defendant did or could contend for a verdict in her favor, bears no analogy to the cases where the judges have erred in sellecting, among several witnesses to the same transaction, one whose testimony was more unfavorable to a party than that of the others, and making the response to an issue or issues dependent upon the creditibility of such witness.

For the reasons given we thing that the judgment below should be Affirmed.

Cited: *Brown v. Dail,* 117 N. C., 43; *Hunter v. Sherron,* 176 N. C., 228.

BANK OF HANOVER ET AL. V. ADRIAN AND VOLLERS ET AL.

Action to foreclose Mortgage—Fraud—Parties in Pari Delicto—Equity Jurisdiction—Question for Jury—Trustee of Insolvent Debtor Represents Creditors.

1. Where it appears to a court of equity that the parties to a suit are in *pari delicto* in respect to a covinous agreement, the court will not interfere to give relief, but will leave the parties to exercise their rights as they may be permitted in a court of law.

2. Where, in the complaint in an action to foreclose a mortgage against an insolvent mortgagor it appeared that the mortgage was given to secure notes for $90,000, payable in three years at 4 per cent interest, and was not filed until the mortgagee became insolvent, and the answer filed by the assignee of the mortgagor (to which a demurrer was entered) alleged that the mortgage was given under an agreement and with the intent to hinder, delay and defraud the mortgagor's creditors; *Held* That

neither party was entitled to equitable relief and the Court will leave them to settle, in a court of law, the question as to the fraudulent intentions of the parties and whether the assignee of the mortgagor was a subsequent purchaser with notice so as to postpone the creditors the mortgagor to the claims of the mortgagee, (AVERY, J., *dissents.*)

3. In an action to foreclose a mortgage against an insolvent mortgagor and his assignee to which the creditors of the former are not parties, the assignee represents the creditors and can interpose the defences that would be available for them.

(538)

On 27 February, 1893, Adrian & Vollers executed their notes to the Bank of New Hanover in the sum of $90,000, payable three years after date, bearing four per cent interest, payable quarterly; and on the same day executed a mortgage to secure the payment of said sum, which was registered 19 June, 1893, the day on which said bank closed its doors and ceased to do business.

On 20 June, 1893, said Adrian & Vollers made an assignment to the defendant, E. K. Bryan, in trust for their creditors, conveying all their property, including the property described in said mortgage deed. On 19 June, 1893, an action was duly instituted and pending in the Superior Court of New Hanover County, wherein Gabriel Holmes and J. H. Waters, who sue in behalf of themselves and all other creditors of said bank, are plaintiffs, and the Bank of New Hanover and others are defendants; in which proceeding plaintiff Davis was appointed receiver of said bank.

The present action to foreclose said mortgage was commenced 12 September, 1893, and the defendant E. K. Bryan, as assignee of said mortgagors, filed an answer alleging that said notes and mortgage were made and delivered under an agreement and with intent to hinder and delay the creditors of said Adrian & Vollers, and prays to have said mortgage deed declared void and that plaintiffs convey to defendants, etc. The plaintiffs' demurrer to said answer was sustained by *Brown, J.*, at April Term, 1894, of New Hanover, with judgment of foreclosure in favor of plaintiffs, and defendants appealed.

George Rountree and E. S. Martin for plaintiffs.
D. L. Russell for defendants.

FAIRCLOTH, C. J. It is conceded that ordinarily a court of equity will not interfere between parties to a convinous agree- (539) ment but will leave them to their strict legal remedies; also, as it has been held that either party *in pari delicto* may by complaint, answer or proof, bring to the attention of the court any fraudulent transaction to prevent the other from recovering the fruits of such

transaction. *Turner v. Eford,* 58 N. C., 106, and subsequent cases. Our view is that in such cases a court of equity will stay its hand and leave the parties where they are to exercise their rights as they may be permitted in a court of law. As no equity to either party can arise out of an inequitable and illegal agreement, we fail to see how this Court, in exercise of its equitable jurisdiction, can aid either party to such dealings. It is a court of conscience and, within the scope of its powers, will be governed by its own rules. We are not aware of any decision of this Court in which it is held that it is moved or restrained by the Statute of Frauds. Code, secs. 1545, 1546. It is true that in some respects equity follows the law, but never to the extent of aiding in the consummation of an illegal, immoral or fraudulent contract. Lord Kenyon once said: "It is safest to preserve the ancient landmarks of the law," and *Pearson, C. J.,* said,, "If the dividing line between law and equity be destroyed the science of law will be in utter confusion, and no one will be able to see his way." *Turner v. Eford,* 58 N. C., 106, was a bill to compel a conveyance on a parol trust, but it appeared that the agreement was fraudulent and the Court declined interfering to compel a conveyance of the legal title.

In *Triplett v. Witherspoon,* 74 N. C., 475, the Court said: "Equity will not interfere to set up any transaction founded in fraud; certainly not against a purchaser for value, but will leave the parties to their legal rights."

In *Ellington v. Currie,* 40 N. C., 21, upon a bill to avoid a
(540) deed made to defraud creditors the Court said: "Equity will not interfere with the operation of the statute at the instance of either party to a fraudulent conveyance."

In *York v. Merritt,* 77 N. C., 213, the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The Court said, "When the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against public policy or *contra bonos mores,* the courts will not enforce it against either party." Again in the same case, 80 N. C., 285, 290, it was held "that the plaintiff could recover (meaning in a court of law) as they were *in pari delicto* and this Court (Equity) in the exercise of its equitable jurisdiction, cannot interfere to give relief."

S. v. Bevers, 86 N. C., 588, was a case in which defendant perpetrated a fraud on the State by purchasing land which he knew had been previously granted, and in the opinion *Ruffin, J.,* said on page 592, "There is no principle better established than that it is the duty of every court to withdraw its countenance from every contract or other act, the di-

rect object or probable tendency of which is injurious to good morals or contrary to public policy." "No court will lend assistance to one who founds his cause of action upon an illegal act, to which he was himself a party. As soon as the court perceives that the action proceeds *ex turpi causa* and that the plaintiff's hands are polluted, it withholds its aid—not out of any consideration for the defendant, but because it will not, on the score of example and public policy, give countenance to such a plaintiff."

In *Brookover v. Hurst,* v *Met.,* 665 (Ky.), the court held, "A court of equity will not relieve the mortgagor from the consequences of his own fraudulent act, nor will it aid the mortgagee in se- (541) curing him in the enjoyment of the property, when its interpretation is necessary for that purpose. The mortgagee is left to his legal remedies."

In *Creath v. Sims,* 5 Howard (U. S.), 204, the following explicit language is used: "The following principles of equity jurisprudence may be affirmed to be without exception: Whosoever would seek admission into a court of equity must come with clean hands; such a court will never interfere in opposition to conscience or good faith. A court of conscience touches nothing that is impure, and the answer to the party is—however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto;* and precisely, therefore, in the position in which you have placed yourself, in that position we must leave you."

We think all the cases cited can be reconciled with the foregoing general principles. We assume nothing unfavorable to either party except as it appears from the allegations and admissions.

The complaint alleges that the mortgagors, Adrian & Vollers, are insolvent; that they executed their notes and mortgage for $90,000 to plaintiff, payable three years after date, bearing interest at four per cent per annum. Would not a few such transactions close the doors of any bank in the State?

It also alleges that said mortgage was recorded in five several counties, giving book and page in each, but failing in each instance to state the day on which it was registered—alleging also that the mortgagee failed in business in less than four months and that the mortgagors on the day after the bank failure conveyed all their property to defendant E. K. Bryan in trust for their creditors.

Now do not these badges of fraud disclosed in the complaint, with the positive allegations of fraud found in the answer, and admitted by the plaintiff for the purpose of this action, coupled (542) with the secret existence of the mortgage nearly four months and until the mortgagee itself is found to be insolvent, all subject to

be explained and obviated of course by either party, present a question, to wit, the intent of the parties in the execution of the notes and mortgage proper to be heard by a jury upon the proofs?

But it is urged that the creditors of Adrian & Vollers are not parties to this action and their rights cannot be considered. We answer that their trustee, E. K. Bryan, is here resisting plaintiff's claim. But again, he is a subsequent purchaser with notice, and that the Stat. Eliz., sec. 13 and 27, postpones his to the plaintiff's claim. We answer that those are legal questions to be tried by a court of law and a jury upon the evidence, specially as to the intentions of the parties, and that a court of equity is not concerned therewith, and will not extend its aid to either party, but leave each in the full exercise of his legal rights as he may be advised. Then, in a case like the present, in which one party alleges fraud and the other admits it, this Court is asked by each party for equitable relief, but for reasons already stated we cannot extend it to either party. The demurrer is overruled and the cause remanded.

Judgment reversed.

AVERY, J. (dissenting): It is the universal rule, to which the search to find an exception in cases adjudicated in our own Court or elsewhere, will be in vain, that the grantor in a fraudulent deed, whether it be absolute in form or a mortgage, is not allowed in courts of law or equity to impeach his own conveyance for covinous conduct, in which he has been a participant and has been equally guilty. Such deeds are declared to be good *inter partes* in the sense that neither can ask
(543) to set them aside for fraud, in equity, because of the necessity, as a general rule, of disclosing his own turpitude, and in law, because the grantor is estopped to impeach his own deed. This proposition is supported by a consensus of opinion in all courts that administer the principles of law and equity as derived from England. *Brady v. Ellison,* 3 N. C., 348; *Vick v. Flowers,* 5 N. C., 321; *Jackson v. Marshall, ib.,* 323; *Pinckston v. Brown,* 56 N. C., 494; *Powell v. Ivey,* 88 N. C., 256; *York v. Merritt,* 77 N. C., 213; *Same v. Same,* 80 N. C., 285; *Westfall v. Jones,* 23 Barb., 9; *Brookover v. Hurd,* 1 Metcalf (Ky.), 665; *Miller v. Markle,* 21 Ill., 152; Bispham Eq., sec. 244; *Swan v. Scott,* 1 Serg. & R., 155; *Evans v. Dravo,* 12 Harris,—; *Williams v. Williams,* 10 Casey, 312.

In *York v. Merritt, supra,* at page 290, the Court say: "They are *in pari delicto* and this Court in the exercise of its equitable jurisdiction cannot interfere to give relief." That was an action brought by the plaintiff for the possession of land, where the defendant sought to set aside the deed on the ground that it was intended as a mortgage, but was executed to defraud the defendant's creditors. The Court said (page

289): "If the intent of the parties in making the deed was to defraud the creditors of the defendant, it would make no difference whether the deed was intended as a mortgage or an absolute conveyance." In the case of *S. v. Bevers,* 86 N. C., 588, this Court announced the general principle that where a plaintiff alleges an equity that entitles him to relief, without disclosing any turpitude on his part, then, *prima facie,* he is entitled to recover; but where it becomes necessary to state, as a part of this cause of action, that it originates in or is dependent upon the enforcement by the Court of an illegal or fraudulent contract the maxim *ex turpi causa non oritur actio* applies, and the Court withholds its aid. Bispham Eq., sec. 248; *Bonesteel v. Sullivan,* (544) 104 Pa., 9; *Gill v. Henry,* 95 Pa., 388; Bigelow Fraud, p. 206; *Harris v. Leador,* Cro. James, 270; *Findlay v. Cooley,* 1 Blackf., 262.

Bigelow, in his work on fraud, pages 206 and 207, says: "And the test whether a demand connected with an illegal transaction is capable of being enforced has often been said to be, whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him. If, on the contrary, the plaintiff can establish his (*prima facie*) case without showing the illegality of the acts of the parties, he can recover. There is however, according to other Courts, a marked distinction between executed and executory contracts of a fraudulent character, where both parties are guilty. The principle is the same that the courts will not lend their aid. The executed contract must therefore stand executed, because the courts will not interfere; while the executory contract must fall for the same reason."

"By common law (says Waite, Fraudulent Conveyances, sec. 429, p. 593) no person is permitted to take advantage of his own wrong. In such cases the doctrine *in pari delicto* applies and where property has been fraudulently conveyed to a grantee he will be permitted to retain it as against the grantor, not from any merit of his own but because the law will not lend its aid to a party seeking to set aside his own fraudulent act. So equity will not decree a specific performance of an agreement by a fraudulent grantee to reconvey the property to the debtor."

by a fraudulent grantee to reconvey the property to the debtor."

In *Williams v. Williams, supra,* it was held that "in a suit upon a mortgage against the administratrix of the mortgagor, the latter will not be permitted to set up as a defence that the mortgage was given with the fraudulent intent of covering the property from (545) creditors in case of embarrassment of either of the parties to it."

The doctrine, when fully and properly stated, is that whenever it

becomes necessary for either of the parties to an executed conveyance to invoke the aid of a court of equity on the ground that it was executed for a fraudulent purpose, in which it appears both were equally guilty participants, the court will refuse the aid asked and will leave the parties in the same position as to the enforcement of their rights that they would have occupied had there been no disclosure of the fraud. In our case had not the defendant set up the fraud and asked the interposition of the Court on that ground, the plaintiff having established, as Bigelow says, his *prima facie* case without disclosing his guilt, was entitled to recover. To leave the bank as it stood before the court prior to the introduction of the fraudulent transaction, was to concede its right to a decree of foreclosure. The principle is substantially stated in two cases relied upon by the plaintiffs' counsel on the argument. *Bonesteel v. Sullivan, supra,* and *Gill v. Henry,* 95 Pa. St., 388. In the former case (*Bonesteel v. Sullivan*) the court held that, the deed being good *inter partes,* a mortgagor could not defeat the recovery of the mortgage in a bill for foreclosure by disclaiming for the first time in the answer a common intent of both parties to defraud other creditors of the mortgago,. In *Gill v. Henry, supra,* the court declared that upon the same principle the mortgagor, where the mortgagee did not in his bill for foreclosure disclose the fraud, could not set up or prove on the trial an agreement between the parties, like that relied on in the answer here, that the deed should be withheld from registration in order to defraud other creditors.

"The person who attempts to cheat others has no right to complain if he himself is cheated." Maite, *supra,* p. 207. Adrian & Vollers
(546) executed a contract upon which the plaintiffs have shown *prima facie* its right to the judgment demanded. The defence attempted to be set up by the assignee (who, as will presently appear, stands in the same relation to the plaintiffs as the assignor) involves the first averment of the turpitude, out of which no right can arise in law or equity. As it does not lie in his mouth, after taking with notice of the mortgage, to avail himself of such a plea, the Court must deal with the cause as though the fraud had never been mentioned. When Bryan, the assignee seeks to avoid the deed by showing its fraudulent character, he is confronted by the rule laid down in *Ellington v. Currie,* 40 N. C., 21, that a court of equity allows only creditors and not "the party or those claiming under him" to impeach them under 13 Elis. It is plain that, unless the assignee has some right conferred by statute, he stands moth in a court of law and a court of equity in the shoes of his grantor or assignor, and is estopped both in law and in equity as effectually from impeaching the deed of his assignor as his own prior deed for the same property.

Turner v. Eford, 58 N. C., 106, relied upon by defendant's counsel, fails to come within the principle which is decisive of that at bar, for the reason that there the heirs of Turner, who filed a bill to enjoin the execution of a writ of possession, claimed under no deed; but the heirs-at-law of Eford had recovered upon the conveyance to their ancestor in an action of ejectment. They were not precluded as are Adrian & Vollers and their assignee by their own deed or their answer, from setting up and proving the fraud. Having the right to avail themselves of that defence, when the allegations of their answer were admitted, the Court of equity left the parties as they stood—the defendant with judgment for possession and a writ in the hands of the Sheriff. The confusion that seems to have arisen about the appli (547) cation of the principle to actions for foreclosure, seems to be due to the erroneous idea that either party forfeits his claim to relief by simply going into equity, when in reality a party is entitled to demand any judgment in law or equity to which he can establish his right without relying upon the fraud as a ground of the relief sought.

The only remaining question is whether he is at liberty to attack as a purchaser under 27 Elizabeth. The statute (Code, secs. 1545 and 1546) which are substantially the same as 13 and 27 Elizabeth, except that the Act of 1860 so amended the latter as to limit its operation to purchasers both for full value and without notice, give to creditors of bargainors or mortgagors, and purchasers of their interests, but not to the bargainors or mortgagors themselves, the right to impeach conveyances on the ground that they were executed to hinder, delay or defeat or defraud creditors or such purchasers. The controversy is narrowed down therefore to the question whether E. K. Bryan, the assignee, is a purchaser for value and without notice of the claim of the plaintiff under the older conveyance. None of the creditors are parties, though they might have been made or might have asked to be made defendants in the cause. It may be true that the rule defining the relative rights of mortgagor, mortgagee and trustee or assignee of the equity of redemption, has been somewhat modified by recent decisions of this Court. *Wallace v. Cohen,* 111 N. C., 103; *Southerland v. Fremont,* 107 N. C., 565; *Cowen v. Witherow,* 112 N. C., 736. But the doctrine that such an assignee in a general deed to secure creditors is "a purchaser within 13 and 27 Elizabeth" and takes subject only to such equities as attached to or bound land in the hands of the debtor, has remained undisturbed since it was first formally announced. *Potts v. Blackwell,* 56 N. C., 449; *Small v. Small,* 74 N. C., 16; (548) *Wallace v. Cohen* and *Southerland v. Fremont, supra; Brem v. Lockhart,* 93 N. C., 191; *Branch v. Griffin,* 99 N. C., 173. If Bryan is to be deemed a purchaser subject only to the restriction mentioned, what

esuperior equities to those of the creditors, whom he represents, are shown to have attached before the conveyance to him? The averments of the answer being admitted by the demurrer, the bank cannot be deemed to have acquired any equitable rights either as against creditors or such purchasers by the covinous conspiracy to give to Adrian & Vollers a false credit and then to deprive those, who should fall into the trap, of the right to subject the property, which was the basis of the credit exended to them. Some more rigid rule than any founded upon the benign principles of equity must be invoked in order to postpone the claims of these creditors, represented by Bryan, to those of the plaintiffs, admitted to have been acquired, if at all, by a conveyance intended by both parties to perpetuate a gross fraud upon the rights of subsequent purchasers as well as subsequent creditors.

But however reprehensible in any aspect, and violative of the rights of the creditors represented by Bryan, the admitted covinous arrangement between the bank and the defendants Adrian & Vollers may have been, we find a difficulty that seems insuperable, in the way of conceding to him as subsequent assignee the right to attack the mortgage deed. Bryan admits in his answer that it was "registered on 19 June, 1893, and that the deed of assignment is correctly set out in the complaint where plaintiff alleges that it bears date 20 June, 1893." The mortgage deed having been registered on the day before the deed of assignment was executed, Bryan as assignee took with constructive
(549) notice of it and of everything contained in it. *Robinson v. Willoughby,* 70 N. C., 358; *Parker v. Banks,* 79 N. C., 480; *Wharton v. Moore,* 84 N. C., 479; 2 *Pom. Eq. Jur., sec.* 692; ib., sec. 665 (4). In *Triplett v. Witherspoon,* 70 N. C., 589, *Pearson, C. J., cites Hiatt v. Wade,* 30 N. C., 380, and quotes from the opinion of *Ruffin, C. J.,* as follows: 'The statute, 27 Eliza., enacts that conveyances of land, made with intent to defraud purchasers shall, only as against purchasers for good consideration, be void. Under that act it was of course held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and with the notice of the deed the purchaser had also notice of the fraud. But the Legislature thought proper in 1840 to alter the law and declare that no person shall be deemed a purchaser within the meaning of the former act, unless he purchase the land for full value thereof without notice at the time of his purchase of the conveyance alleged by him to be fraudulent." *Triplett v. Witherspoon,* 74 N. C., 475.

The distinction which the learned counsel for the defendants attempts to draw between the rights of the assignee in a court of law and in a court of equity, has not been recognized by this Court. The rule as laid down in a court of equity in *Ellington v. Currie,* 40 N. C., 21,

and as applying to cases where such relief if asked under the Code practice in *York v. Merrit, supra,* is, that not only are parties estopped from attacking their own deeds as fraudulent, but those in privity or holding under them, which is a synonymous expression, are also as fully concluded as the grantor. Bryan, assignee, claims title to the equity of redemption by virtue of the deed from Adrian & Vollers, and therefore comes within the general rule in courts of law and Equity, unless such deeds are declared void as to him by the statute (Code, sec. 1546). We have seen that he is not by the statute (550) chaser as can claim the right to attack under that section. Having taken "before and at the time of purchase" with notice of the mortgage deed, it is clear then that Bryan is not at liberty to impeach it.

The other creditors secured by the assignment not being parties, we think there was no error in granting the decree of foreclosure. Why they have not been made parties to this cause, or have not instituted another suit, we are not informed. Unless the admission of the allegations of the answer by demurrer was merely a *pro forma* act, intended to raise the question, it would seem that the mortgage deed might have been successfully assailed by them, either as defendants in this or plaintiffs in an independent action.

Cited: Carr v. Coke, ante, 250; *Minning Co. v. Smelting Co.,* 119 N. C., 418; *Taylor v. Lauer,* 127 N. C., 162; *Observer Co. v. Little,* 175 N. C., 44.

UNITED STATES NATIONAL BANK OF NEW YORK v. S. P. MCNAIR.

Action on Note—Bills and Notes—Commercial Law Set off—Endorsee.

1. An endorsee of negotiable paper for value before maturity, without notice of any infirmity, takes it clear of all equities and defences between antecedent parties, excepting, only. (1) when, by statute, the paper is void in whole or in part from its inception; and (2) when the original consideration of the paper is illegal or fraudulent.

2. One who purchases for value before maturity and without notice of any set-offs, several notes, paying one-half of their aggregate face value and giving credit to the endorser for the other half, holds all the notes free from any right of set-off in favor of the maker as to any remaining unpaid.

3. In such case, the fact that the purchaser of the notes may have sued and recovered on part of them, does not deprive him of the character of a purchaser for value so as to let in the right of set-off as to the others.

4. If a note is not void, illegal or fraudulent, the endorsee who takes it before maturity, for value and without notice, gets the title free from all equities, regardless of how much or little he may have paid for it.

ACTION, tried before his Honor, *George H. Brown,* and a jury, at April Term, 1894, of NEW HANOVER.

The following issues were submitted to the jury:

"1. Is the defendant indebted to the plaintiff; and if so in what sum?

"2. Is the note sued on in this action subject to the set-off pleaded in the answer?"

The plaintiff offered in evidence a note for the sum of $2,500, dated 21 November, 1891, and due thirty days after date, executed by the defendant, to the First National Bank, of Wilmington, N. C., endorsed to the plaintiff by said First National Bank before maturity. The defendant denied that the plaintiff was a purchaser for value of the said note. The defendant introduced as witness in his behalf Asa Walker, who testified as follows:

"I was corresponding clerk of the First National Bank before its failure. Our correspondent in New York was the plaintiff. The First National Bank repeatedly sent the plaintiff notes for rediscount. The note sued on was endorsed to the plaintiff, and sent on for rediscount with a batch of other notes, aggregating $17,000, on 21 November, 1891. These notes were all discounted by the plaintiff, and reported in the account current furnished us by the plaintiff under date of 23 November, 1891."

The notes so sent are described in a letter from the plaintiff to the First National Bank dated 23 November, 1891, and marked "Exhibit A." (Said letter put in evidence.) The account current furnished to the First National Bank by the plaintiff for the month of November,

(552) 1891, was also put in evidence by the defendant. Telegram dated 25 November, 1891, signed H. M. Bowden, to the plaintiff, was also put in evidence. The telegram stated. "First National Bank of Wilmington has suspended until further notice." Also telegram from the defendant to the plaintiff, dated 27 November, 1891. The telegram stated, "Deposits in First National Bank to set-off note favor Bowden cashier. Can you return note to Bank?" was also put in evidence, the said telegram being a night message.

S. P. McNair testified as follows: "When the First National Bank failed on 25 November, 1891, I had on deposit in said bank, subject to check, $2,683.01."

J. G. Boney was also called as a witness by the defendant, and the defendant offered to prove by this witness that a note of Boney & Harper's, for the sum of $5,000, was one of the notes in the batch of notes for $17,000 endorsed by the First National Bank of the plaintiff at the same

time with the note in suit, and which was sent to the plaintiff on 21 November, 1891, for rediscount, and was discounted, that suit had been brought by the plaintiff, and since suit had been brought they had paid thereon into court for the use of the plaintiff the sum of $1,900. This evidence was excluded by the court upon the plaintiff's objection, and the defendant excepted. This was offered as tending to show that the plaintiff had received back a part of the money which it had paid out on these notes and is not a purchaser for value.

The defendant offered to prove that there was a note of Morris Bear & Bro., for $2,000 also rediscounted in the same batch of notes of 23 November, 1891; that said note was sent out for suit, and suit brought, and it was paid.

This evidence was also excluded, and the defendant excepted. The court instructed the jury that they should answer the first issue —$2,500, with interest at the rate of 8 per cent per annum (553) from 24 December, 1891, till paid; and answer the second issue, "No."

The jury having returned their verdict in accordance with his Honor's instructions, judgment was rendered as stated in the record.

The defendant moved for a new trial, and appealed from the refusal, assigning the following errors:

"1. For that his Honor excluded all the evidence tending to show that the plaintiff had received back part of the money it had actually paid on the discount of the notes, and was not a purchaser for value."

Motion overruled. Appeal.

The defendant assigned as error on appeal the excluding by the court of all the testimony tending to show that the plaintiff had received back a part of the money which it had actually paid out on the batch of notes referred to and was not a purchaser for value.

Exhibit "A" was as follows:

NEW YORK, 23 November, 1891.

WM. S. O'B. ROBINSON, Receiver.

H. M. B. &c.,

Wilmington, N. C.

We have this day discounted the following notes contained in your favor of the 21st inst., and proceeds of same placed to your credit, as follows:

(554)

Boney & Harper, due 12 Dec. '91	$ 5,000	$15.83
McNair & Pearsall, due 22 Dec. '91	5,000	24.17
M. Bear & Bro., due 24 Dec., '91	2,000	10.33
S. P. McNair, due 24 Dec., '91	2,500	12.92
B. F. Mitchell & Son, due 23 Dec., '91	2,500	25.42

Amount of notes $17,000
Less discount at 6 per cent 88.67
Proceeds, ... $16,011.33

JOHN J. MCAULIFFE.

S. C. Weil and Shepherd & Busbee for plaintiff.
George Rountree for defendant.

CLARK, J. The familiar general rule is that an endorsee of negotiable paper, for value, before maturity, without notice of any infirmity, takes it clear of all equities and defences between antecedent parties, and is of course entitled to recover the full amount of the same, according to its tenor. The exceptions to this rule are: 1. When by statute the paper is void in whole or in part from its inception as for usury. In such cases it is void to the same extent into whosesoever hands it may pass, even if acquired before maturity, for value and without notice, and the sole remedy of the holder for the deficiency is against the endorser. *Ward v. Sugg,* 113 N. C., 489, and cases there cited. 2. Where the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, the right of recovery is restricted to the consideration actually paid by the endorsee before notice of the fraud (*Dresser v. Missouri,* 93 U. S., 95) or the amount of the debt to which it is collateral. *Kerr v. Cowen,* 17 N. C., 356. But the exception does not extend further, not even to cases where the note
(555) was issued without any consideration, though it may be purchased by the endorsee for less than its face. *Daniel v. Wilson,* 21 Minn., 530. These propositions are also sustained (among a wealth of authorities) by 1 Daniel Neg. Inst. (4 Ed.), section 758 and 758*b*, *Allaire v. Hartshorn,* 1 Zabriskie, 663; *Stalker v. McDonald,* 6 Hill, 93; *Edwards v. Jones,* 7 Car. & P., 633; *Williams v. Huntington,* 6 Am. St., 477; *Cromwell v. County of Sac.,* 96 U. S., 51; *Hubbard v. Chapin,* 2 Allen, 328. Still less does the exception extend to a case like the present, in which there was neither fraud nor illegality, and where the note was executed for full consideration and endorsed to the plaintiff before maturity, without notice of set-off, and upon payment of half the purchase money, credit for the balance being entered on the books subject to check by the endorser. To so extend the exception would not

only be without precedent, but would impair the freedom of transfer and negotiability which is the distinctive feature of commercial paper, by means of which so large a part of the business of the world is transacted. Could the maker, after rediscount of this paper, by notifying the endorsee that he held a set-off against his note, have prevented the endorser from having its checks for the unpaid balance paid by the endorsee? And wherein does the endorser's insolvency extend the maker's rights in this regard? Has not the receiver the same right to check out this balance that the endorser would have had, if it had remained solvent? But where there is fraud, it is different, and the endorsee could not have paid the endorser's check for the balance after notice. Indeed the same contention as in this case was presented and passed on in *Bank v. McNair,* 114 N. C., 335, which concerned this same transaction, and is between the same plaintiff and one of the defendants in that action.

There were five notes aggregating $17,000, endorsed at the same time by the First National Bank of Wilmington to the (556) plaintiff and rediscounted by it. In the trial of this action, which is brought on one of said notes, the defendant offered evidence to show that the plaintiff had recovered on two others of this batch of notes $3,900, "as tending to show that the plaintiff had recovered back a part of the money which it had paid out on these notes, and is not a purchaser for value." As the plaintiff paid $8,102 in cash on the purchase of said notes, besides giving the credit for the balance (after deducting discount), the evidence would not in any view have shown that the plaintiff was not still a purchaser for value. If there was part payment the title to the paper passes to the purchaser where there is no fraud, while, if there is fraud, it does not, and the endorsee is only entitled in equity to the payment he has made before notice of the fraud. The plaintiff has a right, as such purchaser, to collect in full all five of the notes, in which event it will owe the First National Bank the $8,808 placed to its credit by reason of the balance due on the purchase of said five notes, but should there be a deficiency in collecting the full amount of all the notes, the plaintiff might off-set such deficiency upon the $8,808 to the credit of the Wilmington Bank; for, by the maturity of the notes without payment, the plaintiff holds a liability against the First National Bank of Wilmington for $17,000 and interest. The $8,102 in cash, and the credit of $8,808, were on no particular note but on the rediscount value of all five. There is no principle of law that the collection of the notes the plaintiff may be persuaded to sue on first, will exonerate the other notes and enable the makers of the other notes thereupon to plead against the endorsee any sets-off they may have against the payee. Such rule will make the rights of parties depend,

(557) not upon the equal and impartial application of the principles of law to all five notes, but upon the election of the endorsee as to which notes he will be pleased to exhaust first. The plaintiff holds all the notes without liabilitl for sets-off, and any surplus it may collect over and above the cash paid the Wilmington Bank, discount and interest added, will go to the First National Bank of Wilmington to be disbursed in the settlement of its liabilities.

The unpaid purchase money is due the endorser, and not the makers of the note. As to such unpaid balance, there is the right of set-off as between the endorsee and endorser, but not between the endorsee and maker, unless the note is void, illegal or fraudulent. The hardship of the defendant in this case, in not obtaining his set-off, is no greater than in any other case, where a note (as to which there is no fraud or illegality) is assigned before maturity and for value and without notice, though the maker holds sets-off against it.

It can make no possible difference to the maker whether the endorsee paid full value or less, or whether the payment was all cash or partly credit. If the note is not void, illegal or fraudulent, the endorsee who takes it for value, before maturity and without notice, gets the title free from all equities, no matter how much he pays. On the other hand, though he pays f ullvalue in cash, he will still be liable to equities, if he did not take before maturity, for value and without notice. These are the three requirements to protect the holder of negotiable paper, and there is no precedent or reason to add as a fourth that the amount must be paid in cash, to the full amount agreed to be paid.

No Error.

Cited: *Faison v. Grandy,* 126 N. C., 830; *Bank v. Walser,* 162 N. C., 62.

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(558)

DUNCAN M. WILLIAMS v. THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

Action for Damages—Practice—Removal of Cause—Jurisdiction—Evidence—Master and Servant—Principal and Agent—Declaration of Servant.

1. An application for removal of a cause from a State to a Federal Court on the ground of local prejudice must be made to the Federal, and not to the State Court.
2. Where the ground for removal of a cause from the State to the Federal Court is diversity of citizenship, the application must be made to the

State Court, and at the term at which the answer should be filed; otherwise, the right to removal is forfeited. Hence, where the answer should have been filed at April Term of a court, which adjourned a week earlier than the time allowed by law, and an answer filed on the 15th of June following was treated as if filed in time, an application to remove made at the time of actually filing the answer, was too late.

3. In the trial of an action against a corporation for damages for personal injuries sustained by the plaintiff through the negligence of defendant's servant, evidence of an admission by defendant's general manager made after the injury occurred, that the person who caused the injury was a servant of the defendant, is inadmissible.

4. If two witnesses testify to the same state of facts, but the evidence of one is competent and the other is not, the party against whom the evidence is given is entitled to a new trial because the court cannot know which witness the jury believed.

ACTION for alleged injury to the plaintiff, sustained through the negligence of defendant, heard before *Boykin, J.*, at September Term, 1894, of NEW HANOVER. Summons issued on 1 March, 1894, returnable to April Term, 1894, of NEW HANOVER. This Court, according to law, should have commenced on 15 April, 1894, but owing to the absence of the Judge it did not in fact commence until the 17th, and adjourned on the evening of the 20th. Plaintiff filed (559) his complaint on 17 April, and defendant on 15 June, 1894, filed an answer and a petition and bond for removal to the Circuit Court of the United States for trial, and at September Term, 1894, of New Hanover Superior Court, moved for an order of removal to said Circuit Court. This order was refused and defendant excepted and assigns this refusal to remove as one ground of error in this appeal.

The plaintiff was introduced as a witness in his own behalf and was allowed to testify under the objection of defendant, that "I saw the darkey after I was hurt. I do not know his name, and did not know then in whose employ he was. I found out, Mr. Coghill told me, that the darkey was one of the company's servants, working for them at the time." Defendant excepted. It was admitted that Coghill is the local manager in Wilmington of the defendant company, which is a foreign corporation. There were some other exceptions, but a consideration of these two will dispose of the case on appeal.

A. M. Waddell and N. J. Rouse for plaintiff.

Jones & Tillett, Shepherd & Busbee and Iredell Meares for defendant.

FURCHES, J. (after stating the case): We do not think the defendant's first exception, based upon the refusal to remove the case to the Circuit Court for trial, can be sustained. In defendant's applica-

tion to remove the case two grounds are alleged: First, A diversity of citizenship—that plaintiff is a citizen of North Carolina, and the defendant a citizen of New York; and Secondly, The ground of local prejudice.

This ground of local prejudice should have been made to
(560) the Circuit Court, if made at all. The State Court had no right to entertain or consider a motion for removal, based upon this ground. *Blackwell v. R. R.*, 107 N. C., 217. The State Court had the right to grant the motion upon the ground of diversity of citizenship, if it had been made in apt time, that is during April Term, 1894, of the Superior Court of New Hanover. This was not done. The term of the court ended on the evening of 20 April, and the defendant's petition and bond for removal were not filed until 15 June following. By this delay, the defendant forfeited all rights it may have had to removal, and indeed the court lost its power to make the removal. 2 Foster Federal Practice, section 385, p. 823; *Pullman Palace Car Co. v. Speck,* 113 U. S., 925 (Coop. Ed.) and cases cited.

The learned counsel for defendant contend that as the April Term of New Hanover Court closed a week earlier than the time allowed by law, and as the defendant filed an answer on 15 June, which was afterwards treated as an answer, the time for making the motion to remove was extended, and defendant's application was in time, and they cite the case of *Wilcox v. Insurance Co.,* as authority for this contention. This opinion is by *Judge Simonton,* for whose opinions this Court has very great respect. But it is not of that class of cases that we would feel bound to follow, unless we find it sustained by reason and precedent. *Judge Simonton* admits that there are quite a number of cases that appear to differ with this opinion of his, and that as many as two opinions of other Circuit Court Judges are directly in point against this opinion. But this case of *Judge Simonton* is not in point, and our opinion in this case is not in conflict with the opinion of *Judge Simonton,* 60 Fed. Rep., 929. In that case, there was an order of court extending the time for defendant to answer for
(561) 20 days. And defendant's application to remove was made within this 20 days, and he puts his order to remove upon that ground. In our case, there is no order of court extending the time for defendant to answer. And therein is the distinction between that case and our case.

But *Wilcox v. Insurance Co., supra,* is directly in conflict with 2 Foster Fed. Pr., secs. 3 and 5, p. 823, and with the decision of the Supreme Court of the United States. *Pullman Car Co. v. Spect, supra.*

But the evidence of plaintiff that "I found out afterwards, Mr. Cog-

hill told me, that the darkey was one of the company's servants, working for them at the time," was incompetent and should have been rejected by the court upon the objection of defendant.

This was a statement made by Coghill some months after plaintiff received the injury complained of—was not part of the *res gestae* and was therefore incompetent. The fact that Coghill was the general manager of the defendant makes no difference. He was still but an employee of the defendant, and not the defendant; and any statement of his that was not a part of the *res gestae* was but hearsay and incompetent. *Rumbough v. Improvement Co.,* 112 N. C., 751; *Southerland v. R. R.,* 106 N. C., 100; *Edgerton v. R. R.,* 115 N. C., 645; *Branch v. R. R.,* 88 N. C., 573; *Smith v. R. R.,* 68 N. C., 107.

This testimony of plaintiff was directly in point upon the main issue, submitted to the jury, and entitled the defendant to a new trial, unless the error of the court in admitting this evidence is cured by the affidavit of defendant, which was put in evidence by plaintiff, and this is the contention of plaintiff.

If two witnesses testify to the same state of facts, but the evidence of one is competent and the other is not, the party against whom the evidence is given is entitled to a new trial because (562) the Court cannot know which witness the jury believed. *S. v. Allen,* 8 N. C., 6. But plaintiff insists that this case is different from *S. v. Allen, supra,* and that class of cases. That here, the affidavit is the declaration of defendant and the jury is bound to believe it. The Court agrees with the plaintiff as to this proposition of law. And this brings us to the consideration of the admissions contained in the affidavit. If they are the same as the declarations of Coghill, testified to by plaintiff, or as full and direct as the declarations of Coghill, though not in the same terms, then it seems that the error of the court in admitting Coghill's declarations would be cured.

At first, the writer of this opinion was of that opinion. But upon a more careful examination and comparison of the affidavit and the declarations of Coghill, tesified to by plaintiff, I am of a different opinion. Then we do not think the admissions in the affidavit are equivalent to the declarations of Coghill, as testified to by the plaintiff; and in fact upon an examination of the Judge's charge, we find that he does not refer to the affidavit in any manner whatever; but the attention of the jury is specially called to the declarations of Coghill, in the following language: "As to the fact that the poles at the intersection of the streets where the accident is alleged to have occurred, belonged to the defendant company, Coghill, who was agent and representative of the company, admitted to the plaintiff, in a conversation subsequent to the accident, that the party employed in the arrangement of the

glass insulators was a servant of the defendant company." Upon this instruction, specially calling the attention of the jury to the declarations of Coghill, telling them that Coghill "admitted that the party (563) employed was a servant of the defendant company," we cannot say that the declarations of Coghill did not influence the verdict of the jury. Indeed we think it most probable they did.

We considered the question of removal because, upon awarding a new trial, that question would be the first to present itself, and therefore should be disposed of.

New Trial

Cited: *Howard v. R. R.*, 122 N. C., 950; *Neal v. R. R.*, 126 N. C., 641; *Summerrow v. Branch*, 128 N. C., 205; *Morgan v. Benefit Soc.*, 167 N. C., 265; *Patterson v. Lumber Co.*, 175 N. C., 92; *Lumber Co. v. Arnold*, 179 N. C., 277.

WILMINGTON, ONSLOW AND EAST CAROLINA RAILROAD COMPANY COMMISSIONERS OF ONSLOW COUNTY.

County Subscription to Railroads—County Bonds—Election—Duty of County Commissioners.

1. In submitting to the vote of the electors of a county the question of subscription of county bonds in aid of a railroad, a substantial compliance by the county commissioners with chap. 233, Acts of 1885, as amended by ch. 89, Acts of 1887, is sufficient, if there be no fraud.
2. Where, at such election, a majority of the qualified voters of the county vote for the subscription it is the duty of the county commissioners to issue the bonds.

ACTION commenced 7 March, 1893, in ONSLOW, and removed therefrom on notice of the plaintiff to and tried before *Boykin, J.*, and a jury, at November Term, 1894, of LENOIR. The object of the action and the contentions of the parties are set out in the opinion of *Associate Justice Furches.* On the trial the plaintiff submitted to a nonsuit in deference to the opinion of his Honor that, on the evidence, the plaintiff could not recover, and appealed.

(564)

A. M. Waddell and N. J. Rouse for plaintiff.

M. de W. Stevenson for defendant.

FURCHES, J. This action is for a mandamus to compel defendant to issue to plaintiff $30,000 in coupon bonds, under Laws 1885, ch.

223, as amended by Laws 1887, ch. 89, in which plaintiff contends that defendant submitted the question under said Acts to the qualified voters of Onslow County, and that a majority of the qualified voters of said county voted in favor of "subscription," thereby authorizing and making it the duty of defendant to issue said bonds to plaintiff. This demand is resisted upon the ground that plaintiff has no right to said bonds, and that defendant is not authorized to issue the same; and defendant alleges that the election held on 24 January, 1888, was irregular, in that, the Act of 1887 required said election to be held within 40 days, which was not done. That it does not appear that 30 days' notice of said election was given, as the law required. That a new registration was ordered, which was contrary to law and therefore void. That a majority of the qualified voters of Onslow did not vote to issue said bonds, and if they did so vote, it has never been so declared by defendants, and they now refuse so to declare, and to issue said bonds.

It is too clear for argument that defendant has no authority to issue the bonds demanded in plaintiff's complaint, unless a majority of the qualified voters of Onslow County have, by their vote given, in pursuance of law, authority to defendant to do so. Const. N. C., Art. VII, sec. 7. And on the other hand it seems clear to us, that if a majority of the qualified voters of said county, at an election held under and pursuant to law, have voted for the issue of said bonds, then it is the duty of defendant to issue the same, and the Court will (565) compel defendant to do so.

Then it is not denied that the Acts of 1885 and 1887, *supra,* authorized the holding of an election, and it is not denied that an election was held under said Acts for the purpose of determining the question whether said bonds should be issued or not. This much is undisputed ground.

But defendant says, although this is true, that said election was held in pursuance of said Acts, it was not held according to the requirements of said Acts. That said Acts required that said election should be held within forty days from the date of the order of defendant, calling the same, and this election was not held within forty days from the date of the order of defendant, calling the same, and is therefore void.

But plaintiff in reply to this says that time was not of the essence; that being the will of qualified voters, and where it is not shown that there was fraud or design in postponing the election, it will not vitiate or make the election illegal and void. 21 Mich., 324; 14 Barb., 259; 23 Ill., 437. That the time mentioned in the act was not mandatory, but only directory. *Grady v. Commissioners,* 74 N. C., 101.

But defendant says, if said election is not void for the reason that it was not held within the time mentioned, there was a new regis-

tration of voters ordered, which vitiates and renders said election void, and cites *Smith v. Wilmington,* 98 N. C., 343. But, upon examination of this case, we find it is put expressly upon the charter of Wilmington, which provided that there should not be a new registration of voters ordered oftener than once in every two years. And it was shown there had already been one registration during that year. While the general law, Code, sec. 2675, which applies to the case now
(566) under consideration, expressly provides that the county commissioners may order a new registration before any election; and *Chief Justice Merrimon* so states in his dissenting opinion in the case of *Smith v. Wilmington, supra.*

But defendant again says, it is not shown that said election had been advertised for thirty days, as the law requires. But when defendant admits there was an election held under defendant's directions and management, the law will not be so unjust to defendant, as to presume that defendant did not perform the duties required by law. But on the other hand it will presume it did its duty.

But defendant again says, if said election is not void for any of the reasons above stated, it was necessary that the commissioners should pass upon and declare the result of said election; that this has never been done, and they do not propose to do so, and cite *Claybrook v. Commissioners,* 114 N. C., 453, as authority for this position. But, upon examination of this case, we find that it holds that if the commissioners had declared that a majority of the qualified voters of the town had voted for the subscription, bonds had been issued and gone into the hands of innocent purchasers for value, the town would have been bound to pay them, though *in fact* a majority of the qualified voters had *not* voted for the subscription. But it does not hold that because the commissioners had not declared the result showing that a majority had voted for subscription, the election was void. But, that the commissioners having failed to declare that a majority had voted for the subscription, left it an open "question for the jury to determine" upon the evidence. And this case brushes away the straws, such as that the election was held on the 30th and reported on the 3d, that they voted "for subscription," and "against subscription," instead of voting "subscription" and "no subscription," as provided in the Act
(567) authorizing the election; and that the petitioners styled themselves "voters and tax-payers" instead of "residents and tax-payers" as provided in the Act; and takes a broad, catholic view of the whole matter, which goes to the merits of the controversy.

Suppose then we were to try the question as to whether a majority of the qualified voters of Onslow County voted for this subscription, what would necessarily be the result? The plaintiff, upon this point,

introduced the following evidence without objection: "The record of the officer of register of deeds of Onslow County, showing the vote of the different precincts, tabulated result, etc., of said election held on 24 January, 1888, as follows:—Election held 24 January, 1888, for subscription or no subscription for Wilmington, Onslow & East Carolina Railroad."

"To the Board of Canvassers or the Clerk of the Superior Court of Onslow County: Abstract of votes cast at an election held for, and chapter 233, Laws 1885 (giving returns from each precinct, aggregating, for subscription 935, no subscription 345, with registered voters 1648)."

"To the Board of Commissioners for Onslow County: Having opened, canvassed and judicially determined the original returns of the election in the several precincts in the county, held as above stated, do hereby certify as Chairman of said Board that the above is a true abstract thereof, and contains the number of said ballots cast in each precinct for subscription and no subscription, and the number of votes given in said election for the said purpose, 26 January, 1888. (Signed E. L. Frank, Jr., Chairman Board County Canvassers; Hill King, Secretary, *et al.*) I hereby certify that this is a true copy of the original filed in the office of the Clerk of the Superior Court of Onslow County, North Carolina. (Signed E. L. Frank, Jr., Chairman Board County Canvassers.) It is admitted that said election was held on the 24th January, 1888." (568)

And the defendant introduced no testimony. Now it seems to us that it was the duty of the Judge trying the case to have instructed the jury that if they believed the evidence, to find the second issue "Yes."

This is assuming that the commissioners had not declared the result of the election of the 24th of January, 1888, and that the case was being tried upon the evidence, under the law as declared in the case of *Claybrook v. Commissioners, supra.* But it appears to us that a reasonable and fair construction of this evidence shows that the vote was canvassed, the result ascertained and declared, showing that a majority of the registered voters of said county had voted for subscription, and that a majority of the registered voters was a majority of the qualified voters of the county. *Southerland v. Goldsboro,* 96 N. C., 49.

We think the object of all elections is to ascertain, fairly and truthfully the will of the people—the qualified voters. That registration, notice of elections, poll-holders, judges, etc., are all parts of the machinery provided by law to aid in attaining the main object—the will of the voters; and should not be used to defeat the object which they were intended to aid. This being so, it is held that a substantial compliance with

the provisions of the statute, under which the election is held, is sufficient.

We have treated this case as if the plaintiff was a tax-payer, or some one interested in defeating the result of this election. And we (569) have been showing it would be valid against the attacks of such parties. But that is not the case here. The plaintiff is trying to sustain its validity, while the defendant is trying to defeat the plaintiff by alleging its own faults, and thereby trying to take advantage of its own wrong. How far this would be allowed is not necessary for us to say here.

And, not to be misunderstood by this observation, we again repeat what we have heretofore said,—that defendants had no power to submit the question of subscription to the voters of Onslow County, outside of the powers given by the Legislature. And they have no power to issue the bonds demanded by plaintiff, unless a majority of the qualified voters voted for the subscription. But, having the power to submit the question, a substantial compliance with the formalities of the statute in submitting the question to the people, if there was no fraud practiced, and no design in doing so to impose on the people and get them to do what they would not have done if there had been a literal compliance with the terms of the statute in submitting the question is sufficient. And if a majority of the qualified voters of the county voted for the subscription, it is the duty of defendant to issue bonds.

There is error, and the plaintiff is entitled to have the judgment of nonsuit set aside, and a

New Trial.

Cited: Claybrook v. Comrs., 117 N. C., 462; *Quinn v. Lattimore,* 120 N. C., 433; *Mayo v. Comrs.,* 122 N. C., 12; *Charlotte v. Shepard, ib.,* 603; *McNeely v. Morganton,* 125 N. C., 379; *Cox v. Comrs.,* 146 N. C., 568; *Hill v. Skinner,* 169 N. C., 409, 415; *Woodall v. Highway Commission,* 176 N. C., 389; *Comrs., v. Malone,* 179 N. C., 608 *Riddle v. Cumberland,* 180 N. C., 328.

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(570)

STATE ON THE RELATION OF HAMILTON G. EWART v. THOMAS A JONES.

Establishment of Court—Vacancy in Office of Judge—Appointment by Governor.

The General Assembly, by ch. 75, Acts of 1895, establishing a Criminal Court with one judge, provided that the General Assembly should "elect a person to fill the vacancy in said office, which shall be caused by the ratification of this Act." The Act was ratified on the 23d of February, 1895,

but the election of plaintiff to fill the office of Judge was not held until the 27th February, 1895. The Governor refused the application of the plaintiff for a commission as Judge and appointed the defendant to the office. *Held*, in an action in the nature of *quo warranto*, that between the time of the ratification of the Act and the election of the plaintiff to fill the office no such vacancy existed as is contemplated in Art. 4, sec. 25, and Art. 3, section 10, of the Constitution. (AVERY, J., concurs in the decision of the Court that the plaintiff is entitled to the office, but dissents from the conclusion that there was no "vacancy" in the interim between the ratification of the act and the election of plaintiff.)

QUO WARRANTO, heard upon a case agreed, before *Graham, J.*, at March Term, 1895, of BUNCOMBE.

There was judgment for the defendant and plaintiff appealed. The facts appear in the opinion of FAIRCLOTH, C. J.

F. H. Busbee and T. R. Purnell for plaintiff.

W. W. Jones, F. A. Sondley, Shepherd & Busbee and T. F. Davidson for defendant.

FAIRCLOTH, C. J. Under our form of government the sovereign power resides with the people and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law, as declared by the delegates of the (571) people in convention assembled from time to time. In the Constitution of 1868 these limitations are found, bearing upon judicial questions, mainly in Article IV; and in section 4 the judicial power is vested in a Court for the trial of impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace and Special Courts, and the power of such Special Courts, as defined in section 19 of the same article, was declared in *S. v. Pender*, 66 N. C., 313.

In the same article, sec. 31, it was provided that the Governor should fill all vacancies occurring in the offices provided for by this article of the Constitution "unless otherwise provided for," and it was held by this Court that the words "unless otherwise provided for" meant unless otherwise provided for in this Constitution. In the Constitution of 1868 no Criminal Court, nor any other Court, than those provided in Art. IV, sec. 4, could be established by the Legislature, and it is expressly provided in Art. III, sec. 10, that "the Governor shall appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly." Thus it was according to the decisions of this Court cited under the appropriate sections in the present Constitution.

The Convention of 1875 revised and amended the Constitution of

1868 in several respects, and in the following, bearing on the present question:

1. In Art. III, sec. 10—"The Governor shall . . . appoint all officers, whose offices are established by this Constitution, and whose appointments are not otherwise provided for"—omitting the words "and no such officer shall be appointed or elected by the General Assembly," found in the corresponding article and section of the
(572) Constitution of 1868.

2. In Art. IV, section 2—"The judicial power of the State shall be vested in a Court for the trial of impeachments, etc., and such other Courts inferior to the Supreme Court as may be established by law."

3. In Art. IV, section 25—"All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointments of the Governor, unless otherwise provided for" . . . "If any person elected or appointed to any of said offices shall neglect and fail to qualify, such office shall be appointed to, held and filled as provided in cases of vacancies occurring therein."

4. In Art. IV, sec. 30—"In case the General Assembly shall establish other Courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

Upon this last section 30, the plaintiff's right to the office sued for depends.

From this review we find that under the Constitution of 1868 the Governor filled all vacancies provided for therein not otherwise provided for, and that no such officer could be appointed or elected by the General Assembly, and that the Legislature had no power to establish other courts. And we find in the Constitution of 1875, section 30, *supra,* that the Legislature is invested with power to establish other courts inferior to the Supreme Court and to prescribe the manner of electing the presiding officers and clerks thereof, and this power excludes any authority in the executive to fill such an office under the provisions of the Constitution to fill vacancies. This seems to be the plain and natural meaning of the language of sections 30, 31, and other sections. In further support of such construction and of the intention, we were
(573) furnished with the Convention Journal of 1875, pages 175, 176, showing by a direct vote that the Convention refused to incorporate the words "and no such officer shall be appointed or elected by the General Assembly," as it was in section 4 of the Constitution of 1868. The intent of the Convention in making those changes is too plain to require further comment.

The General Assembly, Act 1895, ch. 75, in pursuance of Art. IV, sec. 30, *supra,* established a Criminal Circuit, composed of Buncombe, Madison, Haywood and Henderson counties, providing for one judge and prescribing the powers, jurisdiction, etc., of said Court. Section 7—"That such Judge may be removed from office for the same causes and in the same manner as a judge of the Superior Court, and all vacancies in said office shall be filled by appointment of the Governor, and the person so appointed by the Governor shall hold his office until the next general election, provided that the General Assembly now in session shall elect a person to fill the vacancy in said office, which will be caused by the ratification of this act. Ratified 23 February, 1895."

On 27 February, 1895, the Legislature elected the plaintiff, by the requisite majority, a judge of said Criminal Circuit to fill the office as provided in said Act. On 12 March following the plaintiff applied to the Governor for his commission, which was refused, and on the next day the Governor nominated, appointed and commissioned the defendant as Judge of said Criminal Circuit, who is now in possession thereof.

This exercise of power by the Governor was without authority in the Constitution or the Act of Assembly. There was no vacancy in the office, such as is contemplated by the Constitution to be filled by the Governor. There was in fact no vacancy. It was simply the short interim between the establishment of the office and the (574) election of the person to fill it. Was it necessary for the Legislature to elect the officer in the same breath that created the office, in order to prevent a constitutional vacancy to be filled by the executive, when the act itself declared the purpose of that body to elect the officer? The question seems to furnish the answer. The fact that the word "vacancy" is used in the proviso does not affect the question. Suppose the Legislature had declared that the interim of four days should or should not be a vacancy, that would not help the matter; for it is not the province of that body to determine the legal effect and consequences of its own action. It is manifest that the purpose was to prevent a constitutional vacancy. *Cloud v. Wilson,* 72 N. C., 155, has been invoked on this question. There, D. H. Starbuck had been duly elected Judge of the 8th Judicial District, and after long delay he declined to accept and so notified the Governor. This Court held that to be a vacancy to which the Governor should appoint, *ex necessitate,* as the Legislature was forbidden to fill the place by Article III, sec. 10, and on the further ground that the public would suffer without a judge for the district. Here, the Legislature had the constitutional power to create the office and fill it, and the plaintiff was ready, and tried to enter promptly. There is no analogy.

Our opinion then is that the plaintiff is entitled to the office sued for, and that the judgment below is

Reversed.

AVERY, J. (concurring): The power to fill by appointment all vacancies occurring in the offices provided for by the Article devoted to the Judicial Department was conferred upon the Governor of the State, both by section 31 of Article IV of the Constitution of
(575) 1868, and by that section as amended by the Constitutional Convention of 1875 (Const., Art. IV, sec. 25) uness otherwise provided for. The provisions added to the original section were manifestly made, in view of the decision of this Court in *Cloud v. Wilson,* 72 N. C., 155, and were intended to limit the tenure of the appointees of the Chief Executive, whether to fill a vacancy caused by the death or resignation of an incumbent, or by the refusal of a person elected to qualify, to the time intervening between the making of the appointment and the next regular election for members of the General Assembly, together with a reasonable interval for qualification.

The Constitution as amended in 1875 added to the list of tribunals, to which the judicial power of the State was delegated, in addition to Superior Courts and Courts of Justices of Peace, "such other Courts inferior to the Supreme Court as might (may) be established by law." After giving to the Legislature, in section 12, Art. IV, the power to allot and distribute the jurisdiction not pertaining to the Supreme Court amongst the courts established or which might be established by law, the Convention of 1875 made a specific provision for filling the office of judge of any new tribunal which might be created by the Legislature in pursuance of section 30, Art. IV, upon the construction of which this controversy mainly depends, and which is as follows:

"In case the General Assembly shall establish other Courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

The office of Judge of "the Criminal Court of Buncombe, Madison, Henderson and Haywood counties" is the subject matter of
(576) this controversy, and was created by a statute (Laws 1895, ch. 75) ratified 23 February, 1895. It is provided in section 7 of the Act that an election shall be held for the first full term of four years at the next general election, and that vacancies in the office shall be filled by the Governor, subject to the condition however "that the General Assembly now in session shall elect a person to fill the vacancy in said office, which shall be caused by the ratification of this Act," and

that "said person shall hold his office until his successor shall be elected by the qualified voters of said counties of Buncombe, Madison, Haywood and Henderson at the next general election, and the person so elected shall hold his term of office as provided in section 6" (for a term of four years).

On 27 February, 1895, the General Assembly proceeded to elect a person to fill the office till the next general election, and the relator Ewart received the requisite majority of both houses. The Governor subsequently sent the name of the defendant Jones to the Senate for confirmation, and on failure of that body to act on his recommendation, issued a commission to the defendant and by virture of this appointment he is the present incumbent.

The right of the Governor to exercise the power of appointment conferred by section 25, Art. IV, is contingent upon the occurrence of a vacancy and the absence of any other express provision for filling it. Conceding that a vacancy occurred immediately on the ratification of the Act, on 23 February, and existed at least till 27 February, the controversy is narrowed down to the point whether the General Assembly was vested with authority to provide by the Act that such vacancy sould be filled by the subsequent election during the same session. The warrant of authority for electing the relator is to be found, as his counsel contend, in the provision of section 30, Art. IV, of the Constitution, that the "presiding officer and clerk shall be (577) elected in such manner as the General Assembly may from time to time prescribe." The constitutional amendments, made in 1875, were ratified by the people in 1876 and took effect in accordance with the ordinance of the Convention on 1 January, 1877. On the 10th day of the following March, a Criminal Court for Wake County was created by statute, and it was provided in sections 6, 9, and 11 of the Act (Laws 1876-'77, ch. 271) that the Judge, Solicitor and Clerk should be elected by the General Assembly.

In *Bunting v. Gales,* 77 N. C., 283, brought by the Clerk of the Superior Court to test the right of the clerk of the new Criminal Court, elected by the Legislature, to take from the plaintiff the emoluments enuring to the former from the criminal business theretofore cognizable exclusively in the Superior Court, it was held that the act establishing the tribunal was constitutional and that the plaintiff accepted his office in contemplation of the legislative authority, under section 19, Art. IV, of the Constitution of 1868, authorizing the creation of special courts, to diminish its emoluments as an incident to the transfer of the criminal business to any other court, which it had the power to create. The Court said: "He (Bunting) took his office therefore with a knowledge that the Legislature might establish a Criminal Court subsan-

tially the same with that which they did establish by the Act of 1876-'77, ch. 271, under the amended Constitution and of which they made the defendant clerk." The authority of the Legislature of 1876-'77 to elect a clerk was derived, if it existed, from section 30, Art. IV, of the amended Constitution, and could not be sustained without holding by an unavoidable implication that the "presiding officer," whose office is coupled with that of clerk in that section, could likewise be
(578) rightfully chosen by the same body. While the question was not discussed, yet in order to reach the conclusion announced the Court must have been of opinion, not only that the Legislature had the power to vreate the court, but to elect the clerk whose rights to the fees was sustained. If the Legislature of 1876-'77 had the power to elect a clerk, how can it be contended that, in coupling "the presiding officers and clerks," the same authority was not conferred as to the Judge both of that Court and of the Criminal Circuit created by the act of 1895?

It is insisted that the power of appointment is vested in the Governor by section 10, Art. III, of the Constitution, which empowers him to "nominate and by and with the advice of the Senate to appoint all officers whose offices are established by this Constitution and *whose appointments* are not otherwise provided for." The section (Battle's Rev., p. 42, sec. 10, Art. IV, Const. 1868) for which this was substituted by Convention of 1875, contained, in addition to what is preserved in the present section, the inhibitory provision that "no such officer shall be appointed or elected by the General Assembly." It was in construing the section, as it then stood and when there was no conflicting provision elsewhere in the instrument, that it was held in *Welker v. Bledsoe*, 68 N. C., 457; *Nichols v. McKee, ib.*, 429, and *Battle v. McIver, ib.*, 467, that the Legislature was not only not empowered but was expressly prohibited from appointing trustees of the University and the other officers, the validity of whose elections was the question involved in those controversies. Section 13, Article IX, of the Constitution of 1868 was subsequently amended so as to give to the General Assembly power to provide for the election of trustees of the University of North Carolina. After this alteration in the organic law, an Act (Laws 1873-'74, ch. 64) was passed empowering both houses of the General Assem-
(579) bly by joint ballot to elect sixty-four trustees of the University, and under its provisions the Legislature proceeded to elect. In *Trustees v. McIver*, 72 N. C., 76, *Justice Bynum*, in an able opinion delivered for the Court, and *Chief Justice Pearson* in a concurring opinion, reached the conclusion, in spite of the prohibitory clause which then remained as a part of section 10, Art. III, that the amendment of 1873 did provide, within the meaning of the Constitution, another

mode of selecting trustees than by appointment by the Governor and that the act of the Legislature, pursuance of which the trustees were elected, was constitutional.

If the grant of power to the Legislature to provide for electing trustees was properly held to authorize the election by the General Assembly subject to the same qualification ("unless otherwise provided for") which is found in Art. IV, sec. 25, and despite an additional prohibition against legislative appointment, it would seem unreasonable to allow the same qualification to restrict the delegation of authority, to elect judges, in language equally as clear. The subtle distinction, which counsel contend may be fairly drawn between the grant of the power to provide for the election of an officer and the authority to prescribe the manner of electing him, does not seem to exist, or is entirely immaterial for the purposes of this discussion. The analogy between the cases of *Trustees v. McIver* and that at bar is obvious and striking. It must be noted that all of the cases cited from our own reports to sustain the right of the defendant were opinions in support of the executive power of appointment, when the express grant was made to the Governor, and there was no conflicting constitutional provision to bring the qualification into operation.

It is conceded that the Constitution of 1868 vested the general power of appointment to fill vacancies occurring both in judi- (580) cial and executive offices in the Governor, subject only to any express provisions in the organic law itself for filling them otherwise, and the authority of the Legislature has been extended from time to time since that Constitution was framed, by express delegation of authority as to some of both classes of officers and by removing the express restriction in Article III. But before any such express power was given or limited to the Chief Executive, when by the Constitution as amended in 1835 no express grant of authority to appoint or elect was conferred upon either of the coördinate departments, the residuary power of the people to provide for filling offices, already existing, and to create others, was exercised by their representatives in the General Assembly. As an instance of this kind it seems that the General Assembly at its session of 1866-'67, passed an act (ch. 27) providing for the establishment of a criminal court for the City of New Bern and for the election by the two Houses of a presiding judge and that in pursuance of the act Judge Green was duly elected, and it is a part of the judicial history of the State that the authority of the court was recognized by this Court as a part of our judicial system.

By our silence, we must not be understood as conceding the soundness of the legal proposition of counsel that section 37, Article I, of the Constitution was intended as a restriction upon the power of the

General Assembly, as the direct representatives of the people. Another construction of the same clause is based upon the dea that the representatives of the people are vested with a delegated authority restricted only to the extent of the express grants in the State Constitution to the other co-ördinate departments and by the authority delegated to the Federal Government. Under that interpretation "all power not delegated" in the Constitution "remains in the people" to be
(581) exercised through their representatives and is not to be considered as in abeyance, so that they cannot be exercised, however urgent the necessity for their exercise for the public benefit, except when the people assemble by their delegates in Convention. I do not decide this interesting question, because it is not essential that we should do so, but we present both sides of it to exclude a conclusion that might be drawn from a failure to notice the contention of counsel.

The foregoing opinion was submitted tentatively only as an embodiment of my own views before that of the Court was prepared. It encountered objection on the part of my brethren upon the ground that it conceded the existence of a vacancy between the time when the act took effect and the election of the relator. It was intended only to admit, for the sake of the argument, that when the Legislature provided for filling "the vacancy in said office, which shall be caused by the ratification of this Act," the construction which they plainly put upon the Constitution might by possibility have been correct, but not that it was an interpretation adopted by the Court. It is entirely unneccessary, in the decision of the points involved in this case, to determine whether a vacancy, within the meaning of Article IV, sec. 25, for which the Governor can in any event designate the first incumbent, occurred on the ratification of the act, since every member of the Court concurs in the view that the Legislature in the exercise of the power granted by Article IV, sec. 30, had provided otherwise. I deeply regret that the majority of the Court deem it proper to define "a vacancy" when without raising that question we might have had
the advantage of entire unanimity in our opinion, with such
(582) additional weight as the fact is generally considered as giving to the deliverances of appellate courts. I shall not enter upon the discussion of the soundness of the doctrine that an office can be created and remain unfilled without causing a vacancy. When that question shall be fairly presented, I shall take occasion to give at length my reasons for dissenting from the views of the majority of the Court. Meantime, I venture to express my regret that such a barrier to united action has been, as it seems to me, unnecessarily interposed. Concurring in the conclusion of the Court, I dissent from the proposi-

tion that there was no vacancy between the ratification of the act and the election of the relator.

Cited: Cook v. Meares, post, 585, 589; *Caldwell v. Wilson,* 121 N. C., 469; *S. v. Ray,* 122 N. C., 1099; *Day's case,* 124 N. C., 367, 393, 394; *R. R. v. Dortch, ib.,* 669; *Wilson v. Jordon, ib.,* 702; *Cherry v. Burns, ib.,* 765; *McCall v. Webb,* 125 N. C., 249; *Abbott v. Beddingfield, ib.,* 265, 291; *White v. Murray,* 126 N. C., 157; *Bank v. Comrs.,* 135 N. C., 246; *Rodwell v. Rowland,* 137 N. C., 646.

STATE ON THE RELATION OF C. A. COOK v. O. P. MEARES.

Quo Warranto—Election to Office—Office Created after Election of Officer.

1. A person cannot be elected to an office that does not exist at the time of the election; therefore,

2. Where an office was created by an act of the General Assembly passed on the 8th day of March but not ratified until the 12th day of March, an election on the 9th day of March to fill such office was void.

QUO WARRANTO on the relation of C. A. Cook against O. P. Meares to test defendant's right to the office of Judge of the Circuit Criminal Court composed of the counties of Craven, New Hanover, Mecklenburg, Vance, Warren, Robeson, Edgecombe and Halifax, heard before *Hoke, J.,* at April Term, 1895, of NEW HANOVER.

D. L. Russell, L. C. Edwards and T. P. Devereaux for plaintiff (584)
tiff.

Shepherd & Busbee for defendant.

FURCHES, J. This is an action in the nature of quo warranto for the office of Judge of the Circuit Criminal Court composed of the county of New Hanover and others.

It appears that the General Assembly on 8 March, 1895, completed the passage of an act, through both of its Houses, establishing this "Circuit Criminal Court." But this act was not signed and ratified by the President of the Senate and Speaker of the House until 12 March, 1895. In this act the Legislature declared there sould be one judge for this criminal district, to be elected by the Legis- (585) lature. In pursuance of this legislation it proceeded on 9

March to elect the plaintiff judge of said court, which vote was reported and confirmed on 11 March. And on 13 March, the Governor appointed the defendant judge of said criminal court, and he is now occupying the office, and holding the courts. Every question involved in this case is decided in the case of *Ewart v. Jones, ante,* 570, except one. And that is that plaintiff was elected three days before the act was signed by the President of the Senate and the Speaker of the House.

There is no doubt of the plaintiff's being elected, and it is contended that the legislative will, so clearly expressed, should not be defeated by a mere technicality. It is also said in support of plaintiff's claim that the act of 12 March was only a part of the expression of the legislative will. That it is *in pari materia* with the acts of legislation commenced on the 9th and completed on the 11th in reporting and declaring the vote for plaintiff, and that they should be read and construed together. And they say there are precedents in our own legislative history to support plaintiff's claim. That the Legislature of 1876 passed and ratified an act establishing a criminal court for the county of Wake, on 10 March, and on the same day elected George V. Strong to fill the office, that day created. That on 6 March, 1891, the Legislature passed and ratified an act establishing the Court of Railroad Commissioners, and on the same day proceeded to elect the officers to fill the same. And they contend that it is not known whether these acts were signed by the Speaker and the President of the Senate (586) before or after said elections.

And plaintiff further contends that in March, 1887, the Legislature passed an act proposing an amendment to the Constitution, increasing the number of associate justices of the Supreme Court from two to four, which amendment was to be submitted to the people, in November following, for their ratification or rejection; and provided that said vote should be reported to the State Board of Canvassers on the second Thursday thereafter. And if upon a canvass it should be found that a majority of the people voted for said amendment, the Governor should so declare by proclamation. And that he should attach his certificate to the act to that effect, which should be deposited in the office of the Secretary of State. That it was also provided in said act that at the same election, in November, there should be an election held for two Justices to fill the offices "to be created" by said amendment, if it should be adopted. That an election was so held for two justices, the constitutional amendment was adopted, and the justices so elected qualified and took charge of their offices.

And it is contended that these justices were elected when the vote was cast in November, like the plaintiff was on 9 March. And that the constitutional amendment did not take effect until the vote was counted

and ascertained by the canvassing board, and the Governor's proclamation issued proclaiming its adoption. And that there was no office to fill at the election in November, 1888.

While, on the other hand, defendant says that the act of the Legislature on the 9th, electing the plaintiff, and the act passed on the 8th, but not ratified until the 12th, were separate and distinct acts of legislation, and cannot be considered and construed together. That the rule of *pari materia* does not apply. That when plaintiff was elected on the 9th, there was no such office; and its passing the Legislature on the 8th amounted to nothing until it was (587) signed by the President of the Senate and the Speaker of the House on 12 March.

Defendant further says that this Court in *Scarborough v. Robinson,* 81 N. C., 409, has decided this. And the case of *Rhodes v. Hampton,* 101 N. C., 629, decides that a man cannot be elected to an office when there is no office at the time of the election. And therefore admitting that plaintiff received votes enough to elect him, that he was not elected for the reason that the office was not created for three days thereafter. The only point before the Court in *Scarborough v. Robinson* was to whether the Court could compel Robinson, then Leiutenant-Governor and President of the Senate, and Moring, Speaker of the House of Representatives, to sign a school bill passed by the Legislature or not, after the Legislature had adjourned. And although this was the only question before the Court for its judgment, the Court proceeded to a engthy discussion of legislative powers, in the course of which it announced the opinion that an act passed by the Legislature was not a law until it was signed by the presiding officers. We find very respectable authority to the contrary. And without passing on this *dictum* (because it is not necessary we should do so in giving our judgment in this case) we say that it announces a very grave proposition. If what is held in that opinion be true, the presiding officers of the Legislature are clothed with a veto power greater than that vested in the President of the United States, or in any governor in any state of the Union. Because, where there has been a veto power vested in the executive, there is also provision made to pass the act over his veto, which is not infrequently done. Here, there is no such power. The courts will not compel them to sign the act, and there is no means provided by which the Legislature can pass it over their refusal to sign. But as we have said, we do not pass upon (588) this question.

In *Rhodes v. Hampton, supra,* the point as to whether a party could be elected to an office which did not exist at the time of the election was presented, and the Court held that he could not. And we admit

that it was the intention of the Legislature to elect the plaintiff to the office he is claiming in this action. We admit that the point made by defendant is a technical question. We admit that the journals show that George V. Strong was elected on the day the bill establishing the court was ratified. We admit that the journals show that the railroad commissioners, in 1891, were elected the day the bill was ratified. And we admit the two additional justices were elected at the November election in 1888, and that the amendment creating the offices to which they were elected did not go into effect until some time afterwards—when the Governor so proclaimed. But these all took place when there was harmonious action between the legislative and executive departments of the government. None of them have been tested in the courts. So they cannot be considered precedents to control our action. But in the case of Judge Strong and in the case of the Railroad Commission, as it was all done on the same day, we must presume that it was rightly done, that is, that the act was ratified before the election took place. And in the case of the justice of the Supreme Coudrt, their election was provided for in the same act that provided for the amendment. And this may make the difference between their case and that under consideration. We have said we put out of our consideration in this case the case of *Scarborough v. Robinson,* because, this act creating a criminal court was signed and is now the law. So the question presented in *Scarborough v. Robinson* is not presented (589) here. And we put our judgment on this act, now the law, which provides that "it shall be in effect from and after its ratification," which is in effect saying that it shall not be in effect before that time, and this is 12 March, 1895, and upon the opinion in *Rhodes v. Hampton, supra,* which holds that a party cannot be elected to an office that does not exist at the time of the election. It is better that the intention of the Legislature should be defeated, for a time, than that we should violate the law. We find no error in the judgment appealed from, and the same is affirmed.

CLARK, J. (concurring): It is settled that the Legislature had the power to fill the office created under this act. *Ewart v. Jones, ante,* 570. The statute which is duly and regularly enacted provides that it shall be "in force from and after its ratification." This took place 12 March, 1895. Neither on that day or at any time since has the Legislature elected any one to fill the office. The statute provides further that in event of a vacancy the Governor shall appoint till the next session of the General Assembly, which shall then elect to fill the unexpired term. Under this authority the Governor has appointed the defendant, who is now discharging the duties of the office.

The Legislature held a ballot and selected the plaintiff-relator to fill

the position on 9 March, 1895. But at that time by the very terms of the act it was not in force and could not take effect till ratified, which was three days thereafter. There was then no office which could be filled on 9 March. The attempted election to an office which was not yet in existence, was without warrant of law and was practically a merely informal expression of preference upon the part of members. The failure to elect after the act took effect, and the attempted election at a time prior thereto were, it may be supposed, an inadvertence. To fill an office there must be one already created. If the term of the office is to begin in the future (as in this case, on 1 April), it (590) is competent for the Legislature, or other appointing power, to fill it, provided that there has then been such an office created, but not at a time when there is no such office in existence.

By the terms of the statute, the act not taking effect till after its ratification, it is not necessary for us to consider the nature and effect of a ratification. The act itself selects that date as the beginning of the life of this statute. Prior thereto it was to be dead—of no effect—and after that date it was to live, breathe and be effective. By its terms it could not be retrospective and validate a prior election. And as a wise judge has said, "we cannot be wiser than the law." We cannot hold that this office was in existence prior to the time when the act creating it took effect. The attempt, is simply a nullity. *Rhodes v. Hamp-* however inadvertent the attempt, is simply a nullity. *Rhodes v. Hampton,* 101 N. C., 629. The courts have no prerogative to step in and cure inadvertences and on-action on the part of the Legislature. This would be unwarrantable assumption and interference by this co-ordinate department and would lead to far greater evils in cases of supposed or alleged inadvertences and omissions hereafter than the postponement for a few months of legislative action in filling this position.

It has been held in *Scarborough v. Robinson,* 81 N. C., 409, *Smith, C. J.,* that a bill has no validity till duly ratified, which is "an essential pre-requisite to the existence of the statute, which is incomplete and inoperative without it," and in *S. v. Patterson,* 98 N. C., 660, that a bill "perfected and passed is not a statute till ratified." But even conceding, if we could, that the bill became a law on its third reading in the House on 8 March (it having passed the Senate previously), or that the ratification when made could refer back (591) and make the act valid at the date of such last reading (a doctrine which has no authority to support it), this would not help the relator, for if the act dated back to 8 March it still provides that it was to have no effect till the ratification, which was 12 March. In *Commonwealth v. Fowler,* 10 Mass., 290, 304, *Parsons, C. J.,* an act creating a new county provided that it should take effect on a future

day named. Before that day the proper appointing power appointed an officer to fill one of the positions (judge of probate) created by the act. The appointment was adjudged void, although a custom of making appointments in such cases was shown. In that case were cited Bacon's Abr. Statute C. Lord Raymond, 371; and *Rex v. Gale,* Plowd, 79, which sustain the proposition that an act which is to take effect at a future day has no force till that time. To like purport are our own decisions, for it was held in *S. v. Bond,* 49 N. C., 9, that where a statute creating a criminal offence was to take effect at a future day, the specified act, if committed after the passage of the act but before the day it was to take effect, was not indictable under the act. And as to civil matters it was held, *Dick, J.,* in *Merwin v. Ballar,* 66 N. C., 398, that, if "the act in express terms is declared to be in force from and after its ratification, it had no operation previous to that day. Statutes must be construed as intended to regulate the future conduct and rights of persons and not to apply to past transactions. A contrary intention must be expressed by the statute." If the present statute, in addition to creating the office of judge of a criminal court, had made certain acts indictable, it is clear that such acts, if committed on 9 March, before the ratification on 12 March, would not be punishable. Till the day named for the act to go into effect, no rights nor liabilities can accrue under it. 23 Am. and Eng. Ency., 218.

(529) In *Rhodes v. Hampton, supra,* it was held, *Smith, C. J.,* that the election of a person to an office which did not then exist "was a nullity for the obvious and sufficient reason that there was then no such office to be filled."

To somewhat similar purport are *Kimberlin v. S.,* 130 Ind., 120; 30 Am. St. Rep., 208, which holds that the election of a person to an office held at a time which was not authorized by law is void, and *Brewer v. Davis,* 9 Hump., 208; 49 Am. Dec., 706, which holds that an election on a different day from that provided by an act erecting a new county is void, and *Sawyer v. Haydon,* 1 Nevada, 75, which holds that an election not authorized by law is a nullity.

The above are the few precedents bearing on the point, as the instances have been rare, and they are all against the plaintiff. To say that the Legislature had power to elect, and did elect, is but begging the question. If the election was made without authority of law (the point in issue) it was no election at all.

AVERY, J. (concurring): I concur in the conclusion reached by the Court, but not entirely in the reasons upon which it is made to rest. While much of the discussion in *Scarborough v. Robinson,* 81 N. C., 409, was entirely *obiter* the Court construed a clause of the Constitution (Art. II, sec. 23) as making ratification an essential prerequisite to

the validity of an act of the Legislature, and the decision of the question involved depended upon that construction. The purpose of the plaintiff in bringing that action was either to have a declaration from the Court that the bill should, in view of the facts shown, be deemed to have the force and effect of an act passed and ratified in the ordinary way or that the presiding officer should be required to sign.

It seems to me that the Court did not transcend the proper limit of logical argument in discussing and passing upon the (593) questions whether it was competent for the defendant to still impart vitality to an inchoate act or whether, if the compulsory power of the Court could not be invoked for such a purpose, it could nevertheless declare that under the peculiar circumstances, the unsigned bill should be deemed a complete legislative enactment.

Cited: *Carr v. Coke, ante,* 260, 268; *Range Co. v. Carver,* 118 N. C., 341; *McCall v. Webb,* 125 N. C., 249; *Abbott v. Beddingfield, ib.,* 265; *White v. Murray,* 126 N. C., 157; *S. v. Shuford,* 128 N. C., 591; *St. George v. Hardie,* 147 N. C., 92.

JOHN W. HINSDALE v. JOSEPH B. UNDERWOOD.

Practice—Supplementary Proceedings—Exceptions to Findings—Appeal—Appearance.

1. The findings of fact by a trial court in supplemental proceedins are final and cannot be reviewed on appeal, unless upon an exception that there was no evidence to support them or one or more of them.
2. A general appearance by the defendant before the clerk in supplementary proceedings waives all defects in the service of the notice to appear.

PROCEEDINGS supplemental to execution, heard, on appeal from the clerk of the Superior Court, before *Bryan, J.,* who affirmed the ruling of the clerk and defendant appealed.

S. H. MacRae and MacRae & Day for plaintiff.
N. A. Sinclair and N. W. Ray for defendant.

MONTGOMERY, J. The alleged insufficiency of the affidavit, as argued here by defendant's counsel, is that its material facts were not based on the knowledge of the plaintiff, or on information and belief—the plaintiff using the words "so far as affian is informed and (594) believes,, instead of an unqualified statement of necessary matters

on information and belief. His Honor found as a fact that the words "so far" were not in the original affidavit, and by inadvertence were inserted in the copy. The defendant excepted to this finding but did not put the exception on the ground that there was no evidence to support it. Neither did he ask his Honor to find the facts, if any were before him, in order to have the law, which was applied to them, reviewed in this Court. It appears from the record in the case that the words "so far" were in the original affidavit, but had at some time been erased, and that they were also in the copy served on the defendant. The testimony on which they were erased in the original was not set out by the Judge. The exception must be overruled. "This is an action at law and hence we have no authority to review the findings of fact by the court below. Such findings are final and must be accepted here as warranted by competent evidence unless it should be objected in a proper way that there was no evidence to support the findings, or one or more of them. We can only review questions and matters of law in such cases arising upon the facts as found. *Travers v. Deaton,* 107 N. C., 500.

As to the exception to the insufficiency of the service of the notice, it is only necessary to say that the appearance before the clerk by the defendant was a general one, and all defects in the service of the notice were waived thereby. Besides, the appeal from this ruling of the clerk was premature; the order at most was interlocutory. If the notice had not been properly served, the court would simply have directed a reasonable delay of proceedings or that a new notice issue forthwith to be served within a day specified. *Turner v. Holden,* 109 N. C., 182.

Affirmed.

(595)

PEARCE BROTHERS & CO. et al v. J. W. ELWELL et al.

Cited: Davison v. Land Co., 118 N. C., 370.

Practice—Findings of Fact—Review on Appeal—Receiver, Appointment of.

1. In cases where this Court has the right to review the findings of fact by the court below, it may find the facts if they have not been found below.

2. Where, in an application for a receiver, the complaint and affidavits alleged that defendant debtor and other defendants named, all of whom were insolvent, had combined to defraud the plaintiffs out of their claims against the debtor, and none of the defendants, except the debtor, denied the allegations and the court appointed a receiver for the debtor, but refused as to the other defendants: *Held,* that such refusal was error.

Application by Pearce Bros. & Co., Robeson & Co., and other against J. W. Elwell and others for the appointment of a Receiver, heard before *Bryan, J.,* at May Term, 1894, of ROBESON. His Honor granted the application as to Elwell but refused it as to the other defendants, and plaintiffs appealed.

The facts appear in the opinion of *Associate Justice Furches.*

Battle & Mordecai and McNeill & McLean for plaintiffs.
No counsel contra.

FURCHES, J. This is an application for a receiver, heard by *Brown, J.,* from whose order plaintiffs appealed to this Court. (596)

The motion was heard upon plaintiffs' complaints, used as affidavits, the affidavit of W. H. Miller and the answer of J. W. Elwell, used as an affidavit.

The Judge does not find the facts but simply renders his judgment, appointing a receiver as to Elwell and refusing to appoint a receiver for the other defendants. If his Honor had found the facts, this Court would have the right to review his findings. *Coates v. Wilkes,* 92 N. C., 376. And it certainly has the right to find the facts where they were not found by the court below if it has the right to review his findings. We are not inadvertent to the fact that cases may be found where it is held that this Court cannot review the findings of fact in the court below. But they are distinguishable from this case.

Then the fact that Elwell & Woolard, doing business under the firm name of "Elwell & Co.," are indebted to the plaintiffs, is alleged and not denied. The complaints both alleged, as well as the affidavit of M. H. Miller, that all the defendants are insolvent, that M. S. Lassiter is the wife of M. B. Lassiter and that Sam Lassiter is the infant son of M. B. Lassiter, and that the sale, or pretended sale, of Elwell to M. B. Lassiter and the pretended sale of M. B. Lassiter to his wife and infant son were all a part of a fraud concocted from the begining to cheat and defraud the plaintiffs out of their just debts. That defendants have made different and contradictory statements as to the terms of said sales; and that defendant Elwell is now sporting on the ill-gotten gains of this fraudulent transaction.

The defendant Elwell is the only defendant that pretends to deny any of these damaging charges; and he only denies that his sale to S. B. Lassiter was fraudulent, and if said Lassiter was insolvent it was unknown to him. This denial raises an issue. But the surrounding circumstances throw such a shadow upon this trans- (597) action that the court below properly held that plaintiffs were entitled to have a receiver, as to the defendant Elwell. And if plain-

tiffs were entitled to a reciver as to Elwell, who answered and made the denials stated above, we cannot see why they were not entitled to have a receiver as to the defendants who made no denial of the frauds, insolvency, coverture and infancy, as alleged. *Ellet v. Newman,* 92 N. C., 519; *Rheinstein v. Bixby,* 92 N. C., 307; *Machine Co. v. Lumber Co.,* 109 N. C., 576; *Bank v. Bridgers,* 114 N. C., 381.

In application for ancillary relief, it is not necessary that proof should be as full and as complete as if the trial was before the jury upon the main issues. *Faison v. Hardy,* 114 N. C., 58; *Bank v. Bridgers, supra.* And we are clearly of the opinion that there is sufficient *undisputed evidence* in the case to entitle the plaintiffs to a receiver as to the other defendants, as well as against the defendant Elwell. It may be that a receiver, at this late day, will be of but little benefit to plaintiffs. But this is not a matter for us.

There is error, and the plaintiffs are entitled to have a receiver as to the other defendants, as well as to Elwell.

Error.

(598)

A. L. WEBB & SONS ET AL v. R. W. HICKS ET AL.

Action in Assumpsit—Pleading—Cause of Action—Defective Statement.

1. While the courts will lend their aid in putting a proper construction upon the facts stated where the complaint sets out a cause of action, though defectively stated, yet they will not entertain a complaint which states no cause of action.

2. A complaint which merely states a conclusion of law—that the defendant is indebted to the plaintiff, and that the debt has not been paid, is demurrable both at common law and under The Code.

ACTION, tried before *Brown, J.,* at November Term, 1894 (a jury trial being waived). The complaint was as follows:

The plaintiffs, complaining, say:

"1. That Chas. A. Webb and Oscar E. Webb, above named plaintiffs, at the times hereinafter named, were partners doing business at Baltimore, Maryland, as A. L. Webb & Son.

"2. That the plaintiff, M. McD. Williams, at said times, during 1891, was at the instance of, and as agent for, the defendants, J. Y. Gossler and R. W. Hicks, and by their consent, doing business at Spout Springs, N. C., and as such became indebted to the said A. L. Webb & Son in the sum of eight hundred and ninety-five dollars and thirty-six cents

($895.36) with interest from 19 April, 1892, which is the amount of said indebtedness.

"3. That on or about 2 January, 1892, the said J. Y. Gossler and R. W. Hicks agreed with said M. McD. Williams to submit to arbitration, in order to ascertain the amounts due, and to settle all matters of difference between the said M. McD. Williams, J. Y. Gossler, R. W. Hicks and the creditors of W. J. McDiarmid & Bro., and the said Williams. (599)

"4. That on said 2 January, 1892, as plaintiffs are informed and believe, the said J. Y. Gossler and R. W. Hicks contemplated and were intending to form a corporation for the purpose of working the properties which had been in the possession and use of M. McD. Williams whilst so doing business for them and as their agent as above alleged; and, as part of the agreement to arbitrate, it was stipulated that the corporation to be formed should immediately, upon the coming in of the award, become bound therefor together with said Gossler & Hicks. Hicks.

"5. That in accordance with the intention of said Gossler & Hicks, as above set forth, they procured to be formed a corporation under the name of "The Consolidated Lumber Company," the above named defendant.

"6. That in accordance with said agreement to arbitrate, Jas. C. McRae and N. A. Sinclair were duly named as arbitrators and C. W. Broadfoot as umpire.

"7. That said M. McD. Williams, on or about 6 January, 1892, failed in business and made an assignment of his property to G. W. Buhman, above named plaintiff, for the benefit of his creditors, and his estate is insolvent.

"8. That afterwards, said arbitrators and umpire, after hearing and due consideration of the matters of difference submitted to them, adjudged that the indebtedness to the plaintiff, A. L. Webb & Son, was eight hundred and ninety and 46-100 dollars, which award was duly made on 1 July, 1892."

Wherefore the plaintiff demands judgment.

"1. Against the defendants, John Y. Gossler and R. W. Hicks, for eight hundred and ninety-five and 36-100 dollars with interest on same from 19 April, 1892, and against the defendant, The Consolidated Lumber Company, for eight hundred and ninety and 46-100 dollars and interest on same from July, 1892. (600)

"2. Against all the defendants for the costs and disbursements expended in this action, and for all other and further relief to which plaintiffs may be justly entitled."

The plaintiff Webb was allowed to amend his complaint so as to declare upon two causes of action, one upon the alleged debt and based

upon the agreement in writing made in January, 1891. This agreement is not dated, but it is admitted to have been concluded and entered into in said month and year. It is marked Exhibit "A." Also to set out another cause of action based upon the alleged debt due Webb and the arbitration and award hereinafter set out.

The court found the following facts:

Chas. A. and Oscar E. Webb compose firm of A. L. Webb & Son, of Baltimore, Md.

The above recited Exhibit "A," is, in evidence, admitted to be signed by Gossler & Co., and Hicks. Agreement to arbitrate (not signed by A. L. Webb & Son), dated 2 January, 1892, and also the award dated 1 July, 1892. They are attached together and marked Exhibit "B."

For the purpose of this action it is admitted that after the aforesaid agreement between creditors, entered into in January, 1891, and marked Exhibit "A," said M. McD. Williams, as assignee of W. J. McDiarmid, contracted with A. L. Webb & Son the debt sued on amounting to $890.46, bearing interest from 16 April, 1892, at six per cent, which said debt was evidenced in large part by drafts drawn for money by said Williams, as assignee of W. J. McDiarmid, and small part for spirit barrels, etc. That before said credit was extended to said Williams and his drafts paid, the agent of said A. L. Webb & Son knew of and read the said agreement, marked Exhibit "A." That (601) said debt has never been paid.

The assignment from W. J. McDiarmid to M. McD. Williams, dated 12 December, 1890, is in evidence. The order of payment of debts as set out in this assignment differs somewhat from the agreement (Exhibit A) of January, 1891, as a comparison will disclose.

It is admitted that there were prior mortgage and deeds in trust covering the same property embraced in said agreement of 12 December, 1890, held by Jno. D. Williams, Jos. G. Brown, trustee, and the M. McD. Williams mortgage and the mortgage to Gossler & Co., securing debts unpaid. That said mortgage and deed in trust were foreclosed by the mortgagees and trustees named in them on 5 January, 1892, under powers of sale, and the property was purchased by J. Y. Gossler and R. W. Hicks, and deed executed to them by the mortgagees and trustees.

There is nothing to show that Gossler & Co. or Hicks had actual knowledge of the alleged debt sued on in this action at time it was contracted or thereafter until shortly before beginning of this action, and it is admitted that when the said defendants purchased said property at sale 5 January, 1892, they had no actual notice of said debt. There is no evidence that Gossler & Hicks had any notice that the assignee, Williams, was contracting any debts individually or as assignee.

After the sale of 5 January, 1892, the corporation now known as

The Consolidated Lumber Company was formed, in which Gossler, Hicks and others, who are not parties to this action are stockholders. Gossler and Hicks were promoters of the enterprise and assisted in forming the corporation, and after it was duly formed conveyed the property to it in consideration of part money and part stock. There are now other stockholders besides Gossler and Hicks. Afterwards M. McD. Williams made a general assignment for benefit of his (602) creditors, and N. A. Cinclair, the substituted assignee, is a party plaintiff to this action.

