ANNOTATIONS INCLUDE 179 N. C.

NORTH CAROLINA REPORTS

VOL. 117

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SEPTEMBER TERM, 1895

BY
ROBERT T. GRAY
STATE REPORTER

ANNOTATED
BY
WALTER CLARK
(2 ANNO. ED.)

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

SEPTEMBER TERM, 1895

JACOB WOOL v. TOWN OF EDENTON.

Riparian Owner of Land in Incorporated Town—Duty of Town Authorities—Location of Deep Water Line—Estoppel—Practice—Trial.

1. Where, in the trial of an action, after the defendant, upon whom the burden rested, had introduced his testimony, the court in effect declared that the plaintiff could not in any event recover, it was proper for the latter to submit to a nonsuit and appeal, and his failure to introduce testimony cannot operate to his disadvantage.

2. The general rule is that there can be no waiver of one's rights in property, where there is no estoppel or no valuable consideration received.

3. It is the duty of the authorities of an incorporated town, under the Acts of 1893 amendatory of sec. 2751 of The Code, upon the application of a riparian owner, to regulate the line on deep water to which wharfs may be built; and the fact that such authorities, upon application of W., undertook in 1888 to make a location of the deep water to which entry might be made, and that thereupon W. made an entry and obtained a grant conformably to such location of the line of deep water, does not estop him from having a new location made upon the allegation that the former location of the line was erroneous.

MANDAMUS, tried before *Boykin, J.*, and a jury at Spring (2) Term, 1895, of CHOWAN.

Upon an intimation by his Honor during the trial that the action could not be maintained, the plaintiff submitted to a nonsuit and appealed.

The facts are fully stated in the opinion of *Associate Justice Montgomery.*

Shepherd & Busbee for plaintiff.
W. M. Bond for defendant.

MONTGOMERY, J. Since the passage in 1893 of the two amendatory acts of section 2751 of The Code, it is the duty of the authorities of an incorporated town situated on navigable waters, upon the application of the riparian owner of the lands adjacent to those covered by water, "to regulate the line on *deep water* to which wharfs may be built," just as it was their duty to regulate the line on deep water to which entries might be made before the passage of the amendatory acts. The plaintiff made an application in 1893 to the Board of Councilmen of Edenton to have the deep water line fixed on his lands covered by the waters of Edenton Bay adjacent to his high land, which application this Court decided was sufficient in substance, in *Wool v. Edenton,* 115 N. C., 10. The defendants refused to act on the petition and in consequence of that refusal the plaintiff commenced this action on 18 March, 1893. In his complaint he alleges that he is the owner and in the possession of a certain lot of high land in the town of Edenton, just in the rear of the lands covered by the waters of Edenton Bay, and that as such riparian proprietor he has the right to have the defendants locate the line on deep water to which he may make entry for the purposes recognized by law; that the board of councilmen did, in March, 1888, undertake to locate the line of deep water in front of the property of plaintiff, but that in fact the line so located does not extend to the deep water of Edenton Bay, nor does it regulate the deep water line as required
(3) by law, and if plaintiff be precluded from going further than the line so attempted to be fixed he will not be able to enjoy the use of his riparian rights; that the plaintiff has demanded of defendants to extend and regulate the line to the deep water of the bay, but that they have refused to take any action in the matter. Whereupon plaintiff prays that defendants may be compelled to locate the deep water line at the deep water in front of his said property, etc.

The defendants demurred to the complaint and assigned the following as grounds therefor: 1. It appears from complaint that the councilmen did, in March, 1888, fix the line to which plaintiff might enter, and it does not appear that plaintiff made any objection thereto, but acquiesced in the same until this suit was brought. 2. It appears that the board has regulated the line to which he might enter, and there is no allegation of fraud or collusion. 3. For that, in law, these defendants are the judges in regulating said line, and it appears they have regulated the same, and their discretion cannot be controlled by the court.

The demurrer was overruled by his Honor and this Court sustained the ruling, *Wool v. Edenton,* 113 N. C., 33. The defendants then filed

an answer to the complaint, in which they admit plaintiff's ownership and possession of the land, and that he had made a demand on them to locate the deep water line. They aver, however, that they had already fixed the deep water line truly and in fact in 1888, upon the application of the plaintiff, and that if he be allowed to build a wharf further out than the line which they had already located, navigation would be obstructed; that in 1891 the plaintiff obtained a grant from the State to the land in front of his covered by the water, up to the line located by them in 1888; they further aver "that defendants are advised that the councilmen are in law the judges as to how and where the line on deep water shall be regulated for entries to be made; and as it appears they have exercised their discretion after full investigation of (4) the matter, having heard evidence, etc., prior to fixing the line, they respectfully submit that they cannot be compelled to change their views or to undo what was done in March, 1888, by their predecessors, and done, as they allege, properly and according to law"; and that plaintiff, "by making his said entry after the line was fixed in 1888 and procuring his grant, and not having begun any action to have said line changed in any way until March, 1893, has waived any right to object to said line, if he ever had any cause of complaint."

The defendants also plead the statute of limitations in the following words: "That if any mistake (in the location of the deep water line in 1888) was made, the cause of action to correct same arose more than three years before this suit was begun, and to said action defendants plead the statute of limitations." Upon the complaint and answer having been read, his Honor below expressed the opinion that the plaintiff was not entitled to the relief which he sought; whereupon the plaintiff submitted to a nonsuit and appealed. The judgment of a nonsuit was set aside by this Court, and a new trial ordered (115 N. C., 10). At the Spring Term, 1895, of the Superior Court of Chowan County, a jury was impanelled and the following issues were submitted:

"1. Did councilmen regulate line on deep water to which plaintiff might enter in 1888?

"2. Did plaintiff make entry and procure a grant after 1888?

"3. Would a wharf, built as plaintiff proposes, be within 30 feet of a pier or wharf in use?

"4. Would a wharf, built as plaintiff proposes, obstruct navi- (5) gation?

"5. Is plaintiff's action barred by the statute of limitations?

"6. Has plaintiff waived any right he had by accepting what the councilmen did in 1888?"

The defendants assumed the burden and introduced the following testimony: 1. The record of Councilmen of Edenton, showing that in

March, 1888, defendants, at request of plaintiff, regulated and fixed line of deep water to which plaintiff might enter land in front of his said high land. 2. The entry book, showing entry made of land covered by water in front of said lot of high land by plaintiff on 7 April, 1890. 3. Grant from State issued to plaintiff, covering land entered by him in front of his said land, dated 19 May, 1891.

After the introduction of this testimony his Honor asked if plaintiff admitted that defendants had regulated line of entry, and that thereafter plaintiff had made entry and procured a grant, as contended by the defendants. In answer to the question the plaintiff made the admissions recited in the judgment. Whereupon the court was of the opinion that the action could not be maintained. The plaintiff then took a nonsuit and appealed. The judgment of the court below is in the following words: "This cause coming on to be heard, all parties being before the court, and the plaintiff having admitted in open court that he applied to defendants in March, 1888, to regulate the line to which plaintiff might enter water in front of his lot on Blount Street, described in complaint, and that defendants did fix a line of entry, and that plaintiff thereafter did procure a grant from the State, based on such entry, and plaintiff having failed to offer any evidence, on intimation of the court that plaintiff cannot recover, the plaintiff submitted to a nonsuit. It is adjudged that defendant Councilmen of Edenton recover of plain-
(6) tiff, J. Wool, and H. M. Dixon, surety, the costs of this action to be taxed by the Clerk of this court."

The foundation of the judgment rests upon two considerations: (1) the admission of the plaintiff that the defendants had fixed a line and that plaintiff thereafter had procured a grant from the State based on such entry; (2) the failure of the plaintiff to offer any evidence. As to the failure of the plaintiff to offer evidence, it is enough to say that such a course was to be expected, for the court had declared, in effect, after the defendant had introduced his testimony and the plaintiff had made the admissions set out in the judgment, in answer to a question from his Honor, that the plaintiff could not in any event recover and was bound by his entry and grant from the State, and could not be heard to dispute the correctness of the line fixed by the defendants in 1888. The plaintiff was not bound to do a vain thing.

We come now to consider the effect of the admission made by the plaintiff, that the defendants had fixed a line of entry, and that he (the plaintiff) had procured a grant from the State based on such entry.

We are of the opinion that the plaintiff, by such admission, did not waive his right to have the defendants locate the line a second time if in fact the line which they had already laid off was not the true line—on deep water; and whether or not the line as fixed was upon deep water

was the main issue raised by the pleadings. The right of the plaintiff is to have the line run to *deep water,* for his personal gain, and in that right the public is also interested. The general rule is that there can be no waiver of one's rights in property where there is no estoppel or no valuable consideration received. If the defendants, who were (7) simply the State's agents to fix the line on deep water, had arbitrarily fixed it beyond the deep water line so as to obstruct navigation, the State would not be estopped, in a proper proceeding, from going into the truth of the matter and having the line relocated upon its proper frontage, and thereby remove the obstruction to navigation; and it does seem that the plaintiff, having, outside of any right conferred by section 2751 of The Code, a qualified property in the lands covered by water in front of his high land up to the deep water line, ought not to be estopped from having his rights of property fixed up to the deep water line in cases where the State's agents have already fixed a line which is not the true one. In this case no valuable consideration was received by the plaintiff, and no release of any sort was made by him of his interest in the lands. Estoppels are not favored, and especially are they discouraged in cases where they would occasion injury to the public in addition to individual loss and damage. The town authorities will not be permitted to arbitrarily locate an imaginary deep water line away from the navigated part of the bay, and without making the water navigable up to that line, and thus deprive riparian owners of the right to build wharfs to it that they may avail themselves of the advantages of the navigable waters. And this is just what the complaint alleges and the answer denies. If such were the law a great deal of the business and much of the property of Edenton would be at the uncontrolled will of the temporary local authorities. There is error. The judgment of nonsuit must be set aside and a

New trial.

Cited: Clegg v. R. R., 135 N. C., 153; *Merrick v. Bedford,* 141 N. C., 506.

(8)

W. W. MIDGETT v. JOHN D. MIDGETT ET AL.

Devise—Tenancy in Common.

1. Where a will devising lands to several persons locates the lands by name or by metes and bounds so that each party knows his lands or where they are located, with such certainty that a surveyor can locate them without extrinsic aid, the devisees hold in severalty and not in common.

2. A direction in a will that lands devised to four persons shall be divided into four parts, "share and share alike," constitutes the devisees tenants in common.

3. Where a testator devised to each of four sons a fourth part of a tract of land, that given to the first to begin in the west line of a neighbor C., that given to the second to begin in the west line of the first-named son, and so on, each succeeding part to begin in the western line of the part next before given, and the shares were not otherwise located or designated, and the will further provided that the upland belonging to the whole tract should be examined by "good and punctual men" and be equally divided into four parts, share and share alike, by running straight lines across the land: *Held*, that the devise was to the sons as tenants in common, and the land should be divided equally as to value and not as to quantity, preserving the order of location directed in the will; the first son's part to be next to neighbor C., the second son's part to be next to the first son's, and so on. In case of such a devise, the tenancy being in common, a proceeding for partition was properly brought by one desiring to hold in severalty, and an order dismissing it was erroneous.

PROCEEDING for partition of land, brought by the plaintiff before the Clerk of the Superior Court of DARE, and heard on demurrer *ore tenus*, and, on motion to dismiss for want of jurisdiction, before *McIver, J.*, at Fall Term, 1894, of said court.

The facts are stated in the opinion of *Associate Justice Furches.*

MacRae & Day for plaintiff.
No counsel for defendants.

(9) FURCHES, J. Edward Mann died leaving a last will and testament devising his lands to his four sons as follows:

"2. I give and bequeath unto my son, Spencer D. Mann, one-fourth of all the lands I possess, beginning at Joseph Caroon's N. W. line, running N. W. by a straight line across the land, with all appertaining to it.

"3. I give and bequeath to my son, Samuel E. Mann, one-fourth part of all the lands I own, beginning at Spencer D. Mann's N. W. line, running N. W., with all appertaining to it.

"4. I give and bequeath unto my son, Thomas R. Mann, one-fourth part of all the lands I own, beginning at Samuel E. Mann's N. W. line, running N. W., with all appertaining to it.

"5. I give and bequeath to my son, W. K. Mann, one-fourth part of all the land I own, beginning at Thomas R. Mann's N. W. line, running N. W., with all appertaining to it.

"The amount of land and marsh agreeable to estimation is six hundred and seventy acres. I request that the upland be examined by good punctual men, and as far N. W. as considered to be fit for cultivation. I want to begin at Joseph Caroon's N. W. line and be equally divided into four parts, share and share alike, by running straight lines across the land from the water to the back lines. The N. W. of privilege land and marsh I wish to be equal to each brother for range."

The plaintiff and defendants are the devisees and assignees of devisees named in the will. The plaintiff, wishing to hold his part of the land in severalty, brings this special proceeding in the Superior Court of Dare County (the land lying in that county), alleges a tenancy in common, and asks for partition. Defendants answered. But at the trial term they demurred *ore tenus* and alleged that by the terms of the will they held their lands in severalty, and not as tenants in (10) common. And the court, being of opinion with defendants, dismissed the proceeding, and plaintiff excepted and appealed. In this ruling and judgment there is error.

The general rule seems to be that when the will locates the lands devised by name or by metes and bounds so that each party knows his land, or when they are located with such certainty that a surveyor can take the will and locate them without other aid, then the devisees would hold in severalty and not as tenants in common. In this case, Did the parties know where their metes and bounds were, or could a surveyor take the will and locate the different lots? We think not. The upland is to be examined by good "punctual men" as far northwest as considered to be fit for cultivation. Why have it examined by these good men, if it is to be divided according to quantity, without regard to value? The division is to be equal. But equal in value as we think. This provision of the will, requiring the land to be examined by good men, is inconsistent with the idea that quantity alone was to be considered in making the division.