From the above facts and evidence and admissions in the pleadings the court considers and adjudges:

"1. That A. L. Webb & Son were not parties to the agreement to arbitrate and the award thereon (Exhibit B) and not bound by it, and cannot maintain an action upon it.

"2. That the agreement of January, 1891 (Ex. A), does not render the defendants, Gossler and Hicks, liable to A. L. Webb & Son for the debt sued on.

"3. That the defendant, The Consolidated Lumber Company, is not liable to plaintiffs.

"4. That the action be dismissed and the defendants go without day and recover costs to be taxed by the Clerk."

From this judgment the plaintiffs appealed.

The agreement of 1891, referred to in paragraph 2 of the complaint and designated by his Honor below as "Exhibit A," was in effect an agreement between the creditors of W. J. McDiarmid & Bro., that M. McD. Williams, as assignee, should continue the business of McDiarmid & Bro., for one year from January, 1891, at the end of which time he should "render an account of the said business to the said creditors, when it may be determined by a majority in value of the creditors then unsatisfied whether, and for how long, it shall be further continued, or whether the said business shall then be wound up by a sale of the said property." It was further provided that the assignee should receive, as his entire compensation, 5 per cent on all receipts from sales, in lieu of the 5 per cent on receipts and disbursements provided for in the assignment. The agreement referred to in paragraph 3 of the complaint designated as "Exhibit B" was not signed by plaintiffs, nor were they in any way made parties thereto; and the award mentioned in paragraph 8 found that the "estate held by (603) M. McD. Williams, assignee," was indebted to plaintiffs in the sum of $890.46, but did not adjudge this to be an indebtedness of defendants.

N. A. Sinclair and Shepherd & Busbee for plaintiffs.
McRae & Day and H. McD. Robinson for defendants.

FURCHE., J. The first thing called to our attention in considering this case is the allegations of plaintiffs' complaint, and it was admitted by the learned counsel who argued the case in this Court not to be a very clear statement of plaintiffs' cause of action. But they contended that it was a defective statement of a cause of action and not a statement of a defective cause of action; that a cause of action is stated with sufficient clearness and certainty not to mislead defendants, but to give them notice of plaintiffs' claim, when and how it was created and how they became liable, and that, this being so, the Court ought to sustain the complaint, and cite *Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601. These cases went to the very verge, but we think they were allowable under the liberal spirit of The Code, and we do not propose to disturb them.

But we do not think they sustain the complaint in this case. They properly named all the parties and they stated fully the facts constituting a cause of action. Though they declared on a special contract they stated facts that entitled them to recover on the general or implied contract, for services performed. The form of actions having been abolished by The Code, the Court did not stop to consider
(604) whether, under the old practice, they should have been actions of debt or actions of *assumpist,* but took up the facts and found that a cause of action was stated entitling the plaintiffs to recover and sustained the ruling of the court below in so holding. These were cases where a cause of action was stated and is called a defective statement of a cause of action, inw hich the courts will lend their aid in putting a proper construction on the facts stated.

But in our opinion the complaint in this case fails to state a cause of action, and in this lies the distinction between this case and the cases of *Stokes v. Taylor* and *Fulps v. Mock, supra.* This case does not state facts constituting a cause of action.

Chief Justice Shepherd, in the case of *Lassiter v. Roper,* 144 N. C., 17, in a well-considered opinion, says, quoting from the opinion of *Chief Justice Kent,* 1 Johnson, 453, "I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous and admirably adapted to the investigation of truth and ought consequently to be very carefully touched by the hand of innovation." "It was but in keeping with the spirit of these views that our present system of civil procedure was framed and enacted, and we find this Court, very shortly after its adoption, repudiating the idea that loose and uncertain pleadings would be

tolerated." In *Crump v. Mims,* 64 N. C., 767, the Court said, "We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by The Code," quoting to sustain this position *Parsley v. Nicholsson,* 65 N. C., 210; *Oates v. Gray,* 66 N. C., 442; *Vass v. B. & L. Association,* 91 N. C., 55. "It was a false notion entertained by some of the legal profession that the Code of Civil Procedure is without order or certainty and that any pleading, however loose and irregular, may be upheld. On the contrary, while it is not perfect, it has both logical order, precision and certainty, when it is properly ob- (605) served. Bad practice too often tolerated and encouraged by the courts brings about confusion and unjust complaints against it. It is still essential to state the facts. The Code, sections 233-243, which provides that there must be a plain, concise statement of the facts, constituting a cause of action." *Rountree v. Brinson,* 98 N. C., 107. "A complaint which merely states a conclusion of law (that is, that the defendant is indebted to the plaintiff and that the debt has not been paid) is demurrable both at common law and under The Code."

We have quoted thus extensively from the case of *Lassiter v. Roper,* 114 N. C., 17, for the reason that it is the latest exposition we have from this Court on the question of defective pleadings and because it appears to have been fully considered by the Court and ably and exhaustively treated in the opinion. And because we think it controls, and indeed disposes of the case under consideration.

It is not for us to say what rights the plaintiffs might have under a proper conception of their case and under proper pleadings, treating the creditors of McDiarmid Bros., who signed Exhibit "A" as a partnership. It is only for us to say there is no error in the judgment of the court below.

No Error.

Cited: Farthing v. Carrington, ante 327, 335; *Webb v. Hicks,* 123 N. C., 244; *S. c.,* 125 N. C., 201.

(606)

N. A. SINCLAIR, ASSIGNEE OF M. McD. WILLIAMS, v. R. W. HICKS ET AL.

Ambiguous Contract—Ellipsis—Construction.

While courts may decide between one of two possible constructions of ambiguous terms and may sometimes resort to pertinent extrinsic evidence to arrive at a proper interpretation, they cannot, nevertheless, supply a supposed ellipsis in order to give legal effect to language which, without addition or alteration, would be meaningless.

ACTION tried, at November Term, 1894, of CUMBERLAND, before *Brown, J.* A jury trial was waived and the court found the facts. The controversy involves the interpretation to be given to the last sentence of a contract, marked "Exhibit A," construed with another contemporaneous contract. If the effect of said sentence was to discharge R. W. Hicks from liability to the plaintiff, who is the assignee of the payee therein mentioned, as the indorser on a note for $625, then the plaintiff is not entitled to recover, otherwise he is entitled to recover. The two contracts entered into contemporaneously are as follows:

EXHIBIT "A."

NORTH CAROLINA,
CUMBERLAND COUNTY.

WHEREAS, M. McD. Williams owes R. W. Hicks the sum of $2,765.69, for payment of which said Hicks holds as collateral security a mortgage from W. J. McDiarmid and A. K. McDiarmid and their wives to M. McD. Williams, the same having been transferred for that purpose by said Williams to said Hicks, which mortgage covers the lands in Cumberland and Harnett counties, North Carolina, known as
(607) the McDiarmid lands (about 13,000 acres) and the Cameron tract of 146 acres, and is a second mortgage on said lands, made in December, 1890, and duly recorded in Cumberland and Harnett counties; and whereas said M. McD. Williams, as assignee of said W. J. McDiarmid & Bro., and conducting the assigned business and managing the assigned property during the year 1891, by an agreement of the creditors, has incurred liabilities, as appears by his statements of account; and whereas R. W. Hicks, J. Y. Gossler and M. McD. Williams have this day entered into an agreement for an arbitration, etc., of an account which M. McD. Williams claims against the property lately in his hands as assignee of W. J. McDiarmid & Bro., and

incurred, as he claims, under the agreement of the creditors of W. J. McDiarmid & Bro.; and whereas R. W. Hicks may become one of the purchasers of the assigned property of W. J. McDiarmid & Bro., at the sales to be made this day by J. D. Williams, as first morgagee of said "McDiarmid lands," and by Joseph G. Brown, trustee, of the "Mill tract," containing five and eight-tenths acres, and the machinery and improvements thereon, located at Spout Springs, N. C., and also a part of said assigned estate, in the event of which purchase said R. W. Hicks' claim of $2,765.69 against said M. McD. Williams would become liable to scale in proportion, as said R. W. Hicks' claim represented the purchase money of the whole of said assigned property; and in case the indebtedness incurred by said M. McD. Williams as assignee of W. J. McDiarmid & Bro., and by virtue of the agreement between said Williams and the creditors of W. J. McDiarmid & Bro., should finally be decided to be proper, correct and a charge against the assigned estate, and, in any event, would be subject to the individual claim of about $2,700.00 of M. McD. Williams, to be passed upon, audited and finally determined and settled in accordance with the terms of an agreement of this date between R. W. Hicks, J. Y. Gossler (608) and said M. McD. Williams, which agreement is hereby referred to in further explanation of this agreement, and is made a part thereof so far as concerns said R. W. Hicks and M. McD. Williams; and whereas it is the desire of M. McD. Williams that his indebtedness to said R. W. Hicks, collaterally secured by said mortgage from W. J. McDiarmid & Bro., to said M. McD. Williams, shall be fully paid without any scale or offset, and in case said Hicks should become one of the purchasers, that said sum of $2,765.69, due him by said Williams, shall be allowed as cash on said purchase and without scale of offset in any event: Now, therefore, in consideration of the premises and the further consideration of ten dollars, in hand paid by R. W. Hicks to M. McD. Williams, the receipt of which is hereby acknowledged, the said M. McD. Williams agrees, covenants and promises with and to said R. W. Hicks that in any event said $2,765.69 shall be without scale or offset of any kind, and that he will protect and save said Hicks harmless as to any scale or offset on said sum, that any note or other paper signed or endorsed by R. W. Hicks upon the coming in of the award of the arbitrators or by reason of any claims against said assigned property contracted by M. McD. Williams as assignee of W. J. McDiarmid & Bro., and agent of the creditors under said contract of December, 1890.

Witness: M. McD. WILLIAMS, (Seal.)

H. McD. ROBINSON.

EXHIBIT "B."

Articles of agreement made and entered into this day by and between J. Y. Gossler, Gossler & Co., R. W. Hicks and M. McD. Williams:

WHEREAS, M. McD. Williams is indebted to R. W. Hicks in (609) the sum of $2,765.69, for which he holds as collateral security a mortgage by W. J. McDiarmid & Brother to said Williams, and has agreed to assign to said Hicks a sufficient interest in amount of said mortgage to liquidate said debt; and whereas there will then be a balance of about $862.61 due to M. McD. Williams on the said mortgage; and whereas there are matters of difference between said Gossler and said Williams, and between the creditors of the said W. J. McDiarmid and Brother and the said Williams:

Now, therefore, the said Gossler & Company and John Y. Gossler and the said Hicks agree with the said Williams:

1. That if the said Gossler & Hicks, or any person for them, shall purchase and take deeds for the properties of W. J. McDiarmid & Brother, at the sales advertised for this day at Spout Springs, they will, on or before 9 January, 1892, pay to the said Williams the sum of about $862.61, and he will thereupon assign and transfer the said balance due upon his said mortgage to the said Gossler & Hicks.

2. That all matters of difference between the said Gossler & Hicks and the said Williams and the creditors of W. J. McDiarmid & Brother and the said Williams shall be at once submitted to the arbitration of J. C. McRae and N. A. Sinclair, they, in advance, to select an umpire, and the award of a majority shall be final. This, upon the condition that the said Gossler & Hicks or some person for them, shall purchase and take deeds for the properties to be sold this day.

3. The said Gossler & Hicks and the said Gossler & Company agree that the corporation to be formed shall immediately, upon the coming in of the award, give to the said Williams four notes for the amount of the award of equal amounts, payable in 2, 4, 6 and 8 months (610) after their date, with interest at the rate of 8 per cent; one of said notes to be indorsed by said Hicks and the others by said Gossler. Thereupon the said Williams is to assign to the said Gossler & Hicks his claim and interest under the said award.

4. Said Williams agrees to sell at public sale any and all properties not included in the said J. D. Williams mortgages and the Brown deeds of trust at once. In the meantime and at once the said Williams is to deliver to the said Gossler & Hicks all property and assets of every description belonging to the said trust estate of McDiarmid & Brother, if they become the purchasers as aforesaid. This is to include all the property included in the J. D. Williams mortgages and the Brown deeds

of trust, and all property and assets of the said trust estate not included in the said Williams mortgages and the Brown deed of trust. The said Gossler & Hicks agree that the property which the said Williams shall advertise for sale as herein provided shall be forthcoming at the sale of said Williams. The said Gossler & Hicks shall in the meantime hold the same in trust for said Williams until the day of sale. Dated 2 January, 1892.

JNO. Y. GOSSLER, (Seal.)
GOSSLER & Co.
R. W. HICKS, (Seal.)
M. McD. WILLIAMS, (Seal.)

Witnesses:
H. McD. ROBINSON,
N. A. SINCLAIR.

ADDENDUM—"M. McD. Williams, as assignee, agrees at once to execute to Gossler & Hicks, if they become the purchasers, quit-claim deeds for all the properties."

The conclusions of law were as follows:

1. That no evidence has been offered showing any breach of the covenant contained in last 17 lines (or last clause) in the paper writing marked Exhibit "A."

2. That said paper writing does not convey to Hicks the award of the arbitrators for $2,500 or any part of it in favor (611) of M. McD. Williams.

3. That if the paper marked Exhibit "A" is the basis of any demand in favor of R. W. Hicks against M. McD. Williams, such claim should, under section 2 of the agreement (Exhibit "B") to arbitrate, have been submitted to the arbitrators.

4. That the interest of said Williams in the award shall be assigned to Gossler & Hicks as provided in section 3 of the agreement (Exhibit "B") upon payment of the sum of $625 with 8 per cent interest from 2 July, 1892, by the said corporation.

5. That the plaintiff is entitled to receive and recover the said $625 and 8 per cent interest from said date from the defendant corporation and to recover the same from the defendant, the Consolidated Lumber Company, and the said Hicks as surety or indorser.

6. That plaintiff recover costs to be taxed by clerk.

All of the other facts found by the court below, which are material, are embodied in the opinion. The defendants appealed from the judgment rendered.

N. A. Sinclair and Shepherd & Busbee for plaintiff.
McRae & Day and H. McD. Robinson for defendants.

AVERY, J. (after stating the facts): The award of the arbitrators declares that the plaintiff is entitled to receive of Gossler & Co., and R. W. Hicks, the sum of $2,500, in full of all claims and demands whatever, and it is agreed that by a subsequent arrangement the defendant, the Consolidated Lumber Company, became responsible for the payment of the said amount awarded to the rightful claimant, and has
(612) paid all except the sum of $625, evidenced by a note indorsed by the defendant R. W. Hicks and which he contends was not due to the plaintiff's assignor, Williams, under a contract (marked Exhibit "A") entered into by said Williams contemporaneously with the signing of another agreement, which is to be construed with it, and in which, in addition to the mutual stipulations to submit to arbitration, Williams contracted to assign a sufficient portion of a debt secured to him by a certain mortgage executed by W. J. McDiarmid & Bro., to satisfy a debt of $2,765.69 due to R. W. Hicks from Williams individually. Williams had been appointed assignee by McDiarmid & Bro., and had subsequently executed an assignment to plaintiff for the benefit of his own creditors. By the terms of the last named contract, such sum as should be awarded to Williams was to be secured by four notes in equal amount, three of which were to be indorsed by Gossler and one by R. W. Hicks.

It is contended for the defendants that Williams agreed to hold Hicks harmless in advance as to any apparent liability he might incur by indorsing a note for one-fourth of the amount of the award ($625), which is the subject of the controversy, to Williams. The language of the concluding portion of the instrument to which it is insisted this construction must be given, is as follows: "Now, therefore, in consideration of the premises and the further consideration of $10, in hand paid by R. W. Hicks to M. McD. Williams, the receipt of which is hereby acknowledged, the said Williams agrees, covenants and promises with and to said Hicks that in any event said $2,765.69 shall be without scale or offset of any kind, and that he will protect and save said Hicks harmless as to any scale or offset on said sum, and that any note or other paper signed or indorsed by Hicks upon the coming in of the award of the arbitrators or by reason of any claims
(613) against said assigned property, contracted by Williams as assignee of McDiarmid & Bro., and agent of the creditors under said contract of December, 1890. (Signed by M. McD. Williams, seal, and witnessed by H. McD. Robinson.)"

It is admitted that the debt of $2,765.69 has been realized by Hicks

out of the proceeds of the claim against McDiarmid & Bro., which had been assigned to him by Williams, and therefore the contract to hold Hicks harmless as to that, has been performed. Whatever the parties may have intended for the draftsman to incorporate in reference to the note to be indorsed by Hicks, it is evident that in the hurry of preparing to embark on a train, a sentence was left incomplete, and the latter part of it, as it was written, is not sufficient to limit his liability in any way. Courts may decide between one of two possible constructions of ambiguous terms, and may resort sometimes to pertinent extrinsic evidence to arrive at a proper interpretation. But they are not at liberty to supply a supposed ellipsis in order to give legal effect to language that, without addition or alteration, would be meaningless.

It is the duty of the parties to express intelligibly, and it is the office of the court to enforce, when so expressed, the intent of two or more minds that constitutes the contract. The judgment of the court below is

Affirmed.

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(614)

JOHN McCRIMMEN v. JOHN B. PARISH.

Practice—Appeal—Affirmance of Judgment.

An appellant must show error affirmatively, and where he does not do so and the record is insufficient to determine whether or not error was committed by the trial judge, the judgment below will be affirmed.

ACTION to recover land, commenced by summons issued on 1 April, 1892, and tried before *Bryan, J.*, and a jury, at March Term, 1894, of MOORE. There was judgment on a verdict for defendant, and plaintiff appealed.

Black & Adams for plaintiff.
Douglass & Shaw for defendant.

FURCHES, J. This is an action for possession of land, and there is but one exception presented by the record for our consideration. The judge, among other things, charged the jury as requested by counsel for defendant, as follows: "Every grant and deed must have a beginning corner, and if the jury should find the beginning corner of the McAuley 50 acres to be at M, then they must find the beginning corner

of the John C. Buie 100 acres to be at O; and if they find the beginning corner of the 100-acre tract, then the beginning corner of the 23-acre John C. Buie grant is at the point Q and the plaintiff cannot recover, and you must answer the first issue, 'No.' Plaintiff excepted and, upon denial of motion for new trial, appealed."

It appears from the case on appeal that the plaintiff offered in evidence two grants from the State of North Carolina to John C. Buie, and a deed from Buie to the plaintiff. And the defendant offered in evi-
dence two grants from the State to Murdoch McAuley, and a
(615) deed from Margaret Ann Moore to defendant. And the case
states that "a copy of said grants is hereto attached." But upon examination of the record, we find no such copies. And we suppose from the statement of the case that there had been a survey of the land mentioned in said grants as each grant seems to be located by letters, A, B, and C. But there is no map or plot of such survey attached, or furnished the Court. Therefore, it is impossible for the Court to see whether his Honor's charge was erroneous or not. And, as it devolves upon the appellant to show that there was error, and as he has failed to do so, it only remains for us to affirm the judgment.

Affirmed.

FURCHES, J. Since filing the opinion in this case, copies of the grant to Buie and of the deed from Buie to plaintiff and also a plot of the survey have been filed—no copies being furnished of the grants to Murdoch McAuley. And we have examined the copies and the plot with as much care as we could, thinking we might find sufficient statements to enable us to give an opinion more satisfactory to ourselves than was the opinion heretofore filed. But we find it to be a complicated question of location, and the plot is without explanation. So we are compelled to leave the case as our original opinion left it, by saying, if there is error the appellant has failed to show it to this Court.

No Error.

(616)

S. H. THREADGILL, ADMINISTRATOR OF G. B. THREADGILL, DECEASED, v. COMMISSIONERS OF ANSON COUNTY.

Action on Coupons of County Bonds—Presumption of Ownership—Principal and Agent—Tax-Collector—Instructions to Jury—Statute of Limitations—Amendment of Pleadings—Practice.

(617)

1. While the general rule is that the holder of negotiable paper is presumed to to be the owner, and that the burden is on the defendants to show the contrary by a preponderance of evidence, yet where an agent of a principal is furnished with money to buy, and does buy, up claims against the latter, it is his duty, if he asserts a right to the claims, to show by a preponderance of testimony that the claims are his; therefore,
2. Where a tax-collector of a county, having by authority of the county received coupons of county bonds in payment of taxes, brought suit against the county to recover on coupons of the same kind which he claimed to own, it was improper on the trial to instruct the jury that the possession of the coupons raised a presumption of its ownership.
3. Such erroneous instruction was not cured by a subsequent charge that the fact of the plaintiff's having received the coupons as tax-collector raised a suspicion which it was his duty to rebut by further evidence that he acquired them *bona fide*.
4. Where, in a charge reciting that certain facts raised a suspicion as to plaintiff's (a tax collector's) ownership of coupons, the trial judge added the statement that "plaintiff claims to have rebutted such suspicion by showing when and from whom he got some of them and that he owed none of the taxes for the years he received the coupons"; *Held*, that such addition to the charge was erroneous, as invading the province of the jury, it being equivalent to saying that "the plaintiff has shown you when and from whom he got the coupons and claims that this rebuts the suspicion."
5. Where there is a variance between the record proper and the statement of the case on appeal, the former governs.
6. An amended pleading does not exclude a party from the benefit of allegations in the original pleading.
7. The Statute of Limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons.

ACTION commenced by summons issued 7 October, 1871, and tried before *Bryan, J.*, and a jury, at February Term, 1894, of ANSON. There was a verdict and judgment thereon for the plaintiff, and defendants appealed. The facts appear in the opinion of *Associate Justice Furches.*

J. A. Lockhart and Burwell, Walker & Cansler for plaintiff.
R. E. Little and Battle & Mordecai for defendants.

FURCHES, J. This is an action brought by the intestate of plaintiff upon a lot of coupons amounting as plaintiff alleges to $2,331, and interest thereon from the date of their maturity. On the trial below the plaintiff recovered and had judgment for the full amount claimed and interest thereon, from which judgment the defendants appealed to this Court, assigning quite a number of errors. Among the errors assigned by defendants are the following, which we briefly state as follows:

1. That the court erred in holding that plaintiff being in the possession of the coupons sued on, the presumption is that he is the owner of the same, and that it devolved upon the defendants to rebut this presumption by a preponderance of evidence.

2. That the court erred in admitting in evidence Exhibit "H" under the objection of defendants.

3. That the court erred in refusing to give defendant prayer for instruction that the coupons sued on were presumed to be paid by the lapse of time. And in disregard of this prayer, charging the jury that if they found from the evidence that plaintiff's intestate (618) was the owner of the coupons at the commencement of this action, they should answer the second issue "No," which was the same as instructing the jury that they had not been paid.

It was in evidence and not denied that the coupons were taken from bonds issued by the county of Anson, prior to 1860, in payment of the subscription of that county to the Wilmington, Charlotte & Rutherford Railroad Company; that said coupons became due in 1862, 1863 and 1864, and that the bonds from which they were detached became due in 1880. It was admitted that G. B. Threadgill, intestate of plaintiff, was sheriff of Anson County from 1859 to 1868; and as such was *ex officio* tax-collector for the county. And there is evidence tending to show that, as such sheriff and tax-collector, he was authorized and instructed to take such coupons as those sued on in payment of taxes, and that he did receive such coupons in his official capacity in payment of taxes due to the county.

We recognize the rule as laid down by the court on the trial below as being the general rule, that the holder of negotiable paper is presumed to be the owner, and the burden is on the defendant to show by a preponderance of evidence that he is not. But we are of the opinion that this rule does not apply in this case. It certainly cannot be that an agent—a fiduciary—of a principal, furnished with the means of the principal to buy up claims against the principal, and uses such means in buying up the claims, should be allowed to say to his principal, "I've got the claims (the coupons) in my possession, and I am going to hold them as my own unless you can 'prove by a prepon-

derance of evidence, that they are not mine.'" This rule would reverse the law of centuries, as applied to principal and agent. We understand the law to be just the reverse of that laid down by his Honor, that it is the duty of the fiduciary, the agent (who is in possession of the facts), to show, if he claims the coupons as his own, (619) to the satisfaction of the court and jury that they are his. The burden of proof is upon him. *Allen v. Bryant,* 42 N. C., 276. It is doubtful whether Threadgill, the agent of the county, with the means of the county (the tax lists) in his hands, instructed to take up the coupons of the county, and, undertaking to do so, had the right to go into the market as a purchaser on his own account. *Boyd v. Hawkins,* 17 N. C., 207. But we will not multiply authorities on this point of the case.

But defendants' counsel contended that if the court was in error in holding and instructing the jury that the burden was on defendants to prove that plaintiff was not the owner of the coupons sued on, this error was corrected by the following, which is also a part of the charge of the court: "In response to defendants' first prayer the court charged that if the jury believed the plaintiff's intestate was directed and authorized, as sheriff, by the proper county authorities to receive the coupons in payment of taxes and that he did so receive them, it raises a probable ground of suspicion against plaintiff's being the owner of the coupons; and his being the holder of the coupons, the presumption that he is the owner is rebutted, and it devolves on plaintiff to rebut this suspicion by further evidence that he acquired the coupons *bona fide.* This the plaintiff claims he has done by showing when and from whom he got some of them, and that he owed none of the taxes for the years he received the coupons. Defendants excepted to refusal to give the first prayer of instruction and to the instructions given."

We do not agree with the counsel of plaintiff. The court had just before that part of the charge quoted above, charged the jury in the most positive and decided terms that plaintiff's possession of the coupons was a presumption that he was the owner of them and the burden was upon the defendants to show that he was (620) not, as follows: "That plaintiff having produced the coupons is presumed in law to be the owner thereof, and the burden of proof is on defendants to show that he is not; and defendants must establish by a preponderance of testimony that plaintiff is not the owner of the coupons, and if defendants have not satisfied the jury by a preponderance of testimony that the coupons are not the property of plaintiff, they shall answer the first issue, 'Yes.' Defendants excepted." We do not think that so undecided an instruction as that relied upon by

plaintiff could have the effect to correct the positive error contained in the charge last above quoted.

Indeed, we are of the opinion that that part of the judge's charge relied upon by plaintiff is erroneous. It is confused and undecided and does not charge the law as we understand it to be, as between principal and agent. It may be that plaintiff's intestate acquired the coupons *bona fide,* but as the agent of defendants, and with proper explanation, the charge might have been proper. But, as it is stated and left in the charge, we cannot see that it was any benefit to the jury, and may have been misleading. But as it appears to us, the court in this instruction invaded the province of the jury in the sentence following the words *"bona fide."* The court does not say that plaintiff claims that he has shown you "when and from whom he got some of his coupons," and that he has thereby rebutted "this suspicion," which would have been perfectly legitimate. But the judge says that the plaintiff claims to have rebutted this suspicion "by showing when and from whom he got some of them." So the sentence thus stated is that plaintiff has shown you "when and from whom he got the coupons," and claims that this rebuts the presumption. We do not think that this was correct.

The next exception we will consider is as to the admission of (621) Exhibit "H" by plaintiff under the objection of defendant.

The defendant during the course of the trial had introduced Exhibit "A," which is as follows:

"Statement of Anson County coupons presented to the Commissioners of Anson County by Gideon B. Threadgill and by said Board referred to Henry W. Ledbetter, John J. Dunlap and John C. McLauchlin, County Auditing Committee.

"Coupon No. 3, from bond No. 1, due 1 January, 1862; indorsed by J. McLendon, $70. Etc., etc."

Mr. Gideon B. Threadgill makes the following statement touching the coupons above described: "These coupons came into my possession before the year 1865. I took them up in payment for taxes. I found them about a month ago among other papers at my residence, not knowing up to that time that I had them in my possession. I have no recollection whatever of the circumstances under which I retained and filed away these coupons. I have receipts of James A. Leak given in 1864, and in March, 1865, for $8,000, which was paid to him for the support of soldiers' families. One of these receipts, for $5,000, dated 19 November, 1864, specifies that the money was a part of railroad funds. My impression is, I collected the railroad taxes for 1862-63-64, and in paying the same to Mr. Leak for the purposes set

forth in his receipt, paid him in cash (Confederate money) and kept the coupons which I had taken in in the way of taxes." In answer to the question, "Do you know whether you settled the taxes for the years 1862-63-64?" Mr. Threadgill answers, "I do not. I have no recollection of a settlement of the taxes for those years. I have receipts showing settlement in full of all the other taxes for the years 1862-63-64, but no receipts showing a settlement of the railroad taxes. I find from a statement from the Auditor's office in Raleigh that the amount of taxes levied for railroad purposes in 1862 was $2,106; and I find from an old tax book that the amount levied in 1863, for (622) the same purposes, was $2,500. I cannot find the amount levied for same purpose in 1864. There is no further statement which I can now make that will throw any light upon the matter."

"G. B. Threadgill makes oath that the facts set forth in the foregoing statement, to the best of his knowledge, information and belief, are true.

G. B. THREADGILL.

"Sworn to and subscribed before me, 25 August, 1880.

JOHN C. MCLAUGHLIN, C. S. C."

After defendants had offered Exhibit "A," the plaintiff offered Exhibit "H" in reply. Defendants objected, the objection was overruled and defendants excepted. Exhibit "H" is as follows:

"The Finance Committee met today at the request of Gideon B. Threadgill, Esq. Present, Col. Henry W. Ledbetter, John J. Dunlap and John C. McLauchlin. Gideon B. Threadgill, Esq., makes the following statement in addition to and amendatory of the statement made by him heretofore, to-wit, on 25 August, 1880, touching the county coupons in his possession, of which an inventory is hereto annexed: 'Since my former statement I have become satisfied that I did not receive all of said coupons before the year 1865, and that I received a portion of them since the year 1865. I received the two, indorsed by F. Milton Kennedy, at the house of J. B. Burns in Wadesboro after the close of the war. After the year 1865 I did not collect any back taxes. After the close of the war, after the year 1865, I did not collect any back taxes after the close of the war. I find that there was for the year 1866 taxes against Mr. Kennedy amounting to six or seven dollars. I am satisfied that I received the (623) three coupons indorsed by W. G. Wright since the year 1865. I find upon examination of my receipt book that I did not settle in full the taxes for the year 1864. I have my tax books for the years 1862 and 1863. From these books I find that the levies for payment of coupons for those years were for 1862 $2,100, for 1863 $2,500.'"

The abstract from the Auditor's office shows only the total levies and not the amounts levied for specific purposes. Here the further consideration of this matter was postponed until 17 August, 1881.

"WEDNESDAY, 17 August, 1881.

"The committee met according to agreement. Present, Henry W. Ledbetter and John C. McLauchlin. Mr. Gideon B. Threadgill continues his statement, as follows: 'Upon reflection and in consideration of the fact that I find in the package of coupons in my possession some, to-wit, those indorsed by F. M. Kennedy, and those indorsed by W. G. Wright, which I recognize as having been received by me since the year 1865, I am convinced that I received the whole batch since said year 1865. These coupons are my property. I suppose they were taken by me partly in payment of taxes, and if so, the county has been paid, as I have settled in full the taxes for 1866-67.'

G. B. THREADGILL.

"Sworn to and subscribed before me, 17 August, 1881.

JOHN C. MCLAUCHLIN, C. S. C."

And the plaintiff contended that Exhibit "H" was a part of the same declaration or statement as Exhibit "A" introduced by defendant, and was competent on that account. And we find that in the statement of the case on appeal it is said to be a part of the same trans-
(624) action or declaration as Exhibit "A." But we find from an examination of the record that this is not true; that Exhibit "A" was made on 25 August, 1880, and that the committee to whom it was made, made the following report thereon, the same day it was made to them, marked Exhibit "E," as follows:

"We, Henry W. Ledbetter, John J. Dunlap and John C. McLauchlin, Auditing Committee for Anson County, submit the following report to the honorable Board of Commissioners of Anson County, to-wit: Gideon B. Threadgill, late sheriff of said county, submitted to us a lot of coupons taken from the Anson County Railroad Bonds, amounting in the aggregate to twenty-two hundred and sixty-one dollars ($2,261). We have prepared a descriptive inventory of said coupons and have appended thereto Mr. Threadgill's statement touching them, sworn to and signed by himself. Said inventory and statement are appended hereto marked 'Exhibit A.' We have not been able to find anything beyond Mr. Threadgill's statement to throw any light upon

the question whether said coupons have been heretofore paid by the county and are the property of Mr. Gideon B. Threadgill.

Respectfully submitted,

J. C. MCLAUCHLIN,
J. J. DUNLAP,
H. W. LEDBETTER,
Auditing Committee."

"25 August, 1880.

And we find from the record that more than a year after the report quoted above, the committee made another report which is very evident to us was the result of plaintiff's statement "H," made at his own request, and concluded on 17 August, 1881. This report is as follows: "The claim of G. B. Threadgill, based upon Anson County coupons amounting to $2,261, having been referred to us with (625) instructions to report our judgment as to the question, whose property are said coupons, respectfully report that, upon a careful consideration of all the facts and circumstances brought to our knowledge in the investigation of this matter, we have to state, in our judgment, said coupons are the property of the county of Anson. 12 September, 1881. (Signed by J. C. McLauchlin; H. W. Ledbetter and J. J. Dunlap, Finance Committee)." So, it appears from the record that Exhibit "A" and Exhibit "H" are not a part of the same conversation or declaration. And it has been too often and too recently held by this Court to need the citation of authority, that when the record proper differs from the statement of the case on appeal, the statements in the record proper control.

It is true that statements "A" and "H" are about the same subject matter, but they are not parts of the same conversation or admission, so as to make "H" competent evidence for the plaintiff, because the defendant had introduced Exhibit "A." And this being the only ground upon which we can see that it could be competent, and indeed being the only ground upon which the learned counsel contend that it was competent, we must sustain the defendants' exception and hold that there was error in admitting Exhibit "H" in evidence on behalf of plaintiff.

The next exception we propose to examine is that arising upon the presumption of payment from the lapse of time. It is admitted that the coupons sued on were detached from bonds issued before 1860 and falling due in 1880; and that the coupons became due in 1862, 1863 and 1864. The coupons partook of the same dignity as the bonds from which they were detached, and being dated before 1860 and falling due before 1868, the statute of limitations does not apply. But they may be barred, or rather paid by the lapse of time

(626) and the statute of presumptions. Revised Code, ch. 65, sec. 18. But plaintiff in the first place denies that the coupons sued on are barred by the lapse of time and contends that the bonds from which they were detached did not become due until 1880, and they would not be presumed paid till 1890; and the coupons would be good as long as the bonds from which they were taken would be good. And plaintiff further contends that defendants are not entitled to this defence for the reason that it is not made by the pleadings. Plaintiff admits that defendants pleaded payment in the original answer, but he says that in the amended answer the defendants deny that it has paid these coupons; that the two answers are contradictory, and that the rule is that where there is an amended pleading filed the case must be tried on the amended pleadings, and not on the original, and cites some cases from New York which he says sustain this contention. We have not examined these cases, because, if any such rule obtains in New York, we know the practice is well settled to be otherwise here. Indeed, we find from the record that plaintiff amended his complaint in 1885, the action having been commenced in 1881. But we do not propose to hold the plaintiff down to his amendment, and exclude him from the benefit of his original complaint. And neither do we propose to deprive the defendants of the benefit of the original answer. Nor do we think the rule as to the limitation, contended for by the plaintiff, is the law. To sustain the contention that the coupons are not barred for ten years after the bonds became due, would be equivalent in this case to saying that they would not be barred for thirty years after they fell due. We cannot do this without violating every rule of law, that we know of, in regard to the lapse of time and the presumption of payment. The coupons, though they have (627) the dignity of the bonds, constitute an indebtedness of their own, independent of the bonds, fixing their own time of maturity—as in this case becoming due nearly twenty years before the bonds from which they were detached became due. The right of action accrues when they become due and the owner does not have to wait till the bonds become due. And this, the right of action, is what starts the statute. This view seems to us to be so thoroughly sustained by the "reason of the thing" and the logic of the case, that it requires no authority to support it. But the case of *Amy v. Dubuque,* 98 U. S., 470, is directly in point and sustains the view we have taken of this matter.

This only leaves the question of pleading to be considered, and we have seen that defendant is entitled to the benefit of the original answer and of both amended answers. The proper plea to raise this defence,

is payment—this is elementary learning. It is admitted that defendant has properly pleaded payment in his original answer. But defendant in the fourth section of the amended answer, made at Fall Term, 1882, uses this language, that defendant denies that it "ever made payment of any part of said coupons, as alleged, to the plaintiff as owner of said coupons." This was said, replying to the fourth section of plaintiff's complaint, which contains the following averment: "That on these said coupons the sum of seventy dollars has been paid, leaving a balance of principal due the plaintiff, etc." And we think a fair interpretation of the language used by defendant in the fourth article of the amended answer, is a denial of the payment of this seventy dollars, and not a denial that the coupons were paid.

So we do not think the answer is subject to the criticism of being inconsistent. But if it were, it has been held by this Court that defendant may plead as many pleas as he wishes, and even (628) inconsistent pleas. *Reed v. Reed,* 93 N. C., 462, and cases there cited. And defendant in its last amended answer pleads the statute of limitations for ten years. And it was held by this Court in *Pemberton v. Simmons,* 100 N. C., 316, that this was sufficient to enable the Court to consider the case on the statute of presumptions. We do not think the pleadings in *Reed v. Reed* or *Pemberton v. Simmons, supra,* good pleading, and do not recommend them as models. But this Court has many times sustained very imperfect and defective pleadings, where there was a sufficient statement of facts to constitute a cause of action, and where it could see that the opposite party had not been misled and injured thereby. But while the answers in this case are not as concise and logical as they might be, we cannot say that they do not, with sufficient clearness, state the defendant's ground of defence.

So our conclusion is that there was error in the judge's charge that the burden was on defendant to prove that plaintiff was not the owner of the coupons sued on. We also think there was error in admitting Exhibit "H" in evidence for plaintiff. And we are also of the opinion that the court erred in instructing the jury that the statute of presumptions did not bar the plaintiff's claim. This is a question of law and fact and should have been submitted to the jury upon the evidence in the case, with proper instructions as to whether the plaintiff had rebutted the presumption of payment.

There are quite a number of other exceptions which will probably not arise on another trial, and we have not considered them. There is error, and the defendant is entitled to a

New Trial.

Cited: Person v. Montgomery, 120 N. C., 117; *Ladd v. Teague,* 126

N. C., 549; *Duckworth v. Duckworth,* 144 N. C., 622; *Johnson v. Lumber Co.,* 147 N. C., 252; *Holton v. Lee,* 173 N. C., 107; *McDonald v. McLendon, ib.,* 176; *Southerland v. Brown,* 176 N. C., 190.

(629)

ALEXANDER CAMPBELL v. B. M. MORRISON ET AL.

Action to Recover Land—Trial—Evidence—Instructions.

1. Where in the trial of an action to recover land, the plaintiff introduced as a part of his chain of title a grant from the State containing certain calls, differing in some respects from a deed under which he claimed title and which covered the *locus in quo,* he is not precluded from introducing the latter deed by reason of such variations in the calls.
2. Where, in the trial of an action to recover land, the plaintiff introduced a deed covering the *locus in quo* the calls of which deed differed from those of a grant previously introduced which did not cover the land in controversy, and defendants' evidence tended to show that plaintiff's deed originally corresponded with the grant and also to establish adverse possession by the defendants, it was error to charge that, if a certain point on the plat exhibited in evidence was the corner of plaintiff's grant the plaintiff had located his grant, for such charge did not take into account the location of the grant and deeds, the question as to the alleged alteration of the calls in the deed, the location of defendants' deed and the question of defendants' actual possession of the *locus in quo.*

ACTION for the recovery of land, commenced 28 July, 1890, and tried before *Winston, J.,* and a jury, at August Term, 1892, of MOORE. There was a verdict for the plaintiff, and from the judgment therein defendants appealed. The facts are stated in the opinion of *Associate Justice Furches.*

W. E. Murchison for plaintiff.
Black & Adams, W. C. Douglass, Shaw & Scales for defendants.

FURCHES, J. Plaintiff, for the purpose of making out his title, introduced a copy of a grant from the State to Malcom Gilchrist, bearing date 18 December, 1797, and then offered a deed from
(630) Malcom Gilchrist to Daniel Campbell, the calls of the deed covering the *locus in quo,* as plaintiff alleged, while it seems the copy of the grant did not. Defendants objected to the introduction of this deed for the reason, as they alleged, that plaintiff had introduced the grant, and was bound by that. The court overruled this objection and defendants excepted.

We do not see any grounds upon which this exception can be sustained. This is too clear to admit of argument. But the courses and distances in the grant from the State to Malcom Gilchrist, taking the point "A" on the map as the proper beginning corner (and this was admitted by both sides), do not seem to cover the *locus in quo,* while it seems that the calls in the deed from Malcom Gilchrist to Daniel Campbell do, if the survey is correct. But defendants offered evidence tending to show—and which, so far as we can see from the case presented by the record, was uncontradicted—that this deed originally contained the same calls as the grant to Malcom Gilchrist. Defendants also offered a deed from Duncan Buie to Morris Morrison, a deed from Morris Morrison to Allen B. Morrison, dated 15 July, 1843, and a deed from Allen B. Morrison to defendants for one hundred acres of land, which defendants contend covers the *locus in quo,* and which, according to the survey and plot, does cover the land in dispute. Defendants also offered evidence tending to show that defendants had been in the actual possession of the *locus in quo* ever since 1872; and that this action was not commenced until 28 July, 1890. Upon the evidence the judge charged "that if the point at A on the plat was the beginning corner of the plaintiff's grant, or the copy of the grant and of his deed, then the plaintiff had located his land." To which charge the defendants excepted. We think there was error in this charge, which entitles the defendants to a new trial. The rest of the judge's charge is not given, and therefore we can see nothing (631) to correct this error, if there was anything in the charge to correct it; and therefore pass upon it, as it appears from the record, which was sent in answer to a writ of *certiorari* issued from this Court.

It seems to us from this record that there are several questions presented, which should have been submitted to the jury under proper instructions from the court—such as the location of the grant and deeds, the question as to the alteration of calls in the deed from Gilchrist to Daniel Morrison, the location of defendants' deed, and the question of actual possession of the *locus in quo* by the defendants under their deeds. There is error.

New Trial.

(632)

HARVEY BLAIR & CO. v. L. T. BROWN ET AL.

Action to Set Aside Deed of Assignment—Fraudulent Conveyance—Evidence—Declaration of Assignor, When Admissible—Conspiracy to Defraud.

1. In order to make the declarations of the assignor after the assignment competent evidence in the trial of an action to set aside the deed as fraudulent, it must be shown by evidence outside of such declarations that the assignor and the assignee conspired to defraud the assignor's creditors.

2. In the trial of an action to set aside a deed of assignment, as fraudulent, the evidence showed that between the execution and delivery for registration of the deed, the debtor with the knowledge of the assignee purchased a large quantity of goods from parties with whom he had not formerly dealt, and during the same time the assignee represented to a mercantile agency that the debtor was solvent and was doing a large business; that shortly before the assignment and while the assignee held unrecorded mortgages on the debtor's property for a large amount, both the debtor and assignee represented to dealers that the debtor was solvent and prosperous. It also appeared that the indebtedness to the assignee was much less than that alleged in the deed of assignment, and that a large quantity of personal property had been conveyed to the debtor as exempt, although the deed provided that the assignee should pay him $500 in lieu of exemptions; *Held*, that such facts were sufficient evidence of a conspiracy to defraud the creditors to admit evidence of declarations of the debtor made after the assignment.

3. Oral evidence of the contents of a telegram was properly excluded when the only evidence of its loss or destruction was the statement of the operator that he had "searched for it but could not find it"; that "some original telegrams are destroyed and some sent to headquarters"; and that no search had been made at headquarters for the missing one.

4. It was not error to charge, in the trial of an action to set aside a deed of assignment as fraudulent, that the jury should find the deed to be fraudulent and void if any part of the debts preferred therein were fictitious and the fact was known to the assignor and assignee.

5. In the trial of an action to set aside a deed of assignment as fraudulent, it was error to charge the jury that if they should find the deed to be fraudulent and void as to one creditor they should find it so as to all.

6. In the trial of an action to set aside a deed of assignment as fraudulent, it was error to charge the jury that if they should find that the assignor executed the deed with a view to contracting other debts, they should find it fraudulent and void.

7. A provision in the deed of assignment that the assignee should sell the property conveyed and pay the assignor $500 as his personal property exemptions, was not, in itself, evidence of a fraudulent intent upon the part of the assignor, but should be considered with the other evidence relating to such intent.

DEFENDANTS' APPEAL. (633)

ACTION, in the nature of a creditor's bill, tried at December Term, 1894, of MOORE, before *Armfield, J.* On 26 November, 1890, the defendant L. T. Brown, a merchant residing in Moore County, executed a paper writing purporting to be an assignment of his goods, wares, credits, etc., to the defendant S. D. Jones, to secure the payment of a sum of $5,500 to the said S. D. Jones, and then all outstanding claims against the assignor, naming some of them. The debtor reserved to himself $500, as his personal property exemption, and provided for the expenses of executing the trust before any of the debts should be paid.

This action is instituted by the unpreferred creditors for the recovery of judgments against the defendant Brown for their debts against them, and also to have the deed declared fraudulent and void. It is charged that the assignment was executed in pursuance of a conspiracy between the assignor and the assignee to hinder, delay and defraud the plaintiff, and that such was the intent of the assignor and that the assignee knew of it and participated in it at the time of its execution. The defendant Brown died after the action commenced and his administrator, J. E. Caviness, has been made a party defendant. The answer denies the material allegations of the complaint, except his indebtedness to the plaintiff. The following are the issues submitted to the jury, and their responses thereto:

1. Was the deed of assignment from Brown to Jones, assignee, executed with intent to hinder, defeat, delay or defraud the creditors of L. T. Brown? Answer. "Yes." (634)

2. Is the defendant J. E. Caviness, administrator of L. T. Brown, indebted to the plaintiff? If so, in what amount? Answer. "Yes, as alleged in the admissions filed."

The court thereupon rendered judgment "declaring the deed of assignment executed by L. T. Brown to S. D. Jones fraudulent and void as to the plaintiff creditors of L. T. Brown, and that said deed be set aside as to plaintiff, and further adjudged that the plaintiff recover of J. E. Caviness, administrator of L. T. Brown, the several amounts alleged in the complaint as due to the creditors therein named, aggregating the sum of $5,331.49 and interest; and further adjudged that the plaintiff recover of the defendants the costs of the action, to be taxed by the clerk of the court." His Honor further ordered and adjudged that upon the admissions in the pleadings this cause be referred to Frank McNeill, referee, to ascertain and report to the next term of this court what property and effects of L. T. Brown, deceased, and the value thereof, came or should have come into the hands of S. D. Jones, trustee, by virtue of the said fraudulent deed

of assignment, and said referee was further directed to report any other facts which he might deem essential to a full adjustment of the matters in controversy, and this cause was retained for further orders and directions.

The plaintiff excepted to his Honor's refusal to render judgment against the said S. D. Jones, trustee, and the sureties on the said undertaking, and for the error alleged the plaintiff appealed.

From the judgment rendered upon the verdict against the defendants, both parties appealed to this Court.

(635) *Douglass & Spencer and Shaw & Scales for plaintiff.*

Black & Adams for defendants.

MONTGOMERY, J. (after stating the facts as above): During the progress of the trial the plaintiff introduced evidence tending to show that the deed of assignment from Brown to Jones was preferred and executed on 21 November, 1890, and withheld from record till the morning of 27 November, 1890, and that after the execution of said deed, and before the recording thereof, the assignor Brown executed and delivered to one J. M. Monger the following power of attorney:

"This is to certify that John M. Monger is our agent to contract for the purchase of goods, collect all amounts due us, and generally to do and act for us in as full a manner as if we gave our consent to each individual act of his.

"21 November, 1890. L. T. BROWN."

That said Brown at the time of the execution of the deed of assignment and said power of attorney had on hand a large assortment of goods, the greater part of which he had purchased within the thirty days prior to the assignment, and that said J. M. Monger, immediately after the execution of the said power of attorney, went south, and in a section in which the said Brown had not heretofore purchased goods, and purchased goods for the said Brown on credit to the amount of $6,000, and that said Jones, assignee, knew of these transactions.

There was also evidence introduced by plaintiff tending to show that one Terrell, agent for R. G. Dun's Mercantile Agency, called on Jones, assignee, who was doing business in Sanford, N. C., and in the same town in which the said Brown was doing business, between 21 and 27 November, 1890, and informed him, Jones, of his agency,
(636) and that he was seeking information of the standing, etc., of the business men of Sanford for his firm, and that said Jones informed him that the said Brown was, in his opinion, worth about $5,000; that he (Brown) was doing a very good, straightforward business, and that his store was one of the largest in town.

Plaintiff also introduced evidence tending to show that one J. S. Harper, traveling salesman of Harvey, Blair & Co., one of the plaintiffs, during the month of October, 1890, called on the defendant Jones for information as to the financial standing of the said Brown, and in response thereto Jones informed said Harper that Brown was worth about $5,000, and that at said time, and at the time of the information given by Jones to Terrell as aforesaid, said Jones held unrecorded mortgages on all the real and personal property of said Brown to secure an alleged indebtedness of $5,500.

The defendant Jones testified upon cross-examination by the plaintiff that a short time prior to November, 1890, he, Jones, had disposed of all of his property with intent to defraud one of his creditors.

There was also evidence tending to show that the true indebtedness from Brown to Jones was not $5,500, the amount preferred in said deed of assignment, but was a sum much less than that amount.

There was also evidence tending to show that a short time before the execution of the deed of assignment, and while the said Jones held the unrecorded mortgages on all the real and personal property of the said Brown, said Brown represented to Sweetzer, Pembroke & Co., of New York, that he was worth from $5,000 to $7,000 over and above all exceptions and liabilities, and that he purchased goods on a credit upon faith of these representations.

There was also evidence tending to show that though the (637) assignee Jones was authorized in said deed of assignment to pay Brown, assignee, $500 in money in lieu of his personal property exemption, upon an execution issued against said Brown after the execution of the deed of assignment, said Brown demanded, selected and had allotted to him his personal property exemptions in property to a large extent not conveyed in the deed of assignment.

The plaintiff then insisted that there was before the court sufficient evidence of a combination and conspiracy between the assignor and the assignee to defraud the creditors of the assignor, to admit the declarations of the assignor made subsequent to the deed of assignment. His Honor was of that opinion, and so ruled. Upon this, the plaintiff introduced as a witness for itself J. M. Brown, who testified as follows:

"I am a brother of L. T. Brown. I had a talk with him at my house after the assignment, the next spring after it was made. He said the assignment was all a damned fraud, and that he would not come to court because it would ruin him and injure Mr. Jones. He told me this a dozen times." To all of which the defendants excepted.

The plaintiff then introduced a witness, one N. B. McBride, by whom it proposed to prove a conversation that he had with the

assignor after the execution of the deed of assignment. The defendants objected; objection overruled; defendants excepted.

This witness was then permitted to testify, as follows, to wit:

"I had a conversation with Brown, assignor, after the assignment. It was at Greensboro, in April, 1892. He said he wanted to go home to see Jones, and if Jones would give him his house and lot back he would let things go on as they were, and if they did not he would go on the stand and burst it up, for it was a fraud from beginning
(638) to end; that he was due Jones $2,000 and that he made the assignment to pay the debt. He said to Mr. Douglas that if Jones did not come to terms he was going to employ some one to burst it up. Mr. Douglas told him to stop, when he began to talk, for he was employed on the other side."

To this the defendants excepted.

The plaintiff then introduced as a witness one M. B. Buchanan, by whom it proposed to prove similar declarations of Brown, the assignor, after the assignment. The defendants objected; objection overruled; defendants excepted.

The witness was then permitted to testify, as follows, to wit:

"I heard a talk between Brown and McDonald; Brown said he owed Jones some money, but not so much as he claimed, and if he did not give him back his house and some money he would go on the stand and break the infernal fraud; that he was strapped and had nothing. This was at Greensboro in the spring after the assignment."

The defendants excepted to the ruling of his Honor on the sufficiency of the testimony going to show the conspiracy; and they also objected to the introduction of the declarations made by the assignor after the execution of the deed of assignment. The court did not sustain the exception and overruled the objection to the testimony, and in so doing committed no error. "In order to make the declarations of the assignor after the assignment competent evidence, it must be shown that the assignor and the assignee are combined in a common conspiracy to defraud the assignor's creditors, and this common purpose must be established by evidence other than the declarations themselves." Burrill on Assignments, sec. 362, and the cases there cited.

The defendants introduced as a witness J. G. Bynum, who
(639) testified that on 27 November, 1890, and after said deed of assignment had been executed, to wit, on the night of the same day, he sent a telegram to one J. M. Monger.

The defendants then introduced one G. E. White, who testified as follows, to wit: "I am agent of the railroad, and telegraph operator. I sent a telegram to Monger. It has been destroyed or burnt. I have searched for it and it cannot be found. Some are sent to head-

quarters and some are destroyed. I don't know what became of this one. All commercial telegrams are sent to headquarters. No search has been made at headquarters."

Upon this evidence the defendants offered to prove the contents of said telegram purporting to contain a declaration of said Brown, assignor, made to said Bynum subsequent to the execution of the said deed of assignment and in his own interest supporting said deed. The said J. M. Monger, to whom it was claimed said telegram was sent, was present in attendance upon the trial of this cause at the time the defendants offered to prove the contents of said telegram by said White, having been subpœnaed as a witness by both plaintiff and defendants, and was not offered by the defendants to prove the receipt or contents of said telegram. The plaintiff objected; objection sustained. Evidence excluded; defendants excepted.

His Honor committed no error in refusing to let the witness White testify as to the contents of the alleged telegram. He did not show its loss or destruction, and what he said about it was confused and conflicting. Secondary evidence of the contents of telegrams is admissible on the testimony of the clerk of the telegraph company that the original telegrams have been destroyed. 100 N. Y., 446; *Smith v. Eastern,* 54 Md., 138. In response to plaintiff's prayer for instructions his Honor among other things charged the jury as (640) follows:

1. If the jury shall find that the deed was not made to secure *bona fide* debts, but for the mere purpose of giving ease to the debtors, it is fraudulent and void and the jury should so find.

2. That if the jury should believe from the evidence that any part of the debts preferred in the deed of assignment were fictitious and this fact was known to the assignor Brown and the assignee Jones, then the deed is fraudulent and void and the jury should so find.

3. If the jury should find that there was an agreement between said Brown and Jones that they or either of them should falsely represent said Brown to be solvent, and upon this representation purchase goods so as to have a sufficient quantity on hand to save Jones harmless by making the deed of assignment, and upon these representations the said Brown did purchase from the creditors herein, then the deed is fraudulent and void, and the jury should so find.

The defendants in apt time excepted to the foregoing instructions numbered 1, 2 and 3, and his Honor proceeded to instruct the jury, as follows, without objection or exception:

4. Every debtor in failing circumstances has the legal right to make an assignment of his property for the benefit of his creditors and has

the legal right to prefer such of his creditors as he may wish to pay to the exclusion of the others.

5. The test as to whether a conveyance is fraudulent is not whether in fact it hinders or delays a creditor in the collection of his claim, but whether or not it was made with intent to so hinder or defraud his creditors. If there be no such intent in the mind of the assignor at the time the conveyance is executed, it matters not what effect
(641) the execution of the conveyance may have.

6. Although the jury should believe that the assignor Brown made false representation to sundry parties in the fall of 1890, for the purpose of obtaining goods, this is not sufficient to vitiate the assignment, and should not be considered by the jury, except as a circumstance to assist them in discovering the assignor's intent at the date of the assignment.

7. The fraudulent intent must have existed in the assignor's mind when the deed was executed and delivered, and although he may have previously intended to assign his property to defraud his creditors, still if the deed was *bona fide,* and no such intent existed in the assignor's mind at the time of its execution and delivery, the deed would not be fraudulent, and the plaintiff would not be entitled to recover.

8. If the jury should find that the execution of the deed of assignment operated to the ease, comfort or benefit of the assignor Brown and to the injury of creditors, this would not make the deed fraudulent or void unless made with that intent on the part of Brown that it should so operate.

9. If the jury should find that the assignor Brown or the assignee Jones, before the date of assignment, made false representations to various parties with a view of obtaining goods to enable said Brown to continue his business, or for any other legal or legitimate purpose, and not for the purpose of hindering, delaying or defrauding creditors, the deed of assignment it not for that reason void.

In further response to the plaintiff's prayers for instructions the judge instructed the jury as follows:

10. If the jury shall find that said deed is fraudulent as to one
(642) creditor, they should find that the deed is fraudulent and void as to all.

11. If the jury should find that L. T. Brown executed the deed with the view of becoming indebted, said deed would be fraudulent and void, and the jury should so find.

12. If the evidence is sufficient to produce a belief in the minds of the jury, and the jury should believe it and are satisfied that the deed of assignment was executed with intent to defraud, defeat, delay or

hinder the creditors of L. T. Brown, then they should find in favor of the plaintiff, and answer the issue "Yes."

13. In cases where fraud is alleged the jury are to consider circumstances connected therewith and to give each its proper weight, and if upon the whole testimony the jury believes that the deed of assignment was executed with intent to defraud any one of his creditors, then they should find in favor of the plaintiff and answer "Yes" to the first issue.

To the foregoing instructions, numbered respectively 10, 11, 12 and 13, the defendants excepted in apt time.

The defendants prayed the following instructions:

1. Although the jury should believe that the defendant S. D. Jones indorsed for his assignor Brown or loaned him money, and said Brown promised to save him from loss on account of said loan or indorsement, and in his deed of trust, and in fulfillment of said promise preferred said Jones for the amount of said indebtedness, this transaction would not make the conveyance fraudulent *per se* (nor is it evidence of fraud to be submitted to the jury).

So much of said prayer as is included in the parenthesis was included. Defendants excepted.

2. If the jury believe that the deed of assignment was drawn 21 November, 1890, retained by the assignor and not delivered till 26 November, 1890, this *per se* is no evidence of fraud on the part of the assignor Brown. (643)

His Honor refused to so instruct the jury, but instructed them that this was a circumstance which they might consider with its surroundings. To this the defendants excepted.

3. The fact that the assignor did not include all of his property in the deed of assignment is not *per se* evidence of fraud.

His Honor refused to so instruct the jury, but directed them to consider this circumstance with its surroundings and weigh it with the other evidence in the case.

4. The fact that the deed of assignment requires the assignee to sell the property conveyed and pay the assignor $500 as his personal property exemption, does not render the assignment fraudulent or void upon its face (nor is it *per se* evidence of a fraudulent intent upon the part of the assignor).

His Honor refused to charge the clause enclosed in parenthesis, and defendants excepted.

His Honor then proceeded to instruct the jury that they might consider the fact that the assignor required the assignee to sell the property conveyed and pay him, assignor, $500, his personal property exemptions, with the other evidence in the case bearing thereon, and give

it such weight as in their judgment it was entitled bearing upon the question of the fraudulent intent of the assignor at the time he executed the deed of assignment.

5. If the jury should find that some of the debts named in the deed of assignment were feigned and fictitious, and the others good and valid, it is the duty of the jury to sustain the deed as to the valid debts in any event. Refused, and the defendants excepted.

6. The law presumes the deed of assignment valid. The bur-
(644) den of showing that it is fraudulent rests upon the plaintiff (who must satisfy the jury by strong, clear and convincing proofs that it is fraudulent; otherwise, it is the duty of the jury to sustain the assignment as valid).

The clause enclosed in parenthesis is refused and the following was given instead thereof: "who must satisfy the jury fully, clearly and completely that it is fraudulent; otherwise, it is the duty of the jury to sustain the assignment as valid," and defendants excepted.

There is nothing in defendants' exception to number 2 of plaintiff's prayer for instructions which was given by the court; and while numbers 1 and 3 might have been fuller on the points they touched, yet there is no error in them when taken in connection with the rest of the charge.

There is error in the court's having given the plaintiff's prayer number 10. The doctrine laid down in *Stone v. Marshall,* 52 N. C., 300, was overruled by *Morris v. Pearson,* 79 N. C., 253. There is error also in his Honor's having given number 11 of plaintiff's prayer for instruction. We are also of the opinion that number 4 of defendants' prayer should have been given with the explanation and limitation which followed that part of it which his Honor did give. Number 5 should also have been given with the qualification that such would not be the law if there was a conspiracy between the assignor and the assignee to hinder, delay and defraud the creditors of the assignor at the time of the execution of the deed of assignment. There is error in the particulars set out in this opinion, and the defendants must have a new trial.

PLAINTIFF'S APPEAL IN SAME CASE.

MONTGOMERY, J. There is no error in that part of the judgment from which the plaintiff appealed. "After the institution of the action the plaintiff, on or about 16 February, 1891, applied to *Judge Arm-*
(645) *field,* then holding courts of the 7th District, *at Chambers,* in Rockingham, N. C., on affidavits filed, for an injunction and appointment of a receiver therein; and upon the hearing his Honor made the following order:

"It is adjudged that the prayer for an injunction be refused, the re-

straining order heretofore granted be dissolved, and the petition for the appointment of a receiver be denied, upon the defendant S. D. Jones, trustee, filing an undertaking in the sum of $5,500, conditioned as required by law, to be approved by the court."

In pursuance of said order the defendant S. D. Jones, trustee, then and there executed, delivered and filed an undertaking with sureties in which the obligors undertook "pursuant to the statute (chapter 94, Laws 1885), that the said S. D. Jones shall pay to the plaintiffs in this action all such amounts as may be recovered and adjudged against him upon the final determination of this action, not to exceed $5,000."

Among other things in the complaint the plaintiff alleged "that the plaintiff applied for an injunction and receiver in this cause, upon the trustee S. D. Jones executing an undertaking in the sum of $5,000, conditioned to pay any judgment that the plaintiff may recover in this action, which said undertaking was duly executed by S. D. Jones, trustee, with D. N. McIver, John W. Scott and J. R. Jones as sureties thereto; and that said S. D. Jones accepted the aforesaid trust and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over $5,000."

The defendant trustee and the sureties to said undertaking, who were preferred creditors in said deed of assignment and defendants in this action, admitted in their answers filed the said allegations.

One of the plaintiff's prayers in its complaint was for judgment against L. T. Brown and S. D. Jones, trustee, and the (646) sureties on the aforesaid bond for the sum mentioned therein.

At December Term, 1894, this cause came on to be tried before *Armfield, J.*, and a jury, upon the following issues submitted to the jury:

1. "Was the deed of assignment from L. T. Brown to Jones, assignee, executed by Brown with intent to hinder, defeat, delay or defraud the creditors of L. T. Brown?"

The jury responded to said issue, "Yes."

2. "Are the defendants indebted to the plaintiff? If so, in what amount?"

To which the jury responded, "Yes, as alleged in admissions filed."

Which admitted indebtedness of L. T. Brown to the creditors amounted to the sum of $5,331.40, and interest.

Upon the verdict of the jury (as set out in defendants' appeal), the allegations in the complaint and the admissions thereof by the defendants in their answers, the plaintiff asked for judgment against said Jones and sureties upon said undertaking in the sum of $5,000. The court refused to give judgment as requested, to which the plaintiff excepted.

The allegation that the defendant assignee Jones had received of the

assets of the assignor Brown more in value than the amount of the assignee's bond, to wit, $5,000, is denied by the defendants in their answer: and an account would be necessary to discover the true amount for which the assignee would be liable. But as a new trial has been granted to the defendants, the reference cannot be proceeded with, and the Plaintiff's Appeal is Dismissed.

Cited:Bank v. Bridgers, 128 N. C., 325; *Avery v. Stewart,* 134 N. C., 295; *Green v. Grocery Store,* 159 N. C., 121; *Buchanan v. Hedden,* 169 N. C., 224; *S. v. Davis,* 177 N. C., 577.

(647)

WILSON COTTON MILLS v. RANDLEMAN COTTON MILLS.

Judgment of Justice of the Peace—Collateral Attack for Fraud—Impeachment of Judgment for Fraud in Answer to Creditor's Bill—Attorney Representing Both Parties.

1. Defendant corporation made an assignment for benefit of creditors and plaintiff through its attorney, who was also trustee under the defendant's assignment, split up its account against defendant so as to bring it within a justice's jurisdiction, and obtained judgments thereon. The defendant made no defence to the actions before the justice of the peace because of quieting representations made by the said attorney and trustee. *Held,* that in its answer to a creditor's bill, brought by plaintiff, the defendant had the right, by way of counter claim, to impeach the said judgments for fraud and to demand that they be vacated.
2. In such case the defendant need not set out formally the facts relied upon to show its right to equitable relief, if such right can be gathered from the whole answer.
3. Where the trustee in a deed of assignment was also acting as attorney for a creditor thereunder, a judgment against the assignor in favor of the creditor, rendered on motion of such attorney, will be declared a fraud in law though there was no fraudulent intent.

Petition of plaintiff to rehear case reported in 115 N. C., 475.

H. G. Connor and B. F. Long for petitioner.
J. N. Wilson contra.

AVERY, J. It is contended for the plaintiffs that while this Court correctly held that the judgment could not be vacated unless by
(648) "a direct proceeding to set it aside for fraud" and that courts of Equity must "refuse aid in cases when their action would be tantamount to appellate jurisdiction" exercised in the correction of

errors of law, it erroneously concluded in violation of that principle that they should not be permitted "to have a preference over other creditors."

It is a general rule that equity will, in the distribution of a fund amongst creditors, respect "priorities theretofore acquired." Is the cause before us an exception to that rule? Is it consistent with this doctrine to leave a judgment, that constitutes a lien upon realty, unimpeached, and yet to so interpret the maxim that he who seeks equity must do equity, as to compel the holder of such prior lien to take ratably of the fund arising from such realty with those who had not obtained judgment prior to the filing of the creditor's bill?

We think it is clear that if the judgments rendered by the justice of the peace are allowed to remain unimpeached they must have priority, at least, in the distribution of the fund arising from the sale of the real estate of the defendant company. The controversy is therefore narrowed down to a single point whether in such an action as that before us the defendant could by way of counter claim, set up allegations sufficient for the purpose and directly impeach for fraud the judgments which are the foundation of plaintiff's bill. If it be conceded that the judgments could have been assailed for irregularity only by way of defence in the justice's court why can not the Superior Court entertain a bill in the exercise of its equitable jurisdiction to set them aside for fraud? If it can, is it not in consonance with the leading purpose in establishing the Code practice to treat like an original bill a sufficient statement of the grounds of impeachment in an answer founded upon them and brought by the judgment creditor against the judgment debtor, and to allow the latter to set up by way of counter claim any matter growing out of the same transaction and upon which he (649) might have maintained an independent action.

In *Dougherty v. Sprinkle,* 88 N. C., 300, *Justice Ruffin,* in a well considered opinion, announced as the mature conclusion of the Court that "according to all authorities the court of a justice of the peace is but a common law court and that his jurisdiction does not embrace causes of a peculiarly equitable nature." That doctrine has been approved in many later cases and thus received abundant support from succeeding courts, if the very statement of it did not carry with it the conviction of its soundness. *Patterson v. Gooch,* 108 N. C., 503; *Long v. Rankin, ib.,* 333; *Farthing v. Shields,* 106 N. C., 289; *Bevill v. Cox,* 107 N. C., 175.

The numerous cases therefore in which it has been settled that a justice's judgment cannot be assailed or impeached for irregularities which a court of common law jurisdiction had the power to correct, except by the tribunal in which it was rendered, have no bearing upon

the question before us. *Cannon v. Parker,* 81 N. C., 320; *McKee v. Angel,* 90 N. C., 60; *Morton v. Rippy,* 84 N. C., 611; *Birdsey v. Harris,* 68 N. C., 92.

If the defendant had sought to set aside the judgment on the ground that its assent to the rendition of it was procured in such a way as to render it voidable for fraud in law, it would have been compelled to invoke the aid of a court of Equity when law and equity were administered in different courts. Now that both are administered in the same court and often in the same action, if the equity is sufficiently alleged either in a complaint or by way of counter claim in an answer to a cause of action founded upon the judgment, the party seeking the relief may, upon proof of the averments relied upon to establish the fraud, demand that the judgment be vacated. If the defendant
(650) company had the right to bring an independent suit to impeach the judgment, it might have instituted it within the time prescribed in section 155 (9) of The Code, and the plaintiff could not forestall the assertion of such right by first commencing the suit upon the judgment. As was intimated by *Justice McRae,* the action afforded the first and an early opportunity to the defendant to set up its equity in its answer to the creditor's bill. It was not material that the facts relied upon to establish the right to equitable relief should have been formally set out. It is sufficient if they can be gathered from the whole answer, and appear to have been proven before and found as facts by the referee. *Geer v. Geer.* The Court say in the opinion (page 448): "We are bound by the findings of fact. The findings of fact of the referee will show that plaintiff's attorney, who was at that time a trustee in the deed of assignment, had access to the books of the defendant corporation to compare the accounts of his clients, the Wilson Cotton Mills, with the accounts stated in defendant's books; that he split up said accounts 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' claim to judgment in order to put them on an equal footing with the indebtedness 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, Worth, they were so communicated and no defence was made to the action before the jusitce." The further facts that are material and that may be gathered from the admissions and the findings of the referee may be summed up as follows: On 10 December, 1890, the defendant company at a meeting of its stockholders directed its president to execute an assignment, and that on the
(651) following day, 11 December, 1890, the deed was prepared, naming

T. C. Worth as sole trustee, but, at his own request, the name of S. A. Woodard, plaintiff's attorney, was inserted as co-trustee. Woodard thereupon immediately accepted the trust, in order that he might protect his client, the plaintiff company, and continued to be a trustee until 21 January, 1891, two days before this action was brought, on 23 January, 1891. Both Worth and Woodard were ultimately appointed by the court receivers on 5 February, 1891, and gave bond and assumed control in that capacity. Meantime the trustee Woodard had obtained, as attorney for the plaintiff, as set forth in the opinion, about thirty-six judgments, by splitting up seven accounts (all for sums in excess of $200) and a draft for $2,992.82, and had caused all of the judgments to be docketed in the Superior Court of Randolph County, either on 22 December, 1890, or 24 January, 1891. B. C. Sharpe was the duly constituted agent of T. C. Worth, trustee, and president of defendant company, and as such took charge of the books and supervision of the business for Worth. These facts will appear by reference to findings Nos. 13, 14, 15, 16, 19, and 21.

The rights of the defendants, which grow out of these transactions, are in no way impaired or affected by the fact that S. A. Woodard departed from his instructions in accepting the place of trustee or in any way exceeded his authority for plaintiff. When the books were examined and the accounts were split up and reduced to judgment, he was still co-trustee of Worth and was acting also in the antagonistic capacity of attorney for the plaintiff. He was known to Worth, his associate in the trust, to be an attorney, as sufficiently appears from the findings, and when Worth received through his agent Sharpe the assurance that Woodard's purpose was only to place the claims of his (652) clients on an equal footing with the debts due banks, their relations were such that Worth was warranted in trusting to him as an attorney to protect the interests represented by both. Woodard was one of the trustees at the time, in possession of the property and accountable for it to the assignor and the creditors, and sustained such relations to the defendant company as entitled its president to expect that, while such relations continued, he would refrain from taking, as an attorney of an adversary party, any judgment that would bind its property.

Though an attorney acts in good faith for both plaintiff and defendant in any action or proceeding in the courts, it is well settled that any judgment entered upon his motion against either party for whom he appears as an attorney, and in favor of the other, will be set aside, on the ground that it is a fraud in law. *Molyneux v. Huey,* 81 N. C., 106; *Arrington v. Arrington, ante,* 170; *Moore v. Gidney,* 75 N. C., 34.

However innocently or honestly Mr. Woodard may have acted in his zealous efforts to advance the interests of his original clients, until

he placed himself at arm's length by notice that he had ceased to act as trustee, Worth was excusable for being misled by his representations that he would so manage the claims of the plaintiff as to leave the assets of the insolvent company to be distributed as provided in the deed under which both were acting as trustees. *Gooch v. Peebles,* 105 N. C., 411. Knowing his associate to be a lawyer, Worth was justified in confiding more implicitly in any assurance as to the legal effect of his proposed conduct of the suits before the justice of the peace. No man can maintain a suit against himself even in his fiduciary capacity, and it was upon this principle that the law placed the claim of a personal representative against the decedent of whose estate he has charge, on
(653) an equal footing with a judgment for demands of the same kind held by other creditors. Where two adversary parties to an action are both warranted in trusting to an attorney to protect their interests involved in the controversy, as occasion may demand, a judgment rendered on motion of such attorney, though he may have no actual fraudulent intent (as seems to be conceded in this case), is deemed fraudulent in law. *Arrington v. Arrington, supra.*

We think that the reason upon which this doctrine is founded requires its application to a case where an attorney is counsel for a plaintiff, who is suing the attorney as a trustee or those he represents in his fiduciary capacity and seeking to gain an advantage over both the trustor and *cestuis que trust.* It is not material that Worth was sued as president of the defendant company when he was acting in the dual capacity of trustee and president. It was equally his duty as trustee and president, as far as possible, to see that the purpose of the assignor, the defendant company, as expressed in the deed, until that was set aside by the court, was carried into effect by preventing the plaintiff company from acquiring a lien that would give it priority. Knowing that the other trustee had accepted a trust which imposed upon him the same duty, Worth was warranted in relying upon him to carry out the purpose expressed to Sharpe and communicated subsequently to him.

We forbear, because it is needless to do so, to enter upon the discussion of the other question suggested on the first argument of the case, whether an assignment by a corporation which provides for a ratable distribution of the proceeds arising from the sale of all its property, should not be upheld as valid, on the ground that it is not within the letter of the statute (The Code, sec. 685). While, therefore, we arrive at the conclusion upon a different principle, we think that it was
(654) correctly held that the assets should be ratably distributed. But in order to allow that the court below should have vacated the justice's judgments in favor of the plaintiff on the ground that facts suffi-

cient to warrant such a decree were alleged and proven by the defendant company.

Petition Dismissed.

Cited: Kiser v. Blanton, 123 N. C., 403; *Ellis v. Massenburg,* 126 N. C., 134; *Bank v. Bank,* 127 N. C., 434; *Griffin v. Thomas,* 128 N. C., 317; *Fisher v. Bank,* 132 N. C., 775; *Holt v. Ziglar,* 159 N. C., 279.

H. Z. SHERRILL v. WESTERN UNION TELEGRAPH COMPANY.

Practice—Certiorari—Statement by Trial Judge—Supplying Omission in Testimony.

Where the affidavit in an application for a *certiorari* showed that the word "not" was omitted in an important part of the testimony and was accompanied by a telegram from the trial judge to the same effect and expressing his readiness to supply the omission, the writ will be granted.

L. C. Caldwell and Burwell, Walker & Cansler for plaintiff.
Jones & Tillett for defendant.

CLARK, J. The case on appeal was settled by the judge. The defendant files an affidavit for *certiorari* on the ground that the word "not" was by inadvertence left out in an important part of the testimony and appends a telegram from the judge, to that effect, expressing his readiness to make the correction. This complies with the requirements laid down in the authorities. *Boyer v. Teague,* 106 N. C., 571; *Bank v. Bridgers,* 114 N. C., 107. That the hearing might not be delayed, an *instanter certiorari* was ordered to issue and the cause placed at the end of the district to be called in its order on the (655) second call of the docket for the week. Considering the nature of the correction asked, on suggestion from the Court, the argument is proceeded with on the first call, subject to any change which may be made in the record by the return to the *certiorari,* the decision being withheld till such return is made.

Motion Allowed.

Cited: Cashion v. Tel., 123 N. C., 270; *Barber v. Justice,* 138 N. C., 23.

H. Z. SHERRILL v. WESTERN UNION TELEGRAPH COMPANY.

Action for Damages—Telegraph Company—Failure to Deliver Message—Trial—Expression of Opinion by Trial Judge—Negligence—Damages—Mental Anguish.

1. Where plaintiff, in an action against a telegraph company for failure to deliver a message, shows that defendant received it and failed to deliver it, he has established a *prima facie* case and it devolves upon the defendant to show excuse for such failure.
2. Where, in an action against a telegraph company for failure to deliver a message, the plaintiff establishes a *prima facie* case, the question of negligence is for the jury and an instruction that "upon all the evidence if believed, plaintiff is not entitled to recover," is an expression of opinion by the court upon the weight of the evidence in violation of sec. 413 of The Code.
3. In the trial of an action against a telegraph company for failure to deliver a message, an instruction that if the defendant made proper inquiries as to the whereabouts of the person to whom the message was addressed, from persons of wide acquaintance in the neighborhood and, upon information so received, delivered the message to a person of the same name, it had used reasonable diligence, was erroneous inasmuch as it left out of consideration when and after how much delay the inquiries were made.
4. Where, in the trial of an action for damages for failure to deliver a telegraphic message, it appeared that the message on its face asked for answer and money was paid for a special delivery, it was negligence in the receiving agent when he found difficulty in delivering it, not to wire the sending office for a better address and not to notify the sender immediately upon the non-delivery of the message.
5. A telegraph company cannot by contract restrict its liability for mistake, or delay in the delivery of a message.
6. Where the nature of a telegraphic message appears on its face and the telegraph company fails, through negligence, to deliver it, the party injured by its non-delivery can recover damages for the mental anguish caused thereby.

ACTION, for damages for the non-delivery of a telegraphic message by a telegraph company, tried before *Bryan, J.*, and a jury, at November Term, 1894, of IREDELL. From the judgment, on a verdict for defendant, the plaintiff appealed. The facts sufficiently appear in the opinion of *Associate Justice Clark.*

(656)

Burwell, Walker & Cansler and L. C. Caldwell for plaintiff.
Jones & Tillett for defendant.

CLARK, J. The plaintiff having shown the delivery of the message to the defendant, with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a *prima facie* case was made out and the burden rested on the defendant to show matter to excuse its failure. Thompson on Electr., sec. 274, and cases cited; *Bartlett v. Tel. Co.,* 16 Am. St., 447; *Pearsall v. Tel. Co.,* 21 Am. Rep., 662. The court erred in granting the defendant's second prayer for instruction that "upon all the evidence, if believed, the plaintiff is not entitled to recover and the jury should answer the fourth issue 'No.'" The court should instruct the jury that a given state of facts, as a matter of law, would or would not be (657) negligence. *Emry v. R. R.,* 109 N. C., 589. But when the plaintiff makes out a *prima facie* case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates chapter 452 of the Acts of 1796 (Code, sec. 413), which forbids an expression of opinion by the judge upon the weight of the evidence.

The first instruction granted at the instance of the defendant was erroneous because it left out of consideration when and after how much delay the inquiries were. The promptness with which they were made was an essential element in an instruction as to whether there was reasonable diligence. The third instruction given at the instance of the plaintiff was erroneous. After showing the contract and the failure to deliver the message, the plaintiff had made out a *prima facie* case and the burden was on the defendant to rebut negligence. The court properly told the jury that the defendant was not a guarantor of the delivery and that they should distinguish between plaintiff's grief for the death of the child for which the defendant was in no wise responsible, and that caused by his being deprived by the defendant's negligence of the consolation of seeing his child before its death, but again erred in telling the jury that there was no evidence to support the second issue and directing them to answer it "No."

As to the plaintiff's prayers for instructions, the message on its face asked for an answer, and money was paid for a special delivery. The agent at Statesville violated the rules of the company, upon his own evidence, in not wiring back to the sending office for a better address, when he found difficulty in delivering the message, and in not notifying the sender immediately upon the non-delivery of the message. For these and other reasons appearing in the evidence, it was error to refuse the fourth and sixth of the plaintiff's prayers (658) for instruction. There were other errors excepted to, in apt time, but it is unnecessary to pass on them in detail, as they will prob-

ably not occur on another trial in view of the principles above laid down.

The right of the plaintiff to maintain this action was sustained on a former appeal, 109 N. C., 527. That the defendant cannot by contract restrict its liability was held in *Brown v. Tel. Co.,* 111 N. C., 187, which is now reaffirmed.

The plaintiff, if the message was not delivered by reason of defendant's negligence, the nature of the message appearing on its face, can recover damages for the mental anguish caused thereby. *Young v. Telegraph Co.,* 107 N. C., 370; *Thompson v. Tel. Co., ib.,* 449. The courts of all our sister states are not in accord with each other on this principle. A majority of those who have so far passed on this question sustain this view, being (in addition to this State) the courts of Texas, Indiana, Kentucky, Tennessee, Iowa and Alabama. The weight of the text writers is to the same effect. Gray on Tel., sec. 65; 4 Lawson Rights & Rem., sec. 1970; 2 Thompson Neg., 847, sec. 11; Segwick Dam. (8th Ed.) sec. 894; Sutherland Dam. (2d Ed.) sec. 97; 29 Am. Law Review, 267. An opposite view is held by the courts of Georgia, Mississippi, Kansas and Dakota. In the U. S. Circuit Courts opinions have been delivered on both sides. The better reason in our opinion is with those which agree with the precedents in our own courts; for otherwise, except where the negligence is as to messages relating to pecuniary matters, there would be no liability for any neglect by telegraph companies and these great and necessary public agencies would be irresponsible and therefore unreliable, as to the correctness in transmission or promptness in delivery of mes-
(659) sages of whatever importance, if not relating to mere money transactions. No man could depend upon the correctness or promptness of messages, as to which the law enforces no responsibility when they must pass through the hands of so many agents. The Supreme Court of Illinois, though not passing directly on the point, has intimated a leaning to the view held by this Court, while the Supreme Court of Missouri has recently adhered to the ruling of the minority. The cases have been collected in the notes in several late volumes of the American State Reports. It is unnecessary to cite them here, or to say more than to refer to and approve our own precedents on this point.

New Trial.

Cited: S. c., 117 N. C., 358; *Havener v. Tel. Co., ib.,* 543; *Hansley v. R. R., ib.,* 573; *Roberts v. Ins. Co.,* 118 N. C., 434; *Cashion v. Tel. Co.,* 123 N. C., 270; *Hendricks v. Tel. Co.,* 126 N. C., 310, 311; *Kennon v. Tel. Co., ib.,* 235; *Neal v. R. R., ib.,* 649; *Darlington v. Tel. Co.,* 127 N. C., 449; *Meadows v. Tel. Co.,* 132 N. C., 43; *Bryan v. Tel. Co.,*

133 N. C., 608; *Cogdell v. Tel. Co.*, 135 N. C., 434; *Jones v. Water Co., ib.*, 554; *Harrison v. Tel. Co.*, 136 N. C., 381; *Green v. Tel. Co., ib.*, 492; *Woods v. Tel. Co.*, 148 N. C., 5; *Williamson v. Tel. Co.*, 151 N. C., 228; *Shaw v. Tel. Co., ib.*, 642; *Penn v. Tel. Co.*, 159 N. C., 315; *Ellison v. Tel. Co.*, 163 N. C., 11; *Webb v. Tel. Co.*, 167 N. C., 486; *Young v. Tel. Co.*, 168 N. C., 27.

WALLACE BROTHERS v. R. M. DOUGLAS.

United States Deputy Marshals—Assignment of Claims Against the Government.

1. The matter of the compensation of deputy United States marshals is between them and the marshal and not between them and the Government and therefore the assignment of their claims for compensation against the marshal is not in violation of section 3477 of the Revised Statutes of the United States.
2. Where a United States marshal accepted a draft on him by his deputy marshal, "payable when I receive funds to the use of the drawer," he became liable when the moneys were placed to his credit though he had not taken manual possession thereof.

ACTION, heard before *Bynum, J.*, at May Term, 1894, of IREDELL, on exceptions to a report of a referee. The facts and contentions of the parties will be found in the reports of the former appeals contained in 103 N. C., 19, and 114 N. C., 450, and in the opinion of *Associate Justice Montgomery*. The exceptions of the report were overruled and defendant appealed. (660)

Armfield & Turner for plaintiffs.
R. M. Douglas for defendant.

MONTGOMERY, J. This is the fourth time this cause has been before the Court. In the report of the first appeal, 103 N. C., 19, can be seen the statement of the contention between the parties.

The referee, at the August Term, 1893, of IREDELL, made an amended report as follows: "1st. That the defendant R. M. Douglas was marshal of the Western District of North Carolina for the years 1878, 1879, 1880 and 1881, and that during said years he had in his employment, as deputy marshal, J. T. Patterson, Jr., W. J. Patterson and S. P. Graham.

"2d. That on 4 December, 1879, J. T. Patterson, Jr., drew a draft on defendant in favor of himself for $200.00 (two hundred dollars) and indorsed by him on same day to Blantuo & Dryant and subsequently purchased by the plaintiffs, who are now owners thereof, and that on the——day of——188—, the plaintiffs presented said draft to the defendant for payment, who accepted the same conditionally by writing across the face thereof the following:

'Accepted, payable when I receive funds to the use of J. T. Patterson, Jr.

R. M. DOUGLAS,
U. S. Marshal.'

"3d. That on 16 November, 1881, W. J. Patterson drew a draft on defendant for $325.00 (three hundred and twenty-five dollars) payable to himself and on said day indorsed by him and accepted by the defendant conditionally by writing across the face thereof the (661) following:

'Accepted, payable when I receive funds to the use of W. J. Patterson.

R. M. DOUGLAS,
U. S. Marshal.'

"And that the plaintiffs are now the owners thereof.

"4th. That neither of the foregoing drafts has been paid, nor any part thereof.

"5th. That the defendant, Douglas, has had placed to his credit in the Treasury Department of the United States the sum of $460.76 on claims due him for services of J. T. Patterson, Jr., performed prior to the acceptance of his said draft and the aforesaid sum of $460.76 was not subject to any previous order or money advanced by the defendant to J. T. Patterson, Jr., and that the same was placed to his credit and control since the acceptance of said draft.

"6th. That said defendant Douglas has had placed to his credit and control in the Treasury Department in Washington, D. C., the sum of $2,274.55 due him for service of W. J. Patterson rendered prior to the acceptance of the aforesaid draft for $325.00 and that the same was not subject to any previous draft or moneys advanced by the defendant to the said W. J. Patterson, except a draft for $100.00 and one for $500.00, and that the aforesaid sum of $2,274.55 was placed to the credit and control of the defendant since the acceptance of said draft.

"7th. That the amount of the claim which S. P. Graham traded to the plaintiffs on 25 October, 1881, was $98.82 for services rendered by said Graham as deputy marshal to the defendant, and sworn to before J. C. Anderson, U. S. Commissioner, on 20 October, 1881, and

that the same was presented to defendant by the plaintiffs, which he agreed to pay, and of the aforesaid claim $95.62 has been placed to the credit and control of the defendant in the Treasury Department at Washington, D. C., since the acceptance of said claim (662) by defendant, the remainder of said claim having been allowed by the Government. That the voucher so traded to the plaintiffs was for services rendered prior to said acceptance and before the same was transferred to the plaintiffs. And the further sum of $2,858.76 was placed to the defendant's credit and control in the Treasury Department for services rendered by said Graham, and out of that sum the defendant has received $900.00, leaving $1,958.76 to the credit of the defendant since said acceptance.

"8th. The referee finds as a further fact that the aforesaid amounts, when added together, make a sum total of $620.62.

"From the foregoing facts I find the following conclusions of law:

"1st. That the amount of money placed to the credit and control of the defendant in the Treasury Department at Washington, D. C., as found above, and which is largely in excess of the plaintiffs' claims, is subject to the payment of the drafts sued on to the full amount of the same with interest thereon at 6 per cent from 17 July, 1885, at which time this action began, till 7 August, 1893, which amount, $318.55, added to the principal, makes a sum total of $939.17, which I find as a conclusion of law that the plaintiffs are entitled to judgment against the defendant and for costs of action. All of which, together with the evidence introduced by both parties and the rulings as to the competency of evidence, is respectfully submitted, this 7 August, 1893."

At May Term, 1894, when the case was called for hearing, the defendant made the following motions: "That the action be dismissed for that the complaint and evidence in the case disclose that all the drafts and accounts herein declared on were drawn on claims, or an interest in claims, against the United States before their allowance, and are therefore null and void under the Statutes of the (663) United States; the defendant further moves that the action be dismissed because the referee does not find that any sums of money have been paid to the defendant." The motions were overruled and the defendant excepted. The court then proceeded to consider the case on the report and exceptions. The exceptions were not sustained, the findings of the referee were adopted and confirmed, and the following judgment was rendered:

"This action coming on for hearing before *Bynum, J.*, at May Term, 1894, of IREDELL, upon the report of H. Bingham, Esq., and exceptions thereto, and the decision of the Supreme Court, passing

upon the judgment of *Whitaker, J.*, heretofore rendered at November Term, 1893, of this Court.

"The defendant's exceptions 4, 6, 7, 9 and 12, not heretofore passed upon, are overruled, and the opinion of the Supreme Court overruling exceptions 1, 2, 3 and 11 is hereby adopted.

"The court adopts the findings of the referee upon his findings of fact, holding as matter of law, the records A, B and C. 'AA,' being admitted by the Supreme Court as competent testimony, was sufficient to sustain the findings of fact by the referee in his findings 5, 6, 7 and 8, when plaintiff moved for judgment against defendant because of his negligence in not collecting said sums due him as marshal for services of plaintiffs' assignors, which the referee finds had been allowed defendant and placed to his credit and control, which motion was allowed by the court. Whereupon, upon motion of plaintiffs' counsel, Messrs. Armfield and Turner, it is considered and adjudged by the court that the plaintiffs, Wallace Bros., recover of the defendant R. M. Douglas the sum of $961.50, with interest on $620 at six per cent per annum from 21 May, 1894, till paid. It is further con-
(664) sidered that the plaintiffs recover of the defendant their costs of this action, to be taxed by the clerk of this court, except the sum of one hundred dollars allowed to H. Bingham, Esq., for taking and stating the accounts in this case, which is to be divided, the plaintiff paying $50 and the defendant paying $50 thereof as heretofore adjudged."

To the judgment the defendant excepted for the reason, as he alleges, that it shows that no funds had been received by the defendant to the use of J. T. Patterson, Jr., W. J. Patterson, or on the account of S. P. Graham, and that therefore the plaintiffs are not entitled to any judgment on the claim. He also excepts to the judgment on the ground "that plaintiffs cannot maintain the action and make any recovery against defendant for the reason that the alleged causes of action are unlawful, for that the drafts and account declared on are based upon and assign an interest in claims against the United States before the allowance of the claim by the Treasury Department of the United States in violation of section 3477, U. S. Revised Statutes.

His Honor properly refused to dismiss the action for the first cause assigned therefor. The matter of the compensation of the deputies marshal of the defendant is between them and the marshal and not between them and the Government, and therefore the assignment of their claims for compensation against the marshal is not in violation of section 3477 of the Revised Statutes of the United States. *Wallace v. Douglas,* 103 N. C., 19.

The second cause assigned for the dismissal of the action was prop-

erly refused. It was not necessary for the defendant to have received the manual possession of the money which had been placed to his credit and under his control in the Treasury Department at Washington for the services of his disputes, to fix him with (665) liability on the acceptance which he had made for them. For whatever reason the defendant had failed or refused to make his settlement with the Government, his deputies had no concern. Their compensation, though due to them by the defendant, was audited and passed upon by the proper government officials and put to the credit and under the control of the defendant; and upon that having been done, there was a receiving by the defendant of the funds; so far as he and his deputies were concerned, the defendant became liable to them, and as a consequence to their assignees, the plaintiffs.

The exceptions to the judgment cover the same grounds as do the motions to dismiss, and they are not sustained here.

There is no error in the judgment, even if it be conceded that the court, in rendering it, gave a wrong reason therefor.

No Error.

FURCHES, J., having been of counsel, did not sit on the hearing of this case.

Affirmed. On writ of error, 161 U. S., 346.

J. M. SHARPE ET AL. v. W. A. ELLIASON, ASSIGNEE OF L. PINKUS.

Action for Accounting Against Assignee for Benefit of Creditors—Reference—Insufficient Report.

1. Where, in an action for an accounting against the assignee of an insolvent's estate, a reference is made to ascertain the condition of the estate and the conduct of the business by the assignee, the parties are entitled from the referee to a statement of all the items of the account between them in order that either may, if he thinks proper, except to any particular item; therefore,
2. Where a referee, in such action, stated in his report that certain property which had been sold belonged to the assigned estate and had been duly accounted for by the assignee; *Held*, that such report was too uncertain in that it failed to state how much was realized from the sale and how it had been accounted for.

(666)

ACTION against W. A. Eliason, assignee of L. Pinkus, for an accounting to ascertain the amount with which defendant is chargeable as assignee and for his removal and the appointment of a receiver. From a judgment confirming the report of a referee the plaintiffs appealed. The facts necessary to an understanding of the decision appear in the opinion of *Chief Justice Faircloth.*

L. C. Caldwell for plaintiffs.
Robbins & Long for defendant.

FAIRCLOTH, C. J. This case was heard on referee's report and one fact found was as follows: "That the blackberries sold Wallace Bros. were part of the effects belonging to the assignment, or became such, and are duly accounted for by the said Eliason as assignee." The plaintiffs except, and say "that said report is vague and uncertain, in that it does not state the amount of money realized for berries sold Wallace Bros., and does not state how the same was accounted for." The other two findings of fact and exceptions thereto present the same question. His Honor overruled these exceptions and gave judgment confirming the report, etc. In this there was error. The reason is, as has been heretofore stated by this Court, that the parties are entitled from the referee to a statement of all the items of the account between them, in order that either may, if he thinks proper, except to any particular item. *McCampbell v. McClung,* 75 N. C., 393. Exceptions sustained. Cause remanded to be proceeded in, etc.

(667) Reversed.

FURCHES, J., having been of counsel, did not sit on the hearing of this appeal.

W. B. MOORE ET AL. v. DARIEN SMITH ET AL.

Action Against Administrators—Foreign Judgment—Sureties—Equity.

1. Where a judgment was obtained in another state against the administrators and sureties of a deceased administrator, and an action was instituted in this State for a settlement, such judgment is competent evidence against and binding upon the administrators and their privies, it appearing that such administrators were present and resisting the recovery in the foreign court.

2. In an equitable action for the settlement of the estate of a deceased administrator and to satisfy a judgment obtained in another state against his personal representatives and the sureties on his bond, such sureties

may intervene and receive credit for what they have paid on the judgment, remaining liable to plaintiffs for any balance due on the judgment in excess of what may be realized in the present action.

ACTION, heard before *Bryan, J.*, at January Term, 1895, of ROCKINGHAM.

1. In July, 1862, Pleasant W. Moore died intestate in Henry County, Va., and in October, 1862, Drury Smith was duly qualified as administrator of said Moore in Rockingham County, N. C., and filed his bond in the penal sum of $20,000, with H. C. Wooten, James W. Trent and John W. Morris as sureties on said bond, all of said sureties being then and now citizens of Henry County, Va. The plaintiffs are the heirs-at-law and distributees of said P. W. Moore.

2. In 1872 said Drury Smith died intestate and the defendants, Darien Smith and G. W. Smith, were in January, 1873, duly (668) qualified as his administrators and the other defendants are the heirs-at-law and distributees of said Drury Smith.

3. In 1878 the plaintiffs instituted a suit in Henry County, Va., against the defendant administrators and their said sureties for an account and settlement of their said estate, which resulted in a judgment in the Court of Appeals of Virginia against the defendants and by a decree of the Chancery Court of Virginia said sureties' lands are ordered to be sold to satisfy said judgment, which is still unpaid.

4. Said Drury Smith's estate is still unsettled and this action is brought for a settlement thereof and to have lands sold to satisfy their judgment. At February Term, 1892, said James W. Trent and John W. Morris were made parties plaintiff in this action, who filed an amended complaint, alleging that they were in danger of having their lands sold to satisfy the Virginia judgment and praying the court to protect them by requiring the representatives of their principal in said judgment to satisfy the same out of the real and personal property of the said Drury Smith's estate. Judgment for plaintiffs against defendants was rendered, from which defendants appealed.

Watson & Buxton for plaintiffs.

R. D. Reid, Glenn & Manly and Shepherd & Busbee for defendants.

FAIRCLOTH, C. J. (after stating the facts): His Honor ordered an account of the estate of Smith to be taken and reserved the question of the personal liability of the defendant administrators until the referee's report is filed. The question more elaborately argued before us was as to the effect of the Virginia judgment against the de- (669) fendant administrators, Darien and G. W. Smith. We find it unnecessary to enter into that question, because that judgment was

unquestionably valid against the sureties Trent and Morris, who are now plaintiffs in this action. That judgment is also competent evidence against the defendant administrators and their privies, it appearing from the record that the administrators not only had notice but were present and resisting the recovery against them and the sureties of their intestate, as principal debtor. *Lewis v. Fort,* 75 N. C., 251; *Hare v. Grant,* 77 N. C., 203.

The further objection was taken that plaintiffs, Trent and Morris, could not recover, as they are indemnified, until they have paid the debts against their principal. In an action at law this position would be tenable, but it is not so in a court of Equity, and for this reason they were properly allowed to be made parties plaintiff. The exercise of this equitable jurisdiction works out just results, i.e., the other plaintiffs are enabled to receive the money due them, the real debtor is compelled to pay it and the plaintiff sureties are relieved from jeopardy. *Ferrer v. Barrett,* 57 N. C., 445; *Wickell v. Henderson,* 59 N. C., 286; *Scott v. Timberlake,* 83 N. C., 382. Of course the plaintiff sureties would remain liable on the Virginia judgment for any balance not realized in this action. If it appeared that there were any creditors of Smith's estate they would be necessary parties to enable those sureties to avail themselves of this equitable relief; but in their absence, the heirs and distributees are the next entitled and they are present in this proceeding to receive the money due by defendants.

It will be the duty of the court below to direct that the plaintiff sureties receive no more than they have paid on said judgment to the
(670) use of the other plaintiffs since its rendition, and that the other plaintiffs receive the balance of the recovery according to their several rights.

With these modifications, the judgment is

Affirmed.

J. L. HARTSELL v. W. C. COLEMAN ET AL.

Action to Recover Land—Deed—Vague and Uncertain Description—Extraneous Evidence.

A description of lands in a deed as "lying on the west side of Spring street and north of Mill street," followed by courses and distances from "a stone" on Spring street around a parallelogram to the place of beginning, without indicating whether the starting point is at the intersection of Spring and Mill streets, or at a more remote point, is not so vague and

uncertain on its face to require the exclusion of proof *aliunde* to locate the land by fitting the description to the lot claimed under the deed.

ACTION, tried by *Boykin, J.*, and a jury, at January Term, 1895, of CABARRUS.

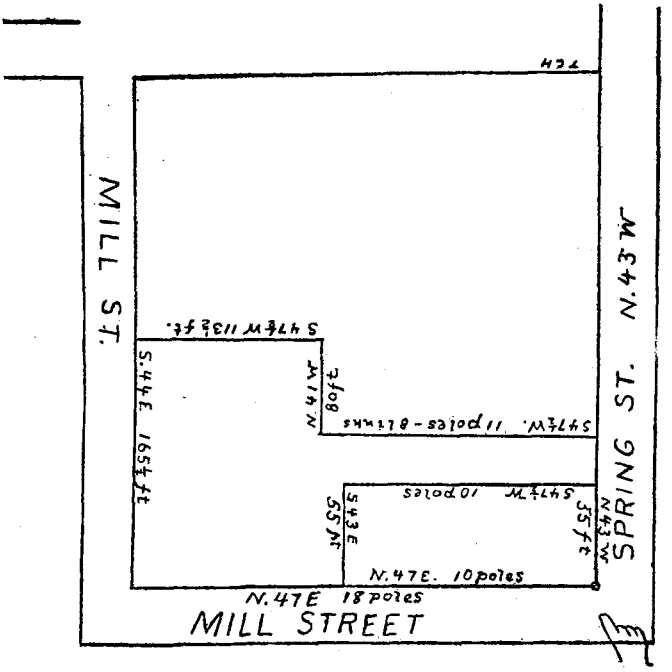
Among other deeds introduced by the defendants for the purpose of showing title in the defendant Coleman, the landlord, to that part of the land of which the defendants were in possession, after plaintiff had established a *prima facie* case, was one from John Fink and wife and C. A. Plott to Luther Palmer, dated 20 January, 1881.

The description in the deed was as follows:

"All that lot of land situated in the county of Cabarrus in the State of North Carolina, adjoining the lands of Dr. John Fink, in the town of Concord, and others, and bounded as follows:

"Lying on west side of Spring street and north of Mill street. Beginning at a stone on Spring street and runs N. 43 W. 55 feet to a stone on Spring street; then S. 47 W. 10 poles to a stone; then S. 43 E. 55 feet to a stone; then N. 47 E. 10 poles (671) to the beginning, containing 38 square rods, more or less."

The following plat was introduced:



The defendants offered to introduce parol evidence to identify and

locate the land therein mentioned. The plaintiff objected, alleging that the description of the land set out in said deed was too vague, uncertain and indefinite to be identified by parol evidence. The court sustained the plaintiff's objection, and the defendant Coleman excepted.

There was a verdict for the plaintiff. Motion by the defendants for a new trial was overruled and defendant Coleman appealed.

(672) *W. J. Montgomery for plaintiff.*
W. G. Means for defendants.

AVERY, J. The words "lying on the west side of Spring street and north of Mill street" might be interpreted as meaning that the lot is to be located immediately west or indefinitely but not very remotely west of it. If it is not the usual interpretation given to them, and therefore the proper construction, it is certainly not erroneous if the defendant could proceed upon that theory and prove to the satisfaction of a jury, that such a hypothesis would enable him to fit the description to the lot claimed by him so as to bring all of the descriptive expressions into harmony, to hold that it would be competent for him to do so. If we can conceive of a reasonable theory, upon which pertinent parol evidence might subserve this purpose, the opportunity should have been given to the defendant to adduce such proof to support it.

Supposing that the intention of the parties was that the deed should be interpreted as if the word "side" had been inserted after "north," it would follow necessarily that the beginning corner must be located at the intersection. This must be true because it would be impossible otherwise to run the first call N. 43 W. 55 feet from one point to another on Spring street and thence S. 47 W. 10 poles to a stone, then S. 43 E. 55 feet to a stone, then N. 47 E. 10 poles to the beginning and still leave Mill street on the immediate south of the parallelogram (which as a mathematical certainty must be formed), unless such were the relative positions of the street and lot. We might have supposed for the purposes of this case that there was an intersection of the streets even if it had not been admitted by counsel and if by running from it the location should prove to be in perfect accord with the other parts of the description, as for instance by finding that the parallelogram
(673) would be bounded on the north and west by lands owned at the date of the deed by Dr. John Fink and on the east and south by the two streets, there would be abundant evidence to go to the jury to fit the description to the thing. *Edwards v. Bowden,* 99 N. C., 80. The question being whether the description was too vague and

uncertain upon its face to warrant the admission of proof *aliunde* to locate it, we have endeavored to discard from our minds the statements of counsel as to what the testimony would have been under a different ruling. The map with explanations must be treated as if it had been drawn by a surveyor acting upon a theory and making a possible location out of what appeared upon the face of the deeds.

Testing the accuracy of the ruling of the court below in this way, we think there was no error in holding that the description could not have been fitted to the land upon any reasonable hypothesis that could be fairly deduced from it. There was error which entitles the defendant to a

New Trial.

LELAND MARTIN v. JOHN A. CHAMBERS ET AL.

Practice—Dismissal of Appeal—Negligence in Prosecuting Appeal—Motion to Reinstate.

Where an appeal after being on the docket for two terms was dismissed, when reached in its order at the third term, for want of prosecution, it will not be reinstated on appellant's affidavit that his attorney was sick, it not appearing that the appellant made any inquiry of his attorney regarding the appeal or sought to get other counsel to prosecute it.

(674)

PETITION OF DEFENDANTS TO REINSTATE APPEAL.

L. S. Benbow, of counsel for petitioners, filed the petition.

CLARK, J. This case having been on the docket two terms without being prosecuted, when reached in its order at the third term, no one yet appearing to prosecute it, was dismissed as provided by Rule 15. *Wiseman v. Commissioners,* 104 N. C., 330. The appellant now moves to reinstate on the ground that he entrusted his case to his counsel and supposed he would attend to it and that said attorney was sick and unable to attend to the appeal, and avers that appellant was without fault and that he has not been negligent. The conclusion at which the appellant arrives is not warranted by the facts stated. The cause was on this docket three terms. It does not appear that counsel was ill the whole of that time. If he was, the appellant was clearly negligent in not securing other counsel to attend to his appeal in this Court. If he was not ill the whole time, it is not averred that the appellant inquired about the case of his counsel, or urged him.

to attend to it, or paid any attention to it in any way whatever. There may be cases in which the appellant has to this extent entirely abandoned all attention to his appeal, entrusting it solely to his counsel and making no further inquiry. If an appellant chooses so to act, abandoning all thought of his case to his counsel, and his appeal, after being neglected three terms, is dismissed under the rules, his grievance has been sustained at the hands of his counsel and his remedy (if he can show he has suffered loss) is by action against his counsel for damages sustained by his neglect so grossly to discharge the duty he has contracted to perform. But an appellant who so entirely abandons all
(675) attention to his appeal as to let it remain for three terms in this Court without ascertaining and without inquiry even whether it was receiving any attention, or even whether such counsel had attended this Court, is not in a condition to ask this Court to encumber its docket longer with a case which concerns himself so little, nor to vex the party who has secured judgment below by protracting the litigation. The judgment below is presumed to be correct, and the party seeking to reverse it must assign and show error, and must prosecute his appeal with more diligence than the appellant has shown.

Motion Denied.

C. J. SHOAF & CO. v. E. FROST.

Exemptions—Allotment—Valuation on Appeal—Reallotment—Practice.

1. Upon an appeal from an appraiser of homestead and personal property exemptions, under the provisions of ch. 347, Acts of 1885 (amendatory of sec. 519 of The Code), the valuation as determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation.
2. Upon an appeal from the appraisal of homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemptions in accordance with the verdict must be appointed by the court and summoned by the sheriff.

ACTION tried at Fall Term, 1894, of DAVIE, before *Battle, J.*, upon exceptions filed by plaintiff to the allotment of homestead and personal property exemptions to defendant.

Upon the trial the following issues were tendered by plain-
(676) tiff and submitted to the jury:

1. Was the land allotted as a homestead worth more than $1,000 at the time of allotment? "Yes."

2. If yes, what was the land worth? Answer, "$2,000."

3. Was the personal property allotted as a personal property exemption worth more than $500 at the time of the allotment? "Yes."

4. If yes, what was said property then worth? Answer, "$600."

The defendant objected to the 2d and 4th issues, and insisted that the jury could only pass upon the question whether the homestead and personal property exemptions as allotted, were excessive. Objection overruled and defendant excepted.

The court thereupon adjudged that the allotment of both real and personal property be set aside, and, further, that the sheriff summon three freeholders to go upon the premises and reallot the homestead and personal property of the defendant, and appraise the same, guided by the verdict of the jury in this proceeding, and report to the next term of court. The defendant excepted and appealed.

Watson & Buxton for plaintiff.
Glenn & Manly for defendant.

CLARK, J. Ch. 347, Laws 1885, amendatory of section 519 of The Code, provides that if the homestead appraisal or assessment shall be increased or reduced by the jury on appeal "the jury shall assess the value of the property embraced therein" and that "the court shall appoint three commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury." If upon the jury's finding an allotment excessive, or the reverse, the case should simply go back to another board (677) of assessors or appraisers, without any valuation fixed by the jury on the allotted property, another valuation of the appraisers could be excepted to, again and again, and the matter could thus be kept in court indefinitely. To prevent this very evil the Act of 1885 was passed, providing that the property embraced in the allotment should be valued by the jury. Then, when the commissioners appointed by the court, meet, taking such valuation as final, it is their duty merely to add or cut off enough (as the case may be) to make the amount of the constitutional allotment. Any exception to the action of this second board can only be to the correctness of the valuation added or subtracted (as the case may be), taking the jury valuation of the property, first allotted, as the basis.

The act (Clark's Code, p. 526) provides that the court shall appoint three disinterested commissioners to make the new allotment in accord-

ance with the verdict of the jury. It was probably an inadvertence that his Honor directed the sheriff to summon them, meaning, it seems, that the sheriff should also select them. The judgment must be modified in this particular by the judge at the next term appointing the commissioners, who shall then be summoned by the sheriff.

As the modification in the allotment made by the new commissioners must be "in accordance with the verdict of the jury" the valuation placed on the allotted property by the jury must be taken as absolutely correct. If, by extraordinary reasons, as added improvements or great rise in values, or on the other hand the destruction of buildings or great depreciation in values, it may be that relief can be had in the manner pointed out in *Vanstory v. Thornton,* 110 N. C., 10, (678) upon an action brought for that purpose. But the commissioners appointed by the judge under this act to make the reallotment must be guided by the valuation fixed by the verdict of the jury.

Modified and Affirmed.

Cited: *S. c.* 121, N. C., 257; *S. c.,* 123 N. C., 343; *S. c.,* 127 N. C., 307; *Sash Co. v. Parker,* 153 N. C., 133.

D. W. HARMON ET AL. v. C. W. HUNT, ASSIGNEE, ET AL.

Action in Nature of Creditor's Bill—Corporation—Creditors—Stockholders—Unpaid Subscription—Evidence—Judgment Against Corporation.

1. In an action by a creditor of an insolvent corporation against a stockholder thereof to recover the amount of his unpaid subscription, a judgment rendered on the report of a referee in an action to set aside an assignment by the corporation, together with the findings of the referee that such stockholder, after subscribing for a certain amount of stock and paying in one-half of his subscription, had been allowed to draw out, after the assignment, all he had paid in, was competent evidence against such stockholder although he was not a party to the action in which such judgment was rendered.
2. One who has not objected to the admission in evidence of a referee's report in a former action to which he was not a party cannot complain on appeal that the admission of such evidence was an error.
3. Where, in an action by the creditors of an insolvent corporation against a stockholder thereof to recover the amount of his unpaid subscription, such stockholder admitted that he had subscribed and had not paid his

subscription to the capital stock, and introduced no further evidence, it was proper to direct a verdict to be rendered against him.

ACTION, in the nature of a creditor's bill, in which the creditors of the Kernersville Manufacturing Company asserted their right to resort to the capital stock paid and unpaid, as a trust fund for the payment of its debts, heard before *Battle, J.*, and a jury, (679) at August Term, 1894, of FORSYTH.

There was a verdict for the plaintiffs, and from the judgment thereon the defendant, R. S. Linville, appealed. The facts appear in *Blalock v. Manufacturing Company* (110 N. C., 99) and in the opinion of *Associate Justice Furches.*

Jones & Patterson and Glen & Manly for plaintiffs.
J. S. Grogan for defendants.

FURCHES, J. We gather from the record in this case and the exhibits "A" and "E," which it seems were offered in evidence on the trial and made a part of the case on appeal, that some years ago—probably in 1881—there was a corporation formed in Forsyth County for the purpose of working and manufacturing tobacco. That a number of persons became subscribers to the capital stock of said company in various amounts, among whom was the defendant, R. S. Linville, to the amount of $200. That a number of these subscribers paid into said company, which was organized and known as the "Kernersville Manufacturing Company," the amount of their subscriptions, while some of them paid only a part and some of them paid nothing, or if they paid any part, were allowed to withdraw what they had paid in. In 1885, this company failed in business, became insolvent and made an assignment of its assets to the defendant Hunt, to secure certain of its creditors. That some time after the assignment, the plaintiffs, creditors of said company, commenced this action to set aside said assignment for fraud and for judgment on their several indebtedness and for general relief. This action was in the nature of a creditor's bill and a reference was made to Mr. Gray to take (680) and state an account of the whole matters involved, which he did and reported to Fall Term, 1889, of Forsyth Superior Court. Both sides filed exceptions to said report and it was continued until February Term, 1891, when all the exceptions were overruled, report confirmed and judgment rendered for amounts found due in the report. This judgment was appealed from, 110 N. C., 99, the judgment modified and affirmed, subject to the modifications made by this Court.

In said report the referee finds that the defendant Linville subscribed $200 and that he paid in $100, being one-half of his subscription, but afterwards he was allowed to withdraw the $100 he had paid in, and the court gave judgment against said defendant for the amount so found against him, and although this judgment was modified in this Court on appeal, it was not modified or changed in respect to Linville.

After this action was commenced the Court made an order to issue summons to all the corporators, making them party defendants, and it seems summonses were issued and the defendant Linville was present, participating in taking the evidence in the reference, and it was supposed he was served. But the papers in the case were afterwards destroyed and though they were partially, or, it may be, fully restored by copies from the case on appeal in this Court, no summons was found against the defendant Linville. The concern being insolvent, a summons in the original action was issued against the defendant Linville, which was served, and a supplemental complaint was filed in substance (though very inartistically done) declaring that defendant subscribed $200 to the capital stock of said corporation, that he paid in $100 but afterwards drew it out; that he (Linville) was a party to the action when the account was taken and judgment rendered (681) against him at February Term, 1891.

The defendant answers and does not deny the subscription, but alleges that he was in the employment of the concern, that it did not keep its contract with him, that it was owing him in January, 1888, more than his subscription, and it compromised the matter and he "surrendered" it, and paid him back the $100. He denied that he was served with a summons or that he was a party to the suit at the taking of the account or at the time of the judgment.

Without objection or exception two issues were submitted to the jury by the court:

1. Was R. S. Linville a party to this action at the time of the hearing before the referee 18 January, 1889, and when judgment was rendered confirming the referee's report? Answer, "Yes."

2. In what amount, if any, is R. S. Linville indebted to the Kernersville Manufacturing Company? Answer, "$200, with interest from 18 January, 1889."

Upon these issues the court gave judgment against the defendant and the defendant appealed, assigning the following ground of error:

"1. That the judge allowed the jury to consider in passing on the first issue, the statement in the referee's report that R. S. Linville was present at the trial before him. (The judge allowed this and the referee also, as a witness, so testified.)

"2. The admission of the referee's report as evidence. (When this report was introduced by the plaintiffs, the defendant Linville did not object.)

"3. The admission of the testimony of the witnesses Buxton, Eller, Gray, Glenn and Blalock.

"4. The said defendant also insisted that on all the evidence the court should have instructed the jury to answer the first issue in the negative. (682)

"5. Said defendant also insisted that the court had no jurisdiction, the principal amount demanded of him being only two hundred dollars.

"6. Said defendant also objected to the appointment of a receiver."

According to the view we have of this case, we cannot sustain either of defendants' exceptions. The first issue, over which it seems the contest was made, in our opinion was entirely immaterial and should not have been submitted. But it did the defendants no harm, as we think the judgment would, or should, have been the same, if the jury had found this issue "No" instead of "Yes."

The corporation was the defendant and it represented the assets of the concern, and a judgment against it bound the assets. It was not necessary to make the individual corporators (the stockholders) parties, to do this; and if the defendant was one of the corporators and had not paid his subscription to the capital stock, and the concern was insolvent, as was alleged and not denied, it was a part of the assets—a trust fund—for the payment of debts. *Blalock v. Mfg. Co.*, 110 N. C., 199; *Heggie v. B. & L. Asso.*, 107 N. C., 581, and cases there cited.

The findings of the referee and the judgment of the court at February Term, 1891, finding and adjudging that the defendant Linville was one of the corporators; that he subscribed $200 and had not paid it, or that he had paid $100 and taken it out again and owed it now, was at least *prima facie* true and was competent evidence if not conclusive. And if the defendant Linville was not a party at the time of taking the account and judgment (and we are assuming that he was not) then we do not say that he might not have disputed the correctness of said judgment as to his liability to the corporation. But we do say that it was competent evidence and established (683) the indebtedness of the corporation to plaintiff. But as defendant introduced no evidence and having admitted his subscription and that he had not paid it, it was the duty of the court to instruct the jury, as he did, to find the 2d issue for the plaintiff. If we are correct in this, the plaintiffs' first exception cannot be sustained, as a part of the judgment at February Term, 1891, confirming the report of the referee and judgment thereon, made the report a part of the

judgment and it was necessary to refer to the report to see what the judgment was.

In the case on appeal the judge says there was no exception to the introduction of the report in evidence as stated in defendants' 2d exception—so this disposes of that exception, if we had not already disposed of it in what is said as to the first exception.

The 3d exception cannot be sustained, as we think (but we do not pass upon this), for the reason that it was as to an immaterial issue, the finding of which either way could not have affected the result.

The 4th exception has in effect been passed upon by what we have already said as to the judgment of February, 1891.

The 5th and 6th exceptions, as we understand, were abandoned on the argument; but if they were not, they cannot be sustained.

We also understand it to be stated on the argument that it would require all the defendant Linville was due the concern together with all they would be able to realize from other stockholders, who had not paid their subscription, and what they would be able to realize from the property and effects of the concern and more, to pay the indebtedness of the said corporation. And with this understanding we affirm the judgment of the court below. But if it should not
(684) require the whole of the unpaid subscriptions, together with the other assets of the concern, to pay said indebtedness, then defendant would only be required to pay his ratable part.

Affirmed.

Cited: Worth v. Wharton, 122 N. C., 380.

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(685)

NATIONAL BANK OF GREENSBORO ET AL. V. J. E. GILMER ET AL.

Action to Set Aside Deed as Fraudulent—Fraudulent Conveyance—Badges of Fraud—Consideration—Dealings Between Father and Son—Special Term of Court, Extending into Regular Term—Trial—Remarks to Jury.

1. It is not improper for the trial judge upon the continued disagreement of a jury, to have them brought before him and to impress upon them the necessity of their reasoning together, instead of being obstinate, and of coming to an early conclusion.
2. Where a trial began on Wednesday of the last week of a special term and the jury had not agreed upon a verdict on Saturday night, it was not improper for the trial judge to open and conduct the regular term on Monday following and to continue the special term into that week for

the purpose of receiving the verdict of the jury, since the rights of the parties were not prejudiced thereby.

3. In an action to set aside as fraudulent a deed from the defendant to his sons, it appeared in evidence that the defendant, prior to the purchase of the land by him, was indebted to his wife on certain notes; that there was a verbal agreement between him and his wife that he should buy a lot and build a factory thereon and hold the same in trust for her sons; that he bought a lot and built a factory thereon (but with money of a firm of which he was a member) and subsequently acquired the entire property; that the agreement with his wife remained executory and the notes unpaid at the time of the death of his wife and that thereafter he became insolvent and conveyed the lot and factory to his sons. *Held*, that such evidence was not sufficient to be submitted to the jury as establishing a trust in favor of the sons, and it was error to refuse an instruction that the deed was without consideration and void as to creditors.

4. In the trial of an action to set aside as fraudulent a conveyance of a stock of goods by the defendant to his son, it appeared (1) that the defendant was indebted at the time of the conveyance; (2) that the sale was to a son; (3) on long credit; (4) without security; and (5) that the son was not worth more than $500 at the time; (6) that the defendant, though not insolvent at the time, was embarrassed by debt and heavy indorsement for others, and (7) that he became insolvent thereafter. *Held*, that neither of these facts, nor all combined, amount to *prima facie* proof of fraud, but they were circumstances calculated to excite suspicion and challenge scrutiny as to the intent with which the conveyance was made.

5. Upon testimony tending to prove such suspicious circumstances, it was the duty of the court, in instructing the jury, to denominate them, not as "evidential facts bearing upon the issue," but as badges of fraud or circumstances tending to show fraud, and that evidence explanatory thereof should be scrutinized with care.

6. While the Act of 1893 (ch. 453) does not prohibit *bona fide* mortgages to secure one or more preëxisting debts, yet where a mortgage is made of the entirety of a large estate for a preëxisting debt (omitting only an insignificant remnant of property) the mortgage is in effect an assignment for the benefit of creditors secured therein, and is subject to the regulations prescribed in said Act of 1893.

7. Under the act regulating assignments for benefit of creditors (ch. 453, Acts of 1893) the failure of the assignor to file the schedule of preferred debts as required in said act, renders the deed of assignment void as to attacking creditors.

ACTION, tried before *Battle, J.*, and a jury, at a Special Term of FORSYTH, which began 24 November, 1894. The plaintiffs, the National Bank of Greensboro, Rowe Wiggins and the Atlantic Bank of Wilmington, North Carolina, being judgment creditors of the defendant J. E. Gilmer, brought this action for the purpose, as is alleged in their complaint, of setting aside and declaring fraudulent and void

certain conveyances and deeds of trust made by the defendant J. E. Gilmer; one being a deed of trust made by the defendant J. E.
(686) Gilmer to the defendant J. W. Shepherd, trustee; another being an absolute deed conveying certain real estate to his two sons, the defendants John L. Gilmer and Powell Gilmer; and the other being the transfer and sale of a stock of goods to the said John L. and Powell Gilmer.

The plaintiffs further allege that at the time of these conveyances, the defendant J. E. Gilmer was insolvent, and that the said conveyances were made for the purpose of hindering, delaying and defrauding the plaintiffs, all of whom were creditors of the said J. E. Gilmer at the time of the said conveyance.

The defendants J. E. Gilmer, J. L. Gilmer and Powell Gilmer—the latter by their guardian J. E. Gilmer—filed their joint answer admitting the judgments recovered against the said J. E. Gilmer in favor of the plaintiffs, denying that the said conveyances were made for the purpose of hindering, delaying and defrauding the plaintiffs.

The defendant J. W. Shepherd, trustee, filed a separate answer admitting the execution of the trust deed to himself by the defendant J. E. Gilmer, and denying the allegations of fraud.

By leave of the court the plaintiffs filed an amendment to the complaint, setting out two additional causes of action, as follows:

As to the deed by Gilmer to Shepherd, trustee, the plaintiffs say:

"That the same in its terms and provisions is in conflict with the Act of 1893, regulating assignments and deeds of trust in that, under the provisions of said deed, the trustee is not required absolutely to close the trust within the next year after making the same,
(687) but by the provisions thereof it may be continued indefinitely, and is therefore void.

"*Twelfth*: That neither the defendant Gilmer, the grantor, nor Shepherd, trustee, the grantee, have complied with the terms and provisions of said act, in that among other things defendant Gilmer, the grantor, has not filed a sworn schedule of the preferred claims under said act as therein provided, nor Shepherd, trustee, a sworn inventory of the property which come into his hands under said deed.

"Wherefore the plaintiffs insist that said deed is void and of no effect."

Issues were submitted to the jury, without objection, and answered by them as follows:

1. Was the trust deed dated 18 January, 1894, executed by J. E. Gilmer with the intent to hinder, delay or defraud his creditors or any one of them? Answer, "No."

2. Was the deed dated 2 August, 1893, from J. E. Gilmer to his

sons John L. and Powell Gilmer fraudulent and void? Answer, "No."

3. Was the said deed a voluntary conveyance as to all undivided 92-100 interest? Answer, "No."

As to any remaining interest? Answer, "Yes."

4. Was the lot described in said deed purchased and the factory thereon constructed by J. E. Gilmer in whole or in part with funds borrowed by him from his wife with the understanding and agreement between them that the property should belong to their sons, the said John L. and Powell Gilmer? Answer, "Yes."

5. If so, what amount of money belonging to his said wife was thus used by said J. E. Gilmer? Answer, "$9,200."

6. Was the bill of sale of the stock of goods on 1 July, 1893, fraudulent and void? Answer, "No."

7. If there was such a trust deed as is mentioned in issue 4th was it a fraudulent trust? Answer, "No." (688)

The plaintiffs introduced in evidence a deed from the defendant to his sons John L. and Powell Gilmer, conveying what was known as "the Factory Lot" in Winston. The deed was dated 2 August, 1893, probated 4 August, 1893, and registered 5 January, 1894. The consideration was stated to be "ten dollars and the further consideration of natural love and affection which he bears to his sons John L. Gilmer and Powell Gilmer and the further consideration of the large sum of money belonging to the mother of John L. Gilmer and Powell Gilmer and used by the grantor in the purchase of the lot herein conveyed and erecting the building thereon."

The plaintiffs also introduced a deed of trust from the defendant to J. W. Shepherd, dated and probated 18 January, 1894, and registered 22 January, 1894. The deed was made for the purpose of securing certain debts therein mentioned and contained a defeasance clause providing that if the grantor should fail to pay the debts secured by the deed on or before 2 April, 1894, then the trustee, upon application of any of the unpaid creditors, should sell the lands conveyed at auction and apply the proceeds to the payment of the said debts and costs, etc., and pay any surplus to the grantor.

The plaintiffs also introduced records of judgments against the defendant and others aggregating about $250,000, together with executions on those belonging to the plaintiffs on which the sheriff had returned "nothing to be found."

For the defendants, the trustee J. W. Shepherd testified, among other things, that at request of creditors he had sold all the property conveyed in the deed in trust at public auction to the defendant John L. Gilmer for $25,000, with which he had been enabled to settle all the debts mentioned in the deed of trust; that he personally

(689) knew of a good many of the secured debts and that they were *bona fide;* that he never had any reason to think that any of the debts were not *bona fide,* and that no fraudulent suggestion was ever heard of by him.

The other material facts developed in the testimony appear in the plaintiffs' request for instructions and the charge of *Battle, J.*

The allegations of fact contained in the amendment to the complaint were admitted by the defendants on the trial, without prejudice as to any conclusions of law therein stated.

The trial of this action commenced on Wednesday, 26 November, 1894, during the week of Special Term, which term would have ended with that week but for the judge continuing the term under the statute, Code, sec. 1228, as amended by Laws 1893, chap. 226, which the plaintiffs insisted that he had no right to do, and they duly excepted to this ruling that he did not have such right. The case was given to the jury on Saturday of that week at 7 p.m., and the court took a recess then for supper till 9 p.m., met again at that hour, and the jury having come in and announced that they could not agree, the judge ordered an adjournment of the court until Monday, 3 December, 1894, at 9 a.m., to which the plaintiffs objected as above stated. Court met on 3 December, 1894, at 9 a.m., pursuant to adjournment. The jury appeared and announced that they had not yet agreed, whereupon they were directed to retire and court was adjourned from time to time (as will appear from the entries in the minute docket, which will be copied and hereto annexed) until the judgment was signed.

The verdict was rendered on Tuesday, 4 December, and after that the special term was continued from day to day by consent of (690) parties in order that plaintiffs' counsel might prepare and present their motion for a new trial. The regular term of Forsyth Superior Court convened on Monday, 3 December, 1894, at 10 a.m., and continued for two weeks.

When the jury came into court Monday morning, 3 December, at 9 a.m., and said they could not agree, the judge told them that it would be a lame and impotent conclusion of the special term, if four days' labor during that term was to go for nothing. "It is important to the parties, it is important to the public that this litigation shall come to an end. You are intelligent men, and are just as able to decide these issues as any other jury will be.

"You ought to consult and reason together and come to a verdict. You ought not to be obstinate about the matter. It is your duty to agree if you possibly can. I shall be here holding court for two weeks, and you will have plenty of time to reflect on the matter."

Late in the afternoon of the same day the jury again came into

court and one of them had certain written questions which he asked the judge and he answered the same, and then said to the jury: "You should reason together, gentlemen, and try to come to a unanimous conclusion on all the issues. I repeat to you what I said this morning, that we have been engaged in this trial for some time, and it is to the interest of the parties and of the public that the suit should come to an end. It is against the public interest that the docket should be in a crowded condition. It prevents persons whose rights are invaded from bringing suits, which they think will be so long in being tried. I do not mean that you should render a compromise verdict which would be improper. If one or two of you should think one way and the others another way (I do not know how you stand, I merely say this for an illustration), that one or those two should not be obstinate about the matter, but all should reason together, discuss the matter fully and see if they cannot arrive at unanimity." The jury then retired, remained out all night, and the next morning returned the (691) verdict which appears in the record.

At the close of the testimony, the plaintiffs asked the court to hold as a matter of law:

1. That the deed of trust executed by J. E. Gilmer to the defendant Shepherd was void upon its face as being in conflict with and inconsistent with chapter 453, Laws 1893, regulating deeds of assignment as is alleged in the amendment to the plaintiffs' complaint and numbered No. 11, and

2. The plaintiffs asked the court to hold the deeds of trust from Gilmer to Shepherd as void, for the reason that it was admitted that neither the grantor Gilmer nor the trustee Shepherd had complied with the terms and provisions of the said Act of 1893 regulating assignments and deeds of trust, in that, among other things, the defendant Gilmer, the grantor, had not filed a sworn schedule of the preferred claims under said act as therein provided, nor the said trustee, Shepherd, a sworn inventory of the property which came into his hands under said deed. The court reserved these questions until after the verdict of the jury, and then refused to grant the motions of the plaintiffs, to which the plaintiffs excepted.

At the close of the testimony plaintiffs submitted prayers for instructions as follows:

1. That taking all the evidence as true with regard to the conveyance of factory, the deed from Gilmer to his sons is a voluntary conveyance and void as to the plaintiffs.

2. That it appears by uncontradicted evidence that the sale of the goods was:

(1) When plaintiff had a subsisting debt.

(692) (2) Was to a son of the debtor Gilmer.

(3) Was on 6, 12, 18 and 24 months time.

(4) Son was at the time of sale of goods not worth more than $500.

(5) Immediately after sale of goods the purchaser issued bill heads, stating that the purchasing firm consisted of W. H. Marler and the two sons, one of whom was at the time nineteen years of age.

(6) No security was taken by the debtor but simply the unsecured notes of the son.

(7) That at the time of sale the debtor, Gilmer, was greatly embarrassed.

(8) That this embarrassment existing in July, 1893, resulted in insolvency.

That these facts being established, the law declares the sale void as to plaintiffs unless evidence of other and additional facts indicating good faith is furnished by defendant, and such additional evidence as appears in this case is not sufficient in law to show good faith in the transaction, and the jury must find the sale of goods to be void as to the plaintiffs.

3. That if the deed of trust to Shepherd was made by defendant Gilmer with the intent to hinder, delay and defraud his creditors, or any of them, the same is void, although neither the trustee, Shepherd, nor the beneficiaries thereunder knew of or participated in such fraudulent intentions and although the debts secured thereby are *bona fide*.

4. As to the deeds to the sons, the court is asked to charge the jury that the request of Mrs. Gilmer that defendant J. E. Gilmer should buy the lot and build the factory with money owing to her and represented by notes of defendant Gilmer, and convey the same to her sons John L. and Powell Gilmer, and defendant's verbal promise to do so, was a mere executory, oral contract, and not
(693) being carried into effect in wife's lifetime the same was incapable of enforcement in specie by the courts, and the notes to the wife, by her death, intestate, became the property of J. E. Gilmer, and therefore it was incompetent and inadmissible in defendant J. E. Gilmer when the money represented by his notes had become his absolute property, to fall back on the incomplete purposes of himself and wife in regard to the factory, and thus execute a deed to the boys; and as to this property, to wit, the factory, the deed of Gilmer to his sons is not founded on valuable consideration and is therefore void as to his creditors.

5. If the court refuses to instruct that upon the case made the deed from Gilmer to his sons was a voluntary conveyance and shall

leave it to the jury to say whether there was a trust, which existed at the death of Mrs. Gilmer, in favor of her sons, which he could execute by conveying to them, then plaintiffs request the court to hold and charge that upon all the evidence the trust was secret and therefore void as to plaintiffs.—Refused; but the court told the jury that if it was a secret, fraudulent trust, the husband to hold himself out as owner, to sail under false colors, if such was the purpose of the parties to the trust, then the same is void and no trust at all, and the seventh issue should be answered "Yes."

6. If the debt of $2,000 preferred in the trust deed to John and Powell, consisted of rents and sales of timber from lands belonging to Lettie with a remainder over to John and Powell, the rents and sales accruing in the lifetime of Lettie, and in the hands of J. E. Gilmer, as guardian, at her death, the money thus due to her became the property of J. E. Gilmer on her death, and did not belong to John and Powell, and hence the preference was fictitious and the insertion of a fictitious debt in this trust deed is a fraud on the part of the grantor, and therefore vitiates the deed, and the first issue (694) must be answered "Yes."

7. If the debt of $2,000 preferred in the trust deed to John and Powell, consisted of rents and sales of timber from land belonging to Lettie, with a remainder over to John and Powell, the rents and sales accruing in the lifetime of Lettie, and in the hands of J. E. Gilmer, as guardian, at her death, the money thus due to her became the property of J. E. Gilmer on her death, and did not belong to John and Powell, and hence the preference was fictitious and the insertion of a fictitious debt in this trust deed is a strong badge and circumstance of fraud.

8. There is evidence that some of the debts secured by the trust deeds were debts in which the debtor, J. E. Gilmer, was liable jointly and severally with others who were solvent and responsible and that these debts were described in the trust deed as being the debts of J. E. Gilmer, without reciting the fact of the liability of these other debtors; and there is evidence that some of said debts recited in the trust deed were secured by good and valuable collaterals, which were not recited in the trust deed. If J. E. Gilmer had the purpose in making the trust deed to suppress these facts and thereby magnify his indebtedness and mislead his creditors, this amounts to an intent to hinder, delay and defraud his creditors, and makes the deed void and the jury must answer the first issue "Yes."

9. If the jury should find that Gilmer inserted in the deed to Shepherd the debt of $4,000 as due to Gilmer, Marler & Co., at a time when they, as a firm, were indebted to him in a greater sum with the

purpose thereby to magnify his indebtedness and mislead his creditors, this amounts to an intent to hinder, delay and defraud his creditors, and such intent vitiates the deed and you will answer "Yes" to the first issue.

The court declined to give instruction No. 1.

The court refused to give instruction No. 2, as therein set
(695) out, but in lieu thereof gave instructions as hereinafter set out.

The court gave instruction No. 3.

The court refused instruction No. 4, but instructed the jury on that point as hereinafter appears.

In regard to the plaintiffs' 6th prayer for instructions, the judge struck out the last part thereof, beginning with the words, "hence the preference was fictitious," and inserted in lieu thereof, "if the defendant, J. E. Gilmer, knew this and fraudulently inserted this debt in the trust deed, that would vitiate the whole trust deed, and the first issue should then be answered "Yes"; but this would not be so if the inserting of a debt that he did not really owe was due to an honest mistake."

A similar change was made by the judge in the 7th prayer for instructions.

These prayers for instructions, thus changed, were given to the jury.

The judge recapitulated the evidence, applied the law thereto, and instructed the jury fully in these and all other law points raised. He was not requested to put his charge in writing. Among other instructions he gave the following:

"1. The defendants' counsel contend that the relation of debtor and creditor existing between J. E. Gilmer and his wife, he owing her $9,200, there was an agreement between him and her that he would purchase a lot in Winston and build thereon a tobacco factory, the property so acquired to be held in trust for her two sons, John and Powell, he, the said J. E. Gilmer, to use in the acquiring of such property the money that he owed her as far as it would go, or his own money with the understanding that the money thus expended
(696) should go as credit on her notes against him, and that, in pursuance of this agreement, he, joining in with one Edmunds, purchased a lot in Winston from W. A. Whitaker and built a factory thereon, paying for the lot and building about $17,000, and afterwards in pursuance of the same agreement took a deed 26 May, 1891, from said Edmunds for his interest in said property; and that the amount of her money used in this way was $9,200, the cost of the property then being $17,000.

"If the jury believe that the facts are as above stated then the two

sons became as soon as the property was acquired the equitable owners of 92-170 thereof and as to such undivided interest the deed from said J. E. Gilmer to said John L. Gilmer and Powell Gilmer, dated 2 Aug., 1893, is not voluntary.

"The alleged facts on which this alleged trust depends must be proven by the defendants to the satisfaction of the jury by evidence which, in their judgment, is cogent, clear, strong and convincing. If the jury do not consider such facts so proven, then they will answer the 3d issue: Yes. If they do not consider such facts so proven, they will answer said issue: No, as to an undivided 92-170 interest. Yes, as to the remaining interest.

"If the lot was purchased and the factory built without any such agreement as above mentioned, or without the existence of facts necessary to create a trust as aforesaid, then the notes held by the wife against the husband, remaining unpaid at her death (she dying intestate), became the property of the husband as her sole distributee (he becoming, that is, the real owner thereof, subject to the claims of her creditors, if any); and the third issue must in that case be answered, Yes.

"4. In a case of circumstantial evidence, there are two inquiries for the jury: (a) The evidential facts, that is, the facts relevant to the issue—are they true? (b) Do you infer from such (697) facts that the fact in issue exists? For example in regard to the sixth issue, the fact in issue (alleged by plaintiffs and denied by the defendants) is, that the goods were sold 1 July, 1893, by J. E. Gilmer to John L. Gilmer with intent to defeat, or to hinder, or to delay the creditors of J. E. Gilmer or some one or more of them; or putting this in other words that his purpose, or some part of his purpose, in making this sale, was to promote his own ease and favor, at the expense of, or to the prejudice of the rights of his creditors."

The evidential facts on which the plaintiffs rely and which the defendants do not contradict, are the following:

(a) That the plaintiffs had at the time subsisting debts.

(b) That the said purchaser was the near relative, the son, of the seller of the goods.

(c) That the sale was not for cash, but on time, notes being taken payable in 6, 12, 18 and 24 months.

(d) That no security was taken for said notes.

(e) That the purchaser was not worth more than $5,000.

(f) That at the time of sale debtor, J. E. Gilmer, was greatly embarrassed.

(g) That immediately after sale the purchasers issued bill heads

stating that the purchasing firm consisted of W. H. Marler and two sons, one of whom was at the time nineteen years of age.

(h) That the debtor J. E. Gilmer's financial embarrassment, existing in July, 1893, resulted in insolvency.

The question is whether, from these facts and other evidential facts which you may find to exist, you infer the existence of the fact in issue.

The defendants argue against such an inference and contend
(698) that they have proven the following evidential facts:

"1. That the said J. E. Gilmer's purpose in selling the goods was to get out of business on account of the ill health of himself and other members of his family, etc.

"2. That he has reason to believe that the notes taken for his son would be paid—his wife, who had considerable property, having frequently expressed to him her desire and purpose to set her said son up in business.

"3. That the said son was of good business qualifications, sober and industrious.

"4. That the printing of Powell Gilmer's name on the bill heads was a mistake. He hadn't really been taken into the firm of Gilmer, Marler & Co., as a member, but it was only intended that he should become a member when he attained his majority. The question is whether these facts are true, and then whether from the whole evidence you infer the existence or non-existence of the fact in issue, remembering that on the whole case the burden of proof is on the plaintiffs."

The plaintiffs duly excepted to the refusal of the court to grant the first instructions prayed for—the refusal to give second instruction prayed for—and as prayed for, and to the giving of the instructions that were given in lieu thereof.

Same as above in regard to the plaintiffs' 4th prayer—to the refusal to give their 5th prayer for instructions and to the instructions that were given in that connection. And to the changes that were made by the court in their 6th and 7th prayers. The plaintiffs further excepted to that portion of the judge's charge in which after recapitulating the evidential facts on which the plaintiffs relied, letters from "a" to "h" both inclusive, as to which the defendant had introduced no contradictory evidence, and after recapitulating the evidential facts
(699) which the defendants claimed to exist in their favor, the judge refused to tell the jury that there was a legal presumption of fraud, but told the jury, "The question is whether these facts are true and then from the whole evidence do you infer the existence or non-existence of the fact in issue, remembering that in the whole case the burden of proof is on the plaintiffs."

The jury responded to the issues as set out above. Plaintiffs moved

for a new trial, which was refused, and appealed from the judgment rendered. Errors assigned were as follows:

"First. That the court erred in refusing to grant the motion of the plaintiffs asking that the said deed of trust from Gilmer to Shepherd be declared void on its face as being inconsistent with the Act of 1893 regulating assignments and deeds of trust.

"Second. That the court erred in refusing to grant the motion of the plaintiffs asking that the deed of trust from Gilmer to Shepherd be declared void upon the admitted facts that neither the grantor, Gilmer, nor the grantee, Shepherd, had complied with the Act of 1893 in reference to assignments and deeds of trust.

"Third. That the court erred in ordering the jury to be brought into court and addressing them in the language as set out above.

"Fourth. That the court erred in continuing the special term after the regular term had been opened and receiving the verdict of the jury on Tuesday, 4 December, 1894, it being the second day of the regular term of the Forsyth Superior Court.

"Fifth. That the court erred in refusing to grant the special instructions numbered 1, 2 and 4 asked for by the plaintiffs, and in changing their 6th and 7th prayers for instructions. (700)

"Sixth. That the court erred in giving in place of instructions fifth asked for, the following: 'But if it was a secret fraudulent trust, husband to hold himself as owner, to sail under false colors, if such was the purpose of parties to trust, same is void as to plaintiffs, and no trust at all, and the seventh issue should be answered, Yes.'

"Seventh. That the court erred in charging the jury as follows: 'After recapitulating the several facts on which the plaintiffs relied, and which the defendants did not contradict, and lettered respectively from "a" to "h," both inclusive, and after recapitulating the evidential facts which the defendant J. E. Gilmer claims to have proven, the question is whether these facts are true, and then whether from the whole evidence you infer the existence or non-existence of the fact in issue, remembering that on the whole case the burden of the proof is on the plaintiffs.' "

Dillard & King, Ricaud & Weill and D. L. Russell for plaintiffs.

Watson & Buxton and Jones & Patterson and Glenn & Manly for defendants.

AVERY, J. The exceptions to the judge's remarks to the jury are without merit. Almost the same expressions were used in *Osborne v. Wilkes,* 108 N. C., 651, and were found unobjectionable on appeal, citing *Hannon v. Grizzard,* 89 N. C., 115. Nor was there error in con-

tinuing the term to conclude the trial or to receive the verdict. This is authorized as to felonies by The Code, sec. 1229 (*S. v. Adair,* 66 N. C., 298) and was extended to all other cases by chapter 226, Laws 1893, except that it would not apply to civil cases begun after
(701) Thursday of the last week of the term. The trial of this action began on Wednesday. At common law, when the jury in a capital case did not agree during the term, they were carried to the next court where of course the business went on during their deliberations. 2 Hale P. C., 297; *S. v. Bullock,* 63 N. C., 570. Certainly it could in no wise prejudice the parties that while the jury were out considering their verdict, the judge opened and conducted another term at the same place. It could in no wise have benefited the parties to have had the judge idle, nor could it be expected that the public business should thus, without cause, have been suspended. The court erred in holding that the evidence offered to establish a trust in favor of the sons was sufficient to be submitted to the jury. The relation of debtor and creditor had existed between J. E. Gilmer and wife many years prior to the purchase by him of the land in 1890 for the firm of which he was the senior member. He bought the land with the firm's money and constructed the building thereon also with funds of the firm. He subsequently, in 1891, bought his partner out and took title to himself without any directions or instructions from his wife, who was not consulted. In 1892 he executed more notes to his wife and entered credits on those then existing. At the death of his wife these notes became the property of J. E. Gilmer. Code, sec. 1479. If there was any agreement between him and his wife that he, being indebted to her, was to buy a lot and build a factory, charging the cost on her notes, the property to be held in trust for his sons, it is the evidence of himself and partner that in fact the lot was bought and the factory built with the funds of the firm. The verbal agreement with his wife was executory, and the notes becoming the property of J. E. Gilmer by his wife's death, the deed thereafter to his sons was without consideration, and void as to creditors. The fourth prayer of in-
(702) structions asked by the plaintiff should therefore have been given, and the instruction given in lieu thereof was erroneous, being based upon a hypothetical state of facts not appearing in the evidence.

But if the testimony offered for the plaintiffs was believed by the jury, there were a number of badges of fraud which can scarcely be accurately described except by so denominating them, though they are sometimes designated as circumstances calculated to excite suspicion and challenge scrutiny in order to ascertain whether a conveyance was executed with fraudulent intent. Among the evidences of fraud relied

upon by the plaintiffs were the following: 1. That Gilmer owed a debt when he sold the goods; 2. That he sold on credit of 6, 12, 18 and 24 months; 3. That the purchaser was not worth over $500; 4. The purchaser gave his note without security; 5. Gilmer was embarrassed with debt; 6. Though not then insolvent, his embarrassment soon after resulted in insolvency; 7. The sale was to a son.

In *Beasley v. Bray,* 98 N. C., 266, the Court held that an absolute conveyance by an insolvent debtor to an insolvent vendee, who was not fixed with a fraudulent intent, even upon a long credit and without security, was merely evidence of fraud to be considered by the jury. It will be observed that in Beasley's case it was admitted that the debtor was not only embarrassed with debt but was actually insolvent. If in this case it had been admitted that the elder Gilmer was insolvent and conveyed to a son for an insufficient consideration, such a combination of circumstances would have raised a presumption of fraud. "But father and son may deal with each other in good faith just as others not so related may do." *Banking Co. v. Whitaker,* 110 N. C., 345.

If the conveyance to the son by an embarrassed father had been made, when only mere relatives were present, and explana- (703) tion had been withheld, these circumstances would have raised a presumption which could be rebutted in no other way than by a full disclosure. *Helms v. Green,* 105 N. C., 251. But in *Bank v. Bridgers,* 114 N. C., 383, the Court said: "The existence of near relationship between the parties to a suspicious transaction often constitutes additional evidence of fraud for the jury," but that it was error to instruct the jury that the existence of such relationship was *prima facie* evidence of fraud.

Had the conveyance been made by an insolvent husband to his wife, the burden would have rested upon those who claimed under it to rebut the presumption of fraud raised by those circumstances. *Peeler v. Peeler,* 109 N. C., 628; *Brown v. Mitchell,* 102 N. C., 347.

This Court has recently held that mere inadequacy of price, however gross and whether considered alone or in connection with other suspicious badges, was only a circumstance tending to prove fraud. *Berry v. Hall,* 105 N. C., 154; *Orrender v. Chaffin,* 109 N. C., 422. In *Berry v. Hall, supra,* following *Ferrell v. Broadway,* 95 N. C., 551, the Court held that a trial judge "was not at liberty to say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it." In the same opinion, referring to the reasons assigned by the judges when acting as chancellors and passing upon the facts, the Court said: "The reasons assigned in these opinions for giving more or less weight to any testimony were not intended to be,

and cannot, without invading the province of the jury by violating The Code, section 413, be adopted as rules to be laid down in the charge of the court for their guidance."

In *Stoneberger v. Jeffreys, ante,* 78, the Court has held that (704) "the burden of proof is sometimes shifted in the progress of the trial, but it is only by the introduction of testimony which the law has declared to be *prima facie* proof of fraud, but which may be rebutted by evidence deemed by the jury sufficient to explain such suspicious circumstances, and thereby overcome the artificial weight which the law has attached to them, as evidence. *McLeod v. Bullard,* 84 N. C., 515; *Lee v. Pearce,* 68 N. C., 77." It thus appears that in recent cases every single circumstance admitted in this case has been declared only a badge of fraud of itself, or where it has been associated with others of the number, the same conclusion has been reached. The application of the abstract proposition (in *Brown v. Mitchell,* 102 N. C., 347), which it is proposed to so apply as to make every new issue of fraud that may arise a law unto itself, was made with reference to the rule that where the husband transfers property to his wife in payment of an alleged debt, the rule is different from the case of father and son, and that circumstance, in combination with his insolvency, shifts the burden upon the wife to show a *bona fide* indebtedness from the husband.

But I can imagine nothing that could introduce greater uncertainty into the law than the proposition that some indefinite combinations of the hundreds of circumstances which are deemed sufficient to throw suspicion upon a business transaction, will hereafter be held to raise a presumption of fraud. In the case at bar, we have eight suspicious circumstances grouped together, and it is proposed to declare them sufficient, as a rule of evidence, to amount to *prima facie* proof of fraud. Suppose we take these eight badges of fraud and a dozen additional ones, making twenty in all, that have never been heretofore held to be more than suspicious circumstances challenging scrutiny by the jury, and see how many hundreds of different combinations (705) may be made and presented to this Court, and we will be able to form some faint conception of the sea of uncertainty upon which we would embark, were we to make such a vague application of the abstract proposition referred to.

Upon the testimony tending to prove all these suspicious circumstances, however, the duty devolved upon the court, in view of the request made by counsel, to speak of them, not as evidential facts bearing upon the issue, but as badges of fraud to be considered by the jury in passing upon the issue involving the fraud. The prayers in which the plaintiffs asked the court to tell the jury that certain

evidence, if believed, raised a presumption of a fraudulent intent in the execution of the deed were properly refused by the court, but they demanded, in lieu of what was asked, some more specific instruction to the jury in order to enable them to comprehend the bearing of the circumstances proved, upon the findings. Parties who seek to set aside deeds are required not only to allege the existence of facts which constitute fraud, but to prove what they allege. Where a plaintiff charges the fraud according to the prescribed practice, and an issue, involving it, is framed and submitted, he has a right to insist that circumstances, which his testimony tends to prove and which the law denominates badges of fraud, shall be so called, and that scrutiny upon the part of the jury shall be invited by bestowing upon them their proper designation. Whenever a charge is excepted to, and it appears to the Court that it was calculated to mislead instead of enlightening the jury, a new trial should be granted. It would have necessitated the presence of a jury of lawyers in the box in order to comprehend fully what was the fact in issue, and the evidential facts tending to support the affirmative or the negative view of the proposition, because the language was technical. Such philosophical discussions (706) are addressed, in opinions of courts, to the bar, but instructions to juries are intended, in contemplation of law, to enable men of fair intelligence but without any technical learning to apply the law to the evidence. The portion of the instruction which we think amenable to the charge that it was not responsive to the requests and was calculated to mislead the jury, is as follows: "In a case of circumstantial evidence there are two inquiries for the jury, First, the evidential facts, that is, the facts relevant to the issue—are they true? Second, do you infer from such facts that the fact in issue exists? For example, in regard to the 6th issue, the fact in issue (alleged by plaintiffs and denied by defendants) is, that the goods were sold on 1 July, 1893, by J. E. Gilmer to John L. Gilmer, with intent to defeat or to hinder, or to delay the creditors of J. E. Gilmer or some one or more of them; or, putting this in other words, that his purpose or some part of his purpose in making this sale was to promote his own ease and favor, at the expense of, or to the prejudice of the rights of his creditors. The evidential facts on which the plaintiffs rely and which the defendants do not contradict, are the following." Then follows the judge's enumeration of the circumstances already mentioned, which counsel had insisted either established or raised a presumption of the fraud, but which the court nowhere calls by the comprehensible designation of badges of fraud, or circumstances tending to show fraud, or that call for scrutiny in the consideration of their findings in re-

sponse to the particular issue. When the plaintiffs took the burden, which the law imposes, of proving the fraud alleged, the court, having refused the instruction that the testimony in any aspect raised a presumption of fraud, should have told the jury, in language calculated to be understood by laymen, the nature and the bearing of the evidence relied upon by the plaintiffs to establish the
(707) affirmative of the issue.

It was error in lieu thereof to recite these admitted facts and the explanatory evidence offered by the defendants and merely instruct the jury, "The question is whether these facts are true and then whether from the whole evidence you infer the existence or non-existence of the fact in issue, remembering that on the whole case the burden of proof is on the plaintiffs." Nowhere in the charge is there an instruction that any of the facts proven or admitted was a badge of fraud and that evidence explanatory of such badge "must be scrutinized with care."

Laws 1893, ch. 453, does not prohibit *bona fide* mortgages to secure one or more preëxisting debts, but when as here, a mortgage is made of the entirety of a large estate for a preëxisting debt, omitting only an insignificant remnant of property, such mortgage is in effect an assignment for the benefit of the creditors secured therein. To hold otherwise would be in effect to nullify the act. The court erred therefore, after the grantor's admission of the above fact, in refusing to grant the plaintiffs' motion to declare the deed of trust void as inconsistent with the Act of 1893 regulating assignments and deeds of trust, and void on the admitted fact that the grantor had not complied with the said act.

Chapter 453, Laws 1893, is not a mere recommendation from the Legislature to insolvents as to the form of assignments and proceedings thereunder, but in its very nature the act is imperative. If not complied with by the assignor by filing schedule as required, the assignment is invalid. The fact that the failure to observe any of its provisions makes the assignee indictable, of itself indicates that the requirements of the act are mandatory. The assignor is not indictable.

The assignment is simply invalid if he did not follow the act.
(708) No authority is necessary for this proposition, but there are precedents to support it. *Julian v. Rathbone,* 39 N. Y., 369 (where the statute is almost identical with ours); *Jeffrey v. McGehee,* 107 U. S., 361; *French v. Edwards,* 18 Wall., 506; Southerland Stat. Const., sec. 459; *Harkrady v. Leiby,* 4 Ohio St., 602; *Fetcheimer v. Baum,* 43 Fed., 719. For these errors there must be a new trial.

New Trial.

Cited: Frank v. Heiner, 117 N. C., 83; *Bank v. Gilmer, ib.,* 420; *Glanton v. Jacobs, ib.,* 427; *Wolf v. Arthur,* 118 N. C., 899; *Cowan v. Phillips,* 119 N. C., 30; *Goldberg v. Cohen, ib.,* 67; *Redmond v. Chandley, ib.,* 579, 580; *Cooper v. McKinnon,* 122 N. C., 449; *Brown v. Nimocks,* 124 N. C., 419; *Howard v. Turner,* 125 N. C., 110; *Austin v. Staten,* 126 N. C., 789; *Taylor v. Lauer,* 127 N. C., 161; *Martin v. Buffaloe,* 128 N. C., 308; *Sutton v. Bessent,* 133 N. C., 563; *Chaffin v. Mfg. Co.,* 136 N. C., 367; *Odom v. Clark,* 146 N. C., 552; *Powell v. Lumber Co.,* 153 N. C., 57; *Wooten v. Taylor,* 159 N. C., 609; *In re Shuford,* 164 N. C., 135; *S. v. Burton,* 172 N. C., 944; *Elliott v. McMillan,* 180 N. C., 233.

J. O. WILCOX v. THOMAS ARNOLD ET AL.

Action on Note—Note of Married Woman—Validity—Ratification After Death of Husband.

1. An action cannot be maintained on a note made by a married woman which does not purport to charge her separate estate nor to be for her benefit.
2. The bare promise of a widow to pay a note executed by her during her coverture, and therefore void, is not binding on her.

CLARK, J., dissents, *arguendo.*

ACTION tried upon appeal from a justice of the peace at Fall Term, 1894, of ASHE, before *W. R. Allen, J.,* a jury being waived by both parties.

The plaintiff instituted his action before a justice of the peace, and declares on a note for about the sum of $35, which he alleged the defendant Nancy Arnold had executed. The defendant denied the execution of the note and relied upon the plea of coverture.

J. O. Wilcox, the plaintiff, was examined in his own behalf, and testified as follows: The note sued on is about nine years old. The names of Joseph Tyre and Nancy Tyre by Joseph Tyre are signed to it. Both names were signed by Joseph Tyre. Nancy Tyre, now the defendant Nancy Arnold, was then the wife of Joseph (709) Tyre. Some time before the note was given the Osbornes had instituted a suit against Nancy Tyre to recover a tract of land belonging to her, which was decided in her favor. About the time it was concluded Joseph Tyre, the husband, came to me and said he could not pay the lawyers, and asked me to lend him some money, and I then

gave to him $20 or $25 in money and let him have some flour, the money and the flour making the amount of the note. Mrs. Nancy Tyre was not present, and Joseph Tyre did not put the money in his pocket but carried it to Major Neal, who was the attorney of Mrs. Tyre in her lawsuit with the Osbornes. During the lifetime of Joseph Tyre I was at his house and talked with her about the debt due me, and she was ashamed that she had not paid the money back. After the death of Joseph Tyre I saw the defendant Nancy and asked her if she was prepared to pay that note, and she pointed to three calves belonging to her, and said, "You can take them and credit them on the note," or she would keep and sell them and pay me what they were sold for. The calves were worth $5 or $6 each. After this G. E. Goodman did some collecting for me and went to see the defendant about paying this note.

G. E. Goodman testified for the plaintiff as follows: The plaintiff, after the death of Joseph Tyre, gave me some accounts to collect against various parties, and among others one against the defendant Nancy Arnold, then Nancy Tyre, for about $7. I went to see her and she let me have a calf in payment of the account. She then asked me if I had a note against her in favor of the plaintiff, and I told her I did not. I then went to see the plaintiff and he gave me the note in this action to collect. I then went to see her again and presented the note. She said she could not pay the note, that she had
(710) nothing to pay with. She did not seem to think all the note was due. She said she would pay this note and all her debts when she could.

It was admitted that at the time the note was given the defendant Nancy Arnold was the wife of Joseph Tyre; that at the time of the conversation spoken of by the witnesses, Wilcox and Goodman, she was a widow, and that at the commencement of this action, and is now, a married woman. The defendant denied the truth of the statement made by the plaintiff and the witness Goodman, and denied that she authorized the making of the note, but the court being of opinion against the right of the plaintiff to recover in this action, accepting the evidence offered by him to be true, so held, and the plaintiff excepted and submitted to judgment of nonsuit, and appealed.

Geo. W. Bower and R. A. Doughton for plaintiff.
No counsel contra.

MONTGOMERY, J. The defendant Nancy Arnold, while she was the wife of Joseph Tyre, executed, together with him, the note upon which suit was brought before a justice of the peace and which con-

stitutes the basis of this action. It purports neither to charge her separate estate nor to be for her benefit; and if it had, the court of a justice of the peace would have had no jurisdiction in the matter. *Dougherty v. Sprinkle,* 88 N. C., 300. The note as an executory contract had no validity. In *Farthing v. Shields,* 106 N. C., p. 289, this Court said, *Justice Shepherd* delivering the opinion, "It is well settled by the uniform decisions of this Court that, except in the cases mentioned in The Code, sections 1828, 1831, 1832, 1836, a *feme covert* is, at law, incapable of making any executory contract whatever. Accordingly it has been determined that The Code, section (711) 1826, requiring the written consent of the husband in order to affect her real or personal estate, did not confer upon her (even when such written consent was given, or when the liability was for her personal expenses, etc.) the power to make a legal contract. Its object was to require the written consent of her husband, in order to charge in equity her statutory separate estate on the same principle which requires the consent of the trustee when the separate estate is created by deed of settlement. *Pippen v. Wesson,* 74 N. C., 437; *Flaum v. Wallace,* 103 N. C., 296."

Vick v. Pope, 81 N. C., 22, and *Neville v. Pope,* 95 N. C., 346, have no bearing on this case. In both of them the *femes covert* made no defence to the actions and allowed judgment to go against them by default. They became bound by the judgments.

The attempt of the plaintiff to hold the defendant liable on a new promise cannot be successful. His testimony and that of Goodman on this point was not sufficient to go to the jury; and if the promise had been proved it would be *nudum pactum* for the reason that there was no present consideration for the promise, and the consideration of the note was not for the benefit of her sole and separate estate.

There is no error in the ruling of the court below and the judgment is

Affirmed.

CLARK, J., dissenting: 1. No statute requires the wife to "charge" her property. 2. There is no statute depriving a justice of the peace of jurisdiction on any contract where the principal sum demanded does not exceed $200. 3. Equity as a separate jurisdiction is abolished by the Constitution.

Cited: B. & L. Asso. v. Black, 119 N. C., 326; *Sanderlin v. Sanderlin,* 122 N. C., 3; *Harvey v. Johnson,* 133 N. C., 360; *Smith v. Bruton,* 137 N. C., 89; *Rutherford v. Ray,* 147 N. C., 260.

(712)

M. L. SLEDGE v. J. S. ELLIOTT ET AL.

Action to Recover Land—Sale of Land for Assets—Order of Sale—Collateral Attack—Truth of Recitals in Decree and Deed—Signing Not Necessary to Validity of Decree.

1. Where, in 1865, license was granted to administrators to sell all the land of their intestate described in the petition to create assets for the payment of debts, under the provisions of sec. 44, ch. 46, Revised Code, and the terms of sale were set out in the order and at a subsequent term of the court, in a decree confirming the sale of certain of the lands made in pursuance of the original order, the administrators were granted "leave to dispose of" another tract which had been described in the petition and covered by the original order of sale: *Held*, that the last order related back to the original order for the terms of sale, and a sale made thereunder was valid.

2. Such subsequent order which authorized the sale, "if, in the settlement of the estate, it should be found necessary," is not void as being a conditional judgment or as attempting to confer judicial powers upon the administrators.

3. The statute authorizing the sale of the lands of a decedent is in derogation of the common law and hence the courts will not deny to an administrator the discretion of selling less land than is ordered to be sold if necessity should not arise for such sale; and, conversely, the administrator will be allowed to continue to sell lands embraced in the license so long as the necessity to raise assets exists.

4. Where a decree of court rendered in 1865, ordering the sale of land, recited that service had been made on all the parties to the action, some of whom were minors, the recitals will be presumed true in a collateral attack; and where it appears, in addition, that the guardian *ad litem* of the minors was clerk of the court and that the rights of third parties have intervened, the sale under such decree would not be disturbed, even in a direct proceeding, unless it should clearly appear that the infants had been injured or defrauded.

5. After the lapse of thirty years the recital in a deed that the sale under which it was made was authorized by a decree of court entered in a cause of which the records of the petition and order, but not of the decree of confirmation, are existent, will be presumed to be true.

6. It was not essential to the validity of a decree in a proceeding to sell land for assets, under the Revised Code, that it should be signed.

(713)

ACTION to recover possession of a lot in the town of Marion, heard before *Shuford, J.*, at Spring Term, 1894, of MCDOWELL. From a judgment for the plaintiff the defendants appealed. The facts appear in the opinion of *Associate Justice Avery.*

Shepherd & Busbee, Battle & Mordecai and English & Morris for plaintiff.

E. J. Justice for defendants.

AVERY, J. The right of the plaintiff to recover in the action for title and possession of a lot was made to depend upon the question whether a record of an administrator's petition for sale for assets with the decree and sale under which the plaintiffs claimed title were open to attack and were shown to be invalid and subject to collateral impeachment by the heirs-at-law of the decedent.

The petition was filed in the Court of Pleas and Quarter Sessions of McDowell County, at the Fall Term, 1864, in accordance with the provisions of Revised Code, ch. 46, sec. 47, *et seq.*, and not under the Act of 1868 (Bat. Rev., ch. 45, sec. 61, *et seq.*). The form of the petition is verbatim in all material respects that laid down in Eaton's Forms, p. 529, and universally used by the profession at that time.

At the Spring Term, 1865, of the court, there was an order for the sale of several other tracts of land and the terms of sale were prescribed therein. Under a proper construction of this order entered at the ensuing Fall Term in connection with that referred to above, it is manifest that the lot in controversy was to be sold, (714) if at all, upon the terms prescribed in the former order for the sale of the real estate generally. It would be sticking in the bark to hold otherwise, when in fact the terms adopted were precisely those prescribed as to the sale of the other property and no possible jeopardy to the rights of the defendants could have resulted therefrom.

The statute (Revised Code, ch. 46, sec. 44) from which the court derived its authority, permitted the granting of a "license" to sell the real estate, and accordingly the first order also declared that the administrators of Elliott should have "license"—not that they should be required—to sell certain other property. The subsequent order that they should have leave to dispose of the town lot described in the petition, if in the settlement of the estate it should be found sufficient, was not in our opinion what is termed a conditional judgment or a judgment void as an attempt to vest in the administrators judicial power. The court unquestionably granted leave to sell the town lot just as it had given its sanction in advance to the sale of the other land for assets. If after obtaining the license, by reason of finding some personal assets, of which they previously had no knowledge, or because of some claim against the estate supposed to be just proving invalid, the approximate estimate of indebtedness had proved incorrect, it will not be contended that the administrators would not have been authorized to desist in their discretion from selling before disposing of even all the tracts described in the first order of the court. They

were empowered, not compelled to sell, and the proviso in the second order gave them no new authority, but was merely in affirmance not only of what was their discretionary power, but of their duty as ministerial officers of the court, acting for the best interest (715) of the heirs as well as the creditors. The statute authorizing the sale of land for assets is in derogation of common law, and the courts would not be inclined to deny to the administrators the right to desist from selling when they had manifestly attained the object for which the law had clothed them with power to sell. The converse of that proposition that they could continue to sell such lands as were embraced by the license, as long as the necessity apparently existed for raising additional assets, must be likewise founded upon reason and principle. *Adams v. Howard,* 110 N. C., 15. If so, why should the validity of an order be questioned when it was merely in affirmance of a right which they already had? We think therefore that the sale of the lot in controversy was authorized by the court.

There were four terms of the court held every year, though jury trials may have been had at only two of them. The order granting the license under which the lot was sold was not made till the Spring Term, 1865, the second term after the filing of the petition at the Fall Term, 1864, and it recites that subpœnas had been served upon all of the parties in accordance with the equity practice, either actually or by publication. Shall a purchaser, who buys under such a decree, be subjected to the hazard of losing, after thirty years, a tract of land for which he has paid because either by accident or design a summons or an order has been lost out of the record? In *Hare v. Holloman,* 94 N. C., 14, this Court held that both under the earlier practice of bringing in the heirs-at-law by *scire facias* and that prevalent before The Code was adopted, of filing a petition in the county courts in order to subject real estate for assets, the proof of service of notice or subpœna upon infant heirs was not essential to the validity of a decree of sale, and that such decrees could not be impeached (716) for want of such service unless it appeared that no real defence was made for them and that they had suffered thereby. It appears from the record that A. M. Finley, clerk of the court, was appointed guardian *ad litem* for the infants. In *Sumner v. Sessoms,* 94 N. C., 371, *Smith, C. J.,* for the Court, said: "A guardian *ad litem* was appointed for the infant defendant, whose acceptance and presence in court must be assumed in the absence of any indication in the record to the contrary from the fact that the court took jurisdiction of the cause and rendered judgment. It is true that the record produced does not show that notice was served on the infant or her guardian, nor does the contrary appear in the record, which, so far as we

have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand and cannot be treated as a nullity until so declared in some impeaching proceeding." The effect of the recitals in a decree, such as that in question, that service has been made upon all of the parties, is the same, whether the proceeding was one under the provisions of The Code or the Revised Code. In either case, a title acquired under the decree cannot be invalidated by a collateral attack upon it; and an additional reason for upholding the decree is that the clerk of the court, who made out the record and was always present, was the guardian *ad litem*. *Fry v. Currie,* 91 N. C., 436; *Williamson v. Hartman,* 92 N. C., 234; *Spillman v. Williams,* 91 N. C., 483; *Williams v. Woodhouse,* 3 Dev., 257. In our case, the rights of third parties having intervened, the courts would not set aside the judgment even in a direct proceeding unless it should clearly appear that the infant had been injured or defrauded. It is of the utmost importance that purchases in good faith and for value should be upheld and that the confidence of the public in the stability of judicial decrees should be maintained. *Syme* (717) *v. Trice,* 96 N. C., 243. Purchasers at judicial sales are bound only to see that the court had jurisdiction and that it ordered the sale. *Fowler v. Poor,* 93 N. C., 466. The recital in the decree that service had been made was sufficient to protect him in this case, both as to the claims of adults and infants. After the expiration of thirty years, the recital in the deed, that the sale was made in pursuance of a decree of the court entered in this cause, must be presumed to be true, notwithstanding the fact that the record is not full. *England v. Garner,* 90 N. C., 197. In any aspect of the case the final decree was entered and the proceeding cannot be impeached for irregularity, *England v. Garner,* 84 N. C., 212, and in the face of the recitals in the decree and deed, the Court would only upon proof that the infants had been wronged or defrauded, allow the decree and sale to be disturbed, even in an action brought to vacate it. After it has remained unimpeached for nearly 30 years, the burden of overcoming a presumption of fairness and regularity in the original record rests upon any one who seeks to disturb a title founded on it.

In the exercise of the discretionary power of this Court we deem it best to refuse the motion based upon newly discovered testimony. *Brown v. Mitchell,* 102 N. C., 347.

It is needless to cite authority to sustain the proposition that the decree was sufficient in form and that it was not essential to its validity that it should have been signed.

For the reasons given the judgment must be

Affirmed.

Cited: Clark v. Riddle, 118 N. C., 692; *Nathan v. R. R., ib.,* 1070; *Morris v. House,* 125 N. C., 557, 562; *Cochran v. Improvement Co.,* 127 N. C., 394; *Chrisco v. Yow,* 132 N. C., 436; *Rackley v. Roberts,* 147 N. C., 204; *Harris v. Bennett,* 160 N. C., 345.

(718)

J. R. CRAWFORD v. S. T. PEARSON ET AL.

Injunction—Right to Damages—Practice.

1. Under chapter 251, Acts of 1893, it is no longer necessary to allege want of probable cause in proceedings to recover damages against plaintiff in attachment suits.

2. It is not necessary under the provisions of section 341 of The Code that separate action shall be brought on an injunction bond for damages sustained, but that such damages shall be ascertained by proceedings in the same action.

3. That the principal in an undertaking, given in an injunction suit, was sued without making the sureties parties makes no difference.

4. Before a motion to assess damages sustained by the wrongful suing out of an injunction can be allowed, there must be a final determination of the action.

ACTION against S. T. Pearson, for damages for wrongfully suing out an injunction, heard before *Allen, J.,* at Fall Term, 1894, of McDOWELL.

The defendant in this action had brought an action against the plaintiff for damages for wrongfully cutting logs on land alleged to belong to him, the plaintiff in said action, and obtained an injunction forbidding the defendant in that action (plaintiff in this) for cutting or disposing of the logs. There was a judgment in that action in favor of the defendant therein (the plaintiff here) who thereupon brought this separate action for $1,500 damages for deterioration of the logs, etc., during the continuance of said injunction.

The defendant herein entered a demurrer as follows:

"1. The defendant, by his counsel, comes and demurs to the complaint herein for that the complaint does not state facts sufficient to constitute a cause of action in that it does not allege that the injunc-
(719) tion sued out by defendant against the plaintiff was obtained without probable cause.

"2. That it appears from the complaint that injunction was granted

in a certain action decided in the county of Rutherford between the plaintiff in this action and this defendant, the damages sustained by the wrongful suing out of the bond can only be recovered in the action where the injunction bond was filed and not by a new action."

The demurrer was overruled, and the defendant appealed.

E. J. Justice for plaintiff.
J. B. Batchelor for defendants.

MONTGOMERY, J. Under chapter 251, Acts of 1893, it is no longer necessary to allege want of probable cause in proceedings to recover damages against plaintiff in attachment suits.

The second ground of demurrer ought to have been sustained. The Code, section 341, does not contemplate that a separate action shall be brought on an injunction bond, but that the damages sustained by reason of the injunction shall be ascertained by proceedings in the same action and in a mode most expeditious and least expensive to the parties, consistent with the due administration of justice and with orderly proceedings. *Gold Co. v. Ore Co.,* 79 N. C., 48.

That the defendant was sued alone in this action, and not his sureties on the injunction bond with him, makes no difference. The undertaking does not impose any new liability on the defendant, but simply provides an additional security, and therefore the damage which the plaintiff suffered, if any, should have been assessed in the same manner as if the sureties on the undertaking had been moved against, i.e., in the same action in which the injunction was issued.

The motion made by the plaintiff in the action in which (720) the injunction was issued, to have his damages assessed, was premature. Before that motion could have been allowed, there must have been a final determination of the action. *Thompson v. McNair,* 64 N. C., 448. There was error in the ruling of the court below. The demurrer ought to have been sustained.

Error.

AVERY, J., did not sit.

Cited: R. R. v. Mining Co., 117 N. C., 193; *Timber Co. v. Rountree,* 122 N. C., 51; *McCall v. Webb,* 135 N. C., 365; *Davis v. Fiber Co.,* 175 N. C., 28; *Shute v. Shute,* 180 N. C., 387.

(721)

SAMANTHA RUSSELL v. TOWN OF MONROE.

Action for Damages—Municipal Liability—Defective Sidewalks—Negligence—Contributory Negligence.

1. The law imposes upon the municipal authorities of a town the imperative duty of keeping in proper repair the streets and bridges of the town.
2. It was negligence in town authorities to leave open a ditch three feet deep at the point where it crossed a part of the sidewalk for sufficient space to admit the body of a person falling into it.
3. Previous knowledge, on the part of the person injured, of the existence of a defect in sidewalks does not *per se* establish negligence on his part.
4. A person walking at night on a town sidewalk is only required to use ordinary care to avoid defective places therein and is not required to remember the location of the defects which he might have seen during the day and is not required to use more than ordinary care to avoid injury therefrom.
5. A person walking on a sidewalk has the right to expect and to act on the assumption that the town authorities have properly discharged their duties by keeping the street in repair—the only exception to the rule being the reasonable requirement that pedestrians must take notice of such structures as the necessities of commerce or the convenient occupation of dwelling houses may require.
6. In the trial of an action against a town for personal injuries caused by defects in a sidewalk, the burden of proving contributory negligence is on the defendant.

ACTION, for damages, commenced on 4 August, 1893, and tried before *Winston, J.*, and a jury, at August Term, 1894, of UNION.

(726)

McRae & Day for plaintiff.
F. I. Osborne and Battle & Mordecai for defendant.

AVERY, J. The law imposes upon the mayor and commissioners of incorporated towns the imperative duty of "keeping in proper repair the streets and bridges of the town" (The Code, sec. 3803) and for a failure to fulfill its requirements they may subject themselves to criminal liability. *S. v. Commissioners,* 15 N. C., 345. The testimony fully warranted the jury in finding that the governing authorities of the town were negligent in leaving open a ditch three feet deep at the point where it crossed a part of the sidewalk, for sufficient space

(two and a half by four feet) to admit the body of a person (727) walking along such footway. *Bunch v. Edenton,* 90 N. C., 431. But the defendant did not appeal and response to the first issue therefore stands unchallenged. It has been held in many of the leading courts of this country that the previous knowledge of the injured person of the existence of a defect in a sidewalk does not *per se* establish negligence on his part. Morrill on City Neg., p. 139, and authorities cited; *Diviney v. Elmira,* 51 N. Y., 512; *Darling v. Mayor,* 18 Hun., 340; *Diwire v. Basley,* 131 Mass., 169; *Gilbert v. Boston,* 139 Mass., 313.

If the plaintiff was exercising reasonable or ordinary care of her own safety when she fell into the ditch she had a right to demand that the jury respond in the negative to the second issue. Jones Neg. Mun. Corp., sec. 221; *Bunch v. Edenton, supra.* The evidence is that the plaintiff had never actually noticed "the hole before" though she admits that she might possibly have seen it if she had been paying strict attention to her pathway when she fell. She had a right to expect and to act on the assumption that the authorities of the town had properly discharged their duty by keeping the streets in good repair. *Bunch v. Edenton, supra,* at page 435; Morrill on City Negligence, pp. 136, 137, 139; *Indianapolis v. Gaston,* 58 Ind., 224. Perhaps the only exception to this rule is the reasonable requirement that persons must take notice of such structures as the necessities of commerce or the convenient occupation of dwelling houses, such as exterior basement stairs. *Bueschung v. St. Louis,* etc., 6 Mo., Ap., 85. *Walker v. Reidsville,* 96 N. C., 382, is distinguishable from that at bar because there the pit into which the plaintiff fell was some distance from the sidewalk (56 feet) though it was excavated by the town and upon property owned by it, and the plaintiff had actual notice of its (728) existence.

The burden was on the defendant under our statute to prove contributory negligence, and in order to thus avoid the consequences of its own carelessness it was necessary to show that the plaintiff failed to exercise reasonable or ordinary care for her own safety. If she did not put herself in fault by careless conduct, she had a right to demand that the jury be instructed to answer the second issue in the negative. Jones, *supra,* sec. 221. To constitute contributory negligence (says Beach in his work on that subject, section 8) there must be a want of ordinary care on the part of the plaintiff and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the question. "Did the plaintiff exercise ordinary care under the circumstances? Was there a proximate connection between

his act or omission and the hurt he complains of?" We can conceive of no reason and we know no authority for holding the plaintiff to a higher degree of care than that involved in what is known as the rule of the prudent man. What is reasonable care is to be determined in some, probably most of jurisdictions, largely by the jury, but with us, when the facts are undisputed, by the court. It is the universal rule however that there is no contributory negligence, where the plaintiff acts with ordinary prudence, in view of the surrounding circumstances suggestive of danger. *Morrill, supra,* pp. 132, 140; *Mason v. R. R.,* 111 N. C., 482; *Emry v. R. R.,* 109 N. C., 589; *McAdoo v. R. R.,* 105 N. C., 140.

As a specific act or omission may be declared negligence at a particular period or under given circumstances, which had been held with other surroundings not culpable at all, so it will be found that (729) the question whether a plaintiff has contributed by his own carelessness to bring about an injury complained of, must be answered after a comprehensive consideration of the conditions confronting him at the time. It was unquestionably error to tell the jury that the plaintiff was required, in order to rid herself of culpability, to exercise under any circumstances more than ordinary care. While the rule of the prudent man is always the test of carelessness on the part of a plaintiff, what is reasonable care does not depend alone upon what a person does or omits to do, but also upon his environments at the moment, when it is contended that his act or omission enhanced his danger. While the rule that a person in order to avoid culpability must exercise such care as a man of ordinary prudence would under similar circumstances use, is always the criterion for testing contributory negligence, as well as negligence, the conditions at the moment may render the same act, at one time, characteristic of a cautious, at another, of a careless man.

We do not understand the rule to be that where a defendant has by carelessness left the plaintiff exposed to peril as a natural consequence of its conduct, the failure of the plaintiff to exercise unusual caution to avoid the ensuing danger will be deemed the proximate cause of an injury that would not have been sustained had the defendant in the first instance been faultless. The plaintiff was not bound to exercise more than ordinary care, because she might possibly, before or at the time of sustaining the injury, have thereby discovered that the defendant had carelessly left persons, passing along the sidewalk at the particular place, exposed to danger. A defendant cannot take advantage of his own wrong to hold others to a more rigid rule of watchfulness. The plaintiff was warranted in acting on the assumption that the authorities of the town had done their duty. She was

not required to see and treasure up in her memory the loca- (730) tion of every defective place in the sidewalk which she had or might have seen during the day time, nor was she expected to see all such places. She was not required to keep a sharp or constant lookout for what could not be reasonably expected, assuming that the authorities of a town had used ordinary care in the discharge of their duty. Locomotive engineers are required to keep a constant lookout for persons, animals and obstructions on railway tracks in front of trains, because they have reasonable ground to apprehend that some such danger may confront them at any moment. A person is not negligent in failing to provide against what could not have been reasonably expected, much less against a danger that he is warranted in assuming does not exist. *Blue v. R. R., post,* 955. Had it appeared that the plaintiff actually saw the hole, or that she was warned against it in time to have avoided falling into it, the case would have presented a different aspect. Having no actual knowledge of its existence before she stepped into it, she was not required to exercise the same degree of diligence that an engineer in charge of a train must use, because he has reason to apprehend and provide against danger to his passengers from obstructions, or to men or animals on the track at any moment, while she was justified in acting upon the belief that the authorities had done their duty by keeping the sidewalk in safe condition.

There was error in instructing the jury that the plaintiff was expected to use more than ordinary care. The court should have told them that she was entitled to recovery if the first issue was found in her favor, unless the defendant had shown by preponderance of the testimony that she did not exercise reasonable or ordinary care.

We think that the case, as the facts were developed on the trial, was governed by the principle laid down in *Bunch v.* (731) *Edenton, supra,* and that it was not shown that the injury was due to her own negligence. There was error and the plaintiff is entitled to a

New Trial.

Cited: Tankard v. R. R., 117 N. C., 561; *Thompson v. Winston,* 118 N. C., 666; *Willis v. New Bern, ib.,* 136; *Little v. R. R., ib.,* 1078; *Tillett v. R. R., ib.,* 1045; *Sheldon v. Asheville,* 119 N. C., 609; *McCracken v. Smathers, ib.,* 619; *Dillon v. Raleigh,* 124 N. C., 189; *Jones v. Greensboro, ib.,* 312; *Neal v. Marion,* 126 N. C., 416; *Cresler v. Asheville,* 134 N. C., 311; *Hester v. Traction Co.,* 138 N. C., 291; *Fitzgerald v. Concord,* 140 N. C., 112; *Kinsey v. Kinston,* 145 N. C., 108; *Edwards v. Raleigh,* 150 N. C., 280; *Harvell v. Lumber Co.,* 154

N. C., 262; *Carrick v. Power Co.*, 159 N. C., 382; *Bailey v. Winston, ib.*, 258; *Ovens v. Charlotte*, 159 N. C., 334; *Styron v. R. R.*, 161 N. C., 80; *Darden v. Plymouth*, 166 N. C., 495; *Dowell v. Raleigh*, 173 N. C., 202; *Rollins v. Winston*, 176 N. C., 414.

COMMISSIONERS OF BURKE COUNTY v. CATAWBA LUMBER COMPANY.

Floatable Streams, What Constitutes—Easement—Riparian Owners.

1. Floatable rivers are navigable highways, in which the public has an easement paramount to the rights of riparian owners; and, in order to establish such easement, it is unnecessary to show that the river is susceptible of use continuously during the whole year, but it is sufficient if it appear that business men may calculate that, with tolerable regularity as to seasons, the water will rise and remain at such height as will enable them to make it profitable as a highway for transporting logs to mills or markets lower down. (Affirming *Commissioners v. Lumber Company*, 115 N. C., 590.)
2. Between a point on the river where defendant's mill was located and the place where logs were cut for transportation thereto were shoals where the water was not deep enough to permit the passage of logs, but eight or ten times a year, at irregular intervals, the river rose several feet, remaining at such height from 24 to 48 hours, during which time logs were carried over the shoals without artificial assistance: *Held*, that the river was a floatable stream, in which the public had an easement, the reasonable use of which was paramount to the rights of the riparian owners. (Overruling *Commissioners v. Lumber Company*, 115 N. C., 590.) FURCHES, J., dissents, *arguendo*.

PETITION to rehear case decided at September Term, 1894, and reported in 115 N. C., 590.

Moore & Moore, I. T. Avery and C. M. Busbee for petitioner.

(732) *S. J. Erwin, J. T. Perkins and Burwell, Walker & Cansler, contra.*

AVERY, J. It seems to be settled law in North Carolina, as in all of the states, that navigable streams of every class, however defined or distinguished from other water courses, are natural highways, and that the public easement, whatever may be its extent, is paramount to the private right of the riparian proprietor. *S. v. Narrows Island Club*, 100 N. C., 477; *S. v. Glen*, 52 N. C., 321, 327; *Broadnax v. Baker*, 94 N. C., 675; Gould on Waters (2 Ed.), secs. 86, 87, 107, 108 and 110; Angell Water Courses, 541a; 16 Am. & Eng. Enc., p. 236; *Sullivan*

v. Jernigan, 21 Fla., 264. All waters including bays, inlets, rivers and creeks, "which are navigated by sea vessels," said the Court in *S. v. Glen, supra,* at p. 323, "are called navigable in a technical sense, are altogether *publici juris* and the soil under them cannot be entered and a grant taken out under the entry law. When the tide ebbs and flows, the shore between the high and low water may be the subject of direct, special, legislative grant. *Ward v. Willis,* 51 N. C., 183"; *Bond v. Wool,* 107 N. C., 139. The Court in that case went on to say that the beds of other streams were "technically styled navigable" and were open for appropriation by individuals by means of grants from the State.