Besides this, the lands are to be divided into four parts, "share and share alike." This provision itself, *ex vi termini,* used in a will, constitutes the devisees tenants in common. *Watts v. Clardy,* 2 Fla., 387; *Holdbrook v. Fenney,* 4 Mass., 567; *Nye v. Drake,* 9 Pick., 37.

We are therefore of the opinion that plaintiff and defendants are tenants in common, and that the ruling of the court and the judgment

appealed from are erroneous. The proceeding should be restored to the docket and proceeded with according to the law in cases for partition among tenants in common, and it is so ordered. But the terms of the will should be observed as to the order of locating the shares of
(11) the different devisees; Spencer Mann's being next to Joseph Caroon's N. W. line, and so on, as provided in the will.

Error.

Cited: *Midgett v. Twiford,* 120 N. C., 5; *Midgett v. Midgett,* 129 N. C., 22; *White v. Goodwin,* 174 N. C., 727.

CLARK BROTHERS v. DAVID HILL, JR.

Conditional Sale—Lease—Registration—Fixtures.

1. A contract for the "lease" of personal property upon payments of rent, the property to belong to the lessee upon the last payment of rent, is in effect a conditional sale, and unless registered its stipulation for the retention of title by the vendors is invalid as to third parties.

2. A "Steam Feed" attached by iron bolts to the sills of a mill, resting on piling driven into the ground, becomes by such mode of attachment a "fixture" as between mortgagor and mortgagee of the land upon which the mill is situate.

ACTION of claim and delivery, tried before *Boykin, J.,* and a jury at February Term, 1895, of BEAUFORT.

The plaintiffs sought to recover possession of a "Steam Feed" machine, which they had shipped to B. F. Moss, under whom the defendant claimed, upon conditions stated in a letter which they wrote to Moss at the time of shipment, the material part of which letter was as follows: "In sending out our Feeds in this way, we have the parties give us their notes, payable according to the terms of the lease as rental on the same, and when the notes are paid we give them title to the machinery and a contract to refund or give back the notes if the machinery does not prove satisfactory, perfectly, and do all we claim for it in our circular. We will ship the Feed on these terms at once, and we know that you will be pleased with it," etc. On the trial it appeared that the "Steam Feed" was attached to the sills of a sawmill by iron bolts, the sills resting
(12) on piling driven in the ground. The land on which the sawmill was built belonged to B. F. Moss, subject to a mortgage which

was subsequently foreclosed. The defendant claimed under the purchaser at the foreclosure sale and was in possession of the land and the "Steam Feed" (attached to the mill as stated) when suit was brought for the recovery of the machine.

Under instructions from his Honor that, upon all the evidence, the plaintiffs were entitled to recover, the jury so found, and from the judgment on the verdict of the defendant appealed, assigning as error that his Honor erred in giving the said instruction instead of the instruction prayed for by defendant that, upon all the evidence, the plaintiffs were not entitled to recover.

Charles F. Warren for plaintiffs.
John H. Small for defendant.

CLARK, J. The plaintiffs earnestly contend that the terms of the contract were those set forth in the reply to Moss when the "Steam Feed" was shipped, *i. e.*, a lease upon payments of rent, as stated, and on the last payment of rent the property to belong to Moss, in the meantime the title to be retained by the vendor. Conceding this to be correct, such contract was in effect a conditional sale. Calling it a "lease" did not make it one, when its terms showed it was not. This was held in *Puffer v. Lucas,* 112 N. C., 377, which has been since cited and approved in *Crinkley v. Egerton,* 113 N. C., 444; *Barrington v. Skinner, post,* 52. This agreement not being registered, the stipulation for retention of the title by the vendors was invalid as to third parties. The Code, sec. 1275. The property in dispute, by the mode of its attachment, became a "fixture" as between Moss and this defendant's assignor, they being mortgagor and mortgagee (*Horne v. Smith,* 105 N. C., 322; *Overman v. Sasser,* 107 N. C., 432), and inured to the benefit of (13) the mortgagee. *Foote v. Gooch,* 96 N. C., 265.

The court should have instructed the jury as prayed by the defendant that, upon all the evidence, the plaintiffs were not entitled to recover, and to answer the issues in the negative.

Error.

Cited: Barrington v. Skinner, post, 52; *Mfg. Co. v. Gray,* 121 N. C., 170; *Blalock v. Strain,* 122 N. C., 287; *Wilcox v. Cherry,* 123 N. C., 84; *Yarborough v. Hughes,* 139 N. C., 203; *Hamilton v. Highlands,* 144 N. C., 283; *Hicks v. King,* 150 N. C., 371; *Fulp v. Power Co.,* 157 N. C., 161; *Hinton v. Williams,* 170 N. C., 117; *Observer v. Little,* 175 N. C., 43; *Starr v. Wharton,* 177 N. C., 324.

RODMAN v. CALLOWAY.

Practice—Fragmentary Appeal—Judgment for Costs.

Where in an action in which each party claimed title to land, and the plaintiff recovered a part thereof, and the issue as to damages on a part of the land was not answered by the jury, but was left open to be subsequently decided, and the exceptions to the evidence were waived in this Court, the appeal is fragmentary and the judgment below as to the division of costs will not be disturbed.

CIVIL ACTION to recover land, tried before *Boykin, J.*, and a jury at February Term, 1895, of BEAUFORT, on the usual issues.

There were various exceptions to the admission and rejection of evidence. The jury rendered a verdict that the plaintiff was owner of the land excepting twenty-nine acres. The answer of the issue as to the title of two-fifteenths of the twenty-nine acres having been, by consent, reserved as a question of law to be decided by the court, his Honor gave judgment that the plaintiff was entitled to recover possession thereof, but declined to give judgment for damages for its occupation, and told the plaintiff that he would give him a new trial upon all the issues if desired. This the plaintiff declined to ask, but requested the court to make an order by which, if the defendant should file a petition
(14) for betterments under the statute, the question of damages could be passed on. Thereupon his Honor made the following order: "In this cause the jury having failed to answer the question of damages for the occupation of two-fifteenths part of the land under fence, twenty-nine acres, it is ordered, adjudged and decided that the said matter is left open to be hereafter decided, if any petition for betterments on said land shall be filed." Judgment for costs was rendered against the defendant, who excepted thereto, as well as to the order above recited, and appealed.

John H. Small and W. B. Rodman for plaintiff.
S. T. Beckwith for defendant.

FAIRCLOTH, C. J. The exceptions to the evidence were waived in this Court and the argument was made mainly on the division of the costs. Each party claimed title to, and the plaintiff recovered a part of, the land. The jury failed to answer the issue as to the damages on a part of the land, which was left over by the court to be decided hereafter. In this fragmentary condition we are not disposed to disturb the judgment on the question of costs.

Judgment affirmed.

Cited: Rogerson v. Lumber Co., 136 N. C., 270; *Shields v. Freeman*, 158 N. C., 127.

A. W. SHAFFER v. BRYAN GAYNOR

Trespass Quare Clausum Fregit—Boundary—Evidence—Reputation—Hearsay—Declarations of Owner of Land—Adverse Possession, what Constitutes—Recital in Deed by Trustee Prima Facie True.

1. Evidence by reputation and hearsay evidence are both competent where the issue involves a question of private boundary, but it is necessary to show, preliminary to the introduction of hearsay testimony, that the person whose statement it is proposed to prove is dead, because if alive the law requires that he be produced.

2. The general rule is subject to the single exception that it is not competent to prove by general reputation the location of a tract of land or premises claimed inside of another grant without showing some monument of title, such as a tree, generally reported to be the claimant's corner, or a line up to which it is generally reported that he has held possession with the acquiescence of others.

3. Occasional acts of ownership, such as entering upon land susceptible of cultivation and cutting board timbers, do not constitute possession that will mature title, but in order that a possession shall be held sufficient for that purpose the claimant must expose himself to an action in the nature of trespass in ejectment, as distinguished from trespass *quare clausum fregit*, continually during the whole statutory period, by subjecting some portion of the disputed land to the only use of which it is susceptible or by the actual occupation of a house or the cultivation of a field, however small, according to the usages of husbandry.

4. A deed is a contract, and the leading object of the courts in its enforcement, where the controversy involves a question of boundary, is to ascertain the precise lines and corners as to which the minds of grantor and grantee concurred. Hence, though parol proof is not, as a rule, admissible to contradict a plain, written description, it is always competent to show by a witness that the parties by a contemporaneous, but not by a subsequent survey, agreed upon a location of lines and corners different from that ascertained by running course and distance.

5. The declarations of a deceased landowner, made in his own interest, are no more competent when they relate to the boundaries of land than when they refer to other subjects; but the declarations of parties to actions are always admissible in evidence against, though not for them.

6. The general rule is that declarations made by one in possession of land in disparagement of his own title or characterizing or explaining his claim of ownership are competent as evidence as well against those claiming under the declarant as against him. But as to declarations made subsequent to the execution of the deed, the rule is subordinate

to the law of evidence which prohibits the contradiction of a written contract by parol testimony and cannot therefore be extended so far as to allow one in possession, even by a declaration against his own interest, to contradict a plain, unambiguous description of course and distance, contained in a deed previously executed.

7. The recitals in the deed made by the trustee to the bank are prima facie deemed correct in so far as they show that the sale was made by the trustee in pursuance of the power contained in the deed of trust.

(Syllabus by AVERY, J.).

(16) ACTION of trespass *quare clausum fregit,* commenced in March, 1886, and tried before *Boykin, J.,* at February Term, 1895, of BEAUFORT.

The plaintiff alleged possession in himself of the lands described in the complaint and deduced title from John C. Blake, trustee, to whom one S. T. Carrow had executed a deed in trust with power of sale. The lands had been bought by Carrow in 1872 at execution sale against Noah W. Guilford, issued on judgments rendered prior to 1868. The defendant asserted title to the land upon which the trespass was alleged to have been committed. In his further defense the defendant alleged "that during or about the months of April or May, 1872, while the said S. T. Carrow was in possession of the lands described in the complaint, excepting that claimed by this defendant, the said Carrow and this defendant had their lands surveyed and agreed upon the lines separating their lands and had the same distinctly marked. That from that time until the beginning of this suit the said Carrow
(17) and those claiming under him have always acknowledged and recognized the said line, and have asserted no claim to the lands claimed by this defendant."

On the trial the plaintiff, in locating his deed covering the *locus in quo,* was permitted by the court, after objection by the defendant, to show that a sweet-gum at the edge of Jacob's Creek was by general reputation in the neighborhood known as Bond's corner. This is the first error complained of.

The defendant claimed under one G. W. Guilford, trustee for G. A. Guilford. Carrow in 1872 had a survey of the lands claimed by him, and on that survey Carrow marked a gum in the southern line of his (Carrow's) land, as fixed by his (Carrow's) deed, and marked a line from the gum north, at the time saying that the gum was the corner of Graham Guilford's land, and that line was the line between them. Upon objection by plaintiff this testimony was ruled out, and defendant excepted.

Defendant offered to show that S. T. Carrow, under whom plaintiff claimed, prior to the conveyance by Carrow, agreed to execute a deed to Graham Guilford, but that in consequence of Carrow's being involved he thought it best that the deed should be made by N. W. Guilford alone. Upon objection by plaintiff this testimony was excluded.

Defendant offered to show that he cut and carried a raft of timber off the land in controversy to Washington, and that Paul Lincke prevented a sale of this raft. This with the view of showing damages. Upon objection, testimony excluded, and defendant excepted. There was no evidence that Lincke was the agent of plaintiff, and the court excluded the evidence.

Defendant requested the court to hold that it was necessary (18) for the plaintiff to show an advertisement and sale under the deed in trust to Blake, independent of the recitals in his deed. The court declined to so hold, and defendant excepted.

Defendant asked the court to charge the jury that the Sheriff's sale was void, for that no homestead was laid off. The court declined so to do, as the judgments under which the land was sold were on debts created prior to 1868, or some of them were. Defendant excepted.

The defendant relied upon color of title and possession to defeat plaintiff's title.

The court charged that there was no sufficient evidence of possession for such a length of time as would ripen defendant's color of title into title. Defendant excepted.

This land was all woods land; it was not cleared, fenced or cultivated.

The defendant testified to the following acts, which were alleged to show possession sufficient to ripen color of title into title:

In 1872, a survey of the land; in 1873, Colonel Carrow cut timber on the land from the latter part of the summer until nearly Christmas, under Guilford; in 1874, one Watt Lewis, by authority of Guilford, got two trees for boards; in 1875, Eli Moore made boards on the land; in 1876, John Brown got some large trees for ship timber; in 1877, Simon Whitehurst worked up two trees, cut down by Brown, into boards; worked on them off and on for four weeks; in 1878, in the spring, a road was surveyed across the land, and in the fall partly cut out; in the fall of 1879, Mack Smith got some staves on the land; in 1880, the defendant got oak timber; he began in January, got some in January, February, and March, and then quit and began cutting again in September; paid one-fourth rent, and the rent amounted to ten dollars; in 1881, Peyton Taylor worked on the land to the same (19) extent as the defendant had done in 1880; in 1882, defendant got four sills for a ginhouse off the land; "in the fall of 1883, I rented

some ginhouse timber to one C. W. Bonner; he paid me two dollars rent; in 1884, one Rollins got some flat knees; worked off and on from summer until about September; in 1885, the defendant bought the land, built a cabin on the land and occupied it for his hands in getting off timber."

The suit was brought in 1886.

This is all of the evidence of possession, except that during the fall and winter of every year the defendant would haul a load of lightwood knots and dead tree tops, and occasionally cut up a dead pine stump or tree, cutting in all fifteen or twenty trees.

The court charged the jury that there was not sufficient evidence of possession for a sufficient length of time to defeat plaintiff's title.