In order to direct the attention more closely to the development of the principles governing the case at bar by a line of decisions in this State, and especially to controvert the contention of counsel that owners of the beds of inland rivers, not navigable for vessels, have the absolute control of the streams, we reproduce the following from the opinion of *Merrimon, J.,* in *S. v. Narrows Island Club, supra:* "The learned counsel for the appellant pressed upon our attention (733) *S. v. Glen,* 52 N. C., 321, as an authority, favoring strongly the absolute right of the owner of the whole bed of the river. This is certainly a misapprehension of the real meaning of that case. The river to which it referred was ascertained to be unnavigable and the case does not contradict what we have here said. Indeed the Court recognized the public right in case of the navigability of the stream. It said: 'As the riparian proprietor of the land on both sides of the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public for the purpose of transportation of flour and other articles in flats and canoes.' It appeared that flat boats were occasionally used in transporting the articles named."

It still remained for this Court, when the forests of the State began to attract attention and to invite capital to utilize them in commerce, to determine in precisely what classes of streams not technically navigable, the easement, which was paramount to the right of the actual owner of the bed of the river or of the riparian proprietor on both sides, existed.

In *McLaughlin v. Mfg. Co.,* 100 N. C., 108, this Court, adopting the classification of streams laid down by Wood in his work on Nuisances, 2d Ed., sec. 457, *et seq.,* defined a navigable stream of the third class to be one which is "floatable or capable of valuable use in bearing the products of the mines, forests and tillage of the country it traverses to mills or markets." That case was cited and approved subsequently in the case of *S. v. Corporation,* 111 N. C., 661.

In the dissenting opinion (which was written before the opinion of

the Court) in *Gwaltney v. Land Co.,* 111 N. C., at p. 547, will be found a definition of a floatable stream, which was adopted by the Court (see p. 552) and which has been since reiterated with (734) approval in *Gwaltney v. Land Co.,* 115 N. C., 581, and in *Commissioners v. Lumber Co.* (the case now before us for rehearing), 115 N. C., 590. The language so often approved is as follows: "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 seasons, the water will rise to and remain at such a height as will enable them to make it profitable to use as a highway for transporting logs to mills or markets lower down." *Justice McRae,* in *Gwaltney v. Land Co., supra,* quoting further from the same opinion, says, "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."

In the former opinion in this case the Court laid down as a further test of floatability, the rule that "A 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. The increase in the depth of the streams occasioned by the rainfall sufficient to float logs, occurs eight or ten times each year, and the water subsides in 24 or 48 hours. 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."

The first question raised by the petition and order granting the rehearing is whether the two rules laid down as criteria for determining the capacity of streams to subserve the purpose of channels of commerce are not so inconsistent that both cannot be allowed to stand as (735) guides to the people, who are anxious to understand and observe the law, as well as to the profession, whose office it is to advise them. If a stream rises to a sufficient height eight or ten times a year to carry down all the logs that have been rolled into it, may it not be possible that prudent business men would calculate with reasonable certainty on and regulate their expenditures with reference to an anticipated rise that will make the use of the stream as a highway profitable, notwithstanding the fact that it continues for only two or three days or even a shorter time? The capacity to carry logs from the place, when they are shipped upon it, and deliver them at the point where they are taken out for use, depends chiefly upon the velocity of the stream and the distance they are transported. Courts are not

required to so restrict the limit to which judicial knowledge extends as to exclude matters which are of common observation and within the knowledge of all intelligent men. *Deans v. R. R.*, 107 N. C., 693. If a stream should carry a log at a velocity of three miles an hour, then in three days or 72 hours it would be transported a distance of 216 miles, in two days 144 miles, and in one day 72 miles. It may be that the longest distance for which the Catawba River is used is not 72 miles and that Johns River is not used for more than half that distance. If all the logs awaiting removal on the banks of each stream were removed only ten times a year but at irregular intervals extending over the nine fall, winter and spring months, it is not impossible, indeed it is almost certain that any prudent business man could arrange to get all the logs needed in ten deliveries. Yet it is probable that all are delivered more than fifty times instead of ten.

How can we arbitrarily fix a minimum period for transportation and at the same time leave the capacity for yielding a reasonably certain profit, as a test of floatability? If it may be true that all logs placed along in either stream would be delivered at the (736) mills of the defendant from 27 to 63 times or oftener in the course of a year, how can we hold that the rises must occur more frequently or continue longer and leave people who wish to know and obey the law in such a state of doubt and uncertainty that they would be deterred without further information from engaging in this important branch of commerce? The rule which makes susceptibility to use, as a channel for transporting the products of mines and forests, the criterion of floatability, is a test which any intelligent lumberman can comprehend and apply. The other criterion, which without regard to the probable profits of the business or the actual condition of the stream, would exclude from the benefits of a water-highway one who locates his plant on a swift mountain water course, which subsides within two or three days, and extend the easement in a sluggish stream to another person, if he settles in the low country, though the water may land as many logs for the one in one day as for the other in four days, is manifestly arbitrary and inconsistent with the rule that has so often been sanctioned not only by this Court in the cases we have cited but approved by all of the leading text-writers and the courts of those states where extensive and valuable forests have been or are being utilized. 1 Wood Nuisances (3 Ed.), sec. 457; *Davis v. Winslow,* 51 Me., 264-290; *Gaston v. Mace,* 33 West Va., 14; *Brown v. Chadburne,* 31 Am. Dec., 641; 59 Am. Dec., p. 22 and note; *Thunder Bay Co. v. Speechly,* 31 Mich., 336; 6 Lawson R. & R., sec. 2928.

Gould, in his work on Waters, sections 108 and 109, says: "It is not necessary that the stream, in order to be a highway, should be capa-

(737) ble of floating logs at all seasons of the year, but its public character depends on its fitness to answer the wants of those whose business requires its use. If the stream is not always navigable it must be capable of floatage, as the result of natural causes, at periods recurring from year to year, and continuing for a sufficient length of time in each year to make it useful as a highway." Gould cites among other authorities the leading case of *Morgan v. King,* 35 N. Y., to sustain the foregoing proposition, and in view of the fact that the learned counsel for the plaintiff seemed to misconceive what the Court in that case meant by the words "in its natural state," it is perhaps best to call attention to the fact that so far from limiting the use of streams to the periods when they are not swollen from rainfall, the Court said (at page 459), "Nor is it essential to the easement that the capacity of the stream as above defined should be continuous, or in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to perodical fluctuations in the volume and height of its water, attributable to natural causes and occurring as regularly as the seasons, and if its periods of highwater or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement." It is plain therefore that the text-writers, all of whom give their sanction to the doctrine of floatability as it has been approved by this Court, are warranted in citing *Morgan v. King,* as they do, to sustain their positions.

It will be observed that in almost every instance where we find the words "in its natural state" quoted from *Morgan v. King* in the opinions of appellate courts, the further discussion of the subject develops the fact that they are used in the sense given to them by the Court of New York. "Natural state" in that connection does not seem to have been understood by courts or text-writers as confining the test of use
(738) for commercial purposes to the low water-mark but as referring to the height attained as the result of the regularly recurring rainfalls of every year, which is a natural cause operating with some degree of uniformity. *Lewis v. Coffee County,* 77 Ala., 193; The Motello, 20 Wall., p. 441; 25 Am. Dec., p. 862 and note; 59 Am. Dec., 649 note.

The intention of the courts seems to have been to limit the right of navigation for logs to those streams made useful by the ordinary rainfall as distinguished from such as would only transport the logs after resorting to artificial means, as by blasting out and deepening the channel or putting in locks or dams with gates. 6 Dawson R. & R., sec. 2924. We see no reason for following to its logical results the argument of the learned counsel for plaintiff and taking this occasion

to overrule the line of our decisions which recognize and define easements for the purpose of floatage. We think that any rule which attempts to fix a definite period of time during which a water course at each recurring rise must remain at a sufficient height to transport logs and to adopt that rule alike to long and to short, to swift and to sluggish streams, is in conflict with the general doctrine, which makes capacity for profitable use the test and, if adhered to, would close for commercial use many water courses that have all of the elements of natural highways, under the general definition approved by the courts of this and other states containing valuable forests. To illustrate the inconsistency of applying the rule which makes time the test, suppose that logs were floated in Johns River for a distance of only twenty miles and in the Catawba for sixty miles, and that the velocity of the current in the former stream were six miles an hour, in the latter three miles, would it require precisely the same length of time necessarily to supply a mill with all of the logs it could saw by the one as by the other? Under a fundamental principle of our system every man is presumed to know and is therefore (739) required to observe the law of the land, and no rule ought therefore to be laid down for the government of the people, unless its terms are, or are capable of being made so certain that they can be understood. Doubtless the instruction which was sustained in *Gwaltney v. Land Co.*, 115 N. C., 579, was intended to apply to extraordinary freshets, upon the recurrence of which prudent business men could not rely for the success of a milling enterprise, but which often do occur at some time during the year and are therefore not unexpected. Construed in any other sense it would establish a rule that would prove so inconsistent with the general proposition that has received our sanction and with the leading authorities that both could not be applied as tests in any conceivable case.

We are brought therefore to the consideration of the question whether the judge below properly applied the correct definition of a floatable stream to the facts found by him in the case before us. The action is brought to restrain the defendants from floating logs down the Catawba and Johns rivers, because when the water rises to a sufficient height to carry the logs over the shoals, they necessarily come in contact with and partially or totally destroy a low bridge across the Catawba and another across Johns River, on a highway in Burke, and a third bridge across the Catawba River, between Burke and Caldwell counties, one half of which is under the official management of the plaintiffs. The defendants have been using both of these rivers above the two bridges in Burke County to transport logs to a point on the Catawba below all three of the bridges, where the mill of the defendant is located. At

(740) this mill the defendants employed about 75 laborers and saw about 35,000 feet of lumber a day and have invested between $250,000 and $350,000, in establishing the plant. The depth of the Catawba River at the bridge known as the Rocky Ford Bridge, and Lovelady Bridge, when the water is at ordinary height averages two feet, but in some parts of it reaches four feet and is about 300 feet wide. The depth of Johns River at the bridge over that stream is about four feet and it is about 100 feet wide. There are shoals on the Catawba at intervals of about half a mile and on Johns River about one-fourth of a mile apart, where the water is only from eight to twelve inches deep at ordinary low water. Between the shoals when the water in either river is at ordinary low water-mark, logs will be carried by the current of both rivers, but not over the shoals without taking out stones and resorting to other artificial helps. Both of these rivers rise eight to ten times a year to a height of from two to four feet above ordinary water and remain at that height from 24 to 48 hours, during which period all of the logs placed in the channel of either will be carried over the shoals without obstruction. (See findings 8 and 9.) These rises occur in the fall, winter and spring months, not at fixed periods, but some time during nine months. Besides these rises about two freshets usually occur during every year, when these rivers rise eight to fifteen feet above the low water line.

Eliminating from this discussion the arbitrary rule prescribing a fixed period for the continuance of the rise, it seems very clear that the learned judge, to whom both parties entrusted the trial of all issues of fact and law, was not in error in holding, upon the facts found by him from the testimony, that both the Catawba and the Johns rivers were in contemplation of law floatable streams. If eight or ten times a year every log placed in either stream above these bridges will be (741) carried without hindrance or obstruction over the shoal to the defendant's mill lower down, then it inevitably follows that by cutting and placing logs upon the bank in the way described in the findings of the judge (see findings) a sufficient number can be transported on these highways to supply the mills. The reasonable expectation that it would be within its power every year to transport a sufficient number of logs to keep its mills in operation without resorting to artificial assistance at the shoals, justified its managers in establishing their business. If the judge was correct in finding that these rises "occurring at irregular intervals" during the fall, winter and spring months, are sufficient to carry every log committed to either river over the shoals, then the principle involved here is not affected by the fact that instead of being so provident as to lay in its supplies at the proper seasons, the defendant had sometimes opened a channel at the shoals

during the summer months for the passage of logs, though, as his Honor finds, the mill had been almost exclusively supplied by floatage. The question is whether the company was warranted in calculating when its business was established, that these two highways could be utilized, legitimately, to furnish it full supplies of raw material for its mill. We think that the facts justified the heavy expenditure it has made in the reasonable expectation that the law would protect it in the proper use of these natural highways. If these rivers are floatable they are natural highways in which the public have, as in other water highways, an easement—the reasonable use of which is paramount to the rights of all others. Gould, secs. 87 to 91 and 107 to 110; *Broadnax v. Baker, supra;* Angell on Water Courses (7 Ed.), sec 536; 16 Am. & Eng. Enc., pp. 269 and 270, and notes; *ib.*, pp. 259 and 260, and notes; *Gwaltney v. Land Co.,* 111 N. C., at p. 547.

Where a stream is navigable for any purpose it is generally (742) a nuisance to obstruct it. Wood on Nuisance, sec. 464; *S. v. Dibble,* 49 N. C., 107; *S. v. Parrott,* 71 N. C., 314; 6 Lawson R. & R., sec. 2936; *S. v. Harper,* 71 N. C., 314; *Lewis v. Keeling,* 46 N. C., 299; *Hettrick v. Page,* 82 N. C., 65; Elliott Roads and Streets, p. 491 and note. This principle as a general rule applies to interference with the right of floatage just as to attempts to prevent the passage of vessels in streams affording sufficient channel for them. Wood, *supra,* sec. 464. But the right of floatage must be exercised reasonably and with a due regard to the rights of riparian proprietors and the owners of the beds of fresh water streams, especially such as belong to the third class of navigable waters and are only used as highways for the purpose of transporting logs. The owners of the soil have a right to the reasonable use of the water as a power for propelling machinery and operating the various kinds of mills. While the right to an easement for floatage is superior to that of the proprietor of the soil, the law enforces the use of the dominant easement with due regard to the servient interest. A person using a stream as a highway for transporting logs as well as one in charge of a steamer plying on navigable water, is answerable for wanton injury in even removing a nuisance. *Gwaltney v. Land Co., supra; Lewis v. Keeling,* 46 N. C., 299.

The governing principle is that the right to the use of a water highway for the transportation of timber is subject to the maxim that we must so use our own as to avoid needless injury to another. The public have the paramount right of way in the public road, yet that does not excuse one driving a carriage or wagon over it for needlessly injuring a person or even an animal, that is temporarily obstructing it. *Davies v. Mann,* 10 M. & W. (Ex.), 545. It remains for us to determine in each case that may hereafter arise what is culpable

(743) carelessness in the enjoyment with the easement. We adhere to the announcement made by the Court in the opinion which we are now reviewing (115 N. C., 596, 597) that the right of floatage 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. And on the other hand, it would seem that if these were floatable streams, in which the public has 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 bridges on the highways as to permit the use of rivers for the purpose of floatage." If the streams are highways, then bridges constructed over them so as, by interposing a barrier to floating logs every time the rivers rise sufficiently high to carry them over the shoals, to practically prevent their use by the public, are unlawful obstructions. 6 Lawson R. & R., sec. 2936; *Kean v. Stetson,* 5 Pick., 492; *Charlestown v. Middlesex,* 3 Met., 202. The case last cited was one where the county commissioners acted under the authority of an act passed by the legislature of Massachusetts, empowering them especially to build the bridge, but not specifying its character, and *Chief Justice Shaw,* in a strong opinion, announced the principle that the county authorities were not warranted in so constructing the bridge as to obstruct the use of the stream as a highway.

The question of reconciling the conflicting claims of owners of the soil of the bed of the stream, who erect dams across floatable rivers for the purpose of operating mills, is not now before us. The Legislature has made provisions in certain cases for opening dams so as to permit the passage of logs floated over them to market (The Code, sec. 3712) and in chapter 56 of The Code, which contains this provision, county commissioners are clothed with authority to have streams cleaned (744) out. It would seem that these sections were passed entirely with reference to floatable streams because, without condemnation the commissioners would have no right to enter upon and clean out the beds of streams which were not natural highways.

It seems that the low bridges constructed by the plaintiffs and their predecessors have been frequently destroyed during rises in the rivers by trees floating down, but within a few years past the injuries to them have generally been caused by logs that are being transported to the mills of the defendant company. We cannot destroy a great natural right which affects people scattered over hundreds of square miles whose only prospect of disposing of valuable property is depending upon the use of water for transporting timber to market, in order to save a county the difference between the cost of bridges two or three feet above the low watermark and more durable structures above the high watermarks.

Perhaps it may not be improper to add that where a stream is not floatable it can be used for the transportation of logs only by a license from the owner of the bed of the stream or the riparian proprietor. Without such license one who is using the stream for such a purpose is, either as a trespasser, responsible for at least nominal damages or, when he creates a nuisance, for any special damage shown to have been actually sustained. It appears incidentally from the testimony that many tributaries of the Catawba other than Johns River, and of which the floatability is not in question here, have been used in some way by the defendant for transporting logs to the Catawba and thence to its mill. This intimation may serve as a guide in regulating its conduct or in adjusting the rights of those interested. In reference to the argument that no sufficient ground had been shown for granting a rehearing, we need only say that the Court was not advertent, in its former opinion, to the inconsistency of the two tests of floatability given (745) in the same opinion. The question was not discussed in the opinion, and attention was not directly called to it on the argument.

On reviewing the rulings of the learned judge who tried the case below we find no error and are of the opinion that the judgment should have been affirmed. To the end that it may be now enforced let this opinion be certified to the court below.

Petition Allowed.

FURCHES, J. (dissenting): Dissenting from the judgment of the Court, I think it due alike to the Court and to myself that I should state some of the reasons I have for so doing.

The petition to rehear in my opinion is in violation of the rules of this Court. It does not only undertake to point out the error of the Court in its opinion as reported in 115 N. C., 590, but it enters into an extensive argument to sustain the petition. This is not allowable, as held by the Court in *White v. Jones,* 92 N. C., 388, where it is held that such arguments should not be made in the petition but on the argument in Court. As I understand the rule, interpreted by the Court, "no case should be reversed upon a petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the Court." *Watson v. Dodd,* 72 N. C., 240; *Hicks v. Skinner,* 71 N. C., 539; *Haywood v. Daves,* 81 N. C., 8; *Derereux v. Devereux, ib.,* 12; *Smith v. Lyon,* 82 N. C., 2; *Lockhart v. Bell,* 90 N. C., 499; *University v. Harrison,* 93 N. C., 84; *Dupree v. Ins. Co., ib.,* 237. "Where the grounds of error assigned in a petition to rehear are substantially the same as those argued and passed upon in the former hearing, the Court will not disturb its judgment." *Lewis v. Rountree,* 81 N. C. 20. "The

(746) weightiest considerations induce the Court to adhere to its decision unless manifest error appears, especially when the decision was made by a full Court and with unanimity, and after full argument by counsel." *Lewis v. Rountree, supra.* "The Court reiterates that it will rehear a case only for weighty considerations and when the alleged error clearly appears." *Emry v. R. R.,* 105 N. C., 45.

The matters of fact complained of by the petitioner are "that it seems that the court overlooked the findings of *Judge Allen* that petitioner's mill had been established in 1890" and that *Judge Allen* found that both the rivers, at the "point" where the bridges are, were floatable streams. We do not admit these allegations. As we find that *Justice Avery* in a concurring opinion starts out by saying: "If it be true as appears from the testimony offered, and was found by the judge below, that neither the Catawba River nor Johns River affords sufficient water to float logs over the shoals that abound in the beds of both, except when they rise suddenly eight or ten times every year, and continue at a sufficient height to carry logs off for a period from 24 to 48 hours, then neither of the rivers would fall within the definition of a floatable highway, heretofore given by this Court. *Gwaltney v. Lumber Co.,* 111 N. C., 547." Then it would seem that not only the findings of *Judge Allen* were fully considered by the court, but the evidence in the case as well. But suppose the court did not take into its consideration the fact that petitioner's mill was established in 1890, can it be contended that the establishment of petitioner's mill changed the character of the streams and made two rivers navigable that were not so before? I cannot subscribe to any such doctrine. And suppose these rivers are wide enough and deep enough at the "points" where plaintiffs' bridges are, to float a log, but for every quarter
(747) of a mile above and below in Johns River, and every half mile above and below in the Catawba River, there are shoals and rocks, as is found by *Judge Allen,* so shallow and rough that a log will not float over them except when the water is up—from eight to ten times a year. What difference could this make in determining whether these rivers were navigable or not? What good could it do the petitioner to float his logs under the bridge if he could not get them down the river? So it is perfectly apparent to me that there is nothing in these assignments, if it should be true that they were not considered by the court. And this I do not admit.

Then the only remaining question to be considered is the question of law argued, rather than stated, in the petition, that the Court erred in construing the word "usually" in *Judge Allen's* finding. The petition then shows that this part of the judge's findings was not overlooked by the Court. And that the petition should not be allowed, and the opinion

rendered at the last term of the Court overruled on this ground. See *Dupree v. Ins. Co.*, and other cases cited, *supra.*

This is a rehearing. The facts are just now what they were at the last term of the Court. Not a word has been added and not a word taken away. It is admitted in the petition that they were considered and the opinions of the Court show they were, as one of the opinions filed says the facts found by the judge and shown by the evidence established the fact that this river is not even a floatable river. It is not shown that the case was not well argued at the last term, or that it was hastily determined. Indeed the case as published forbids any such conclusions, as there is not only a leading opinion by *Justice McRae,* but a lengthy concurring opinion by *Justice Avery.* The opinion at last term was unanimous—no dissenting voice. It is shown there were no mistakes of fact at that term that (748) could possibly affect the opinion of the Court. So the question comes substantially to this: that this case is an appeal from the last term of this Court to the present term. And the result is that four Justices at this term hold that the judgment of five Justices at the last term was erroneous.

I have thus far been considering the case upon the rules and practice established, as I think, by a train of authorities, some of which I have cited, to show that this petition should not be allowed.

And as my opinion is not to be the law that governs the case, I will not enter into an elaborate discussion of the question as to whether this river is a navigable, a "floatable," stream or not. But in my opinion the doctrine announced in the opinion of the Court reverses what has been considered the law in this State for more than a hundred years. I had supposed until recently that what was naturally a navigable water course was settled in this State. The idea has been, and this State has acted upon that idea from its organization until now, that it has no right to grant the beds of navigable water courses, but that it had the right to grant the beds of such as were not navigable. And acting upon this idea, the State has granted the soil under the water in most of the water courses in the western part of the State—such as the Catawba River, Johns River, Yadkin River, etc. *S. v. Glen,* 52 N. C., 321. These rivers are not like they are in the eastern part of the State. There, where a river is wide enough for navigation, it is deep enough. But the rivers in the western part of the State, such as the Catawba, the Johns and the Yadkin, are broad, shallow, rapid, and full of shoals and rocks, and valuable principally for water power which abounds all through that section of the State. Many of the citizens who wish to erect mills and for the purpose of not being troubled about their dams, have entered or (749)

bought of others that had entered the beds of these streams, erected their dams thereon, attached thereto their mills and machinery. They are the owners of this property. But the effect of this opinion is to legislate them out of their property, their vested rights, without process or compensation. The idea that the Catawba and Johns rivers are navigable water courses is one of recent origin. It has been held that the Yadkin was not—was, because it probably is now, under this decision. In *S. v. Glen, supra,* which is reiterated by this Court through *Chief Justice Merrimon* in the case of *S. v. Club,* 100 N. C., 482, it is held not to be navigable. And the Yadkin River is longer and much narrower a navigable water course than are the Catawba and Johns rivers.

But under the definition laid down in this case, the question will be, what is not a navigable water course? There are thousands of little streams in the West that will float a log (and how many are to be floated to make it navigable, we are not told) when up. They, like the Catawba and Johns, rise when it rains, and can be counted on to rise with about as much certainty as either of these streams. Then, why are they not also navigable? Where is it to end? And where is the line to be drawn between what is and what is not a navigable stream? Whose property will be safe against an interested lumber company or lumber speculator? Our rivers in the western part of the State are not like the rivers in the northwest, the source from which the Court draws its authority for declaring these streams navigable water courses. They are more like our eastern rivers. Their seasons are different from ours. They rise at regular periods, and continue so for the season, and

I prefer to adhere to our own authorities and State policy rather
(750) than to these northern authorities that reached us about the time such parties began to speculate in our timbers.

"Floatable water courses" is a term not known to our law, until within the last six or eight years, and, as I say, came about the time the lumber speculators came, who, as I understand and as seems to be urged in this case, have bought up large sections of woodland, and the Court must protect them.

With me, this has nothing to do with my judgment in this case. I cannot see how large bodies of timbered land, as urged in the opinion of the Court, can make a river navigable which was not navigable before. It may be a convenience to those having such timber to have a navigable water course. But how the fact of having timber can create the navigable condition of the water course, I cannot see. I cannot help looking at this case as a contest between the parties for legal rights and not one of policy. If these rivers are navigable water courses, the plaintiffs are trespassers and are guilty of creating and maintaining

a public nuisance, though they are only doing what had been conceded to their ancestors and predecessors for a hundred years. But if the North Carolina idea should be sustained, that is, if these streams are not navigable water courses, then the petitioners in destroying plaintiffs' bridges are trespassers. If the plaintiffs are trespassers, every mill owner and fishery owner, who thought he was owner of the soil upon which his dam is erected, is guilty of creating and maintaining a public nuisance.

The Court says the Legislature could make provision for slopes, or in some other way protect such persons. If there is to be legislation, I think it ought to be by the Legislature in declaring and providing for making that a public highway which nature has failed to make so, in which there would be provision made to compensate the (751) property owners for their property taken for the public use— as in cases of railroads, canals and other public improvements. That is within the province of the Legislature and not within that of the courts.

Cited: Mfg. Co. v. R. R., 117 N. C., 590; *Parker v. Hastings,* 123 N. C., 674; *Hutton v. Webb,* 124 N. C., 754; *Hodgin v. Bank,* 125 N. C., 504; *Hutton v. Webb,* 126 N. C., 903; *S. v. Baum,* 128 N. C., 605; *Warren v. Lumber Co.,* 154 N. C., 37.

T. A. HELMS ET AL. v. M. C. AUSTIN ET AL.

Proceeding for Partition of Lands—Deed, Construction of—Reformation of Deed—Jurisdiction—Delivery of Deed Presumed from Registration.

1. A deed made by E. S. of the first part and S. S. "his wife and her heirs named on the back of the deed" of the other part, conveyed certain lands to the wife and her children, a life estate being reserved to the grantor. On the back of the deed the names of the children were indorsed and, in addition, the provision that if the wife should have any other children they should have an equal share with the "above heirs": *Held,* that the wife and children took a fee simple.

2. Although the clerk of the Superior Court cannot, in an action for partition, reform the deed under which the plaintiff claims, the Superior Court may grant such relief when the proceeding is transferred or goes to it by appeal.

3. Where a donor acknowledges the execution of a deed for the purpose of registration and it is accordingly registered, a delivery is presumed and only clear proof will warrant a court in holding the presumption to be rebutted; and the subsequent acts or declarations of the grantor to the effect that a delivery was not intended are admissible to rebut such presumption.

4. The presumption of the delivery of a voluntary deed by a father to his wife and children (in which he reserves a life estate) arising from the fact of registry, is not rebutted by the fact that the grantor retained possession of the deed and of the land which he listed for taxation and by an indorsement made on the back of the deed by the probate judge for the grantor that "the cause of my giving my lands to my family by deed as well as by will, is in order to give the courses and distances of the same."

(752) SPECIAL PROCEEDING for the partition of land, brought originally before the clerk of the Superior Court of Union, and transferred to Term for trial of the issues of law and fact raised by the pleadings and heard before *Winston, J.*, and a jury, at August Term, 1894, of UNION. The facts appear in the opinion of *Chief Justice Faircloth.*

Burwell, Walker & Cansler for plaintiffs.
Shepherd & Busbee and F. I. Osborne for defendants.

FAIRCLOTH, C. J. This was an action for partition before the clerk and was transferred to the Superior Court. The defendants denied that the plaintiffs had any interest in the land to be divided, which was equivalent to the plea of "sole seizin." The question arises upon three deeds made by Ennis Staton of the first part, and "Sarah Staton his wife and her heirs, named on the back of this deed, of the other part," the said Ennis Staton reserving his life estate in the lands conveyed, and the consideration named is love and affection. On the back of each deed are indorsed the names of the several children of the grantor, the plaintiff's name being one each time. In the third deed, the conveyance is to "Sarah Staton his wife and her children" and in the indorsement on the back thereof, after repeating the names of the same children as in the other two, it is stated "and if the said Sarah Staton should ever have any other child or children, that he or they shall have an equal share with the above heirs."

These deeds are dated 13, 14 and 15 September, 1869, and were registered, after probate, on 26 August, 1870, and 2 September, 1870.

It is a well known rule that if two constructions can be put on a deed or any part of it, that shall be given to it which is most benefi-
(753) cial to the grantee. These deeds were inartificially drawn, using

the words "heirs" and "children" indifferently, by one having no legal conception of their technical meaning, but the intent is clear. It would be unreasonable to assume that the father, in providing for his family, meant to give them only a life estate leaving the fee undisposed of, after reserving his own life estate. We are entirely satisfied from the context and from the nature and purpose of the deed that it was the intention of Ennis Staton to convey a fee simple to his wife and children, and we declare that to be the effect of each of the deeds. *Fulbright v. Yoder,* 113 N. C., 456; *Holmes v. Holmes,* 86 N. C., 205; *Vickers v. Leigh,* 104 N. C., 248; *Pritchard v. Bailey,* 113 N. C., 521. Here we might rest this branch of the case, but the plaintiff prayed the Court, in the event that the deeds did not convey a fee simple estate, to be allowed to reform the deeds according to the true intention of the grantor. The defendant's counsel denied the power of the Court to give this relief, inasmuch as the clerk before whom the action was properly instituted had no power to give such equitable relief.

By The Code, sec. 102, the duties, at first assigned to the probate judge, are required to be performed by the clerks of the Superior Courts, as clerks of said courts, and their duties and connection with the court, are fully explained in *Brittain v. Mull,* 91 N. C., 498, and under our new code system of practice we see no reason why the court may not amend and give any relief that the parties may be entitled to, according to the facts, in any case sent up by the clerk either by transfer or by appeal, provided the original subject matter be within the jurisdiction of the clerk. The advantage of such practice to the courts and to the parties litigant is manifest, and we hold that the equitable relief asked for, if it had become necessary, could have been given in the Superior Court. (754)

In 1875, when the code system was new, this Court held, in a case much like the present, that upon an appeal from the Probate Court in a special proceeding, which was dismissed in that court, the Superior Court could and should give such equitable relief as the parties were entitled to, upon the plea of fraud in procuring a deed for land, it being conceded that the probate judge had no such power. *McBryde v. Patterson,* 73 N. C., 478.

The defendants further insisted that these deeds were never delivered, and relied upon the indorsement on the deeds made by the probate judge at the time the deeds were acknowledged by the grantor and ordered to be registered, and upon subsequent acts and declarations of the grantor, to rebut the implication of delivery arising from the registration. The indorsement was as follows: "The cause of my giving my lands to my family by deed as well as by will is in order to give the courses

and distances of the same." It is admitted that Ennis Staton retained possession of the deeds after their registration, and remained in possession of the land and listed it for taxes until his death. These admitted facts are all consistent with the fact that the grantor retained a life estate, and, taken alone, have no tendency to rebut the implication of delivery arising from the registration.

In a case "on all fours" with the present, it was held by this Court that where the donor went into court and acknowledged a deed of gift for the purpose of registration and it was accordingly registered, that was a delivery, and that any subsequent declaration that it had not been delivered and was not to have effect did not invalidate it. *Airey v. Holmes,* 50 N. C., 142; *Ellington v. Currie,* 40 N. C., 21.

These cases dispose of the defendants' exceptions to the exclusion (755) of their proposed evidence.

Where the maker once parts with the possession or control of a deed he can not afterwards recall it, and the donee's acceptance is presumed, especially when it is beneficial to him.

Registration of a deed is only *prima facie* evidence of its execution, probate and delivery, and not conclusive; for otherwise no fraud or mistake could be corrected in either respect. The presumption arising from this *prima facie* effect may be rebutted by sufficient evidence. To this effect is *Love v. Harbin,* 87 N. C., 249, and various other cases, including the text-books. In *Mitchell v. Ryan,* 3 Ohio St., 377, it was held, first, that a recorded deed is *prima facie* evidence of delivery, and it is to be presumed that the maker means to part with the title, and that clear proof ought to be required to warrant a court in holding otherwise; secondly, that where a grant is a pure unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent.

The indorsement on the deeds—"The cause of my giving my lands to my family by deed, etc."—indicates plainly that he was trying to settle his property on his family, which he could only do by having the deed recorded. If to perpetuate the courses and distances was his only object, then an ordinary survey and plot would have done as well, and might have as well been registered as these deeds if they were not intended to pass any title to the grantees.

The rule in *Shelly's case* has no application. *Leathers v. Gray,* 101 N. C., 162. The evidence of the clerk, as indicated, was insufficient to rebut the presumption, if it had been admitted.

Affirmed.

Cited: Frank v. Heiner, 117 N. C., 82; *Robbins v. Roscoe,* 120 N. C., 83; *Griffith v. Richmond,* 126 N. C., 378; *Roseman v. Roseman,* 127 N. C., 500; *Tarlton v. Griggs,* 131 N. C., 221; *Austin v. Austin,* 132 N. C., 266; *Wetherington v. Williams,* 134 N. C., 281, 282; *Darden v.*

Timberlake, 139 N. C., 182; *Smith v. Proctor, ib.,* 320; *Bryan v. Eason,* 147 N. C., 288; *Whitehead v. Weaver,* 153 N. C., 89; *Lewis v. Stancil,* 154 N. C., 327; *Buchanan v. Clark,* 164 N. C., 65; *Torrey v. McFadyen,* 165 N. C., 239; *McMahan v. Hensley,* 178 N. C., 588; *Reece v. Woods,* 180 N. C., 633.

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S. T. PEARSON v. J. R. CRAWFORD ET AL.

Action for Trepass on Land—Trial—Issues—Finding of Jury—Argument of Counsel—Discretion of Judge.

1. The extent to which counsel may comment upon witnesses and parties must be left to the sound discretion of the trial judge and such discretion will not be reviewed on appeal unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury.
2. In the trial of an action for trespass on land, where plaintiff claimed title under a deed and defendants denied that the grantors thereof were the true owners, the jury under an instruction that plaintiff must first establish title to the land described in the complaint and then prove its location before he could recover, found that plaintiff's title was valid; that the location of the land had not been proved to their satisfaction; that defendants had not trespassed thereon and that plaintiff had suffered no damage: *Held,* that, under the charge, these findings and the judgment thereon, were not inconsistent or contradictory, and plaintiff cannot complain of such judgment inasmuch as his failure to recover was thereby placed on the ground of a failure to locate the land and not on the ground of any defect in his deed.

ACTION for trespass, commenced in the Superior Court of MCDOWELL, 8 January, 1892, and removed on motion of plaintiff, to BURKE, at January Special Term, 1894, of which it was tried before *Armfield, J.,* and a jury.

The plaintiff claimed that he was the owner of a tract of land in McDowell County, containing 70,400 acres known as the Wm. and Robt. Tate tract or grant, and that defendants had trespassed thereon by cutting and hauling off timber to the great damage of plaintiff.

The issues and material parts of the testimony, together with the portions of the charge to the jury excepted to, appear in the opinion of *Associate Justice Montgomery.*

J. B. Batchelor for plaintiff. (757)
Justice & Justice for defendants.

MONTGOMERY, J. The plaintiff moved for a new trial on the ground

that the verdict was contrary to the weight of the evidence. The motion was overruled and the plaintiff excepted. There is nothing in the exception. The matter was one which ought to have been addressed to the discretion of his Honor purely.

The plaintiff's objection to the argument of defendants' counsel for the alleged reason that he abused his privilege as an attorney in speaking of the plaintiff as a speculator, buying the large boundary of land at 6 1-4 cents per acre, is without merit. There was proof tending to show that the plaintiff had bought the land claimed in his complaint (about 70,000 acres, wild and untillable mostly) at that price. Certainly such an argument, being intended to show that the purchase of the land at such a price, under all the circumstances, was for the purpose of future sale and profit, was not a gross abuse of his privilege. In *Goodman v. Sapp,* 102 N. C., 477, the Court said that a number of cases cited "and numerous other authorities settle the general principle that the extent to which counsel may comment upon witnesses and parties must be left ordinarily to the sound discretion of the judge who tries the case, and this Court will not review his discretion unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury."

There were no exceptions taken to any part of his Honor's charge to the jury, and no prayers for special instructions asked by either the plaintiff or the defendants. The issues submitted to the jury were not objected to by either side, nor were any new ones suggested in the course of the trial.

(758) We will now examine the real questions brought to this Court for settlement. They concern the form and the substance of the issues, and the nature of the judgment rendered thereon:

Issues and responses of the jury: 1. Is plaintiff the owner of the land described in the complaint? Yes (11-12). 2. Where is the beginning corner of the Tate tract? We don't know. 3. Where is the southwest corner of the Tate grant? We don't know. 4. Where is the northeast corner of the Tate grant? We don't know. 5. Did the defendants trespass on the land of plaintiff? No. 6. What damage has plaintiff sustained? None.

Upon the verdict the following judgment was rendered: "It is considered by the court that plaintiff is the owner of the land described in the complaint, but that defendants have not trespassed on the land of plaintiff, and plaintiff has not located his tract of land described in the complaint: It is therefore adjudged that the injunction granted in this cause be dismissed, and that defendants go without day and recover of plaintiff the costs of this action."

The plaintiff excepted as follows: "Plaintiff excepts to the foregoing judgment in open court and the rendition thereof, on the ground that it was inconsistent and contradictory, as were the issues upon which it was based, the said issues having been framed in such a way as not to entitle the defendants to any judgment thereon, and plaintiff further insisted that the finding of the first answer, 'Yes,' must embrace the location of plaintiff's land as described in the complaint, and defendant was not entitled to have it declared in said judgment that plaintiff had not located his land." The exceptions were overruled and the plaintiff appealed.

The issues in this case are not such as are usually submitted in actions of this nature, but in the light of the charge of his Honor they are clear to a certainty and in no sense inconsistent with each other or contradictory. They seem in connection with (759) the charge to have been perfectly fair to the plaintiff, and more favorable to him than he might have had a right to demand. The plaintiff claimed the land described in his complaint, and on which the alleged trespass was said to have been committed, through *mesne* conveyances back to a grant from the State to William and Robert Tate, dated 1795. The direct and immediate conveyance under which the plaintiff claimed was one from the heirs-at-law of Maria Nixon. The defendants contended that the real heirs of Maria Nixon did not execute the deed, and that the persons who signed it were not the Nixon heirs, and that matter seemed to the judge to be one of so much importance on the trial that to prevent confusion he submitted the first issue to settle the question of the regularity of the paper title of the plaintiff to the land embraced in his deed. The instructions on this issue could not be misunderstood by the jury. The court said: "In considering the first issue you will not inquire into the location of the land described in the complaint, but only as to whether the plaintiff has made out his title thereto, i.e., whether he has shown you who the heirs of Maria Nixon are (here the testimony, the contention of the parties, and the law as to this point were stated fully to the jury). There is no pretence that more than 11-12 of the interests of the heirs of Maria Nixon were conveyed, and if you find by a preponderance of the testimony that the plaintiff is the owner of 11-12 of the land described in the complaint, you will answer the first issue, 'Yes, 11-12,' and will proceed to consider the other issues."

The plaintiff insists that the second, third and fourth issues are not consistent with the first, and that the verdict involved a contradiction. This view of the plaintiff is a mistaken one. His Honor in his instructions on these issues, pointed unerringly and with entire certainty to their meaning and purpose. He said: "If you answer (760)

the first issue, as to plaintiff's title, 'Yes, 11-12,' you will then proceed to consider the second, third and fourth issues as to the location of the land claimed by plaintiff. If plaintiff establishes his title, the burden is still on him to show by a preponderance of the evidence where his land is situated—to locate it before he can recover (here the evidence as to location of grant was read to jury, contentions of parties stated, and jury fully instructed as to law applicable to this part of the case). If you find from the evidence that plaintiff has located any line or lines or corner of his tract, you may locate the entire boundary by following the calls in his grant or deeds. If there is a natural object called for found, course and distance must give way to reach it. If plaintiff has located his tract of land you will indicate by your answers to the second, third and fourth issues the locations of the corners referred to, whether they be located where plaintiff claims, or elsewhere. If plaintiff has not satisfied you by a preponderance of the evidence of the location of any part of the boundary set out in his grant, you will answer the second, third and fourth issues, 'We don't know,' and the fifth issue, 'No,' and the sixth issue, 'Nothing.' "

The jury must have understood what these issues meant, and why they were submitted in the form in which they were. And the counsel for the plaintiff were satisfied with them, for his Honor told the jury that if the plaintiff from the evidence had located any line or lines, or corner of his tract, "you may locate the entire boundary by following the calls in his grant or deeds." The judgment followed in form and substance the verdict of the jury, and is not objectionable in any aspect. The paper title of the plaintiff was declared regular, but the location of the land not having been proved, the court made these statements in the judgment. This was favorable to the plain-
(761) tiff because it put his failure to recover of the defendant on the ground of his failure to locate the land, and not on the ground of any defect in his deed. No Error. The judgment is affirmed.

Affirmed.

AVERY, J., did not sit.

Cited: S. v. Surles, 117 N. C., 725; *S. v. Tyson,* 133 N. C., 696.

R. B. CLARK v. JOSEPH HODGE.

Action for Possession of Personal Property—Competency of Witness—Chattel Mortgage—Mortgagee as Subscribing Witness—Execution by Corporation—Validity of Mortgage.

1. Where he is not excluded under the provisions of section 590 of The Code, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as sec. 1351 of The Code removes the disqualification formerly attaching to witnesses having an interest.

2. The common seal of a corporation being affixed to an instrument is *prima facie* evidence that it was affixed by competent authority, and hence it is not incumbent upon one claiming personal property under a mortgage by a corporation to show that its execution was duly authorized.

3. In the trial of an action for possession of personal property claimed under a chattel mortgage executed by a corporation, it is competent for the adverse party to go behind the seal and show that it was not affixed by the legally exercised authority of the company.

4. A chattel mortgage recited that a corporation was indebted to the mortgagee, "for which he holds my note," and to secure the same "I do" convey to him certain property owned by the corporation, and "if I fail" to pay the debt, the mortgagee may sell, allowing an attorney fee to be charged to "me"; the attestation was "witness my hand and seal." The mortgage was signed by the "president" of the corporation as "president" with his private seal, and by others as "treasurer" and "stockholder," and the corporate seal was set opposite to their names: *Held*, that such mortgage was a conveyance by the president personally and not one by the corporation acting through him.

5. Where the property described in a chattel mortgage which purported to be the act of the corporation but was only that of an officer personally, belonged to the corporation and was in the adverse possession of the defendant at the time of the execution of the mortgage, the instrument was properly excluded as evidence in an action for the possession of the property by the mortgagee.

(762)

ACTION, to secure possession of personal property, tried before *Boykin, J.*, and a jury, at Spring Term, 1894, of RUTHERFORD.

The property in litigation, as was shown by the evidence and not controverted by the plaintiff, was at the time of making the pretended chattel mortgage hereafter mentioned, the property of a corporation known as "The Rutherfordton Land and Industrial Company," with office at Rutherford, N. C., and at the time the said mortgage was executed was in the adverse possession of the defendant, Joseph Hodge.

In order to make out his claim, the plaintiff offered to introduce in

evidence a paper writing in the nature of a deed of trust in words and figures as follows, to-wit:

STATE OF NORTH CAROLINA,
County of Rutherford.

The Rutherfordton Land and Industrial Company, of County and State aforesaid, is indebted to R. B. Clark, of the County and
(763) State aforesaid, in the sum of Eleven Hundred Dollars, for which he holds my note to be paid 13 April, 1892, and to secure the payment of the same I do hereby convey to the said R. B. Clark these articles of personal property, to-wit: (Here follows description of property.)

But on this special trust, that if I fail to pay said debt on 13 April, 1892, then he may take possession of and sell said property at public auction, for cash, first giving twenty days' notice at three public places in said county, and apply the proceeds of such sale to the discharge of said debt, interest and costs on the same, and it is further provided and agreed that if the said debt is not paid when due, then the said R. B. Clark is hereby authorized to place this mortgage in the hands of an attorney for collection, and pay said attorney the sum of not more than 10 per cent, as fee for collecting same, and charge said fee to me, to be paid out of the money arising from said sale, and after paying said debt, interest, costs and fee, he shall pay over the surplus, if any, to the said R. B. Clark.

Witness my hand and seal this 13 April, 1892.

(A mortgage on 59 1-2 acres of land given as additional security for this debt.)

D. N. HITCHCOCK, PRES.
L. P. ERWIN, STOCKHOLDER.
T. M. LYNCH, TREAS.

Seal of the Rutherfordton L. & I. Co., Incorporated 22 April, 1891.

Witness, R. B. CLARK.

STATE OF NORTH CAROLINA, Rutherford County. } IN THE SUPERIOR COURT, 29 February, 1892.

The execution of the within Chattel Mortgage was duly proven by the oath and examination of R. B. Clark, the subscribing witness thereto.

Therefore let the same and this certificate be registered. Fee, 19c., paid.

J. F. FLACK, C. S. C.

To the introduction of the paper as evidence the defendant
(764) interposed the following objections, to-wit:

1. The paper writing was not attested by the secretary of the corporation as required by the Acts of 1891, chapter 118, page 104.

2. It was not shown that the parties who executed the paper had any authority from the members of the corporation to make it. There was no evidence that the corporation authorized the execution of the mortgage.

3. The paper was void upon the ground that the pretended mortgagee was the sole subscribing witness thereto. His attestation alone would not, and did not, sufficiently prove the execution of the paper so as to authorize the clerk to order the registration. The order of the clerk to register the paper was without authority. The registration was therefore void as well as the instrument itself was void.

4. The corporation could not make a mortgage, or deed of trust, on the property, because at the time the mortgage was made it did not have possession of the property, it, the property, being in possession of the defendant.

The court ruled the paper out. The plaintiff excepted. Upon this ruling of the court, the plaintiff took a nonsuit and appealed.

E. J. Justice for plaintiff.
S. Gallert for defendant.

CLARK, J. It was not a sufficient objection to the introduction of the mortgage that the subscribing witness thereto, by whom its execution was proved when admitted to probate, was the mortgagee therein. The Code, sec. 1351, removes the disqualification attaching formerly to witnesses having an interest. The mortgagee in this case, not coming within any of the exceptions (Code, sec. 590; *Bunn v. Todd,* 107 N. C., 266), was competent as subscribing witness to prove (765) the execution of the mortgage to himself, but such practice is not commended nor to be encouraged, for the probate is *ex parte* without opportunity for cross examination.

Nor was it incumbent upon the party offering the mortgage to show that its execution was duly authorized. The common seal being affixed is *prima facie* evidence that it was affixed by proper authority. 1 Devlin Deeds, sec. 341. It was competent for the opposite party to go behind the seal and show that it was not affixed by the legally exercised authority of the company. *Duke v. Markham,* 105 N. C., 131, 136. But the instrument on its face is not the mortgage of the corporation. It recites that the corporation (naming it) is indebted to the plaintiff "for which he holds my note to secure the payment of the same, I do hereby convey

to him the following articles of personal property, to-wit: now in the Hodge Hotel belonging to the said company, and if I fail to pay said debt by 13 April, 1892" (then follows power of sale with provision for allowance of ten per cent to attorney for collection) "charging said fee to me, and after paying said debt, interest, costs and fee, the surplus to be paid over to said Clark" (the mortgagee). "Witness my hand and seal, this 13 April, 1892." To this, D. N. Hitchcock affixes his signature as "president," adding his private seal. Two others signed respectively "treasurer" and "stockholder," the seal of the corporation being set opposite to the three names. Laws 1891, ch. 118 (since repealed and reënacted with some modification by the Act of 1893, ch. 95), is like The Code, sec. 685, an enabling act, additional to and not exclusive of the common law mode of executing deeds. *Bason v. Mining Co.,* 90 N. C., 417. This instrument might possibly therefore be
(766) admitted as executed in behalf of the corporation so far as the common seal and the signing of the officers are concerned, but from the attestation clause, the body of the deed and the conveying words, it is clear that it is the conveyance of D. N. Hitchcock and not that of the corporation acting through him. It is the personal act and deed of its president. *Clayton v. Cagle,* 97 N. C., 300; *Davidson v. Alexander,* 84 N. C., 621; *Insurance Co. v. Hicks,* 48 N. C., 58; *Plemmons v. Improvement Co.,* 108 N. C., 614. It is admitted that the property embraced in the description was at the time of the execution of the mortgage the property of the corporation (not of said Hitchcock) and was in the adverse possession of the defendant. The mortgage offered was therefore properly excluded.

No Error.

Cited: Bernhardt v. Brown, 122 N. C., 591; *LeRoy v. Jacobosky,* 136 N. C., 458; *Edwards v. Supply Co.,* 150 N. C., 175; *Power Corp. v. Power Co.,* 168 N. C., 221.

J. B. BOSTIC v. SAMUEL YOUNG ET AL.

Injunction—Relief against Execution—"Connor's Act"—Practice.

1. A court of Equity will not interpose by injunction to prevent a sale of complainant's real estate under execution against another, since the question of title to real estate is one to be determined at law and the owner can there make his defences.

2. Under ch. 147, Acts of 1885 ("Connor's Act"), which provides that no conveyance of land shall be valid, as against creditors and purchasers for value, but from its registration thereof, a deed of trust is of no validity whatever as against a judgment creditor unless registered.

MOTION to dissolve a temporary restraining order issued in a cause pending in CLEVELAND and heard before *Graham, J., at Chambers,* in Charlotte, N. C., on 8 March, 1895. The motion was allowed and plaintiff appealed. The facts appear in the opinion of *Associate Justice Montgomery.* (767)

Webb & Webb for plaintiff.
A. Anthony and R. L. Ryburn for defendants.

MONTGOMERY, J. It appears from the complaint that B. D. Suttle conveyed to W. C. Bostic the tract of land by deed dated 10 December, 1890, but that the deed was not registered until 12 February, 1895; that the vendee paid $8,000 for the land, $3,000 in cash of his own means, borrowed of the plaintiff Crawford $5,000, with which the balance of the purchase money was paid, and executed together with his wife a deed of trust on the land to J. B. Bostic to secure the payment of the $5,000 borrowed from Crawford; and that the deed of trust was registered in Cleveland County, where the land is situated, on 25 May, 1892. It further appears from the complaint that because of condition broken a sale of the land was made under the trust deed by J. B. Bostic, on 21 January, 1893, and that Crawford, *cestui que trust,* bought the land at the price of $5,350, went into possession, and is still in possession enjoying the uses and profits thereof. No deed, however, has been executed by the trustee to the purchaser Crawford. It appears further from the complaint that on 23 October, 1893, the defendant Young procured a judgment against B. D. Suttle, the original vendor, for $421.25, had the same docketed in Cleveland County, where the land is situated, and that he had execution issued to the sheriff of Cleveland on 29 January, 1895, and that the sheriff was about to sell the land when the plaintiff commenced this action.

The question before the Court for decision is whether the plaintiff can invoke the equitable relief of the courts to prevent the de-
(768) fendants (the plaintiffs in the execution) from proceeding to sell the land under their execution; and this involves of course the question as to whether this action can be maintained under the Act of 1893, ch. 6. For if such an action as this can be maintained under that act, then the plaintiff would be entitled to the relief by injunction, which he seeks if the facts warranted it. The point in the case, when the facts are summarized, is briefly stated: The deed from Suttle (the defendant in the execution) to W. C. Bostic, though dated 10 December, 1890, was not registered (although the purchase money was paid at the time of the execution of the deed) until 25 February, 1895. The judgment of Young, the defendant in this action, against Suttle was obtained, and execution levied upon the land before the registration of the deed, and the plaintiff Crawford is in possession of the land under the sale made by the trustee.

Where a party has a full remedy at law, the court of Equity will not grant extraordinary relief by way of injunction. In this action, in case of a sale of the land under the execution, the purchaser, before he could assert title derived from the sale, would have to bring his action at law for the possession against the plaintiff who is in possession, and prove his title to the property; and in such an action the plaintiff in this, the defendant in that action could raise every question involved in the controversy, which he seeks to raise in this action. In that action, he could set up in his defence the very matters he now alleges in his prayer for equitable relief. *Browning v. Lavender,* 104 N. C., 69; *Murray v. Hazell,* 99 N. C., 168; *Southerland v. Harper,* 83 N. C., 200. In High on Injunctions, section 120, the writer says: "A Court of Equity will not interpose by injunction to prevent a sale of complainant's real estate under execution against another, since the question of title to
(769) real estate is ordinarily to be determined at law." The rulings of our Court on this subject have sustained that principle. In *Gatewood v. Burns,* 99 N. C., 357, one of the plaintiffs in that case, Thomas May, alleged that he had purchased a tract of land from his co-plaintiff, Gatewood, in 1882, and paid for the same before certain liens of judgment creditors of Gatewood had attached to the land, but that the deed was not made to him by Gatewood until the liens had been created by the judgments. May was in possession of the land, but apprehending that Gatewood's execution creditors might sell it, he invoked the Court to adjudge his title good and to enjoin the creditors from selling the land. The Court refused the relief sought, holding that "it is not the province of the Court to interpose its authority to

prevent the sale of the land. If the plaintiff has title to it, a sale or attempted sale of it under the execution would pass no title. If on the other hand he has no title and the land belongs to the defendant in the execution, then the creditor would have the right to sell it, if need be, to pay his debt." In *Bristol v. Hallyburton,* 93 N. C., 384, where the defendant sought to have an execution against his interest in a tract of land enjoined on the ground that the interest of the defendant in the land was a contingent interest and not subject to execution, the Court refused the injunction, and *Judge Ashe,* in delivering the opinion of the Court, said: "The application to stay the execution regularly issued upon a judgment at law because the sheriff has levied upon property not subject to the execution, or because the property belonged to another and the defendant in the judgment, is a procedure unknown to our practice. We cannot see how the sale of the land, although it may not be the subject of sale under execution, can work an irreparable injury to the defendant in the execution; for the sale and sheriff's deed have no other effect than to pass such interest as the defendant had at the time of the sale, subject to execution." (770)

The facts in the present case are easily to be distinguished from those of the case of the *Mortgage Co. v. Long,* 113 N. C., p. 123. There, the conflicting claims to the land arose between judgment creditors and mortgage creditors of the defendant Long. No relief was sought by Long against either set of creditors. We think it proper to add that the Court in arriving at its conclusion have also considered the final effect of this litigation; that is, whether the plaintiff would be entitled, finally, to the relief he seeks. The Court will not upon application for interlocutory injunction shut its eyes to the question of the probability of the plaintiff's ultimately establishing his demands, nor will it by injunction disturb defendant in the exercise of a legal right without a probability that plaintiff may finally maintain his rights as against that of the defendant. High on Injunction, sec. 5. In this view of the case, we have arrived at the further conclusion that that part of the Act of 1885, ch. 147, sec. 1, which reads as follows, "No conveyance of land, nor contract to convey, or lease of land for more than three years shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof, within the county where the land lieth," settles the matter set out in the complaint, against the plaintiff. The quotation from the Acts of 1885 is in precisely the same language used of deeds of trust and mortgages in the Act of 1829 (Code, sec. 1254) and the uniform construction of the Act of 1829 by this Court has been to the effect that deeds of trust and mortgages are of no validity whatever as against purchasers for value and against creditors,

unless they are registered, and they take effect only from and after registration. *Robinson v. Willoughby,* 70 N. C., 358; *Fleming v. Burgin,* 37 N. C., 584; *Leggett v. Bullock,* 44 N. C., 283. It (771) is to be noted that the creditor in this action is a judgment creditor, and also that there is no allegation in the complaint that the plaintiff was prevented from registering his deed by the fraud of the defendant.

There is no error in the ruling of his Honor dissolving the restraining order and refusing the injunction, and the same is

Affirmed.

Cited: Blalock v. Strain, 122 N. C., 287; *Pelletier v. Lumber Co.,* 123 N. C., 603; *Trust Co. v. Sterchie,* 169 N. C., 24; *Realty Co. v. Carter,* 170 N. C., 7.

J. C. COWEN v. T. J. WITHROW ET AL.

Action to Recover Land—Purchaser at Execution Sale—Unregistered Deed—Connor's Act—Notice—Provision for Registration.

1. "Connor's Act," ch. 147, Laws 1885, providing that no purchase from a bargainor or lessor shall pass title as against an unregistered deed executed before 1 December, 1885, of which the purchaser has notice, applies to a purchase at sale under execution.

2. "Connor's Act," ch. 147, Laws 1885, which was ratified 27 January, 1885, provided that an unregistered deed should not be good against a subsequent but prior registered deed; it also provided that the act should not, until 1 January, 1886, apply to deeds executed before the ratification of the act and that an unregistered deed should be good as against an after-purchaser taking with notice thereof, and expressly repeals sec. 1245 of *The Code* which requires registration of deeds within two years from their date. *Held,* that by implication, section 1245 of The Code was continued in force until 1 January, 1886, so as to authorize the registration of deeds, until then, of deeds previously executed. (Associate Justices CLARK and MONTGOMERY dissent.)

(772) ACTION to recover land, tried before *Winston, J.,* and a jury, at Fall Term, 1894, of RUTHERFORD. There was judgment on a verdict for the plaintiff and defendants appealed. The facts are stated in the opinion of *Associate Justice Furches.*

Justice & Justice for plaintiff.
S. Gallert for defendants.

FURCHES, J. We are now considering this case for the fifth time, and propose to treat it on a different line from that heretofore pursued, with the hope it may not return to trouble us again.

This is an action of ejectment in which plaintiff alleges title in himself, and this is denied by defendants. This allegation of plaintiff and denial of defendants makes an issue of title, and plaintiff must recover, if he recovers at all, upon the strength of his title and not on the weakness of defendants' title. It is not necessary that defendants should do anything until plaintiff has shown that he is the owner of the land. If he fails to do this he must fail to recover.

But this is not the case with defendants. They need not show any title in them to defeat plaintiff's recovery. It is sufficient for them to show that plaintiff has no title to the land in controversy.

Plaintiff, recognizing the fact that the burden was on him, undertook to show that he was the owner; and to do this, introduced in evidence a deed from the sheriff of Rutherford County, dated 3 December, 1888, for the lands in dispute, showing that they were sold as the lands of T. J. Withrow. He then placed in evidence three executions against T. J. Withrow based upon docketed judgments in Rutherford County. One of these judgments was docketed 10 September, 1885, and the other two after that time. Possession of defendants being admitted, plaintiff closed his case and defendants undertook their (773) defence.

The defendant P. J. Withrow offered in evidence a deed from T. J. Withrow to her for the lands in controversy, dated 5 August, 1882, and registered 26 November, 1889. This deed was objected to by plaintiff, objection sustained by the court, deed ruled out and defendants excepted.

The defendant P. J. Withrow then introduced as a witness her husband T. J. Withrow, and offered to prove by him that before the plaintiff bought the land in controversy, he, witness, told the plaintiff that the land was not his, that he had sold it to P. J. Withrow, that she had paid him for it and he had made her a deed to the same. She also proposed to prove by this witness that on the day of sale he gave public notice of the fact that he had sold the land to P. J. Withrow, that she had paid him for the same and that he had made her a deed therefor. And that he informed J. C. Erwin, the agent of the plaintiff, who bid off the land for the plaintiff, before he bid off said land, of the facts above stated. But all this evidence was objected to by plaintiff and excluded by the court, and the defendants excepted.

Was there error in the court excluding this evidence? If there

was, the defendants are entitled to a new trial. If there was not, the judgment should be affirmed.

The case on appeal does not state the grounds upon which the court held that the deed of T. J. Withrow to the defendant P. J. Withrow was incompetent. It was registered, and there is no objection made to the sufficiency of the probate or to the form of the certificate.

It was for the very land then in controversy, and why it was not competent evidence we are unable to see. As to what effect (774) it should have upon the issues then before the court, and being tried, was a different thing, and one proper for the instructions or rulings of the court, according to its understanding of the law. We can conceive of no reason for excluding this deed, unless we hold that a deed executed in 1882 could not be probated and registered in 1889. Indeed this was the ground upon which plaintiff's counsel undertook to sustain the ruling of the court, in rejecting this evidence, in his argument before us,—that it was executed before December, 1885, and was not registered before December, 1885, and could not be registered after that time.

This Court is not prepared to give its sanction to this proposition. We can see no law to sustain such proposition, and we are glad we do not, as such a ruling at this time would unsettle the title to thousands of tracts of land in North Carolina that are considered settled. Then was there error in ruling out the testimony of T. J. Withrow? We have stated that plaintiff must recover, if he recover at all, upon the strength of his own title, and not for the want of a title in defendants. And this evidence, as we understand, was offered by defendants for the purpose of showing that plaintiff's deed was invalid. And if it would do this, or tend to do so, then it was competent and should have been received, and it was error to exclude it. We might stop here.

But the law as contained in chapter 147, Laws 1885, p. 233, is that after 1 December, 1885, where a party purchases land, with the knowledge that another has purchased the same land and has a deed therefor dated prior to 1 December, 1885, which has not been registered, the second purchaser shall acquire no title as against the prior unregistered deed. Then if this be the law, and the evidence of T. J. Withrow would have proved or tended to prove that plaintiff had knowl- (775) edge of the prior unregistered deed of the defendants, the evidence was competent and should have been admitted. Indeed, it was not only competent, but bore directly upon the main issue in the case.

The defendant's deed being put in evidence, it seems to us there was but one issue left for the jury, and that was whether the plaintiff bought with knowledge of the defendant's deed, made in 1882.

This Court decided, when this case was here before, that notice to the agent Erwin was notice to the plaintiff. *Cowen v. Withrow,* 111 N. C., 306, but defendants here proposed to prove actual personal notice. It was also contended by plaintiff that the Act of 1885 did not apply to plaintiff. That as he purchased at a sheriff's sale, he was not such after-purchaser as was prevented from purchasing with knowledge of a former deed. But this Court has held otherwise, and we have no disposition to overrule that opinion, *Cowen v. Withrow,* 114 N. C., 558.

But it is contended by plaintiff that the judgment creditors of T. J. Withrow acquired liens on this land, attaching at the date of docketing their judgments, and that plaintiff by becoming the purchaser at execution sale stands in the shoes of, and has the benefit of said liens. We admit this proposition of law. But plaintiff got no more than T. J. Withrow had (granting that his deed is valid to pass title, and this is only admitted for this argument) and this was but the naked legal title, the equitable estate being in P. J. Withrow. And when her deed was registered in 1889 it became a perfect legal and equitable title, and related back to the date of her deed (*Phifer v. Barnhart,* 88 N. C., 333) and wiped out all estate that T. J. Withrow had in said land, and also the interest plaintiff had acquired under his deed.

And while we understand it to be admitted that this would ordinarily be the case, yet it is claimed that this case is an exception to this general rule. It is contended that when the judgment of (776) the *S. v. Withrow* was docketed in 1885, the defendant, P. J. Withrow, could not have registered her deed. And this being so, the judgment liens attached and thereby took a priority. And this brings us to a consideration of Laws 1885, ch. 147. This act was ratified on 27 February, 1885, and provides in the fifth paragraph that it shall be in force from and after 1 December, 1885. And it is further contended that section 1245 of The Code expired by limitation, upon the adjournment of the Legislature in 1885, and that there was no law authorizing the registration of any deed, or other paper required to be registered, from the adjournment of the Legislature of 1885 until January, 1886, and that deeds dated prior to December, 1885, cannot be registered. This is an important question, not to say a startling one to us, and if true will probably unsettle the title to ten thousand tracts of land in North Carolina. It would be most remarkable, if this is true, that we have lived for ten years without discovering so important a matter as this.

We are not prepared to yield our assent to this proposition. The Act of 1885 certainly contemplated that the registration of deeds should go on. In the first section it provides that the provisions of this act

shall not apply to deeds, etc., until 1 January, 1886. Why and what reason was there for postponing the application of this act, which was to place deeds on the same footing as mortgages and to make them invalid against an after-purchaser, who gets his deed registered first, if the owner of the deed had no right to have his "prior deeds" registered? Would it not be adding insult to injury to notify the citizen that we will not apply the mortgage law to you until 1 Jan-
(777) uary, 1886, but in the meantime we will not let you register your deeds and perfect your titles?

But again. The second proviso of the same section (Laws 1885) provides that if any person shall purchase any land from any prior donor or lessor, it "shall avail or pass no title as against any unregistered deed executed prior to 1 December, 1885, when the person or persons, claiming under such unregistered deed, shall be in the actual possession and enjoyment of such land, either in person or by his or their tenants, at the time of the execution of such prior deed, or when the person or persons, claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed or the claim of the person or persons holding or claiming thereunder."

Can it be possible that the Legislature would have made such a provision as this, without intending to provide a means by which such prior deeds might be registered? Or did the Legislature intend to say to the holder of such deed that you cannot register it, but you had better be on the lookout, or some fellow will get your land? But again, the second section of this act provides that persons holding unregistered deeds, executed prior to the first of January, 1856, may have them recorded without proving their execution, but "upon the affidavit of the holder, and that such deeds and affidavits shall be entitled the registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds." Why should the Legislature say this if there was no means by which they could be registered? And the Legislature is so anxious that everybody should have his deeds registered before the mortgage law applied that the fourth section reduces the fees of the clerks and registers on such deeds. And the fifth section provides that the Secretary of State shall cause this act to be published in at least three newspapers in each judicial district
(778) and shall send copies thereof to the clerks and registers to be posted in their offices. And the registers of each county shall cause the same to be posted in as many as four public places in each township in his county, for at least sixty days before this Act of 1885 goes into effect. Then why do all this, if no one could have any deed or contract registered?

We know as a matter of fact there never was such a harvest for clerks and registers. Almost everybody was rushing forward to get his deeds registered before the new act took effect. And we have no doubt that more deeds were registered in the year 1885 than had been registered in any other ten years in the history of the State.

It must be manifest that the Act of February, 1885, regarded section 1245 of The Code as continuing in force and effect until repealed by that act. The first sentence in the Act of February, 1885, is to repeal section 1245 of The Code. This act is to go into effect on 1 January, 1886. Why then should the Act of February, 1885, which does not go into effect until January, 1886, by express terms, repeal section 1245, if this section had expired at the adjournment of the Legislature, in March, 1885, as contended by the plaintiff? We are not willing to cast that imputation upon the Legislature, and upon the learned gentleman said to be the author of the Act of 1885, as it would do to say that this act was passed in express terms, for the purpose of repealing an act that would expire and be lifeless with the adjournment of the Legislature, and make the act repealing it take effect eight or nine months after the act they were repealing was dead.

Our opinion is that by clear implication the Act of February, 1885, continued in force section 1245 of The Code, until it went into effect on 1 January, 1886, and that there has been no time since 5 August, 1882, when defendant might not have registered her deed. There is error and the defendant is entitled to a new trial.

New Trial. (779)

CLARK, J. (dissenting): The plaintiff claims under a deed from the sheriff upon execution sale against T. J. Withrow dated 3 December, 1888, and registered 11 December, 1888. The execution on two docketed judgments against him, one of them taken at Spring Term, 1885, and docketed. His homestead was laid off in other property, and this tract was returned as his property in excess, September, 1888. The *feme* defendant claims under an alleged deed from her husband dated 2 August, 1882, but not registered till 26 November, 1889, nearly a year after the registration of the plaintiff's deed.

By section 1245 of The Code, which is a copy of the law in force at the date of the deed to the *feme* defendant, such deed was not "good and available unless registered within two years after the date of said deed." It was not so registered and was therefore, like an unregistered mortgage, a nullity as to executions or liens against the grantor unless the two years' limitation was extended. No statute of extension has since been passed, unless the second proviso of section 1, ch. 147, Laws 1885, be so construed. But it is unnecessary to construe

it, for, granting it bears that construction, by its terms it only took effect 1 December, 1885, and in the meantime, at the Spring Term of 1885, the lien of the judgment docketed against T. J. Withrow at a time when the alleged unregistered deed to his wife was a nullity (it being then more than two years "after date of said deed" in August, 1882) became a vested right which could not be divested by an act taking effect thereafter on 1 December, 1885. The sale under execution issuing on said judgment, and deed thereunder to plaintiff dated
(780) back to the Spring Term of 1885, and the plaintiff acquired a good title. This is stated in the dissenting opinion of the two dissenting Judges in this case, 112 N. C., on page 743, and the opinion of the other three Judges, delivered by the then Chief Justice, in its concluding paragraph on page 739 impliedly concedes the proposition, but avoids it on the ground that the point was not made and no exception taken on the trial. This time the point was made and ruled in accordance with the intimation of the Court, and the defendant excepted and appealed. Fraud was alleged, but his Honor excluded the proof offered to sustain the charge, as unnecessary, on the ground that the above principles entitled the plaintiff to recover, without going into the evidence of fraud.

Laws 1885, ch. 147, by its terms did not take effect till 1 December, 1885. One of its provisions is the repeal of section 1245 of The Code. The plaintiff does not contend that the repeal of this section took place prior to 1 December, 1885, when the rest of the act took effect. On the contrary he insists that section 1245 remained in full force till that date. By its terms the deed of T. J. Withrow was void and of no effect because not registered "within two years after the date of the deed," which was 2 August, 1882. The deed being null and void as to the creditors of the grantor after 2 August, 1884, just as an unregistered mortgage would have been, the judgment docketed against T. J. Withrow, Spring Term, 1885, conferred a vested right in the land which could not be disturbed by an act taking effect 1 December, 1885. Such act might revive the rights of the holder of an unregistered deed, but it could not destroy liens acquired under the docketed judgment while the unregistered deed was null and void by the terms of the law then in force. It must be noted that The Code, sec. 1245, did not extend the time for the registration of deeds for two years
(781) from its ratification, which previous Legislatures had been in the custom of doing, as seems to be supposed, but simply kept in force the former act that deeds should not be "good and available" unless in two years "after date of the deed." The date of the deed being 2 August, 1882, it ceased to be "good and available" 2 August, 1884. If revived, it could only be by virtue of the act taking effect

1 December, 1885, for section 1245 was the law up to that date. Now, in the interval, while the deed was a nullity as to the creditors of the grantor, just as an unregistered mortgage would have been, the lien of the docketed judgment was acquired at the Spring Term, 1885. The plaintiff, as purchaser under the execution issued on that docketed judgment, gets a vested interest, thereby acquired, free from any subsequent rights or liens of the unregistered deed of the grantee, however conferred, by statute or otherwise. This is the office and purpose of docketing judgments. Otherwise, they would be of small use. The plaintiff having acquired by purchase under execution issued thereon, the vested right and lien on the property conferred by such docketed judgment antedates any rights which could be conferred on the holder of the unregistered deed by the act, which did not take effect till 1 December, 1885. Whatever the intent of the Legislature may be supposed to have been, it had not the power, nor can it be supposed to have intended, to destroy vested interests in the land acquired by the lien of the docketed judgment before the act became operative. So in *McKeithan v. Terry,* 64 N. C., 25, it was held that the lien acquired by a levy in 1867 could not be divested by the homestead provision of the Constitution adopted in 1868. Such transactions as the one here attempted to be set up are the strongest example and vindication of the wisdom and necessity of the Act of 1885, *supra.* The husband in possession of land under a registered deed continues to receive the rents and profits and to list and pay taxes on it in his own name.
When his homestead is set apart, this is laid off as his excess, (782) without exception. When the excess is offered for sale, then for the first time it is contended that the wife claimed that a deed had been made to her seven years before. When the plaintiff offers to show fraud and to rebut the evidence that the notice was even then given—the deed in fact not being recorded till a year later—his Honor excluded it (and properly) as unnecessary on the grounds above stated that the lien of the docketed judgment was not divested by the subsequent act of the Legislature.

MONTGOMERY, J., concurs in this dissent.

Cited: Blue v. Ritter, 118 N. C., 581; *Patterson v. Meares,* 121 N. C., 267; *Hallyburton v. Slagle,* 130 N. C., 484; *Laton v. Crowell,* 136 N. C., 380.

L. C. YOUNGER ET AL. v. M. RITCHIE ET AL.

Action to Set Aside Fraudulent Conveyance of Homestead.

Whatever doubt might have existed as to the right of creditors holding docketed judgments to have immediately set aside as fraudulent, and as a cloud on their title, a conveyance by the owner of a homestead upon which such judgments are a lien, they were removed by ch. 78, Acts of 1893, which provides that the fact that the lands do not exceed in value the homestead exemption shall be no defence, but prohibits the sale of the land until after the expiration of the homestead.

ACTION, tried at Spring Term, 1895, of STANLEY, before *W. S. O'B. Robinson, J.*

The action is in the nature of a creditor's bill brought by a large number of creditors to set aside certain deeds executed by the defendant M. Ritchie to his wife and son, the other defendants.

(783) The plaintiffs having admitted that the lands embraced in the deed from the defendant M. Ritchie, to the defendant M. A. E. Ritchie, his wife, were worth less than the sum of one thousand dollars, the court thereupon intimated an opinion that the plaintiffs could not recover judgment setting aside said deed, for the reason that the defendant could not make a conveyance in fraud of his creditors of lands worth less than his homestead, he being still a resident of this State.

In deference to this intimation of the opinion of the court, the plaintiffs submitted to a judgment of nonsuit and appealed.

Brown & Jerome for plaintiffs.
No counsel contra.

CLARK, J. This is an action by several creditors of the male defendant to set aside his conveyance to his wife, on the ground that it was made with intent to hinder, delay and defraud the creditors of the grantor. It was admitted that he was a resident of the State and that he could still claim a homestead in the land conveyed, if the deed was declared fraudulent, it being worth less than one thousand dollars, and no other homestead having been allotted him. *Crummen v. Bennett,* 68 N. C., 494; *Dortch v. Benton,* 98 N. C., 190, and numerous other cases affirming the same doctrine. The plaintiffs are not seek-

(784) ing to assert that the defendant is estopped to assert his homestead rights in the property, by reason of the fraudulent conveyance thereof, but they contend that their docketed judgments be-

ing liens upon the reversion after the termination of the homestead (*Jones v. Britton,* 102 N. C., 166), they are entitled to have the cloud or obstruction of the fraudulent conveyance removed now, because the evidence may by the process of time beome unavailable. Had there been any doubt of their right to maintain this action for that purpose, it is removed by chapter 78, Laws 1893, which expressly provides that it shall be no defence to actions to set aside fraudulent conveyances to "allege and prove that the lands therein embraced do not exceed in value the homestead allowed by law," providing however that the act shall "not be construed to authorize the sale of the land until after the homestead exemption has expired."

It was competent for the Legislature to so enact, and the meaning of the statute is clear and unambiguous. It is not improbable that its enactment was brought about by the doubtful intimation in *Rankin v. Shaw,* 94 N. C., 405, that such was not the case, as the law formerly stood, and to cure such defect. The judgment of nonsuit must be set aside.

Reversed.

(785)

J. H. MOOSE ET AL., EXECUTORS OF G. H. BARNHARDT, v. W. S. MARKS.

Action on Note—Application of Payments.

1. Where a creditor holds two or more claims against a debtor, the latter may direct the application of a payment to either of the debts; if he does not do so, the creditor may make the application; if the latter fails to do it, the law will apply it to the debt with the least security.

2. Where a creditor holding two notes against the defendant, one as executor and the other as assignee in his individual right (the latter without defendant's knowledge) and in answer to a request for a remittance made on the ground that "one of the heirs" needed it, defendant sent a check saying, "I send you this amount to relieve the heir in distress": *Held,* that the payment should be applied on the note held by plaintiff as executor.

ACTION, tried before *Robinson, J.,* at Spring Term, 1895, of STANLY.

The action is for $64.58, balance due on a note for $600, secured by mortgage on defendant's real estate. This note was executed to plaintiffs' testator, G. H. Barnhardt, and was held and sued on by the plaintiffs as executor of Barnhardt.

The following letter, dated 24 December, 1892, from the plaintiff to the defendant was introduced by the defendant and admitted by the plaintiff: (786)

DRY'S MILLS, N. C., 24 December, 1892.

W. A. MARKS, *Albemarle, N. C.*

Sir: Will you be so kind as to send me a check for $75, as one of the heirs is in a strain and needs it very much.

If possible send that am't. Will be very much obliged. If you cannot, send all you can.

Yours, etc., J. H. MOOSE.

The defendant testified that in response to said letter he sent the plaintiff $57.50. Defendant further testified that he did not know, at the time he sent the said sum of money, that plaintiff held another note, or any other evidence of indebtedness against the defendant.

It was admitted that the plaintiff applied the said payment to another note held by him, executed by the defendant to one J. W. Hardister, which had been transferred to plaintiff.

The court charged the jury that plaintiff had a right to apply the said sum of $57.50 to the Hardister note. To this charge the defendant excepted.

There was a verdict and judgment for plaintiffs, from which (787) defendant excepted and appealed.

Montgomery & Crowell for plaintiffs.
Brown & Jerome for defendant.

FAIRCLOTH, C. J. It is agreed all around that the debtor may direct the application of his payment, and on his failure to do so the creditor may make the application, and if he fails then the law will make it to the debt with least security.

Here, the plaintiff held a note for $600 in his right as executor against defendant and another for a less amount as assignee in his individual right; the latter holding, however, was unknown to the defendant. The plaintiff applies by letter for $75 "as one of the heirs is in a strain and needs it very much." The defendant answers, "Find check for $57.50. I will send you some more as soon as I can raise it," which was equivalent to saying, "I send you this amount to relieve the heir in distress," and in legal effect was a request to apply it on the $600 note, and good faith required that it be done.

Judgment Reversed.

Cited: Young v. Alford, 118 N. C., 220; *French v. Richardson,* 167 N. C., 44.

(788)

W. R. HUNEYCUTT ET AL. v. W. R. BROOKS ET AL.

Proceedings for Partition—Denial of Title—Plea of Sole Seizin—Evidence—Statute of Limitations.

1. Where, in a proceeding for partition, the plaintiff claims to be tenant in common with defendant and the defendant denies plaintiff's title and alleges sole seizin in himself, the proceeding becomes in effect an action of ejectment and the burden of proof is on the plaintiff to establish his title.

2. Plaintiffs, in an action for partition in which defendants denied plaintiffs' title and alleged sole seizin in themselves, claimed under the will of their father devising the land to his widow during her widowhood and then to plaintiffs. It was shown that the widow had died without marrying again, but there was no evidence that either she or the plaintiffs had held possession of the land within 35 or 40 years prior to the action. *Held*, that the evidence did not establish plaintiffs' title and they were not entitled to recover.

3. The statute of limitations does not begin to run against remaindermen until the expiration of the particular estate.

SPECIAL PROCEEDING for partition of land, commenced before the clerk of the Superior Court of Stanly, and issues of law and fact being raised upon the pleadings, the same with all the proceedings therein, were transferred by the clerk to the civil issue docket for trial. At Spring Term, 1894, of STANLY, said case was tried before *Boykin, J.*, and a jury.

J. Milton Brown for defendants. (792)
No counsel contra.

FURCHES, J. This is a proceeding commenced in the Superior Court of Stanly County before the clerk for partition of the lands mentioned in the complaint. Plaintiffs allege that they are tenants in common with defendants in said lands. The defendants answer and deny that plaintiffs are the owners of the lands mentioned in their complaint, and plead *"non tenant insimul"* (sole seizin in themselves), which is the "general issue" in a proceeding for partition. *Purvis v. Wilson,* 50 N. C., 22. This makes the issue where the plaintiff claims to be the owner of land and the defendant denies that he is the owner. In effect it becomes an action of ejectment and the defendant is required to give bond for cost and damage before he can answer as in an action of ejectment under section 237 of The Code. *Cooper v. Warlick,* 109 N. C., 672; *Vaughan v. Vincent,* 88 N. C., 116.

This being so, the burden of proof is on the plaintiff, the test being

this: Suppose no evidence should be introduced, who would be entitled to recover? 1 Greenleaf Ev. (14 Ed.), pp. 104, 105 and note B;
(793) *Clapp v. Brougham,* 9 Cowen N. Y., 530; 17 Am. & Eng. Enc., 747; Bailey's Onus Probandi, 113; Abbott's Trial Ev., 723. Then suppose no evidence had been introduced in this case, plaintiffs alleging seizin in themselves and defendants denying it, and nothing appearing in the pleadings to estop defendants (as claiming under or through the same person) from denying plaintiffs' title, who would have been entitled to recover? The simple statement of this proposition, it seems to us, shows that defendants would be entitled to an instruction from the court to the jury, directing them to return a verdict for defendants. And we are of the opinion that the court erred when it held that the burden was on defendants. If defendants had declined to introduce evidence and the court had instructed the jury to return a verdict for plaintiffs—which the court would have done if it had followed the logic of its position that the burden was on the defendants—defendants would have been entitled to a new trial.

But defendants' plea of sole seizin did not only throw the burden upon plaintiffs to open the case, but also to prove their title, as in ejectment. The plaintiffs had to recover, if at all, upon the strength of their own title. It was not necessary that defendants should do anything until plaintiffs did this. After defendants had offered three deeds running back to 1845 and a long continued possession, which we do not deem it necessary to discuss in this appeal, the plaintiffs did introduce evidence, but in our opinion it fell far short of making out their case.

They first introduced the will of David Brooks, probated at August Term, 1842, which was in substance to his widow Polly Brooks, during her widowhood, and then to his children. And it was shown that Polly Brooks never married again and died in 1882 or 1883. But it
(794) was not shown that Polly Brooks or any of the plaintiffs had been in possession of this land (the sixty-four and a half acres of which defendants claim to be sole seized) for thirty-five or forty years; in fact plaintiffs failed to prove possession in Polly or themselves of any of the lands mentioned in the complaint. The will of David Brooks does not establish title in plaintiffs, by their showing as they did that they were the children and heirs-at-law of the said David. This will, without proving that plaintiffs or their mother Polly had held possession under it, proved no more than it would have proved in 1842 when it was probated. Suppose then that defendants had been in possession, and plaintiffs and their mother Polly had brought their action of ejectment against them, and offered this will in evidence and stopped; could it be contended that plaintiffs had made out their title and were entitled to recover? This proposition must be answered in the neg-

ative. We are therefore clearly of the opinion that plaintiffs failed to establish their title to the land in controversy, and the court should have so instructed the jury. But instead of so instructing, the court instructed them if they believed the evidence to find for plaintiffs. In this there was error.

This disposes of the appeal. But there are other questions presented by the record, which have been argued and will necessarily arise on a new trial if plaintiffs succeed in making out their title. These are, as to what estate this will conveyed to Polly Brooks, and as to the statute of limitations—or possession. And our opinion is that, if David Brooks owned the lands named in the will, and Polly Brooks never married again, she was the owner of the same until her death unless she conveyed it, and then the assignee would be the owner until her death. And this being so, plaintiffs would have no right to the possession of said land, and no right to sue for the same until after the death of Polly. So, if the sixty-four and one-half acres, claimed (795) by defendants, is a part of the David Brooks lands mentioned in his will, and he was the owner thereof and had the right to convey the same by said will, then time did not commence to run against the plaintiffs until the death of Polly. And if defendants are tenants in common with plaintiffs, as they allege, it would require twenty years' sole possession by defendants from the death of Polly to defeat plaintiffs' claim. *Ward v. Farmer,* 92 N. C., 93, and cases cited. But if they are not tenants in common with plaintiffs, and hold under deeds from parties who are strangers (that is, others than plaintiffs), seven years' adverse possession would bar plaintiffs' right. The right of the *feme* defendant to dower has nothing to do with this proceeding.

There is error and defendants are entitled to a

New Trial.

Cited: Alexander v. Gibbon, 118 N. C., 798; *Worth v. Simmons,* 121 N. C., 362; *Graves v. Barrett,* 126 N. C., 270; *Brown v. Morisey,* 128 N. C., 140; *Parker v. Taylor,* 133 N. C., 104; *Woody v. Fountain,* 143 N. C., 69; *McCaskill v. Walker,* 147 N. C., 198; *Gregory v. Pinnix,* 158 N. C., 150; *Sipe v. Herman,* 161 N. C., 109; *McKeel v. Holloman,* 163 N. C., 136; *Ditmore v. Rexford,* 165 N. C., 620; *Lester v. Harward,* 173 N. C., 84; *Moore v. Miller,* 179 N. C., 398.

DR. JAS. M. HENDERSON v. WILLIS B. DOWD.

Constitutional Law—Legislative Powers—Appointment of Guardian—Idem Sonans.

1. An act of the Legislature authorizing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk.

2. Where there is no doubt as to the identity of the person named in the act, an act of the Legislature is not invalid, because, by clerical error, the initial letter of his middle name is incorrectly inserted therein.

CONTROVERSY submitted without action under section 567 of The Code and tried by *Robinson, J., at Chambers,* in Shelby, 19 April, 1895.

The case agreed states:

(796) That the defendant, Willis B. Dowd, is the guardian of Margaret E. Henderson, a lunatic, duly appointed by the clerk of the Superior Court of Mecklenburg County, and has in possession the real and personal property of his said ward.

That the defendant has removed to the city of New York, having tendered his resignation as such guardian which the said clerk is willing to accept provided a suitable person can be found to take the said office.

That Dr. Jas. M. Henderson, the plaintiff in this action, is willing to accept the said guardianship but, owing to the difficulty of making the required bond, applied to the General Assembly of 1895 and obtained the passage of the act referred to in the pleading and a controversy has arisen in regard to the construction of the said act, being contended on one side that the plaintiff is entitled to the office of guardian and to the property of the said ward without the intervention of the clerk of the said court, while it is contended on the other side that the only object of the said act was to authorize the clerk of the said court to appoint the plaintiff guardian of the said ward without requiring of him the bond provided for in sections 1573 and 1574 of The Code. His Honor, being of the opinion that no appointment on the part of the clerk of the court was necessary, gave judgment against the defendant for the delivery of the said ward's property into the possession of the plaintiff, from which judgment the defendant appealed.

Section 1 of the act of the General Assembly referred to is as follows:

"That Dr. Jas. N. Henderson, of Charlotte, North Carolina, be allowed to act as guardian of Margaret E. Henderson without being required to give bond as directed by section 1574 of The Code."

McCall & Nixon, Jones & Tillett for plaintiff.
Clement Dowd for defendant.

FAIRCLOTH, C. J. This Court is of opinion that the Legislature has the power to enact that the plaintiff be appointed guardian of Margaret E. Henderson without bond, etc., because there is no restriction on such power in the organic law. The policy of so doing is not for this Court to consider. It is by the authority of the Legislature that the duties of the clerk are prescribed and regulated, and if that body can delegate the execution of such duties to the clerk, it must have the power to do the same. We are not to be understood as saying that the guardian, when thus appointed, is exempt from accountability, nor from the supervision of the clerk, as in cases of appointment by the clerk, except in the matter of entering into bond. The objection to the name of the plaintiff is without force. There is an interesting list of *idem sonans* cases collected in *S. v. Collins,* 115 N. C., 716.

Judgment Affirmed.

Cited: Miller v. Alexander, 122 N. C., 721.

ALPHA MILLS v. WATERTOWN STEAM ENGINE COMPANY.

Action for Damages—False Warranty—Sale of Personal Property—Principal and Agent—Issues—Discovery of Fraud—Statute of Limitations—Damages.

(798)

5. It is sufficient if the issues submitted on the trial of an action embrace the the defendant was that the person upon whom service of the summons was made was not the agent of defendant, and the jury, in the trial of the action, found an issue establishing such agency, the refusal of the motion to dismiss by the trial judge who, at the time it was made, passed on the fact, cannot be excepted to on appeal.
2. The refusal of a new trial upon the ground that the verdict is against the weight of the evidence is not reviewable on appeal.
3. Where a person, as agent of another, contracts to sell an engine of a certain kind and knowingly delivers an inferior one, the purchaser may retain the engine and sue both principal and agent for damages.
4. An agent authorized to sell is authorized to make a warranty.
5. It is sufficient if the issues submitted on the trial of an action embrace the substantial contention of the parties in such manner as not to deprive either party of the benefit of a substantial right.

6. Where it was admitted that B sold an engine to plaintiff and in an action against B and W for damages, on false warranty, the jury find on a distinct issue that B was W's agent in the transaction, the refusal to submit an issue as to whether or not there was a sale by W was not error.

7. The amendment, by ch. 269, Acts of 1889, of section 155 (9) of The Code, by which the words "in cases which were heretofore solely cognizable by courts of Equity" were stricken out, applies to an action for a false warranty in a sale made before the amendment, so that, in actions where relief on the ground of fraud is sought, the cause of action shall not be deemed to have accrued until the discovery of the fraud complained of.

8. A foreign corporation cannot set up the statute of limitations in bar of an action for false warranty.

9. Where, in the trial of an action for false warranty, a dispute exists as to when the plaintiff first knew of the fraud, the question as to whether the action is barred by the statute of limitations is one of fact for the jury.

10. A plaintiff in an action for false warranty in the sale of an engine is entitled only to damages naturally arising from the fraud and not to interest on his payments nor to amounts paid for insurance.

CIVIL ACTION, brought by plaintiff against the Watertown Steam Engine Company (a foreign corporation) and its agents, Brem & McDowell, for damages arising from its false warranty and deceit in the sale of an engine, the manufacture of the Watertown Steam Engine Company.

(799) The following is a copy of the offer for the sale of the engine which was bought from the defendant by the plaintiff:

Office of Brem & McDowell, Machinery, Mining Supplies and Safes. Agents for Liddell & Co., Manufacturers of "Boss" Cotton Presses, Saw Mills, Shafting, Pulleys, Hangers, etc. Agents for Watertown Engines. Cleveland & Hardwick Engines. The Pratt Improved Cotton Gin. Corn and Flour Mills. Victor Wagon and Platform Scales. Emerson, Smith & Co. Planer and Solid Tooth Circular Saws. Marvin's Fire Proof Safes. Steam and Water Fitting and All Sizes of Wrought Iron Pipe and Rubber and Leather Belting, Constantly on Hand.

CHARLOTTE, N. C., 9 April, 1888.

E. K. P. OSBORNE, Esq., President Alpha Mills.

Dear Sir: We will sell to your mill the following machinery, at prices given:

One Watertown automatic cut-off engine, 18x28 cylinder, 150 H. P. nominal, or 155 H. P. cutting off at half stroke 70 lbs. steam	$1,500.00
80-horse still boilers, at $843 each	1,686.00
No. 3 pump	175.00
No. 11 heater	250.00
Steam and water connection	100.00
Machinist's time	30.00
Freight, about	43.00
	$4,154.00

With pump and heater.

Yours respectfully, BREM & MCDOWELL.
Accepted: E. K. P. Osborne, Pres.

The engine was delivered on 12 December, 1888, and was set up on 5 February, 1889, and suit was brought on 3 January, 1892.

There was much evidence offered and many exceptions taken (800) to the admission and exclusion of testimony and to the refusal to give instructions asked for and to the charge as given, all of which is set out in a voluminous record. The material facts and exceptions are sufficiently stated in the opinion of *Associate Justice Furches.*

The issues submitted and the responses thereto are as follows:

1. Did Brem & McDowell warrant the engine to be a 150 horse-power engine of the manufacture of the Watertown Steam Engine Company? Answer, "Yes."