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

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

AVERY, J. In the discussion of the admissibility of evidence by reputation and of hearsay evidence, in *Dobson v. Finkley,* 53 N. C., 499, *Chief Justice Pearson* said: "It is settled law that both kinds of evidence are competent in questions of private boundary in this State. In the latter, to-wit, hearsay evidence, it is necessary as a preliminary to its admissibility to prove that the person whose statement it is proposed to offer in evidence is dead; not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be (20) produced as a witness, whereas it is manifest that in respect to evidence by reputation this preliminary question cannot arise." *Harris v. Powell,* 3 N. C., 349; *Hartzog v. Hubbard,* 19 N. C., 241.

The rule that testimony by reputation was competent, under any circumstances, to locate the boundaries of land was admitted to be a departure from the English doctrine, which is still adhered to in many of the States, notably by the Court of Massachusetts; but the fact that the country had been recently settled and was still but sparsely inhabited and that consequently monuments of title could not be so well known or firmly established as in an older country seems to have been ample justification for a modification which adapted the rule to the reason. The fact that the courts of Tennessee and of Kentucky, where the conditions were similar, followed the ruling in this State is additional evidence of the necessity for the change. *Sasser v. Herring,* 14 N. C.,

342; *Bond v. Talbott,* 1 Cooke, 142; *Smith v. Arwells,* 2 Littell, 159; 1 Greenleaf, sec. 145, note on pp. 194 and 195.

The newly adopted principle was subject, however, to the single restriction that it was not competent to show a general reputation that the premises claimed were located within the limits of certain grants, without any evidence as to monuments of title, though the claimant was permitted to prove that particular landmarks, such as trees, streams or lines, constituted, according to the general report, parts of his boundary, or that he held possession with the acquiescence of others up to a known line. *Mendenhall v. Cassels,* 20 N. C. 43.

The exception, therefore, to the testimony of the witness (21) Whitehurst that there was a general reputation in the neighborhood that the sweet-gum at 12 was Bond's corner is without merit.

"Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over land, do not constitute a possession that will mature title." *Ruffin v. Overby,* 105 N. C., 78; *Asbury v. Fair,* 111 N. C., 251; *Hamilton v. Icard,* 114 N. C., 532. A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. *McLean v. Smith,* 106 N. C., 172; *Bynum v. Carter,* 26 N. C., 310; *Tredwell v. Riddick,* 23 N. C., 56; *Cox v. Ward,* 107 N. C., 507; *Hamilton v. Icard, supra.* The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass *quare clausum fregit* for damages. *Hamilton v. Icard, supra,* pp. 536 and 537; *Osborne v. Johnston,* 65 N. C., 22; *McLean v. Smith, supra; State v. Suttle,* 115 N. C., 784; *Boomer v. Gibbs,* 114 N. C., 76. The digging of ditches and constructing roads through swamps for the purpose of getting shingles, when it appeared affirmatively that the swamp lands were susceptible of no other use, was such an assertion of ownership as subjected the occupant to an action of possession, as was the continuous getting of turpentine on a pine barren worthless for any other purpose (*Tredwell v. Riddick,* 23 N. C., 56; *Bynum v. Carter,* 26 N. C., 310); and these two cases mark the extreme limit to which this Court has gone. The testimony in this case was similar to that offered in *Ruffin v. Overby* and several others that we have cited. The acts of dominion consisted of cutting board timber some time during a particular year on a (22)

piece of woodland; but there was no evidence to show that they were continuous or, if they were, that the land, though while covered with timber it was not susceptible to other use, might not have been cleared and cultivated, regardless of its capacity for profitable production. There was no error, therefore, in instructing the jury that such acts were not an assertion of the right that would mature title.

The sweet-gum at 12 had, it seems, been marked by S. T. Carrow as a pointer to show where a stake called for as a corner was located. The marking was done in the progress of a survey made by one S. T. Roberson, to determine the location of the line between Carrow's land and that of Noah W. Guilford. The plaintiff claimed through S. T. Carrow, to whom the Sheriff of Beaufort County conveyed, by virtue of a sale under execution of the lands of Noah W. Guilford, on 6 January, 1872. Plaintiff exhibited mesne conveyances, including deed of trust from Carrow to John C. Blake, deed from Blake, trustee, to the First National Bank of Raleigh, and from the bank to the plaintiff, dated 31 October, 1883.

The defendant claimed under a deed from N. W. Guilford to George W. Guilford, trustee for Graham A. Guilford, dated 23 May, 1872. It was in evidence that this survey was made between the date of the deed of Satchwell, Sheriff, to Carrow and that of Noah W. Guilford to George Guilford, trustee, and at some time in the spring of 1872. S. T. Carrow was at the time of the survey in possession under the Sheriff's deed.

A deed conveying land is a species of contract, in the enforcement of which the leading purpose of the courts, where the controversy involves a question of boundary, is to ascertain the precise lines and
(23) corners as to which the minds of grantor and grantee occurred.

Parol proof, of course, is not as a general rule admissible to vary or contradict a plain written description, but it is always competent to show where the parties located the lines and corners by a contemporaneous survey, in order to define more exactly what was intended to pass. *Cherry v. Slade,* 7 N. C., 82. The survey made under such circumstances is intended, in contemplation of law, to reduce to a certainty what the courts would have held sufficiently definite for enforcement as a contract without a survey only when it appeared that by running from an established point called for according to the description contained in the deed a definite boundary would be embraced within the lines. Hence it is held competent to prove that a contemporaneous, but not a subsequent, survey located a corner at a place different from that ascertained by following course and distance. The corner was located by means of the gum pointer

and the line was marked by Carrow, not contemporaneously or with a view to the subsequent execution of the conveyance by Noah W. Guilford to George Guilford, trustee, and the law does not therefore impute to the parties the intent to contract with reference to the survey merely because it had been made before the date of the deed. Admissions made in the progress of a survey subsequent to the date of the deed executed to George Guilford, or even a parol agreement to mark the lines and corners in a certain way, would not have been competent to show that a line or corner was located otherwise than where a definite description contained in the deed would locate it, because the effect would be to contradict or vary a written contract, upon its face free from ambiguity, by a subsequent verbal agreement entered into without consideration. *Caraway v. Chancey,* 51 N. C., 361; *Buckner v. Anderson,* 111 N. C., 572; *Shaffer v. Hahn,* 111 N. C., 1. It is equally clear that the testimony is not com- (24) petent as proof of an act accompanying the delivery of a deed and constituting a part of the *res gestae,* so as to bring the case (in accordance with the contention of counsel) within the reason of the ruling in *Roberts v. Preston,* 100 N. C., 243.

Though Carrow is dead, his declarations made in his own interest would be no more competent when they relate to the boundaries of land than when made in reference to other subjects. *Heddrick v. Gobble,* 63 N. C., 48; *Ray v. Pearce,* 84 N. C., 485; *Roberts v. Roberts,* 82 N. C., 29. But the declarations of parties to suits are always admissible evidence against, though not for, them. *McRainey v. Clark,* 4 N. C., 698; *McDonald v. Carson,* 95 N. C., 377; *Gidney v. Moore,* 86 N. C., 484; *Avent v. Arrington,* 105 N. C., 377.

If the declaration of Carrow would have been competent against him as plaintiff in this action, it would be competent under the general rule applicable to all classes of cases against the plaintiff, who claims through him. *May v. Gentry,* 20 N. C., 117; *Woodley v. Hassell,* 94 N. C., 157; *Braswell v. Gay,* 75 N. C., 515. It has been frequently held, too, that where declarations are made by one in possession of land, characterizing or explaining his claim of ownership or in disparagement of his own title, they are competent as evidence not only against the declarant, but against all claiming under him. *Guy v. Hall,* 7 N. C., 150; *Kirby v. Maston,* 70 N. C., 540; *Marsh v. Hampton,* 50 N. C., 382; *Mebane v. Bullard,* 82 N. C., 23; *Nelson v. Whitfield,* 82 N. C., 46; *Pearce v. Jenkins,* 32 N. C., 355; *Peck v. Gilmer,* 20 N. C., 391; *Cansler v. Fite,* 50 N. C., 424. If, however, the declaration of Carrow, made even against his own interest, was offered to contradict a plain, unambiguous description, it was clearly incompetent

(25) under the principle laid down in *Schaffer v. Hahn* and *Buckner v. Anderson, supra.* It appears that while there is no description of the disputed line given in the deed from N. W. Guilford to George Guilford, trustee, except by reference to Carrow's line and the lines of other adjacent tracts, it purporting to cover the land bounded by the lines of Carrow and others, the surveyor ran the several calls of Carrow's deed, or the deed to which it refers for description, either by course and distance or to established corners, from the beginning to a pine, at fig. 7, known as the "proved pine," and thence, according to the course and distance of the deed, south 46 west 313 poles along an old marked line, the distance giving out at 8, though no gum was there found. The other calls were also run by course and distance, or to known corners at stations 9, 10, 11, and back to the beginning at fig. 1. Is Carrow's declaration admissible to control a well-defined description and an undisputed survey by course and distance? The general proposition that the declarations of one in possession in disparagement of his own right are admissible as against all who claim through or under him is of necessity subordinate to the more important rule that an unambiguous, written description, which is the best evidence of the nature of the contract between the parties, and an undisputed location by a survey in accordance with the running from known corners by course and distance cannot be contradicted by more uncertain proof of declarations by a former owner while in possession, which, if acted on, would require an utter disregard of course and distance. If, as the surveyor testifies, by running from a known corner at the beginning either to established corners or by course and distance, according to the calls of the deed, to an admitted corner at 7, and thence by course and distance, he located the plaintiff's gum corner at 8, it is not competent to contradict that description, which from known or admitted

(26) data fixes the corner with mathematical certainty by the survey there, by a declaration made by the grantee under a mesne conveyance, while in possession. The beginning corner was not disputed, and courses and distances from it inevitably carried the surveyor to 7, which the defendant admitted was a corner which he made the point of departure in the controversy about the next line. The calls, following chain and compass, as was not disputed, would run from 7 to 8, 9, 10, 11 and 1, so as to include the land trespassed upon and the whole boundary claimed by the defendant, except the triangle 8, 9, F. It is plain, then, that to give to the proof of Carrow's declaration the effect of cutting off 300 acres by running from 7 to E would be to contradict by hearsay evidence the description, which from admitted data and by survey, the correctness of which was not questioned, appears

to cover the *locus in quo* and fix the plaintiff's boundary as claimed by him. The case was somewhat confused in the argument by leaving the impression that there was doubt about the location of plaintiff's calls, whereas it was the description of the defendant's title, which called for plaintiff's line and the line of others, so as to include what was not embraced by the deeds of either of them. We think, therefore, that there was no error in excluding the testimony as to Carrow's declaration. The verbal agreement of Carrow to join N. W. Guilford in the conveyance to George, which was not carried out because of Carrow's embarrassment, in part by the mortgage through which plaintiff claims, was utterly void in any aspect. There is as little force in the exception to the refusal of the Judge to admit the testimony that Paul Lincke, plaintiff's agent, prevented the sale of a raft.

The recitals in the deed from the trustee to the bank are deemed prima facie correct in so far as they show that the sale was made by the trustee in pursuance of the power contained in (27) the deed of trust. *Shaffer v. Hahn, supra.* The executions under which the land was sold as the property of N. W. Guilford and bought by Carrow issued upon debts created before the year 1868. The title passed to the purchaser, therefore, discharged of all liability to allotment as a homestead. *Long v. Walker,* 105 N. C., 90.

Upon a careful review of all the exceptions we conclude that the judgment must be

Affirmed.

Cited: Hamilton v. Icard, post, 478; *Deaver v. Jones,* 119 N. C., 599; *Higdon v. Rice, ib.,* 625, 626, 627, 629; *Westfelt v. Adams,* 131 N. C., 383; *Ratliff v. Ratliff, ib.,* 428, 431; *Prevatt v. Harrelson,* 132 N. C., 252; *Cowles v. Lovin,* 135 N. C., 491; *Yow v. Hamilton,* 136 N. C., 359; *Hemphill v. Hemphill,* 138 N. C., 506; *Norcum v. Savage,* 140 N. C., 473; *Bland v. Beasley, ib.,* 631; *Bivings v. Gosnell,* 141 N. C., 343; *Vanderbilt v. Johnson, ib.,* 373; *Haddock v. Leary,* 148 N. C., 380; *Hill v. Bean,* 150 N. C., 437; *Lumber Co. v. Triplett,* 151 N. C., 411; *Lamb v. Copeland,* 158 N. C., 138; *Bank v. Whilden,* 159 N. C., 281; *Ricks v. Woodward, ib.,* 649; *Corey v. Fowle,* 161 N. C., 189; *Kirkpatrick v. McCracken, ib.,* 200; *Clarke v. Aldridge,* 162 N. C., 331; *Allison v. Kenion,* 163 N. C., 585; *Lumber Co. v. Lumber Co.,* 169 N. C., 89, 96; *McKimmon v. Caulk,* 170 N. C., 57; *Byrd v. Spruce Co., ib.,* 434; *Lumber Co., v. Hinton,* 171 N. C., 30; *Improvement Co. v. Andrews,* 176 N. C., 282; *Singleton v. Roebuck,* 178 N. C., 203; *Timber Co. v. Yarbrough,* 179 N. C., 339.

J. T. PETTIFORD v. ARTHUR MAYO, ADMINISTRATOR OF W. H. SIMMONS.

Trial—Evidence—Testimony of Facts Raising Conjecture Only.

1. While in the trial of an issue no fact or circumstance from which an inference as to the truth of the matter in dispute can be drawn ought to be excluded from the consideration of the jury, yet such facts and circumstances as raise only a conjecture or suspicion ought not to be admitted to distract the attention of the jury or to consume the time of the court.

2. In the trial of an issue as to the execution of a note by the intestate of defendant, testimony that the deceased was a man of property and had money lent out when he died was properly withdrawn from the consideration of the jury.