2. At the time of said warranty were Brem & McDowell the agents of the Watertown Steam Engine Company for sale of said engine? Answer, "Yes."

3. Did the Watertown Steam Engine Company, through Brem & McDowell as its agents, warrant that the engine sold to the plaintiff, the Alpha Mills, was a 150 horse-power engine of the manufacture of said Watertown Steam Engine Company? Answer, "Yes."

4. Was the said engine a 150 horse-power engine of the manufacture of said company? Answer, "No."

5. Did Brem & McDowell represent to the plaintiff that the engine was a 150 horse-power engine of the manufacture of said company with the purpose of inducing the plaintiff to buy the engine? Answer, "Yes."

6. Was said representation true? Answer, "No."

7. Did Brem & McDowell know, or have reason to believe, at the time of said representation, that said engine was not a 150 horse-power engine of the make of said company? Answer, "Yes, but not with fraudulent intent."

8. Was plaintiff induced by said representation to buy the engine? Answer, "Yes."

9. At the time of said representation were Brem & McDowell (801) the agents of the Watertown Steam Engine Company? Answer, "Yes."

10. Is plaintiff's cause of action barred by the statute of limitations as to Brem & McDowell? Answer, "No."

11. Is the plaintiff's cause of action barred by the statute of limitations as to Watertown Steam Engine Company? Answer, "No."

12. What are the plaintiff's damages? Answer, "$2,023.74."

Judgment was rendered by the court in favor of the plaintiff.

Burwell, Walker & Cansler for plaintiff.
Geo. E. Wilson and George F. Bason for Steam Engine Co.
Jones & Tillett for the defendants Brem & McDowell.

FURCHES, J. This is an action for damages upon an alleged false warranty in the sale of a steam engine in which plaintiff recovered and defendants appeal, and file 44 exceptions to the ruling of the court. We do not expect to take up and discuss these exceptions *seriatim,* but only to discuss such of them as will dispose of the case on appeal, as many of them will in all probability not arise again.

The defendants moved to discuss the action for want of due service. This motion had been made and passed upon some terms ago, upon affidavit, as to whether the defendants Brem & McDowell were agents of the other defendant in making the sale complained of. And if there had been any reason for doubting the correctness of the finding of the court at that time (and we do not see that there was), there certainly is none now, when this question has been submitted to a jury and found that they were the agents of the Watertown Steam Engine Com- (802) pany. This motion overruled.

Defendants then moved for judgment on the findings of the jury (*non obstante,* we suppose). This exception was not argued and we suppose was virtually abandoned. But if it was not, we see no ground upon which it can be sustained, and it is overruled.

Exhibit 5 contains the contract for the sale of the engine, which in our opinion shows that Brem & McDowell acted as agents of the Watertown company in making the sale. And that it also constitutes a sale with warranty. *Thomas v. Simpson,* 80 N. C., 4; *Love v. Miller,* 104 N. C., 582. And that plaintiff might retain the engine and have an action against defendants for damages. *Lewis v. Rountree,* 78 N. C.,

323; *McKinnon v. McIntosh,* 98 N. C., 89. An agent authorized to sell is authorized to make a warranty. *Hunter v. Jameson,* 28 N. C., 252. We do not think the fact that Brem was a member of the plaintiff corporation benefits the defendants. If he acted as the agent of the Watertown company in making this sale—was in its employ and pay—he could not at the same time be acting for the plaintiff corporation. And thus acting, it is not to be supposed that he would give plaintiff information injurious to his principal, and which would likely prevent a sale of its property. *McKoy v. Hancock,* 38 N. J. Eq., 161; *Hickman v. Green,* 27 S. W., 440; *Bank v. Harris,* 118 Mass., 147; *Allen v. R. R.,* 150 Mass., 200. It has been held that if the agent did not know of the defects at the time of making the sale, he would not be guilty of a moral fraud, but still it would be a legal fraud. *Peebles v. Guano Co.,* 77 N. C., 233. But in this case the jury, by the seventh issue, find that the agents had knowledge at the time of the sale, that the engine was not a 150 H. P. engine. So it is not necessary to invoke the rule in the case of *Peebles v. Guano Co., supra.* (803)

The defendants insist that they were entitled to their first issue as to whether there was a sale or not. And ordinarily it seems to us that this would be so. But in this case it seems not to be denied that there was a sale of an engine by Brem & McDowell to the plaintiff. And we suppose defendants insisted on this issue upon the ground that Brem & McDowell were not the agents of the Watertown company. And as this was submitted as a distinct issue and found that they were, we think this supplies any apparent necessity for this issue. There was been much discussion (to be found in our reports) as to what are proper issues. But we think it has been finally settled that if the issues as submitted embrace the substantial contention of the parties, in such manner as not to deprive either party of the benefit of a substantial right, this is sufficient. And applying this rule we do not see that defendants were prejudiced on account of the court's not submitting this issue, and must overrule this exception.

Defendants contend that plaintiff's action is barred by the statute of limitations. And as to the defendants Brem & McDowell, we would hold this to be so, under the cases of *Blount v. Parker,* 78 N. C., 128, and *Jaffray v. Bear,* 103 N. C., 165, but for Laws 1889, ch. 269, amending subsection 9, section 155 of The Code. This amendment strikes out of section 155 of The Code, that part upon which the decision in *Blount v. Parker* and *Jaffray v. Bear* was put. This amendment leaves all actions subject to the same rule, whether they were heretofore cognizable solely in courts of Equity or not, and makes all actions come under the same rule as if they had been originally cognizable in courts of Equity. And the jury having found the issue

(804) of fraud in favor of plaintiff, it makes this point in the case, as to defendants Brem & McDowell, depend upon the time when the fraud was discovered by plaintiff, that is, when it first discovered that the engine was not a 150 H. P. engine. As to the other defendant, the Watertown company, we think a different rule obtains. This defendant is a foreign corporation. Its citizenship is in New York. In matters of litigation it has the right to avail itself of this fact, as is often done in cases of removal from state to federal courts. And we see no reason why it should not be subject to the same rule that individuals are, who are citizens of other states. We therefore do not think the statute of limitations applies to them, whether the fraud was discovered within three years before the commencement of the action or not. Code, sec. 162; *Grist v. Williams,* 111 N. C., 53. The defendants Brem & McDowell contend that as the Act of 1889 was passed after the sale complained of was made, the amendment does not apply in this case, and that the law as it stood before the amendment must govern. We do not agree to this contention. The statute of limitations is no satisfaction of plaintiff's demand. It is only a bar when set up to the action of the court. It does not act on the rights of the parties, but only affects the remedy. It is created by the Legislature and can be removed by the Legislature. This is certainly so where it had not run so as to become a bar. As it affects no vested rights, there is no reason for holding that it is unconstitutional. And that is the only ground we see, upon which defendants' contention can be sustained.

This brings us to the consideration of his Honor's charge upon the statute of limitations. The question of the statute of limitations is a mixed question of fact and law. And it is true, as stated by his Honor, if there is no dispute as to facts, then it becomes a question of law and the court should instruct the jury as to their verdict. But where there are disputed facts, as to when it started to run, (805) then it is the duty of the court to submit that question to the jury. In this case it depended (as to Brem & McDowell) as to when plaintiff first had knowledge that the engine sold it was not a 150 H. P. engine. It was in evidence that plaintiff more than three years before the commencement of this action, had in its possession a catalogue of the Watertown company, which tended to show that the engine sold plaintiff was not a 150 H. P. engine. What Ward said about it, and other evidence which tended to show knowledge, was, at least, enough to make it a disputed question of fact. And this being so we think it was error in the court to instruct the jury that from all the evidence in the case they should find that the statute of limitations had not run. We also think there was error in his charge upon the

question of damages. Plaintiff gave in evidence the cost of transportation and putting down both engines. And defendants contend that under his Honor's instructions the jury charged them with this expense for both engines. If this is so, it seems to us it is clearly wrong. If plaintiff had gotten the last engine first, it would have been compelled to have borne this expense. Why then charge it to defendants? If defendants are liable, it should only be for the expense of the defective engine. It may be the defendants were not charged for both by the jury. But we have examined his Honor's charge, and can nowhere find that they were instructed as to this matter. And as the evidence was allowed and they were not instructed as to it, we think it probable, indeed most likely, that the jury did charge defendants with both. We also think there were other errors in his Honor's charge upon the question of damages. It was too broad. The rule in cases like this, as we understand it, is to allow such damages as naturally arise from the false warranty, but not for everything that may result therefrom. *Ashe v. DeRosset,* 50 N. C., 301. And we cannot see (806) how such things as interest and insurance could have been in the minds of the contracting parties, or can be said to grow out of the breach of contract between the parties. Would not plaintiff have had to pay interest and insurance, whether there was a breach of this contract or not? And did this in any way depend upon this contract between plaintiff and defendants? These and any other matters that could not have been in the minds of the contracting parties, and did not arise from the breach of warranty, should be eliminated from the question of damages.

There are other exceptions in the case, which we do not think necessary to pass upon now, as they will likely not arise on a new trial. But for the errors pointed out we are of the opinion there should be a new trial.

New Trial.

Cited: Ricks v. Stancill, 119 N. C., 102; *Rouss v. Ditmore,* 122 N. C., 778; *Mfg. Co. v. Gray,* 124 N. C., 326; *Tompkins v. Cotton Mills,* 130 N. C., 354; *Green v. Ins. Co.,* 139 N. C., 310; *Hough v. R. R.,* 144 N. C., 701; *Mfg. Co. v. Davis,* 147 N. C., 270; *Volivar v. Cedar Co.,* 152 N. C., 35; *Winn v. Finch,* 171 N. C., 275; *Cone v. Fruit Growers, ib.,* 571.

(807)

HOWELL, ORR & CO. v. THE BOYD MANUFACTURING COMPANY.

Assignment of Claim—Acceptance of Draft by Surviving Partners—Indorsement of Draft.

1. A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same.
2. A surviving partner of a firm, who was also secretary of a Co. to which the former was indebted, accepted a time draft drawn by himself as secretary of a Co., which indorsed it to plaintiffs "for value" and "to pay a debt and close up an open account." In a similar draft drawn in renewal of the first, other indebtedness of a Co. to plaintiffs was included so that the new draft was for a larger amount than was due from the firm to a Co. *Held*, that the transaction was a valid assignment to plaintiffs of the claim of a Co. against the firm, and plaintiffs are entitled to recover of the firm so much of the draft as equaled the amount due from the firm to the Co. (CLARK, J., dissents, *arguendo.*)

ACTION to recover the amount expressed in a certain draft as set out in the complaint, tried before *Graham, J.*, and a jury, at March Term, 1895, of MECKLENBURG. From the case on appeal tendered by plaintiffs and accepted by the defendant, the following facts are gathered:

In 1893, and prior to 17 August, 1893, the defendants were engaged in partnership business under the name of the Boyd Manufacturing Company and the plaintiffs were engaged in partnership business also, and at the same time the Hermitage Cotton Mills were engaged in partnership business under that name and style. The Boyd company was composed of A. J. Boyd, T. A. Richardson, S. H. Boyd and George D. Boyd. On 17 August, 1893, A. J. Boyd died. S. H. Boyd was a member and the manager of the Boyd company and was secretary and treasurer of the Hermitage company. On 17 August, 1893, the Boyd company was indebted to the Hermitage company on account in an amount about $5,500, and the Hermitage company was indebted to the plaintiffs about the same amount. For this amount, S. H. Boyd, as treasurer and secretary of the Hermitage company, on 1 September, 1893, gave to the plaintiffs three drafts for said amount, drawn on the Boyd company, of which he was a member and manager, payable to the Hermitage company, and accepted the drafts and indorsed

(808) them to the plaintiffs as secretary, etc., of the Hermitage company. Two of the drafts have been paid by the latter company. The drafts were renewed one or two times and the first, when renewed, was for the original $1,470.92, with some new transaction included,

amounting to $2,000, or more, on which was still due, when this action commenced, $1,738.54 and some interest. All these drafts were payable at some future day, say 30, 60 or 90 days.

S. H. Boyd testified as plaintiffs' witness, "This draft (the one sued on) was indorsed to the order of Howell, Orr & Co., for value to pay a debt and close up an open account due by Hermitage Cotton Mills to Howell, Orr & Co., and the draft was given in part renewal of a former draft."

Again he says that "Sanders (one of the plaintiffs) on 1 September, 1893, came to see me and brought a statement of plaintiffs' account against the Hermitage company, so as to get bankable paper for the account, as the cotton season would soon open and he wanted to get his account into shape. . . . I did not accept the said drafts on account of the said indebtedness to the Hermitage Mills though the Boyd company was indebted to the Hermitage company at the time. I accepted the draft in order to give Sanders a paper he could use on my own responsibility without consultation with any others."

Sanders testified: "I had been trying to get him (S. H. Boyd) to settle our account and he promised to settle in thirty days. I told him we wanted our money, etc. I took the drafts." The Boyd company did some new business but closed up its business early in 1894.

There was judgment for the defendant and plaintiffs appealed.

Burwell, Walker & Cansler for plaintiffs. (809)
Maxwell & Keerans for defendant.

FAIRCLOTH, C. J. (after stating the facts): At common law an assignment is the transferring and setting over to another of some right, title or interest in things in which a third party, not a party to the assignment, has a concern and interest. 1 Bac. Ab., 329. And the term implies the relation of debtor and creditor. By our Code all things in action arising out of contract are assignable.

Upon the death of A. J. Boyd the firm of the Boyd company was dissolved and the survivors had no authority to create or contract new debts binding on the original company. It then became their duty to close out and wind up the firm business by collecting its assets and paying its debts and finally distributing the balance to the parties entitled to it. The survivors, however, have the right to purchase new material and make new debts so far as may be necessary to work up unfinished material and sell the same. This is for the benefit of the creditors and the estate itself, and this to some extent was done in this case. Now, what was the effect of the conduct of S. H. Boyd and the plaintiffs in the matter? The Boyd company was indebted by ac-

count to the Hermitage company and the latter was indebted to the plaintiffs by account, the former being dissolved by death, and the duty of settling its affairs devolves upon the survivors. The plaintiffs on 1 September, 1893, applied to the Hermitage company to have their account settled, stating that they wanted their money, and they received the drafts in question with a promise that they should be paid in 30 days, etc. S. H. Boyd says: "The draft was indorsed to the plaintiffs 'for value' . . . It was indorsed to pay a debt and close up an open account due by Hermitage company to plaintiffs and the
(810) draft was given in part renewal of a former draft." Of these transactions the defendant had full notice on 1 September, 1893, when the company was solvent, and so far as appears is still solvent.

To this Court it appears that something more than accommodation paper was intended. The demand for payment of plaintiffs' account, the indorsement of draft "for value" and "to pay a debt and close up an open account" due the plaintiffs, certainly have a significant meaning, all of which was known to the defendant. Was it not plain transferring and setting over of the account against the Boyd company to the plaintiffs and thus paying a debt and closing up the account due by the Hermitage company? It was simply using the account against the Boyd company instead of money to pay the plaintiffs. The case is not similar to banking operations where promptness in daily transactions is required, where the bank pays out its deposits upon checks, drafts, etc., for they owe no debt to anyone except the depositors and are not liable on such paper to anyone until they have accepted it. Let it be admitted that S. H. Boyd had no authority after dissolution to accept drafts and assume new obligations for the Boyd company, still he had authority as manager of the Hermitage company to use its paper and credits to discharge its debts. This is no affair of the defendant. It owed a debt and was in duty bound to pay it to whomsoever it might belong, and here it was served with notice of the true ownership.

It is suggested that as the drafts drawn were payable at a future day they were therefore new debts. Not so, because they were upon the original consideration, and that fact could not affect the defendant, because its debt was due and it had the privilege of paying it any day at will, regardless of a proffered indulgence by other parties.

If the holder had declined the defendant could have made a
(811) legal tender and deposit of the money and at once discharged its liability and stopped interest and cost. *Parker v. Beasley, ante,* 1.

We are of opinion that plaintiffs are entitled to recover $1,470.92 with interest and no more, because we cannot see certainly that any

balance was a debt proper against the defendant at A. J. Boyd's death. His Honor's refusal to give plaintiffs' prayer for instruction to the extent above indicated, was error, and this conclusion makes it unnecessary to consider other exceptions.

Reversed.

CLARK, J. (dissenting): The defendant, the Boyd Manufacturing Co., was not incorporated, but was a partnership, and was dissolved by the death of A. J. Boyd in August, 1893. Subsequently thereto, S. H. Boyd, Secretary and Treasurer of the Hermitage Cotton Mills, and who was also a surviving partner in the firm known as the Boyd Manufacturing Co., drew a draft on the latter at 90 days, on 3 May, 1894, in favor of the plaintiffs for $2,075.49 and attempted to accept the same himself as manager of the Boyd Manufacturing Co. At the time of the draft, the Boyd Manufacturing Co. was indebted to the Hermitage Cotton Mills in an amount considerably less than that. Before the draft fell due, the Hermitage Cotton Mills collected of the Boyd Manufacturing Co. the entire amount due. This is an action by the plaintiffs, in whose favor the draft was drawn, to collect it over again of the drawee, on the ground that it paid the Hermitage Cotton Mills in its own wrong.

S. H. Boyd, surviving partner, had no authority to accept the draft so as to bind the Boyd Manufacturing Co., as it had been dissolved. The attempted acceptance was a nullity except as to S. H. Boyd individually, and against him a judgment has been entered up (812) and not appealed from. The position of the plaintiffs therefore, as to the Boyd Manufacturing Company, is that of a holder of a draft not accepted, and the plaintiffs have by virtue of such paper no claim against the drawee. Their claim is valid of course against the drawer.

The plaintiffs claim, however, that they are assignees of the debt which the Hermitage Cotton Mills company held against the Boyd Manufacturing Company, and therefore that the latter is still liable to them, notwithstanding it has paid the debt in full to the Hermitage company.

The answer to this is that the witness of the plaintiffs, who is uncontradicted, testifies that in fact it was not an assignment and was not intended to be, but was merely "accommodation paper." Another witness for plaintiffs, L. W. Sanders, testifies, "We received these papers as the acceptances of the Hermitage company and the Boyd Manufacturing Company and as bankable paper." It could not therefore have been an assignment of a claim. The evidence is uncontradicted that in point of fact there was no assignment of the debt, and the claim of the plaintiffs against the Boyd Manufacturing Company is simply

that of the holder of an unaccepted draft, since the attempted acceptance by an unauthorized surviving partner is a nullity. *Kahnweiler v. Anderson,* 78 N. C., 133.

It is contended, however, that such paper may be treated as an assignment of the debt, though not so intended between the parties at the time. The question is a very important one, affecting materially the course of dealings in commercial paper, and the following principle seems well settled. To make an order operate as an assignment, it must be upon a particular fund; it is not enough that it is drawn upon a debtor. 83 Me., 242, and numerous cases and other authorities there cited. See also 90 Cal., 297, and 21 Am. St., 456.

(813) Besides, an unaccepted draft or check is never held to be a claim against the drawee in the nature of an assignment of the debt, unless it was due at the time when presented and the drawee at that time had funds in his hands due the drawer. This has twice been recently held by this Court, *Marriner v. Lumber Co.,* 113 N. C., 52; *Hawes v. Blackwell,* 107 N. C., 196; *Bank v. Shuler,* 120 U. S., 511. When this paper fell due, the drawee had no funds in hand due the drawer, and was not indebted to it, having paid to it, or on its sight drafts, the full amount due. It is true there had been a former draft on the Boyd Manufacturing Company in favor of the plaintiffs, but the plaintiffs had taken in its stead a new draft at ninety days. This was notice to the Boyd Manufacturing Company that the plaintiffs held no claim against it which could be presented till the end of ninety days, and it could not till the maturity and presentation of the check lock up the drawer's debt, and refuse to pay the drawer or its sight drafts the amount due, unless it had accepted the drawer's time draft, which it was disabled in law to do. It is this which distinguishes this case from *Brem v. Covington,* 104 N. C., 589. The ninety days draft, unaccepted, was not a lien on the funds of the drawer in the hands of the drawee, but was simply a request to the Boyd Manufacturing Company to pay the plaintiffs $2,075.29 at the end of that time, and this (in the absence of the uncontradicted evidence that it was not an assignment at all) would have been an assignment of whatever funds the drawer had in the hands of the drawee at the maturity of the draft. The plaintiff doubtless would not have taken such paper, but it is certain that it was relying, not upon an assignment, but upon the acceptance of the Boyd Manufacturing Company, which, unfortunately for it, was a nullity. The claim that it is an assignment is a second thought, which was only conceived when the bankable

(814) paper, the plaintiffs thought they were taking, proved worthless as to the drawee, because of the invalidity of an acceptance by a member of an extinct partnership to bind it. Even if it

had been an assignment, by the terms of the paper itself and on its face, it was an assignment which (in the absence of an acceptance) was not to take effect till ninety days from May 3, at which time there was no debt due the Hermitage company on which it could take effect. Though the drawee had notice of the assignment, it had notice too that it was not payable for ninety days, and in the meantime it had notice also of drafts payable at sight, or by the creditor's own demand, which it could not refuse to pay. It could not pay both, and not having accepted the time draft, it had no ground to refuse payment of the sight drafts. Wherein is the advantage or effect of the acceptance of a time draft if mere notice of it to the drawee, without acceptance by him, is a lien on the funds of the drawer in the hands of the drawee so that the latter cannot, except at his own peril (as in this case) pay the drawer himself or his sight drafts prior to the date when the unaccepted draft shall fall due.

(815)

CHIPPEWA VALLEY BANK v. NATIONAL BANK OF ASHEVILLE.

Negotiable Instruments—Bona Fide Purchaser—Agreements Between Drawer and Payee of Negotiable Paper Not Binding on Owner for Value and Without Notice.

1. The fact that the maker of certain notes, by an arrangement with payee, had at different times drawn on the latter, at maturity of some of the notes, for such part as he was unable to pay, and that the drafts so drawn had passed through plaintiff's hands, was not sufficient to charge plaintiff with notice of a similar arrangement respecting notes by the same maker to the same payee, which the plaintiff had acquired before maturity, without actual notice of any equities against it.

2. In the taking of a deposition, interrogatories are not required to be in writing, and when there is nothing to indicate that the deposition does not contain the whole of the deponent's testimony or that it was not written down at the time and in the presence of the witness, a motion to quash should be refused.

ACTION, tried before *McIver, J.*, and a jury, at March Term, 1894, of BUNCOMBE. There was judgment for plaintiff and defendant appealed. The facts appear in the opinion of *Associate Justice Clark.*

J. H. Merrimon for plaintiff.
W. W. Jones and F. A. Sondley for defendant.

CLARK, J. The defendant bank having for collection a note which was sent to it by plaintiff, who had acquired it as assignee for value and before maturity, accepted of the maker part payment and a draft at 60 days, drawn by the maker on the payee, and sent its own check for the full amount of the note to the plaintiff, the holder of the note.

The said draft not being accepted, the defendant stopped pay-
(816) ment of its check, and this action is brought by the plaintiff to recover the amount of the same. The defendant introduced evidence that there was an agreement between the maker and the payee that when the notes of the former to the latter became due and were presented for payment, if the maker was not in funds he might pay what he could and draw back on the payee for the difference; that this had occurred several times and the notes had always been forwarded to defendant for collection by the plaintiff bank and the remittances made through the same agency, and the defendant contended that this fixed the plaintiff bank with notice of the agreement. The testimony of the cashier of the plaintiff bank, which is uncontradicted, is that the plaintiff took the note for value, before maturity, and without notice of any equity; that it was not the agent of the payee but the purchaser for value, and had no knowledge or notice whatever of any agreement between payee and maker of the kind alleged by the defendant. His Honor upon the evidence properly instructed the jury to return a verdict for plaintiff. The fact that the plaintiff bank had several times forwarded notes against the maker for collection to the defendant bank and that drafts drawn by the maker against the payee had thereafter passed through the two banks, even if known to plaintiff bank to have been in renewal or indulgence of part of said notes (which is not shown), was not of itself notice in law to the plaintiff that there was such agreement as to this note. Actual notice of such agreement is negatived, and is not fixed with constructive notice by the course of dealing between parties transmitting or collecting through its bank that the promissory note of the maker, who had often given counter-drafts on the payee, was given on the agree-
ment that he has that standing privilege and is always to have
(817) a similar indulgence.

The motion to quash the deposition was properly refused. The interrogatories were verbal and are not required to be in writing. There is nothing to indicate that the paper does not contain the whole of the deposition, or that it was not written down at the time in the presence of the witness. The only evidence on the point is the certificate of the commissioner, which certainly does not sustain the exception.

No Error.

LAURA S. JONES v. CITY OF ASHEVILLE.

Action for Damages—Condemnation of Land for Municipal Purposes —Parties—Intervention in Suit—Practice.

1. A person only interested in the subject matter of the litigation but whose interest will not be affected by the result, is not entitled as a matter of right to intervene in an action; if interested jointly with either plaintiff or defendant in the subject of litigation, and the result will affect his interests, he may, as a matter of right, intervene.
2. Where one is entitled, as a matter of right, to intervene in a suit and applies for leave to do so, it is error to proceed with the case until the question of such right is determined.

ACTION by Laura E. Jones against the City of Asheville, to recover damages for injury to her property and for a *mandamus* to compel the City of Asheville to pay to her the amount theretofore assessed as the value of her land appropriated by the city. The facts are fully stated in the opinion of *Associate Justice Furches.*

C. M. Stedman for J. M. Campbell (appellant). (818)
W. W. Jones, F. A. Sondley and J. H. Merrimon contra.

FURCHES, J. The plaintiff and J. M. Campbell are the owners of a house and lot in the city of Asheville, the plaintiff owning a life estate therein and Campbell owning the remainder in fee simple. In 1892 the defendant city acting in accordance with the provisions of its charter and in the exercise of its right of eminent domain, for the purpose of widening the streets of the city of Asheville, took and appropriated a part of the lot above mentioned, belonging to the plaintiff and the said J. M. Campbell. Some time after the appropriation of the property above mentioned, the damage to said lot was assessed in the name of the plaintiff, reported to the commissioners as the law provided, and by them ratified and affirmed. This report assessed the damage at $875, but before it was paid Campbell put in a claim for his part, as he alleged, of the $875 and forbade the defendant city paying it to the plaintiff. And under this condition of things the city refused to pay and the plaintiff brought this action. And at December Term, 1892, the plaintiff filed her complaint, and some time in March, 1893, the defendant filed an answer, in which it set up the fact that Campbell was the owner of the reversion and Mrs. Jones the owner of the life estate in said lot. And asking that Campbell be made a party defendant and the matter adjusted. But it does not appear that any steps were taken to make Campbell a party, until

August Term, 1893, when he appeared in court by his attorneys and asked to be made a party defendant, and that he be allowed to file an answer and set up his claim to a part of the $875. Before this, the plaintiff Jones and the defendant city had agreed upon a judgment, but the same had not been signed and filed. The court refused the motion of Campbell to be allowed to make himself a party defendant and to file his answer, and Campbell appealed.

(819) It appears in the facts found by the court that the plaintiff had requested Campbell, before she commenced her action, to join her in trying to get pay for their property. And he declined to do so, saying that his interest in the property did not commence after her life estate ended, and he would have nothing to do with it till then. And it seems that the court below thought this was not very nice treatment, on the part of Campbell, to refuse to assist her, until she was about ready to get the money and then come in and claim a part of it. And the court, it would seem, was holding him to what he had said. But it is not denied that Campbell is the owner in fee of the remainder after the plaintiff's life estate. In fact it is so found by the court. It is not denied that the City of Asheville, in the proper exercise of its right of eminent domain, had taken a part of the property and endamaged the same to the amount of $875. In fact, this is admitted, and these facts present the question of law whether Campbell is not entitled to a part of the money, now in the hands of the City of Asheville, arising out of this damage. And, if so, whether he is not entitled as a matter of law to be made a party to this action.

The rule seems to be that a party, only interested in the subject matter of litigation, is not entitled as a matter of right to intervene. *Colgrove v. Koonce,* 76 N. C., 363; *Wade v. Saunders,* 70 N. C., 270. But where a party is interested in the action jointly with either plaintiff or defendant in the subject of litigation, such party may claim to intervene as a matter of right. *Lytle v. Burgin,* 82 N. C., 301. Such a party as this is considered a necessary party to a complete determination and settlement of the litigation. *Colgrove v. Koonce, supra.*

(820) Where a party may intervene as a matter of right and his application to do so is refused by the court, he has the right to appeal. *Rollins v. Rollins,* 76 N. C., 264. Where one may intervene as a matter of right, it is error in the court to proceed with the case, after application is made, until the question of such right is settled. *Keathly v. Branch,* 84 N. C., 202.

Therefore, we are of the opinion that the appellant Campbell was entitled to intervene as a matter of right, and that having this right he had the right to appeal to this Court, when this right to intervene

was denied him. And the court should not have proceeded to judgment, after the application was made, until that question was settled. We are not called upon in this appeal to pass upon the relative rights of the plaintiff Jones and the appellant Campbell, and we do not do so. We only say that it appears that they are jointly interested in this fund. But in what proportion we do not undertake to say. That is left to be determined hereafter, taking into consideration the nature and character of the damage, as to how it affects the value of the life estate, and also as to what damage it has been to the remainder in fee. There is error and the case is remanded with directions to allow the appellant Campbell to intervene and set up his defence, and that the case then be proceeded with according to law.

Error.

Avery, J., did not sit.

Cited: Byrd v. Byrd, 117 N. C., 525; *Thompson v. Rospigliosi,* 162 N. C., 164.

(821)

W. A. BLACKBURN AND WIFE v. THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

Action on Insurance Policy—Fire Insurance—Assignment of Policy—Assent of Company to Assignment—Estoppel—Fraudulent Burning—Evidence—Exception to Charge, When Taken—Practice—Married Woman.

1. The Trial Judge has authority to order the consolidation of several actions brought on concurrent policies of insurance on the same property.
2. Where, in an action on fire insurance policies, the defence was that the property was fraudulently burned by the insured, it was error to charge that such burning must be proved beyond a reasonable doubt; only a preponderance of testimony is required.
3. An exception to the charge to the jury, if made for the first time in the statement of case on appeal, is in time.
4. An assignment of a fire policy by a *feme covert,* without the consent of her husband, and to one having no interest in the property, is valid when it was assented to by the agent of the insurer and was not procured by false representations or suppression of facts. In such case, the defendant is estopped to deny the validity of the assignment.

ACTION, tried before *McIver, J.,* and a jury, at March Term, 1895, of

BUNCOMBE, for the recovery upon a policy of fire insurance issued to Cynthia A. Blackburn, which by the consent of the defendant's agent, indorsed on the back, had been assigned to W. A. Blackburn, before the destruction of the property. The defendant, after formerly denying portions of the complaint, for further defence alleged:

"That the defendant is informed and believes that Geo. N. Blackburn, the father of the plaintiff, and William Blackburn, the plaintiff, and Cynthia A. Blackburn unlawfully conspired, confederated, and agreed together, to burn the hotel described in plaintiffs' com-
(822) plaint, and in pursuance of said conspiracy and of his own wicked purpose and intent to defraud the defendant company the said plaintiff William A. Blackburn unlawfully and willfully burned or caused to be burned the hotel described in plaintiff's complaint."

And for further defence the defendant company alleged:

"That it is informed and believes that the plaintiff had no interest in the property described in the complaint at the date of the alleged assignment of said policy or at the time of the burning of the aforesaid property, or at the time of the commencement of this action."

When the case came on for trial it was by order of the judge, and by consent of counsel for both parties, consolidated with several other actions against other defendants whose policies were concurrent and covered the same property.

The 8th and 9th issues referred to in the opinion were as follows:

8. Did plaintiffs agree, conspire and confederate together to burn the hotel and furniture?

9. Did W. A. Blackburn willfully burn or cause to be burned the hotel and furniture described in the complaint?

Both of the said issues were answered in the negative.

In reference to issues, the jury also found that Cynthia A. Blackburn was the owner of the hotel at the date of the policy and at the time of the fire, and that W. A. Blackburn was the owner of the policy of insurance at the time of the fire.

The defendants' counsel asked for the following instructions:

1. That William A. Blackburn cannot recover for the loss of the hotel if he was not owner of the hotel at the time of fire.

(823) 2. That Cynthia A. Blackburn cannot recover for the loss of the hotel if she was not the owner of the policies of insurance at the time of the fire, as a union of subject matter of insurance and policies of insurance in the same person is necessary to a recovery.

His Honor charged as to the 8th issue as follows: "That the law presumes a wrong in no man and so the law presumes that plaintiffs

did not conspire together, and the burden is upon the defendants who make the charge to establish it by a preponderance of evidence. If defendants fail to do so you should answer this issue, 'No.' If you find the facts and circumstances relied upon to establish the alleged conspiracy, existed, still if you find there is a reasonable hypothesis consistent with the innocence of the plaintiffs, you should respond 'No' to the issue. You are not to infer that the plaintiffs conspired together to burn the hotel and furniture because the facts are consistent with the charge. The fact must be inconsistent with his innocence."

His Honor further charged the jury as to the 9th issue: "That the same rule of law prevails. The burden is upon the defendants to establish the affirmative of this issue by a preponderance of evidence, and if they fail to do so, you should respond 'No' to the issue. You are not to infer that the plaintiff, W. A. Blackburn, willfully burned the hotel and furniture because the facts and circumstances relied upon to establish the truth of the charge are consistent with it. The facts and circumstances must be inconsistent with his innocence."

The defendants took no exception to this charge upon the trial but in their statement of case on appeal they said: "To this charge defendants excepted."

When the jury returned their verdict to the court the de- (824) fendants moved for judgment thereon in favor of all the companies except the Orient Insurance Company, on the ground that the verdict disclosed that the hotel, for the loss of which plaintiffs were seeking recovery, was owned by Cynthia A. Blackburn at date of loss; and the policies were owned by William A. Blackburn at the date of loss; the defendants insisting that there must be a union of the subject matter of insurance and the policies of insurance in the same person to entitle either to recover, while the verdict showed that one plaintiff owned the property and the other the policies of insurance at date of loss.

This motion was overruled and the defendants excepted. Defendants then moved for a new trial for the refusal of the court to give the instructions prayed by them, and for the errors in charge as given. This motion was overruled by the court and the defendants excepted.

The judgment was then rendered by the court in favor of the plaintiffs upon the findings of the jury, and the defendants excepted and appealed.

J. H. Merrimon, C. M. Stedman and Moore & Moore, for plaintiffs.
M. E. Carter and Fry & Newby for defendant.

CLARK, J. The consolidation of the five actions upon concurrent

policies of insurance on the same property was consented to, but if it had not been the judge had authority to so order, as there might properly have been only one action brought. *Pretzfelder v. Ins. Co., ante,* 491.

The charge of the court upon the 8th and 9th issues is not entirely clear, but it in effect amounts to an instruction that the defendants must show the conspiracy between the plaintiffs to burn and also the burning by W. A. Blackburn "beyond a reasonable doubt," for
(825) the court instructed the jury that there was a presumption of innocence and that they must find "that there was no reasonable hypothesis consistent with the innocence of the plaintiffs" and that it is not sufficient "that the facts and circumstances relied upon to establish the truth of the charge are consistent with it. They must be inconsistent with his innocence." This is not the correct rule in civil actions which have nothing to do with guilt and innocence. The burden was upon the defendants as to these two issues to prove their allegations, by the preponderance of the evidence, but not beyond a reasonable doubt. It is true that authorities in other states are conflicting, but this is the general rule in civil actions and our courts have seen no reason to depart from it. *Kincade v. Bradshaw,* 10 N. C., 63; *Barfield v. Britt,* 47 N. C., 41; *Outlaw v. Hurdle,* 46 N. C., 150. Both reason and the weight of authority, especially the later cases, sustain the proposition, that "in an action on a policy of insurance against fire, when the defendant pleads that the property was fraudulently burned by the plaintiff the defendant is not bound to prove such defence beyond a reasonable doubt." *Blaeser v. Ins. Co.,* 19 Am. Rep., 747; *Elliott v. Van Buren,* 20 Am. Rep., 668; *Jones v. Greeves, ib.,* 752; *Ins. Co. v. Johnson,* 21 Am. Rep., 223; *Kane v. Ins. Co.,* 23 Am. Rep., 239, citing Stevens on Evidence, Art. 94, p. 115; *Ins. Co. v. Berry,* 8 Kan., 159; *Munson v. Atwood,* 30 Conn., 102; *Wightman v. Ins. Co.,* 8 La., A., 442; *Marshall v. Ins. Co.,* 43 Mo., 586; *Rothschild v. Ins. Co.,* 62 Mo., 356; *Huchberger v. Ins. Co.,* 4 Bissell, 262; *Sibley v. Ins. Co.,* 9 Bissell, 31; *Ins. Co. v. Usaw,* 112 Pa. St., 80; *Ins. Co. v. Jachnichen,* 110 Ind., 59; *Mack v. Ins. Co.,* 4 Fed., 59; *Scott v. Ins. Co.,* (by *Dillon, J.*); 1 Dillon C. C., 105; *Schmidt v. Ins. Co.,* 1 Gray 529; *Ellis v. Buzzell,* 60 Me., 209; *Ins. Co. v. Wilson,* 7 Wis.,
(826) 169; *Matthews v. Huntley,* 9 N. H., 150; *Simmons v. Ins. Co.,* 8 W. Va., 474; 1 Gr. Ev., sec. 13a, note; 2 Greenleaf Ev., sec. 408, note b; Wharton Ev., sec. 1246; 1 May on Ins., sec. 583; Biddle Ins., 443; Wood Ins., sec. 101.

The defendants took no exception to the charge at the time, but in making out their statement of case on appeal they specifically excepted to the charge in this particular. This is in sufficient time for

exceptions to the charge though not as to any other matters. *Lowe v. Elliott,* 107 N. C., 718, and other cases cited in Clark's Code (2d Ed.), p. 383, and *Tillett v. R. R., post,* 937.

If the assignment of the policy by Cynthia A. Blackburn was defective because her husband did not join therein, she and her husband being parties to the action, the defendants cannot complain, but taking the assignment as sufficient as to its execution, the defendants are estopped, for through their agents they assented to the assignment being made and there is neither allegation nor proof that there was any suppression of the facts or that said agents were misled or deceived in assenting thereto. It would be a fraud on the plaintiffs if the defendants could assent to the assignment, lull the assignee and assignor into a belief that the property was protected by the insurance and continue to receive the premiums, yet, when there is a loss by fire, could assert that they had been released from liability by an assignment which by their assent duly indorsed on the policy they had agreed might be made and which was relied on by the plaintiffs. It is very certain that if the defendants had not indorsed their assent the assignment would not have been made; else, why the care taken to procure such assent to be indorsed? It is true that the rule is that a policy of insurance against fire is not valid if taken out by, or if assigned to, one who has no interest in the property insured.
But here the defendants agreed that the plaintiffs might ex- (827)
ecute this assignment; it is not alleged that the companies had any representations made to them in order to procure their assent; that the assignee had an interest in the property and they were not incapacitated to give a valid and binding assent. That, under such circumstances, the assignment is valid and binding on the companies is held in *Ins. Co. v. Flack,* 56 Am. Dec., 748, and is noticed in *Bibend v. Ins. Co.,* 30 Cal., 78, where it is held that an assignment of this character is regarded in the light of a transfer of the right to receive the money that might become due upon the happening of a loss. *Fertilizer Co. v. Reams,* 105 N. C., 283, 295.

As the error only affects the verdict upon the 8th and 9th issues, a new trial is granted only as to them, the judgment being affirmed in all other respects. *Burton v. R. R.,* 84 N. C., 192, 201. *Tillett v. R. R.,* 115 N. C., 662.

New Trial.

Cited: S. c., 117 N. C., 532; *Bernhardt v. Brown,* 118 N. C., 709; *Sydnor v. Byrd,* 119 N. C., 487; *S. v. Harris,* 120 N. C., 579; *S. v. Melton, ib.,* 596; *Strother v. R. R.,* 123 N. C., 200; *S. v. Pierce, ib.,* 749; *Benton v. Collins,* 125 N. C., 90; *Ins. Co. v. R. R.,* 179 N. C., 259; *Lasley v. Scales, ib.,* 581.

(828)

FIRST NATIONAL BANK OF SPRINGFIELD v. THE ASHEVILLE FURNITURE AND LUMBER COMPANY.

Corporations—Authority of Manager—Sale of Property Resulting in Discontinuance of Business—Payment of Debts—Directors' Meeting —Validity.

1. However broad may be the general power of the manager of a corporation to conduct its manufacturing business, it cannot extend to a transaction which virtually results in a discontinuance of its business.

2. Where the treasurer and general manager of a corporation engaged in the manufacture of furniture, had general charge of its business, with power to sell goods, purchase material, borrow money and pay debts, being pressed with demands for the payment of its debts and threatened with attachment proceedings, agreed with certain corporate creditors upon the value of the entire stock of furniture and a large quantity of lumber belonging to the corporation and turned it over to them to be applied on the company's debt to them, some of which were not due: *Held*, that such transaction was void as being *ultra vires*.

3. An instruction by the directors of a corporation engaged in the manufacture of furniture, to their general manager, to sell the furniture on hand and "apply the proceeds to the payment of the debts" in this State, was not an authority on him to dispose of the entire stock, together with a large quantity of raw material, as a part payment on certain debts of the company, some of which were not due.

4. To make the proceedings of a meeting of directors of a corporation regular it must be at a stated time provided for in the charter or by-laws or held after notice to all of the directors.

5. The acts of a majority of directors of a corporation held at an unusual time and place, without notice to all of the directors, are not valid.

6. Where it appears that a majority of directors of a corporation met at an unusual time and place of holding meetings, and no record of the meeting is produced or alleged to exist, one who attempts to show that the corporation by the acts of such meeting ratified the unauthorized act of its agent, must prove that the meeting was regular and that all the directors had actual notice thereof.

ACTION, tried before *Armfield, J.*, and a jury, at August Term, 1893, of BUNCOMBE. There was judgment on a verdict for defendant, and plaintiff appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

F. A. Sondley and Moore & Moore for plaintiff.
W. W. Jones, C. M. Stedman and M. E. Carter for defendant.

MONTGOMERY, J. The plaintiff, at the time of commencing (829) its actions (afterwards consolidated and tried as one against the defendant, a corporation) issued and levied attachments upon certain real and personal property which it alleged belonged to the defendant. The National Bank of Asheville, the Battery Park Bank and the Western Carolina Bank, the appellees, intervene and claim the personal property attached by virtue of an alleged purchase by them from the defendant on 4 November, 1891, twenty days before the attachment was levied. The only matter for our decision is whether that sale and purchase constituted a valid transaction and passed the title to the property to the intervenors. The intervenors, having to show by preponderance of testimony their title to the property took upon themselves that burden and attempted to show a valid sale to them, at a fair price, by an agent of the defendant. The verdict of the jury establishes the sufficiency of the price agreed on as a fair one and there is no contention over that matter. It is admitted by all parties that the property which the intervenors claim under the alleged sale embraces the entire stock of manufactured goods (furniture) which the defendant had on hand, at the time of the sale, valued at about $19,000, and also a lot of flooring valued at about $3,000. W. W. Avery, the defendant's agent, who made the alleged sale to the intervenors, testified that he got a full price for it, but explains that the intervenors were creditors of the defendant, some of the debts not being due at the time of the sale, and that they took the property at the price agreed on, $22,081.11, "as a payment on their debts." The witness Avery in writing to the secretary of the defendant corporation, two days after the alleged sale, made the following statement of the transaction:

(830)

ASHEVILLE, N. C., 6 Nov., 1891.

MR. WM. EDMINSTON, Knoxville, Tenn.

Dear Sir: As telegraphed you last night, the three banks here, acting together, attached for the overdue debts due them. But they have not sued us individually and I do not think they will, if we can make the property pay them out. They were all cocked and primed for me when I went up yesterday afternoon to meet them at five o'clock, had all the papers issued and ready to serve. I wanted to get some time but they would not consent to give me any, as they seemed to be afraid some other creditor would come down on us and get the drop on us before they did. They were going to attach everything we had, and I knew if they did so and got all our property into the hands of a receiver, it would be sacrificed to such an extent that it would

never come anywhere near paying our debts, as all of the creditors of the concern would be treated alike by the receiver, there would be a great deal of paper left unpaid with our personal indorsement on it, and on this paper we would be sued and none of us ever get out from under the load of debts and judgments that would be piled up against us. So, I asked them if they would be willing to take our furniture and lumber as a payment on the paper which they held against us and on which we were individually indorsed, and give us an opportunity to sell it for them and get as much out of it to pay on these papers as we could. After consulting some time they agreed to do this and I made the sale to them, as it was the only thing left for me to do, and seemed to be the best thing I could do for all of us . . . . ; but they still insisted upon attaching our real estate and other property for the overdue debts, in order, as they said, to make themselves secure. This they did yesterday afternoon and our factory is now in the hands of the sheriff. To-day they seem to feel that their debts against us
(831) are secure, and, while I do not know positively, I think they will be inclined to let us work it out, if we feel so disposed, and make the property pay them as much as we can of their debts; but they have come down on us so suddenly and unexpectedly that I have no confidence left in any of them. . . . . "

The question now arises, did W. W. Avery have authority to dispose of the property in the manner in which he did? As to his general powers, he was the treasurer of the company and he testified that he "sold all the furniture manufactured at the works of the company," and "used the proceeds of sale for the benefit of the company in carrying on its general business"; that "it was agreed that he should stay at Asheville and run the business; that from the formation of defendant company he had charge of it, managed it, sold its furniture, borrowed money for it and paid its debts"; that he had done this "for two years and up to the date when the furniture in question was sold to the intervenors without any objection from the directors or stockholders of corporation, but with their full knowledge and consent, and that he managed all the affairs of the company." And it is also contended for the intervenors that if the alleged sale by Avery was outside the scope of his general powers, described as above, his conduct was nevertheless authorized by the directors of the defendant corporation, who afterwards met at Cincinnati and "talked over informally the business of the company; that it owed a large amount of debts and that the directors would have to make some arrangements to meet them as they became due, which would be at an early day." The particular authority thus given him is then stated by the witness: "They all agreed and so instructed me to come back to North Carolina, sell the furniture

we then had on hand and apply the proceeds to the payment (832) of the company's debts here with a view of removing the plant to Lenoir City, Tenn."

We think that the agent Avery, transcended his powers as claimed for himself by his own testimony when he attempted to make such a disposition of the property of the corporation as this transaction discloses, and therefore that no title to the property passed to the intervenors in the attempted sale. Avery claimed, and the testimony shows, that he had very large powers in the active management for which the company was organized, the manufacture and sale of furniture, but we cannot find from a reading of the whole testimony that the company ever entrusted him with the power to do what he attempted to do in the transaction above set forth. His agency concerned the running and continuation of the business. By this act he practically put an end to it. Under his powers he was to sell the product of the defendant manufacturing company, purchase material for its use, borrow money and pay its debts. He was not authorized to take the entire stock of furniture and also a large quantity of lumber, agree upon a value for it with certain of the creditors of the corporation, turn the property over to them and have the value placed upon its indebtedness, some of which was not due, as a credit. Which thing he did. At the time of the attempted sale the agent gave to the preferred creditors (the intervenors) information concerning the company's matters, showing its large indebtedness and its inability to pay the same, which resulted in the immediate action of the creditors, the intervenors, by attachment of the other property of the defendant, and thereby closing up the business of the company. However broad may be the general power of an agent to conduct the business of a manufacturing corporation, it cannot, in reason, be extended to cover such a transaction as the one which the agent in this matter attempted to perform. Neither were the special instructions which Avery claims were given to (833) him by the directors at Cincinnati, such as to confer upon him the power which he exercised in the attempted sale to the banks, the intervenors. He says he was authorized to sell the furniture which was then in hand and "apply the proceeds of sale to the payment of the debts here" (in North Carolina). This did not empower him to dispose of the entire stock and also of some $3,000 worth of unmanufactured material as a part payment on debts to certain of defendant's creditors, some of which were not due. It therefore follows that Avery had neither general nor special authority to transfer to the intervenors the property in dispute, and that because of his want of authority to do so, they took no title thereto. Owing to the unusual and extraordinary disposition of the property of the defendant corporation which

the agent was attempting to make, the other parties to the transaction (the intervenors) were put on their guard, and they should have been particularly careful to find out the agent's power; more especially as in the matter he was attempting to relieve himself of personal liability on account of his indorsement of the notes which the banks held against the company. There was certainly enough in this transaction to have excited suspicion of lack of authority of the agent, and they should have clearly scrutinized his powers. Therefore it follows that in his Honor's refusal to instruct the jury, as he was requested to do by the plaintiff, that there was "no competent evidence that W. F. Avery had authority to sell the furniture as attempted in this case," there was error and on account of this error there must be a new trial.

But the intervenors contend that if Avery did transcend his powers, yet his action was afterwards ratified by defendant corporation, and by this ratification any defect in their title to the property, if there was any, was cured. Certainly the defendant could have rati-
(834) fied the acts of its agent and by so doing make valid an act which without such ratification would have been invalid. But, in seeking to cure such a defect in the act of their agent and alleging that the ratification took place at a meeting of the directors, it must be first shown that the meeting was a legal one. It is said that the alleged ratification was made at the Glen Rock Hotel in Asheville. The intervenors' evidence in regard to that meeting is as follows: Avery said, "I think there was a notice given of the meeting of the company at Glen Rock Hotel, am not sure of that, however. The Glen Rock Hotel was not the usual place of the meeting of the company, but was the most convenient place inasmuch as two of the directors were already there. The meeting at this hotel was regularly organized at the suggestion of Carter, and the sale of the furniture to the banks was discussed and approved by the meeting." Carter's testimony concerning this meeting, was as follows: "The directors of defendant company met at Glen Rock Hotel in Asheville; the meeting was organized by the president and secretary, with a majority of the directors present. I explained to them, as attorney of the company, the sale of the furniture made to the banks; all of the directors in the meeting approved of the sale. Avery held the stock of the Tennessee company of about $100,000, which they said they wished to transfer to the banks in liquidation of the company's indebtedness to the banks. After the meeting was informed of this sale of the furniture to the banks they directed Avery to destroy that stock, which he did by tearing it up in my presence. I do not know that there was any previous notice of the Glen Rock Hotel meeting given to the directors of the company." The testimony shows that the board of directors of defendant company

consisted of five members, Avery being one of them, and that he and two others were present at this meeting. Here then were three out of five directors at an unusual place and time for holding (835) the meetings of the company, without notice to the other directors, so far as appears from the testimony. Was such an assemblage a meeting of the corporation in any legal sense? We cannot think so. "Unless the meeting is one that assembles at stated times, pursuant to some provision in the constitution or by-laws, it must be duly notified to all the directors. For even if a majority of a total number of directors were present and the vote is unanimous, so that the votes of the absentees could not have changed the result, it does not follow that those actually present would not have voted differently, had they heard what the absentees, if present, might have said. To make the proceedings regular, all should have had an opportunity to be present and take part in them." Taylor Corporations, sec. 260. And even though it be taken as true that the usual presumption in favor of regularity applies to the directors' meetings, and that the burden of proof to show a want of due notice of the meetings is on the party impeaching the regularity, yet we think the presumption was rebutted by the admission of the intervenors that the assemblage of a majority of the directors was at an unusual place, at an unusual time, and that no record of such meeting was produced or alleged to exist; and that under all the circumstances of this meeting of a majority of the directors, as proved by the intervenors' witnesses, it was incumbent on them, when they sought to show that the corporation by that meeting had ratified the act of the agent in disposing of the property in dispute, to show actual notice of the meeting given to each director. Upon the question of ratification his Honor's charge was as follows: "Now, Avery and Carter testified that at a meeting at Glen Rock Hotel there was a gathering of a majority of the directors (836) of the Asheville company and that then this board undertook to ratify Avery's acts. The question is, was that a lawful meeting and had it the power to ratify? The evidence is somewhat equivocal and not so certain that they attempted to organize, and the evidence of Carter is that he knew of no notice, but there is no evidence that there was none. As I told you before, men having a duty to perform are presumed to do that duty rightly and to take all necessary steps in its right performance, and as you have heard all the evidence on this point I will leave it with you to say whether there was a lawful meeting of the board there or not. Against it you will note that Carter said he knew of no notice, and you will remember that he said that the meeting was organized at his suggestion and at an unusual place for the directors to meet, a place where they never met before. It also ap-

pears that this board was somewhat uncertain in its method of holding its meetings, that they were in the habit of meeting at various places, and against this stands the presumption I have mentioned before, that men act according to law, and if upon the whole evidence you believe this was a lawful meeting, then it was lawful; but if not, it goes for nothing, so far as ratification is concerned, but can be used for the purpose of contradicting these men, because they were then attempting to approve of this very sale. If you find this was an unlawful meeting, it is not to be considered for the purpose of proving ratification, but to contradict these men."

The plaintiff excepted because, first, "The Judge should have charged the jury that the meeting at Glen Rock Hotel was not lawful," and second, "Because there was no evidence to warrant the Judge in submitting to the jury the question whether or not the meeting at Glen Rock Hotel was lawful." Our opinion is that, upon the undisputed facts concerning the assembling of the majority of the directors at Glen
(837) Rock Hotel, there was no such meeting in law of the governing and directing body of the defendant corporation as to make its acts and conclusions the acts and conclusions of the corporation, binding on it and its creditors, as a ratification of an otherwise invalid act.

There was error in his Honor's refusal to charge on the matter of ratification as he was requested to do by the plaintiff.

After what has been said in this opinion it seems unnecessary to discuss any other of the exceptions filed by the plaintiff.

New Trial.

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

Cited: S. c., 120 N. C., 476; *Bank v. Furniture Co.,* 122 N. C., 752; *Glass Plate Co. v. Furniture Co.,* 126 N. C., 889.

LEWIS T. CLINE v. BRYSON CITY MANUFACTURING COMPANY.

Action Against Corporation—Residence—Change of Venue.

1. A domestic corporation has no residence within the meaning of section 192 of The Code, and an action may therefore be brought against it by a non-resident plaintiff in any county, subject to the power of the court to change the venue.
2. Where a defendant obtains a change of venue under sec. 192 of The Code, in order to promote "the convenience of witnesses and the ends of justice," and fails to docket a transcript at the next ensuing term of court for the county to which it is removed, the order of removal may be stricken out at the next term of the court which granted it.

MOTION by plaintiff upon notice to the defendant, before *Boykin, J.*, at December Term, 1894, of BUNCOMBE, to vacate an order made by *Shuford, J.*, at the August Term, 1894. (838)

This action was begun 3 August, 1894, by service of the summons to be found in the record on E. Everett, the president of the defendant, which is a domestic corporation.

At the August Term, 1894, of the said Superior Court, the defendant moved upon affidavit, to have said action removed to the county of Swain, and the order was made by *Shuford, J.*, removing the same to said county.

The defendant failed and neglected to have a transcript of the record of said case sent up to said county of Swain at the next term of the Superior Court held for said county, and the clerk of the Superior Court of Buncombe did not send up said transcript because no fees were ever paid him to do so, and no demand or request was ever made by the defendant for said case to be sent to the Superior Court of Swain, except the motion for a removal, and neither did the clerk make any demand for fees for said transcript.

A term of said Swain Superior Court had convened and adjourned since the August Term of the Superior Court of Buncombe County, and before the notice issued by the plaintiff to the defendant, notifying the said defendant that the plaintiff would move to have said order vacated.

His Honor, *E. T. Boykin,* after hearing the argument of counsel, made an order vacating the order made by *Shuford, J.*, removing said cause to the county of Swain.

To this order the defendant excepted, and appealed.

J. H. Merrimon for plaintiff. (839)

Fry & Newby for defendant.

CLARK, J. In *Fisher v. Mining Co.*, 105 N. C., 123, 125, it is said that if, after obtaining an order for the removal of a cause to another

county, the party obtaining the order does not docket the transcript at the next term of the court to which it is removed, the court from which it has been ordered to be removed can, at the first term held thereafter on proof of such failure, strike out the order of removal. This is in analogy to an appeal to this Court in which, if the transcript is not docketed here at the next term, the court below on proof of that fact may, on proper notice, adjudge the appeal abandoned, and proceed accordingly. *Avery v. Pritchard,* 93 N. C., 266.

The defendant insists, however, that this being a case where the removal was a matter of right and not resting in the discretion of the judge, it was incumbent upon the opposite party and not on itself as the mover, to have the transcript docketed in the court to which it was ordered to be removed. Whether such distinction exists is not before us now because the removal was not imperative, but it rested in the sound discretion of the court whether "the convenience of witnesses and the ends of justice would be promoted by the change." The Code, 195 (2). The Code, section 194, applies to foreign corporations. The defendant is a domestic corporation and for the purposes of venue may be sued in the county where the plaintiff resides, or, if he is a non-resident, in any county subject to the power of the court to change the venue. Code, sec. 192. There is no statute requiring that a domestic corporation shall be sued in the county where it has its principal place of business. If this were so, fire insurance companies could be sued upon their policies only in the county where their principal office is located and ac-
(840) tions for damages against railroad corporations, for the same reason, could only be brought in three or four counties in the State. There was a statute (Laws 1868-69, ch. 251) for a brief period which provided that a railroad corporation could only be sued in some county in which part of its tract was located. *Graham v. R. R.,* 64 N. C., 631. But this was soon repealed by Laws 1870-71, ch. 281; *Kingsbury v. R. R.,* 66 N. C., 284. A corporation has a principal place of business but it has no "residence" within the meaning of section 192 of The Code, and the residence of its officers and directors cannot be imputed to the corporation. The defendant having failed to docket the transcript in Swain Superior Court at the next term after it obtained the order of removal, the judge at the next succeeding term of Buncombe Superior Court, which was held thereafter, properly struck out the order.

No Error.

Cited: Farmers Alliance v. Murrel, 119 N. C., 125; *Dunn v. Marks,* 141 N. C., 233; *Roberson v. Lumber Co.,* 153 N. C., 123; *Rackley v. Lumber Co., ib.,* 173.

J. F. HAYNES v. NATHAN COWARD.

Appeal—Certiorari—Time of Application for—Negligence.

Where the transcript is not filed at the first term after the trial below, as required by Rule 5, on the failure of the appellant to apply at such term, as required by Rule 41, for a *certiorari* to procure it, he is not entitled to such writ at a subsequent term. In such case, the failure to apply for a *certiorari* is not atoned for by the alleged negligence of the clerk below.

PETITION for a *certiorari* to have transcript sent up from the Superior Court of JACKSON at the Spring Term, 1893, of which the case was tried. The petitioner Coward appealed from the judgment below, but failed to have the transcript docketed in this Court at the term next ensuing the term of the court at which the case was tried. (841) Plaintiff had a transcript of part of the record docketed and appeal dismissed. At this term the defendant applied for a *certiorari,* alleging as an excuse for his delays the negligence and delay of the clerk of Jackson Superior Court to make out the transcript.

The petition was refused.

J. F. Ray for petitioner.
J. H. Merrimon contra.

CLARK, J. If there is delay in sending up the transcript on appeal in time to be docketed for hearing during the call of the district to which it belongs at the first term of this Court beginning after the trial below as required by Rule 5 (115 N. C., 835) and such delay is caused by the neglect of the clerk or judge, all the authorities are to the effect that the appellant, if without laches himself, is entitled to a *certiorari* to bring up the transcript or the omitted part of it, as the case may be. But the writ must be applied for regularly, at such term (Rule 41) and before the appeal is dismissed. The appellant's failure to do this is negligence which is not atoned for by the previous neglect of the clerk or judge which had otherwise entitled the appellant to a *certiorari. Paine v. Cureton,* 114 N. C., 606. This is very plain and has been repeatedly stated and reasons pointed out therefor. Among the very numerous cases it is sufficient to cite *Pittman v. Kimberly,* 92 N. C., 562; *Porter v. R. R.,* 106 N. C., 478; *Triplett v. Foster,* 113 N. C., 389; *Graham v. Edwards,* 114 N. C., 228.

If the transcript is not sent up, the appellant, with very little trouble can ascertain that fact below in time either to get it sent up or to apply, when the district is called, for a *certiorari.* Or if, for any reason,

(842) he cannot learn this below, the counsel who represents him here will see that the transcript or some essential part of it has not arrived and should apply for a *certiorari* when the district is reached or before. If the appellant has no counsel in this Court he cannot be put in a better condition than an appellant who has paid enough attention to his appeal to have counsel here to argue it. If he have no counsel to look after the case here, he should at least ascertain below whether the transcript has been properly made out and forwarded here. The Code discountenances mere technicalities, but it exacts proper diligence and a business-like attention to matters in court. The presumption is in favor of the correctness of the judgment below, and a party seeking to reverse it, must do so without delaying the argument here and a decision beyond the regular time prescribed as above. Granting, as alleged by appellant, that the failure to send up the transcript to the Spring Term, 1894, of this Court, was due to the negligence of the clerk and was without any fault on the part of the appellant, still his failure to apply at such term for a *certiorari* waived his right to ask it at the next term. Furthermore, a motion to reinstate was made at Fall Term, 1894, and when reached in regular order was denied. It is true that the defendant did not take care to be represented when the motion came up. That does not make his position any better. There has been no notice served since of another motion to reinstate, and if it had been the matter is *res adjudicata.* This case is almost identical with *Duncan v. Underwood, ante,* 525, and *Causey v. Snow, ante,* 497.

Motion Denied.

Cited: Burrell v. Hughes, 120 N. C., 279; *Smith v. Montague,* 121 N. C., 94; *Parker v. R. R., ib.,* 504; *Norwood v. Pratt,* 124 N. C., 747; *Benedict v. Jones,* 131 N. C., 474; *Walsh v. Burleson,* 154 N. C., 175.

H. W. MOORE v. J. P. ANGEL.

Action for Trespass—Claim of Title by Defendant—Failure to Disclaim Title—Costs.

1. While the failure of the defendant in an action in trespass, in ejectment, or *quare clausum fregit* does not deprive him of the benefit of proving a better title to a part of the land in dispute in himself, or out of the plaintiff, yet he must submit to a judgment declaratory of the right of his adversary to the land as to which the plaintiff has been compelled to show title and prove the trespass.
2. Where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the

boundaries set up in his answer, with a greater amount for damages on his counter-claim than was allowed plaintiff, plaintiff is nevertheless entitled to costs.

ACTION of trespass, tried at Fall Term, 1894, of MACON, before *Shuford, J.* The pleadings were in the usual form and the amended complaint charges the defendant with trespass, and the amended answer charges the plaintiff with trespass. The usual issues were framed and submitted to the jury, which jury found in favor of the plaintiff.

The defendant excepted to the judgment of the court taxing him with the costs of the action.

J. F. Ray for defendant. (845)
No counsel contra.

AVERY, J. In his complaint the plaintiff alleged that he held title and possession of a certain tract of land, which he described by metes and bounds, and charged that defendant had trespassed upon it. The defendant denied all these allegations and set up, by way of counter-claim, that he was the owner and was in the possession of a specified tract of land, a part of which was embraced in the boundaries of that described in the complaint. In order to support an action for simple trespass, a plaintiff must show, where any person is holding adversely, actual possession, but in the absence of adverse occupation, the constructive possession, which proof of title draws to him, is sufficient. *Harris v. Sneeden,* 104 N. C., 369; *Cohoon v. Simmons,* 29 N. C., 189; *Carson v. Blount,* 19 N. C., 546. If the defendant had disclaimed title to all of the boundary declared for in the complaint, to which he did not ultimately show a better right than the plaintiff, the burden would have rested upon the latter only to prove the amount of damage that he was entitled to recover. But the issue of title to the whole tract being raised, the plaintiff proved to the satisfaction of the jury that he was the owner, and in contemplation of law in possession of a portion of the land declared for, on which the defendant had trespassed. The title being put in issue, whether by trespass in ejectment or trespass *quare clausum,* it was proper that the findings of the jury as to the portions of the land to which each of the parties had shown title, should be specific, and the necessity for such findings was only intensified by the fact that a counterclaim for trespass on the part of the plaintiff had been set up in the answer. But leaving out of view every other aspect of the case, the findings that he was (846) the owner of certain land and that the defendant was a trespasser, entitled the plaintiff, by virtue of his having sustained the original allega-

tions of his own right and the defendant's wrong, as the prevailing party, to judgment that he was the owner of the portion to which he had shown title with at least nominal damages and costs. While the failure of the defendant to enter a disclaimer neither in trespass in ejectment nor in trespass *quare clausum fregit* deprives him of the benefit of proving a better title to a part of the land in dispute in himself, or out of the plaintiff, he must nevertheless submit to a judgment declaratory of the right of his adversary to the land as to which the plaintiff has been compelled to show the title and prove the trespass. *Cowles v. Ferguson,* 90 N. C., 308; *Harris v. Sneeden, supra; Murray v. Spencer,* 92 N. C., 264. This was a case within the meaning of section 525 of The Code, wherein "a claim of title to real property arose in the pleadings," and the plaintiff, if the issue based thereon was found in his favor, was entitled to judgment declaratory of his title, and for nominal damages, if none had been assessed, with costs. The statute in this respect is in affirmance of the principle established before its enactment. It is true that where an action is brought to enforce a contract and the jury find that the plaintiff is indebted to the defendant in a sum exceeding what is due from him to the plaintiff, judgment may be given for the excess and carries with it the incidental right to recover costs. *Garrett v. Love,* 89 N. C., 206; *Hurst v. Everett,* 91 N. C., 399. But the rule established in such cases does not abrogate the other express provisions of the statute applicable where the title to real estate is put in issue. The ruling of the court was in accordance with law, as we have stated it to be. If the defen-
(847) dant had disclaimed title to all the land declared for, except that for which he proved his right, no issue as to the plaintiff's title would have been raised, and the findings that the defendant's title, disputed by plaintiff, was good and that the defendant had sustained greater damages than his adversary, upon both necessarily, perhaps on either, the defendant would have recovered costs.

Whether this is a case in which the question of costs is the main point, as in *Futrell v. Deanes, ante,* 38, or is merely incidental to an appeal which involves the validity of the judgment, as in *Hobson v. Buchanan,* 96 N. C., 444, the practical result would be the same. Whether the judgment be affirmed or the appeal dimissed, the defendant would be liable for costs here. We adjudge that the plaintiff recover costs of the appeal. Judgment against the appellant for costs.

Cited: Vanderbilt v. Johnson, 141 N. C., 373; *Bryan v. Hodges,* 151 N. C., 415; *Swain v. Clemmons,* 175 N. C., 242, 243.

(848)

T. W. PATTON v. PAUL GARRETT.

Action on Note Given in Performance of Award—Issues—Arbitration —Award—Right to Set Aside Award for Mistake—Partial Performance of Award—Estoppel.

1. It is well settled that it is within the sound discretion of the trial judge to settle the issues for the jury, subject to the restriction that they shall be such as are raised by the pleadings, and that the verdict thereon shall be a sufficient basis for the judgment, and that neither party shall be deprived, for want of an additional issue, of the opportunity of presenting some view of the law arising out of the evidence.
2. Arbitration being a favored mode of settling disputed matters, the courts are slow to set aside awards upon an allegation that the arbitrators have attempted and failed to decide according to law.
3. The words "adjudge," "determine," and "award," used by arbitrators in their award, do not necessarily carry with them the idea of a judgment according to law so as to enable one of the parties to have the award set aside for errors of law where the point decided was doubtful.
4. A naked promise by a party to an arbitration and award to allow the other party an additional credit for an item, if it should prove to have been inadvertently omitted by the arbitrators, is without consideration, and hence not binding.
5. While corruption or partiality is ground for setting aside an award, mistake is not unless the arbitrators have been led into it by undue means or through fraudulent concealment of a party.
6. Where one of the parties to an arbitration executes his bond for the amount of an award, as directed by the arbitrators, he is estopped to defend an action thereon on the ground that he executed it in ignorance of a mistake in the award and of the fact that the award was reviewable by a court as to a question of law involved therein.

ACTION tried before *McIver, J.*, and a jury, at Spring Term, 1894, of BUNCOMBE. There was a verdict for the plaintiff and from the judgment thereon defendant appealed.

On the 13th of January, 1890, C. W. Garrett & Co., and Paul Garrett, the defendant, entered into a contract by which the defendant was to sell for C. W. Garrett & Co., for a commission, their wines and brandies made at their Medoc Vineyards in Halifax County. That afterward, a disagreement having arisen between the parties concerning their rights and interests under the contract, they agreed to submit the matters in dispute to arbitration, the agreement being in the following words:

STATE OF NORTH CAROLINA—*Halifax County.*

This indenture, made this the____day of_____, 1891, between Lucy

W. Garrett and H. S. Harrison and his wife Mary S. Harrison, composing the firm of C. W. Garrett & Co., party of the first part, and Paul Garrett, party of the second part, witnesseth: That whereas
(849) certain matters of controversy have arisen between said parties, which are now in litigation in the Superior Court of Halifax County, and whereas all the parties above named desire to avoid the delay, expense and unfriendly relations which necessarily attend litigation, and that all such matters as are now in controversy shall be settled by arbitration, and whereas the following are the questions in dispute and to be arbitrated, to wit:

1. What amount does Paul Garrett, trading as Garrett & Co., owe to C. W. Garrett & Co., for wines, brandies and other merchandise sold and delivered?

2. What amount, if any, is Paul Garrett entitled to recover of C. W. Garrett & Co. for the alleged breach or breaches of contract which existed between said parties, a copy of which contract is hereto attached and made a part of this instrument?

3. It is agreed that all matters pertaining to the business of Garrett & Co., as may be supposed by either party to influence his interest, may be considered in this arbitration, and that in the event the arbitrators shall conclude that either party has been damaged by the course of the other they shall decide the amount of such damages.

Now, therefore, for the avoidance of litigation and for other purposes above indicated, the parties of this indenture hereby agree to submit all matters of controversy to Mr. John A. Collins, of Enfield, N. C., and Mr. William P. Simpson, of Wilson, N. C., and to a third party to be selected by the said Collins and Simpson, as arbitrators. The award of any two of the arbitrators shall be final.

In the event of an award of damages to either party the amount may be arranged by note at six months for said amount bearing interest at eight per cent and with such security as the arbitrators may deem sufficient.

It is further agreed that no evidence shall be considered by
(850) said arbitrators, except such as would be admissible in a court of law, and, in the event that neither party shall wish to submit evidence which is objected to by the other party, the arbitrators shall pass on the question of admissibility.

The place of meeting of the arbitrators shall be at the Medoc Vineyards, and the time for said arbitration shall be fixed by the arbitrators.

That at the meeting or meetings of the arbitrators it is agreed that neither party shall be represented by legal counsel, but C. W.

Garrett & Co. may be represented by T. W. Patton, and Paul Garrett may represent his own interests.

The parties hereto do hereby bind themselves, their heirs, executors and assigns in the sum of five thousand dollars that they will abide by the award of the arbitrators.

In testimony whereof the parties above named have hereunto set their hands and seals the day and year above mentioned.

The arbitrators met at Medoc Vineyards on 12 November, 1891, the plaintiff representing C. W. Garrett & Co., and the defendant being present in person. The arbitrators, after hearing all the testimony offered on both sides, made the following award:

12 NOVEMBER, 1891.

Whereas, certain matters of controversy between C. W. Garrett & Co. and Garrett & Co. have been referred to the undersigned T. J. Hadley, J. A. Collins and W. P. Simpson, and whereas we have this day met at Medoc and carefully examined and weighed such evidence as was presented by parties to said controversy, do make the following award:

1. We award that said Garrett & Co. pay to C. W. Garrett & Co., twenty-two hundred and sixty-nine dollars and fifty-five one-hundredths dollars, as per account of C. W. Garrett & Co., ad- (851) mitted to be correct.

2. We award that C. W. Garrett & Co. pay to Garrett & Co., one hundred dollars and seventeen one-hundredths dollars, being balance due Paul Garrett on book of C. W. Garrett & Co., per account rendered; and also that C. W. Garrett & Co. pay Garrett & Co., sixty-seven and sixty-one hundredths dollars for sour wine and discount, the discount being half the amount charged against Paul Garrett in account rendered against him by C. W. Garrett & Co.

3. We award, that whereas the contract between the parties was indefinite as to its duration, we adjudge it should mean to continue for twelve months, and whereas by reason of a supposed sale of the Medoc property, for the failure of which sale Paul Garrett was in no way responsible, the contract was annulled before the expiration of twelve months, and the said Paul Garrett was deprived of the reasonable profits under said contract. Now, therefore, we adjudge that C. W. Garrett & Co. pay to said Paul Garrett eight hundred dollars as damages.

4. We award that Garrett & Co. execute to C. W. Garrett & Co., a note of even date herewith bearing interest from date at eight per cent per annum for $1,301.87 due six months from date in full settlement of all claims between the parties to date.

5. We award that the matter of security to said note be left to be agreed upon between Paul Garrett and T. W. Patton, as agreed upon by these gentlemen now present. (Signed by the arbitrators.)

The defendant, immediately upon the making of the award and in pursuance of it, executed the bond upon which this action is based, which is as follows: "Six months after date I promise to pay to the order of C. W. Garrett & Co., thirteen hundred and one and
(852) 87-100 dollars, this being the amount awarded in an arbitration held this day, with interest from date at eight per cent per annum. Witness my hand and seal this 12 November, 1891." (Signed and sealed by Paul Garrett.) The bond was assigned and indorsed to Lucy W. Garrett for value by C. W. Garrett & Co., and by her indorsed for value to the plaintiff.

This action was brought to recover of the defendant the amount of the bond. The defendant set up as a defence all of the matters about which he had complained under his contract with C. W. Garrett & Co., and which were submitted to arbitration, and averred further that he had executed the bond immediately upon the rendition of the award and in ignorance of any omission therein, and in further ignorance of the power of the court to review said award, and in ignorance of the erroneous construction of the law in regard to the contract, as set out in section 15 of this answer, and of his right in the premises. He then in his answer, after denying that the plaintiff was the owner of the bond, averred other matters of defence as follows:

13. That after delivering the note to the plaintiff, Patton, as agent of the said C. W. Garrett & Co., the defendant discovered that there was omitted from said award an account of this defendant (called Garrett & Co.) against said C. W. Garrett & Co., mainly for sour wines which had been taken back from customers on account of their defective quality, which on the hearing was admitted to be correct by the plaintiff, Patton, and which the said arbitrators were directed by him to allow. The said arbitrators inadvertently overlooked the same in making their calculations, and allowed defendant no credit therefor; said account amounted to $241.60. As soon as defendant de-
(853) tected the omission he called the attention of the said Patton to the same, and he then and there agreed that if the arbitrators intended to allow the account, he would credit the same on said note; and he directed the defendant to see Messrs. Hadley and Simpson, who spent the night in Ringwood, and ascertain from them whether they intended to allow the same. Said Patton took the copy of the account filed with the arbitrators and said he would show it to the other arbitrator, Dr. John A. Collins.

On the next morning this defendant saw said Hadley and Simpson and they declared that it was their intention to allow the account, and they wrote out a supplemental award allowing the same and delivered it to this defendant. Defendant sent said paper to the plaintiff Patton, and has not seen it since.

14. That said account was omitted by the arbitrators from undue haste and by a mere clerical mistake, contrary to their real intentions, and the same ought to be credited on the note sued upon, which has never been done.

15. That the said arbitrators endeavored in the third article of their award to follow the law in the construction of the contract thereinbefore referred to, and the defendant insists put an erroneous construction thereon. Wherefore said award should be set aside and annulled.

16. The defendant requested the arbitrators to examine the account of the defendant with said C. W. Garrett & Co., pointing out various items which he alleged to be erroneous, and which amounted to at least two hundred dollars, but they neglected and failed to do so.

17. That if said plaintiff owns said note, he took the same with notice of the aforesaid matters and things, and after its maturity.

18. That the action brought by C. W. Garrett & Co. on their claim for $2,300, is still pending in Halifax Superior Court.

19. That on 23 March, 1891, said C. W. Garrett & Co. brought (854) an action against this defendant, trading as Garrett & Co., to recover damages, which they claimed to have suffered by reason of the defendant trading under the name of Garrett & Co.; this defendant insists that this controversy was submitted to the aforesaid arbitrators under the agreement set out in section 10, but said arbitrators failed to decide the same or make any award in regard thereto.

20. That said action is still pending in the Superior Court of Halifax County, although no complaint has been filed therein.

21. That the defendant has instituted an action in the Superior Court of Halifax County, returnable to March Term, 1893, thereof, against said C. W. Garrett & Co., to vacate said award and recover his damages. Wherefore the defendant prays judgment that said award be set aside; that he have credit for said amount of $241.60 and interest; that said note be declared paid in full; for such other and further relief as may be proper, and for costs.

The plaintiff made replication denying the averments of the answer except the 16th, which he replies to in these words: "The plaintiff denies the allegations in the sixteenth paragraph of said answer, excepting so much of the said allegations which state that the defendant requested the arbitrators to examine the account of the defendant

with said C. W. Garrett & Co., pointing out various items at the time. That during the investigation of the arbitrators the defendant introduced evidence, and the plaintiff is informed and believes that the same was properly heard and considered by the arbitrators in making up their award."

W. W. Jones and F. A. Sondley for plaintiff.

(855) *Jas. H. Merrimon for defendant.*

MONTGOMERY, J. (after stating the case as above): At the opening of the trial the defendant prepared and asked the court to submit the following issues: "Did the arbitrators undertake to decide the law in construing the contract between C. W. Garrett & Co. and Paul Garrett, and decide said questions of law erroneously? Did the arbitrators pass upon and settle all material matters submitted to them for their arbitrament and award? Did the plaintiff, as agent for C. W. Garrett & Co., agree with the defendant that if the arbitrators intended to allow the account of $241.60, it should be credited on the note sued on?"

The court refused to give them and submitted the following: "1. Was the plaintiff the owner of the note sued on at the date of the issuing of the summons in this action? 2. Is the defendant indebted to the plaintiff, and if so, in what sum?" The defendant excepted.

His Honor committed no error in either refusing the defendant's issues or in submitting the ones he did. There are only two issuable facts raised by the pleadings in this case: (1) Was the plaintiff the owner of the bond? (2) Was it still due and unpaid?

It has been settled in *Emry v. R. R.*, 102 N. C., 209, following *McAdoo v. R. R.*, 105 N. C., 140, and a large number of cases in which the ruling has been affirmed, that it is within the sound discretion of the trial judge to determine what issues shall be submitted and to frame them subject to the restriction, 1st, that only issues of fact raised by the pleadings are submitted; 2d, that the verdict constitutes a sufficient basis for a judgment; 3d, that it does not appear that a party was debarred for want of an additional issue or issues of the oppor-

(856) tunity to present to the jury some view of the law arising out of the evidence. This has been approved in *Bond v. Smith*, 106 N. C., 553; *Denmark v. R. R.*, 107 N. C., 185; *Blackwell v. R. R.*, 111 N. C., 151; *Black v. Black*, 110 N. C., 398.

By taking up and passing upon the defendant's exceptions, a little out of their numerical order, we find that it will be unnecessary to go into the first and second exceptions:

3d Exception. "The defendant then asked his Honor to pass upon the point made in the fifteenth paragraph of defendant's answer, to-wit:

'That said arbitrators endeavored, in the third article of their award, to follow the law in the construction of the contract hereinbefore referred to, and the defendant insists, put an erroneous construction thereon. Wherefore, such award should be set aside and annulled'; and to hold that the arbitrators made a mistake in law and put an erroneous construction upon said contract and assessed defendant's damages upon such erroneous construction, and that such award was void."

His Honor committed no error in overruling this exception. Looking at the face of the award, to which we are confined, so far as this exception is concerned, we cannot say that the arbitrators intended to decide the matters embraced in that exception according to law. The words "adjudge," "determine," "award," when used by the arbitrators, do not necessarily carry with them the idea of a judgment according to law. Arbitration, as a means of settling disputed matters, being so much favored by the courts, they will be slow to set aside awards because it is alleged that the arbitrators have attempted to decide according to law and have "missed it." The language of the award in this case is not stronger than that used by the arbitrators in the case of *King v. Mfg. Co.*, 79 N. C., 360, and that award was upheld. Besides, an award ought not to be set aside unless in cases where the decision is plainly and grossly against law—not where the point decided might be doubtful. *Cleary v. Coor*, 2 N. C., 225. (857)

4th Exception. "That defendant offered to show that plaintiff agreed with the defendant that if the arbitrators intended to allow a credit of $241.60 on account of sour wines, the note should be credited with that amount, and that the arbitrators did intend to allow same and omitted it by inadvertence; that this was after the note was executed. Plaintiff objected. His Honor sustained the objection and the defendant excepted."

We can see no error in his Honor's overruling this exception. The promise alleged to have been made by the plaintiff was clearly without consideration. No benefit could possibly have accrued to the plaintiff—but a loss—and the defendant does not pretend that he was put to any loss, inconvenience or trouble by reason of the promise.

5th Exception. "Defendant offered to show that the arbitrators did not pass upon all matters submitted to them between C. W. Garrett & Co. and Garrett & Co., and between C. W. Garrett & Co. and defendant. The plaintiff objected. His Honor sustained the objection and defendant excepted."

6th Exception. "Defendant offered to show that the account for sour wine was omitted by the arbitrators from defendant's credits by undue haste and a mere clerical mistake, contrary to the real intentions

of the arbitrators. The plaintiff objected. His Honor sustained the objection and defendant excepted."

We will consider as one the 5th and 6th exceptions, for the fifth cannot be considered if it is disconnected from the sixth, because it is too general in its terms and language. It does not point out any particular matter which was presented to the arbitrators and which they refused to hear as was the case in *Walker v. Walker,* 60 N. C., p. (858) 259, cited by the defendant. But if the 5th exception should be considered as another form of exception 6, we then have the question presented as to whether a mistake of the arbitrators can be set up to defeat, in whole or in part, the award. We are clear that it cannot be. Corruption or partiality are grounds for setting aside an award, but not so a mistake, unless the arbitrators have been led into that mistake by undue means; or unless they have fallen into the mistake by the fraudulent concealment of a party. "A mistake committed by an arbitrator is not of itself sufficient ground to set aside the award. If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus the object of references would be defeated and arbitration instead of ending would tend to increase litigation. *Easton v. Easton,* 43 N. C., 98. There was no error in his Honor's overruling these exceptions.

In thus disposing of the exceptions which we have discussed, it is not necessary to pass upon the others. We have given these exceptions more consideration probably than they were entitled to because of the earnestness and ability with which they were discussed by the counsel for both sides; for beyond question, when the defendant, agreeably to the award, executed his bond for the amount awarded to C. W. Garrett & Co. he could not be heard to say, when sued for the amount, that he had executed the bond in ignorance of mistake in the award (859) and further ignorance of the power of the Court to revise the same. In executing the bond the defendant partially performed the award and he is estopped thereby. *Bryan v. Jeffreys,* 104 N. C., 242.

No Error.

Cited: Silvey v. Axley, 118 N. C., 961; *Ricks v. Stancill,* 119 N. C., 102; *Mayberry v. Mayberry,* 121 N. C., 250; *Ezzell v. Lumber Co.,* 130 N. C., 207; *Cowles v. Assurance Soc.,* 170 N. C., 371.

VAN BROWN v. JOHN HOUSE ET AL.

Action to Recover Land—Boundaries—Survey—Course and Distance —Monuments or Natural Objects—Vague Description.

1. The general rule is that the calling in a grant or deed control in locating the land conveyed thereby, subject to the exception that where a natural object or monument is called for, and it is susceptible of location, such natural object or monument, when located, will control the course and distance; but such calls must be both reasonable and certain.
2. A deed to B, dated 28 March, 1799, granted 10,240 acres, the boundaries beginning at a birch, and "running south 360 chains to a stake supposed to be in D's line; thence with his line east 390 chains to his N. E. corner." The D line was a mile and a quarter from where the calls in the B grant gave out. The D grant issued in 1795 was for 60,000 acres, some of its boundaries being over 20 miles long. If the lines running south were extended to the D line, the B grant would contain about 25,000 acres. If it stopped after running 360 chains, the grant would still contain more than 10,240 acres, the amount the deed called for: *Held*, that the calls "running south 360 chains to a stake supposed to be in D's line, thence with his line east 390 chains to his northeast corner," were too vague and uncertain to vary the course and distance called for in the grant.

AVERY, J., dissenting.

ACTION to recover land, tried before *Armfield, J.*, and a jury, at August Term, 1893, of MADISON.

There was judgment for defendants and plaintiff appealed. The material facts, upon which the decision turns, appear in the opinion of *Associate Justice Furches.* (860)

V. S. Lusk for plaintiff.

W. W. Jones and H. T. Rumbough for defendants.

FURCHES, J. This is an action of ejectment brought to this Court on appeal of plaintiff. Plaintiff for the purpose of making out his title offered in evidence a grant from the State of North Carolina to himself issued on 18 June, 1890. And it being admitted by defendant that it covered the land in question, and it also being admitted that defendant was in possession, plaintiff rested his case.

The defendant for the purpose of showing that the land claimed by plaintiff had been granted prior to the date of plaintiff's grant, and was not the subject of grant in 1890, offered in evidence a grant from the State to John Gray Blount and William Stedman, dated 28 March, 1799, which he claimed covered the land in controversy. The calls of this grant are for "ten thousand two hundred and forty acres of land in Bumcombe County on the west side of the French Broad river,

beginning at a birch, ash and pine on the west bank of said river opposite the Painted Rock below the Warm Springs, running south 360 chains to a stake, supposed to be in Stokely Donelson's line, thence with his line east 390 chains to his northeast corner, thence south 275 chains to a bunch of dogwood on a branch of Spring Creek near the Puncheon Camp, Donelson's beginning corner, thence east 80 chains, thence 150 chains to a line of David Allison's 250,240-acre survey, thence with that line north 45 degrees to the French Broad River, thence down the river with the meanders of the bed of the river and around the line of
(861) the old patented land on the west side of said river to the beginning."

The beginning call of this grant on the west bank of the French Broad River at the Painted Rock was agreed upon by plaintiff and defendant. And it is admitted by defendant that to run south from this agreed beginning, three hundred and sixty chains, and then east will not include the land covered by plaintiff's grant. But defendant claims that the Blount grant, under which he is defending, calls for the line of the "Stokely Donelson grant," which he alleges is further south, and that the Stokely Donelson line is the southern line of the Blount grant. Under this claim of defendant, the surveyor, as it was proper for him to do, extended this south line for one and one-fourth mile further than the three hundred and sixty chains called for in the Blount grant, to a point that defendant claimed to be the "Stokely Donelson" line. And it is admitted by plaintiff that if this point, claimed by the defendant to be the Stokely Donelson line, is the southern boundary of the Blount grant and thence east, that it does cover the land contained in his entry of 1890.

There was much evidence offered by both sides as to the location of the Donelson grant which was for 60,400 acres "issued 28 August, 1875." Defendant's evidence tended to establish it at the point contended for by him. And plaintiff's evidence tending to show that this line, the one contended for by defendant, was not the Stokely Donelson line.

There are some exceptions taken to the evidence which we are not prepared to approve, as we understand the ruling of the court. But as the point does not distinctly appear, and we may not understand the point intended to be made, and as a ruling on this point
(862) in favor of the plaintiff would probably not materially affect a new trial, we prefer to put our opinion on a more substantial point.

At the close of the evidence the plaintiff asked several special instructions of the court which we will not repeat in full. But in these instructions he asked the court to charge that the first call "south 360 chains to a stake, supposed to be Stokely Donelson's line, thence

with this line east 390 chains to his northeast corner," was too vague and uncertain to vary the course and distance called for in the grant. And that the court should so charge the jury and instruct them that said grant stopped at the end of the call for 360 chains, and thence ran east. The court refused this prayer of plaintiff, and instructed the jury "that if they should find that the beginning corner of the Donelson grant was at the point designated by the hand at the figure 28, as contended for by defendant, and that its line had been run out and marked and located at the date of Blount's grant, or that they were susceptible of location to a mathematical certainty from the Donelson grant, the beginning corner of the Blount grant being admitted, the call of the Blount grant 'beginning at an ash opposite the Painted Rock, running south 360 chains to a stake supposed to be in Stokely Donelson's line, and then east with his east line 390 chains to his northeast corner, etc.' (though the distance gave out before the Donelson line was reached by the first call), the second call would carry the line to the nearest limit in the Stokely Donelson line, and then with that line to the northeast corner of Donelson's grant, if such a line can be found, and if they believe from all the evidence that the Stokely Donelson line was the line called for in the Blount grant, that the land in controversy was covered by the Blount grant, and the plaintiff could not recover. That if they should find that the Stokely Donelson grant had been correctly located; that its beginning corner was established at the date of its issue, and its lines were located or were susceptible of (863) location to a mathematical certainty from the grant, and the lines of the Stokely Donelson grant were the lines called for in the Blount grant, that the law would extend the second call in the Blount grant to the line of the Stokely Donelson grant, and then with it to its northeast corner, etc. So that at the date of the plaintiff's entry and grant there was no land vacant and open to grant within the said boundary, the same having been previously granted to Blount by the State."

So then the question is, Were the refusal to give the instructions asked and the charge as given erroneous? If they were, the plaintiff is entitled to a new trial. If they were not, then the judgment should be affirmed.

In the early history of this State there were a great many very large grants of land obtained by speculators, commonly called speculation-grants. As the country did not fill up rapidly, these lands did not increase in value rapidly, and but few of these "speculators" derived much benefit from such lands. But many of them have floated down with the current of time, and are now in the hands of other speculators who now hold them under tax-titles or otherwise, purchased for small

sums. And as these lands now begin to grow in value and importance, we have more and more litigation growing out of these old grants, the most of them being located in an almost unsettled rough mountain country, the lines of which often extend for miles. Many of them, it is said, were never actually surveyed, but a party wanting to make an entry would locate a beginning corner and then plot the boundaries, and in the language of the court below locate them "with mathematical certainty" by simply making a plot of a survey. And it is evident to our minds that both the Blount grant and the Donelson grant (some of the lines of which were 20 miles long) were located in this way. And
(864) this may afford some explanation for the Blount grant calling for "a stake supposed to be in the Stokely Donelson line"—when the Stokely Donelson line is a mile and a quarter from where the calls in the Blount grant give out, if the Stokely Donelson line is where defendant contends it is.

The general rule is that the calls in a grant or deed control in locating the land granted or conveyed. But this general rule is subject to the exception that when a natural object or monument is also called for in the deed or grant, susceptible of location, and is identified and located, this will control course and distance, as called for in the instrument. And the courts have held that the line of an adjacent tract, if known and established at the time of issuing the grant or executing the deed, may constitute such natural object or monument.

But this exception is put on the ground that the natural object is more certain than course and distance, as these depend upon the correctness of the compass, the accuracy of the surveyor and the faithfulness of the chain-carrier.

To take the case out of the general rule that course and distance, as called for in the conveyance, control, there must be another call more certain than course and distance. Then, is the call to a stake "supposed to be in Stokely Donelson line" one mile and a quarter from where the course and distance called for in the grant give out, more certain than course and distance called for? It is manifest from the call itself that the party locating this grant did not know where Stokely Donelson's line was. And if he did not know where it was then, but it should, a hundred years after the grant was issued, be found that the Stokely Donelson line was one mile and a quarter from where the
(865) calls of the grant located the grant, can it be reasonably contended that this uncertain call "supposed to be in the Stokely Donelson line" is more certain than the call "thence south 360 chains to a stake"? This it must be, or the calls of course and distance contained in the grant will control. This is the general rule, and the exception must be established or the general rule will prevail.