3. In the trial of an issue as to the execution of a note by the intestate of defendant, evidence that the deceased declared on his deathbed that he was going to die and did not owe a cent in world was properly excluded.

ACTION on a promissory note alleged to have been executed by W. H. Simmons, the intestate of defendant, tried before *Boykin, J.*, and a jury at June Term, 1895, of WASHINGTON.

The only issue submitted was, "Did W. H. Simmons execute
(28) the note sued on?" There was verdict for the plaintiff, and defendant appealed from a judgment thereon.

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

W. B. Rodman for plaintiff.
J. H. Small for defendant.

MONTGOMERY, J. The defendant denied that his intestate executed the note sued on, and a single issue was submitted to the jury on that point. The plaintiff introduced a witness who testified to the execution of the note by the defendant's intestate, and who also testified, on his cross-examination, that the maker was a "man of property, had a good farm and lent money at times." A witness for the defendant testified that the intestate was worth between three and four thousand dollars and had twenty-five hundred dollars loaned out when he died. The court afterwards withdrew this testimony from the jury and instructed them not to consider it, and the defendant excepted and appealed. No

fact or circumstances in any way connected with the matter in issue or from which any inference of the disputed fact can reasonably be drawn ought to be excluded from the consideration of the jury. On the other hand, such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters. Besides, such a proceeding is a waste of time and a cause of expense. Was the testimony excluded calculated to enable the jury to decide the issue presented? Did it throw any light on the fact to be determined—the execution of the note? Did it have any reasonable tendency to disprove its execution? We do not see how it could have had such effect. Can it be true that the allegation that a man of property had borrowed money carries with it an (29) idea so inconsistent with the relations of practical business life as to furnish proof, in itself, of the act not having been done? We cannot think so. It does not even carry with it a serious suspicion. In the course of human experience it not infrequently happens that prosperous, prudent men have not ready money to answer present needs, and borrow on that account. It is, to say the least, not unreasonable to infer that such was the situation of defendant's intestate at the time the note was alleged to have been executed. There was no proof offered to show that at any time, from the alleged execution to his death, the intestate had money on hand idle. This Court said, in *Brown v. Kinsey,* 81 N. C., 245: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." There was no error in the withdrawal and exclusion of the testimony by his Honor.

There was another exception raised on the trial, but not insisted on here in the appellant's brief. It is this: The defendant offered to prove that the intestate on his deathbed said that he "was going to die and that he did not owe a cent in the world." The court excluded the testimony on the plaintiff's objection. There can be no doubt that his Honor was right in so ruling. There is no error in the action of the court below.

Affirmed.

Cited: Byrd v. Express Co., 139 N. C., 276; *Liquor Co. v. Johnson,* 161 N. C., 76; *S. v. Bridgers,* 172 N. C., 882.

(30)

IDA L. LUPTON v. SILAS LUPTON.

Description—Parol Evidence to Assist Description—Identification.

Where the assignment to a widow of her year's support from her husband's estate included "one-half of boat," and it was proved in an action relating to the title thereto that her husband was interested in but one boat: *Held*, that such assignment was not void, and parol evidence was admissible to identify the boat as the one in which the husband had a half interest.

SPECIAL PROCEEDING, begun before the Clerk of the Superior Court of Carteret, for the sale for partition of a boat described in the petition. One issue, as to title, was raised and, being transferred to term for trial, was heard before *Boykin, J.*, and a jury at Fall Term, 1894, of CARTERET.

The facts sufficiently appear in the opinion of *Chief Justice Faircloth*. From a judgment for the plaintiff defendant appealed.

Simmons, Gibbs & Pearsall for plaintiff.
N. J. Rouse for defendant.

FAIRCLOTH, C. J. The plaintiff, Ida L. Lupton, filed a petition for sale and division of the proceeds of a certain boat, "Dolly," alleging that she and defendant were tenants in common of the boat, which was denied by defendant. In the assignment of plaintiff's year's allowance from her former husband's estate one of the items was "one-half of boat," and defendant insisted that that part of the assignment was void for want of better description and that no title passed. It was proved that the boat "Dolly" was the only boat in which her husband had any interest at his death. His Honor admitted the assignment in
(31) evidence and heard oral testimony as to the identity of the boat and defendant excepted and appealed.

The evidence was competent. *Spivey v. Grant*, 96 N. C., 214; *Phillips v. Hooker*, 62 N. C., 194. These cases are distinguishable from *Blakely v. Patrick*, 67 N. C., 40, where there were more than ten buggies, and the ten could not be identified.

Affirmed.

Cited: Coleman v. Whitaker, 119 N. C., 115; *Fulcher v. Fulcher*, 122 N. C., 102; *Alston v. Savage*, 173 N. C., 214.

AARON MARCUS v. BERNSTEIN, COHEN & CO.

Action for Damages—Malicious Prosecution—Termination of Criminal Action—Nolle Prosequi at Instance of Accused.

1. The criminal proceeding which is made the ground for an action for malicious prosecution must be terminated before such action can be maintained.

2. A *nolle prosequi* is a sufficient termination of a criminal proceeding to entitle the defendant therein to maintain his action for malicious prosecution, unless it appears from the record that he *procured* the proceeding to be so terminated.

ACTION for malicious prosecution, tried before *Brown, J.,* and a jury at Spring Term, 1895, of TYRRELL.

The plaintiff was arrested in a criminal proceeding at the instance of the defendants, and was charged with embezzling goods to the amount of $80 belonging to the defendants. The plaintiff insisted that he purchased the goods out and out, and the defendants insisted that the goods were simply consigned to him to be sold, etc. The plaintiff was arrested and brought before a justice of the peace for trial, when the plaintiff "acknowledged the claim and arranged with the prosecutors that if they would withdraw the suit or take a *nol. pros.,* (32) he would settle the claim, which was agreed to."

The plaintiff paid the claim, and the prosecutors took a *nol. pros.* and paid the cost of the criminal action. Plaintiff was thereupon discharged, and brought this action for damages, alleging that the prosecution was malicious. The issues were found in favor of the plaintiff and he had judgment, from which the defendants appealed.

J. H. Blount, W. M. Bond and R. C. Strong for plaintiff.
Shepherd & Busbee for defendants.

FAIRCLOTH, C. J. His Honor charged the jury that upon the facts in this case the burden was upon the plaintiff to show to the satisfaction of the jury, by a preponderance of evidence, that the prosecution was not only malicious, but that it was also commenced and the defendant was arrested without probable cause, and that the prosecution had terminated before the commencement of this action. This charge was quite favorable to the defendants, and as the plaintiff made no exception those questions are out of our way. It is well settled that the criminal

proceeding must be legally terminated before an action of this nature can be maintained, and it is unnecessary to cite authorities on that proposition.

What constitutes a legal termination of the criminal action is a question upon which the authorities are conflicting in different States. We shall not review them nor collect them into opposing scales for the purpose of finding in which scale is the preponderance of evidence, as this Court has said that a *nolle prosequi* is sufficient to enable a party to maintain his action. *Hatch v. Cohen,* 84 N. C., 602; *Welch* (33) *v. Cheek,* 115 N. C., 310; *Groves v. Dawson,* 133 Mass., 419.

The essential thing is that the prosecution on which the action for damages is based should have come to an end. How it came to an end is not important to the party injured, for whether it ended in a verdict in his favor, or was quashed, or a *nol. pros.* was entered, he has been disgraced, imprisoned and put to expense, and the difference in the cases is one of degree, affecting the amount of the recovery.

The defendants contend, however, that when a *nol. pros.* is obtained by the procurement or consent of the plaintiff, that is an exception to the above rule. We are not aware that that question has ever been presented to this Court, but we are inclined to agree to that proposition. In *Langford v. R. R.,* 114 Mass., 431, it was held: "Where a *nol. pros.* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution." We do not think, however, that the facts in the present case make an exception to the general rule. The plaintiff protested all the time that his arrest was malicious and without just cause. There was no compromise, as the plaintiff only paid his debt, which he was in duty bound to do, and the defendants paid the cost of the prosecution. This was the arrangement or agreement, and nothing appears to show that the plaintiff *procured* the *nol. pros.* any more than that the defendants entered it on their own motion. In fact, their paying the costs rather indicates their desire to have a *"stet processus,"* as it is called in the early books, and also indicates that their action was instituted more for the purpose of collecting their debt than because of any criminal offense, or from any patriotic motive, (34) which purpose can receive no sanction in this Court, and should not be encouraged in any court. It is an authorized mode of the strong controlling the weak.

"Procure" means "to contrive, to bring about, to effect, to cause." Webster Dict. Procure means action, and the *nol. pros.* must have been at the instance or request of the plaintiff. If it cannot be seen

at whose instance the dismissal was entered, then the general rule prevails, because the reason and the grounds upon which the exception is based do not appear.

No error.

Cited: Welch v. Cheek, 125 N. C., 355; *Wilkinson v. Wilkinson,* 159 N. C., 266.

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(35)

B. V. McCLESS ET AL v. J. C. MEEKINS ET AL.

Injunction—Pleading—Practice—Municipal Debts—Necessary Expenses—Power of County Commissioners to Fund—Special Taxes—Obligation of Contracts—Constitutional Law.

1. Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, removed or otherwise disposed of pending the suit, so that the complainant may lose or be hindered or delayed in obtaining the fruit of his recovery, the court will, in aid of the equity, secure the fund by injunction.

2. In an action to have the funds raised by a special tax applied to the purpose for which it was levied, to-wit, the payment of county bonds issued in settlement of debts incurred by the county, the complaint alleged that the county orders, to fund which the bonds were issued, were "valid and overdue": *Held,* that such allegation was sufficient, without specially alleging that the orders were given for the necessary expenses of the county or by the sanction of a majority vote of the qualified voters of the county.

3. Where, in an action to have the funds raised by a special tax for the payment of county bonds, into which county orders had been funded, applied for that purpose, there is nothing in the pleadings to show that such county orders were not issued for the necessary expenses of the county, it cannot be urged as an objection to the complaint that it does not state that the orders were issued for such necessary expenses, the presumption being that the commissioners who issued the orders acted in good faith and within the scope of their authority under the Constitution and laws.

4. The commissioners of a county have the right to issue county bonds in the place of orders previously issued for the necessary expenses of the county, without obtaining the sanction of a majority vote of the qualified voters of the county.

5. Section 7 of Article VII of the Constitution does not require that an act of the General Assembly authorizing a special tax to pay debts of the county contracted for necessary expenses shall provide for the submission of the matter to a vote of the people.

6. An act of the General Assembly may be constitutional in part, and in part unconstitutional; therefore:

7. An act of the General Assembly (ch. 257, Acts of 1889) authorizing county commissioners to fund the indebtedness of the county by issuing bonds and to levy a special tax for paying them, is valid in so far as it is applicable to indebtedness incurred for necessary expenses, but in so far as it relates to indebtedness not so incurred it is in conflict with section 7, Article VII of the Constitution.

8. Chapter 257, Acts of 1889, authorized the levy and collection of a special tax for the payment of certain county bonds; chapter 278, Acts of 1895, directed that the special tax collected under the said act of 1889 should be turned into the general county fund: *Held*, that the act of 1895 is without effect, being in conflict with section 7, Article V of the Constitution, which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied.

9. An act of the General Assembly authorizing the levy of the requisite taxes to pay municipal bonds and in force when the bonds are issued enters into and becomes a part of the contract under which the bonds are delivered and taken, and cannot be annulled by subsequent legislation.

(36) MANDAMUS by B. V. McCless *et al.* against J. C. Meekins, Sr., Treasurer of TYRRELL County, and others, to compel the defendant as such Treasurer and others, to apply a special tax fund to payment of bonds held by plaintiff, and for an injunction to restrain the defendant, Meekins, Treasurer, from turning the fund into the general fund of the county, pending the action, heard before *Brown, J.*, who continued the injunction to the hearing, and defendants appealed. The facts sufficiently appear in the opinion of *Associate Justice Montgomery.*

J. H. Blount for plaintiffs.
W. B. Rodman for defendants.

MONTGOMERY, J. The main object of this action is to restrain the defendant, Meekins, who is the Treasurer of Tyrrell County, from paying into the general county treasury a special tax fund which the plaintiff alleges was collected for the benefit of himself. He also alleges that if this fund is so disposed of he will be without remedy because of the large indebtedness of the county, and because of the constitutional

limitation which prevents a sufficient levy of taxes to pay its necessary current expenses. The answer does not fully deny this allegation, nor did the defendant file before his Honor affidavits for any purpose on the motion for the order of restraint. So it seems that if the order should be vacated the action would to all intents and purposes be dismissed. It is unnecessary to cite the numerous decisions of this Court sustaining the proposition in *Parker v. Grammer,* 62 N. C., 28: "Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, or removed, or otherwise disposed of by the defendant, pending the suit, so that the complainant may lose the fruits of his recovery or be hindered and delayed in obtaining it, the (37) court will, in aid of the equity, secure the fund," etc.

In this case, however, whether or not there was error in the granting of the order by his Honor depends upon the power of the Board of Commissioners to issue bonds in substitution of county orders, given for the necessary expenses of the county, without the sanction of a majority of the qualified voters, and also upon the constitutionality of two acts of the General Assembly, chapter 257, Laws 1889, and chapter 278, Laws 1895.

Before we discuss the force of these acts, we will notice another question raised by the defendants as to the sufficiency of the complaint in matter of substance: the defendants contend that as the complaint does not show that the county orders, for which bonds were issued, were given for the necessary expenses of the county or by the sanction of a majority vote of the qualified voters of the county, they (the orders) are therefore void. The complaint alleges that the orders were *valid* and overdue, and this would seem to be sufficient pleading, because any county order issued by the commissioners, without a popular vote, for any debt or obligation of the county, except for necessary expenses, would be invalid. But if not, we think that the objection is not well taken. There is nothing in the pleadings tending to show that the orders were not issued for the necessary expenses of the county, except an averment in the answer to that effect, based expressly on the failure of the plaintiff to so allege, and not as a substantive fact. The presumption is that the commissioners acted in good faith and within the scope of the authority conferred upon them under the Constitution and laws. Of course if it should appear on the trial of this action that the orders were (38) issued by the commissioners for any other consideration except necessary expenses, the orders would be void, and the plaintiff would not be entitled to the relief he seeks. The presumption, then, being in favor of the validity of the orders and that they were issued for necessary county expenses, we come to the question, "Did the commissioners have the right to issue bonds in the place of the county orders unless they were

authorized to do so by a vote of the majority of the qualified voters?" The answer is "Yes." In *Tucker v. Raleigh,* 75 N. C., 267, this Court had under consideration Article VII, sec. 7, of the Constitution, and decided not only that the city had the power, without the sanction of a popular vote, to contract a debt for its necessary expenses, but that it also had the right to acknowledge the debt by the issue of an order on the treasurer of the city for its payment, and also to substitute a bond of the city for the orders which it had previously issued for the same debt. It was also held in that case that "the general rule is that where a body is authorized to contract a debt, it is implied that the usual evidence or security may be given." In addition, it may be said that if legislative authority had been necessary for the issue of the bonds to pay necessary expenses, it was had by the Act of 1889, ch. 257.

The answer does not clearly make the averment that the Act of 1889, in authorizing the levy and collection of a special tax to pay the indebtedness of the county, without a popular vote being provided for, violates Art. VII, sec. 7, of the Constitution. But as the question is of interest to the entire county and the plaintiffs rely upon the act itself, and the conformity thereto of the magistrates and the Board of Commissioners in levying the tax, to have this fund subjected to their debt, we will take up this phase and pass upon it. Article VII, sec. 7, of the Constitution does not require that an act of the General Assembly which authorizes a special tax to pay debts of the county contracted
(39) for its necessary expenses shall require the matter to be submitted to a vote of the people.

The act provides, among other things: "Section 1. That for the purpose of settling and paying the lawful indebtedness of Tyrrell County outstanding———it shall be lawful for the Board of Commissioners of said county to fund the same by issuing the bonds of the county to the amount of ten thousand dollars, ——— the said bonds to run from one to ten years——— Section 2. That, in order to pay the said bonds and interest, the Board of Commissioners in joint session with the the justices of the peace of the county shall levy annually a special tax sufficient to pay the same———" We have already said that the commissioners would have no right to issue bonds without a popular vote unless for necessary expenses. Neither would the Legislature have the power to authorize them to do so. It seems from the perusal of the act that power was intended to be given to the commissioners to issue bonds for any and all indebtedness of the county, whether incurred for necessary expenses or not. This power will not be conferred by the legislative power, for such an attempt would be directly in conflict with Article VII, section 7, of the Constitution. But we see no reason why the commissioners should not be allowed, under the act, to fund the

county debt and issue bonds for that part of the same which was contracted for necessary expenses, without a poular vote, even if they had not the power given to them expressly under the Constitution and other laws than the Act of 1889. An act of the Legislature can be constitutional in part and in part unconstitutional. *McCubbins v. Barringer,* 61 N. C., 554; *Johnson v. Winslow,* 63 N. C., 552. The presumption, then, being as we have already seen, that the bonds of the plaintiff are issued by the commissioners for any other consideration except county expenses, and the plaintiffs having alleged that the bonds (40) were delivered to them in accordance with the provisions of the Act of 1889, and that the special tax fund, now the subject of controversy, was the fruit of a levy and collection in accordance with the act, we conclude that the plaintiffs are entitled to have this fund kept intact until the final trial of this action, unless, as the defendants contend, the act is repealed by the subsequent Act of 1895, ch. 278. We are of the opinion that the Act of 1895 is without effect, because it is against the provisions of Article V, section 7, of the Constitution, which is in these words: "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." Besides, if the plaintiffs' complaint be true, the Act of 1889 entered into and became a part of the contract as much so as the expressed agreement of the parties, and the Act of 1895 seeks to impair the obligation of the contract. This cannot be done. Art. I, sec. 10, Const. U. S. In *Vann Hoffman v. Quincy,* 4 Ill., 555, the Supreme Court, in discussing this principle, said: "It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than any other. Laws requiring taxes to the requisite amount to be collected to pay municipal bonds which were in force when the bonds were issued cannot be annulled by subsequent legislation." There is no error in the granting of the restraining (41) order.

No error.

Cited: Coal Co. v. Ice Co., 118 N. C., 236; *Hutchins v. Durham, ib.,* 468; *Williams v. Comrs.,* 119 N. C., 525; *McDonald v. Morrow, ib.,* 677; *Caldwell v. Wilson,* 121 N. C., 469; *Greene v. Owens,* 125 N. C., 222; *Bennett v. Comrs., ib.,* 469; *Smathers v. Comrs., ib.,* 485, 488; *Horn-*

thall v. Comrs., 126 N. C., 30; *Broadfoot v. Fayetteville*, 128 N. C., 531; *Black v. Comrs.*, 129 N. C., 126, 128; *Whitfield v. Garris*, 131 N. C., 150; *Mfg. Co. v. Summers*, 143 N. C., 106; *Charlotte v. Trust Co.*, 159 N. C., 391; *Drainage District v. Parks*, 170 N. C., 438; *Cottrell v. Lenoir*, 173 N. C., 145; *Bennett v. Comrs., ib.*, 628; *Parvin v. Comrs.*, 177 N. C., 509.

W. E. BROWN v. E. E. DAIL ET AL.

Sale of Contingent Interests—Chattel Mortgage, Validity of—Mortgage on Prospective Products—Registration—Lien.

1. Contingent rights are, as a rule, assignable in equity, and a deed conveying the same, if executed fairly, and for a sufficient consideration, will, upon the happening of the contingency and the vesting of the interest, be enforced in equity as a contract to convey.

2. A contract creating a lien upon the stock of prospective products of a business, to secure capital for the operation of the business, is a valid chattel mortgage.

3. The fact that a lien is created on the entire stock and prospective products of a business, in order to secure advancements for its conduct, does not raise a presumption of fraud either upon the ground that it is manifestly for the ease and comfort of the one conducting the business or that the terms of the contract are such as to call for explanation and throw upon one claiming under it the burden of rebutting the presumption that it is fraudulent.

4. Where parties engaged in sawmilling business executed a chattel mortgage upon all their stock on hand and upon their prospective stock and products in order to secure advancements for carrying on the business, and the mortgage was duly recorded, logs sold to and coming into possession of the mortgagors became subject to the lien of the mortgagee, as against the vendor, immediately upon delivery.

ACTION for the possession of personal property, tried before *Bryan, J.*, at the May Special Term, 1895, of CRAVEN, upon exceptions filed by the defendants to the report of a referee.

The facts as found by the referee were that in February, 1893, (42) James F. Heath and others entered into a contract with the plaintiff which, after setting out in the premises that the former, who were engaged in the business of cutting and sawing timber, had

not the means necessary to carry on the business and had applied to the plaintiff for financial aid, who agreed to make the advances if he should be fully secured, provided as follows:

"It is agreed by all the parties to this agreement that all the logs cut, all the lumber sawed and every product of this business shall stand as security for all and any advancements made under this agreement; and when the lumber is sawed any sums received from the sale of the same at the mill shall be paid over to the party of the first part, and on any shipment made of said lumber the bill of lading shall be made out in W. E. Brown's name, and the proceeds of the same shall come first to him; that the moneys received by W. E. Brown from the sale of lumber shall be applied to the payment of any and all indebtedness to him due and owing by the parties of the second part and the parties of the third part for advancements made under this contract and agreement, and the balance, if any, shall be paid over to the said parties of the second and third parts, as their respective interests may appear."

The referee further found that said contract was duly registered on 3 May, 1893, and that the plaintiff performed his part of the contract; that said Heath and others entered upon the lands of the defendant, E. E. Dail, under the lease of the timber rights, cut timber thereupon and failed to pay rents, until on 12 September, 1893, in settlement for rent and timber up to that date, they sold to the defendant, E. E. Dail, all the lumber on the sawmill yard, and on that day the said Dail took possession.

The referee found as conclusion of law that the said contract was a mortgage, and after registration was notice to the world of its conditions and covered property acquired after its date in the conduct of the business described in the contract; that the title to the (43) lumber delivered to Dail under the sale of 12 September, 1893, did not pass to him except subject to the lien of the mortgage to plaintiff.

The report and findings of the referee were sustained by the court, and the defendants appealed.

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

AVERY, J. Under the rigid rule of the common law contingent interests might be released to the particular tenant or devised, or might pass to the heir or executor, but according to Blackstone could not "be assigned to a stranger unless coupled with some interest." 2 Bl., 290. But a different principle prevailed in courts of equity, and following

the more liberal policy, which is better adapted to the state of society in this country, the Court has held that contingent rights are, as a rule, assignable in equity, and that a deed purporting to pass what one expects to inherit from a parent, and many other contingent rights, will, upon the happening of the contingency and the vesting of the interest, be enforced in equity as a contract to convey, when it appears that the deed was executed fairly and for a sufficient consideration. *Foster v. Hackett,* 112 N. C., 546; *Watson v. Smith,* 110 N. C., 6; *Wright v. Brown,* 116 N. C., 26; *Taylor v. Smith, ib.,* 531; *McDonald v. McDonald,* 58 N. C., 211; *Mastin v. Marlow,* 65 N. C., 695; *Bodenhamer v. Welch,* 89 N. C., 78. The ancient prohibitory rule which declared deeds for pretended titles and for interests in lands adversely held, as well as conveyances of expectancies to strangers, inoperative and void, was founded upon the idea that such contracts were in contravention
(44) of public policy. This Court was not governed, in *Loftin v. Hines,* 107 N. C., 361, by any such principle as was suggested on the argument, but justified the ruling upon the widely different and much more rational view of public policy that, in sustaining the validity of mortgages upon crops that might be made by the mortgagor for an indefinite future period, the courts would not lend their sanction to contracts tending to "diminish production." In this case the agreement by virtue of which the property is claimed vested in the plaintiff, in consideration of his stipulation to make advancements to defray the necessary expenses in the prosecution of the sawmilling business, the title to "all the logs cut, all the timber sawed and every product of the business" if it was neither illegal nor fraudulent. The defendants attempt to impeach the instrument upon two totally incongruous grounds. They contend, first, that it should be held void as against public policy because it tends to oppress the defendants, who were engaged in running the mill, and destroy production in the line in which they were engaged, and for the further reason that it is the duty of the Court to hold that the agreement is either upon its face void, because by its terms manifestly made for the ease and comfort of the men engaged in the milling business, or if that is not true that the terms of the instrument are such at least as to call for explanation and throw upon the plaintiff claiming under it the burden of rebutting the presumption that it is fraudulent. The six exceptions to the referee's report, which were overruled by the court, raise the question whether either of these contentions should be sustained.

As between the original contracting parties we think the agreement is neither void nor presumptively fraudulent. The authorities cited show that the agreement was not void because it purported to
(45) pass the equitable right to personal property which at the time

had no potential existence. There is no apparent danger of destroying the business of the mortgagors if we hold that the paper must be construed as creating a lien from its registration, since the plaintiff, as a security for the money advanced to buy, cut, deliver and saw logs, acquired a lien upon the logs and the product of the mill, with the power in the defendants to sell at the mill and pay over the proceeds of sale to the plaintiff, Brown, or to ship to other markets in the name of Brown as consignor. A contract of this kind, to operate indefinitely on the capital of another, conduct the sales of the product of the business and pay over the proceeds, but to hold both raw material and the finished or converted article in trust to secure the payment of the fund advanced, is not of the kind that either destroys industries or oppresses those conducting them. The parties engaged in the milling business were allowed to make an experiment on the most favorable terms to ascertain whether it is true that mathematical calculations may be relied on to ascertain in advance the probable profits of any other business, but that figures will fail to bring correct results when applied to the prospective operation of a sawmill. From bad management or some other cause the business did not prosper, and thereupon a lot of logs which had been delivered unconditionally, so as to vest the title to them first in the defendants and then subject them to the lien, if any was created by the agreement, were turned over to the brother of one of the defendants, who had furnished them. The brother (E. E. Dail) had no longer any title to or lien upon the logs. If the agreement created a lien as between the parties to it upon all logs delivered at the mill, it would follow, upon the authority of adjudication in this Court and elsewhere, that the defendant, E. E. Dail, had constructive notice (46) of its terms and its legal effect, because upon a well-established principle he could have no better title than his vendor. Jones Ch. Mort., section 156.

If the defendants by the terms of the agreement held the proceeds of sale of the lumber and logs in trust to secure the payment of the money advanced, it would seem manifest they are in the condition that a person always occupies who takes property which he knows is held in trust in payment of a debt due him from the trustee in his individual capacity. If E. E. Dail had taken a horse which had been subjected to the lien of a chattel mortgage by those who were operating the sawmill to secure a debt due to the plaintiff, clearly the title would not have passed in the face of the registered assignment. If the title to the logs passed by delivery to those operating the mill, as it unquestionably did by the delivery, and the mortgage was not void as contrary to public policy, then they became subject to the lien immediately on delivery. We think the agreement must be construed according to the manifest intent of the

parties as a chattel mortgage. No particular form is essential, and the instrument has all of the constituents necessary to create a chattel mortgage. The intention of the parties, that the property to be thereafter acquired should be held in trust for the benefit of the plaintiff and that the proceeds of sale of it should be paid over to him, is plainly expressed, and the instrument must therefore be construed as a chattel mortgage, subject to lien laws and other statutes subject to such contracts. Jones Chattel Mort., 275. If not coming within the particular rule applicable to crops, it falls within the general doctrine governing chattels having no potential existence or subsequently acquired. Jones Chattel Mort., 270a; 40 Am. Dec., 717, note; 71 Am. Dec., p. 730.