Then if there was nothing more in the call than this (a stake supposed to be in Stokely Donelson's line) it seems clear to us upon the "reason of the thing" that this call would not be sufficient to take the case out of the general rule, and the course and distance called for in the grant must prevail. But this is not only so upon the reason of the thing, but it has been so held by our Court. *Mizzell v. Simmons,* 79 N. C., 182. But the call does not stop with the call for a stake "supposed to be in Stokely Donelson's line," but it then calls as follows "thence with this line east 390 chains to his northeast corner." And it is claimed for the defendant that this call is more certain than the other, and carries the south line of the Blount grant to the Donelson line wherever it may be. But we do not assent to this proposition. In our opinion, any call to take the case out of the general rule must be both reasonable and certain, and we do not think this is either. We do not think it reasonable that when the State granted to Blount a tract of land commencing on the west side of the river at the Painted Rock, thence south 360 chains, it intended that line to extend one and a fourth miles further than was called for. And to have this effect the call must be to some well known and well established object, at the time of the grant. But as it appears to us, this call depends upon the other call "supposed to be in Stokely Donelson's line" and it is no stronger than that call, which, we have seen, is not sufficient. If the Blount grant had extended to Stokely Donelson's line, thence east would have necessarily run with Stokely Donelson's line, as his line was an east and west line. But if the grant did not go to the "supposed (866) line," then it did not run east with the "supposed line." Whether we get to the Stokely Donelson line or not does not change the calls in the Blount grant. It is thence east from wherever the Blount grant stops.

It is not pretended that the defendant established or found any corner or line of the Stokely Donelson grant, except the beginning corner. And the other lines and corners of a 60,400-acre grant are attempted to be established by a survey "with mathematical certainty" to control the course and distance called for in Blount grant. It is not contended that any marked line or monument is found locating the Stokely Donelson line at the point where defendant contends that the Blount grant should terminate. We do not think such a mathematical line as this can be used to control the positive calls of course and distance contained in the Blount grant. Who can tell that there are not errors in the calls of course and distance in the Stokely Donelson grant, or in the survey made in a rough and almost unbroken forest of a 60,000-acre tract of land granted a hundred years ago?

The surveyor testified (and his testimony is made part of the judge's

case on appeal) that to survey the Blount grant, as contended for by defendant, it would contain between 25,000 and 30,000 acres of land; and to survey it by the calls and distances in the grant, as contended should be done by plaintiff, it will contain more than 10,240 acres (this being the amount called for in the grant).

We are not inadvertent to the fact that, as a general rule, quantity of acres called for in the conveyance cannot be invoked to establish lines and locate the deed. But it has been held by this Court that "where the boundaries are doubtful it becomes an important element." *Cox v. Cox,* 91 N. C., 256. We do not think this south boundary (867) of the Blount grant doubtful. But if it should be considered so, then this question of quantity comes in to sustain the view we have taken of this case.

We are of the opinion that plaintiff was entitled to the prayer as above stated and there was error in the court's refusing to give the same, and there is also error in the charge as given. The plaintiff is entitled to a new trial and it is so ordered.

New Trial.

AVERY, J. (dissenting): It was conceded that the call from a known beginning "running south 360 chains to a stake supposed to be in Stokely Donelson's line" would not control course and distance under the ruling in *Mizzell v. Simmons,* 79 N. C., 182, even where the location of the line called for was unquestioned and no difficulty would arise about the point where an extended line would intersect with the "Stokely Donelson line," but the question presented by the appeal is whether the judge erred when he refused to charge the jury that the two calls "south 360 chains to a stake, supposed to be in Stokely Donelson's line, thence with his line 390 chains to his northeast corner, were too vague and uncertain to vary the course and distance called for in the grant," though the defendant offered evidence "tending to show the location of the Donelson line as contended for my him," viz., where he contended the extended line intersected.

The court instructed the jury in substance that if the Stokely Donelson line could be ascertained with "mathematical certainty," the first call taken in connection with the second would be construed so as to give effect to all of the descriptive words and would extend the first line to the Donelson line and run with it the distance called for.

If the first call had been for stake "in" Stokely Donelson's (868) line and that line had been at the time of taking out the grant "an established line or capable of being then established," then, upon the authority of *Mizzell v. Simmons,* 79 N. C., 187, and *Carson v. Blount,* there cited, it would have been competent, by a survey of the

Donelson grant, to establish the line called for and then extend the first line till it should intersect with it. This would be done upon the fundamental maxim, that the law regards as certain whatever can be made certain with the data available for the purpose. The opinion delivered by *Justice Bynum,* in *Mizzell's case,* that a line which was capable of being established would control distance as effectually as one actually marked, finds support in a long line of decisions. *Judge Pearson* in *Corn v. McCrary,* 48 N. C., 496, said of a similar line: "It makes no difference whether it is a marked or an unmarked or mathematical line, at it is termed in the case, provided it be the line which is called for." In the same opinion he defines a mathematical line as one not marked, but ascertained by running the call from one known corner to another. It is admitted that there was evidence tending to show the location of the Donelson line, that would have been intersected by extending the first call. The same learned Justice, in *Graybeal v. Powers,* 76 N. C., 66, announces the doctrine distinctly that whenever a line of another tract (whether a marked or mathematical line) is called for, course must be disregarded, if the jury find that the evidence is sufficient to locate the line mentioned.

It being conceded then that there was testimony tending to locate the line mathematically, it follows upon the authorities cited above that distance must be disregarded, if the jury think it established mathematically by running between two known corners, just as if there had been additional evidence that it was marked. If there is any established rule of construction which would require that the second line should be run direct to the Donelson line, if the jury considered (869) the evidence sufficient to locate it, the judge did not err in his instruction to the jury that if they found from the evidence that the Donelson line had been run out and marked and located, or that it "was susceptible of being located to a mathematical certainty," then the second call would be run to, and then with that line according to the call. If the Donelson line could be ascertained with mathematical certainty (that being a question for the jury when the testimony was conflicting) the call "thence with his (Donelson's) line" would be according to all of the authorities, more certain than the other description "east 390 chains to his northeast corner." But it is a familiar and well established rule that in cases like this the line must be run so as to fulfill both descriptions as near as possible. *Buckner v. Anderson,* 111 N. C., 572; *Shaffer v. Hahn, ib.,* 1; *Proctor v. Rowe,* 15 N. C., 670; *Shultz v. Young,* 25 N. C., 385. "It is a leading rule in the construction of all instruments (said *Judge Gaston* in *Shultz v. Young, supra*), that effect should be given to every part thereof, and in expounding the

description in a deed or grant of the subject matter thereof they ought to be reconciled if possible and as far as possible. If they cannot stand together each of them is to be considered as declaring the intent of the parties. The lines of other tracts may be as notorious and certain as any natural object, and by making one of these lines a part of the description of the thing granted, the parties represent it as a known line by which the certainty of the thing granted is defined." Upon the principle stated, the Court held in that case that in order to fulfill the whole of a description from a certain point "south with A B's line 310 poles to C D's corner," where the direction of C D's corner was at right angles with that of A B's line, it was proper to run the distance called
(870) for 310 poles with A B's line, and thence direct to C B's corner.

Our case presents the question whether precisely the same leading purpose of the following two descriptions, whether they can be reconciled, would not, as the judge told the jury, extend the distance so as to reach the Donelson line, if in the opinion of the jury it was properly located, and meet the description fully by running with it to the objective point called for. In this way, the three purposes of the grantor, to run with a certain line, to run a certain distance, and to reach a given object would all be carried out. Among the older cases which recognize the doctrine of diverging from a course so as to run with a natural boundary and return by the most direct route to a known objective point, is that of *Cherry v. Slade,* 7 N. C., 82, and among the later cases that of *Long v. Long,* 73 N. C., 370.

The principle which governs this case was recognized by both parties in *Buckner v. Anderson, supra,* but the controversy grew out of the difference as to its proposed application. Upon looking into the facts, it is manifest that the ruling in that case sustained the instruction excepted to in this.

I do not think that the Court can take judicial cognizance of the history of land grants, certainly outside of what appears in the judicial annals of the State. But even the judicial history indicates that the original grantee, under whom the defendant claims, obtained patents for large bodies of land covering a considerable portion of many counties, notably Yancey, Madison, Buncombe and Haywood, and that a large number of small land owners trace their titles to that source. I cannot concur in speaking disparagingly of any title acquired in a way that the law pronounces legitimate. Proprietors of large bodies of territory and owners of small homesteads should feel that they
(871) meet with equal favor before the courts, and even claimants under tax titles, which will rarely if ever be found valid where they were executed before the passage of the statute regulating the sale of land for taxes, which is now in force, are entitled to the full pro-

tection afforded by the laws. It is true that nearly all of the surveys made a hundred years ago, whether for large or small tracts, covered far greater acreage than they purported to include, and many grants for small tracts embraced within their limits proportionately as great an excess over the acreage called for as the large grant offered in this case would cover, if surveyed according to the contention of the defendant. We cannot make a rule for large tracts without disturbing the principles under which the boundaries of smaller ones have by common consent been settled.

Cited: *S. c.*, 118 N. C., 870; *Peebles v. Graham*, 128 N. C., 227; *Whitaker v. Cover*, 140 N. C., 281; *Lumber Co. v. Hutton*, 152 N. C., 542; *S. c.*, 159 N. C., 450; *Dunn v. Clerk's Office*, 176 N. C., 51.

(872)

J. H. SMITH v. ARTHUR, COFFIN & CO.

Costs—Surety on Prosecution Bond—Agreement of Parties as to Costs Not Binding on Surety—Appeal—Practice.

1. A surety on plaintiff's prosecution bond is liable only for such costs as defendant shall recover of the plaintiff in the action and is not liable for any part of the plaintiff's costs.
2. Where the plaintiff in an action obtained judgment against the defendant for a certain amount and costs, but execution was stayed and the action retained until a counterclaim raised by the defendant could be disposed of, and a compromise of such counterclaim was agreed upon between the parties whereby plaintiff's judgment was reduced and he consented to pay costs: *Held*, that such agreement was not binding on the surety on the prosecution bond, and he is not liable for any of the costs of the action.
3. Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax.

MOTION to retax the costs in an action, heard before *Shuford, J.*, at Fall Term, 1894, of SWAIN. The facts appear in the opinion of *Associate Justice Furches.*

J. W. Cooper for R. G. Cooper.
Fry & Newby contra.

FURCHES, J. On 12 July, 1889, plaintiff brought suit against defendants, returnable to Fall Term of Swain Superior Court. In this action

R. L. Cooper became plaintiff's surety for the prosecution of his suit. Plaintiff filed his complaint and defendants filed their answer in which they set up a counterclaim to plaintiff's action. At Fall Term, 1891, plaintiff recovered judgment against defendants for the sum of $2,445, and cost of action.

But this trial did not dispose of defendants' counterclaim and the case was retained on the docket until that could be disposed of, and execution of plaintiff's judgment was stayed until that was done. Afterwards (but it does not appear at what time) plaintiff and defendants agreed to refer the matters involved in defendants' counterclaim to Mr. Newby. But it does not appear that he ever took the account.

Sometime after this plaintiff and defendants agreed upon terms of compromise as to defendants' counterclaim in which defendants were to pay into court the sum of $1,650, and to release any further claim they might have on account of said counterclaim, and plaintiff
(873) agreed to accept the $1,650 in full satisfaction of his said judgment and plaintiff also agreed in this compromise to pay all unpaid cost.

It appears from the findings of the judge at Fall Term, 1894, that there remains $29.20 due Jenkins and Franks as witnesses, and $25 allowed Mr. Newby as referee, still unpaid. The sum agreed upon—$1,650—was paid into court, but at what time this was done does not appear.

The matter stood this way until Fall Term, 1894, when defendants made a motion to retax the cost that had been taxed against defendants under the judgment of 1891, and to tax them against the plaintiff and the said R. L. Cooper, his surety on the prosecution bond. This motion was resisted by Cooper, but allowed by the court, and judgment being so entered against said Cooper he appealed to this Court. Then, leaving out of view the question of time (the motion being made more than one year after the judgment at Fall Term, 1891), can the judgment of the court appealed from be sustained?

Section 209 of The Code requires that, before a clerk shall issue a summons, he shall take from the plaintiff a bond in the sum of $200, upon condition "that the same shall be void if the plaintiff shall pay the defendant all such cost as the defendant shall recover of him, in the action."

In contemplation of law, the parties pay the cost of litigation as the action proceeds, and this bond is given, it is true, entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. *Hallman v. Dellinger,* 84 N. C., 1.

But the condition of the bond is to pay the defendant such cost as he shall recover of plaintiff "in the action." Then, if defendants did not

recover of plaintiff any cost "in the action," the surety is not bound. And we see that in this case the plaintiff recovered of defendants $2,445, and the cost of action. This amount, it is true, was reduced to $1,650, by way of compromise and agreement of the parties, in which agreement the plaintiff agreed to pay certain costs. And as he (874) agreed to do so, he ought to pay it. But this agreement to pay this cost does not bind Cooper. He was no party to this agreement. The defendant did not recover this cost in the action and Cooper is not bound for any cost except such as defendants "recovered in this action," and he recovered none.

Attorneys for defendants contend in their brief that this is a matter of discretion in the court below from which there is no appeal, and cite as authority for this position the case of *S. v. Massey,* 104 N. C., 877. But that case is under section 733 of The Code and has no application to this case, and can in no way be authority for the position taken.

It is also contended in the brief that no notice of appeal was given, and that the case on appeal was not served within ten days. But the facts, as they appear from the record, are otherwise.

It is also contended in the brief that we are bound by the facts found by the court below. We recognize this as the law, and decide the law of the case upon the facts as we find them in the record.

Cooper, though not a party to the original action, was made a party to this proceeding, and had a right to appeal. We therefore hold that Cooper is not liable for this cost and that the judgment appealed from is erroneous.

Error.

Cited: Dale v. Presnell, 119 N. C., 493.

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(875)

G. B. CARDEN v. W. R. McCONNELL.

Action for Damages—Slander of Title—Parol Evidence of Written Contract, When Admissible.

1. The rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between parties to the writing and where its enforcement is the gravamen or substantial cause of the action.
2. Where, in an action for slander of plaintiff's title, it was alleged that the defendant had, by misrepresentations as to his title, prevented the carrying out of a written contract for the sale of the land between plaintiff and another, parol evidence as to the contents of such writing was admis-

sible, such contract being collateral to the gravamen of the charge and material only as to the measure of damages.

ACTION, tried before *Shuford, J.*, and a jury, at Fall Term, 1894, of CLAY. From a judgment, on a verdict for defendant, plaintiff appealed. The facts appear in the opinion of *Associate Justice Furches.*

G. B. Carden for plaintiff.
J. B. Batchelor for defendant.

FURCHES, J. This is an action by plaintiff to recover damages for slander of his title to land. Plaintiff offered in evidence a deed from T. M. Ledford and wife to himself, and was then introduced to prove a sale of the land to one Isbell, and on stating that the sale was in writing the defendant objected to his speaking of the contents of the paper writing, and the objection was sustained. Plaintiff then introduced Isbell, who testified that he took the paper writing and assigned it to one Hoffman, of Detroit, Michigan. Plaintiff then offered to prove the contents of the paper writing. Defendant objected
(876) and the objection was sustained. Plaintiff excepted to his Honor's ruling and submitted to a nonsuit and appealed.

It is a well settled principle of the law of evidence that where a transaction takes place between parties, which is reduced to writing and signed by them (or it may be otherwise assented to by them), and an action is brought to enforce this transaction, the written evidence must be produced or accounted for before other evidence is admissible as to the transaction. This rule is put upon the ground that the parties have agreed that the writing shall be the evidence of their contract or transaction. This learning is too familiar to call for citations to support it.

But this rule only obtains in actions between parties to the written evidence of the contract and where its enforcement is the gravamen—the grievance complained of—the substantial cause of the action. Burrill's Dictionary, 568; 1 Greenleaf Evidence, 366. This action is not between the same parties who made the written contract to sell the land. That was between the plaintiff and Isbell, and this action is between the plaintiff Carden and the defendant McConnell. The defendant McConnell is no party to this writing, and is in no way bound by it. And as he is not bound by it, as between him and the plaintiff, the plaintiff is not bound by it. If it binds one, it binds the other. And as it does not bind defendant, it does not bind the plaintiff. *Reynolds v. Magness,* 24 N. C., 26. But this action is not brought upon this written contract between the plaintiff and Isbell. It is brought against the defendant upon the allegation that he had falsely claimed,

to the party to whom plaintiff was about to sell his land, that he (the defendant) was the owner of one-half of the mineral interest in the same, and plaintiff's title was not good, and that defendant by this means had prevented him from making the sale. This false representation is what the plaintiff complains of. This is the gravamen—the grievance. Burrill's Dictionary, *supra*. The sale to Isbell (877) and the writing which was the evidence of that transaction, as between plaintiff and Isbell, is collateral to the gravamen—the issue—in this action, and is only material as to the measure of damage to which plaintiff would be entitled, if he sustains the issue as to the slander—the alleged grievance he has against defendant. This paper then being collateral to the issue—the grievance complained of—its contents may be shown without producing the paper. *Reynolds v. Magness, supra; Pollock v. Wilcox,* 68 N. C., 46; *Wilson v. Derr,* 69 N. C., 137; *S. v. Wilkerson,* 98 N. C., 696. There was error in sustaining defendant's objection to the testimony.

New Trial.

Cited: Archer v. Hooper, 119 N. C., 582; *S. v. Sharp,* 125 N. C., 631; *Belding v. Archer,* 131 N. C., 317; *Ledford v. Emerson,* 138 N. C., 503; *Holloman v. R. R.,* 172 N. C., 375; *Hall v. Giessell,* 179 N. C., 659.

(878)

W. H. ROWLAND v. OLD DOMINION BUILDING AND LOAN ASSOCIATION ET AL.

Building and Loan Association—Contract—Usury—Foreclosure of Mortgage—Uniform Laws.

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. Laws must be consistent with each other and uniform in their bearing upon all the people of the State; and, inasmuch as the general law fixes the rate of interest at six per cent per annum, no law of the General Assembly

can be allowed to alter or change the general law in this respect. Hence, chapter 444, Laws 1895, amendatory of chapter 7, vol. 2, of The Code, has not the effect of allowing a charge by building and loan associations of a greater rate than six per cent per annum on loans.

PETITION to rehear case reported in 115 N. C., 825.

MONTGOMERY, J. The matter before the Court arises upon an application to rehear the case of *Rowland v. B. & L. Association,* 115 N. C., 825. We have given each and all of the grounds specified in the application a thorough and careful examination. Indeed, we have gone over the whole case, as it appears in the record, and as it was presented to the Court; and we have considered anew the opinion of the Court, in all its bearings. In addition, we have also thought over the effect and the meaning of the act of 1893 and that of 1895, amendatory of chapter 7, vol. 2, of The Code (Building & Loan Associations).

We were urged in the last argument, by counsel for the defendants, to regard these acts as interpreting the original one and as confirming the power of these corporations to charge, for money loaned by them, amounts under the names of "dues," "fines," "fees," in addition to the rate of interest allowed by law. If this be conceded to be the intention of the law-making power, it does not follow necessarily that this Court will, in construing these statutes, give effect to such intention. Laws must be consistent with each other and uniform in their bearing upon all the people of the State. The courts cannot, and must not, in their interpretation of the law, violate this principle. "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Const.,
(879) Art. I, sec. 7. We have a general law fixing the rate of interest at six per cent per annum, and no act of the general assembly can be allowed to alter or change the general law in this respect.

We reiterate what this Court said in the case of *Mills v. B. & L. Association,* 75 N. C., 292: "We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest, without incurring the penalties of our usury laws. Calling the borrower 'a partner,' or substituting 'redeeming' for 'lending,' or 'premium' or 'bonus' for an amount which they profess to have advanced, and yet withhold; or 'dues' for 'interest,' or any like subterfuges, will not avail. We look at the substance." And, too, where the State undertakes to make such special grants to special interests, we must adopt the meaning most favorable to the grantor, "for," as *Chief Justice Pearson* said in the case of *R. R. v. Reid,* 64 N. C., 158, "it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individ-

uals seeking to procure the grant, and that the 'promoters,' as they are styled in England, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being, in its strict sense, a contract, is more like the act of an indulgent head of a family dispensing favors to its different members, and yielding to importunity."

If corporations combining the capital of individuals are allowed to charge more than the legal rate of interest, by imposing fines and penalties upon those who borrow from them, on their failure to meet their obligations, the general law regulating interest will be defeated, and our legitimate banking institutions and private capitalists, who lend money on interest, will be greatly prejudiced in their rights, unless they resolve themselves into building and loan associations, and thus (880) make a dead letter of our usury laws.

Counsel for the defendants called our attention to the magnitude of the business and the immense amount of capital of these associations, their aggregated capital doubling many times the combined capital of all the national banks of the country. This is a strong reason, to our minds, why the power of these corporations should be watched with a jealous eye. *Justice Reade,* in delivering the opinion in *Mill's case, supra,* well said: "They are numerous and influential. They influence legislation. By their liberal advertising, they influence the press. And even the courts may be insensibly affected." The enormous profits which the defendant association derives in the conduct of its business, as set forth in their by-laws, and as demonstrated in the opinion in this case delivered by *Justice Burwell,* make it clear that the laws should not grant them such favors as they claim from the State.

In conclusion we are satisfied that the unanimous decision of this Court, *Rowland v. B. & L. Association,* 115 N. C., 825, is sound in all respects, and is the law of the land.

Upon the application for the rehearing of this case, *Justice Burwell* discovered that the Court had overlooked a credit of $130, a part of the money paid by defendant Noell, which the plaintiff had given to Noell. The following is the language of *Judge Burwell* upon discovering the oversight: "In the statement of the account made by the referee occurs this item: 'By cash paid on loan, $130.' In the petition for a rehearing it is stated that this credit was placed on the account as the value of the stock and that we overlooked that fact. This is true. If, therefore, the assignee, Pittman, is declared to be the owner of the stock, this credit should be stricken from the account; for, as we have held, the defendant association is entitled to have all that it loaned Noell with six per cent interest thereon. Indeed, (881)

its counsel states that it asks no more. The proceeds of the sale of the mortgaged property are sufficient, it appears, for that; and therefore there is no necessity, in order to satisfy the association's claim, that payments on stock should be applied on the debt. Hence we may, without encroachment on the rights of the building and loan association, direct that it be paid in full out of the proceeds of sale, and thus leave the stock for him to whom Noell assigned it, the defendant Pittman. The property in court consists of the proceeds of sale and the stock. Under the circumstances, it is but just and proper that the mortgaged loan (and we hold it to be) should be paid out of the first, the proceeds of the sale. This will produce an equitable result." The petition to rehear is therefore dismissed, and the former judgment modified in respect to the $130 credit.

AVERY, J., dissents.

Cited: Strauss v. B. & L. Asso., 117 N. C., 314; *Rowland v. B. & L. Asso.,* 118 N. C., 78; *Smith v. B. & L. Asso.,* 119 N. C., 259.

(882)

J. S. MERONEY, JR., v. ATLANTA BUILDING AND LOAN ASSOCIATION.

Action to Enjoin Foreclosure of Mortgage—Building and Loan Association—Usurious Contract—Conflict of Laws—Lex Loci Contracti—Lex Loci Solutionis.

1. Where a loan was made by a building and loan association of Georgia to a citizen of this State, on application to and through a branch agency of such association located in this State, and managed by a local treasurer and collector in this State, to whom payments were to be made and who received commissions on his collections, and gave fidelity bond to the association: *Held*, that the rights and liabilities of the parties under the contract (though the latter recited that it was solvable in the other state) must be determined by the laws of this State and not by the laws of the other state—it being the evident intent of the parties that the debt should be discharged by payments to the local treasurer in this State.
2. In the enforcement of a mortgage on land, the usury law of the state in which the land is will govern, the security having been given for money to be used in the state, though payment of the loan in another state was provided.
3. A foreign building and loan association, having some of the features of the building and loan associations organized under the laws of North Carolina, but having, in addition, power to raise funds by issuing interest- and dividend-bearing stock, to buy and sell property, in general, and to act

as agent and trustee for the investment and management of funds, is not entitled to exercise the special powers and privileges of such local organizations.

4. The transaction between a *quasi* building and loan association and its borrowing stockholder is simply a loan, and is usurious, where he is liable under certain circumstances to pay more than the amount loaned and legal interest.

5. On an accounting between a *quasi* building and loan association and its borrowing stockholder, he should be charged with all he received, with legal interest thereon, and should be credited with entrance fee, stock dues, premiums, and interest on payments in advance of legal interest, and should not be charged with fines for noncompliance with provisions as to payment of premiums.

6. Act 9 March, 1895, restricting, in its first section, building and loan associations to six per cent interest, if held to allow greater interest by the provision of a subsequent section authorizing them to charge costs, expenses, interest, premiums, and fines, is repealed by act 13 March, 1895, prohibiting any one, without exception, to exact more than six per cent for the loan of money.

(883)

ACTION to enjoin the foreclosure of a mortgage and for an accounting, heard before *Armfield, J.,* at Fall Term, 1893, of CHEROKEE. There was judgment for the plaintiff and defendant appealed. The facts appear in the opinion written by *Justice Burwell* before the expiration of his term of office, and adopted in full by the Court.

J. W. & H. L. Cooper for plaintiff.
J. W. Hinsdale for defendant.

CLARK, J. The following full and convincing opinion prepared by *Justice Burwell* as last term is adopted by the Court:

"The question between these parties is, What sum is legally due to the corporation, called The Atlanta National Building & Loan Association, from the plaintiff on account of a loan of $300, made by it to him on 11 September, 1890, the payment of which was secured by a deed in trust made by the plaintiff and his wife to the defendant Goldsmith, by which they conveyed to him, as trustee, a certain town lot in Murphy, Cherokee County?

"What the defendant corporation contends for as its dues under its contract with the plaintiff, is clearly set out in the letter of its able counsel, which has been made by it a part of its answer. This letter is dated 10 March, 1892, is addressed to the plaintiff, and after telling him the writer is instructed 'to foreclose said deed of trust,' gives

(884) him 'an opportunity to settle' without a sale of his property, as follows: 'You were a subscriber to five shares of the common stock, class "B," of said Association, upon which you have paid the dues of sixty cents per month on each share from March, 1890, to January, 1891, inclusive, eleven months, at $3 per month, $33. See By-Law No. 3. On 11 September, 1890, you borrowed $300 from the Association and made your note and deed of trust to secure the same according to the charter and by-laws of the company. By this contract you agreed to pay the Association, in addition to the dues or monthly installments upon your stock which you contracted to pay upon becoming a stockholder, the sum of $3 per month as interest and premium on said advance until the stock should reach its par value; and you stipulated that if you failed to pay promptly, when due and payable, the said monthly interest or premium, fines and monthly payments on said stock for a period of three months after the same became due or any installment thereof became due, then at the option of the said Association the whole indebtedness should at once become due and collectible. You owe interest and premium for the same time according to your contract —$3 per month for 14 months, $42. The Association has exercised its option and now requests due payment of the whole indebtedness. You owe under your contract of subscriptions to five shares of stock, dues February, 1891, to March, 1892, sixty cents per share per month, for 14 months at $3 per month, $42. You likewise owe for 14 months at ten cents a share per month, or fifty cents per month for 14 months, $7. See By-Laws, No. 8. This makes a total of $91 to be added to the principal of your note, $300, which makes a total of $391. By-Law 22, paragraph 22, provides: "After a member has made not less than eleven successive monthly payments of dues, exclusive of the admission or entrance fee, provided he has paid dues for every month up to the date of with-
(885) drawal and all fines or other charges against him, he may withdraw the amount of dues paid by him, less that part of the same apportioned to the expense fund," as prescribed in By-Law No. 25, with interest at six per cent per annum for the average time on the amount withdrawable. Paragraph 4 of the same by-law provides: "No withdrawal of shares which are in arrears will be allowed until such arrears with all fines and other charges have been paid; payment of dues must be continued until the month of actual withdrawal; the admission or entrance fee and the ten cents per share per month appropriated to the expense fund cannot be withdrawn. Sixty days' notice in writing to be signed by the shareholder is required for all withdrawals. A withdrawal fee of $3 must be paid on each certificate. Each notice to withdraw will have attention in order in which it is received. Dues are the monthly installments paid on shares and do not include the admission or entrance

fee of one dollar per share." By-Law 25 provides: "There shall be retained and reserved from the monthly dues paid on the shares the sum of ten cents per month per share for the payment of expenses, to be known as the expense fund. The excess over and above expenses to go to the profit account." In this settlement the company will concede to you the withdrawal value of your shares as if you were not in arrears. Your dues on stock from March, 1890, to March, 1892, as $3 per month, would be $75, less expense fund ten cents a share, fifty cents a month, for 25 months, $12—leaving due $62.50. Add interest at six per cent for average time, twelve months and a half, $3.40—making $65.90, less withdrawal fee $3—leaving $62.90. So deducting from $391 the credit of $62.90, we have $328.10 as the amount which the Association is now claiming to be due by you. If the same shall be paid without foreclosure you will be relieved of the additional expense of 10 per cent of $32.10, attorney's fee and expense of sale. Unless you shall at once pay to me the amount due by you to said Association, I (886) shall under my instructions proceed to foreclose the deed of trust according to law. I will call your attention to the fact that this contract is solvable in Georgia and is made with reference to its laws. The courts of Georgia have decided such a contract to be valid and binding.'

"The defendant is organized under the laws of the State of Georgia and an examination of its charter, a copy of which is filed with the brief of its counsel, discloses the fact that the scope of its power is very extensive. 'The object of said Association,' it is said, 'shall be pecuniary profit for its stockholders, to encourage the savings of small sums of money, to aid persons of limited means in obtaining homes, the accumulation of a fund which shall be paid in monthly installments by its stockholders, and lending the same on real estate, personal or other acceptable security to members of said association or to persons not members thereof or to corporations, and to take and hold deeds, mortgages, executions or other liens, or personal security therefor, to sell, assign, transfer or otherwise dispose of all such securities or any part thereof; to make, issue and sell bonds or other obligations based on the security and property held by the association; to buy, sell, own and deal in any real or personal property; to improve any such real estate by erecting buildings, machinery or other appliances for increasing the value thereof, to lease or rent the same, and to sell the same for cash or on installments; also to act as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians and trustees. To carry out all of which objects, as well as to do any and all other acts or things necessary and lawful in the prosecution and

(887) management of said business and businesses, petitioners pray to be invested with full power and authority.'

"And by its charter it is given full power and authority to carry out all these objects of its organization.

"Now, if we leave out of our consideration, for the present, all questions about the alleged special powers and privileges of this corporation, and all questions that pertain to the intricacies of the business of building and loan associations, and the application of payments made by the borrower from such an association on stock in liquidating his indebtedness, we have here a loan of money made by a foreign corporation to a citizen of this State and secured by mortgage on land in this State, at a rate that is plainly usurious under the law here, 12 per cent (six per cent as interest and fifty cents per month as premium) and an insistence by the foreign lender that, because it is stipulated in the contract that it is 'solvable' in the foreign state and is made with reference to its laws, and those laws allow the taking by it of that rate of interest for the loan of money, the courts of this State are bound to enforce such a contract by a decree of foreclosure.

"The proposition challenges careful attention. It is important that foreign capital invested within our borders shall have, to the very utmost, its just dues, and that it shall find our courts ready now, as they have always been, to protect its interest and enforce all its lawful rights. But it is important also that the settled policy of the State should be upheld by its courts, and that schemes which to them seem manifestly adopted merely to evade its usury laws should not be allowed to bring about a virtual abrogation of those statutes.

"If a foreign bank or other lender of money may establish local branches or offices in this State, and through its agents solicit and take application for loans on mortgages of land here to be sent to the (888) home office, to be passed upon and allowed there, and if, because of such arrangement, and the insertion of a statement, put in the note or mortgage that the contract is 'solvable' in the foreign jurisdiction, and is made 'with reference to its laws,' the courts of this State are required to enforce such contracts, and decree a foreclosure of the mortgage and a sale of the land, that the foreign usurer may have his usury, then surely will it have come to pass that it is no longer true that there is no 'cover or device,' by which the wholesome restraints put upon the money lenders by our statutes may be escaped.

"Upon this subject there is in *Martin v. Johnson,* 84 Ga., 481, a most emphatic declaration from the highest court of the state that is the domicile of the defendant corporation. A loan of money had been made by a citizen of Massachusetts through an agent in Georgia to a citizen of the latter state, secured by mortgage on land there but payable in

the former state. It was contended that the rights of the mortgagee were not to be governed by the laws of Georgia in respect to usury because the note was payable in Massachusetts. The Court said: "If this Court should hold that a note made in this State but payable in the State of Massachusetts for money advanced by the agent of a person who resides in Massachusetts could be collected notwithstanding it contained sixteen per cent usurious and unlawful interest, then the law of this State as to usury would be inoperative and useless; the money lenders of those states that have no usury laws but which allow to be collected any rate of interest contracted for, could flood this State with their agents and by the loan of money exact the highest rate of interest, even a hundred per cent.'

"It seems, therefore, that the principle for which the defendant corporation contends is denied in the courts of its own domicile—that a foreign money lender, loaning money in Georgia on mortgage on Georgia land, must be content in a foreclosure proceeding to (889) have the amount due determined by Georgia law.

"The reasons that support the rule there are valid here. The rules of comity require us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this State as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens, and give to the foreigner an advantage which the resident has not. *Walters v. Whitlock,* 9 Fla., 86 (76 Am. Dec., 607). Much less does it require that we should allow a Georgia corporation to enforce a mortgage loan which is illegal and void by our laws (*Ward v. Sugg,* 113 N. C., 489) while in that state the rule is as stated in *Martin v. Johnson, supra.*

"It is well settled, so well settled that authorities need not be cited, that a purely personal contract made in one place to be executed in another, is to be governed by the laws of the place of performance. This general rule is subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. Tyler on Usury, 83.

"Now, it seems very manifest to us, considering all the facts and circumstances, that this Georgia corporation required the plaintiff, a citizen and resident of this State, to declare, in the obligation given by him to it for the money loaned him, that the contract was solvable in that state and was made with reference to its laws, not because it was contemplated by either of the parties that the money would be paid there, or that the parties would enforce their respective (890)

rights under the contract in the courts of that state, but because this money lender desired to escape the restraints of the laws of this State, and, by this formal declaration inserted in the contract, compel the courts of this State in a suit for the foreclosure of the mortgage to adjust the rights of the parties according to the laws of Georgia and the decisions of its courts, and in disregard of the laws of this State and the decisions of this Court.

"The by-law in relation to the establishment of local branches is as follows: 'In accordance with the authority conferred in its charter this Association will establish local branches in Georgia and other states at such points as the board of directors may approve. The local branches shall elect their own officers and directors and may make such by-laws as they desire to govern their own bodies not inconsistent with those of the parent office. The treasurers of the local branches shall give such bonds to the Association for the faithful performance of duties and the prompt remittance of all collections by them, as the board of directors of the parent office shall determine in each particular case. They shall receive two per cent on all collections from the local branches made and paid over to the treasurer of the parent office by them.'

"It appears from the record that there was a 'local branch' at Murphy, through which this loan was negotiated. It is evident that the borrower was expected to make his payments to the treasurer of this local board, who was under bond 'to the Association' for the prompt remittance of all collections. The by-laws provided for compensation for this treasurer —two per cent of his collections. The local treasurer must be considered the collecting agent of the Association. A payment to him must (891) be considered a payment to the Association. Asseveration that he is the agent of the local branch, not the parent company, that he was expected to receive and remit money, not as agent of the lender to whom he had given bond for the faithful performance of his duties, but of the borrower, cannot avail. It is evident that this contract, which the borrower was required to say was solvable in Georgia, was in fact to be solved by payments to this local treasurer, and that the form of the transaction was adopted to disguise its real character.

"Considering the transaction, therefore, without any regard to the intricate questions pertaining to what are called building and loan associations, but merely as a loan of money made by a money-lending corporation of another state through its local branch in this State, in the manner detailed in the case on appeal, to a citizen here, we conclude that in this contest between the parties as to their respective rights and liabilities under the contract, those rights and liabilities must be determined by the laws of this State; that it is, in truth, a North Carolina

contract to be governed by our laws, and not a Georgia contract to be governed by the laws of that state.

"If there was no local board and no local treasurer; if the application of this resident of North Carolina for a loan of money to be secured by a mortgage on land in this State, to be executed here, had been forwarded directly to the home office of this foreign corporation, and had been there granted upon the condition that the note or bond given by the borrower should be made payable at the home office and should bear interest at a rate allowed by the laws of that jurisdiction but illegal here, it has been declared by high authority that, in a suit to foreclose the mortgage, the decree of foreclosure will limit the recovery of the lender to the rate of interest allowed by the laws of this State. Wharton in his treatise on the Conflict of Laws, section 507, says of the question, 'Whether, when a mortgage is given as security for (892) a loan, and the mortgage is in one state and the place of payment of the loan is another, the law of the former state or that of the latter state is to prevail in the settlement of interest,' that it has been frequently litigated in the United States, and 'with results which on their face are irreconcilable.' And the learned author says: 'The true test is, was the mortgage merely a collateral security, the money being employed in another state and under other law, or was the money employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies. If the latter, then the law of the place where the mortgage is situate must prevail.'

"It is stated in the elaborate brief of the learned counsel for appellant that the authorities cited by Wharton do not sustain the rule thus laid down by him. Among these cases is *Chapman v. Robertson,* 7 Paige, 627, in which it was adjudicated, as stated in the head-notes of that case in 31 Am. Dec., 264, that 'The construction and validity of personal contracts depend on the laws of the place where they were made, unless they were entered into with the view of being performed elsewhere,' and also that 'transfer of land or other heritable property, and the creation of liens thereon, is governed by the laws of the place where such property is situate.' Of this case *Folger, Justice,* said in *Dickinson v. Edwards,* 77 N. Y., 573, *'Chapman v. Robertson, supra,* is a case often cited and relied upon, but it does not impinge the general rule that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned Chancellor concedes that the case would have come clearly under that principle if the contract in suit had been only the personal contract of the (893) defendant; but he holds, that as it was a mortgage actually executed here by a resident here, upon land here, for money borrowed to

be used here, though to be returned elsewhere, the law of this State would fix the legality of the rate of interest reserved, and he further reasons that the contract was partially made here actually in reference to our laws, with an appeal to our courts contemplated by the parties, if necessary.'

"A distinction seems thus to be clearly recognized between a contract, 'purely personal,' as for instance a promissory note executed in this State, but made payable *bona fide* in Georgia, and a contract not 'purely personal,' as for instance a loan of money by a citizen of Georgia to a resident here to be repaid in that state and to be evidenced by note, so payable, and mortgage on land in this jurisdiction. In *Jackson v. Mortgage Co.,* 88 Georgia, 756, *Bleckley, C. J.,* speaking of a loan of money made by the defendant to the plaintiff in New York, but secured by mortgage on land in Georgia, where he resided, says: 'There was not one contract for making the notes, and another for securing them by a conveyance, but a part of one and the same contract was expressed in the notes, and a part in the deed executed at the same time. There was no intention to make a loan without having it secured both by the notes and the deed. It was therefore impossible to accomplish the object without calling in the laws of Georgia as a part of the transaction. New York had no law which could make any contract conveying land situated in Georgia operative or obligatory. As the laws of Georgia would thus be essential with respect to a part of the transaction, that law, if possible, ought to be applied to the whole. There was no intention to make a mere personal contract, but the scheme was to make one partly personal and partly confined by its very nature to a given situs, to wit,
(894) the State of Georgia.' See also *Martin v. Johnson, supra,* which was a suit to foreclose a mortgage, the debt being payable in Massachusetts. It is there said: 'There is a portion of the contract which under no circumstances could be enforced in the State of Massachusetts—that as to the land upon which it is sought to set up a lien. Nor do we readily see how any portion of this contract could be enforced in the State of Massachusetts against a person resident in the State of Georgia.'

"The difference in the contracts makes a difference in the rule applicable to their enforcement. Hence, in *Pine v. Smith,* 11 Gray, 38, it was decided that a note made in Massachusetts and secured by mortgage on land in that state, although payable in New York, was to be construed by the Massachusetts law; and in *Thompson v. Edwards,* 85 In., 414, it was held that if A of Indiana borrowed in Indiana, on notes secured by a mortgage on land there, money of a citizen of New York, some of the note being payable in New York, and some specifying no place of payment, the contract was an Indiana contract, and the question of its being usurious was to be tested by the law of that state. In *Pancoast*

v. Ins. Co., 79 Indiana, 172, the notes and mortgages were payable in Connecticut, and the court said: 'It is true that the notes and mortgage are made payable in Hartford in the State of Connecticut. But it is true that they were executed in this state, the mortgagor lives in this state, the lands lie in this state and from the terms of the mortgage it is clear that the intention of the parties was that the contract was to be enforced in this state. The mortgage could be enforced nowhere else. In such a case the law of this state governs, the rate of interest being fixed in accordance with the laws of this state.'

"The doctrine which Dr. Wharton announces seems to us just and reasonable. It has been repeatedly held that such trans- (895) actions would constitute 'doing business' in this State so as to subject the foreign money lender, thus conducting himself, to a license tax. Murfree on Foreign Corporations, sections 65, 69, and cases cited. The contention of the defendant corporation seems to us to amount to this: that it must be allowed to do business in North Carolina in total disregard of North Carolina's statutes and the decisions of her courts; that it shall be allowed to take mortgages on North Carolina land from a resident owner for money loaned to the resident, to be used here, and foreclose them in North Carolina courts, where alone jurisdiction for foreclosure could reside, and where alone it must have contemplated enforcing its rights, if a resort to courts should be necessary, not by North Carolina statutes and the decisions of her courts, but by Georgia statutes and the decisions of its courts; in fine, that it shall be allowed to override in the courts of this State the laws of this State and its well settled policy as to the borrowing and lending of money.

"We cannot accede to this proposition, but, instead, we choose to adopt the doctrine announced by Wharton, quoted above, which seems to us more reasonable and which he assures us is sustained by the authorities.

"We have, indeed, as it appears to us, an affirmance of that doctrine in *Commissioners v. R. R.,* 77 N. C., 289, where the learned *Justice Rodman,* speaking of certain bonds which the defendant company had delivered in New York and which were payable there, and which, it was contended, were 'governed by the laws of New York in respect to the rate of interest,' says: 'These bonds were clearly a North Carolina contract; the precedent debt, which was the consideration, was incurred and payable in North Carolina; both parties resided in North Carolina; the bonds were secured by a mortgage on real property in North Carolina, which could only be enforced (896) through the courts of this State. In our opinion the bonds could legally bear no greater rate of interest than that allowed in North Carolina.'

"Now, if the reason given by this able Judge for declaring that these bonds were clearly a North Carolina contract be analyzed, it will be found that the fact that 'both parties resided in North Carolina' could not have been an important factor, for in *Roberts v. McNeely,* 52 N. C., 506, it was proved that both parties lived in Salisbury in this State, and yet the contract between them, a promissory note, executed at their residence, but payable in New York, was declared to be governed by the law of that state as to the rate of interest it would bear—to be a New York contract in this respect. The really controlling reason for the conclusion announced so unhesitatingly about that contract seems to have been that the parties manifestly contemplated the courts of North Carolina as the tribunal for the enforcement of the contract, the security, the mortgage, being enforcible, as is there said, only through the courts of this State, and, this being so, the laws of the former must govern the rate of interest.

"We do not deem it necessary to discuss each one of the many authorities cited by defendant to show that our courts must be governed by the decisions of the courts of Georgia in ascertaining what is due, on an accounting from this mortgagor to this mortgagee. In not one of them, so far as we can see, did the court enforce a contract which was illegal and void by the law of the forum, illegal and void by the law of the place where the contract was made, and illegal and void by the law *rei sitae,* and valid, if at all so, only by the *lex loci solutionis.*

"*Falls v. Loan and B. Company,* 97 Ala., 417, was an action to foreclose a mortgage. The facts were very similar to those in our case.
(897) The Court decided that 'the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit,' and added: 'Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than eight per cent interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than that.' In that case, as in this, the borrower was required to have paid three months' installment on stock before he could obtain a loan, and yet that Court declares that the transaction was 'practically a loan of money,' and quotes from *Uhlfelder v. Carter,* 64 Ala., 527, the following language: 'In determining whether a contract is infected with usury, its substance and effect, not its form, are material.'

"Holding, therefore, as we must, that the contract of a loan between this mortgagor and mortgagee is governed by the laws of this State, we come to the question, what is due the mortgagee according to those laws?

"We are met at the threshold of this investigation by the contention of the defendant corporation that, being a 'building and loan association,' it is entitled to exercise the same powers and privileges as if it had been organized in this State according to the provisions of The Code, vol. 2, ch. 7; that the same effect is to be given to its contract with the plaintiff, as if it were a North Carolina corporation, formed in strict compliance with the provisions of that chapter of The Code, and therefore entitled to exercise special powers and privileges.

"'A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscriptions or savings of its members to assist them in building or pur- (898) chasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the society upon good security.' 2 Am. & Eng. Enc., 604. Mr. Endlich (sec. 283), speaking of the proper and legitimate purposes of the creation of such corporation, says: 'To all practical intents, it may be said to be to enable a number of associates to combine and invest their savings to mutual advantage, so that from time to time any individual among them may receive out of the accumulation of the pittances which each contributes periodically a sum, by way of loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrance out of his subscription. It is only so far as they serve these purposes and are confined to the objects necessarily involved therein that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits, they are *ultra vires.*'

"Nearly every state in the Union has a general statute relating to the incorporation of building and loan associations or associations of that class called by some name of similar import. Each of these statutes differs from the other. All agree in this, that the contemplated organizations are all strictly coöperative in their nature. Professor H. B. Adams, of Johns Hopkins University, an eminent writer on economics, in his essay on corporations, in 13 Appleton's Encyclopedia (Annual 1888), speaks of these associations as a 'peculiarly American form of coöperation.' Mr. A. B. Burke, to whom Mr. Endlich acknowledges his indebtedness in a note to section 7 of his work, cited heretofore, has lately used the following language in a journal published in the city of Philadelphia: 'As the term "building society" is very indefinite, and as applied to Philadelphia societies an actual (899) misnomer, it is necessary to specify exactly what is meant by such society. The name was first applied to organizations which built houses to be sold. It was also applied to speculative loan associations whose stockholders had no relations with the borrower, except that of

lenders of money; and more recently it has been applied to "national" loan associations, having agencies all over the Union, and salaried officers and agents. The term "building society" as here used is not intended to apply to any organization of the character above mentioned. It is essential that the true plan should be clearly understood, and that its coöperative principles should be faithfully followed, or those who are tempted to imitate the Philadelphia workingman in buying a house may . . . lose, not only their money, but their faith in coöperative enterprises.'

"If we consider the scope of the powers of this corporation, we find that they far exceed those conferred upon 'homestead and building associations' by The Code of this State. The powers conferred upon it have been heretofore fully set out, and need not be repeated. Suffice it to say that it has powers under its charter to do things far exceeding in risk the assisting of its members 'in building or purchasing for themselves dwellings or real estate.'

"If we consider the manner in which its funds are to be raised, we find that it is not by 'accumulating a fund from the monthly subscriptions or savings of its members,' but mainly by inducing capitalists to invest their surplus in one or the other of the kinds of stock provided for in the following by-law: '2. Full-pay-interest-bearing stock in class B which shall be sold at $50 per share and which shall bear interest at six per cent per annum, payable semi-annually, on $50 per share. (900) This stock shall be redeemable upon maturity of the installment stock in said class, at $100 per share, less the aggregate sum of dividend paid thereon.

"'3. Permanent investment stock which shall be sold at $100 per share and which shall participate in the profits of the Association from the date of issuing the certificate of stock to be paid semi-annually, to wit, on 1 February and 1 August of each year. The par value of all stock at maturity shall be $100 per share. A member may hold any number of shares.'

"A corporation having the authority to incur such risks and responsibilities and deriving its funds from such a source in whole or in part, is not a building and loan association except in name. It is merely a money-lending, dividend-paying corporation, to which, for some purposes, some features of a 'building and loan association' have been attached. Its purposes and powers put it outside of the pale of the beneficent statute which was intended to encourage coöperation among the saving poor, and not to aid the rich in finding good investments for their capital.

"The purpose had in view by the legislation of the different states allowing the incorporation of these building and loan associations, as

they are called, is thus stated by Mr. Endlich in section 119 of his work on the laws of such corporations: 'As a mere saving institution, the building association would never have recommended itself to the favor of legislatures to so unprecedented a degree. As a mere bank for the depositing of money lying idle, for the purpose of fructifying it for the rich, by fleecing the needy, it would never have acquired the unusual rights it exercises. But the idea, the possibility, of making membership in it the means of raising a property-holding, homestead-owning class of citizens, precisely as to those whose improvident habits and petty earnings had hitherto debarred them from the blessings, or feeling the stimulus of the prospect, of owning their own (901) homes,—the desirableness of augmenting the portion of land owners among the working classes, particularly in a republic, seemed so weighty a consideration in the minds of legislators, that they were willing, in exchange, to make a sweeping exception to many of the best settled rules of general policy applicable to dealings between man and man.'

"If, as the defendant contends, our statute confers upon building and loan associations those special powers and privileges, constituting, as the learned author says, 'a sweeping exception to many of the best settled rules of general policy applicable to the dealings between man and man,' it is certain that no corporation except such an one as is contemplated by the statute can lay any claim whatever to those special powers and privileges.

"A true building and loan association, such as our statute provides for, has no authority to declare or pay dividends on its stock. Endlich on the Law of Building Associations, sec. 324. 'As to participation in profits, the scheme has reference to the final adjustment of accounts, not to any intermediate realization.' The defendant corporation has two classes of stockholders to whom, as shown by the by-law heretofore quoted, dividends are to be paid each year, and, having power to so conduct its business, is not the kind of an association which our legislature designed to promote. A corporation of that class cannot risk its members' money and houses by engaging in many of those enterprises enumerated in the defendant's charter heretofore set out. The defendant has 'full power and authority' to do all those things. Therefore it is not of that class and can lay no claim to those special powers and privileges with any justice whatever.

"In section 39 of Mr. Endlich's treaty it is said that these associations are founded upon principles of strict mutuality and equality of benefits and obligations. A corporation not founded on those principles cannot be truly a building and loan association within (902)

the purview of our statute. The benefits are not strictly mutual and equal where one stockholder, according to the plan of organization, is entitled to semi-annual interest on what he has paid in, and another to semi-annual dividends, while others must await the termination of the life of the association or some other time, indefinitely future, before reaping any profits. There is no strict equality of obligation, where one stockholder pays $50 for a share of stock, and another obligates himself to pay $100 per share.

"In Maryland, a corporation which made its loans to members in the approved form of building association loans, but whose aims and nature did not bring its property within the statute as a building association, was not allowed to enforce reservations lawfully permitted to such institutions.' Endlich, sec. 335; *Williams v. Loan & Annu. Asso.*, 45 Md., 546. The same doctrine is established in Pennsylvania. *Jarrett v. Cope*, 68 Pa. St., 67; *Kuffert v. Guttenburg B. Asso.*, 30 Pa. St., 465; *Rhoads v. B. Asso.*, 82 Pa., 180.

"The wisdom of this doctrine will be apparent, we think, to all who will consider the possible consequences of a contrary rule.

"For illustration: Let us assume for the sake of argument that a building and loan association organized under our statute has a right to loan money to its members at the rate of one-half per cent per month and a like 'premium,' or one per cent per month; that it requires its members to pay sixty cents per month as dues on each share of $100, of which ten cents is to go to the expense fund of the association, and enforces prompt payment of a fine of ten cents per month per share. Let us now suppose that one of those worthy citizens for whose special
(903) benefit it is said this 'beneficent statute' was adopted, is induced to subscribe for ten shares in one of these beneficent institutions. His first duty is to pay $10, for the privilege of being enrolled. Let us assume that the agent who induced him to subscribe takes this for his trouble, and give that particular sum no further consideration.

"Let us now suppose that this member, wishing to become a home owner, selects one to cost $1,500, and, using $500 which he had and one thousand dollars borrowed from the association on a mortgage of the property, he takes the title and bravely sets out to battle with the debt he has incurred, to provide a home for his family, in good cheer at the prospect held out to him by the company's agent that at the end of seven years 'at the farthest' his ten shares of stock will be worth one thousand dollars, and that then, by a very simple process of adjusting the accounts, he will at the same moment cease to be a debtor to the association and also a stockholder in it, and the mortgage on his house will thereupon be canceled. Let us assume that the mortgage provides that he will pay 'said monthly interest or premium,

fines and monthly payments on said stock' until the said shares shall become fully paid in and of the value of one hundred dollars each, as the mortgage set out in this record does.

"Now, let us suppose that this workingman, at the end of seven years, having promptly, out of his hard earnings, paid each month ten dollars interest and six dollars stock dues to the association, asks that his stock be exchanged for his debt and his home be disencumbered of its lien, and is told that while the soliciting agent was no doubt entirely sincere in his belief that the payments thus far made by him would satisfy his indebtedness, the rosy-hued hopes constituted no part of the contract; that it is stipulated that he should keep up his dreary (904) round of monthly payments until he had fully paid up his stock and it was worth one hundred dollars per share—that contrary to everybody's expectations the expenses had been larger than was anticipated and net profits had been smaller than hoped for, and that his stock was not worth one hundred dollars per share, as the books of the company plainly showed; that, while his engagement was that, if the exigencies of the association required it, he would pay one thousand dollars in stock dues alone, he had in fact only paid $504 ($84 times $6) on that score, and out of that he had agreed that $84 (840 times ten cents) should be used as expenses, leaving, it might be, only $420 really credited on his stock account. Let us suppose that, still hoping for good results, he resumes his payments and toils on; that from month to month, from year to year, the happy day when the stock is worth par is put off by accumulating expenses and constantly recurring losses until at the end of 166 2-3 months he insists that his stock dues, at least, in any event, are all paid, because 166 2-3 payments of sixty cents each amount to one hundred dollars, and is told that ten cents of each sixty cents paid in by him had according to his agreement been applied to the expenses, and that the association was in debt, and that all the subscriptions for stock, which he was informed constituted a trust fund, must be paid in, and hence, as the expenses of the business, including the interest and dividends paid to certain classes of the stockholders, had consumed all the profits, it would be required of him to pay stock dues for two hundred months, as it takes two hundred times fifty cents to make one hundred dollars. Let us suppose that he continues his payments for two hundred months, and thus, beyond all question, pays all his stock dues, and when he then asks for the application of his paid up stock to the satisfaction of his mortgage debt, (905) is told that, while the company was called a building and loan association, it had acted also as agent or trustee for the investment and management of funds for persons, corporations, administrators, executors, guardians and trustees—that it had dealt in real estate, and had

been engaged in erecting buildings and machinery thereon, and that those enterprises, all of which were *infra vires,* had proved disastrous, and is informed that, though the receiver who had been appointed to wind up the affairs of the corporation would find that his stock was all paid in, and that there was no claim against him on that account, he would also ascertain that the stock of the company was of no value, owing to the disasters that had come upon some of its various undertakings, and that it would be necessary for all mortgagors to continue to pay the interest (12 per cent) on the amounts advanced to them, until he had collected enough to adjust all the liabilities of the company, or else to take advantage of the option allowed and pay back the whole sum borrowed—one thousand dollars—at once.

"Surely the trusting home builder, caught in such toils, might justly exclaim against a statute, called beneficent, that would produce such a result. Such an outcome is possible. Of its probability in different degrees it is not for us to judge. The class to which the defendant corporation is by us to be assigned is the point under consideration—whether to the class of money-lending, dividend-paying corporations of the investors of capital, or to a class of incorporated associations, coöperative in their very nature, and designed by means of such co-operation to foster a homestead-owning class of citizens with little risk to them because of the severe limitations put by the law of their creation upon the corporate powers and purposes. An examina-
(906) tion of the charter of the defendant corporation, its methods and powers, leads us unhesitatingly to put it in the first named category, and to declare that there is no such conformity by it to the building and loan associations of our statute as to entitle it to claim any special rights or powers therein granted to associations organized according to its terms, with the limited powers and the restricted purposes therein set out.

" 'If the charter of a building association, or what is called its constitution,' says Mr. Endlich, section 64, 'contains the grant of power . . . in excess of what the statutes regulating the formation and powers of such organizations sanction, the objectionable grant is simply void. Each such illegal feature may become the basis of a proceeding by the state against the society, and result in the forfeiture of the franchise.'

"Applying this principle to the case in hand, we have here a corporation calling itself a building and loan association and asserting the possession of special powers and privileges as such, and yet having in its charter or constitution grants objectionable because in excess of what our statute, regulating formation and powers of such organization, sanctions. We cannot declare these objectionable grants simply

void, for the State of Georgia had the right to invest this legal entity of its creation with all of these powers. Each such feature cannot become the basis of a proceeding by this State against the society, and 'result in the forfeiture of the franchise,' for those features are not, it seems, illegal where conferred, and the power of forfeiture which this commonwealth may properly exercise over the corporations of its own creation cannot be applied to this foreign corporation. A member of this association, who should seek in the courts an injunction against the exercise by its managing board of these powers and the assumption of the accompanying risks, or should endeavor to hold those officers responsible to him for losses incurred in the (907) exercise of those powers upon the ground that a building and loan association, within the purview of our statute, could not lawfully engage in such business and incur such risks, would be promptly confronted with the reply, not to be gainsaid, that the restraints of our statute could not affect the right and powers of this foreign corporation. Because of these things it must follow that there is no course open to the courts of this State but to declare that the so-called building and loan associations whose charters legally invest them with the powers not contemplated by our statute (Code, vol. 2, ch. 7) are not building and loan associations within the purview of that statute.

"We come now to the consideration of the defendant corporation's contention that its contract with the plaintiff 'without reference to the statute specially authorizing it, is not usurious.' Here we may quote the language of *O'Neal, C. J.*, in *B. & L. Asso. v. Bollinger,* 12 Rich. Eq., 124, when speaking of a contract similar to the one we have under consideration: 'How the contract can be anything else than usurious it is difficult to conceive. Indeed, it must task, and has tasked, human ingenuity in every tribunal where the question has been presented, to find the reason whereby such a contract could be sustained.'

"The defendant's counsel sets out as the basis of his argument the following facts:

" '1. The contract of borrowing is separate and distinct from that of subscription, and the obligation to pay monthly dues upon the stock was incurred by the contract of subscription.

" '2. The money which Meroney received, whether considered as an advancement upon a portion of his stock or as a loan, was never to be repaid except by the maturing of his stock at an un- (908) certain time.

" '3. If Meroney should perform his contract, it would be uncertain whether he would in the end pay more or less than eight per cent interest, upon the statement of an account, with the strong probability in favor of his paying less.

"'4. His liability to pay a greater rate of interest than eight per cent was caused by his own default, which he might have avoided by simply keeping his contract.

"'5. Being interested as a stockholder, only three of his five shares having been pledged to the Association, Meroney was directly interested in any profits which the company might make upon his loan. It was in the nature of a dealing with partnership funds.'

"As to all this we may say what was said by *Justice Reade* in *Mills v. B. & L. Asso.,* 75 N. C., 292: 'We look at the substance'; or what was said by *Judge Gaston* in *Shober v. Houser,* 20 N. C., 22: 'It is the duty of the courts to look not merely at the words but at the substance of the transaction; on the one hand, not to be governed by the words, if the substance goes to defeat the provision of the statute, and, on the other hand, not to rely on the words, so as to defeat the contract, if in substance the transaction be legal. . . . In spite of every effort of the courts to carry into complete effect the legislative will, no doubt the true character of usurious securities is very frequently concealed under cunning contrivances, but when that character is seen, whatever may be the contrivance, the court must and will act upon the transaction such as in truth it is.' We see in this whole transaction only a lending of three hundred dollars to the plaintiff at 12 per cent per annum, payable monthly, coupled with an engagement on the part of the defendant that if the plaintiff makes no default in his stipulated payments, whether as borrower or stockholder, the defen-
(909) dant would not require the payment of the sum advanced or loaned to him until the value of his stock reached one hundred dollars per share, and that in that event three shares of his stock should cancel the debt. A contract for the loan of money is usurious, if the lender reserves the right in any event to collect more than eight per cent and the sum loaned. The liability of the plaintiff to pay a greater rate of interest than eight per cent grows out of the contract. The existence of such liability shows the contract to be usurious. We quote as applicable here, the emphatic language of *Justice Reade* in the case cited above: 'We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest without incurring the penalties of our usury laws. Calling the borrower a "partner" or substituting "redeeming" for "lending" or "premium or bonus" for an amount which they propose to have advanced, and yet withhold; or dues for interest, or any like subterfuge, will not avail. We look at the substance.' The doctrine announced in that case by the learned Justice has been consistently followed by all the decisions of this Court since that time. It was foreshadowed by the strong language of *Chief Justice Pearson* in *Smith v. Mechanics Building &*

Loan Asso., 73 N. C., 372, the first case in which such an association appeared in this Court, and in which Mr. William N. H. Smith, afterwards Chief Justice of this Court, was of counsel for the association, and filed an elaborate brief in which he argued many of the points now again presented. Yet this learned Chief Justice, who had himself, as counsel, argued earnestly to the contrary, yielded cordial assent to the doctrine of the *Mills case,* and the opinions of this Court in *Overby v. B. & L. Asso.,* 81 N. C., 56, and *Hoskins v. B. & L. Asso.,* 84 N. C., 838, delivered by him, distinctly affirm the rule there laid down, which is also approved in *Dickerson v. B. & L. Asso.,* 89 N. C., 37; *Pritchard v. Meekins,* 98 N. C., 244, and (910) *Heggie v. B. & L. Asso.,* 107 N. C., 581. Indeed, that the doctrine of the *Mills case* is well settled in this State is recognized on all sides. Mr. Endlich says (sec. 347) that that case has been consistently followed in cases arising subsequently in this State. And in 2 A. & E. Enc., 612 (note), North Carolina is put among those states where the transaction between a building and loan association and its borrowing stockholder is 'considered simply a loan.' The legislative branch of the state government has tacitly recognized and approved the doctrine of the *Mills case* and those cases that follow it; for, though the General Assembly has repeatedly convened since the adoption by this Court of the rules applicable to the conduct of the business of building and loan associations organized under the statute of 1868-69, it has never seen fit to alter that statute so as in any way to free them from the effect of those rules. If the contract under consideration must, according to the well settled doctrines of this Court, be held to be clearly usurious though the defendant corporation were a true building and loan association under our statute, much more clearly is it usurious when made by a corporation having, as we have said, no just claim whatever to such special powers and privileges as such associations may be entitled to, if any. Our Constitution most wisely provides that 'No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.' Can the Legislature grant to a corporation, or to a certain class of corporations, the exclusive or special privilege of charging more than eight per cent for money loaned while the general law of the State, by which all other individuals and corporations are controlled, declares all such contracts usurious and void? See *Goodwin v. B. & L. Asso.,* 12 Bush (Ky.), 110, where (911) the negative of that proposition is held to be clearly the law, and see also *Birmingham v. McLard,* 45 Md., 541. Such seems to be the conclusion of this Court in *Simonton v. Lanier,* 71 N. C., 498, where, speaking of this constitutional provision, *Justice Bynum* said: 'The

wisdom and forethought of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever working foe of free and equal government.' Whatever may be said upon that subject, this is at least clear: the intent of the Legislature to confer such a privilege upon a claimant must be entirely free from doubt or it will not be allowed—both the grant and the identity of the grantee must clearly appear.

"It was proper, therefore, that his Honor should adjudge that the contract set out in the defendant's answer as that which it claimed the right to enforce by a sale of the plaintiff's land 'was usurious under the laws of North Carolina.' We have declared, for the reasons heretofore set out, that for the purposes of this action it is a North Carolina contract, and that the sum due to the defendant must be ascertained upon an accounting by applying to the disputed items the rules established by the decision of this Court. One of those rules—that one which has been fixed by a long line of decisions and has been repeatedly approved—is that this Court, looking at the substance of the matter, as bound to do, sees in this whole transaction simply a loan of money by the defendant to the plaintiff. In the account taken by the referee under the directions of his Honor the plaintiff is charged with all he received with eight per cent interest thereon. Entrance fees, stock, dues and premium must all go to his credit, for as we view it, all these payments are but parts of the transaction which we have (912) declared to be merely a borrowing and lending of money at an illegal rate. If the plaintiff was to be charged with interest at eight per cent upon the sum loaned him, he was entitled to like rate upon his payments. He should not have been charged with any fines, for this defendant, as we have said, has no right to lay any fines upon its borrower under any circumstances here, and certainly cannot collect fines from the plaintiff because he refused compliance with its illegal demands. Whatever may be the decisions in other states in this one all these matters are well settled. 2 Am. & Eng. Enc., 639, note 1. We can see no reason for reviewing at this late day what has been so long acquiesced in by all.

"It may not be improper for us to say in this connection that the insertion in such contract as we now have under consideration, of a stipulation that in no event should the aggregate of all the sums to be paid by the borrower (interest being allowed to his credit) exceed the sum loaned him and interest thereon at eight per cent per annum, would perhaps entirely relieve all such transactions from the imputation of being usurious. The remedy seems easy. It is insisted with great confidence that the rate which he would be required to pay, if he and his fellow borrowers would carry out their engagements, will be much

less than six per cent. If that be true, no loss can come to the lender by reason of the incorporation of such a stipulation in the contract. It would be merely to make that a part of the contract which is in fact an inducement to it, but an inducement put in such shape as to be of no legal effect to protect the borrower from usurious exactions. The proposition is a simple one. Let the money-lending corporations that, under the guise of building and loan associations, are professing to loan money, in a complicated and somewhat confusing method at six per cent or less, insert in their contract a binding stipulation to the effect that in no event will they exact more than eight per (913) cent and all trouble and difficulty will vanish. The courts will be content, for the law against the taking of usury will be obeyed. The borrowing mortgagor will be fully protected against illegal and ruinous exactions, and what has been told him with confidence by the lending mortgagee will be, in a measure, legally secured to him.

"The lending corporation cannot reasonably object, for the limit proposed (eight per cent) stands far beyond the rate it assures the borrower it will exact. An objection on its part to the insertion of this safeguard for the home builder would but emphasize the necessity for the rigid enforcement of the rule of the *Mills case,* showing as it would, that there was some danger that the exigencies of its business might frustrate all its hope and calculations, and bring to the confiding borrower ruin or disaster.

"In *Taylor v. Building & Loan,* 56 Ark., 340, such a restriction was in the contract between the borrowing member and that association, and the court held that that stipulation relieved the transaction of all charge of taking illegal interest.

"We have proceeded thus far upon the assumption that the promise of the plaintiff borrower to pay the defendant lender for the use of money six per cent as interest and six per cent as premium, so called, was such a contract as would be enforced in the courts of the State of Georgia if it was solvable in that jurisdiction and made with reference to its laws. The general law of that state makes seven per cent the legal rate, but parties may lawfully contract for eight per cent. Charging interest beyond this limit is illegal. How, then, can it be lawful for the defendant corporation to charge in that state what is clearly the equivalent of 12 per cent, to wit, six per cent interest and six per cent premium? (914)

"We are told that in *Parker v. B. & L. Asso.,* 46 Ga., 166, and in *Vanpelt v. Asso.,* 79 Geo., 439, the Supreme Court of Georgia so declared. An examination of the first mentioned case which is very fully reported enables us to see that the Fulton B. & L. Association was a corporation differing in many respects from the defendant.

It seems to have been a true building and loan association as defined by Mr. Endlich. Its contract with Parker was not identical with that of this defendant with this plaintiff. It differs from it in many material respects. Neither Parker nor Vanpelt was charged six per cent interest and six per cent premium on the money advanced to them. We have not been able to find in any of the cases from the Supreme Court of Georgia, to which we have been cited, any adjudication upon a contract exactly similar to the one we have here under consideration. In *Parker's case,* at page 192, the Court says of the transaction: 'Whether the scheme taken as a whole is or is not a device to avoid the usury laws is a question of fact for the jury under the proof. The Court so charged the jury and the finding is in effect that it was not such a device. We think the jury found rightly upon the evidence.' The evidence in that case was the charter and by-laws of the association and the contract with Parker. *Non constat,* that because it was proper for the jury to find there was no device to evade the usury laws of Georgia in that scheme upon that evidence, it would be necessary for all juries to find that there was no such device in this defendant's scheme as evidenced by its charter, by-laws and contract with the plaintiff. Comity may require that the courts of this State shall adjudge to a citizen of Georgia, suing here, upon a purely personal contract solvable in that state, a citizen of this State such a sum as by the laws of Georgia he could there recover on the contract—that the measure (915) of his recovery shall be determined by the *lex loci solutionis;* but surely comity does not require us to assume, in order to give the foreign plaintiff more than our own citizens in like circumstances could recover, that, because the courts of that state had declared one scheme of a genuine building and loan association not usurious 'upon its face,' therefore the law of that state was that the very different scheme of a very different corporation is not usurious. A decision of the Supreme Court of Georgia, *Butler v. L. & I. Co.,* 94 Geo., 562, which has been rendered since the trial and argument of this case, is confirmatory of our view of the law above expressed. In that case, which was an action by the Mutual A. L. & I. Company, of Atlanta, Ga., against Butler to foreclose a mortgage, such as we here have under consideration, 'It claims to loan money at six per cent per annum, payable and collectible monthly, but under the name of 'premiums,' which is but another name for usury, collect another six per cent monthly, by such device collecting really 12 per cent per annum, payable monthly on loans, thus, under fancy names, carefully eschewing the name of 'interest,' which said charges really are, and, with the object and intent to do so, contracting to take and collect a higher rate of interest than is allowed by law.'

The lower court, considering, no doubt, that the principle established by *Parker's case, supra,* was applicable, overruled this plea and gave judgment for the foreclosure of the mortgage, but on the appeal the Supreme Court says: 'The plaintiff, as indicated by the record, not being a building and loan association, pure and simple, like the one involved in *Parker's case,* 46 Ga., 166, the object of which was to enable its members to acquire houses and homes by the payment of small sums monthly, but, on the contrary, being apparently a composite institution embracing for its objects insurance, loans and invest- (916) ments, the plea of usury should have been entertained for investigation and determination by the jury, under proper instructions from the court as to whether the scheme of the institution as a whole embraced usurious measures and designs, and whether the loan to the defendant was infected with usury or not, and, if so, to what extent.' The record here fully shows that the Atlanta Building & Loan Association is, as we have said, 'not a building and loan association, pure and simple, like the one involved in *Parker's case,* 46 Ga., 166, but is what the highest court of its own state has well described as a 'composite institution' and therefore not entitled to claim benefit under that decision. Thus is swept away the claim of the defendant corporation that by the *lex loci solutionis* it is allowed to charge and collect on its loans six per cent interest and six per cent 'premium.'

"Our attention has been called to Laws 1893, ch. 434, to show that building and loan associations are, as it is said, favorites of our law, and that they are granted special favors by our statute. This is true. And it also seems to be true that our Legislature has invited, as it were, foreign associations of that kind to do business in this State under certain prescribed regulations. The act which thus seems to invite them to come, with the assurance that they shall enjoy privileges and exemptions here not allowed to corporations of other classes, is an amendment to the general law for the incorporating of building and loan associations (Code, vol. 2, ch. 7). It is evident that the Legislature intended to confine its liberal invitation to those foreign corporations whose powers, purposes and methods correspond with the powers, purposes and methods of home corporations organized under this general law, and that it did not intend to thus favor corporations, the scope of whose powers extended far beyond the limits (917) imposed upon domestic corporations by the act. The powers of a building and loan association organized under our laws are very limited. It is a strictly mutual coöperative organization. It cannot borrow money except for specified purposes. It cannot act as a banking institution. It cannot deal in real estate or personal property. It cannot issue bonds. It cannot engage in manufacturing.

It cannot act as a trustee or trust company. All these things are *ultra vires.* If its officers engage in them, and loss follows, they are personally liable to the members. They may be enjoined from engaging in them. If the charter of a foreign corporation, called a building and loan association, shows that these businesses and others of like nature are, as to it, *infra vires,* then it follows that the privileges and exemptions of the act cannot be claimed by it. The charter, not the name, determines the class to which it belongs.

"In *Land Corporation v. Sec. of State,* 76 Mich., 162, there was a petition for a mandamus to compel the defendant to file the articles of association of the relator, a foreign corporation, under an act of that state. The mandamus was denied upon the ground that the relator was not such a corporation as the act contemplated. The Court said: 'The method of organizing, the extent and condition of creating, holding and transferring stock, the authority and constitution of the governing body and the powers and functions of the corporation, and of its constituent members and bodies, are all matters of importance. The secretary of state based his principal objection to filing these papers on the fact that, instead of being organized for mining and treating metals, those were but partial, and to some extent incidental. But this company, as a corporation already organized under foreign laws for the multifarious purposes named in its articles, cannot obtain (918) any legal standing by filing its papers under section 23 of the mining law without the subversion of settled principles.' Our statute contemplates the licensing of corporations organized for a certain single purpose, with certain prescribed methods and powers. One organized under foreign laws for multifarious purposes has no right to the license under the act. It can depend for the enforcement of its rights in our forums only on the rules of comity.

"We are not forgetful of the earnestness with which it was argued before us that because, as it was said, large sums of money had been loaned in this State by foreign companies upon schemes similar to that one we have here under consideration, and much other foreign capital stands ready for investment within our borders upon like contracts, it was most important that such transactions should not be declared usurious; and we were told in effect that if our conclusion was as herein declared, the foreign lenders would at once proceed to foreclose the mortgages to the great inconvenience of those who had borrowed from them. We cannot change our opinion of the law to suit the exigencies of any occasion. The law applicable to the case in hand and others of like nature has been, as we think, for a long time clearly settled in this State. In all the legal literature pertaining to the perplexing matters of building and loan associations, so far as we have found, the

doctrine of this Court is conceded to be plainly stated and consistently followed. We merely reiterate what our predecessors long ago decided. If under these circumstances the lender gets less hire for his money than he hoped for, the blame, if there be any, must rest on those who have acted in defiance of the decisions of this Court, not upon us who only decline to reverse those decisions. But can harm come to the lender? Certainly not, unless it is exacting more than six per cent for the hire of money, for that rate it is allowed to collect. (919) How can the borrower be harmed? His mortgage cannot be foreclosed or his lands sold so long as he makes the stipulated monthly or weekly payments set forth in it.

"When these payments, treated as partial payments on the debt, are sufficient to extinguish that indebtedness, the account being taken according to the principle repeatedly announced by this Court, the lien on his property will have been discharged, and the courts will decree its formal cancellation. We guard him from unreasonable and perhaps ruinous exactions in the future. We do not precipitate upon him any new burden. We merely fix a limit when his burden-bearing shall in any event cease; and we fix that limit far beyond the line where the lender says he will wish to go. So, the assurance of safety we give to the borrower works no restraint on the lender, and both should be content.

"When this cause was before this Court on a former appeal, the sole question was whether there was sufficient ground for enjoining the sale of the plaintiff's property till the controversy could be heard and determined on its merits. The record as then presented contained an allegation on the plaintiff's part that the transaction as detailed in the complaint and answer was contrived to evade the usury laws of this State. We did not consider it at all necessary then to discuss the very important matters involved in this controversy, as it nowhere appeared that they had been passed upon by the court below. The order then appealed from was not erroneous, we said, for the sufficient, but not necessarily sole, reason that there was evidently a 'serious issue' between the parties. We merely declined to reverse an order continuing the injunction in force until the hearing."

So far we have adopted the very able and elaborate opinion (920) prepared for the Court at last term by *Justice Burwell*, but which was not then filed. A reargument was had at this term of this and the cognate case of *Rowland v. B. & L. Asso.*, 115 N. C., 825, embracing substantially the same controversy. This is five times the questions involved in these two cases have received the fullest and most exhaustive argument before the court. It must be conceded that we have not acted hastily and that we have had at least oppor-

tunity to comprehend the points presented in all their bearings. Counsel for defendants frankly admitted in the argument that their clients began business in this State knowing that the decision of this Court in the *Mills case* (75 N. C., 292), which has for twenty years remained undisturbed by the courts or the Legislature, prohibited the mode which they proposed to follow and have followed, but that they came expecting to procure a reversal of that decision. That a party deliberately and systematically should violate the law as it has been announced and continuously recognized by the highest court of the State for a series of years with the avowed purpose of causing the Court to take back and reverse its decision under the better instruction of such law-breaker, is a proceeding hitherto unknown in this State. The non-resident counsel of the non-resident corporation, who thus admit their deliberate violation of our statutes, used as one of their most persistent arguments to change the views of this Court, that the combined capital of such corporations mounts up to millions of dollars. It is not the first time that accumulated wealth has demanded exclusive favors and privileges, but it has probably never before been so unreservedly asserted in a court of justice, in this State at least. Our revolutionary ancestors anticipated the force, the exactions, the indifference to equality of overgrown combinations of capital, and placed in the
(921) Bill of Rights of 1776 the provision against the grant of exclusive privileges, which remains in our present Constitution as a protection to the plain, common people against these excessive claims of money-gathering corporations. The above opinion of *Justice Burwell,* now adopted by us, shows how little claims such institutions as this defendant is shown to be, have to use the beneficent title of building associations and that they are in fact thinly disguised banking associations claiming to be superior to our usury law because chartered elsewhere. Such discrimination, if legal, would destroy all our home banks, and other like institutions, which faithfully observe the law limiting the rate of interest, and pay their taxes to the support of the State and county government. Though putting aside, if this claim were allowed, our taxation and usury laws, the defendant would yet seek to obtain the use of our courts to collect the money which it has secured by mortgages on real estate here. The circumstances would justify sharper criticism than we have so far given to any case before us. The defendant asserts immunity from the restrictions and burdens imposed by law on all others, and at the same time asks the best security allowed by law and the use of the process of the courts to enforce it. The defendant also called to our attention a bill which it procured to be passed at the last session of the General Assembly, and claims to be protected by it in the violation of our usury laws. This statute, which is drawn with

considerable art, provides in the first section that building and loan associations are restricted to six per cent, which by a general act of the same Legislature has been restored as the limitation upon interest. In a subsequent paragraph, the association is allowed to charge cost, expense, interest, premiums and fines. The controlling idea in the first paragraph restricting these corporations to the six per cent, which is the general policy of the State, must govern, and calling these other exactions premiums, penalties and the like does not make (922) them other than interest, or authorize the exaction of more than six per cent for the totality. A similar case was *Simonton v. Lanier,* 71 N. C., 498. When two constructions of a statute are possible, the Court should adopt that which is most reasonable and in accord with the declared and recognized public policy of the State. It would neither be reasonable nor in accord with our recognized policy, nor just to the Legislature, to construe that they deemed that public opinion and considerations of justice required that the industries of the State should be protected against the exactions of a greater rate than six per cent for the use of money, and yet that the same Legislature provided that combinations of capital by dubbing themselves building and loan associations and euphoniously styling their exactions of interest premiums, fines, penalties and the like, could collect charges for the use of money without limitation. This would be one law for the rich and another for the poor. Could we hold that the Legislature intended to so enact (and they certainly did not), the wisdom of the organic law has placed its ban upon such discrimination and special privileges. A penalty or fine for non-payment of money is interest. If money is loaned at six per cent and five per cent premium, this is simply 11 per cent interest. The courts have always said that in usury cases they "look through all disguises to the real nature and truth of the transaction." The shifts and devices of avarice are countless in attempting to evade the protection which the law-making power sees fit to erect against its exactions. Calling interest by other names, as premiums, fines and penalties, is a threadbare device and was laid open in very clear language in our leading case of *Mills v. B. & L. A.,* 75 N. C., 292, twenty years ago. Recurring to the Act of 1895, which the defendant pressed on our notice as an exemption in its favor, it may be noted that if the Legislature could be understood as having intended it to mean what (923) the defendant claims, thus overriding the first clause thereof and the general statute as well, and if there were no constitutional

prohibition against the grant of such exclusive and special privileges, even then the act in question took effect 9 March, 1895, while the general act prohibiting anyone, without exception, to exact more than six per cent for the loan of money took effect 13 April, 1895. This would have the effect of repealing all exceptions and stopping on that date the exaction of a higher rate by the defendant if allowed under its prior special act.

Affirmed.

AVERY, J., dissents.

Cited: Strauss v. B. & L. Asso., 117 N. C., 314; *Smith v. B. & L. Asso.*, 119 N. C., 255, 259; *Hollowell v. B. & L. Asso.*, 120 N. C., 287; *Cheek v. B. & L. Asso.*, 126 N. C., 245; *Faison v. Grandy*, 128 N. C., 441; *Smith v. Ingram*, 130 N. C., 104; *B. & L. Asso. v. Blalock*, 160 N. C., 492; *Bank v. Wysong Co.*, 177 N. C., 291.

N. T. RIDLEY v. SEABOARD & ROANOKE RAILROAD CO.

Practice on Appeal—Settlement of Case—Death of Judge.

Where, on appeal, the case and countercase were filed in time, but the trial judge died before settling the case, the appellant, instead of a new trial being granted, may withdraw his case and have the appeal tried on the countercase.

MOTION for writ of *certiorari*.

B. B. Winborne and R. B. Peebles for plaintiff.
McRae & Day for defendant.

CLARK, J. The case on appeal and countercase were served in time and the trial judge was promptly requested to settle the case. At the call of the docket at last term, being the first term of this Court which was begun after the trial below, the appellant docketed the record proper and asked for a *certiorari* to bring up the case on appeal.

Counsel consented, however, that the cause might be continued (924) to this term and that the "case on appeal" might be settled by the judge at NASH Court, which was to be held by the judge (*Graves*) who had tried the cause. His Honor died before he could do so. The appellant would be entitled, nothing more appearing, to have

the case remanded for a new trial, but the appellee expresses a desire to withdraw its countercase and try the appeal upon appellant's case. The appellant certainly has no ground to object to this. *Drake v. Connelly,* 107 N. C., 463. The trial judge having died, either the appellee or appellant might on motion withdraw the case or countercase and the appeal will be heard upon the statement of the case on appeal made by the opposite party. In such cases the party intending to withdraw the case (or countercase) properly should notify the opposite party in time, so that the case may be printed and stand regularly for trial at the first term. This was not done in this instance, but that there may be no unnecessary delay the case is set for hearing at the end of the docket at this term.

Motion Allowed.

Cited: Parker v. Coggins, 116 N. C., 73.

WELLINGTON AND POWELLSVILLE RAILROAD COMPANY v. CASHIE & CHOWAN RAILROAD AND LUMBER CO.

Where a railroad company, seeking to condemn land for its right of way, has given ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction will not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court.

PETITION to rehear the case reported in 114 N. C., 690.

R. B. Peebles and Battle & Mordecai for plaintiff.
F. D. Winston and R. O. Burton for defendant.

AVERY, J. This is a petition to hear the same case reported (925) in 114 N. C., 690. The plaintiff instituted a special proceeding to condemn the right of way over defendant's land. The defendant in its answer alleged that it would sustain irreparable damage, if the road should be built, and using the answer as an affidavit, obtained a temporary restraining order, which on the return day was vacated upon the filing by the plaintiff of a bond in the penal sum of one thousand dollars conditioned for the payment by the plaintiff of all costs and damages recovered by the defendant in this action. The appeal is from the order dissolving the injunction.

We are warranted in assuming that the penal sum, mentioned in the bond, was fixed by the court after due inquiry, and is, therefore, amply sufficient to secure to the defendant any damage that may be ultimately

recovered of the plaintiff for the wrongful entry upon its lands, if indeed any wrong has been done. Conceding that the plaintiff is a trespasser, compensation in damages will nevertheless, as a general rule, be allowed for such an injury, and there is no allegation in the answer that will bring this case within any exception to it.

It is contrary to the policy of the law to use the extraordinary powers of the Court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good as well as for private gain. *Lewis v. Lumber Co.,* 99 N. C., 11. On the other hand this Court has given its sanction to the practice of granting restraining orders till the hearing against a party who by force was impeding the prosecution of such enterprise, on the ground that a trespass was being committed on his premises, when apparently he could be compensated in damages for the injury of which he complained. *Navigation Co v. Emry,* 108 N. C., 130.

(926) The plaintiff is proceeding, as was said in the former opinion of this Court, under a charter authorizing it to appropriate land for its use upon just compensation, and the question of the necessity for taking a proper right of way is not before us. Pending the proceeding for condemnation, ample provision has been made to compensate the defendant for any loss sustained by a wrongful entry on the part of plaintiff, and if it be admitted that the plaintiff is not authorized to enter till after the appraisal and the payment into court, in accordance with the provisions of The Code, sec. 1946, of "the sum appraised," the plaintiff is still in the worst aspect of its conduct committing a trespass for which it is answerable in damages, the ultimate payment of which is secured in advance by a sufficient bond.

The defendant has not only failed to show that he has or will sustain, but even that he may suffer, irreparable injury.

Petition Dismissed.

Cited: R. R. v. Newton, 133 N. C., 136; *S. v. Wells,* 142 N. C., 594; *Griffin v. R. R.,* 150 N. C., 315; *Jeffress v. Greenville,* 154 N. C., 496; *Waste Co. v. R. R.,* 167 N. C., 342.

(927)

KATE P. JOHNSON ET AL. v. EAST CAROLINA LAND AND RAILWAY COMPANY.

Deed—Parol Evidence—Estoppel—Agency—Acts of Agent Binding a Principal.

1. Although, where an agreement has been reduced to writing, parol evidence is not admissible to contradict, add to or explain it, yet when a deed authorized defendant railroad company to take so much of the land as was necessary for its roadway, etc., parol evidence is admissible to show that the defendant agreed to pay in addition to the consideration expressed in the deed of any land taken or used in excess of a strip twenty feet wide.
2. Where a grantee accepts and acts under a deed, availing himself of its benefits, he cannot be heard to say that the person who negotiated for the land and procured the execution of the deed, was not its agent to make an agreement as to the compensation to be paid the grantor.
3. The right or power to purchase implies the right or power to pay or agree to pay for the thing purchased.

ACTION for damages, tried before *Brown, J.*, at Fall Term, 1894, of CRAVEN.

There was judgment for the plaintiffs and defendant appealed.

(931)

W. W. Clark for plaintiffs.

F. M. Simmons and Shepherd & Busbee for defendant.

FAIRCLOTH, C. J. When an agreement is reduced to writing, the rule of evidence that parol testimony is not admissible to contradict, add to, or explain it, is too well established to require further argument, and whether the law requires it to be in writing or not, still the written memorial is the surest evidence.

The deed of plaintiffs to the defendant is uncertain as to the amount of land on the home plantation conveyed to defendant, but it allows that matter to be made certain by authorizing defendant to take an amount of land sufficient for the use of its roadway, ditches, etc. This sufficiency cannot be determined by the terms of the deed and could, if the parties were not agreed, only be done by evidence *aliunde*.

The plaintiffs offer to prove that at the time the deed was made with this indefinite provision, it was agreed by parol that, in addition to the main consideration expressed, the defendant should pay for the excess over twenty feet, whenever so used. This is denied, but found to be so by the jury upon the testimony of witnesses. We cannot see

that this evidence violates the rule of evidence above referred to. It is in furtherance of an agreement, not expressed in the deed, but arising naturally out of the uncertain feature of the deed already pointed out and as a part of the main transaction.

The witness Foy says he was assisting the defendant gratui-
(932) tously, and when it was decided that the road was to come, he went to plaintiffs' agent, Rhem, to get the right of way and insisted on it with more than twenty feet, handed him the deed to be signed by him and the plaintiff, and saw the plaintiff and told her she must give the road all the land necessary through the home plantation, that he had the deed prepared and she signed it and handed it to him, that he had it recorded and sent it to the defendant at Wilmington, and says he did not agree to pay anything for the excess, and that he had no power to agree to pay the plaintiff one cent, and was afterwards a director in the defendant company. Here was certainly a good deal of active and gratuitous work for some one. The defendant has accepted this deed and by building its road on the home plantation has availed itself of the contract, whatever it was, and of the benefit thereof, and cannot now be heard to say that Foy was not its agent. The right or power to purchase implies the right or power to pay or to agree to pay. We see no error and the judgment is

Affirmed.

Cited: Buie v. Kennedy, 164 N. C., 299.

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(933)

E. F. YOUNG v. WILMINGTON AND WELDON RAILROAD COMPANY.

Warehouseman—Ordinary Care—Negligence—Trial Evidence.

1. Where goods were held in a railroad company's warehouse, at owner's risk and for his convenience, the company was no longer liable as a common carrier but only for want of ordinary care as a warehouseman, and the owner of the goods, in an action for the value of the same, should be required to prove negligence as a part of his case.
2. A trial judge is not required to submit a case to the jury unless there is something more than a scintilla of evidence upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof lies.
3. In an action against a railroad company to recover goods burned in its warehouse, evidence that a night telegraph operator, who had an office in a room adjoining the warehouse, and slept therein, was intemperate in his habits and was drunk on the night of the fire, does not justify a verdict for the plaintiff.

YOUNG *v.* R. R.

ACTION commenced before a justice of the peace, in which the plaintiff claimed damages for the destruction of certain goods and merchandise which were burned in the defendant's warehouse, at Dunn, North Carolina.

The justice rendered judgment in favor of the plaintiff, from which the defendant appealed. The case came on for trial at November Term, 1894, of HARNETT, before *Bynum, J.*, and a jury.

The plaintiff introduced the following testimony:

P. J. Peffrys testified as follows: I was the agent of defendant, at Dunn, in April, 1894, and am still the agent.

The defendant's warehouse was burned, at Dunn, on the morning of 13 April, 1894, before daylight. Young's goods were in the warehouse at the time of the fire, and were destroyed by it. The goods had been in warehouse for some time. They were received about 5 February, 1894, and had been in the warehouse ever since. The freight had been paid upon them and no charge was made for storage. The warehouse was securely locked on the night of the fire. I do not know (934) what caused the fire, but I believe it was accidental. The company had a lot of its own property in the warehouse at time of the fire which was also destroyed.

I did not take my goods out of the warehouse before the fire (935) because I was not ready for them. I paid the freight with the understanding they were to stay there until I called for them. The agent never asked me to move them.

His Honor having intimated that plaintiff could not recover, the plaintiff submitted to a nonsuit and appealed. (936)

F. P. Jones for plaintiff.
Junius Davis for defendant.

FAIRCLOTH, C. J. At the close of plaintiff's evidence his Honor was of the opinion that he was not entitled to recover, and a nonsuit was taken and an appeal granted. At the time of the fire the defendant was not liable as a common carrier but was only liable for want of ordinary care as a warehouseman. *Hilliard v. R. R.*, 51 N. C., 343. The plaintiff was required to prove the negligence as a part of his case. *Kahn v. R. R.*, 115 N. C., 638. We think his Honor properly held that the evidence was insufficient to justify the jury in rendering a verdict for plaintiff. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence (937) be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evi-

dence. There is, or may be, in every case, a preliminary question for the judge, not whether there is absolutely no evidence, but whether there is more than a scintilla of evidence upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the burden of proof is imposed. *Commissioners v. Clark,* 94 U. S., 278; *Ryder v. Womble,* L. R. Exc., 39; *Wittkowsky v. Wasson,* 71 N. C., 451.