(47) The case at bar differs from *Cheatham v. Hawkins,* 76 N. C., 335, in that the advancements under the contract were made not to help one who had become embarrassed to pay off pressing claims and weather the storm, but to start a new business, as all of the parties to it doubtless thought, with the prospect of profit to those operating the mill and of reimbursement of advancements with interest to the plaintiff. This case, it seems to us, falls within the reasons given by the Court for sustaining a mortgage upon a stock of goods, made to secure the notes executed for the purchase price, in *Kreth v. Rogers,* 101 N. C., 263. No presumption of fraud arises where a lien is created, as in this instance, to start a new industry by furnishing the necessary capital to operate the business. Men who lend financial aid to start such enterprises are often public benefactors, and should not be subjected to the suspicion that overhangs those who help to cover up and put beyond the reach of creditors the assets of a failing person or partnership business.

For the reasons given we think there is

No error.

Cited: *Williams v. Chapman,* 118 N. C., 945; *Warren v. Short,* 119 N. C., 42; *Cooper v. Rouse,* 130 N. C., 204; *Boles v. Caudle,* 133 N. C., 534; *Godwin v. Bank,* 145 N. C., 327; *White v. Carroll,* 146 N. C., 233; *Lumber Co. v. Lumber Co.,* 150 N. C., 286; *Grocery Co. v. Taylor,* 162 N. C., 312; *Lee v. Oates,* 171 N. C., 725.

(48)

BARRINGTON & BAXTER v. W. R. SKINNER ET AL.

Personal Property—Conditional Sale—Registration—Notes in Renewal of Old Notes—Security Not Released by Acceptance—Claim and Delivery—Judgment.

1. An instrument relating to the sale of an article of personal property which provided that, when all the notes given for its purchase should be paid, the title should vest in the purchaser, was a conditional sale.

2. An instrument constituting a conditional sale of personal property is properly registered in the county where the purchaser resides, and in case of the latter's removal to another county with the property, need not be again recorded in the latter county.

3. The acceptance of new notes "in renewal and in lieu of the former notes" given for the purchase of property is not a novation or a relinquishment of the security afforded by the registration of an agreement that the vendor should retain title until such notes are paid.

4. Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant, if so adjudged, is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor.

CLAIM AND DELIVERY, heard on a case agreed before *McIver, J.*, at May Term, 1895, of CRAVEN.

The action was brought by plaintiffs at Fall Term, 1891, of Craven County Superior Court to recover one upright Sterling piano, one Bay State organ, sixteen school desks, all being described in a chattel mortgage from said W. R. Skinner to one W. A. Sadler, dated 7 July, 1891, which mortgage was duly recorded in Book 29, Records of Craven County. The piano was the only property in dispute, Skinner having surrendered his interest in said property to the plaintiffs. At February Term, 1892, W. D. Moses & Co., of Richmond, Va., by order of court, were allowed to interplead as to the piano.

It was admitted that W. D. Moses & Co. delivered the piano to W. R. Skinner conditionally, the terms being set forth in the paper-writing marked "A," which paper-writing was proven in Craven County and recorded in Jones County, after being passed upon by Clerk of said Jones County; that at the time of executing said paper-writing said W. R. Skinner was a resident of Jones County, and Walter D. Moses

& Co. were residents of Richmond, Va.; that the witness to said paper-writing, A. Cohn, and upon whose oath the same was probated,
(49) is a blind man and cannot see to read; that said paper-writing marked "A" was not, nor has it ever been, recorded in Craven County; that soon after the execution of said paper-writing, in September, 1889, the said W. R. Skinner removed from said county of Jones to the county of Craven, and brought with him the piano in question; that in March, 1890, the said W. R. Skinner executed to one W. A. Sadler, then residing in Pamlico County, a mortgage for one hundred and twenty-two dollars on the following property, to wit: one piano and one organ, the said W. R. Skinner then residing in New Bern, county of Craven, and the said mortgage was recorded in said Craven County, Book 28, page 68; that on 11 July, 1891, the said W. R. Skinner executed to said W. A. Sadler a mortgage for the sum of one hundred and thirty-five dollars in payment of the former mortgage and interest and for indulgence in the payment of the mortgage debt, including in said mortgage, besides the piano and organ, the sixteen desks referred to in this action of claim and delivery, which said mortgage was then recorded in Craven County, the county where the said W. R. Skinner then resided, in which mortgage the said W. R. Skinner covenanted that said property was free and clear of all encumbrances, and in fact there were no liens or encumbrances then on said property recorded in Craven County; that on 13 June, 1891, after maturity of the said note and mortgage the plaintiffs, without notice of any prior lien, after having the records of Craven County examined to ascertain if any lien was on record against said property, purchased the note and mortgage for the full face value, to wit, one hundred and twenty-five dollars, from the said W. A. Sadler, who duly and properly assigned the same to the plaintiffs; that after the said W. R. Skinner had removed from Jones County to Craven County, on 30 October, 1890, he did execute to Walter D. Moses & Company fifteen notes of fifteen dollars each in renewal and in lieu
(50) of the former notes, all of which had then become due, but no mortgage or lien was executed to the said Walter D. Moses to secure the said new notes by the said W. R. Skinner, nor were the said notes recorded in Craven County or elsewhere, though they purport to be lien notes. It was agreed that the old notes, which were secured by a lease contract or paper-writing (marked "A"), when surrendered were marked "Surrendered for renewal note" across the face.

Exhibit "A" was as follows:

"This agreement, made by and between Walter D. Moses & Company, of the first part, and W. R. Skinner, of Polloksville, North Carolina, of the second part, Witnesseth: That the said Walter D. Moses & Co. do hereby lease to the said party of the second part a Sterling Up. G. Piano,

stool and cover, style D, No. 6140, and of the value of two hundred and sixty-five dollars, for the sum of fifty dollars in advance and his note payable in six months after date for sixty-six and 67-100 dollars, and his note payable nine months after date for sixty-six and 66-100 dollars, and his note payable in twelve months after date for eighty-four and 16-100 dollars, said cash payment and notes to bear interest at the rate of eight per cent per annum from date of maturity till paid, to be paid for the use thereof, agreeing that when the above-named sum of two hundred and sixty-five dollars shall have been paid to the said Walter D. Moses & Co., they will sell and deliver to the said party of the second part the said instrument with a good and effectual bill of sale therefor.

"And said party of the second part hereby agrees to pay the above-named sum in the above-specified manner for the use of said instrument until the aforesaid sum of two hundred and sixty-five dollars shall have been paid in full, and in case of a failure to make said payments or any of them or to fully comply with the terms of this (51) agreement, then the said party of the second part agrees to deliver up said instrument to the said Walter D. Moses & Company, or their assignees on their election, without legal process, in as good condition as the same now is, reasonable use and wear thereof excepted. It being agreed and understood by the parties hereto that until the said instrument has been paid for in full as herein provided it is to remain the property of the said Walter D. Moses & Co. It is further understood by and between the parties hereto that in the event of a failure to make the payment on the instrument above mentioned and the return of the same to the party of the first part at their option, the said party of the second part agrees to pay rent at the rate of nine dollars per month, also———and insurance for the time during which the said party of the second part has possession of the said instrument. And said party of the second part hereby agrees that said Walter D. Moses & Co. shall keep insured the said instrument at the expense of said party of the second part against loss by fire for the benefit of said Walter D. Moses & Co., as their interest may appear; the said instrument not to be removed from his residence, Pollocksville, North Carolina, without consent of said Walter D. Moses & Co. endorsed on this instrument.

"Nothing in this memorandum and any payment of money and rent as provided shall in anywise vest in said party of the second part any title to said instrument or any property therein for any term whatever, or shall prevent or hinder said Walter D. Moses & Co. from taking possession of said instrument at any time it may be deemed proper, as herein provided, the party of the second part hereby waiving the benefit

of the homestead exemption as to the obligation secured by this
(52) agreement. Dated at Richmond, Va., this 8 June, 1889. In witness whereof we have hereunto subscribed our names.

"WALTER D. MOSES & Co.,
"W. R. SKINNER.

"Witness: A. COHN."

His Honor, being of the opinion that the paper-writing marked "Exhibit A" did not constitute a conditional sale, adjudged that the interpleaders, the said Walter D. Moses & Co., recover of the plaintiffs the possession of the said Upright Sterling piano, and if possession of the same could not be had, that the said Walter D. Moses & Co. should recover of the plaintiffs and their sureties the sum of one hundred and fifty dollars and the costs of the action, to be taxed by the Clerk.

From this judgment the plaintiffs appealed.

W. W. Clark for plaintiffs.
No counsel contra.

CLARK, J. The terms of the sale of the piano by Moses & Co. to the defendant provided for the execution of notes for the installments of rent, and that when all the rent notes were paid title should pass to the said Skinner, title being retained by Moses & Co. till such final payment. Such instrument was in truth and in legal effect a conditional sale, and has been so held in *Puffer v. Lucas,* 112 N. C., 377, which has been cited and approved in *Crinkley v. Egerton,* 113 N. C., 444, and *Clark v. Hill, ante,* 11. The registration was properly made in the county of Jones, where the purchaser resided and the property was situated. The Code, sections 1254, 1275. On the removal of the purchaser with the property to Craven County it was not required that the instrument should again be recorded in that county.

(53) The renewal of the notes indicated no intention to relinquish the security afforded by the registration of the agreement that the vendors should retain title. On the contrary, it is expressly stated that the new notes were given "in renewal and in lieu of the former notes," and that when the old notes were surrendered they were marked "Surrendered for renewal note" across the face. There was no novation, and the new notes retained the same security as the old ones. *Hyman v. Devereux,* 63 N. C., 624. This differs from *Smith v. Bynum,* 92 N. C., 108, where there was a novation and a distinct relinquishment of the security by taking a new mortgage and note in settlement. The plaintiffs upon their bond for the return of the property to the defendant, if so adjudged, or its value (The Code, 324) were properly adjudged to deliver the same to the interpleaders, Moses & Co. (The

Code, secs. 189, 424, subsec. 1), but in the absence of any finding or agreement that the value of the piano was $150, it was error to render judgment for that sum against the plaintiffs and sureties if said piano were not delivered to said interpleaders. The plaintiffs are entitled to have the value of the piano ascertained, and should be adjudged to pay only the value of the same (not exceeding, however, in any event the balance due on the purchase money) if the piano is not delivered. The judgment thus modified is affirmed.

Modified and affirmed.

Cited: Clark v. Hill, ante 12; *Grubbs v. Stephenson, post,* 72; *Mfg. Co. v. Gray,* 121 N. C., 170; *Wilcox v. Cherry,* 123 N. C., 84; *Hamilton v. Highlands,* 144 N. C., 283; *Hicks v. King,* 150 N. C., 371.

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(54)

CHARLES PREISS ET AL. v. E. COHEN ET AL.

Res Judicata—Issues—Arrest and Bail.

1. Where, in the trial of an action in the nature of a creditors' bill, in which the complaint alleged that the defendant debtor had made a fraudulent assignment to his codefendant and that the purchases of goods from the plaintiffs by the defendant debtor had been made by fraudulent representations, the plaintiffs tendered issues as to the bona fides of the assignment and also of the several purchases from plaintiffs, and only the issue as to the fraudulent assignment was submitted by the court, which was found in favor of the defendants, and plaintiffs did not appeal from the refusal of the court to submit the other issues: *Held*, that the refusal to submit the issues was an adjudication against the right of the plaintiffs to have the same submitted and, whether erroneous or not, became *res judicata* after the failure of plaintiffs to prosecute an appeal therefrom.

2. In such case the plaintiffs are precluded from having the defendant held to arrest and bail for any fraud alleged in the complaint.

3. The words "before judgment," as used in section 295, mean "final judgment" upon the matters put in issue by the pleadings, and hence the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted; hence:

4. Where, in an action in the nature of a creditors' bill alleging that defendant debtor purchased goods from the plaintiffs upon false repre-

sentations and made a fraudulent assignment to a codefendant, the court refused to submit any issue except as to the fraudulent assignment and judgment was rendered on the debt, and plaintiffs did not appeal: *Held*, that if plaintiffs had appealed from the refusal of the court to submit issues as to the other allegations of fraud and the ruling had been reversed he might, on trial of the issues, have had defendant arrested under section 447 of The Code, notwithstanding section 495 of The Code provides that an order of arrest must issue "before judgment."

THIS ACTION was begun December, 1892. At May Term, 1894, of CRAVEN, it came on for trial upon complaint and answer as
(55) filed before *J. F. Graves, J.*, and a jury.

The following issues were tendered by plaintiffs, declined by the defendants and overruled by the Judge:

"1. What was the value of the goods set apart to E. Cohen as his personal property exemption?

"2. Was the sale of said goods set apart made with intent to defraud, delay or hinder the creditors of E. Cohen?

"3. Did defendant Sol Cohen have notice of such intent?

"4. Was the deed of assignment by E. Cohen to H. Donnenberg made with intent to hinder, delay or defraud the creditors of E. Cohen or any of the said creditors?

"5. Did the defendant E. Cohen obtain the credit and goods of the Chesapeake Rubber Co. by fraudulent representations as to his financial condition made to said Chesapeake Rubber Company?

"6. Were the goods and credit obtained from the Weinberg Cloak Company by E. Cohen by fraudulent representations as to his financial condition made to said Weinberg Cloak Co.?

"7. Were the goods and credit obtained from the Cohen-Adler Shoe Co. by E. Cohen by fraudulent representations as to his financial condition made to said Cohen-Adler Shoe Co.?

"8. Were the bills of the Weinberg Cloak Co. and the Cohen-Adler Shoe Co. assigned for a valuable consideration to the plaintiffs Chesapeake Rubber Company, as alleged?"

The court submitted but one issue—that as to fraudulent intent in making the assignment. Plaintiffs excepted. A mistrial was had, the jury failing to agree.

The case came on again for hearing before *McIver, J.*, and a jury at the February Term, 1895. Plaintiffs tendered the same
(56) issues. Defendants declined the same, and the court overruled them and submitted the following issue only:

"Was the assignment of E. Cohen made with intent to hinder, delay or defraud creditors?" to which the jury answered "No." Plaintiffs excepted to the refusal to submit the issues as tendered. Judgment was entered that all the defendants except Sol Cohen and E. Cohen go without day. No appeal was taken from said judgment.

Plaintiffs moved for judgment for debts demanded in pleadings, and on motion the motion was continued. At Spring Term, 1895, motion was again continued before *McIver, J.* At May Special Term, 1895, case came on to be heard before *Bryan, J.* On 2 May, 1895, plaintiffs moved before Clerk of the Superior Court: "S. Preiss and J. Preiss, partners, as Chesapeake Rubber Co., the plaintiffs above named, show the court: That a sufficient cause of action exists in their favor against the defendant E. Cohen, as set out in articles XIV and XVI and XVII of the complaint, and for the causes set out in articles IV and XV and XVI of the sworn complaint in this action, which they ask to be taken as an affidavit for arrest, they move the court that an order of arrest for the said defendant be issued and that he be held to bail."

The order of arrest was issued by W. M. Watson, Clerk of the Superior Court. The defendant was arrested and gave bail for the sum of $1,000 on 2 May, 1895. At said Special Term, June, 1895, *Bryan, J.,* upon motion of defendant E. Cohen, upon the record in the case, dissolved the order of arrest and made order releasing the bail of said defendant, from which the plaintiffs S. and J. Preiss appealed. Plaintiffs then moved for continuance of their motion for judgment until appeal could be heard. Court proceeded to judgment, (57) from which plaintiffs also appealed.

Plaintiffs S. and J. Preiss assigned as error refusal to submit issues tendered, the order of discharge and dissolution of said order of arrest and the refusal to continue motion until appeal was heard.

W. D. McIver for plaintiffs.
W. W. Clark and O. H. Guion for defendants.

FAIRCLOTH, C. J. This is a creditors' bill heard upon complaint and answer. The complaint alleges that defendant E. Cohen assigned his stock of goods on 21 November, 1892, to defendant H. Donnenberg, with intent to defraud, delay and hinder his creditors, the plaintiffs. It also alleges that he purchased goods, etc., from the several plaintiffs upon fraudulent misrepresentations. These several allegations are denied by the answer of defendants, except that they admit the purchases and the amounts due each plaintiff as alleged. At May Term, 1894, the plaintiffs tendered an issue as to the assignment of E. Cohen to

Donnenberg and other issues as to the *bona fides* of the several purchases from the plaintiffs. The court refused to submit any of such issues to the jury, except the first as to the assignment, and the plaintiffs excepted. A mistrial was had. At February Term, 1895, the cause came on, when the plaintiffs tendered the same issues, and the court refused to submit any except one, to-wit: "Was the assignment of E. Cohen made with intent to hinder, delay or defraud creditors?" The plaintiffs again excepted to the refusal to submit the issues tendered. The jury answered the issue submitted "No." Judgment was that all the defendants go without day except E. Cohen and Sol Cohen. No appeal was taken from said judgment. Plaintiffs moved for judg-
(58) ments for the amounts of their claims, and on (their) motion the motion was continued. At Spring Term, 1895, the motion was again continued. On 2 May, 1895, the plaintiffs on affidavit obtained an order from the Clerk and caused E. Cohen to be arrested. No appeal from the above rulings of the court was ever prosecuted. At May Special Term, 1895, the case was again heard, when his Honor adjudged that the order of arrest be discharged and that the defendant E. Cohen recover his costs incurred by reason of said arrest. Plaintiffs appealed and moved for a continuance of their motion until appeal was heard.

This review of the proceedings presents the question whether the plaintiffs had the right to have their several issues tendered tried in this action, and to arrest the defendant on 2 May, 1895. The refusal of the court to submit the issues tendered by plaintiffs, and excepted to, was an adjudication against such right and subject to be reviewed by this Court, and became *res judicata* after the failure to prosecute an appeal therefrom. *Passour v. Lineberger,* 90 N. C., 159; *Wingo v. Hooper,* 98 N. C., 482. The ruling of the court against the right of the plaintiffs to submit their several issues of fraud to the jury in this action involved the right of the plaintiffs to have the defendant arrested for the causes alleged in their complaint, and until that right was determined in their favor they had no right to arrest him as they did on 2 May, 1895, because that would be taking two bites at the same cherry. The plaintiffs, when their summons issued, could have had defendant arrested by complying with The Code provisions in regard thereto, but did not elect to do so. When they tendered their several issues upon the pleadings they raised the question of their right to arrest defendant for the causes stated in their complaint, which was decided against them by his Honor, and they could proceed no further
(59) under section 295 of The Code, and his Honor committed no error in discharging the order of arrest made on 2 May, 1895.

The plaintiffs were under the misapprehension that if they should enter judgments simply for the amounts of their debts which were not disputed they would lose their right to ever arrest the defendant on the grounds set out in their complaint, by reason of The Code, sec. 295. The words "before judgment" in that section were treated by this Court in *Houston v. Walsh,* 79 N. C., 35, as *final* judgment, and final judgment in this action, we think, means a judgment upon the matters put in issue by the pleadings, about which there was earnest contention, and not a judgment merely for their debts, which were not in issue nor disputed.

If plaintiffs had prosecuted their appeal from the refusal of the court to submit the issues tendered and successfully maintained their right to submit their issues, then their right to arrest defendant would have been established, and to proceed and try the truth of their allegations; and if those issues were found in their favor they could still have had the defendant arrested under section 447 of The Code by complying with that and section 291. The judgments rendered at any time simply for the debts could not interfere with the course of the action or the rights of the parties in the matters in dispute on the questions of fraud. *Claflin v. Underwood,* 75 N. C., 485. Section 447 presupposes a judgment for the debt.

Article I, section 16, of the Constitution says: "There shall be no imprisonment for debt in this State except in cases of fraud." Now, in order to avoid a violation of this article of the Constitution and at the same time protect honest creditors against dishonest debtors, it devolved upon the Legislature, in cases of fraud, to enact such (60) laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This is done in The Code, Title 9, and other sections, and it then becomes the duty of the court to interpret and ascertain the meaning of these enactments, which is a task not always free from difficulty.

If the defendant, after trial and execution, finds himself still under arrest, and cannot be relieved by motion for his discharge, he must seek his remedy under The Code, section 2942, for the relief of insolvent debtors.

Judgment affirmed.

Cited: Stewart v. Bryan, 121 N. C., 49; *Ledford v. Emerson,* 143 N. C., 533; *McKinney v. Patterson,* 174 N. C., 487.

(61)

A. L. HASSARD-SHORT v. HARDISON & BIGGS.

Contract, Breach of—Measure of Damages—Trial—Instruction—Harmless Error.

1. It is not error to refuse to give an instruction where there is no evidence to support it.

2. Where, in the trial of an action for breach of contract to deliver logs, it appeared that the breach complained of continued but one day, after which defendants resumed the delivery until stopped by plaintiff, it was not error to refuse to instruct the jury that if defendants committed a breach it was optional with plaintiff to resume the contract on defendants' offer to do so, and that if plaintiff, after the breach offered to purchase timber of defendants independently of the contract and defendants refused to sell and plaintiff was unable to procure the logs elsewhere, the measure of plaintiff's damages would not be affected by the offers made by defendants.

3. Where, in the trial of an action for breach of contract to supply logs to the plaintiff, it appeared that the breach lasted only one day, after which the defendants resumed delivery, and there was no evidence that the plaintiff earned or might have earned anything at other employment while his mill was idle, it was harmless error to instruct the jury to deduct from the damages to be awarded plaintiff what he earned or might have earned at other employment during the period of the breach.

4. Where, by the terms of a contract relating to the purchase and sale of logs, the logs were to be paid for "in cash or its equivalent," the vendor was not bound to accept drafts on third parties in payment, and the fact that he did so several times did not compel him to continue to do so.

5. Where the plaintiff in an action for breach of contract declares on a written contract that provides for payment "in cash or its equivalent," he will not be allowed to show a verbal agreement on the part of the vendor to accept drafts on a third party in payment.

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

There was judgment for the defendants, and the plaintiff appealed. The facts are sufficiently stated in the opinion of *Associate Justice Furches.*

John L. Bridgers and Don Gilliam for plaintiff.
Jas. E. Moore for defendants.

FURCHES, J. This is an action for damages for an alleged breach of contract in defendants failing to deliver logs and for other breaches assigned by plaintiff upon a written contract between the parties.

According to the terms of the contract, defendants were to provide and furnish plaintiff a suitable place at Robersonville to put his mill and to furnish plaintiff at his mill not less than ten thousand feet of logs per day, of specified size and quality, for which plaintiff at the end of each recurring month was to pay defendants five (62) dollars per thousand "in cash or its equivalent."

This contract was made in December, 1890, and the parties commenced delivering logs and sawing lumber in March, 1891, which was continued until July, 1891. But before this time the plaintiff had fallen short in his payments, which he then settled by giving his note and mortgage on his mill for $1,100 in part, and paying the balance by a draft on Parmele & Eccleston, to whom plaintiff was selling lumber. Defendants before this had received drafts on Parmele & Eccleston in part payment for their logs; but having reason as they thought to suspect the solvency of Parmele & Eccleston, defendants informed plaintiff that they would take no more of these drafts unless they were secured, and that they would stop delivering logs unless some arrangement was made to secure them. There was considerable chaffering between the parties about the matter, but the plaintiff failed to provide any additional security, and on 7 July defendants stopped the delivery of logs. But defendants, failing to get other security, on the next day notified plaintiff that they would continue to deliver the logs on the same terms they had been delivering them, and on the 9th they commenced delivering logs, which they continued until plaintiff notified them that he would not receive them.

It was decided when this case was here before that plaintiff was entitled to recover such damages as he sustained on account of the breach of contract—the failure to deliver logs; but if defendants on the next day offered to continue to deliver logs on the same terms they had been delivering them, and commenced to deliver them and continued to do so until plaintiff notified defendants he would not receive them, that plaintiff would only be entitled to such damages as he sustained between the time defendants stopped delivering the (63) logs and the time when they commenced to deliver them again. *Same case,* 114 N. C., 482. So the rule of damage in this case has been settled, and it only remains for us to see whether this rule has been observed and properly enforced.

There are no exceptions to evidence. There are a number of special instructions asked by defendants, but they were all given as asked, or

in substance, except 9, 17 and 18, and these, we think, were properly refused.

As to 9, there was no evidence that plaintiff was at work on the railroad during the time defendants failed to deliver logs. In fact there was no evidence showing that he was not on the railroad at that time, and it would have been improper to submit a question to the jury without some evidence to support it.

The 17th cannot be sustained. It is true that it was optional with plaintiff after the breach by defendants whether he would continue the old contract or make a new one with defendants. But this is not the point in the case. The question is the measure of damage on account of defendants failing to deliver logs. And if they only failed to deliver for one day, and then continued to deliver until they were notified by plaintiff that he would no longer receive them, what difference could it make whether plaintiff tried to buy them from others and could not? He had no need for buying from other persons when defendants were offering to deliver them on the same terms they had been delivering them.

The 18th prayer cannot be sustained and is disposed of by what we have said in discussing 17. This disposes of the prayers for special instructions, and it only remains to consider his Honor's charge to the jury.

His Honor in charging the jury upon the question of damage instructed them, among other things, that they should estimate the value of plaintiff's personal service as well as profits of mill in fixing
(64) the amount of damage to which plaintiff was entitled, and to deduct expenses of mill, etc., and what plaintiff did earn or might have reasonably earned at other employment. Plaintiff objected to this part of the charge, and if it is liable to objection the plaintiff has failed to show us that he is damaged thereby. It is certain that under this charge plaintiff had the benefit of having his personal services considered by the jury in estimating his damages.

While there is no evidence tending to show the plaintiff did earn anything on that day, or that he might with reasonable diligence have done so, and while it may have been improper to submit this proposition to the jury when there was no evidence, we fail to see that plaintiff is damaged by this instruction.

The court further charged the jury: "The construction of a written contract is a matter of law to be passed upon by the court. And the court instructs you that it was no part of the original contract, for a breach of which this action is brought, that the defendants should accept the paper of Parmele & Eccleston as the equivalent of money. And the

court further instructs you that, if you believe that the defendants took Parmele & Eccleston's paper at various times during the contract, they were not thereby compelled to continue to do so under the original contract."

The plaintiff complains of this charge and insists that the contract is that plaintiff shall pay defendants for the logs "in cash or its equivalent," and that there was a verbal agreement that defendants would take drafts on Parmele & Eccleston, and that that was what "equivalent" in the contract meant.

To be paid "in cash or its equivalent," without further explanation, would mean anything besides money that defendants might agree to take, as they agreed to take and did take a note (65) and mortgage or drafts on Parmele & Eccleston. But there is nothing in the written contract fixing these or anything, as the equivalent of cash.

And if there was any other contract between the parties than the written contract set out at full length in plaintiff's complaint, it is not declared on in this action.

We therefore fail to see the error complained of in his Honor's charge. Indeed, as we think, it was a correct exposition of the law arising upon this contract.

Counsel for plaintiff seem to lay stress upon a sentence used by the Court in the opinion in 114 N. C., 482, where, in the argument of the case, the Court uses the following language: "If the parties had entered into a new contract identical in terms with the original," etc., and plaintiff says these terms of the renewal of the delivery of logs were not a renewal of the contract on "identically the same terms," as defendants still refused to receive drafts on Parmele & Eccleston. This language was used by the Court for entirely a different purpose from that for which plaintiff wishes to use it. The Court was there using it to show that plaintiff would still have a right of action; that this renewal of the contract on identically the same terms as the old contract would not of itself be a waiver of the breach of the old contract. But how it can be used by plaintiff to show that, because he did not renew the contract on "identically the same terms," this would affect the measure of damage, we fail to see.