Affirmed.

Cited: S. v. Arkle, post, 1032; *Oakley v. Tate,* 118 N. C., 367; *Bryan v. Bullock,* 119 N. C., 194; *Higdon v. Rice, ib.,* 640; *Markham v. R. R., ib.,* 717; *Weeks v. R. R., ib.,* 742; *S. v. Satterfield,* 121 N. C., 560; *Malloy v. Fayetteville,* 122 N. C., 485; *Lewis v. S. S. Co.,* 132 N. C., 920; *Byrd v. Express Co.,* 139 N. C., 276; *Brick v. R. R.,* 145 N. C., 206. *Aderholt v. R. R.,* 152 N. C., 406; *McGuire v. R. R.,* 154 N. C., 386; *Liquor Co. v. Johnson,* 161 N. C., 76; *Moore v. R. R.,* 173 N. C., 314.

J. W. TILLETT v. LYNCHBURG AND DURHAM AND NORFOLK AND WESTERN RAILROAD COMPANIES.

Action Against Joint Defendants—Lessor and Lessee Railroad Companies—Motion for New Trial—Practice—Error in Omission of Name of One Defendant.

1. While it is the better practice to assign errors in the charge on a motion for a new trial below, it is not necessary.
2. Where one of two joint defendants joined in the exception to a charge to the jury and in the appeal, and set out the exception in the statement of case on appeal, the fact that such defendant did not join in the motion for a new trial is immaterial.
3. Where, in an action against the lessor and lessee of a railroad, sued jointly and making a common defense through the same counsel, a new trial was granted for an error excepted to by both, and the lessor, being advised that it had an additional defense not open to the lessee, moved separately for a judgment on the verdict, and the lessee moved for a new trial, but the motion for a new trial and the exception to its refusal were signed by counsel "for defendants," and the appeal was taken by both defendants: *Held,* that the mere inadvertence of counsel in entitling the motion for a new trial in behalf of the lessee only will not overrule the fact that he signed such motion in behalf of both defendants, excepted for its refusal, and to the error in the charge, in behalf of both, and appealed for both.

TILLETT *v.* R. R.

PETITION to rehear the same case, reported in 115 N. C., 662. (938)

R. O. Burton, Jones & Tillett and W. W. Kitchin for petitioner.
Wm. A. Guthrie contra.

CLARK, J. A new trial was granted to both defendants, 115 N. C., 662. This is a petition to rehear the case and leave in force the judgment below as to the lessor company. As the case would still go back for a new trial as to the lessee company, we might have this anomalous state of things if the petition were granted: on a new trial below, the jury might find either that there was no negligence or that the plaintiff was guilty of contributory negligence, and there would be a judgment standing against the lessor for $9,000 and costs for a wrong sustained by the plaintiff through the agency of the lessee, and a verdict and judgment in the same action that the lessee company had done him no wrong but was entitled to recover costs against him for his false clamor. The Court will be slow to so rule as to make possible such a condition. It must clearly appear that the lessor has been guilty of such neglect or failure to except, as to put it beyond its power to claim the benefit of the new trial equally with its co-defendant.

In this case both defendants were represented by the same counsel, and while separate answers were filed the lessor company adopted the answer of the lessee and "relied upon all the defences therein pleaded." Both defendants excepted to the verdict and judgment. The lessor moved for a judgment in its favor on the verdict, and the lessee for a new trial upon certain grounds assigned in the motion, among them the ground on which this Court declared there was error below, and which was an exception recited in the motion as having been made by the appellants (in the plural). This motion was (939) signed, "W A. Guthrie, attorney for defendants" (both defendants). The court refused both motions and the entry states that "the motion for a new trial was overruled, to which the defendants (both defendants) excepted." The court rendered judgment against both defendants for $9,000 damages and costs, and the record states: "From which judgment both defendants appealed to the Supreme Court." The defendants were sued jointly—they made a common fight—they had the same counsel. The ground on which this Court granted a new trial was an error in the charge which could be excepted to after verdict. *Lowe v. Elliott,* 107 N. C., 718. And which was excepted to by both appellants. The lessor company thought it had an additional defence, not open to the lessee, and moved separately for

judgment on the verdict, but it is clear that it did not abandon the grounds for a new trial which it possessed in common with its co-defendant. The motion for a new trial was signed by counsel as attorney for defendants (in plural), the exception for overruling the motion was made by him in behalf of the defendants (in the plural) and the appeal was taken by him for both defendants. The mere inadvertence of counsel in entitling the motion for a new trial in behalf of the lessee, will not overrule the fact that he signed such motion in behalf of both, excepted for its refusal and to the error in the charge in behalf of both, and appealed both. In fact, the charge (in this particular on which this Court found there was error) having been excepted to by both defendants, and both having appealed, it would have been immaterial if the lessor had not joined in the motion below for a new trial. In *McKinnon v. Morrison,* 104 N. C., 354, it is said, it would be "the better practice to assign errors in the charge on a motion for a new trial" below, but that it is not necessary. That the de-
(940) fendant joined in the exception to the charge, and in the appeal set out the exception in the statement of case was sufficient, even if it had not joined in the motion for a new trial. *Taylor v. Plummer,* 105 N. C., 56.

Petition Dismissed.

Cited: Blackburn v. Ins. Co., ante, 826.

GILBERT LOGAN v. NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Lease of Railroad—Liability of Lessor for Negligence of Lessee—Fellow-Servants.

1. Though railway companies fall within the classification of private corporations, they are quasi-public and have no more authority to rid themselves of responsibility for the performance of the duties imposed upon them as inseparable from the privileges given them than they have to sell any property which is necessary for corporate purposes.
2. A railroad company cannot escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act of the Legislature specially exempts it from liability in such case.
3. Where a section boss has full power to hire, command and discharge those working under him, he is not a fellow-servant.
4. In an action against one railroad company as lessor of another for injuries sustained by plaintiff, a section hand in the employ of the lessee, by reason of the negligence of the section boss of the latter, a complaint which alleges the fact of incorporation of both companies, the making of

the lease, the fact and nature of plaintiff's employment, and that in removing a hand-car from the track, in response to the orders of his boss, the giving of which at that time was negligence, he was struck and injured by a passing train, states a cause of action.

ACTION for damages, negligent injury to an employee, against the North Carolina Railroad, as lessor of the Richmond & Danville Railroad, heard on complaint and demurrer before *Green, J.,* (941) at February Term, 1895, of GUILFORD.

The demurrer was sustained and the plaintiff appealed.

(944)

L. M. Scott and Shaw & Scales for plaintiff.

F. H. Busbee and Shepherd, Manning & Foushee for defendant.

AVERY, J. It is settled law in this State that railway companies are private, as distinguished from public, corporations. *Hughes v. Commissioners,* 107 N. C., 598; *Durham v. R. R.,* 108 N. C., 399. But when the power of eminent domain is delegated for the purpose of enabling other companies to discharge duties for the public benefit, they occupy a different relation to the State and the people from that of ordinary private corporations, the powers of (945) which are given and exercised exclusively for the profit or advantage of their stockholders, and are therefore called quasi-public, though they fall within the classification of private corporations. Hence, it has been declared that these companies have no more authority to sell, separate from the franchise, any real estate belonging to them and dedicated to strictly corporate purposes than a judgment creditor of a county has to subject the land on which the public buildings of the county are located. *Gooch v. McGee,* 83 N. C., 64; *Hughes v. Commissioners, supra; Cox v. R. R.,* 10 Ohio, 372; *R. R. v. Colwell,* 37 Pa., 337; *Foster v. Fowler,* 60 Pa., 27. Indeed, in *Gooch v. McGee, supra,* the clearest intimation is given, after approving the principle announced in the cases just cited, that, but for the fact that the statute had dispensed with the necessity for doing so, this Court would have overruled *S. v. Rives,* 27 N. C., 227. There is a consensus of legal opinion everywhere that quasi-public corporations cannot sell themselves, and that their creditors cannot subject at execution sale, except as incident to the franchise, any property which is necessary for corporate purposes. If they cannot denude themselves of the means of discharging their duties to the public, can they by a lease of the franchise and appurtenant property rid themselves of responsibility for the performance of the duties which are imposed as inseparable from privileges granted them by the Legislature?

The question of the authority of the lessor company to "farm out" its franchise and property to the lessee is no longer an open one. *S. v. R. R.*, 72 N. C., 634. The plaintiff, after alleging that the North Carolina Railroad Company had leased its road to the Richmond & Danville Railroad Company, will not be heard to insist that we shall
(946) refuse to take notice of the adjudications of this Court in reference to the validity of the lease, unless the charters should be exhibited.

The defendant's counsel contend that the authority to lease being conceded, its exercise by necessary implication absolved the lessor company from all liability during the term for injuries caused by the negligence of the lessee in operating it. Is such an implication necessarily involved in the grant of power to lease? Or must it appear that the State has in express terms released the lessor from the duties and obligations which devolved upon it in its very creation, and which constituted the consideration for clothing it with nominal corporate powers? Upon this question the authorities are conflicting, and, as it is presented for the first time here, it is our privilege and our duty to be governed, not by the number of cases cited on the one side or the other, but rather by the soundness of the reasoning upon which they rest. Beach Pri. Cor., sec. 366, says: "A railway company executing a lease to another company of the exclusive use of its track and rolling stock for 99 years, which is confirmed by the Legislature, will be liable for the destruction of property by fire, caused by the neglect on the part of the lessee company to keep its track clear of all inflammable matter, notwithstanding the Legislature may have conferred on such lessee corporation all of the powers of the lessor. There being no clause of exemption in such act of the Legislature, the liability of the lessor will remain . . . The original obligation to answer for negligence in the operation of the road can only be discharged by a legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company."

After conferring upon a corporation the right of eminent domain, with many other special privileges which the Legislature is
(947) empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the State cannot be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs

or defaults. *Bank v. R. R.*, 25 S. C., 22; *Harmon v. R. R.*, 28 S. C., 401; *Nagler v. R. R.*, 83 Va., 707; *Acker v. R. R.*, 84 Va., 648; *Macon v. R. R.*, 49 Ga., 678; *Balsey v. R. R.*, 119 Ill., 68; *Singleton v. R. R.*, 21 Am. & Eng. R. R. Cases, 226; 1 Spelling Pri. Corp., sec. 135. "The lessor company (says Spelling, *supra*) remains liable for the performance of public duties to private parties for the non-delivery of goods received by it for delivery, and for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter."

As we have intimated, the decisions of the courts of different states, and sometimes those of the same states, are conflicting, and we do not pretend to be governed by the greater number but the greater weight of the reasons given to sustain them. No matter how many leases and sub-leases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety both of persons and property so transported. Spelling, *supra*, sec. 134. On the other hand the carrier, who simply substitutes, with the consent of the state, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute unless he can show, not only explicit authority to lease the property, but to (948) rid itself of such responsibility. *Singleton v. R. R., supra.* Where the Legislature gives its express sanction to the release of the lessor company from liability, there can be no question that it is exempt. *Broslen v. R. R.*, 145 Mass., 64.

Of the two or three reasons assigned for holding that the lessor company is liable for the torts of a lessee, where it has legislative authority to demise its road, but there is no express provision for its own exemption, we prefer to rest our ruling upon the ground that the original grant of extraordinary privileges still carries with it a correlative obligation to perform the duties, which were in contemplation of the State and the corporation when the charter was enacted. The Legislature is warranted in granting such exclusive privileges only in consideration of services to be rendered to the public. Constitution, Art. I, sec. 7. While the compensatory obligation to use ordinary care in providing for the safety of persons and property committed to its care, as a carrier, inheres in and attaches to the exercise of the corporate rights by the lessee, we think that without the express sanction of the Legislature the lessor is not relieved by any implication arising out of the general power to lease, but still remains subject to its original liability. *R. R. v. Reylun*, 106 Ill., 534. When the State exercises its supreme and exclusive power, in delegating to a corporation the right upon the payment of just compensation to take it for public purpose, the com-

pany holds its interest in the land solely for corporate purposes and subject to the right of the sovereign, if it fail to discharge its public functions, to institute proper proceedings and have it dissolved. In cases of dissolution, it seems that the property and franchise may be sold for the benefit of creditors and devoted to the same or (949) diverted to some other public purpose, and that there is a bare possibility of reverter. *Gooch v. McGee, supra; Bass v. Nav. Co.*, 111 N. C., 446; *VonGlahn v. DeRossett,* 81 N. C., 467. Where the interest of the lessor company in the land condemned is limited to the right to use for corporate purposes and its franchise, which frequently expires in a term of years, is subject to forfeiture, in case of misuser or non-user of its powers, we fail to trace any such analogy between it and its lessee, as exists between a landlord, who is owner of the fee, and his lessee for years. Yet, upon this supposed analogy, many of the courts have held that the liability of the railway company that demises its road, like that of a landlord, extends no further than the obligation to use ordinary care in keeping the track, road-bed, right of way, station houses and other permanent structures in such condition that the safety of the public will not be imperiled by them, while the lessee is solely answerable for injuries caused by negligence in running trains, or the use of defective machinery.

A part of the original obligation of the lessor company to the public was to furnish such trains and other appliances as would be necessary to provide for the safety of the passengers as well as the employees, who should travel on its cars, and we see no reason why that duty should not exist, like that to look after the road-bed, till the Legislature, for the sovereign, declares the lessor absolved from it.

Resting our ruling upon the broader ground of the obligation to the public, which is inseparable from the grant and the exercise of the corporate privileges, except by the express consent of the Legislature, we see no force in the view of the subject which seeks to limit the scope of the lessor's duty, to such as pertain to land. Under the statute, which this Court in *Gooch v. McGee, supra,* says is in affirmance (950) of the common law principle, the land held for corporate purposes is an incident to the franchise and held only for the purpose of enjoying the privileges granted and performing the duties imposed. It seems but a narrow view of the subject to say that the duties attach to the limited interest in the land, and not to the franchise, to which the road-bed is a mere incident.

There are, however, still other courts in which it is held that while the liability of the lessor arises out of the original duty imposed by the charter, and that the power to lease raises no implication that it can rid itself of its responsibility for injury to others whether due to the

bad condition of the road-bed, right of way or other permanent structures, or to the careless running of trains or defective machinery, the lessees are nevertheless solely answerable for injuries to their own employees and servants. Looking to the fundamental principle upon which we rely to sustain our position, we see no sufficient reason for drawing any such line of distinction. While we know that there are courts which maintain, and others that deny, the correctness of this doctrine, yet if we apply the test, which we hold to be the true one, that the liability of the lessor grows out of the duty imposed with the privileges in the first instance, the same reason is found to exist for holding it liable to servants of the lessee for injuries sustained by them, as for those inflicted on passengers. Spelling, *supra,* sec. 135. A part of the original duty imposed by the charter was to compensate servants in damages for any injury they might sustain, except such as should be due to the negligence of their fellow-servants. The employee is deemed in law to contract ordinarily to incur such risks as arise from the carelessness of the other servants of the company, but where the lessor company would be liable, if it had remained in charge of the road, to a person acting as its own servant, we see no reason why it should not be answerable to him when employed (951) by the lessee. Its implied obligation in the first instance—to come back to the touchstone—was to compensate its own servants for injuries due to any cause other than the carelessness of their fellows, and the same rule must apply in its relation with the servants of the lessee. If the lessee would be liable, if sued jointly with the lessor company, then the demurrer cannot be sustained.

That brings us to the question whether the section "boss," Snell, who, as alleged in the complaint, "had full power and authority from the lessee company to hire and discharge hands, and whose orders and commands the plaintiff was bound to obey, is to be deemed a fellow, when by his failure to stop the hand-car in time, and by his carelessness in directing the manner of its removal from the track in front of an approaching train, he caused the plaintiff to be injured.

The demurrer admits the truth of the allegations of the complaint, and we think the facts bring this case within the principle announced in *Patton v. R. R.,* 96 N. C., 455. In that case the section master, who was empowered, just as in this, to command, discharge and employ laborers, ordered the laborer to jump from the moving train. The order to the plaintiff was to jump off the hand-car in a cut, assist in removing it from the track, and to attempt to hold it against the bank and out of the way of the passing train. Being unable to keep it out of the way of the train, the car was stricken and thrown violently against him, so that he sustained serious injury. Under the ruling in *Patton's*

(952) *case,* there would be no question about the liability of the lessee company, if it had been sued, and holding as we do that the lessor is liable to the same extent as the lessee company, we conclude that there was error in sustaining the demurrer.

Error.

Cited: Carr v. Coke, ante, 247; *Cowan v. Fairbrother,* 118 N. C., 414; *Barcello v. Hobgood, ib.,* 730; *Tillett v. R. R., ib.,* 1043; *Styles v. R. R., ib.,* 1090; *Turner v. Lumber Co.,* 119 N. C., 397; *Williams v. R. R., ib.,* 749; *James v. R. R.,* 121 N. C., 528; *Norton v. R. R.,* 122 N. C., 937; *Johnson v. R. R., ib.,* 958; *Benton v. R. R., ib.,* 1009; *Pierce v. R. R.,* 124 N. C., 93; *Ward v. Odell,* 126 N. C., 954; *Perry v. R. R.,* 128 N. C., 473; *Raleigh v. R. R.,* 129 N. C., 266; *Perry v. R. R., ib.,* 335; *Harden v. R. R., ib.,* 357, 363, 366; *Phelps v. Steamboat Co.,* 131 N. C., 13; *Brown v. R. R., ib.,* 458, 459; *Lamb v. Innman,* 132 N. C., 980; *Mabry v. R. R.,* 139 N. C., 389; *Dunn v. R. R.,* 141 N. C., 523; *Carleton v. R. R.,* 143 N. C., 47, 49; *Hill v. R. R., ib.,* 586, 597; *Britt v. R. R.,* 144 N. C., 252; *Coal Co. v. R. R., ib.,* 747; *McCullock v. R. R.,* 149 N. C., 307; *Parker v. R. R.,* 150 N. C., 434; *Wright v. R. R.,* 151 N. C., 531; *Zachary v. R. R.,* 156 N. C., 500; *Lloyd v. R. R.,* 162 N. C., 496; *Hyder v. R. R.,* 167 N. C., 587; *Mitchell v. Lumber Co.,* 174 N. C., 121; *Bryant v. Lumber Co., ib.,* 361; *Dill v. R. R.,* 178 N. C., 610; *Clement v. R. R.,* 179 N. C., 226, 230; *Gilliam v. R. R.,* 179 N. C., 511; *Vann v. R. R.,* 180 N. C., 660.

L. V. GRADY v. RICHMOND AND DANVILLE RAILROAD COMPANY.

Summons—Service on Agent of Receivers—Amendment of Sheriff's Return.

1. The court may permit the sheriff to amend his return, so as to make it speak the truth, and the amendment when made relates back to the original return.
2. A return of service of a summons which was made on a local agent of a railroad company in the hands of receivers, and which recited that it was served by delivering a copy to a person named "agent of the defendant company," may be amended by striking out the word "company."
3. Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent.
4. A service of a summons upon the local agent of the receivers of a corporation has the same legal effect as if made upon the receivers personally.

GRADY *v.* R. R.

ACTION by L. V. Grady against the Richmond & Danville Railroad Co., heard before *Hoke J.*, at Spring Term, 1895, of DUPLIN.

The summons was issued against the R. & D. Railroad Co., and Samuel Spencer, F. W. Huidekoper and Reuben Foster, receivers, who were then in charge of its property, returnable to Duplin Superior Court on the first Monday in August, 1894, 6 August, and was served 23 May, 1894, by the sheriff of Wayne County, who delivered a copy of it to C. M. Levister, who was "the local agent employed in charge of the freight office at Goldsboro, collecting freight charges, etc." The sheriff returned the summons indorsed, "Served by delivering a copy of this summons to C. M. Levister, agent of the defendants Co." At the August Term judgment by default and inquiry was taken (953) and at December Term a jury was impaneled and final judgment entered. At February Term, 1895, the defendants, upon notice dated 3 January, 1895, moved to set aside the said judgments because they "are irregular and void and entered without any service of process upon the defendants above named or any of them."

His Honor found as facts that Levister at the date of the service of the summons, 23 May, 1894, was the agent of the receivers, then operating the railroad, and that the copy of the summons was delivered to him as such agent. He permitted the sheriff to amend his return by striking out the word "Co.," so that the return stands, "Served on C. M. Levister, agent of the defendants." He held that the judgment was valid and refused defendant leave to file an answer. Defendant appealed.

A. D. Ward for plaintiff.
F. H. Busbee for defendants.

CLARK, J. The power of the court to permit the sheriff to amend his return, both before and after judgment, so as to make it speak the truth, is settled beyond discussion. *Campbell v. Smith,* 115 N. C., 498, and cases cited: Clark's Code, pp. 222, 227, 498, 499. The amendment "related back to the original return and has the same effect as if the amended return had been originally made." Murfree on Sheriffs, sec. 880; 22 A. & E. Enc., 204; Freeman on Ex., 538. There was no ground, therefore, on which to permit an answer to be filed. The service upon "the local agent" was valid under the statute. Code, sec. 217; *Jones v. Insurance Co.,* 88 N. C., 499; *Katzenstein v. R. R.,* 78 N. C., 286; *S. v. R. R.,* 89 N. C., 584. "The receivers were only temporarily in charge of the corporation, in lieu of the regular (954) officers, and a service upon their local agent is a service upon them. Whether the judgment recovered will or will not be paid in

preference to other liabilities of the corporation, does not affect this question." *Farris v. R. R.*, 115 N. C., 600. Service upon the receivers is service upon the corporation, as fully as if made upon the president and superintendent, whose duties they are temporarily discharging, as they come within the term "other head of the corporation," Code, sec. 217, and a service upon their local agent is merely a substitute for, and has the same legal effect as, service upon them personally. *Trust Co. v. R. R.*, 40 Fed., 426; *Ganebin v. Phelan*, 5 Colo., 85. The statute, Code, sec. 200, contains no exception or discrimination which requires service of summons to be made as to railroad companies or their receivers, more than ten days before the term. Here, the service was legally and duly made on the defendants seventy-five days before the next term.

We concur, therefore, in the ruling of the learned judge that the proceedings were not "irregular and void" nor "without due service of process upon the defendants." His judgment is in all respects

Affirmed.

Cited: Manning v. R. R., 122 N. C., 827; *Kissenger v. Fitzgerald*, 152 N. C., 250; *Hollowell v. R. R.*, 153 N. C., 21; *Pants Co. v. Ins. Co.*, 159 N. C., 180; *S. v. Lewis*, 177 N. C., 557; *Clements v. R. R.*, 179 N. C., 226, 229; *Gilliam v. R. R.*, 511.

(955)

DANIEL BLUE v. ABERDEEN AND WEST END RAILROAD COMPANY.

Action for Damages—Railroad Company—Liability for Fire Caused by Sparks from Engine—Strong Wind—Instructions.

In the trial of an action for damages caused by fire started by sparks from a locomotive, witnesses had described the wind on that day as "hard," "unusual," and "extraordinary," and the trial judge instructed the jury that if the wind causing the escape of sparks from the locomotive was "unusual and extraordinary," and if, but for the "unusual and extraordinary" character of the wind, the sparks would not have escaped and communicated the fire to plaintiff's premises, defendant was not liable: *Held*, such charge was erroneous in that the court did not explain the meaning of the words "unusual and extraordinary," so as to present to the jury the question whether the wind could have been reasonably expected at that season and in that section of the country.

ACTION for damages caused by the alleged negligence of the defendant in allowing fire to escape from its engine and destroying the plain-

tiff's property, tried before *Brown J.*, and a jury, at August Term, 1894, of MOORE.

J. W. Hinsdale and MacRae & Day for plaintiff. (958)
Black & Adams, W. C. Douglass and Shaw & Scales for defendant.

MONTGOMERY, J. The plaintiff, in his complaint, claims damages against the defendant for negligently permitting fire to be communicated from its engines or property to the lands adjoining its railroad and right of way, by which said fire and the spread and the extension thereof the plaintiff's property was destroyed and damaged. It appears from the case on appeal that the plaintiff admitted on the trial that the engine of the defendant company was in good condition and had a proper spark arrester; and that the only claim of negligence made by the plaintiff was upon the ground of rubbish on the right-of-way or upon or near the road-bed to which fire was communicated. From these admissions it would seem that it was only necessary to have submitted that phase of the case to the jury. Upon this view his Honor charged: "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 (959) as to catch fire from the engine, and it did catch from the engine and the fire spread across the lands of another person to plaintiff's lands, defendant company would be liable to plaintiff for damages sustained. There is no evidence of contributory negligence upon the part of plaintiff." There is no error here, and no exception made by the defendant. But the court, at the request of the defendant, made the following special charge: "That the defendant could only be required to provide against usual and ordinary weather, and if the jury should find that the wind which caused the escape of the sparks and fire was unusual and extraordinary, and but for the unusual and extraordinary character of the wind the sparks and fire would not have escaped from defendant's engine and would not have communicated to plaintiff's premises, the defendant would not be guilty of negligence and plaintiff could not recover."

This instruction must have been given to cover another view presented to the jury, that is, that the fire might have been communicated directly to the plaintiff's lands from sparks and fire blown from the defendant's engine.

Plaintiff excepted to the special instructions and this raises the only point for decision here. While this instruction seems to be unnecessary to have been given upon the case first presented, yet after it was made it may have influenced the jury and have diverted their attention from the very plain charge theretofore made by his Honor. As to the nature

and kind of the winds the testimony was variable and conflicting. Some of the witnesses described it in such general terms as "wind blowing in gusts, hard wind, blowing hard, wind blowing very hard, very windy, unusual wind, unusually and extraordinarily windy." As to the witness who testified to particulars, some said "wind would have blown hat fifty yards, sparks further"; "sparks from stack would have blown fifty or seventy-five yards"; "wind would have
(960) blown sparks one hundred or two hundred yards." We think the exception is well taken. The instruction is all right so far as it goes, but the language used is too general. It contains no explanation to the jury as to the manner in which they were asked to consider the testimony, whether by comparison with other winds in the same climate, or other seasons of the year; or whether to be taken in connection with that testimony which went into the particulars of the wind, or to be considered as independent proof.

The words "unusual and extraordinary," as in common use, very often are exaggerations of speech, and in many cases, if properly inquired into and explained, would be found not to be synonymous with "unnatural" and "unexpected." And further, the testimony in its particulars does not disclose any unnatural or unexpected wind. We think that his Honor should have so explained the meaning of the words "unusual and extraordinary" in conjunction with the particular testimony offered, as to have presented the question whether or not this wind could reasonably have been anticipated and expected by the defendant in the climate and season and section of country. In *Emry v. R. R.,* 102 N. C., 226, the judge below instructed the jury upon the question of negligence that "it was the duty of defendant to have constructed its culvert so it would carry off the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and by reason of an insufficient culvert the plaintiff's land was overflowed, the answer to the first issue (Has the defendant negli-
(961) gently ponded water back upon the plaintiff's land?) should be yes, unless the defendant has acquired the right to pond water on the plaintiff's land." *Justice Avery,* in delivering the opinion, in sustaining the ruling of the trial judge, went on to say: "His Honor, in addition to the language quoted from his charge, told the jury that the defendant was 'not negligent if the overflow was the result of extraordinary and unusual rainfall.'" It is not to be inferred, however, that

the additional words "extraordinary and unusual" alone would have been a sufficient charge to the jury on the question of negligence.

There was error in the instruction given, and there must be a new trial.

New Trial.

Cited: Russell v. Monroe, ante, 730; *Tankard v. R. R.,* 117 N. C., 563; *Tillett v. R. R.,* 118 N. C., 1044; *Little v. R. R., ib.,* 1078; *Purcell v. R. R.,* 119 N. C., 738; *Little v. R. R., ib.,* 778; *Williams v. R. R., ib.,* 750.

ELIAS WATKINS v. RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY.

Action for Damages—Case on Appeal—Delay in Service—Estoppel—Injury to Passenger—Negligence.

1. Where appellant failed to serve his countercase within five days as required by chapter 161, Acts 1889, but the appellant's counsel telegraphed that he would accept service on his return home, which he did, the telegram was an estoppel on appellant, for, but for the telegram, the appellee might have served the countercase within the statutory time by leaving a copy at the residence or office of appellant or his counsel.
2. A passenger who alights from a moving train at the direction of the conductor is not, as a matter of law, guilty of contributory negligence when there was no appearance of danger within the locality where he alighted or in the rate of speed of the train.

ACTION for damages for negligence, tried before *Brown, J.,* (962) and a jury, at December Special Term, 1894, of RICHMOND.

In this Court the defendant moved that the Court adopt its case on appeal instead of the one settled by the judge. (966)

It appears from the affidavit on file that the appellee's case was ready to be served upon the appellant within five days, but the counsel for the appellant being out of town, an agent of the plaintiff wired said counsel to know if he would accept service of the case, and he replied that he would when he saw the papers. When the counsel for the appellant returned to Rockingham he accepted service of the case, and he himself sent the papers to *Judge Brown,* with the request that he should settle the case, excepting, however, to the failure of the appellee to file his countercase within the statutory time.

Jones & Tillett for plaintiff.

MacRae & Day for defendant.

CLARK, J. The appellee's countercase was not served in the five days required by the amendatory act of 1889, ch. 161. The appellant could therefore insist on his motion that his statement should be taken as the true case on appeal (*Cumming v. Hoffman,* 113 N. C., 267) but for the fact that his counsel waived the objection by telegraphing that he would accept service on his return home, which he did. Though the appellant's counsel excepted when he sent the case and countercase to the judge, with request to settle the case on appeal on the ground that the acceptance was after the expiration of the five days, the telegram was an estoppel; for, but for the telegram, the appellee might have served the countercase within the statutory time by leaving a copy at the residence or office of appellant or his counsel. Code, sec. 567 (3); *S. v. Price,* 110 N. C., 599. The case as settled by the judge must be taken as the case on appeal.

The entire charge of the judge is not presumed to be sent (967) up, but only that part having reference to the exceptions taken. *S. v. Cox,* 110 N. C., 503. The instruction excepted to is fully sustained by the cases of *Lambeth v. R. R.,* 66 N. C., 494, and *Nance v. R. R.,* 94 N. C., 619. Indeed, this is a stronger case against the defendant, as there was evidence that the train was moving very slowly and the plaintiff got off the train by direction of the conductor and with care. As the prayer for instruction, which was declined, was "that if the jury believed the evidence the plaintiff could not recover," this evidence, for the purposes of the exception, must be taken as true. Passengers alighting from trains at the direction of the conductor "are justified in assuming the place to be safe, and only under exceptional circumstances will their alighting be contributory negligence." Bishop Non-Contract Law, sec. 1101. In *Lambeth's case, supra,* the passenger alighted on the platform and was killed. Here, fortunately, he got off on sandy soil and only his leg was broken. The case of *Burgin v. R. R.,* 115 N. C., 673, holds that the passenger is not justified in leaping from the train while in motion, unless invited to do so by the carrier's agent, and when it is not obviously dangerous, and approves *Lambeth's case.* In the present case, there was no appearance of danger, either in the locality itself or in the rate of speed at which the train was moving, which made it contributory negligence to obey the conductor's injunction to "step right off here, old man."

No Error.

Cited: McNeil v. R. R., 117 N. C., 644; *Hinshaw v. R. R.,* 118 N. C., 1053; *Hodges v. R. R.,* 120 N. C., 556; *S. v. Ridge,* 125 N. C., 657; *Darden v. R. R.,* 144 N. C., 3; *Whitfield v. R. R.,* 147 N. C., 241; *Carter v. R. R.,* 165 N. C., 252.

(968)

LEWIS SHADD v. GEORGIA, CAROLINA AND NORTHERN RAILROAD COMPANY.

Action for Damages—Master and Servant—Vice-Principal—Negligence.

1. A conductor is, in his relation to those subject to his orders on the train in his charge, a vice-principal acting for the company.
2. Where a servant's movements are directed by a vice-principal of a corporation and the former believes that discharge from employment will follow his disobedience of orders, his acts under such circumstances will not render him culpable or guilty of contributory negligence, but will be imputed to the company whose officer coerced him to act without regard to his own wishes or judgment.
3. Where plaintiff, an inexperienced brakeman, was ordered by the conductor of a railroad company to make a coupling which an experienced brakeman had volunteered to make, and as plaintiff went between the cars, in obedience to the command, and while he was arranging a displaced link, the conductor, who could see plaintiff's danger, signaled to the engineer to back the train and at the same time shouted to the plaintiff not to miss the coupling: *Held*, that it was error to charge that plaintiff could not recover for injuries received in so attempting to obey orders and make the coupling.

ACTION, for damages, tried at January Term, 1895, of UNION, before *Robinson, J.*, and a jury.

F. I. Osborne for plaintiff. (969)
MacRae & Day for defendant.

AVERY, J. A more experienced brakeman proposed to go in and make the coupling between a car standing on the track and the rear car of the train, to which the engine was attached, but the conductor, with an oath, ordered him back and said, "No, let Shadd (the plaintiff) make it; how will he ever know anything if you never let him do anything?" The plaintiff then "signed the engineer down," and stepping in front of the stationary car began to strike a link that had "gotten crossways," with a pin which he carried in one hand, while (970) he held his lamp in the other. The two cars at this moment were eight or ten feet apart, when the conductor, moving from the side on which he and his two brakemen were standing when the order was given, crossed between them to the opposite side of the track and waved to the engineer to back his train. When the brakeman was striking the link to get it into its place, the conductor was saying to him, "Don't miss the coupling, as I want to get away some time to

night." As the pin was brought by a second blow into its proper place, the conductor again said in a loud tone of voice, "Don't miss the coupling." While these urgent commands were being given, the train was all the while moving back, in obedience to the signal of Reid, towards the new employee, who had gone between the cars under his express order and was then exposed to peril that was becoming every moment more imminent as the train approached the stationary car. The engineer's movements were regulated in direction, if not speed, by the conductor's lamp until plaintiff's hand was caught between the drawhead of the front car and the link he had been adjusting on the drawhead of the rear car (he could not say confidently which) and was badly injured.

It is a settled law in this State that a conductor is, in his relation to those subject to his orders on the train in his charge, a vice-principal acting for the company. *Mason v. R. R.*, 114 N. C., 718, and same case 111 N. C., 482. It can but be admitted as a fact, looking at the testimony as we must do, in the aspect most favorable to the plaintiff, that he went between the cars and exposed himself to peril at the command of the conductor, who, seeing him thus in danger, urged him to arrange the coupling as rapidly as possible, while he was at the same time causing the train to approach him. We think (971) that these facts bring this case clearly within the principle established on the first appeal in *Mason's case, supra.* This case is not exactly "on all fours" with that. It is really stronger for the plaintiff, in that the testimony sent up discloses no express agreement between the plaintiff and the company, such as was in evidence there, and in the further fact that the plaintiff in our case was sent between the cars by a direct order from the conductor, and was urged to expedite the coupling by him, he being all the while in a position to see that the servant had no stick, nothing but a pin and a lamp. Another difference is that the conductor Reid was so near that he might have heard the sound made by the first lick at the displaced link, and seeing how the plaintiff was delayed in adjusting it, might have desisted from giving the signal to move back the train, till his position became less perilous. As the facts appear, from the testimony sent up, the plaintiff was selected by the company itself (the conductor being the embodiment of its authority), instead of another servant, who volunteered to take his place, was ordered to discharge a hazardous duty without considering his previous training or his present preparation of suitable implements for performing the work, and was kept in a perilous position by urgent injunctions to expedite the coupling till, by his order to another servant, the train was so moved as to cause the injury. The plaintiff was brought within the reason upon which the

liability was declared to depend in *Mason's case, supra,* because, from the moment when the first command was given till the injury was inflicted, he was kept constantly in danger by repeated orders of an officer upon whose favor his choice of retaining his place depended. The servant's movements were directed by a living representative of the authority of the company, and that he was justified in assuming that discharge would inevitably follow disobedience. The consequence was that, if his acts would ordinarily have rendered (972) him culpable, they must, under the circumstances, be imputed to the company which coerced him by the command of its officer, without regard to his own wishes or judgment. The sudden order and the persistent urgency of the officer, while it was being executed, doubtless intensified the apprehension of consequences that might flow from disobedience, but neither in this nor *Mason's case* is it to be understood that the plaintiff's culpability depended upon the manner of giving the command, but upon the source from which it emanated. The error in the charge of the court entitles the plaintiff to a

New Trial.

Cited: Turner v. Lumber Co., 119 N. C., 397; *Pleasants v. R. R.,* 121 N. C., 496; *Wright v. R. R.,* 122 N. C., 853; *Greenlee v. R. R., ib.,* 986; *Ward v. Odell,* 126 N. C., 954; *Haltom v. R. R.,* 127 N. C., 258; *Smith v. R. R.,* 129 N. C., 178; *Lamb v. Littman,* 132 N. C., 980; *Ridge v. R. R.,* 167 N. C., 523; *Hollifield v. Telephone Co.,* 172 N. C., 724.

STATE v. THOMAS JENKINS.

Jurors—Misconduct of Jury—Use of Intoxicants During Deliberation on Verdict—Void Verdict—Mistrial.

1. Jurors, while in the discharge of their duties, must be temperate and in such condition of mind as to enable them to discharge their duties honestly, intelligently, and free from the influence and domination of strong drink.
2. Where jurors purchased and drank whiskey and "some of them were under its influence" while deliberating on their verdict, the verdict returned by the jury was null, and a mistrial should have been entered and a new trial granted to defendant against whom such verdict was rendered.

The defendant was convicted upon the trial of an indictment for injuring stock running at large, at Fall Term, 1894, of BEAUFORT, before *McIver, J.,* and moved for a new trial upon the ground of miscon-

duct of the jury. Upon affidavits submitted by both the State and the defendant the court found the following facts:

(973) "The court charged the jury before dinner, and they immediately returned to the jury room, which was on the lower floor of the courthouse, where they remained until supper time. At supper time the court instructed the sheriff to give the jury supper. The sheriff took them in a body down town and carried them to Mrs. Smith's restaurant, where they got supper. They stopped at Wright's, on the way back to the court house, and got some cigars or tobacco. They went upstairs in the court room on their return, and a deputy sheriff was placed with them. On that night the jury had some whiskey, one a pint and another a quart. Nearly all of them drank of this whiskey. Some of them were under its influence. The next morning being Saturday morning, the jury having been put in the grand jury room, on the lower floor of the court house, some whiskey was passed through the window into the room. All the whiskey which the jury drank was purchased by them. There was no allegation, proof or evidence that there was any outside influence brought to bear upon the jury, or that there was any improper influence, and no misconduct on the part of the jury, except as above stated. The jury returned a verdict about ten o'clock Saturday morning."

The motion was overruled, and the defendant excepted and appealed from the judgment pronounced, assigning as error the refusal of his Honor to grant a new trial on account of the misconduct of the jury.

The Attorney-General and W. B. Rodman for the State.
Charles F. Warren for defendant.

MONTGOMERY, J. The question for determination is, do the findings of his Honor show such misconduct on the part of the jury as to vitiate the verdict, and to make it in law no verdict? For otherwise

(974) the verdict would simply be erroneous, and, therefore, under the final control of the judge below as to his discretion in granting or refusing a new trial. The answer to the question depends most largely upon the proper construction of the words, "Nearly all of them drank of this whiskey, some of them under its influence." We think the fair, reasonable and natural meaning of these words is that some of the jurors were under the controlling power, sway and ascendancy of the whiskey which they drank. This being so, they were in a condition which unfitted them to discuss evidence, and to properly consider its weight and the effect of their conclusions. They were, on this account, not good and lawful men, as the law required them to be, and therefore their verdict was null. There was a mistrial. There is no room for the inference that these jurors might have been

under the influence of strong drink on the night before they delivered their verdict on the next morning at ten o'clock, and have been sober at and before that hour. The findings of fact show that other whiskey was passed through a window to the jury on that very morning. The law requires that jurors, while in the discharge of their duties, shall be temperate and in such condition of mind as to enable them to discharge those duties honestly, intelligently and free from the influence and dominion of strong drink. No prudent man would be willing to have the facts of his case passed upon by a jury some of whom were under the influence of whiskey. Our reports contain no case in which the facts found on motions for new trials for misconduct of jurors are the same, in words or substance, as in this case, and we do not, by this decision, overrule or modify any opinion heretofore rendered by this Court in matters of this nature. In some of the states of the American Union, drinking in any degree by any of the jurors in the progress of a trial vitiates the verdict. This is not the rule in North Carolina. In *S. v. Sparrow,* 7 N. C., 487, the Court (975) held unanimously, "that it had been settled rightly that taking refreshments vitiates the verdict only in those cases where they are furnished by the party for whom the verdict is found." In *S. v. Bailey,* 100 N. C., 528, the Court found, as a fact, upon motion for a new trial by defendant, "that after the retirement of the jury, one of their number took a flask from his pocket and, upon his invitation, four drank of the whiskey it contained. None of the jurors were in any degree under the influence of the liquor, nor was the quantity taken sufficient to produce any sensible effects," and overruled the motion, in which ruling this Court declared there was no error. In *S. v. Miller,* 18 N. C., 500, the prisoner offered to prove, after motion for a new trial on other grounds had been made and denied, that while a juror was absent from the body of the jury, he visited the store of W. J. L. to get a drink of spirits, which store stands at the distance of one hundred and twenty yards from the courthouse and in view of it. The judge refused to receive this evidence, but this Court, on appeal, discussed the point though sustaining the ruling of his Honor, and held that the matters attempted to be proved, if true, did not entitle the defendant to a new trial. *Chief Justice Ruffin,* who delivered the opinion in *Miller's case,* said, however, "But in the present case there is no suggestion that he (the juror) drank to the slightest degree of intoxication." He said further: "I do not dispute that if a juror drank to excess so as to disqualify him for his office, it is not only a misdemeanor, but it ought to vitiate the verdict. I will not deny that such a case appearing in the record could be acted on by a court of errors."

As we have already said, we have no reported case in which the use of strong drink, to the extent found in this one, has been made to appear. All the cases reported on this subject are easily to (976) be distinguished from this.

We are of the opinion that his Honor erred in refusing the motion for a new trial, and that there was a mistrial on account of disqualification of the jury because some of them were under the influence of whiskey while they were engaged in making up their verdict. The defendant is therefore entitled to a

New Trial.

Cited: S. v. Tyson, 138 N. C., 629.

STATE v. E. S. HART.

Indictment for Arson—Practice—Appeal—Charge to Jury—Failure to Request Instruction Until After Verdict—Exception—Verdict.

1. **An assignment of error that the court declined to charge as requested will not be considered where the record does not show that any instructions were asked for.**
2. **Where there is an assignment of error that the evidence did not justify the verdict, this Court will consider only the evidence offered by the State.**
3. **An exception taken to a charge after verdict was rendered will not be considered on appeal.**
4. **Where the trial judge in his statement of the case on appeal says that he recapitulated the evidence to the jury, and there is nothing in the record to contradict this statement, an assignment of error that the court did not recapitulate the testimony will not be considered on appeal.**
5. **Where a bill of indictment contains all the averments that are necessary, the fact that it contains more than is necessary, and therefore subject to the criticism of duplicity, will not vitiate it. Such defects are cured by a verdict.**

(977) INDICTMENT for burning a barn, tried before *Brown, J.*, and a jury, at Fall Term, 1894, of CRAVEN. The defendant was convicted and appealed. Such facts as are necessary to an understanding of the opinion are stated in the opinion of *Associate Justice Furches.*

The Attorney-General for the State.
C. R. Thomas for defendant.

STATE *v.* HART.

FURCHES, J. The defendant, having been convicted, moves for a new trial and assigns two grounds for his motion: first, that the court did not charge the jury as requested; and secondly, that the court did not recapitulate the evidence to the jury. And these motions being denied, he then moved in arrest of judgment, upon the ground that the bill of indictment was defective.

Defendant's motion for a new trial cannot be sustained upon the first cause assigned for more than one reason. First, upon examination of the record we fail to find any prayers or request for instructions, and therefore cannot see that the court failed to give the instructions asked, if any were asked. But the brief of defendant seems to put this part of the prayer for a new trial upon the ground that there was not sufficient evidence on the part of the State to justify a jury in finding a verdict of guilty and the court should have so instructed the jury. We say evidence in behalf of the State, because we, as a Court, cannot consider the evidence in favor of the defendant. If we could, we might have a different opinion from that of the jury as to what the verdict should have been. But if we should consider defendant's exception and assignment sufficient to authorize us to consider it as an exception to the charge of the court upon this ground, still it does not appear that it was made until after the verdict was rendered, and when it was too late to interpose such an exception. *S. v. Kiger,* 115 N. C., 746, and cases there cited.

If it had appeared from the record that the defendant had (978) asked the court to give this instruction and the court had refused to do so, it would have presented an interesting question. But this question is not presented as we have seen, and we can see no good reason why we should review the many decisions we have upon this line, and we will not discuss the matter further, as whatever we might say would be but a *dictum,* and we think, as a general rule, *dicta* are not profitable to the courts or to the profession.

The second ground assigned for a new trial cannot be sustained for the reason that the defendant is not sustained by the facts. As we find the judge in his statement of the case says that he did recapitulate the evidence to the jury, and there being nothing in the record to contradict this statement, we are bound by it. This disposes of defendant's motion for a new trial and the only remaining question is defendant's motion in arrest of judgment, and we do not think this can be sustained.

The bill is inartistically drawn—contains more than is necessary, but all that is necessary—and may be liable to the criticism of duplicity. But as it contains all the averments that are necessary we think the verdict must be sustained. *S. v. Thorne,* 81 N. C., 555. But this is

a motion in arrest of judgment and not a motion to quash. And if the bill is liable to the criticisms pointed out by defendant in his brief, such defects were cured by the verdict and cannot avail the defendant on a motion in arrest of judgment. *S. v. Simmons,* 70 N. C., 336. There is no error and the judgment is

Affirmed.

Cited: S. v. Darden, 117 N. C., 698; *Riley v. Hall,* 119 N. C., 415; *S. v. Leach, ib.,* 835; *S. v. Harris,* 120 N. C., 578, 579; *S. v. Wilson,* 121 N. C., 657; *Hart v. Cannon,* 133 N. C., 14; *S. v. Burnett,* 142 N. C., 580; *S. v. Shine,* 149 N. C., 481; *Baxter v. Irvin,* 158 N. C., 280; *S. v. Carlson,* 171 N. C., 824.

(979)

STATE v. J. B. WILSON.

Indictment for Obtaining Money Under False Pretences—Indictment, Sufficiency of.

A bill of indictment for obtaining money under false pretences, which fails to charge that it was obtained "feloniously" (as required by ch. 205, Acts of 1891) is fatally defective.

INDICTMENT for obtaining money under false pretences, tried before *Coble, J.,* and a jury, at February Term, 1895, of VANCE. There was a verdict of guilty and the defendant moved in arrest of judgment, and appealed from the refusal of the motion.

(980) *The Attorney-General for the State.*
Hicks & Hicks for defendant.

FAIRCLOTH, C. J. The defendant is indicted for obtaining goods under false pretences. He was convicted and he entered a motion to arrest the judgment, which was refused, and he appealed.

The indictment fails to charge that the goods were obtained "feloniously" and is therefore fatally defective. This is so by reason of Laws 1891, ch. 205. *S. v. Bryan,* 112 N. C., 848; *S. v. Caldwell, ib.,* 854, and authorities there cited.

Judgment Arrested.

Cited: S. v. Shaw, 117 N. C., 765; *S. v. Bunting,* 118 N. C., 1200.

(981)

STATE v. WALTER WYNNE.

Bastardy—Jurisdiction—Judgment—Constitutional Law.

1. The statute (section 35 of The Code) imposing a fine for begetting a bastard child, makes the act a criminal offence.
2. The limiting the punishment for bastardy to a fine of $10 confers upon justices of the peace exclusive jurisdiction for twelve months after the commission of the offence; after that period the Superior and Criminal courts have concurrent jurisdiction under section 892 of The Code.
3. The offence of bastardy is completed when the child is begotten.
4. The provision that the court, in bastardy proceedings, may, in addition to a fine, compel the defendant to pay an allowance to the mother, is not unconstitutional as authorizing imprisonment for debt.
5. Under section 32 of The Code authorizing the court in bastardy proceedings to commit defendant "until he find surety," such a judgment, though conditional, is valid.

PROCEEDINGS for bastardy, tried at January Term, 1895, of FRANKLIN, before *Coble, J.*

The Attorney-General for the State. (982)
N. Y. Gulley for defendant.

AVERY, J. The statute (Code, sec. 35), by imposing a fine for begetting a bastard child, makes the act a criminal offence. *S. v. Parsons,* 115 N. C., 730; *S. v. Burton,* 113 N. C., at page 655; *Myers v. Stafford,* 114 N. C., at page 240. The limiting of the punishment to a fine of ten dollars *ipso facto* confers exclusive original jurisdiction of the criminal offence upon the courts of justices of the peace for twelve months from the time when the offence is committed (Laws 1889, ch. 504); but after the lapse of a year, the concurrent jurisdiction of Superior and Criminal courts attaches under the provisions of The Code, sec. 892.

When is the criminal offence complete? It is clearly when the child is begotten, because the mother as soon as she becomes conscious of her pregnancy is allowed to complain (Code, sec. 32) and procure the issuing of a warrant, upon which the accused may be arraigned and tried immediately on being brought before a justice of the peace, unless the justice shall deem it proper to grant him a continuance. Code, sec. 34. Following the principle announced in *S. v. Burton, supra,* the Court said in *Myers v. Stafford, supra,* that "the question now being presented in such shape that it is necessary to be decided,

we are of the opinion that the begetting of a bastard child has become a petty misdemeanor." It was demonstrated in *S. v. Burton, supra,* "that a fine can only be imposed for a crime or misdemeanor or a contempt."

The charge embodied in the indictment and sustained by the proof upon which the defendant was found guilty was that he "on 4 October, 1893, in and upon the body of one Mary Neal did willfully (983) and unlawfully beget a bastard child, etc." The indictment was sent and returned a true bill at January Term, 1895, of the court, more than twelve months after the child had been begotten and the offence had become complete. Construing The Code, sec. 892, with the amendatory act of 1889, prolonging the period for the exercise of exclusive original jurisdiction by the justice from six to twelve months, we can not escape the conclusion that after one year from the perpetration of the petty misdemeanor of begetting a bastard child, that, like all other offences, for which no greater punishment can be imposed than a fine of fifty dollars or imprisonment for one month, becomes cognizable in the Superior Court as well as before a justice of the peace, until the prosecution is barred by the lapse of time.

The plea of not guilty necessarily involves the question of paternity, upon which the finding, on the issue raised by it, depends. When, therefore, the defendant is convicted of the criminal offence, the incidental authority to enforce the police regulation as pointed out in *Parson's* and *Burton's cases, supra,* is immediately vested in the court that takes cognizance of the misdemeanor. The power of the court to imprison for fine and costs as well as for non-payment of the allowance, and the relation sustained by the mother of the bastard and of the county commissioners to the judgment were fully discussed in *S. v. Parsons, supra.* The incidental authority to enforce the police regulation is expressly conferred by statute, and there can be no reasonable doubt about the power of the Legislature in the premises. At common law, in addition to the infliction of punishment of fine and imprisonment for a public nuisance, the court might order that the nuisance be abated. 2 Wharton Cr. Law (7 Ed.), sec. 2377. So that, to clothe the court with some incidental power to further provide for the public protection, after making an example of the offender, is to neither transcend the limit of legislative authority nor to depart (984) from the practice prescribed in other cases.

The learned counsel for the defendant referred on the argument to a warrant, but the record sent up is entirely consistent with the idea that the prosecution had originated in the Superior Court by the sending of the indictment after that court had concurrent

jurisdiction. If we could conceive, therefore, of any principle upon which the fact of the assumption of jurisdiction by a justice, where neither the pendency of a prosecution nor the judgment of that court had been pleaded or set up in bar, would defeat the jurisdiction of the Superior Court to try after the lapse of twelve months from the commission of the offence (*S. v. Drake,* 64 N. C., 589), we can take no judicial knowledge of matters outside of the record.

By permission of the Court the defendant's counsel has been allowed, since the foregoing was written, to present to the Court some additional reasons for maintaining that there was error below. The statute (Code, sec. 31) restricts the right of justices of the peace to issue warrants for bastardy, to cases where the affidavit is made voluntarily by the mother, or upon certain grounds set forth by a county commissioner, just as the Act of 1868 made it a condition precedent to the exercise of jurisdiction in case of assault and battery that it should appear by affidavit that there was no collusion between the complainant and defendant. But the Superior Court is a court of general jurisdiction, and there being nothing upon the face of the record to oust its authority, it must proceed to try, when a defendant is arraigned for an offence and it appears from the indictment itself that a justice's court no longer has the exclusive right to take cognizance. The rule finds illustrations in those cases where a more serious assault is charged and the proof sustains only a conviction for such an assault as is, at the time, within the ex- (985) clusive jurisdiction of a justice. *S. v. Cunningham,* 94 N. C., 824; *S. v. Fesperman,* 108 N. C., 770; *S. v. Speller,* 91 N. C., 526; *S. v. Ray,* 89 N. C., 587; *S. v. Russell,* 91 N. C., 624. The authority of a justice of the peace to take cognizance of criminal actions is special, conferred at the discretion of the Legislature under a well-defined power given in the Constitution, Article IV, section 27. *S. v. Jones,* 100 N. C., 438. There is a presumption in favor of the rightful authority of a court of general jurisdiction, when upon the face of the record it appears to have cognizance. The authority of a justice of the peace, on the other hand, is not based upon any principle of the common or organic law delegating and fully defining it, but upon the discretionary exercise of a restricted power by the Legislature. The consequence is that it must always appear affirmatively that the Legislature has followed strictly its power of attorney in delegating judicial authority, and that the court upon which it is conferred has kept within the limits prescribed by the statute. Bastardy being a criminal offence, *prima facie,* therefore the Superior Court has jurisdiction of it. If, by virtue of the Constitution, Article IV, section 27, the Legislature has restricted for a time the authority of the higher

court and delegated a portion of it to the inferior jurisdiction, the latter must, like an attorney in fact, show that it has pursued the letter of its power in order to establish its right to exercise it. Because the Legislature has hedged the justice's authority about with conditions precedent, such as the making of a particular sort of affidavit by a specified person or officer, it does not follow that the higher court, which has under the Constitution jurisdiction of all offences except such as for a time have been placed under the control of an inferior tribunal by virtue of a restricted authority, shall not resume its constitutional power when the time for which the exclusive jurisdic-
(986) tion was delegated, has expired.

Under the express language of the statute (Code, sec. 32), authority is given the court to commit a defendant convicted of begetting a child, "until he find surety" to a bond conditioned for the indemnity of the county and to perform the order of the court. Though the general principle is, as stated by counsel, that conditional judgments are void, yet should we concede that the judgment here is conditional, it is just such a judgment as is authorized by statute. If the court had attempted to delegate its authority, as in *Strickland v. Cox,* 102 N. C., 411, the order would have been unconstitutional and void because there is no warrant in the Constitution for delegating such power. It has been repeatedly held by this Court that the enforcement of such a police regulation was not within the inhibition of the Constitution in reference to imprisonment for debt. *S. v. Burton,* 113 N. C., 655. So that there is no reason why the Legislature should not modify a principle of the common law, if it has done so, in this case, provided it keeps within the purview of its own authority.

We can conceive of but one question of practice, in cases of this kind, that is not fully settled by recent adjudications, and to anticipate that now would be to give an *obiter* opinion.

No Error.

CLARK, J., dissents.

Cited: S. v. Mize, 117 N. C., 781; *S. v. Oswalt,* 118 N. C., 1210, 1215; *S. v. Ivie, ib.,* 1229; *McDonald v. Morrow,* 119 N. C., 675; *S. v. Nelson, ib.,* 799; *S. v. White,* 125 N. C., 682; *S. v. Addington,* 143 N. C., 686, 688.

Overruled: S. v. Liles, 135 N. C., 735.

(987)

STATE v. J. I. CHAMPION.

Indictment for Perjury—Indictment, Sufficiency of—Certified Copy of Record—Evidence.

1. An indictment for perjury, charging the defendant with "knowing the said statement or statements to be false, or being ignorant whether or not said statement was true," is sufficient, being in the exact words of the form prescribed for such indictments by Laws 1889, ch. 83.
2. A certified statement by the register of deeds of a county as to how much property was listed for taxation by defendant, not being a copy of such list, is incompetent as evidence in a trial of one charged with perjury, inasmuch as section 1342 of The Code makes competent only the "copies" of official records, etc.

Perjury, tried at January Term, 1895, of FRANKLIN.

There was a motion to quash the bill of indictment, in that it charged the offence in the alternative, i.e., that the defendant made the statement, knowing it to be false, or being ignorant whether or not said statement was true. The bill of indictment was as follows:

"The jurors for the State upon their oath, present that James I. Champion, late of Franklin County, on 19 October, 1891, at and in the county aforesaid, did, unlawfully and feloniously, commit perjury upon a justification on a certain undertaking before S. G. Davis, a notary public, in and for the State of North Carolina, which said undertaking was filed in a certain civil action pending in the Superior Court of Nash County, wherein S. B. Ricks was plaintiff and James Strother, Ed. Strother and Lucius Strother were defendants, by falsely asserting on oath that he, the said James I. Champion, was worth over and above his liabilities and exemptions allowed by law, one thousand and seventy dollars, knowing the said statement or statements to be false, or being ignorant whether or not said (988) statement was true, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

Motion to quash was overruled, and the defendant excepted.

The paper which contained the alleged false oath was introduced in evidence, and also certain other paper-writings referred to in the opinion. There was a verdict of guilty. Judgment and appeal by the defendant.

The Attorney-General for the State.

W. M. Person and Argo & Snow for defendant.

MONTGOMERY, J. There was no error in his Honor's refusal to quash the indictment. The motion to quash was based on the alternative form of that part of the indictment charging the defendant with knowledge of the falsity of the oath: "Knowing the said statement or statements to be false, or being ignorant whether or not said statement was true." The indictment in the respect complained of is in the exact words of the form prescribed for indictments for perjury by Laws 1889, ch. 83, and approved in the case of *S. v. Peters,* 107 N. C., 876. The State offered as evidence a certificate of the register of deeds of Granville County which is as follows:

"I, Jas. A. Norwood, Register of Deeds for the County of Granville and State aforesaid, do certify that W. H. and J. I. Champion listed for taxation for the year 1891, as appears from the tax books (989) on file in my office, 414 acres of land valued at $2,300; and I further certify that J. I. Champion listed for taxation the following personal property for said year (1891): 1 horse, $75; 1 mule, $75; 5 cattle, $25; 4 hogs, $10; farming utensils, $50; household furniture, $100; total $335. Witness my hand and official seal, this 5 day of January, 1894. J. A. Norwood, Register of Deeds, etc."

This certificate was offered as some evidence to show that the defendant was not worth as much as he justified for, on 19 October, 1891. The defendant objected to its introduction because it did not purport to be a copy of the tax record certified as required by law to be received in evidence. We think the objection was well taken and that his Honor ought not to have overruled it. Section 1342 of The Code provides that "copies of all official bonds, writings, papers or documents recorded or filed as records in any court or public office shall be as competent evidence as the original when certified by the keeper of such records or writings under the seal of his office, when there is such seal, or under his hand, when there is no such seal, unless the court shall order the production of the original." A copy is a transcript of the original—a writing exactly like another writing. The certificates used in evidence did not purport to be a copy in this sense. If such statements as this certificate were allowed to be used as evidence in courts of law, as copies, there would be danger that the interpretations and conclusions of the officers in charge of records would often be used in evidence instead of the exact words and figures of the original entries. The record is the evidence and must speak for itself, and the certificate of the register's office is only evidence of the correctness of the record. There is error and there must be a

New Trial.

Cited: Wiggins v. Rogers, 175 N. C., 68.

(990)

STATE v. POSS WINSTON.

Indictment for Larceny—Confession of Prisoner, Competency of in Evidence.

1. While the declarations and admissions of a prisoner, made after threats or inducements held out to him, are as a general rule incompetent as evidence against the prisoner, yet facts ascertained in consequence of such declarations or admissions, and declarations connected with and explaining such facts, are admissible. Hence,
2. On a trial of a defendant for larceny, it was competent for a constable who had arrested the defendant to testify that, after he told the defendant that he knew about the stolen goods and that it would be best for him to tell, the defendant showed him where the goods were hidden.

INDICTMENT for larceny, tried before *Mebane, J.*, and a jury, at Fall Term, 1894, of NASH. The defendant was convicted and appealed, assigning as error the admission of evidence duly excepted to on the trial and which is set out in the opinion of *Associate Justice Furches.*

The Attorney-General for the State.
N. Y. Gulley for defendant.

FURCHES, J. This appeal presents but one question for our consideration, and that is, as to the admissibility of the evidence of Brantley, a constable who arrested the defendant.

Brantley testified, under objection of the defendant, that "Poss was arrested; there was found soap and baking powder and matches; I told Poss that if he knew about where other articles were, it would be better for him to tell." Counsel for Poss Winston objected to witness testifying to any statement made by Poss. The court allowed witness to testify as to what he did in consequence of said statements.

Defendant, Poss Winston, excepted and witness proceeded to testify "that he found all the articles that Murray had missed, except a piece of white cloth; found them in the garden where (991) defendant lived. They were buried in the ground under some cabbage. He, Poss, pointed out where other articles were to be found. Poss requested to have this talk with me." Was this testimony admissible, is the question.

The general rule is that, after threats or inducements held out to a defendant, as in this case, "it would be better for him to tell, if he knew, where other articles were," any admission made by him after that, would be incompetent. But there are exceptions to this rule, and it seems to us that this case comes within the exception. This rule is

not intended for the benefit of guilty defendants, but in the interest of truth. And it has been wisely held that simple declarations and admissions, made under such inducements, are so unreliable that the law will exclude them from the consideration of the jury. But it seems also to be well settled, that any facts ascertained in consequence of such declarations or confessions are admissible in evidence. And the declarations, connected with and explaining such facts, being considered a part of the *res gestae,* are also admissible. As in this case the defendant's going with the officer, a distance of a half mile, and pointing out the articles stolen, and telling the officer where other articles were concealed, and the officer finding the articles, as stated by the defendant, are admissible in evidence. The reason of the rule for excluding such admissions as are induced by promises and hopes of favor, ceases in such cases as this, as there can be no mistake as to the truth of the fact that the goods were found where he said they were, and where he pointed them out to Brantley.

This doctrine is well settled in this State. *S. v. Garrett,* 71 (992) N. C., 85; *S. v. Lindsay,* 78 N. C., 499, and authorities there cited.

These cases, especially *Lindsay's case,* fully sustain the ruling of the court below, and we cannot sustain defendant's exception, without overruling these cases, which we have no disposition to do as, in our opinion, they are founded on just principles and sound reasoning.

Affirmed.

Cited: S. v. Lowry, 170 N. C., 733.

STATE v. GEORGE MILLS.

Indictment for Murder—Instructions to Jury—Exceptions to Charge of Judge.

Where the instructions asked for are given in substance and effect, no exception will lie because they are not given in the language of the request.

INDICTMENT for murder, tried before *Bynum, J.,* and a jury, at September Term, 1894, of WAKE. The defendant was indicted for the murder of Iana Wimberly and pleaded not guilty. On the trial the defendant introduced no evidence and asked in writing that the following instructions be given:

1. Even if the jury shall find as a fact that George Mills inflicted the wounds of which Iana Wimberly died, and they shall find that

she died of those wounds, yet they cannot find him guilty of murder in the first degree unless you shall also find that the act was the result of deliberation, premeditation and a design formed beforehand.

2. The jury have a right to inspect the prisoner, whom and whose case they have in charge, and if they shall believe from his appearance and all the evidence that he is incapable of meditating, premeditating, or pre-forming intelligently, a design, they cannot find him guilty of murder in the first degree, though they should further (993) find that he inflicted the wounds and that she died of them.

3. Though the jury should find that the defendant inflicted the wounds upon the deceased and that she died of those wounds, yet they cannot find him guilty of murder in the first degree unless they shall also find that there was deliberation, premeditation, a pre-formed, deliberate design in his own mind to do the act.

The court refused the instructions asked in so far as they are not embraced in the charge as given, which was in writing and as follows:

1. Murder is when a person of sound mind and discretion unlawfully killeth any reasonable creature or being and under the peace of the State with malice aforethought, entire, express or implied.

2. By sound mind and discretion is meant that the one doing the killing has a will or legal discretion.

3. Malice is a wicked intention to do the injury and is of two kinds, express malice and implied malice. Express malice is when a party evidences an intention to commit the crime; implied malice is when a person commits an act unaccompanied by any circumstances justifying its commission: the law presumes he has acted advisedly and intended the consequences produced by his act.

4. Everyone over the age of fourteen years is presumed by law to be of sound mind and discretion until the contrary is proven, and the burden is on the defendant in this case to satisfy you, but not beyond a reasonable doubt, that he is of sound mind and discretion.

5. By the law of North Carolina murder is divided into murder in the first degree and murder in the second degree, the punishment of murder in the first degree being capital; and in the second, imprisonment in the penitentiary for a term of years. (Ch. 85, Laws 1893, the act dividing murder into two degrees, was here read (994) to the jury.)

7. Your inquiry in this case is: 1. Is Iana or Iana Elizabeth Wimberly dead? 2. If yes, did the defendant kill her? 3. If he did kill her what were the circumstances under which he did the act which produced her death? And before the defendant can be convicted of murder the burden is on the State to satisfy you beyond a reasonable doubt of the truth of the first two propositions, and that the killing

was one under such circumstances as to make it murder in the first or second degree, under what I shall tell you will be murder in the first and murder in the second degree.

8. Every presumption is in favor of the innocence of the defendant, the only presumption against him being that he is of sound mind and discretion and hence responsible for his acts.

9. The State relies upon circumstantial evidence to convict the defendant of murder. Circumstantial evidence is not inherently as strong or satisfactory as direct and positive evidence, still if it convinces a jury beyond a reasonable doubt it would be their duty to rely upon it and to render a verdict of guilty, but if after weighing all the circumstances relied on and which are proven to the satisfaction of the jury there is any reasonable way by which they can account for the death of Iana Wimberly without saying that the defendant killed her, it would be their duty to acquit him.

10. The law implies malice in every willful and deliberate and premeditated killing, so that if you find that the defendant and Iana Wimberly started to Jenks for a leopard plant and they passed by the Vaughan house, and the defendant, with the gun rack or a like heavy instrument, in pursuance of a design previously formed, inflicted upon the head and face of Iana Wimberly five or six blows, fracturing her skull and otherwise injuring her, from which injuries she died, the law presumes the malice and it will be murder in the first degree. But malice is not implied from the mere killing with the gun rack or other like deadly weapon—the killing must have been done willfully and deliberately, and with a preconceived intention.

(995)

11. Where two persons agree to commit a felony each is responsible for the act of the other, provided it be done in pursuance of the original understanding or in furtherance of the common purpose. Hence,

12. If you find that the defendant agreed together with A. J. Wimberly and Julia Atwater and others to take Iana Wimberly to the Vaughan house for Julia Atwater to produce an abortion on her, producing an abortion being a felony, and an abortion being as follows: "Every person who shall willfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother; and every person who shall administer to any pregnant woman or prescribe for any such woman, or advise and procure such woman to take any

medicine, drug or anything whatsoever with intent thereby to procure the miscarriage of any such woman or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes," and the defendant in pursuance of that agreement carried her to the Vaughan house to effect that purpose and Julia Atwater killed her in the attempt to produce the abortion, the defendant being present aiding and abetting, it would be murder in the first degree, if he knew the nature of the act he was doing and that the act (996) was wrong.

13. If you find that the defendant agreed together with A. J. Wimberly and Julia Atwater and others to take Iana Wimberly to the Vaughan house for Julia Atwater to produce an abortion, and I have just explained to you what is an abortion, and the defendant in pursuance of that agreement carried her to the Vaughan house to effect that purpose and Julia Atwater was not at the house, and the defendant killed her because of a preconceived, willful and deliberate purpose to kill her unless the abortion was produced, it would be murder in the first degree, or if he attempted to produce an abortion and killed her in the attempt, it was murder in the first degree, or if he attempted to kill her with laudanum procured previously for that purpose and, failing in that and in pursuance of a plan previously conceived, willfully and deliberately killed her with the gun rack or a like deadly weapon, it is murder in the first degree.

14. If you find as a fact that defendant inflicted the wound upon Iana Wimberly from which she died, but he did not do it deliberately, willfully and with premeditation, it is murder in the second degree.

15. If you find that he inflicted the fatal wounds the jury have a right to look at the defendant and to consider his appearance, together with the evidence which has been introduced, and if his appearance, with such of the evidence as the jury believe, satisfy you that he did not know the nature of the act he was doing or that it was wrong to do it, he would not be guilty. If his appearance and the evidence which you believe satisfy you he knew the act he was doing was wrong, but he was not of sufficient mind to be capable of deliberate premeditation, he would be guilty of murder in the first degree.

16. If you find the defendant and Iana Wimberly went to (997) the Vaughan house and someone else struck the fatal blows, and this defendant had nothing to do with it, as told by him to A. J. Wimberly, if you believe Wimberly, he is not guilty of anything.

17. The court then summed up the evidence, pointing out to the jury the bearing it had on the commission of the deed; the contention of the State, the contention of the defendant, the absence of motive,

the fact that the defendant had a right to rely upon the evidence of the State for his defense as much as though he had introduced evidence himself.

There were no exceptions to the charge further than to a failure to give the instructions asked by the defendant. There was a verdict of guilty of murder in the first degree and judgment of death pronounced after overruling motion in arrest of judgment and motion for a new trial. Defendant appealed.

The Attorney-General for the State.
T. M. Argo for the prisoner.

FURCHES, J. (after stating the facts): It is not contended by the State that the court below gave the instructions in the language in which they were asked. But it is contended they were given in substance and effect, and that is all the law required to be done. *Bethea v. R. R.*, 106 N. C., 279, and many other cases; and upon a careful examination of his Honor's charge, it seems to us that this is true; that, in substance and effect, the court did give defendant's instructions.

The three instructions asked by defendant are very nearly the same, except that the second instruction asked his Honor to charge the jury that they had the right "to inspect the prisoner," which was given.

In our opinion, the 10th, 14th and 15th paragraphs of his Honor's charge did give, in substance and effect, the prayers of defen-
(998) dant. And if they did, there being no other exception and no error appearing in the record, we must affirm the judgment of the court below.

But we have carefully examined the whole charge of the court, and are of the opinion that it is full and fair to the defendant, and that, if it does not give in substance and effect the prayers asked by the defendant (as we think it does), it is a correct exposition of the law of this State as it now exists under the statute of 1893, dividing murder into two degrees. *S. v. Fuller*, 114 N. C., 885, where this act was fully and ably discussed in the opinion of the Court by *Justice Avery* and in the dissenting opinion of *Justice Clark*.

There is no error. Let this opinion be certified to the end that the sentence of the court may be executed.

No Error.

STATE v. JOHN MANGUM.

Indictment for False Pretence, Sufficiency of—What Is False Pretence —Misrepresentation of a Subsisting Fact.

1. To constitute the indictable offense of obtaining goods, etc., under false pretence, there must be a false representation of a subsisting fact intending to cheat and which does cheat.
2. A bill of indictment which charges that defendant in swapping horses stated that his horse was sound, knowing that he was not sound, and that the prosecutor was induced thereby to trade, is sufficient, since it charges that defendant misrepresented a subsisting fact calculated to cheat and which the State says did cheat, etc.

The defendant was indicted and tried at September Term, 1894, of WAKE, before *Bynum, J.*

There were two bills of indictment found at September Term, (999) 1894, to wit:

I. The jurors of the State, upon their oaths, present: That John Mangum, late of the county of Wake, wickedly devising and intending to cheat and defraud, on 1 February, 1894, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly and feloniously did unto one S. H. Perry falsely pretend that a certain horse was sound in every respect and only about nine years old, and that he had had the horse for about four years.

Whereas, in truth and fact the said horse was not sound and was about fifteen years of age, and the said John Mangum had not had the horse for four years. By means of which false pretense he, the said John Mangum, knowingly and designedly did then and there unlawfully, willfully and feloniously obtain from the said S. H. Perry the following goods and things of value, the property of the said S. H. Perry, to wit: one mule and seven dollars in money, with intent then and there to defraud, against the form of the statute in such case made and provided and against the peace and dignity of the State.

II. The jurors for the State upon their oaths present: That John Mangum, late of the county of Wake, wickedly devising and intending to cheat and defraud, on 1 February, 1894, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly and feloniously did unto one S. H. Perry falsely pretend and represent that a certain horse which the said John Mangum was then and there offering to trade the said S. H. Perry was both sound and gentle; that a woman could manage the said horse; that the said horse was able to work well; that the said John Mangum had owned the horse for four years; that the said horse would be nine years old in the spring

(1000) of 1894, and he, the said John Mangum, had paid $175 in cash for the said horse.

Whereas, in truth and fact the said horse was not sound or gentle, a woman could not manage the said horse, and the said horse was neither able nor did work well, the said John Mangum had not owned the said horse for four years, the said horse in the spring of 1894 was very much older than nine years of age, to-wit, about fifteen years of age, the said John Mangum had not paid $175 in cash for the said horse, all of which was well known to the said defendant at the time aforesaid. By means of which said false pretence he, the said John Mangum, knowingly and designedly did then and there unlawfully and feloniously obtain from the said S. H. Perry the following things and goods of value, the property of the said S. H. Perry, to-wit: one mule of the value of fifty dollars and seven dollars in money, with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

The defendant moved to quash. The motion was allowed, and the State appealed.

The Attorney-General for the State.
T. M. Argo for defendant.

FURCHES, J. The defendant is indicted for a false pretence, in trading a horse to the prosecutor Perry. The defendant moved to quash for the reason that the bill did not charge a criminal offence, which motion was allowed by the court, the bill quashed, and the State appealed.

There are two bills of indictment, which the Court treats as one bill with two counts. *S. v. Watts,* 82 N. C., 656, *and S. v. McNeill,* 93 N. C., 552. So, if either bill is sufficient, the motion should have been refused.

Then the second bill, though not very well drawn, charges (1001) that the defendant "unlawfully, knowingly, designedly and feloniously did unto one S. H. Perry falsely pretend and represent that a certain horse which the said John Mangum was then and there offering to trade to the said S. H. Perry, was sound and gentle; that a woman could manage the said horse; that the said horse was able to work well." There are other averments in this count, but we think the case turns upon those quoted above.

The principles governing an indictment in this State for false pretences are clearly stated by *Justice Reade* in delivering the opinion of this Court in *S. v. Phifer,* 65 N. C., 321, which has been regarded as the leading case on this subject from that time until now.

It is held in that case, to constitute this offence "there must be a false representation as to a subsisting fact intending to cheat and which does cheat." And if we have what is apparently conflicting opinions on this subject, since *S. v. Phifer,* it is not because the principle of the law governing such cases was not settled and understood by the Court, but for the reason that there has been some trouble, at times, in applying the rule. For instance, in the case of *S. v. Holmes,* 82 N. C., 607, almost identically the same language is used as in this case, that the "horse was sound and healthy," and the Court in that case held that this did not charge a criminal offence. While in the case of *S. v. Burke,* 108 N. C., 750, the language used was that the horse "was sound and worked well, and would not kick," and this was held to be sufficient. This case is sustained by *S. v. Wilkerson,* 103 N. C., 337.

These two cases seem to be in conflict with each other, and, if they are, we should take the last case to be the correct exposition of the law, unless we felt called upon to overrule it, as being in conflict with established authority and sound reasoning. But neither of these cases, nor any other case in our reports, doubts the rule of law (1002) as held in *Phifer's case, supra.* In fact it has been quoted and approved in nearly every case on this subject, from the time it was delivered down to *S. v. Daniel,* 114 N. C., 823, in which it is quoted in an able opinion by *Justice MacRae.* So, we say, the trouble has been, not in not understanding the rule, but in its application. And we admit that the lines of demarcation between what is an indictable offence and what is not an indictable offence, are so close together that it is sometimes difficult to distinguish between them.

So then, leaving *S. v. Holmes, supra,* and *S. v. Burke, supra,* out of the case, and going back to the principle laid down in *S. v. Phifer, supra,* we think that defendant's saying that the "horse was sound," knowing that he was not sound, was a falsehood as to a subsisting fact calculated to cheat and which the State says did cheat. And that the bill, therefore, charged the defendant with an indictable offence, and there was error in quashing the same.

Error.

Cited: *S. v. Matthews,* 121 N. C., 605; *S. v. Whedbel,* 152 N. C., 774.

(1003)

STATE v. W. H. HATCH ET AL.

Indictment of Public Officer—Public Officers—Neglect of Duty—Evidence.

1. Public officers are responsible to the people for acts of omission as well as commission.
2. Section 1090 of The Code creates two distinct offenses—one, the willful omission, neglect, or refusal to discharge the duties of an office, which is punishable by fine and imprisonment; the other, the willful and corrupt action of an officer, by omission or commission, contrary to his oath of office, which is punishable by removal from office and by fine and imprisonment.
3. To convict an officer of willful omission, neglect, or refusal to discharge his duty, a corrupt intent need not be shown.
4. The sale by county commissioners of county property, at a grossly inadequate price, and for less than could have been obtained by reasonable effort, and without opportunity for competition, is evidence of omission of duty under section 1090 of The Code.
5. Honesty and good intent are not a full defense against an indictment for neglect of duty if there is evidence of willful carelessness in the discharge of official duty, resulting in injury to the public.

INDICTMENT against W. H. Hatch and others, county commissioners, for willful neglect of official duty. From a judgment for the State the defendants appealed. The facts appear in the opinion of *Associate Justice Clark.*

Jas. C. MacRae, with the Attorney-General, for the State.
H. A. London for defendants.

CLARK, J. The cornerstone of our system of government is that it is a government "of the people, by the people, and for the people."

(1004) It follows, that any public officer is a public servant, responsible to the sovereign, the people. The responsibility attaches for acts of omission, as well as commission. For such malfeasances, the trial for some officials is by impeachment, for those of lesser degree by indictment and trial by jury. Section 1090 of The Code creates two distinct offenses. One is the willful omission, neglect or refusal to discharge any of the duties of his office. This is a misdemeanor, punishable by fine and imprisonment not exceeding two years. The other is the willful and corrupt action of an officer, whether by commission or omission, contrary to the true intent of oath of office. Upon conviction for the latter offense, termed by statute misbehavior in office, the officer must, by the sentence of the court, be removed from office besides being fined and imprisoned at the discre-

tion of the court. *S. v. Pritchard,* 107 N. C., 921. The first offense is for negligence, or other misconduct in official duties, without corrupt intent, and is simple malfeasance, misfeasance or non-feasance. The second is such malfeasance, misfeasance, or non-feasance with a corrupt intent.

In this case there is no proof of corrupt intent, but the charge is that the defendants willfully and unlawfully neglected and omitted to discharge the trust reposed in them, by "selling for the sum of twenty-one dollars, a price grossly inadequate and less than could by reasonable effort have been obtained in cash, 35,000 shingles readily worth seventy dollars." There was evidence sufficient to go to the jury to prove the charge. The shingles had recently cost the county $87.50 and they were sold by the chairman at private sale (together with some lumber of his own) at twenty-one dollars, and the other defendants had assented to his action. There was no advertisement, and the defendants offered no evidence that they had made inquiry or endeavored to get a better price. The court correctly refused to charge that unless a corrupt intent was shown the jury must acquit, and told the jury if the defendants willfully and negligently omitted or re- (1005) fused to perform their duty, or negligently and willfully abused their discretion in regard to the sale of the shingles, as charged in the bill of indictment, the defendants were guilty. To the above charge and refusal to charge the defendants excepted. The jury found them guilty. They were fined one penny each and appealed.

There is no exception to the indictment or the admissibility of evidence. The judge told the jury that the defendants had the right to sell at private sale. The conviction is not for selling at private sale nor at a low price, but for willful negligence in not caring for the county property by selling "at a grossly inadequate price and at much less than by reasonable effort could have been obtained." The county is entitled to be protected not only against dishonesty in the sale of public property, but against want of reasonable effort to obtain a fair price. The gross inadequacy in the price obtained and the sale without opportunity given in some way, either by inquiry or advertisement, for competition was simply evidence offered to show negligence in the discharge of this duty, to obtain a fair price.

The indictment under the first clause of the act, which is but an affirmance of the common law, lies against officers for willful neglect of duty, not mere errors of judgment. 2 Wharton Cr. Law, sec. 1568. But we think that the charge is sufficient in this respect and under the instruction given by the court the jury must have concluded that the neglect was willful.

In *S. v. Hawkins,* 77 N. C., 494, it is held that any public officer

is liable to indictment at common law for any willful neglect of his duties or any abuse of his powers. The sale of the shingles (1006) in question was a matter entrusted to the defendants as public officers. They did not sell them corruptly. But it is found by the jury that they negligently sold them at less than one-third their cost and at a price grossly inadequate and less than could with reasonable effort have been obtained for them. Was a sale made by them without such reasonable effort, and thereby devolving loss on the county, a willful neglect or abuse of the powers and duties entrusted to them? It would seem clear that it was. If it was not, then it could hardly be possible to find an instance in which the common law or the first part of section 1090 would apply, but public officers would be liable for no malfeasance except in cases in which a corrupt intent is alleged and proved. This cannot be the law. Whether such conduct is an omission or neglect of duty which comes within the first clause of section 1090 of The Code, or is a neglect of duty at common law, is immaterial. In the present case, honesty and good intent are not a full defense. However honest the defendants may be (and their honesty is not called in question), the public have a right to be protected against the wrongful conduct of their servants, if there is a carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public.

No Error.

Cited: Stanley v. Baird, 118 N. C., 83; *Sanders v. Earp, ib.,* 279; *S. v. Ostwalt, ib.,* 1213; *S. v. Deyton,* 119 N. C., 882; *Staton v. Wimberley,* 122 N. C., 110; *S. v. Dickson,* 124 N. C., 874; *Williams v. Greenville,* 130 N. C., 99; *Turner v. McKee,* 137 N. C., 254; *S. v. Leeper,* 146 N. C., 661; *S. v. Berry,* 169 N. C., 373; *S. v. Mincher,* 172 N. C., 905; *Allen v. Reidsville,* 178 N. C., 533.

(1007)

STATE v. W. E. WORTH.

Indictment for Violation of City Ordinance—License Tax—Municipal Power to Tax Trades—Construction of Statute.

1. The word "trade," when used in defining the power to tax, includes any employment or business for gain or profit.
2. Section 3 of Article V of the Constitution authorizes the Legislature to tax trades, professions, franchises, and incomes. Section 3800 of The

Code empowers cities and towns to levy taxes "on all persons, property, privileges and subjects within the corporate limits which are liable to taxation for State and county purposes," and chapter 192, Acts 1876-77, confers upon the City of Wilmington authority to levy taxes on all subjects liable to taxation under section 3, Article V, of the Constitution: *Held*, that the City of Wilmington is authorized under the statutes named to levy a tax upon the manufacture and sale of ice.

3. A municipality authorized to tax trades, professions, franchises, and incomes is not bound to tax them uniformly as to amount.

4. An act authorizing the levy of a tax by a city on a particular date will be construed as authorizing the levy on that date or within a reasonable time thereafter.

Defendant was charged with violation of city ordinance of Wilmington and appealed from the ruling of the mayor to the Criminal Court of NEW HANOVER, at the January, 1895, Term of which he was tried before *Meares, J.*, and a jury.

The city tax laid against defendant as an ice dealer is under the following: "For the storage, manufacture or sale of ice at wholesale, with privilege of retailing, $66 per annum," which he insists is illegal.

Upon the trial below the jury found a special verdict as follows:

"That on June, 1894, the defendant carried on the business of ice manufacturer, converting water into ice, in the city of Wilmington, and of selling the said manufactured product at wholesale and retail in said city; that they had carried on said business for (1008) several years, and are still carrying it on. That on said 1 June, 1894, and for ten days thereafter, the defendants failed to pay the tax levied by the said city upon their business, being the tax found in the General Tax Ordinance passed 29 May, 1893, section 10, sub-section 52, and have not yet paid said tax. That there are merchants in said city who buy and sell ice that they do not manufacture, but defendants are not of this class. That the said city passed on 29 May, 1893, the General Tax Ordinance for the year 1893, and on 6 August, 1894, the General Tax Ordinance for 1894, both of which are hereunto annexed."

The court being of the opinion that the law on the above facts was against the defendants a verdict of guilty was entered, and judgment rendered in the sum of one penny each against the defendants, and that they pay the costs of this proceeding. From this judgment the defendants appealed.

The defendants, through their counsel, assign error as follows:

1. That the business of an ice manufacturer is not taxed by Pr. Laws 1860-61, chap. 180, p. 218.

2. That the city has no right to tax an ice manufacturer by virtue of Laws 1876-77, ch. 192, sec. 9, or by sec. 3800, vol. II, of The Code, or any other law appertaining to said city.

(1009) 3. Because the ordinance above referred to only applies to such business conducted up to 1 June, 1894, and is not covered by the Ordinance of 1894, as that was not passed until 6 August, 1894.

4. Because the tax imposed is not uniform, as the ordinance is generally discriminative, especially against ice manufacturers.

P. B. Manning with the Attorney-General for the State.
J. D. Bellamy, Jr., for defendant.

AVERY, J. The Constitution of North Carolina (Art. V, sec. 3) authorizes the Legislature to tax trades, professions, franchises and incomes. This power may be exercised directly for State purposes, or delegated by statute to the counties and towns as governmental agencies in order to provide for municipal expenses. The statute (The Code, sec. 3800) empowers cities and towns to levy taxes "on all persons, property, privileges and subjects within the corporate limits, which are liable to taxation for state and county purposes." The amended city charter (Laws 1876-77, ch. 192, sec. 9) confers authority to levy taxes on all subjects liable to taxation under Art. V, sec. 3, of the State Constitution, "and also on all other subjects of taxation on which authority to levy taxes enumerates." The power to tax trades, etc., is superadded to the general authority to impose a uniform *ad valorem* tax on all property.

One of the levies made by the City of Wilmington is described in its tax ordinance as follows: "For storage, manufacture or sale (1010) of ice at wholesale, with privilege of retailing, $66 per annum."

Does the power to tax trades authorize the imposition of this tax on the defendant as a manufacturer of ice? The appeal hinges upon the answer to this question. The power delegated by the State to its political subdivisions must be exercised within the scope of a strict construction of the language used by the Legislature and especially must governmental agencies show authority of law for the levy of taxes. Cooley Const. Lim., pp. 636 to 638; Sedgwick S. & C. Lim., 466; Southerland on Stat. C., sec. 378. But while this principle is well established we do not think that the city has transcended its authority. The word trade is often used in a more restricted sense to mean either the particular occupation of a mechanic or a merchant; but where it is used in defining the power to tax its broadest significance is given to it and it is interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupations or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit.

The Schooner Nymph, 2 Summers, 516 (opinion by *Justice Story*); *Bank v. Wilson,* Law Rep. (Exch. Div.), 108; *May v. Sloan,* 101 U. S., 231. We think that the city is empowered by the Act of 1876-77, certainly, if not by section 3800 of The Code, to impose the tax on manufacturers of ice.

It would be "sticking in the bark" to so construe the law as to restrict the authority to levy to the particular date (1 January) mentioned in the act. The city may every year, either on or within a reasonable time after the day mentioned, alter by increasing, diminishing or abrogating this specific levy on any of the subjects comprehended under the terms used in the Constitution, but it was not intended that the right to exercise the power should be limited to a particular day or that the city should be deprived of revenue upon any (1011) taxable trade because the authorities failed to formally declare on the first of June whether each specific levy should be increased, diminished or discontinued for the ensuing year. We see no force in the suggestion that the Legislature or the city, as a sub-agency of the government established by it, is bound to tax uniformly, as to amount, the different subjects of taxation comprehended under the general description as "trades, professions, franchises and incomes." It was not intended to limit the exercise of a sound discretion by compelling the city authorities to make the amounts exacted for converting meats into sausage and for manufacturing and selling ice exactly the same. No such rule of uniformity is prescribed in our organic law. When the power delegated to a city or town is abused in this respect the Legislature may restrict their discretionary authority by fixing a maximum or minimum limit for the tax on any or all of the subjects specifically taxed. But they have not done so and we see no evidence of abuse of power, if we had authority to correct or remedy such a wrong.

For the reasons given we think that there was

No Error.

Cited: Rosenbaum v. New Bern, 118 N. C., 93; *Guano Co. v. Tarboro,* 126 N. C., 71; *S. v. Irvin, ib.,* 993; *S. v. Hunt,* 129 N. C., 689; *S. v. Danenberg,* 151 N. C., 720; *Guano Co. v. New Bern,* 158 N. C., 355; *Drug Co. v. Lenoir,* 160 N. C., 573; *Mercantile Co. v. Mount Olive,* 161 N. C., 126; *Smith v. Wilkins,* 164 N. C., 140, 141; *Bickett v. Tax Com.,* 177 N. C., 435, 436.

(1012)

STATE v. IRA J. SCOTT.

Indictment for Selling Liquor on Sunday—Intoxicating Liquors—Question for Jury.

1. Where a liquor, by common knowledge or observation, is intoxicating, the court may so declare, but if it is doubtful whether it is intoxicating or not, then it is a question of fact for the jury; hence,
2. Where, in the trial of an indictment for selling spirituous liquors on Sunday, without prescription of a physician and not for medical purposes (section 1117 of The Code), the evidence was that the prosecuting witness drank four bottles of brandy peaches sold by the defendant and became drunk thereby, it was for the jury to determine whether the liquor was spirituous and intoxicating.

INDICTMENT for unlawfully selling spirituous liquors to one Archie Mathis, on Sunday, without prescription, etc., tried before *Hoke, J.*, and a jury, at February Term, 1895, of DUPLIN.

The Attorney-General for the State.
A. D. Ward for defendant.

(1015) FAIRCLOTH, C. J. The defendant was indicted for unlawfully selling spirituous liquors on Sunday without prescription, etc. The Code, sec. 1117, enacts: "If any person shall sell spirituous or malt or other intoxicating liquors on Sunday except on the prescription of a physician, and then only for medical purposes, the person so offending shall be guilty of a misdemeanor."

These are direct and unambiguous words. Two witnesses for the State testified that they drank of bottles of brandy peaches sold by the defendant on Sunday, and were made drunk thereby. The defendant testified in his own behalf that he sold brandy peaches without prescription, etc.; that he kept them in stock and sold them as groceries, as food; that the liquid was syrup and not brandy. His Honor charged the jury that if they believed the evidence the defendant had sold the articles on Sunday without prescription, etc., and the question of the defendant's guilt or innocence would depend on whether the articles sold were spirituous and intoxicating liquors, as described in the State's evidence; that if they were satisfied beyond a reasonable doubt that the liquor in which the peaches were preserved in the bottles sold was brandy or other liquor, and the same contained alcohol in sufficient quantities to make one drunk, when freely used, they would render a verdict of guilty, otherwise not guilty.

The whole evidence being before the jury, under the above charge, they necessarily had to determine whether the liquid in the bottles was brandy or syrup, as claimed by the parties, without other instructions.

His Honor properly gave the defendant the benefit of going to the jury on the question of the quality or character of the liquid drunk from the bottles, although this Court has held that when the liquid, by common knowledge and observation, is intoxicating, the court may so declare; but if it is doubtful whether or not it be so, then the question of fact is raised for the jury. *S. v. Giersch,* 98 N. C., 720, and several preceding decisions. (1016)

Affirmed.

Cited: S. v. Burton, 138 N. C., 578; *S. v. Parker,* 139 N. C., 588; *S. v. Piner,* 141 N. C., 763.

STATE v. B. L. PAGE ET AL.

Practice—Failure to Except Until After Verdict—Appeal.

Where defendant in a criminal action made no exception to the evidence or instructions to the jury, but after conviction and refusal of motion for new trial "excepted," without specifying anything to which he excepted, the judgment will be affirmed when no error appears on the record.

INDICTMENT, against B. L. Page et al. for assault and battery, tried before *Whitaker, J.,* at Spring Term, 1894, of ROBESON. The defendants were convicted and appealed.

The Attorney-General for the State.
No counsel contra.

FAIRCLOTH, C. J. The defendants made no exception to the admission of evidence nor to his Honor's charge. After verdict and rule for new trial discharged, the case states that "defendants excepted," but does not specify anything to which the defendants excepted. We have examined the record and find no error therein.

Affirmed.

Cited: Burnett v. R. R., 120 N. C., 519.

(1017)

STATE v. GEORGE ARKLE.

Indictment for Larceny—Larceny—Felonious Intent—Failure to Return Property Found.

1. To constitute larceny, there must be an original felonious intent, general or special, in the mind of the accused, at the time of the taking or finding lost property, otherwise it is a trespass only and not a felony.
2. The omission to use the ordinary means of discovering the owner of property lost and found raises a presumption of fraudulent intention against the finder, which it is necessary for him to explain and obviate, and this is done by showing that he endeavored to find the owner or that he openly made known the finding so as to make himself responsible to the owner for the value when he should appear.
3. In a trial for larceny it appeared that defendant, while away from home, received the property, consisting of a pocketbook containing money, bank certificates, and a check payable to the prosecuting witness, from his wife, who found it, defendant not having been present when it was found. The day after he returned home defendant wrote to the bank which issued the certificate for the name of the owner. There was some delay in returning the property, caused by a feeling engendered by correspondence with the owner, to whom defendant explained the whole matter, and by defendant's demand for a reward: *Held*, error to submit the case to the jury.

CRIMINAL ACTION, tried at November Term, 1894, of COLUMBUS, before *Brown, J.*

(1031) *The Attorney-General for the State.*
Lewis & Burkhead and J. B. Schulken for defendant.

FAIRCLOTH, C. J. The defendant was indicted for stealing a pocketbook containing money, bank certificates and a check payable to the prosecutor, also for receiving the same knowing that they were stolen property. The second count was withdrawn and is out of the case.

In every instance there must be an original, felonious intent, general or special, at the time of the taking or finding of lost property, in the mind of the accused, to construe larceny. If such intent be present, no subsequent act or explanation can change the felonious character of the taking. If it be not present, it is only a trespass and cannot be made a felony by any subsequent misconduct or bad faith in the taker. "The omission to use the ordinary and well known means of discovering the owner of goods lost and found, raises a presumption of fraudulent intention, more or less strong against the finder, which it behooves him to explain and obviate; and this is most readily and naturally done by evidence that he endeavored to discover the owner, and kept the goods safely in his custody, until it was reasonably supposed that he could not

be found, or that he openly made known the finding, so as to make himself responsible for the value to the owner when he should appear. In this class of cases it is material for the prosecutor to show that the felonious intent was contemporaneous with finding." 3 (1032) Greenleaf Ev., sec. 159; Rapalje on Larceny.

It it urged by the Attorney-General that the defendant's delay from 9 May to 6 June to disclose the fact that he had possession of the pocket-book, with internal evidence of the ownership, was some evidence of an original felonious intent and was sufficient to be submitted to the jury. If that were so, it could only relate to the receiving of the pocket-book from his wife, as there is no evidence that he was present at the finding of the lost article, and the count for receiving is not before the court. We do not think, however, that the evidence was such as ought to be submitted to a jury. His explanation is found in his letters used by the State, in which it appears that on the day after his return to his home in Wheeling, West Virginia, from a Southern tour, he made a proper and reasonable effort to discover the owner by writing to the bank at Wilmington, which had issued the certificates, etc., and in a few days explained the whole matter to the owner and kept his property safe for him. Without this voluntary disclosure, the prosecutor had not a scintilla of evidence by which he could trace his property or the defendant. Our views on such evidence as we think should not go to the jury were fully expressed in *Young v. R. R., ante,* 932. The further delay in the matter seems to be the result of some feeling engendered by the correspondence, and because defendant demanded compensation or reward. This does not affect the main question. In *Regina v. Gardner,* L. & C. Crown Cases, 243, this case is found: Bougher, a lad fourteen years old, found a check and soon showed it to the defendant, who took it and refused to return it. He knew and saw the owner but held the check for a reward, and the jury so found. Held by the Court that the facts do not show any felonious intent, and that the mere withholding the check did not amount to such a taking as is required to constitute the offense of larceny. (1033)

New Trial.

Cited: S. v. Foy, 131 N. C., 806.

STATE v. J. B. MCCORMAC.

Murder in the First Degree—Premeditation.

1. In the trial of one charged with murder in the first degree it is not essential that the prosecution, in order to show *prima facie* premeditation and deliberation on the part of the prisoner, should offer evidence tending to prove a preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution.
2. In order to warrant the trial judge in submitting to the jury the question of defendant's guilt, in a trial for murder in the first degree, it must have appeared in some aspect of the evidence that the defendant deliberately determined to kill the prisoner before inflicting the mortal wound.
3. In a prosecution for murder in the first degree, it appeared that the defendant had gone to the house of deceased in the evening, armed; had, in conversation with the deceased, shown two pistols; had remained until 2 o'clock, when the deceased was shot. That there was no quarrel immediately before the shooting. That when he fired he said, "I guess that will do you," laid one of his pistols beside deceased, and remarked, "I reckon you will let me alone now": *Held*, it is not error to submit the question of defendant's guilt of murder in the first degree to the jury.
4. If the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial.

INDICTMENT for murder, tried before *Brown, J.*, and jury, at October Term, 1894, of ROBESON. The defendant was charged with the murder of Thomas Smith on 3 July, 1894, was convicted and appealed. The facts sufficiently appear in the opinion of *Associate Justice* (1034) *Avery.*

The Attorney-General for the State.
French & Norment and Herbert McClammy for defendant.

AVERY, J. It is not essential that the prosecution, in order to show *prima facie* premeditation and deliberation on the part of a prisoner charged with murder in the first degree, should offer testimony tending to prove a preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution. "In order to conviction of murder in the first degree (said this Court in *S. v. Norwood,* 115 N. C., 789), as the judge below properly instructed the jury, it is necessary that the State should show that the prisoner deliberately determined to take the child's life by putting the pins into its mouth, and thereupon (it being immaterial how soon after resolving to do so) carried her purpose of so using the pins into execution and thereby caused death." It must have appeared in some aspect of the evidence that the accused deliberately determined to kill the prisoner before inflicting the wound,

in order to warrant the judge in submitting the question of his guilt on the charge of murder in the first degree to the jury. If the witnesses testified to the truth of facts and circumstances tending to show that while they were together on the occasion when the homicide occurred or even during the conversation which terminated in the shooting, the prisoner upon sufficient deliberation to make it a fixed and definite determination, formed the purpose to shoot and kill the deceased, it was the duty of the court to allow the jury to pass upon the issue of guilt or innocence of murder in the first degree. There was, we think, testimony tending to show that the shooting was done after premeditation and deliberation. The prisoner had gone to the (1035) house where the deceased, his brothers, and others were during the evening and had remained talking either to the deceased alone or to the others with him, till 12 o'clock at night, when the deceased was shot. During all of that time his horse, harnessed to his buggy, was hitched near where they were talking. A witness stepped out into the field, leaving a lamp burning, and the other members of the party drinking with prisoner and deceased. The pistol fired while he was out and on his return the lamp was extinguished and deceased was shot—the two brothers of the deceased being then asleep. When the pistol was fired the prisoner said, "I guess that will do you." He then walked up to deceased where he was lying dead, and placing one of his pistols beside him said, "I reckon you will let me alone now." During his conversation with deceased it was in evidence that prisoner had two pistols in his hip pockets and that in the earlier part of the evening one of them was stuck in his pocket with the muzzle upwards, but that later while talking with deceased he had the two pistols out in his hands and put them into his pockets in the usual position. Just before the shooting occurred the prisoner walked off from the deceased as if going out of the piazza and while deceased was standing with his side towards him. He turned, however, as he was walking away and fired at Smith, whose relative position still remained the same. Apart from the testimony of the prisoner it does not appear that deceased was even quarreling with prisoner just before the latter walked down the piazza and fired. Defendant's own version of the affair, if believed, would unquestionably put a different hue upon the transaction, but there was not only no other evidence of legal provocation but no other evidence of a quarrel, abuse or insult, that might have tended to show that he acted under the influence of sudden passion. While premeditation and deliber- (1036) ation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that

the prisoner acted upon a deliberately formed purpose. *S. v. Fuller,* 114 N. C., 885. Kerr on Homicide, sec. 72, says: "The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense." The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, while sudden passion aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design.

We think that there was no error in leaving the jury to find upon the testimony whether or not the killing was done in pursuance of a preconceived purpose deliberately formed. In arriving at a conclu-
(1037) sion they would naturally look to the testimony as to the conduct of the prisoner at and about the time of the homicide, and the attendant circumstances, to throw light upon the question, rather than to a computation of the time intervening between the formation and execution of the purpose.

The guilt or innocence of the prisoner depended upon whether his intent to kill had been definitely formed, not upon the length of time that he had cherished the purpose.

For the reasons given the judgment is

Affirmed.

Cited: S. v. Gadberry, 117 N. C., 826; *S. v. Covington, ib.,* 861; *S. v. Thomas,* 118 N. C., 1118; *S v. Dowden, ib.,* 1153; *S. v. Rhyne,* 124 N. C., 854, 858; *S. v. Smith,* 125 N. C., 621; *S. v. Truesdale, ib.,* 698; *S. v. Bishop,* 131 N. C., 761; *S. v. Hunt,* 134 N. C., 688; *S. v. Lipscomb, ib.,* 693; *S. v. Daniel,* 139 N. C., 552, 553; *S. v. Jones,* 145 N. C., 470; *S. v. McDowell, ib.,* 566; *S. v. Stackhouse,* 152 N. C., 808; *S. v. Daniels,*

164 N. C., 469; *S. v. McClure,* 166 N. C., 332; *S. v. Cameron, ib.,* 384; *S. v. Bynum,* 175 N. C., 780; *S. v. Lovelace,* 178 N. C., 767; *S. v. Baity,* 180 N. C., 725.

STATE v. HENRY HORN.

Indictment for Murder—Threats—Subsequent Reconciliation—Sudden Provocation—Manslaughter.

1. While threats made in a thoughtless and bragging manner should not receive too much consideration from a jury, yet they are competent and proper evidence, and what weight they should have with a jury is a question for them under proper instructions from the court and a consideration of all the circumstances under which they were made.
2. Where, in the trial of a prisoner charged with murder committed in 1883 (before the passage of the Act of 1893), the evidence showed that defendant had made threats against the life of the deceased, but that thereafter, on the day of the killing, their relations were friendly and that the immediate provocation to the homicide was the shooting of defendant's brother by the deceased: *Held,* that the jury should have been instructed that, if they found these facts, defendant could be convicted of manslaughter only, inasmuch as, after the reconciliation, the law would presume the crime to be due to the new and sudden provocation and not to previous malice.

INDICTMENT for murder found in 1883, and tried before (1038) *Brown, J.,* and a jury, at October Term, 1894, of ROBESON. There was evidence tending to show that previous to and on the day on which the prisoner shot and killed David Butler, the two men had been on unfriendly terms and that the prisoner had said that he intended to kill Butler before many days. One witness testified that on the morning of the day on which deceased was killed prisoner had said that he had a yellow jacket in his pocket that was going to sting Butler before night. There was evidence, also, tending to show that on the day of the homicide the relations of the parties were friendly and that prisoner had attempted to pacify the deceased, who had been drinking, and had told him that he was a friend of his and that he, the prisoner, had had nothing to do with a difficulty which deceased had with prisoner's brothers. The evidence showed that just before the killing, deceased had shot a brother of the prisoner, and one witness testified that when the prisoner shot and killed the deceased, the latter was attempting to shoot the prisoner and another brother of the prisoner.

The prisoner testified in his own behalf as follows: "The killing of Butler took place near my store; don't know who came there first, Butler or myself; think we went there about the same time. Butler said to me: 'Let me see you a little. I suppose you the going to give me a good thrashing about the difficulty between me and John Horn?' I said it was not so. 'Have not said a word against you. You and I are good friends. Let us remain so. I had nothing to do with yours and John's difficulty. I have a family to provide for.' Butler said, 'Damn your family. My father has a family.' Butler then had his hand on his pistol and cursed me. I said, 'We have been good friends, let us remain so.' Butler said, 'Your damned brother has sworn to lies about me,' and said he would shoot the Horn boys, and put his hand on his pistol. I said, 'If that is what you (1039) are up to I'll leave.' I tried to pacify Butler two or three times that day, and told him I wanted us to remain friends; that I had nothing to do with his troubles with my brother. I was friendly up to the time he shot James and attempted to shoot me. I went off to the gin about noon. Butler was not at the store when I returned. Gaddy wanted to get in the store to get some flour. Asked him if he could wait until I got my dinner, and he said, 'Yes.' Got my dinner, and went to get in the store to get the flour for Gaddy. As I was going into the store Butler caught me by the arm, cursed me and threatened to kill the last one of the damned Horn boys; and said, 'The last one of you are a sheep-eating set.' I said, 'Let me alone. Don't wish any trouble with you.' I went into the store. While I was getting the flour someone said Butler had his pistol drawn on Jim Horn. I cannot say Butler had his pistol drawn on Jim Horn. I asked Butler please not to shoot. Butler's pistol did not fire the first time, but fired the second time, when he shot Jim Horn, who was my brother. Butler then pointed his pistol at me twice. It snapped the first time. The second time he threw up his pistol on me I shot him. I never had the conversation with Campbell. Never had any such conversation with Ed. Gaddy. Was very friendly with Butler. When I went to the gin I did not expect to see Butler any more that day. Had nothing against Butler. I went away; was gone for a few years; did not run away; came back, and voluntarily surrendered."

No one testified that Henry Horn was not friendly with Butler on the day that Butler was killed, or that Henry Horn had ever done or said anything to show that he was unfriendly with Butler, except as (1040) it may appear as herein recited.

The prisoner contended that he was not guilty of anything more than excusable homicide, and if the jury should be against him on that position they could not find him guilty of anything more than manslaughter. Prisoner's counsel during his argument to the jury turned to the court and requested that the court charge the jury that there was

no evidence of murder in this case, and that his Honor should so charge the jury, and take the question of murder away from the jury. The court stated in reply to the questions of the counsel that the court declined to charge the jury that there was no evidence of murder in this case to be considered by the jury, to which remark of the court the prisoner duly excepted.

Prisoner's counsel further contended, and argued to the jury as well as to the court, that in no view of the evidence could the prisoner be found guilty of murder, because all the malice that could be implied was from the killing with a pistol, and all the expressed malice that could be found from the evidence, was, as a question of law, rebutted by the facts, as proven by the State as well as the defendant's witnesses.

The court in reply to this argument, and addressed to it by the prisoner's counsel, said to the counsel that the counsel had overlooked in this argument one view taken by the solicitor, which was that the State contended that it had shown evidence of actual expressed malice, to be considered by the jury, other than legal malice implied by the law from the use of a deadly weapon. Prisoner's counsel duly excepted to this remark of the court.

Prisoner's counsel virtually requested the court to charge that the shooting of James Horn by Butler and the almost immediate shooting of Butler by Henry Horn, the brother of James Horn, and the further fact that Henry Horn was friendly with Butler after the alleged threats and conversations rebutted any implied malice, (1041) and also any actual expressed malice that could be proved by the witnesses introduced in the case. This request was read by counsel from a written statement of the law, as contended for by him, and which he used in arguing the case to the jury and to the court. The court then charged the jury as follows: The crimes of murder and manslaughter were defined, and the jury were told that the case was to be tried under the law as it existed in this State prior to the Act of 1893. That the prisoner has admitted that he killed the deceased, David Butler, with a pistol in Robeson County, in September, 1893. This puts the burden of proof upon the prisoner to show, to the satisfaction of the jury, but not beyond a reasonable doubt, that such killing was justified or excusable; or to show such circumstances as will reduce the killing from murder to manslaughter. Prisoner is not required to show anything beyond a reasonable doubt.

The court then charged that malice is presumed from the killing with a pistol under the law as applicable to this case; and in addition, it is contended upon the part of the State, that it has shown evidence of expressed malice and threats before the homicide. The court then recited to the jury the facts in evidence relied upon by pris-

oner's counsel in argument, sustaining the prisoner's plea that the killing was done in self-defense. The court recited the facts in evidence relied upon by the solicitor in his argument, tending to show that the homicide was murder, and also recited the evidence in the case bearing upon the views of manslaughter. The court then charged:

As to murder: 1. If the jury believe the prisoner determined before he went to the store that he would kill Butler, on the day of the homicide, and armed himself for this purpose and went to the scene of homicide, with such intent and purpose, and entered into the difficulty to
(1042) carry out his purpose, and succeeded in such preconceived purpose of killing the deceased, the prisoner is guilty of murder.

2. If the deceased and James Horn had a difficulty, and after the difficulty was over, the deceased was walking towards his horse, although a pistol in his hand, and the prisoner, actuated by malice, and for the purpose of carrying out a previously formed determination, intent and plan to kill the deceased, came out of the store, shot and killed him, the prisoner is guilty of murder.

As to manslaughter: 3. If the prisoner was not moved and actuated by expressed malice towards the deceased, and was not carrying a previously formed plan to kill him, but saw that his brother and deceased were engaged in a fight, and that the deceased fired at his brother, James Horn, and the prisoner ran out of the store, and, acting under the excitement of the moment, or the anger engendered, fired and killed the deceased as he was walking away, and towards his horse, the prisoner would be guilty of manslaughter. It would also be manslaughter provided the jury shall believe that the prisoner, acting in good faith, fired in defense of his brother, and the jury shall be of the opinion that at the time of firing the prisoner had no reasonable grounds to believe that Butler would do his brother any further bodily harm.

These were the two views of manslaughter presented to the jury by the court.

As to self-defense: 4. The court explained that when a man is attacked by another with a pistol he is not required to retreat, but may slay his adversary: and then charged if the prisoner saw his brother engaged in defending himself against an attack by the deceased, who was armed with a pistol (the brother James Horn being unarmed, as the evidence, if believed, shows, except in respect to the stick,
(1043) testified to by the witnesses), and if the prisoner believed, and, in the opinion of the jury had reasonable grounds to believe, that the deceased was trying to kill his brother James, or to do James some great bodily harm, then the prisoner had a right to fire and kill the

deceased in defense of his brother, and it would be excusable homicide, and the prisoner not guilty.

If the jury believe that the prisoner had formed a previous plan to kill the deceased, and was not then engaged in carrying out such plan and resolution, and that the prisoner came out of the store, although armed with a pistol in hand, and that the deceased turned on prisoner as testified to, and drew his pistol on the prisoner, so that the prisoner had reason to believe that the deceased was endeavoring to shoot prisoner, then the prisoner had a right to shoot and kill the deceased and it would be excusable homicide, and the prisoner not guilty.

There was a verdict of guilty of murder and a motion for new trial, which was refused, and from the judgment thereon and sentence of death defendant appealed.

The Attorney-General for the State.
French & Norment and Herbert McClammy for defendant.

FURCHES, J. We do not think defendant's exceptions, to the reply of the court to the questions asked the court during the argument of the case to the jury, can be sustained. We do not know whether they are excepted to as being out of time or as being erroneous. But we do not think they can be sustained on either ground. If the exceptions are put on the question of time, it would seem they were made in response to questions addressed to the court by defendant's counsel. And it may fairly be inferred that the counsel for defendant wished to know the views of the court at that time, that he might the (1044) better know how to direct his argument, and that the court so understood him. And whether this was the object of counsel or not, it is a reasonable inference to be drawn from the questions, and we do not think defendant has any just ground for complaint. Nor do we think these exceptions can be sustained upon the ground of error in law, as in our opinion there was evidence in the case involving murder, manslaughter and excusable homicide.

It was admitted that the defendant killed the deceased David Butler with a pistol. This threw the burden on the defendant. The State then offered two witnesses, whose testimony tended to show previous threats and express malice on the part of defendant. And while these were denied by defendant, he offered evidence tending to show that after the alleged threats (which the State insisted showed express malice) the deceased and the prisoner had talked the matter of John Horn over, that prisoner had assured the deceased that he had nothing to do with that trouble, telling the deceased that they had always been friends, and that he did not want any trouble with the deceased. And the court

in the case on appeal states that "no one testified that Henry Horn was not friendly with Butler on the day that Butler was killed, or that Henry Horn had ever done or said anything to show that he was unfriendly with Butler, except as it may appear as herein recited." Evidently referring to the testimony of Campbell and Gaddy. And defendant insisted that if it should be found by the jury that defendant had made the alleged threats, that it also appeared that he (defendant) had become reconciled and was friendly with the deceased on the day of the homicide; and asked the court to charge that the law
(1045) inferred the killing was from the recent provocation. This the court declined to do. And upon this view of the case we think there was error.

We do not think courts and juries should give too much weight to threats—often made in a thoughtless, bragging manner, without any purpose of ever carrying them into execution, and sometimes made in the moment of passion, soon to pass away with the passion that produced them. But still they are competent and proper evidence, and as to what weight they shall have is a question for the jury, considered under proper instructions from the court and all the circumstances under which they were made. This evidence made it necessary to submit the question of murder to the jury.

But to remove this testimony from the case, it would seem that the offense would be reduced to manslaughter, as the provocation of defendant, seeing the deceased shoot down his brother, or seeing his brother and the deceased a few moments after the deceased had shot down defendant's brother, was very great. Therefore it became of the utmost importance in the trial that the court should properly charge and instruct the jury as to the law of previous threats tending to show express malice, as affected by an after reconciliation. This the court did not do. The court should have charged the jury that every question of fact necessary for the conviction of defendant and every question of fact necessary for defendant's defense, should be found, from the evidence in the case, to be true. That if the defendant did make the threats, as testified to by the witnesses for the State, then this would tend to show express malice on the part of the defendant. But if they should so find, then they should consider the evidence offered by the defendant tending to show a reconciliation on the part of the defendant, and that defendant after the threats was friendly with the
(1046) deceased. And if they should find from the evidence that he was, then the law no longer attributed the killing to previous malice, but inferred it was from the new and sudden provocation. *S. v. Barnwell,* 80 N. C., 466. And if it was done under the new provocation, the defendant would not be guilty of murder but only of manslaughter.

S. v. Hill, 20 N. C., 629; *S. v. Ta-cha-na-tah,* 64 N. C., 614; *S. v. Jacob Johnson,* 47 N. C., 247; *S. v. Matthews,* 78 N. C., 523.

In this opinion we have not considered the question of self-defense as it was not necessary that we should do so, and merely mention it here to show that we have not considered it.

We notice his Honor (doubtless through inadvertence, as we find the same thing in other cases) in charging the jury uses the expression "believe" where we think he should have said, if you "find as a fact from the evidence." We merely mention this, as we see it in this case, and in other cases. But in this opinion, we have laid no stress upon this matter, and do not consider it in making up our judgment.

There is error in the matter pointed out in this opinion, for which defendant is entitled to a

New Trial.

Cited: S. v. Byrd, 121 N. C., 686.

(1047)

STATE v. JULIUS ROBINSON.

Indictment for Carrying Concealed Weapons—Former Conviction—Appeal by State.

1. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.
2. An assault with a deadly weapon is an entirely separate and distinct offense from that of "carrying concealed weapon," the assault being a complete offense whether the weapon is carried secretly or openly.
3. A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon.
4. Where the jury returns a special verdict on the facts and the court enters a verdict thereon of not guilty, the State may appeal.

INDICTMENT for carrying a concealed weapon, to-wit, a pistol, tried before *Norwood, J.,* and a jury, at April Term, 1895, of BRUNSWICK. The defendant pleaded not guilty and "former conviction." The jury found the following special verdict: "That on 1 March, 1895, in the county of Brunswick, the defendant had and carried concealed about his person while off his own premises a certain pistol as charged in the indictment; that at April Term, 1895, of this court the said defendant

was tried and convicted upon an indictment for an assault and battery committed 1 March, 1895, upon one John Billups with a certain deadly weapon, to-wit, the pistol before mentioned; that the time of carrying the concealed weapon as aforesaid was the same time at which the assault and battery upon Billups was committed and for which the defendant was convicted as aforesaid. If upon this state of facts the court is of opinion that the defendant is guilty, then the jury find him guilty, otherwise not guilty."

Upon the special verdict the court adjudged the defendant not guilty and from a judgment discharging the prisoner, the State appealed.

The Attorney-General for the State.
No counsel contra.

(1048) CLARK, J. In *S. v. Stevens,* 114 N. C., 873, it is said, "A single act may be an offense against two statutes and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Accordingly it was there held that the same act of selling a single glass of liquor might be separately punished by the United States, by the State and by the city, if sold without a license from each. While the act is one, the offenses are different. *S. v. Yancy,* 4 N. C., 133; *S. v. Reid,* 115 N. C., 741. Here, however, the acts are separate, "assaulting" and "carrying concealed weapon." The assault is an entirely separate and distinct offense from that of carrying a concealed weapon, and it does not alter the case that the assault was made with a weapon illegally concealed. The assault with a deadly weapon is a complete offense whether the weapon is carried concealed or openly. The offense of carrying a concealed weapon is complete, irrespective of the fact that an assault is or is not committed with it. Therefore the conviction for an assault with deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. *S. v. Nash,* 86 N. C., 650; *S. v. Morgan,* 95 N. C., 641.

It was sufficient upon the special verdict for the court to have judgment that the defendant was or was not guilty, but the entry upon such opinion of a verdict of not guilty worked no harm and did not prevent the appeal by the State. *S. v. Ewing,* 108 N. C., 755; *S. v. Spray,* 113 N. C., 686; *S. v. Gillikin,* 114 N. C., 832.

Upon the facts found by the special verdict a judgment of guilty

should have been entered. The case will be remanded that it may be so entered and sentence passed on the defendant in accordance therewith. *S. v. Cody,* 111 N. C., 725.

Reversed.

Cited: S. v. Lawson, 123 N. C., 742; *S. v. Smith,* 126 N. C., 1059; *S. v. Taylor,* 133 N. C., 759; *S. v. Lytle,* 138 N. C., 740; *S. v. Hooker,* 145 N. C., 584; *S. v. Ditmore,* 177 N. C., 594.

(1049)

STATE v. JOEL LILLY.

Indictment for Carrying Concealed Weapons—Presumption—Evidence.

1. The gist of the offense of carrying a concealed weapon is the manner of carrying it—the offense being not the carrying of a weapon but the carrying a concealed weapon.
2. The statute (section 1005 of The Code) raises a presumption that the weapon is concealed upon proof that the defendant has it about his person off his own premises.
3. Where, in the trial of an indictment for carrying a concealed weapon, it appeared in evidence that the defendant, while off his own premises, had a pistol on his person under his overcoat, but it was not shown whether the overcoat was worn open or buttoned, and there was also evidence that the pistol could be seen: *Held,* that it was error to instruct the jury that if they believed the testimony the defendant was guilty, inasmuch as it was a matter for the jury, and not for the judge, to determine whether the evidence was sufficient to rebut the presumption of concealment raised by the statute and whether or not the weapon was in fact concealed.

INDICTMENT for carrying a pistol concealed about the person of the defendant, tried at Spring Term, 1895, of STANLY, before *Robinson, J.,* and a jury.

Tine Christian, a witness for the State, testified that she saw the defendant off his own premises with a pistol in a belt around his body; that the defendant had on his overcoat, but that the pistol could be seen, either when the defendant was sitting down or standing up.

The defendant introduced no testimony and the court charged the jury, that if they believed the evidence the defendant was guilty.

There was a verdict of guilty and the court gave judgment imposing a fine, from which judgment the defendant appealed.

(1050)

The Attorney-General for the State.
Bennett & Bennett for defendant.

CLARK, J. The statute raises a presumption that the weapon is concealed upon proof that defendant has it about his person off his own premises. The Code, sec. 1005. The defendant to rebut this presumption relies on the evidence "that the pistol could be seen either when the defendant was sitting down or standing up." On the other hand, the State relies on the fact that the defendant had it on under his overcoat. It does not appear how the overcoat was worn, whether open, displaying the weapon, or partly buttoned up. It could not have been buttoned up entirely, since the weapon "could be seen." Whether the presumption of concealment was rebutted, whether the weapon was in fact concealed, but a close scrutiny might have enabled one to see it, or whether in fact it was worn openly, the overcoat unintentionally in certain positions obstructing the view, was a question which should have been left to the jury. The indictment is for carrying a concealed weapon, not for simply carrying the weapon. *S. v. Dixon,* 114 N. C., 850. The gist of the offense is the manner of carrying it. The jury should have been told that the burden was on the defendant to rebut the presumption of concealment, and upon the evidence whether that presumption had been rebutted, should have been left to them under proper instructions. Possibly his Honor's view on the facts was right, if he had been sitting as a juror, but as different conclusions might have been drawn from the evidence, the case should have been left to a jury.

New Trial.

Cited: S. v. Hinnant, 120 N. C., 573; *S. v. Reams,* 121 N. C., 557; *S. v. Boone,* 132 N. C., 1110; *S. v. Simmons,* 143 N. C., 617; *S. v. R. R.,* 145 N. C., 572; *S. v. R. R.,* 149 N. C., 474; *Westfelt v. Adams,* 159 N. C., 424.

(1051)

STATE v. RED MILLS.

Indictment for Slandering Innocent Woman—Slander—Evidence—Word Spoken or Written Before Action Begun—Animus.

1. Words written or spoken before or after those which form the basis of an action or indictment for slander are admissible to show the animus of the defendant, also the mode and extent of their repetition.
2. On trial for slander of a woman, after the defendant, as a witness, had admitted the innocence of the prosecutrix, and had undertaken to justify the words spoken on the ground that he had only repeated a rumor, without wrong motive, an affidavit made by him, at a prior term of court, to secure a continuance on the ground of the absence of a witness by whom he expected to prove the unchastity of the prosecutrix, was properly admitted.

STATE *v.* MILLS.

INDICTMENT for slandering an innocent woman, tried before *Robinson, J.*, at Spring Term, 1895, of UNION. The defendant was convicted and appealed. The facts and ground of appeal are set out in the opinion of *Chief Justice Faircloth.*

The Attorney-General for the State.
No counsel contra.

FAIRCLOTH, C. J. The defendant was indicted for slandering an innocent woman. At some term of court before the trial term, the defendant filed an affidavit for a continuance, because of the absence of certain witnesses by whom he expected to prove an actual, sexual intercourse of the prosecutrix with another person.

At the trial, after the State rested its case, the defendant caused himself to be examined as a witness in his own behalf, when he admitted the innocence and virtue of the prosecutrix and undertook to justify the words spoken by swearing that he was simply repeat- (1052) ing a rumor that he had heard; that he meant no harm by it and that he had requested the party to say nothing about it. After defendant's evidence was closed the State offered the affidavit above referred to for the purpose of showing defendant's animus in speaking the words charged in the indictment. This evidence was objected to, but admitted, and the defendant excepted. Verdict of guilty.

The affidavit was competent evidence. The plea of justification put on the record is an aggravation, if the defendant either abandons the plea at the trial or fails to prove it. Words written or spoken before or after those sued on are admissible to show the animus of the defendant, also the mode and extent of their repetition. Odgers Libel and Slander, secs. 178, 272; Folkard's Stookey on Slander and L., sec. 580; Newell Defamation, S. and L., page 331, sec. 31, page 348, secs. 56, 58. Any words spoken before or after action begun, are competent to show the degree of malice. *Brittain v. Allen,* 13 N. C., 125; *James v. Clarke,* 23 N. C., 397.

No Error.

Cited: S. v. Howard, 169 N. C., 314.

(1053)

STATE v. L. A. CROWELL.

Indictment for Seduction Under Promise of Marriage—Deceit—Statute of Limitation—Instructions—Sentence.

1. Deceit being the very essence of the offense, the statute (section 1177 of The Code) exempting certain crimes, including deceit, from the two years statute of limitations, applies to the offense of seduction under promise of marriage.
2. Although, where there is a request that the charge of the trial judge shall be put in writing, the entire charge must be written, yet this rule does not forbid any and all oral expressions from the presiding judge. Hence, where, by an expression to the jury, the defendant, in the trial of an indictment, got the benefit of a prayer for instructions, the defendant cannot complain that it was not put in writing.
3. A "virtuous woman," within the meaning of the statute, is one "who has never had illicit intercourse and who is chaste and pure," and it was not error in the trial of a defendant charged with seduction under promise of marriage to refuse to add to such definition the words "and she must have a mind free from lustful and lascivious desires."
4. Chapter 248, Acts 1885, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment.
5. The fact that a sentence both of fine and imprisonment was imposed, when only one was authorized, does not entitle defendant to a new trial, but the case will be remanded for proper sentence.

INDICTMENT for seduction of an innocent and virtuous woman, under promise of marriage, found at Spring Term, 1895, of CATAWBA, before *Timberlake, J.*, and a jury.

Miss Etta Propst, the prosecutrix, testified: "I am twenty-two years old; have lived always in Catawba County. First met defendant when I was about twelve years old. He was living in Lincoln County, about one and a half miles from where I lived. I was an innocent woman up to the time I became intimate with defendant. We were engaged to be married; engagement was made when I was sixteen years old. He paid attention to me as a friend with all respect he could; made evening calls; went out riding; to my sister's reception and to his own house; he brought his sisters to see me often; he took me to his house once or twice; took me to sociables; to Mr. Dellinger's and Mr. Reinhardt's;

paid attention to me at church and respected me with all respect
(1054) he could. It was in June or July when engagement took place;

I have one child; Dr. Crowell is its father; it was about one year before birth of child that I became engaged to defendant; child

will be five years old next May; up to time of said engagement I was an innocent woman; it was a year after engagement before I had sexual intercourse with him; at this time he was living at his own home; about one year after sexual intercourse before child was born; first had sexual intercourse with him in my father's parlor. He lived in Lincoln County from engagement to birth of child. He was away part of the time in Baltimore. I told him he ought to fulfill his promise; he told me some time in the future would be better; don't know how often I told him; he put me off several times in that way. Defendant wrote me several letters (letters are shown her which she identifies as his handwriting). His faithful promise to marry me and his persuasions made me yield; I begged him not to ask it; I cried to him not to ask it. (Child is here shown her which she says is hers.) I had another admirer besides him and he asked me to make him quit; asked me if I would rather marry him to stop other fellows, which I did."

Cross-examined.—"As near as I can recollect it was about one year before sexual intercourse that we became engaged. He asked me to stop Gus Shuford if I would rather marry him, and I stopped him; something else was said about marriage; he gave me his right hand and promised if anything happened at time of first connection he would marry me immediately. He went away in September to attend lectures; this intercourse had continued a month or so; it was first of July, 1889; he had connection with me from the first time till he left more than once; he came home in March; child was born in May, 1890; suppose it was July, 1888, when I became engaged to him; don't think I told my father; have no mother or step-mother; I told my sister soon after we became engaged; I didn't find out my condition (1055) till after he went to lectures; I asked him to fulfill his promise as soon as I saw him; he said it was not a suitable time; I mentioned it to him as often as I saw him; he came often before and afterwards; can't recollect number of times I mentioned it to him; he said about the same thing every time—that it would be better in future; he told me not to tell anybody; said his folks were against it; I told my father of my engagement before and after pregnancy; I could not get heart up to tell him and sister told him; I told him it was under promise of marriage; can't say how long before birth of child before I told him. We had right smart of company; it was not customary to put light out; it was not frequently done—it might have been done sometimes; I was in sitting-room with light out with no one else but him; it was not a frequent occurrence for young men to put lights out; I have with him put light out a time or two; no one else was in there when lights were out as I recollect; it was before he had connection with me that he told me if anything happened he would marry me."

Letters from the defendant to prosecutrix written after the pregnancy and tending to show a promise of marriage admitting the paternity of the child, were read in evidence under objection by the defendant.

There was evidence corroborative of the testimony of the prosecutrix as to the attentions paid to her by the defendant from the time she was twelve years of age up to the time of her pregnancy, during which time he attended her in public at parties and receptions and, on occasions, carried her to the house of his father, where his sisters lived, and other friends, good and respectable people.

One witness, sister of prosecutrix, testified that shortly after the birth of the child, when asked why he did not carry out his promise
(1056) of marriage, defendant did not deny that he had made a promise but said that he was not then financially able to marry.

The defendant testified in his own behalf, admitting the illicit intercourse with prosecutrix (which he alleged began in January, 1889, instead of July, 1889), but denied that the seduction was under promise of marriage, and stated that he had at no time before the illicit intercourse promised to marry her.

Among other instructions prayed for by the defendant and refused by the court was the following:

"The State must satisfy you beyond a reasonable doubt, by her own and by independent corroborating evidence, that the prosecutrix prior to the alleged seduction was of a virtuous and pure mind and heart; that is, a mind free from lustful and lascivious desires and, unless you are so convinced, you will acquit the defendant."

There was a verdict of guilty and the court adjudged that the defendant pay a fine of $5,000 and be imprisoned in the State penitentiary for five years. Defendant appealed.

The Attorney-General for the State.
Jones & Tillett and D. W. Robinson for defendant.

CLARK, J. The Code, section 1177, excepts from the two years statute of limitation, perjury, forgery, malicious misdemeanors, and deceit. There has never been such an indictable offense as "deceit," but the meaning of this section has always been that misdemeanors, the gist of which was malice or deceit, are within the exception. In *S. v. Christainbury,* 44 N. C., 46, it was held that there being no such offense as "deceit," it would apply to "cheating by false token" of which deceit was the gist, but would not include "conspiracy to cheat" "the gist of
(1057) which offense is the conspiracy and the cheating but an aggravation." That decision did not restrict deceit to "cheating by false token," but instanced that as an offense coming within general de-

scription of misdemeanors by deceit. The statute against seduction under promise of marriage (Laws 1885, ch. 248) had not then been enacted. In *S. v. Horton,* 100 N. C., 443, 449, *Smith, C. J.,* says, that this statute "plainly contemplates a seduction, brought about by means of a promise of marriage, in the nature of deceit." Indeed deceit is the very essence of this offense, the warp and woof of it, so to speak. There is more warrant for so holding it than the court had for placing cheating by false token under that head, for this offense is perpetrated solely by reason of the trust and confidence placed in the perpetrator by the woman in consequence of the intimate relation existing between them and relying on the promise of marriage by means of which he procures the indulgence of his desires. In cheating by false token there is not this dependence and breach of confidence and trust.

The Attorney-General properly conceded that this crime would not have come under the other exception in this section, "offenses committed in a secret manner." That clearly applies to crimes committed in such manner that offender is unknown to the person injured.

Laws 1891, ch. 205, defining felonies and misdemeanors, makes this offense, if committed since the act, a felony as to which there is no statute of limitation. But that act does not apply to this offense which was committed prior to its enactment.

When there is a prayer to put the charge in writing the entire charge must be written. *S. v. Young,* 111 N. C., 715; but as was said by *Smith, C. J.,* in *Currie v. Clark,* 90 N. C., 355, 361, "it is not the policy or purpose of the statute, nor does the language bear (1058) such rigorous construction as to forbid any and all oral expressions from the presiding judge. This would be to subordinate substance to form and subserve no useful purpose." The defendant prayed the court to instruct the jury that the offense was barred by the statute of limitations. This the court declined, but orally told the jury instead, "The statute of limitations has nothing whatever to do with this action and you will not take it into consideration." The defendant has the full benefit of the exception that the prayer was refused and has not cause to complain that the judge did not write down the incidental oral remark.

Nor was there error in refusing to give the definition of an innocent and virtuous woman asked by the defendant. The law looks at conduct, and motive only as shown by conduct, and not at thoughts undisclosed and natural impulses not acted on. The precedents sustain the definition given by the Court that an innocent and virtuous woman is one "who has never had illicit intercourse with any man and who is chaste and pure." *S. v. Ferguson,* 107 N. C., 841. The court properly refused to go farther and charge that the prosecutrix must have had "a mind free from lustful and lascivious desires."

The court erred, however, in imposing both fine and imprisonment. The act (1885, ch. 248) provides that the defendant upon conviction of the offense "shall be fined or imprisoned at the discretion of the court and may be imprisoned in the penitentiary not exceeding five years." The disjunctive "or" cannot be construed "and" in a criminal statute when the effect is to aggravate the offense or increase the punishment. *S. v. Walters,* 97 N. C., 489. The latter part of the clause "and may be imprisoned in the penitentiary," etc., means "and if the alternative of imprisonment is selected by the judge, the imprisonment in (1059) his discretion may be in the penitentiary, not exceeding five years.

This, however, does not entitle the defendant to a new trial, but the case will be remanded that sentence may be imposed at the next term of Catawba Superior Court in conformity to this opinion. *S. v. Walters, supra; S. v. Lawrence,* 81 N. C., 522; *S. v. Queen,* 91 N. C., 659. The verdict stands. His Honor holding the court below will in the exercise of his discretion, within the limits allowed by law, impose either fine or imprisonment.

Error. Remanded.

Cited: S. v. Austin, 121 N. C., 622; *S. v. Dewey,* 139 N. C., 566; *S. v. Whitley,* 141 N. C., 825; *S. v. Black,* 150 N. C., 857.

STATE v. T. C. McCOY.

Ordinance—Conflict with General Law.

Gambling being an offense under the general law (chapter 29, Acts 1891) a city ordinance covering the same subject is void.

The defendant was convicted of gambling in violation of a city ordinance and appealed to the Criminal Court of BUNCOMBE, in which, at the January Term, 1895, he was tried and convicted before *Jones, J.,* and a jury, and appealed.

The Attorney-General for the State.
No counsel contra.

FAIRCLOTH, C. J. The Act of Assembly, 1891, ch. 29, declares, "That it shall be unlawful for any person to play at any game of chance, at which money, property or other thing of value is bet, whether the same

be in stake or not, and those who play and those who bet thereon (1060) shall be guilty of a misdemeanor."

The ordinance of the City of Asheville under which the defendant is arraigned, adopted 8 July, 1887, says, "Any and all persons who shall (play) at any game of chance in the corporate limits of the City of Asheville with cards, for any money or other articles of value, whether said money is staked or not, shall pay a fine of $50." The defendant is charged with gambling in said city in 1894, by playing a game of chance with cards for money, etc., and the only question submitted is, "Does the mayor have jurisdiction of such offenses?" Under the Act of 1891, *supra,* it is clear that the Superior Court has jurisdiction of the offense therein declared, and it is so well settled that municipal by-laws and ordinances must be in harmony with the general laws of the State and when they are in conflict the by-laws and ordinances must give way, that we deem it unnecessary to reargue the question. *Town of Washington v. Hammond,* 76 N. C., 33; *S. v. Langston,* 88 N. C., 692; *S. v. Brittain,* 89 N. C., 574; *S. v. Keith,* 94 N. C., 933.

The fact that cities may have different regulations on the same subject can make no difference, for they are all subject to the rule above stated. We think the mayor in the present case was without jurisdiction of the offense charged.

Error.

Cited: S. v. Black, 150 N. C., 857.

(1061)

STATE v. A. WERNWAG.

Indictment for Violation of Town Ordinance—Sale and Delivery.

Where an ordinance of a town prohibited the sale of fresh meats within certain limits without a license, and the defendant, who conducted the business of a seller of fresh meats outside of such limits, received a telephone message from a person within such limits to bring to the latter fresh meats of a certain kind at an agreed price, and subsequently delivered and received pay for the same: *Held,* that as the buyer would have had the right to reject the meats if not such as ordered, the transaction was executory until the delivery of the meats, and the sale, therefore, took place within the prohibited limits, and was a violation of the town ordinance.

INDICTMENT for a violation of a town ordinance, tried on appeal from the mayor's court of Asheville, at January Term, 1895, of the Criminal Court of BUNCOMBE, before *Jones, J.,* and a jury. The defendant was

convicted and appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

The Attorney-General for the State.
No counsel contra.

MONTGOMERY, J. The City of Asheville, by one of its ordinances, prohibits by fine the sale of fresh meats without a license first had from the city, within a radius of three-fourths of a mile from the Court House as the center of the circle, except at the market established by the City. The defendant, who lived and conducted the business of a seller of fresh meats outside of the three-fourths mile limit, received a telephonic message from C. H. Southwick, manager of a hotel inside of the limit, to bring to him at the hotel some fresh meats, the price being agreed on.

Agreeably to this message the defendant brought, in his own
(1062) wagon, the meats to the hotel and delivered the same, receiving payment afterwards. In making this transaction did the defendant violate the city ordinance and thereby become liable for the fine imposed by the city? We are of the opinion that he did. In the first place the goods ordered were not of a specific character and therefore the contract was only executory. The witness said, "I telephoned to the defendant to send me some fresh beef and fresh mutton, describing such as I desired." It cannot be doubted that if the meat when delivered at the hotel had not been of the kind ordered, the buyer could have refused to receive it. "Where there is a sale of goods generally no property in them passes until delivery, because until then the very goods sold are not ascertained." Benjamin on Sales, sec. 315. The general rule is that if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified and receive payment on delivery, title will not pass until such delivery. Benjamin, *supra,* sec. 325; *Edmundson v. Fort,* 75 N. C., 404.

2. The transaction was executory. The difference between this and a sale is, that in the latter the goods which are the subject of the contract become the property of the buyer immediately upon the conclusion of the contract regardless of delivery, and the risk of loss or injury is upon the buyer; whereas, in an executory contract the title to the goods is in the seller until the contract is executed. If in this case the fresh meats had been lost or destroyed on their way from the defendant's shop to the hotel, how could it be thought that the proprietor of the hotel would be compelled to pay for that which he had never received and which the defendant promised to deliver to him at his hotel in good condition?

The plain meaning of this matter is this: The hotel manager
(1063) sent a message to a seller of meats outside of the three-fourths

mile limit, "Bring me some fresh meats of a certain description; if they are such as I order I will take them and pay you for them; if they are not of the kind I order, I will not." Surely there is no sale in this.

3. The transaction cannot be a sale. In a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, without regard to whether the goods are delivered to the buyer or remain in the possession of the seller. *Lester v. East,* 49 Ind., 588. If by the terms of the contract the seller is required to send or forward the goods to the buyer, the title and risk remain in the seller until the transference is at an end, after which time the title is vested in the buyer. *Bloyd v. Pollocks,* 27 West Va., 75; *Taylor v. Cole,* 111 Mass., 363; *Fry v. Lucas,* 29 Penn. St., 356. The cases of *Armstrong v. Best,* 112 N. C., 59, *and Ober v. Smith,* 78 N. C., 313, are easily to be distinguished from the cases above cited, and the points are not of the same character with those. In *Armstrong v. Best* and *Ober v. Smith,* the orders for goods were written in North Carolina and sent by letter to Baltimore. The goods were selected by the sellers and delivered to common carriers, unconditionally, for the purchasers. The delivery to the common carriers completed the contract, and upon that completion our Court held that the contract was governed by the laws of North Carolina, and not that the sale was complete when the goods were ordered in North Carolina.

There is no merit in the exception made by the defendant to the court's allowing an amendment to the warrant issued by the mayor. The amendment did not change the nature of the action, and therefore the power of the court to allow an amendment was unrestricted. *S. v. Vaughan,* 91 N. C., 532; *S. v. Norman,* 110 N. C., 484. There was no error in the judgment of the court below and the same is

Affirmed. (1064)

Cited: Sims v. R. R., 130 N. C., 557.

STATE v. G. W. DOWNS ET AL.

Indictment for Selling Intoxicating Liquors—Illegal Sale—Ignorance of the Law—Advice of Counsel—Intent—Indictment—Verdict.

1. Where an indictment charged the unlawful sale of spirituous liquors within two miles of "Bethel Methodist Church in Macon County," a verdict (following the statute prohibiting the sale) describing the church merely as "Bethel Church in Macon County" did not constitute a material variance.

2. An indictment charging the unlawful sale of spirituous liquors is not defective because it does not specify the kind of spirituous liquors sold, inasmuch as that is a matter of evidence.
3. It is not necessary in an indictment for the unlawful sale of liquors within a prohibited distance from a certain church to refer to the statute, inasmuch as it is a public local statute of which the court will take notice.
4. Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value; therefore, the unlawful sale of spirituous liquors is not excused by the fact that the defendant, acting under advice of his counsel, believed that the particular sale was not a violation of the law.
5. The intention with which an unlawful sale of intoxicating liquors was made by one having no authority to make the sale for any purpose is immaterial.
6. A government license for the sale of intoxicating liquors will not protect the holder thereof from prosecution by the State for selling in violation of State laws.
7. An indictment charging the violation of a certain section of the statute need not specify that the act charged does not come within an exception created by a subsequent section of the same statute.

(1065) INDICTMENT for the unlawful sale of spirituous liquors within two miles of Bethel Methodist Church in Macon County, tried before *Shuford, J.*, and a jury at Fall Term, 1894, of MACON. The defendants were found guilty—under a special verdict—and appealed from the judgment thereon. The special verdict was as follows:

"The jury for their verdict say, that the defendants within two years before the finding of this bill of indictment sold spirituous liquors at the place of manufacture in Macon County, to-wit, one gallon to one David Lewis, within two miles of Bethel Church, in Macon County, Laws 1881, ch. 234.

"That before making said sale the defendants inquired of two reputable attorneys, who practice law in said county, if the said Bethel Church was incorporated, and were informed by said attorneys that said church was not incorporated, and that it would be no violation of the law for them, the said defendants, to sell spirituous liquors at said place of manufacture in quantities not less than a gallon.

"The defendants had license from the United States Government to manufacture and sell spirituous liquor at the place of manufacture.

"That the defendants did not intend to violate the law when they made said sale.

"If, from the foregoing facts, the court is of the opinion that the defendants are guilty, then the jury find them guilty; and if, from said facts, the court should be of the opinion that the defendants are not guilty, then the jury find them not guilty."

The Attorney-General for the State.
J. F. Ray for defendants.

CLARK, J. The indictment charges the sale of spirituous liquor within two miles of Bethel Methodist Church in Macon County. The statute, Laws 1881, ch. 234, and the verdict both describe the church simply as Bethel Church in Macon County. There is nothing to (1066) indicate that the church is not one and the same. The added word "Methodist" in the indictment is simply harmless surplusage or immaterial variance. *S. v. Eaves,* 106 N. C., 752. There is nothing tending to show that there was any ambiguity or more than one Bethel Church in the county as in *S. v. Partlow,* 91 N. C., 550, or that the defendants were in any wise prejudiced in their defense or misled as to the church which was meant. It was not necessary that the indictment should specify the kind of spirituous liquor sold. That was a matter of evidence. *S. v. Packer,* 80 N. C., 439.

Nor was it necessary to refer to the statute in the indictment, as it was a public local statute. *S. v. Wallace,* 94 N. C., 827. Neither was it any defense that before making sale of the liquor the defendants on inquiry of counsel were told that the church was not incorporated and that it would be no violation of the law for the defendants to sell within two miles thereof at the place of manufacture in quantities not less than a gallon. "Ignorance of the law excuses no one," and the vicarious ignorance of counsel has no greater value. *S. v. Boyett,* 32 N. C., 336. The law does not encourage ignorance in either. *S. v. Dickens,* 2 N. C., 406. If ignorance of counsel would excuse violations of the criminal law, the more ignorant counsel could manage to be, the more valuable and sought for, in many cases, would be his advice.

The criminal intent is not the intent to violate the law but the intentional doing the act which is a violation of law. It is only when the criminality depends not merely upon the act but upon the motive or intent with which it is done that the intent becomes material. *S. v. McBrayer,* 98 N. C., 619; *S. v. Dalton,* 101 N. C., 680; *S. v. Wray,* 72 N. C., 253, pressed by defendants' counsel, applies only (1067) to parties (as druggists) authorized to sell for medical purposes and who therefore cannot be found guilty for merely selling, but only if they sell not in good faith for such purposes.

The license from the United States Government was only a protection from prosecution by its authority. It did not protect the defendants from prosecution in the State courts for selling contrary to State laws. *S. v. Stevens,* 114 N. C., 873.

When there is an exception in the same clause which creates the offense it should be negatived in the indictment. If the exception is in

another clause this is not necessary, but it is matter to be shown in defense. *S. v. Norman,* 13 N. C., 222; *S. v. Tomlinson,* 77 N. C., 528; *S. v. Heaton,* 81 N. C., 542; *S. v. Lanier,* 88 N. C., 658; *S. v. George,* 93 N. C., 567. Here the proviso that the act should not apply to the sale of vinous liquors, is in a separate clause, the ninth, while the provision violated by the defendants is in the second clause. If the liquor sold had been vinous and the defendants had wished to rely upon that fact this was matter of defense, and it was not necessary to anticipate and negative it in the indictment.

No Error.

Cited: S. v. Bynum, 117 N. C., 752; *S. v. Snow, ib.,* 779; *S. v. Harris,* 119 N. C., 813; *Epps v. Smith,* 121 N. C., 161; *S. v. McLean, ib.,* 595, 601; *S. v. R. R.,* 122 N. C., 1061; *S. v. R. R.,* 125 N. C., 671; *S. v. Smith,* 126 N. C., 1059; *S. v. Newcomb, ib.,* 1106; *Norwood v. Lassiter,* 132 N. C., 58; *S. v. Yoder, ib.,* 1118; *Barber v. Justice,* 138 N. C., 21; *S. v. Lytle, ib.,* 740; *S. v. Piner,* 141 N. C., 762; *S. v. Powell, ib.,* 785; *S. v. Simmons,* 143 N. C., 616; *S. v. Hicks, ib.,* 694; *S. v. Hooker,* 145 N. C., 584; *Rabon v. R. R.,* 149 N. C., 60; *Powers v. R. R.,* 166 N. C., 602; *Allen v. McPherson,* 168 N. C., 437; *Ham v. Person,* 173 N. C., 74; *McLean v. Johnson,* 174 N. C., 346.

(1068)

STATE v. J. S. GUNTER.

Indictment for Secret Assault—Assault from Ambush.

1. An assault cannot be said to have been made in a secret manner except when the person assaulted was unconscious of the presence as well as of the purpose of his adversary.
2. Where, in a trial of an indictment for a secret assault under the statute (chapter 32, Laws 1887), it appeared that the prosecutor, after being ordered from defendant's premises, saw the defendant come out and, by pointing, directed his wife's attention to a certain place near by, from which prosecutor inferred that it was defendant's intention to go there and shoot him, and that, thereupon, prosecutor went home, returned with his gun, and searched for defendant, who, before prosecutor discovered his whereabouts, shot at and wounded the prosecutor, who recognized defendant by the flash of the gun: *Held,* that the assault was not made "in a secret manner" within the meaning of the statute. (CLARK, J., dissents, *arguendo.*)

STATE *v.* GUNTER.

INDICTMENT against the defendant, Jasper Gunter, for a secret assault on his brother, J. C. Gunter, tried before *Shuford, J.*, and a jury, at the Fall Term, 1894, of GRAHAM.

J. C. Gunter, the principal witness for the State, testified that he is the brother of the defendant, and that a feud has existed for several years between himself and the defendant; that on a certain morning, within a short time before the finding of the bill of indictment, he and some members of his family were near the defendant's premises, and were in the act of entering a pair of bars opening into a field, which was in dispute between himself and the defendant, when the defendant hallooed to them to leave, or something to that effect, and as they did not leave, the defendant ran into his house and came out with a gun in his hand, and stopped and said something to his wife, which the witness did not hear, and pointed in the direction of a place near the bars and a short distance from the witness, and the (1069) witness inferred from defendant's motion that the defendant was going to this place for the purpose of shooting the witness; that the witness ran into his own house—a distance of a few hundred yards—and got his gun and a pistol and came back toward the bars, and near the place to which the defendant had pointed, and was looking for the defendant, when the defendant fired his gun at witness from ambush and shot the witness in the leg; that the witness fell, and as he fell he looked toward the place from where the report of the gun came, and saw and recognized the defendant, about sixty yards away with his gun; that the witness then aimed his gun at the defendant and attempted to shoot, but his gun failed to go off, and he then fired three shots with his pistol.

The defendant asked the court to charge the jury that, inasmuch as the prosecuting witness had been put on notice as to where the defendant was, and was in search of the defendant, and was expecting to be assaulted by him, the defendant was not, according to the State's own testimony, guilty of a secret assault.

The court declined to give this instruction, and left it to the jury to determine whether or not the defendant assaulted the prosecuting witness with a gun, as charged in the bill of indictment, and told the jury that if the defendant committed the assault, and committed it with malice and with intent to kill, and was at the time concealed from the witness's view so that the witness could not see him, nor see that the assault was about to be made, the defendant would be guilty of a secret assault, although the witness might have had reason to believe that the defendant was near and meant to assault him.

To this charge the defendant excepted.

(1070) The jury returned a verdict of guilty against the defendant, and the defendant thereupon moved that the judgment of the court be arrested on the ground that the bill of indictment was defective, in that it failed to set out the manner of the assault.

This motion was overruled, and the court pronounced judgment, from which the defendant appealed.

The Attorney-General for the State.
J. F. Ray for defendant.

AVERY, J. An "assault cannot be said to have been made in a secret manner except where the person assaulted is unconscious of the presence as well as of the purpose of his adversary." *S. v. Patton,* 115 N. C., 753. According to the testimony of the prosecuting witness himself, he saw the defendant come out of the house after ordering himself and his party to leave his premises, and he (prosecutor) inferred from defendant's pointing to a place near where he stood that it was the defendant's purpose to go to that place and shoot him. Acting upon this inference the prosecutor ran to his own house, a distance of a few hundred yards, and returned armed with a gun and a pistol, and began to search for the defendant about the place where the latter had indicated to his wife by pointing that it was his intention to go. The defendant "from ambush," as the prosecutor testifies, shot at him before his hiding place was discovered. At the flash of the gun, however, the assailant was seen and recognized by the prosecutor. It seems therefore that though not previously discovered, the defendant was not concealed, but was within the range of the prosecutor's vision, if properly directed, all the while.

(1071) It was never intended by the Legislature that one who had run several yards to arm himself with gun and pistol and had returned for a battle royal with an adversary whom he knew to be armed and ready and anxious for the conflict, should be allowed, because the adversary had meantime taken the prudent precaution to step behind a bush in order to get the first fire, to invoke the aid of the criminal law to have him convicted of a felony for exhibiting such superior strategy. The statute was enacted to protect the innocent and unwary, not armed belligerents who, in the search for an enemy, draw his fire from behind a masked battery. From the prosecutor's own testimony he was fully aware of the defendant's design, and instead of keeping out of his way, sought him where he expected to find him. The State cannot now, because the latter changed his position in the face of apparent danger and shot before he had been thrown on the defensive, insist the the assault was a secret one, or that the injured party was surprised. He had been taken at no

disadvantage because he knew of the intent to shoot on the part of the defendant and was thoroughly prepared to meet it. *S. v. Jennings,* 104 N. C., 774. He knew the neighborhood of his proposed rendezvous and was beating the bushes for him, at his own game, when he was anticipated in his design.

It was never intended by the Legislature that one who is armed and on the alert seeking an opportunity to shoot another, should be held the victim of a secret assault because his adversary steps out of the open way in order (if we may use a provincialism) "to get the drop on him," instead of boldly confronting him, till pressed to the wall by a deadly assault. The law was not intended to drive a defendant to the dilemma of either waiting till he can make out a case of self-defense with all of the attendant risk, or subjecting himself to liability for a secret assault by taking the initiative as against one who is searching for him with deadly purpose and prepared to carry it out, and (1072) who is fully aware that he is in the vicinity and is likewise armed. With such knowledge of the presence and purpose of the defendant, if the prosecutor was taken at any disadvantage, it was because he willfully exposed himself, with notice of the extent of his own danger. It further appears that the person who for the purpose of the prosecution poses as an innocent sufferer from a secret and unexpected assault, was himself trying to overcome forcible resistance to a forcible entry upon land in possession of the person who offered the resistance. The assault was not, in any aspect of the testimony relied upon by the State, made in a secret manner. In refusing to instruct the jury, as requested, there was error which entitles the defendant to a new trial.

New Trial.

CLARK, J. (dissenting): There is no exception raising any suggestion that the defendant acted in self-defense. The sole exception is that he did not commit the assault "in a secret manner." The Legislature, taking note of the fact that while an attempt to commit either of the other three capital offenses was a felony, the attempt to murder was only a misdemeanor, punishable with fine and imprisonment, enacted ch. 32, Laws 1887, which provides that a malicious assault and battery with deadly weapon "by waylaying or otherwise, in a secret manner, with intent to kill" should be a felony. This assault was made with a gun and with the intent to kill, the prosecutor being shot in the leg. The witness is uncontradicted who testified that the defendant "fired his gun at him from ambush." It would seem that this was "by waylaying, or otherwise, in a secret manner." Indeed, it is the very mischief intended to be met by the act which

(1073) proposed to lessen the number and danger of assaults with intent to kill by requiring the party under fear of heavier penalty to fight without concealment, openly and fairly. Furthermore, the judge charged the jury that the defendant was guilty of a secret assault if "he was at the time concealed from the witness's view (the witness being the man who was shot) so that the witness could not see him, nor see that the assault was about to be made," although the "witness might have had reason to believe that the defendant was near and meant to assault him." This would seem correct. If a man intending to travel a certain road is told that an enemy is lying in ambush for him, and such enemy does fire on him from ambush and wound him, it is none the less an assault in a secret manner because the victim was put on his guard and was looking out, gun in hand, to protect himself. The only difference in this case is that the witness was warned not by a friend, but by seeing the defendant enter the thicket along the intended path of the witness, with a gun in his hand. The witness got his gun and while going along the path "was shot from ambush" by defendant, who was "concealed from view" so that witness could neither "see him nor that he was about to shoot." The secret manner deprecated by the statute is just this mode of proceeding, and its secrecy is not taken away by the fact that, by warning of friends or the previous evidence of his eyes, the witness had reason to believe that a man was lying in ambush with intent to kill him. In *S. v. Jennings,* 104 N. C., 774, it was held to be a secret assault when the prosecutor, standing in the public square of a town, was cut with a knife from behind by the defendant, whom the prosecutor immediately grabbed. The Court held that it was not necessary that defendant should have endeavored to conceal his identity, but that the statute was based "on the idea of fair play," and to make it "doubly dangerous (1074) to assail a person on unequal terms," which in that case consisted in striking the witness with a knife before he was seen. This is approved in *S. v. Shade,* 115 N. C., 757, and *S. v. Patton, ib.,* 753. In all three cases it is expressly stated that "shooting by one lying in ambush" would be plenary proof of an assault in a secret manner and that less would be sufficient. In the present case, the testimony of the witness is uncontradicted that he was "shot from ambush" by a concealed person whom he could neither see nor see that he was about to shoot. The jury found from the evidence that the defendant was the man who, while thus concealed in ambush, shot the prosecutor.

Cited: S. v. Harris, 120 N. C., 579; *S. v. Keen, ib.,* 612; *S. v. Bridges,* 178 N. C., 738.

APPENDIX.

PORTRAIT OF THE LATE ASSOCIATE JUSTICE RODMAN, PRESENTED TO THE COURT ON 6 FEBRUARY, 1895.

Hon. Geo. H. Brown, Jr., addressing the Court, said:

MAY IT PLEASE THE COURT:—In behalf of his sons and daughters, I have the honor of presenting the portrait of WILLIAM BLOUNT RODMAN, who was for ten years of his life a member of this Court. It is right and proper that we should not only preserve in the volumes of the Reports of this Court the evidences of the wisdom, learning, and ability of its members, but that their familiar faces should look down from their canvases upon the scene of their earthly labors and triumphs. It is not only calculated to inspire your Honors to emulate the examples of your great predecessors and to write your names in large letters upon the judicial history of the State, but the young men who, on each recurring term, go forth from this room to engage in the generous rivalry, and encounter the difficulties of our profession, will catch hope and inspiration as they gaze upon the noble features of the dead jurists whose portraits ornament these walls. They will remember the humble origin of many of them, the obstacles overcome, and the difficulties surmounted, and perchance ambition's spark may be fanned into an energetic flame by the contemplation of their careers.

"Lives of great men oft remind us
We can make our lives sublime,
And departing leave behind us
Footprints on the sands of time."

He, whose lifelike portrait I have the honor to present, was born in the town of Washington, North Carolina, 29 June, 1817, and was the son of William Wanton Rodman and his wife, Polly Ann, the daughter of that John Gray Blount whose name is so well known throughout Eastern and Western North Carolina as the largest landowner who ever lived in the State. The subject of this sketch came of intellectual ancestors on both sides. His father is said to have been a very able lawyer and a man of much intellectual force, who practised law in the city of New York for a number of years, and removed to Washington, North Carolina, in 1811. The maternal grandfather, John Gray Blount, is said to have been a man of strong and rugged personality, progressive and enterprising, of great force of character and excellent judgment. He was not a member of any of the learned professions. The residence which John Gray Blount constructed, and where he lived and died, is now standing in the town of Washington, and is the home of Judge Rodman's surviving sister.

From the early accounts that we have of him, the youth of Judge Rodman was very precocious. At the early age of five years the young boy William Rodman was at school, and according to the reports of his teacher, still in existence, he could at the tender age of seven years scan and translate Latin. It frequently happens that extraordinary, precocious children do not fulfill the promise of their youth. In this case, however, the youth was but the father of the man. A remarkable capacity to acquire and assimilate learning was manifested in him almost before he was out of frocks, and he retained his faculty in a most remarkable degree unimpaired up to the close of his long and laborious life. It was not simply the power to remember that he possessed, but it was the faculty of complete assimilation. What he read and learned became a part of his intellectual fiber. As the healthy stomach takes

up food, feeds and strengthens the body, so his capacious memory took up, digested and retained all he read, and his intellectual powers grew and strengthened upon the nutriment. At the age of fifteen young Rodman entered college, graduating at Chapel Hill at the age of nineteen with the first distinction. While at college he is said to have been a close student and an omnivorous reader, a habit he retained all his life. He had the advantage of studying law under one of the greatest men whose careers adorn the history of this State, William Gaston, *clarum et venerabile nomen.*

After he came to the Bar the young lawyer settled in his native town. Making rapid strides, he was soon in the enjoyment of a large and lucrative practice. He came to a Bar whose members were men of great ability and distinction in their profession. Such lawyers as Stanley, Bryan, Donnell, Warren, Satterthwaite, Sparrow and Carter were for years his generous rivals, and constituted foemen worthy of his steel. In a short time Mr. Rodman came into the very front ranks of the profession and was justly and generally regarded as one of the very ablest and most learned practitioners in Eastern North Carolina.

After 1878 I met him at the Bar frequently in the courts of Pitt, Beaufort, and Hyde. Although his silvered hair betokened advancing years, yet to those who witnessed the trial of the first cause in which he participated after returning to the Bar, it was plainly evident indeed that "Ulysses had come." There are some lawyers who, from peculiar mental endowment or from taste, acquire special skill in the trial of certain kinds of causes. Judge Rodman tried all kinds well. His management and speech in the celebrated case of Washington Carrowan, in which he was leading counsel for the prisoner, proves that as a criminal lawyer he had few equals and no superiors in the State. The trial of civil causes, however, he much preferred. He prepared them exhaustively and tried them with great success.

He managed a complicated boundary case with as much ease, clearness, and ability probably as any lawyer who ever lived in the State. Upon questions of tort, commercial and contract law, he was equally at home. He was not an orator in the usual sense of that word. He did not try to stir the passions, and he never condescended to appeal to the prejudices of a jury. He was as far removed from the demagogue as one pole is from the other. He was essentially a reasoner. His style of speaking was as fluent and easy as that of any speaker I ever heard, and so simple and clear that the humblest intellect must surely have comprehended his meaning. It was not only no effort to listen to him, but his speech had that logical and interesting quality which carried his hearers along without effort on their part. He was eloquent, but it was the eloquence of pure reason. His speech flowed as smoothly and evenly as a deep-flowing stream. It seldom surged as a tempestuous torrent. No lawyer was ever more devoted to the interest of his clients. No lawyer ever served them with more fidelity as well as ability, and I may add that few ever demanded such moderate compensation for their services.

In 1854 Judge Rodman was associated by the Legislature with the Hon. B. F. Moore, then the recognized head of the Bar of this State, as a commissioner to revise and print a complete compilation of the laws of this State. Their work is known as The Revised Code. It is said that Mr. Moore always gave Judge Rodman credit for having performed the larger share of that work, and that he always spoke of him as one of the most thoroughly equipped and accurate lawyers in the State. This work, though now but little in use owing to the great revolution in our laws, is a monument to the research and ability of both these eminent men.

On 1 September, 1858, Judge Rodman was married to Miss Camilla D. Croome, of Greensboro, Alabama, a lady who blended in her character the highest mental and moral qualities, coupled with a charming personality. She died 26 May, 1887. The surviving children of this marriage are Col. William B. Rodman, a distinguished lawyer, living in his father's native town and occupying his father's old office, Miss Lida T. Rodman, Mrs. Owen H. Guion, Dr. John C. Rodman, and Willie Croome Rodman, all of whom, without exception, inherit the quick mental faculties and rare intelligence of their parents.

In the home circle, Judge Rodman's character was most beautiful. In portraying this I can do no better than borrow the eloquent pen of Mr. Pulaski Cowper: "His home, of all places on earth, was the most attractive to him; and when not professionally engaged, at his home he would always be found, and he never left it at night. Thoughtful, sympathetic, and indulgent to his children, ever alive to their wishes and wants, with a heart as warm and unselfish as was ever implanted in the human breast, and impulses responsive to love and tenderness, it can well be conceived how joyous was the family tie, and how intense the sorrow when death had broken it."

To those who did not know Judge Rodman intimately this picture may appear overdrawn, for he was very reserved in his nature, and as imperturbable as a Teuton. But beneath that calm and unmoved exterior there dwelt a wealth of tenderness and affection that today finds a most responsive echo in the hearts of those who were its objects.

At the breaking out of the war between the States, Judge Rodman raised a company of artillery and served for some time in Eastern North Carolina. Afterwards he became a judge of a military court, which position he held until he surrendered at Appomattox. In 1868 he was elected to the Constitutional Convention and took his seat in that body. In the minds of those who knew Judge Rodman well at that time there is no doubt that in taking that seat he was not inspired by a desire for office. He was not an office-seeker, and never had been. His ambition had never taken that form. Shortly before the war he was tendered a high judicial station and declined it. He had never been a candidate for any office up to that time that I am aware of except in 1842 he ran for the Legislature. So I am firmly convinced that he was not actuated by any selfish motive or desire for personal aggrandizement. His motives were pure and patriotic and inspired by love for his people and his State. He saw that coming events were casting their shadows before, and that his mother State would soon be under the domination of an alien crew unless her children came to her rescue.

He hoped, when he took his seat in that memorable body, to lead it in those paths of legislation conducive to the good of the State. He fervently believed that it was the only salvation for the State that her sons, having her true interest at heart, should endeavor to take part in formulating for her government the new Constitution. That he was only partially successful was not his fault. There is no doubt that, while Judge Rodman's conservative views, as frequently expressed in that Convention, did not always prevail, they had a very salutary influence and doubtless averted many harmful measures which otherwise might have been engrafted upon the fundamental law of the State.

He also gave to the Constitution some most valuable and useful provisions which have been of great utility as safeguards against unwise legislation. He was the author of the provision in the article on Revenue and Taxation which fixes the proportion between the tax on property and on the poll. I have been informed that this provision up to that time had not been found in the Constitution of any state in the Union. He was also the author of the provision

which regulates State and county taxation, and imposes a limit to taxation by the county. I believe he was also the author of the Married Woman's Act, adopted in 1869 and 1870.

When the distinction between the law and equity practice was abolished and the common-law method of civil procedure displaced by the Code, Judge Rodman assisted more than any other in adapting the code system to the needs of our State. He prepared a criminal code, to which he devoted great labor and research. As it was never adopted, its merits are generally unknown. I have examined a copy of it, and, while I regard the common-law criminal procedure as far superior to any possible criminal code, I can say that this work of Judge Rodman bears the impress of the fullness of his learning, and of his comprehensive and discriminating mind. In leaving this part of Judge Rodman's life, I must say that I believe the impartial judgment of posterity will declare that our State is largely the gainer by his connection with the Convention of 1868.

Without effort on his part, Judge Rodman was called to the Bench of the Supreme Court, and took his seat at the January Term, 1869. Like his preceptor, the great Gaston, he had no preliminary training as a judge in the *nisi prius* courts of the State; but I doubt if any lawyer ever brought to this Bench more fullness and accuracy of learning, a greater capacity for labor, or a more impartial and discriminating mind. He had, preëminently, the judicial temperament. Nature had made him a just and impartial man, and all his life he had followed the precepts of justice and right in his dealings with his fellow-man.

There are judges, I doubt not, who feel a tendency to sometimes allow their emotions to influence their judgment, and who restrain such feelings by the exercise of will and the promptings of an enlightened conscience. Judge Rodman needed no such curb. Impartiality was, in his composition, an intellectual quality, a feature of his mind with which he had been endowed by nature. He was, also, more of the philosopher than most of us. He always bore good fortune without undue elation, and adversity with wonderful equanimity. I was present in his room at Hyde court on an occasion when a messenger from his farm hurriedly brought him the news that his gin-house and fifty bales of cotton had been destroyed by fire the night before. At the time he was engaged in writing an important pleading. He looked up from his work, asked the messenger two or three questions, and resumed his writing with the utmost composure. It is seldom that men acquire that great control over their feelings and emotions that he possessed.

At the time Judge Rodman came to the Bench, our jurisprudence underwent, in many respects, a radical change. It was a transition period in our history. The Court could not always "travel with ease along the highway of precedent." New paths had to be blazed out, and a system of law, in many respects unfamiliar to our people, was to be shaped and molded to the needs and uses of a sparsely settled agricultural State. Judge Rodman's fertile and resourceful brain lent invaluable aid to this Court during that period. His opinions upon constitutional questions are justly regarded by the profession as among the very ablest in our Reports. His dissenting opinions, in some notable cases, show not only the independence of his mind, but the power and force of his reasoning faculties and his great acumen. His style might well be studied with profit by the judicial writer. The simplicity and elegance of his diction is evidence of the richness of his vocabulary. He was not only a master of his native tongue, but he was entirely at home in the language of Virgil, as well as Homer; in the language of Goethe, as well as Hugo. He was a mathematician of a high order, and a *belles lettres* scholar of extensive and varied

acquirement. His love of learning was only exceeded by his love of truth. It is useless that I should continue this imperfect sketch. No words that I can utter will add to his fame. He has made for himself, in the records of this Court, a monument which will preserve his name and memory to future generations as long as law is revered and precedents are respected.

It only remains, in conclusion, that I shall present to your Honors this portrait of a great judge and a good man, that it may hang among those of his illustrious predecessors and associates, portraying to present and future generations the lineaments of one of those profound lawyers who assisted in expounding and maintaining the great system of jurisprudence under which we live.

Following Judge Brown, Hon. Charles F. Warren addressed the Court as follows:

MAY IT PLEASE YOUR HONORS:—I have been requested by the family of the late Judge Rodman to be present on this occasion. The distinguished jurist who has presented his portrait to this Court has left but little unsaid. Born in the same town, and living neighbors, members of the same profession and practising at the same Bar, I esteemed and admired him. It is a pleasure to pay my tribute to his worth as a citizen, his purity as a man, his ability as a judge, and his learning and integrity as a lawyer.

Graduating at the State University with the first honors of his class, he was prepared for the Bar by Judge Gaston. A hard student, a ripe scholar, a close reasoner, with high conceptions of the dignity and honor of his profession, he was splendidly equipped for the practice of the law. There was no flaw or crevice in his armor. Like a knight of old, he entered the lists prepared to do battle with all comers. He at once took and held high position in a conspicuously able and brilliant Bar. Stanley, Donnell, Satterthwaite, Warren, Carter, and Sparrow, his professional brethren, have all long since gone over to the silent majority. They were not mere practitioners, trained and skilled in the principles and forms of the law. They brought to the practice of the law every resource of liberal education and cultivated and disciplined faculties. History, science, philosophy, and the literature of the living and dead languages were at their command. The attrition of mind, like the spark from the flint, drew forth their best powers. They entered the arena like the Greek athlete, stripped and oiled for the decisive wrestle, and, if in the contest they touched mother earth, like Antæus, they arose strengthened by the contact. There was a courtesy and *esprit de corps* among them which gave tone and character to the profession. With them the practice of the law had higher aims than the acquisition of money.

Judge Rodman loved the law for its own sake. He gave it no divided affection, but devoted his life to its service. To him it was the noblest and most attractive of the sciences. To him it was a progressive science, adapting itself to social changes and conditions and keeping pace with the progress of invention and the march of civilization. He did not hesitate to discard the useless and obsolete. He believed—

"That man's the best conservative
Who lops the mouldered branch away."

In the maturity of his intellect and physical powers his capacity for labor was immense. He considered nothing done while anything remained to be done. Enjoying a lucrative and exacting practice, he still found time to labor in other fields. With his associates he prepared the Revised Code, which is regarded by the profession as a most thorough and accurate compilation of the statute law of the State. The articles of the Constitution of 1868 upon the

judiciary and revenue and taxation were mainly drawn by him. A pleader of rare skill and precision under the old method, and schooled in its forms and precedents, he strongly advocated the adoption of the new system. The changes and alterations in the New York Code of Civil Procedure necessary to adapt it to our judicial system were made by him. The acts on Criminal Procedure, Draining Lowlands, Landlord and Tenant, and Marriage were drawn by him, and stand upon the statute books substantially as he drew them. As a lawmaker he was exact, painstaking and conscientious. Lord Catham deprecated the presence of the mere lawyer in Parliament, and he said you might shake the Constitution and the lawyer would remain silent, but if you touched a cobweb in Westminster Hall, the exasperated spider would sally out in its defense. Judge Rodman had no reverence for rubbish.

His ten years of service upon this Court was a period of transition. The State had just emerged from a desperate civil war, and old forms had vanished in the conflict. The foundations of society were shaken. Novel and perplexing questions arose which needed to be solved by the Court. The thousand and one questions incident to a change from one form of government and currency to another, and from a system of slavery to a free State, acts and contracts which had their birth and origin in social disorder, the construction and adaptation of new laws enacted to meet the new order and condition of things, all came up for solution. It was a fierce light which beat upon the Court in those days of unrest and passion. While its conclusions may not always have met our approbation, no one can deny its great ability. The opinions of Judge Rodman are well considered and expressed. His style, if less terse and perspicuous than that of the great Chief Justice who presided over the Court, was more ornate and scholarly. He was apt in illustration, and was a fine classical scholar. His knowledge of the law was profound. He was a great judge. Soon those who have heard him will pass away and time will obliterate the monument which marks his last resting place, but his voice will still speak from the printed page.

Returning to the practice of the law at the expiration of his judicial term, he found his old associates gone and younger men contesting for the emoluments and honors of the profession. I wish here and now to bear testimony to his uniform courtesy and kindness, to his absolute fairness to his professional brethren, and to the modesty and amiability of his character. What there was in his case, Judge Rodman developed, and he tried it upon its merits. He planned no surprises and dug no pitfalls for his adversary. The trial of a case was to him the method provided for the ascertainment of truth. He lacked the fire and intensity of the orator. He appealed to the intellect rather than the emotions. In his estimate of men he was not always correct, and by reason of this, in the trial of cases, he sometimes lost when he ought to have won. In legal argument he was admirable, and he unfolded and developed the equities of his case with rare judgment and power. No subject was so subtle and intricate that he could not elucidate it. When he presented some nice question of law, or drew some fine distinction, I thought that the science of metaphysics had lost what the law had gained.

His life was filled with honors and usefulness. He has done the State service and should live in her history. Her judicial annals are enriched by his labors, and he has left his impress upon her statute and organic law. His memory will be cherished and honored by the members of that profession to which he devoted his life and which he so highly adorned.

Remarks were also made by Mr. John H. Small, as follows:

MAY IT PLEASE THE COURT:—The grateful spirit which prompted the presen-

tation of the portrait of this eminent lawyer and judge by his family is worthy of commendation.

It is a beautiful custom and, I believe, received its impetus with the removal of the Court to this commodious and appropriate building. It is well that the living students of the law may look upon the faces of the great jurists of our appellate court who have laid deep and strong the basic principles of our jurisprudence and that the laity shall see here reflected the images of these great men who, as expounders of the law, have thrown a protecting panoply around the liberty and property of its citizens.

Success in any calling involves labor, and, in many instances, a more or less high degree of intelligence, but to achieve a distinguished success in the law, at the Bar, or on the Bench, involves the unceasing industry of a well-matured mind, which no pretensions can usurp and no false glamour deceive.

The ultimate criterion of a lawyer is the verdict of his peers, and, as in no other profession, their verdict is always just.

The people of North Carolina, from the days of the Colonial period to the present, have possessed many virtues which, in many respects, have never received just recognition at the hands of the historian; but I wish, with becoming modesty, to suggest that gratitude to her public men, a prompt recognition of eminent services, and a reverent preservation of the memorials of the past, cannot truthfully be considered as one of our cardinal virtues.

We permit the pressing problems of the present to usurp the glorious memories of the past, and while we admire the learning of the living and applaud the hero of today, we forget the dead oracles of the generations before, and permit the patriotic services of her sons to rest in uncertain tradition.

It has been said that "history is the essence of innumerable biographies." Certain it is that if the biographies of our distinguished men could be written with fidelity and memorials of their life's work properly cherished, then the field would be ripe and the harvest plentiful for the future historian.

This is not the occasion, nor does time permit any extended notice of the life and service of the distinguished Judge, to whose memory this occasion is a tribute, and it would be superfluous in view of the very appropriate sketch which has been submitted; but it is to be hoped that the biography of Judge Rodman may yet be written by loving hands, in order that his zeal and industry and learning in the mysterious realms of the law may furnish an inspiration and stimulus to those whose good fortune it was not to know him in life.

Judge Rodman was always a student. His conclusions did not come by intuition, nor did he always regard precedents as infallible, but he entered into the reason and principles of the proposition under consideration, and boldly followed the conclusions of his logical mind. As an advocate, when his case demanded it, he reveled in a technical point and often excited the admiration of his brethren at the Bar by his lucid, cogent, and learned arguments upon questions which to them had been speculative, but under the treatment of his logical mind and terse English became living realities of the law.

Prior to the war, he had a large practice in his circuit, comprising a number of eastern counties, and attracted a large and influential clientage, particularly in litigation affecting real estate. To use the expression of the laity, he was regarded as the best "land lawyer" in the east, which was no mean distinction considering the brilliant galaxy of lawyers then practising in that section.

Judge Rodman has left his impress upon the organic and statute laws of our State. As a member of the Convention of 1868, he was one of the most learned members of that body, and took an active part in framing the new Constitution to meet the changed conditions, and it may be said with simple

justice now, that every clause which he drafted and was adopted has proven by actual experience the wisdom of his great mind and his disinterested zeal for the people of North Carolina. As the leading member of the commission appointed to draft the Code of Civil Procedure, the present Code was reported and adopted. Considering the traditional conservatism of the Bar of the State, this in itself was a bold act and brought many anathemas upon the heads of the commission, but a practical application of its provisions has overcome all opposition, and it would be impossible to return to the old forms of pleading and procedure.

Judge Rodman was elected a Justice of the Supreme Court in 1868, and served the full ten years of his term until 1 January, 1879, the only other Justice elected at the same time and serving the full term being Justice Reade. It would be verily "carrying coals to Newcastle" to speak in detail of his labors in this Court. The memorials of his work are found in the 17 volumes of the Reports from 63d to 79th, inclusive.

Many of his opinions on leading cases, many are landmarks which point the way, and they have not only been the admiration of the Bar, but they have been quoted with approval by his learned successors on this Bench. During the ten years which he sat in this Court there were nine Justices at different periods, viz.: Chief Justices Pearson and Smith, Justices Reade, Dick, Settle, Faircloth, Boyden, and Bynum.

We are reminded that time in its relentless march has made serious inroads into the ranks of this illustrious company. Of these nine only three survive: the present Chief Justice and Justices Dick and Bynum.

I surmise there was one side of the character of Judge Rodman which the superficial acquaintance did not perceive. With his studious habits, his contemplative mind, and his innate modesty, he was withal a man of deep sentiment and tender emotions. Not the susceptible consciousness which bubbles over at trifles but the deep, abiding sentiment which runs its majestic and silent course and mingles its being in the object of its affections. The great sorrow of his life was the death of his loyal and estimable wife, and though he seldom referred to his great grief, yet his friends knew that his heart was sad in contemplation of his irreparable loss. He passed the evening of his life in his native town of Washington, dwelling among his beloved books and with his devoted children, to whom he was fondly attached until the summons came and he passed over the river to that bourne from which no traveler returns. He left surviving two most estimable and intelligent daughters and three sons, all of whom are exemplifying the force of parental example, and do honor to a distinguished lineage. Two of the sons have entered life's work; the one a physician and the other a lawyer, the latter bearing the name of the distinguished judge and making fine promise of a useful future.

William Bland Rodman, the learned lawyer and upright judge, will live in the annals of North Carolina, and his portrait upon these walls will serve to recall a life fraught with good and fruitful works.

Response of CHIEF JUSTICE FAIRCLOTH:

The Court has listened to the remarks just made with much pleasure.

Judge Rodman engaged in his chosen profession at an early age and pursued it diligently until his declining years, and did so with marked success. His success at the Bar and on the Bench as member of this Court affords abundant proof of his distinguished ability, astuteness and untiring industry. His power was impressed upon the mind of his profession and intelligence of the people of the State. The organic law, the statutes of the State, and the court records, and especially his opinions in this Court, all testify to his fine learning, his

superior abilities and his great usefulness to his country and to his profession. His learning was general and everywhere disclosed his superior power and careful thought. His example in the work of his profession is worthy of imitation by those who come after him. His name, reputation, and usefulness as a jurist will be the inheritance of those who survive long after the memories of those who knew him have failed.

The Court accepts the portrait cheerfully and tenders its thanks to the donors. It will be suspended on the walls of this hall in its appropriate place and it is now so ordered by the Court. The clerk will note these proceedings in his record and superintend the execution of the foregoing order.

INDEX.

COLLATERAL ATTACK.

1. While mere irregularities in the conduct of a proceeding will not subject the decree therein to a collateral, or even, under some circumstances, to a direct attack, the rule is different when the allegations in the pleadings necessary to jurisdiction of the court are untrue, and where, if the truth had appeared on the record, it would have been the duty of the court on motion, or *ex mero motu*, to have dismissed the proceedings for want of jurisdiction. *Springer v. Shavender*, 12.
2. Where the children of a person, under a misapprehension of the facts, admitted the allegation, in a proceeding for the sale of their ancestor's land, that he was dead, and submitted to a decree for the sale of the land, they will be allowed in a collateral action to impeach such decree, and to avoid the estoppel of title derived through it, by showing that their ancestor was in fact alive at the date of the decree and sale. *Ibid.*
3. Where, in a proceeding to sell land, an order of sale has been made and property sold and the sale confirmed, the judgment is final, and can only be set aside in a direct proceeding for that purpose. *Smith v. Gray*, 311.
4. Where infant defendants are served with a summons in proceedings for the partition of land and a guardian *ad litem* is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity. *Ibid.*
5. Defendant corporation made an assignment for benefit of creditors, and plaintiff, through its attorney, who was also trustee under the defendant's assignment, split up its accounts against defendant so as to bring it within a justice's jurisdiction, and obtained judgments thereon. The defendant made no defense to the actions before the justice of the peace because of quieting representations made by the said attorney and trustee: *Held*, that, in its answer to a creditor's bill brought by plaintiff, the defendant had the right, by way of counterclaim, to impeach the said judgments for fraud and to demand that they be vacated. *Cotton Mills v. Cotton Mills*, 647.
6. In such case the defendant need not set out formally the facts relied upon to show its right to equitable relief, if such right can be gathered from the whole answer. *Ibid.*
7. Where a decree of court, rendered in 1865, ordering the sale of land, recited that service had been made on all the parties to the action, some of whom were minors, the recitals will be presumed true in a collateral attack; and where it appears, in addition, that the guardian *ad litem* of the minors was clerk of the court, and that the rights of third parties have intervened, the sale under such decree would not be disturbed, even in a direct proceeding, unless it should clearly appear that the infants had been injured or defrauded. *Sledge v. Elliott*, 712.

COPARTNERSHIP.

1. The creditors of a copartnership have no lien upon the partnership property as against individual creditors. *Armstrong v. Carr*, 499.
2. With the assent of the members of a firm, any one of them is free to dispose of the partnership property for his individual use, and a creditor cannot intervene to prevent the application. *Ibid.*
3. An assignment of partnership property by members of an insolvent firm is not rendered fraudulent as to the firm creditors by a clause therein preferring over partnership creditors debts due to creditors of the individual partners. *Ibid.*

CORPORATION.

1. As between itself and its creditors, a corporation is simply a debtor, and the relation of trustee and *cestui que trust* does not exist so as to create a lien upon the assets of the corporation in favor of the creditor in any other sense than applies to an individual debtor. *Electric Light Co. v. Electric Light Co.*, 112.
2. A creditor has no equitable title to assets of a corporation, whether solvent or insolvent, in the hands of its treasurer, and the courts will not interfere with equitable jurisdiction to enforce the payment of a judgment in favor of the creditor against the corporation. *Ibid.*
3. Where, as the basis of a sale of stock, the seller makes representations as to the financial condition of a corporation and the value of the stock therein, such representations constitute a warranty of the truth thereof, and for a breach thereof the seller is liable to the purchaser. *Blacknall v. Rowland*, 389.
4. A stockholder has the right to inspect books of corporation in order to obtain information upon which to frame his complaint. *Holt v. Warehouse Co.*, 480.
5. In an action by a creditor of an insolvent corporation against a stockholder thereof to recover the amount of his unpaid subscription, a judgment rendered on the report of a referee in an action to set aside an assignment by the corporation, together with the findings of the referee, that such stockholder, after subscribing for a certain amount of stock and paying in one-half of his subscription, had been allowed to draw out, after the assignment, all he had paid in, was competent evidence against such stockholder, although he was not a party to the action in which such judgment was rendered. *Harmon v. Hunt*, 678.
6. Where, in an action by the creditors of an insolvent corporation against a stockholder thereof to recover the amount of his unpaid subscription, such stockholder admitted that he had subscribed and had not paid his subscription to the capital stock, and introduced no further evidence, it was proper to direct a verdict to be rendered against him. *Ibid.*
7. The common seal of a corporation being affixed to an instrument is *prima facie* evidence that it was affixed by competent authority, and hence it is not incumbent upon one claiming personal property under a mortgage by a corporation to show that its execution was duly authorized. *Clark v. Hodge*, 761.
8. In the trial of an action for possession of personal property claimed under a chattel mortgage executed by a corporation, it is competent

FRAUDULENT CONVEYANCE.

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