Plaintiff's damage does not consist in defendants failing to make a new contract, but because they failed to deliver logs under the old contract. And it has been shown in 114 N. C., 482, as well as in

(66) this opinion, that this was for the time intervening between the date when defendants stopped delivery and commenced again. No error.

Affirmed.

Cited: Hollowell v. Ins. Co., 126 N. C., 401; *Lumber Co. v. R. R.*, 152 N. C., 74; *Jones v. Ins. Co.*, 153 N. C., 391.

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(67)

W. F. GRUBBS v. CHARLES STEPHENSON.

Trial—Verdict—Evidence—Claim and Delivery—Forthcoming Bond—Judgment.

1. In the trial of an action against an alleged lessee for the possession of crops to satisfy advances made by plaintiff, the following issues were submitted: (1) Did defendant rent land of plaintiff as alleged in the complaint? (2) Did crops seized in this action grow on said lands? (3) If so, did the plaintiff make advancements, as is alleged, to said defendant? The jury answered in the negative to the first two issues and in the affirmative to the third: *Held*, that the response to the third issue is not contradictory of the answers to the first two.

2. Where, in the trial of an action by one claiming to be the lessor of land against the alleged lessee for the possession of the crops to satisfy advances, it appeared in evidence that the plaintiff's name was not in the lease when signed by the defendant, it was competent for the latter to testify that he had rented no land from the plaintiff, such testimony being admissible not to contradict the paper-writing, but to negative any verbal contract of renting, if the jury should find that plaintiff's name was not in the lease.

3. Where in such case the defendant testified that he had rented the land from S., who intervened in the action to claim the crops as landlord, it was competent to corroborate such testimony by producing the lease from the latter.

4. The Code does not favor circuity of actions, and the gist of the bond required of the plaintiff in claim and delivery proceedings being the return of the property taken, or its value, it is of no concern to such plaintiff whether the judgment directs it to be returned to the defendant or to an intervener who claims it by assignment from the defendant.

5. A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages.

GRUBBS *v.* STEPHENSON.

ACTION commenced by W. F. Grubbs against Charles Stephenson before a justice of the peace, under the landlord and tenant act, to get possession of crops alleged to have been raised on land rented by said Stephenson from J. W. Jordan and W. F. Grubbs. Judgment was rendered against Grubbs, who appealed to the Superior Court and gave the undertaking required by law to enable him to reclaim possession of the property, with one Rogers as surety. After the undertaking was executed and the appeal probated, M. F. Stancill intervened, claiming that he was the landlord of Stephenson and that the crops belonged to him to satisfy advances made by him to Stephenson. The action was tried on such appeal before *McIver, J.*, and a jury at Spring Term, 1895, of NORTHAMPTON. The defendant denied renting the land from the plaintiff, Grubbs.

The issues submitted to the jury and their answers were as follows:

"1. Did the defendant, Stephenson, rent land of the plaintiff and J. W. Jordan, as is alleged in the complaint? Answer: No.

"2. Did crops seized in this action grow on said lands? Answer: No.

"3. If so, did the said Grubbs make advancements in supplies and money, as is alleged, to said Stephenson? Answer: Yes.

"4. Is the defendant, Stephenson, indebted to said Grubbs for such advancements? If so, in what sum? Answer: Yes; $161.50, with interest from 1 November, 1887.

"5. What was the value of the property seized in this action by the plaintiff? Answer: $125.35, with interest from 1 November, 1887."

A contract was introduced, signed by the defendant, Stephenson, agreeing to rent from J. W. Jordan, Jr., and W. F. Grubbs (68) a one-horse crop of forty acres of land for the year 1887, and to pay therefor 900 pounds lint cotton. The words "and W. F. Grubbs" had been interlined after the agreement was first written. There was conflicting testimony as to whether the interlineation was made before or after the signing by Stephenson.

The plaintiff, W. F. Grubbs, testified that after Jordan rented the Bridgers land of H. B. Peebles, he let him take a half interest in the lease; that in January, 1887, Charles Stephenson came to him to rent a one-horse crop on said farm; that he selected a piece of land lying west of the road, but did not conclude the bargain for it; that a few days afterwards he came again; he told Stephenson that he had let Coats have the piece of land on the west side of the road, but to go to Mr. J. W. Jordan and he could get land on the east side of the road just as good. He further testified that when Stephenson came the second time he, Grubbs, and Jordan had just returned from stepping off the land which Jordan let Stephenson have; that Jordan attended

to renting out the land and writing the contracts, and Grubbs collected the rents and settled with H. B. Peebles; that the words "and W. F. Grubbs" were in the handwriting of J. W. Jordan and were there when the paper was handed to him; that during the year 1887 he furnished Charles Stephenson with money and agricultural supplies to the amount of $———, of which Stephenson paid $———, and left due him on 1 November, 1887, $161.50; that he had been merchandising at Seaboard for several years before and after 1887, but had never, except in 1887, trusted Charles Stephenson for any goods, etc.; that if he was not Stephenson's landlord he had no lien for said advancements.

(69) "The crop seized grew on the land described in Exhibit A. Charles Stephenson told me it did.

"I testified on a former trial of this case that the receipts for the rents received from Charles Stephenson were in J. W. Jordan's handwriting. All the rents were paid, and Charles Stephenson had turned over cotton to me amounting to seventy-four dollars, in part payment of his account for advancements. I was a merchant at that time."

Charles Stephenson, for defendant, testified: That in January, 1887, he went to Mr. W. F. Grubbs to rent a one-horse farm of the Bridgers land; that Grubbs told him that he could get a piece on west side of the road. A few days afterward he went to see him again, and Grubbs told him that he had let Coats have that piece of land, as he was already on it, but that Mr. J. W. Jordan would let him have all the land he wanted on the east side of the road. He went to Mr. Jordan, and he let him have a piece of land lying northeast from the house, which had been staked off, and said it was 40 acres. Afterwards he rented of Mr. Jordan another piece nearer the house, said to contain 35 acres, and also hired Mr. Jordan's mule. He admitted signing the paper marked Exhibit A, but said if W. F. Grubbs' name was in it, it was not read to him. He said Grubbs had furnished him supplies in 1887, but none before or since.

He was asked: "Did you rent any land of Grubbs for the year 1887?"

First Exception: This question was objected to (not, however, upon the ground it was leading) by plaintiff. Objection overruled, and witness answered that he had never rented any land from Grubbs at any time. Plaintiff excepted. "The crop seized was grown on the land rented for Stancill, and not on the land described in Exhibit A. I never told Mr. Grubbs that the crop grew on the land described in Exhibit A."

Second Exception: Defendant offered in evidence a paper-

(70) writing purporting to be a lease from M. F. Stancill to the defendant, Stephenson. Objection by plaintiff; objection overruled, and plaintiff excepted.

The jury answered "No" to 1st and 2d issues; "Yes" to 3d, and "$161.50" to 4th, with "interest from 1 November, 1887."

Plaintiff moved to set aside the verdict:

1. Because it was contrary to weight of evidence.

2. Because the findings on first and second issues were inconsistent with and contradictory to the finding on third issue. Motion overruled, and plaintiff excepted.

Plaintiff then moved for a trial *de novo* upon the grounds:

1. That the verdict was inconsistent and contradictory, as above stated.

2. For error in admitting Stephenson to testify that he never rented any land of Grubbs.

3. For error in admitting in evidence paper-writing B. Motion overruled, and plaintiff excepted.

Plaintiff then moved for judgment against Stephenson for $161.50. Motion refused, and plaintiff excepted.

Plaintiff then moved for judgment against Stephenson for $161.50 less $125.35. Motion overruled, and plaintiff excepted.

The plaintiff insisted that Stephenson, having admitted in his answer that M. F. Stancill was his landlord and entitled to the crop, was not entitled to a judgment for the return of the property and for that reason the condition of his bond was not broken. Overruled, and plaintiff excepted.

Judgment was rendered for the defendant, Stephenson, "against the plaintiff and his surety on the appeal and stay bond for $125.35, with interest from 1 November, 1887, till paid, and the costs, it appearing that the property seized cannot be returned to the de- (71) fendant."

Plaintiff appealed.

In addition to the exceptions noted, the appellants filed the following to the judgment, to-wit:

"1. Upon the pleading Stephenson is not entitled to a return of the property, and no judgment should have been taken against W. J. Rogers.

"2. The judgment does not conclude and put an end to the issues raised in the pleadings.

"3. It should be in the alternative."

R. B. Peebles for plaintiff.

W. H. Day for defendant.

CLARK, J. Construing the responses to the issues in connection with the pleadings and evidence, it is clear that there is no contradiction between the finding on the third issue and that on the first and second.

It would simply be "sticking in the bark" to construe the words "if so," which appear in the third issue but not in the response, as having that effect. The jury to these issues simply found that the defendant did not rent the land of Grubbs, but that Grubbs made him advances for which the defendant owes him to the amount found in response to the 4th issue.

There being evidence tending to show that Grubbs' name was not in the lease when signed by the defendant, it was competent for him to testify that as a matter of fact he had rented no land of Grubbs that year; this was admissible not to contradict the paper-writing, but if the jury should find Grubbs' name was not in the paper when signed, to negative any verbal contract of renting from Grubbs of that or any other land. The defendant having testified that he had rented the land in question of Stancill, it was competent to corroborate him
(72) by producing the lease from the latter.

The plaintiff's bond being for the return of the property if adjudged against him (The Code, sec. 324), neither the plaintiff nor his surety can complain that when the property or its value is returned to the defendant the latter must forthwith hand it over to the intervener. That matter in no wise concerns the plaintiff. The property being adjudged not to be his, by his bond he must return it or account for the value of it. Indeed, if the judgment had directed the return not to the defendant, but to the intervener direct, because of its being due him by the defendant, the plaintiff's bond would be responsible for the execution of the judgment. *Barrington v. Skinner, ante,* 47. The Code does not favor circuity of actions, and the gist of the bond is the return of the property taken, or its value, and the disposition of it, whether direct to the defendant or to the interpleader as the defendant's assignee, does not concern the plaintiff.

The judgment disposes of the controversy so far as the plaintiff is concerned. He cannot be heard to object that judgment was not rendered in favor of the intervener, as might have been done. *Barrington v. Skinner, supra;* The Code, sec. 424 (1).

The judgment ought properly to have been in the alternative for the return of the property, or if that could not be had, for its value with damages. The Code, sec. 431; *Council v. Averett,* 90 N. C., 168; *Hall v. Tillman,* 103 N. C., 276.

The judgment should be thus modified and affirmed.

Modified and affirmed.

Cited: *Oil Co. v. Grocery Co.,* 136 N. C., 355.

(73)

J. F. SHACKELFORD AND WIFE v. H. L. STATON.

Action of Tort—Superior Court Clerk—Failure to Index Judgment—Statute of Limitation—When Right of Action Accrues.

1. In an action of tort against a Clerk of the Superior Court for failing to index a docketed judgment as required by section 433 of The Code, section 155 (2) of The Code prescribing three years as the time within which an action must be brought on a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it, is applicable.

2. If for such neglect action had been brought against the Clerk on his official bond section 154 (1) of The Code (the six years statute) would apply.

3. The statute of limitation begins to run against a cause of action given by section 433 of The Code, in favor of a judgment creditor against a Clerk of the Superior Court for failure to properly index the judgment, at any time after such failure and during the term of office of the clerk. *Hughes v. Newsome*, 86 N. C., 424, distinguished.

ACTION against the defendant, former Clerk of the Superior Court of Edgecombe County, for damages resulting from his failure to properly index a judgment, tried before *McIver, J.*, April Term, 1895, of EDGECOMBE.

His Honor, being of the opinion that upon the facts as alleged in complaint the action was barred by the statute of limitations, gave judgment accordingly, and plaintiffs appealed. The facts are fully stated in the opinion of *Associate Justice Montgomery.*

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

MONTGOMERY, J. It appears from the complaint that plaintiff Kate S. Shackelford, then a *feme sole,* on 13 April, 1885, at the Spring Term of Edgecombe Superior Court recovered a judg- (74) ment for $536.89 against S. F. and B. P. Jenkins and John Killebrew; that the defendant in this action was Clerk of the Superior Court at the time of the rendition of the judgment and continued in the office until December, 1886, when his term expired; that the defendant docketed the judgment within the time prescribed by law, but failed to cross-index the same under the name of John Killebrew, one of the defendants in the judgment, as he should have done under section 433 of The Code; that Killebrew was the owner of real estate more than

sufficient in value to have discharged the judgment, after the allotment to him of his homestead, at the time when the judgment was docketed, and continued to own it until it was sold, for the benefit of other creditors than the judgment creditor, on 1 September, 1890, under a deed of trust executed by him to the trustee on 25 February, 1889; and that after this sale Killebrew became entirely insolvent and has continued so; that the other judgment debtors were insolvent when the judgment was rendered and have remained so; that by failure of the defendant to properly index the said judgment and the subsequent conveyance by deed of trust by Killebrew and sale under the trust, the plaintiff lost the amount of her judgment. The complaint does not set forth the date of the marriage of the plaintiff. The defendant in his answer admits the date and the amount of the judgment and his failure to index it as required by law, and he admits the ignorance of the plaintiff as to his failure, the expiration of his term of office in December, 1886, the date of the execution of the deed of trust by Killebrew, and the sale of Killebrew's land under the trust. The defendant then pleads the statute of limitations. The summons shows that the action was commenced on 3 April, 1893.

(75) Upon these facts alleged and admitted the court below, upon the pleadings, was of the opinion that the action was barred by the statute of limitations, and gave judgment against the plaintiff. It is insisted for the plaintiff in this Court that the statute of limitations did not begin to run until some consequential damage had occurred to the plaintiff's rights. If this proposition should be held to be correct, we see no reason why the time at which this consequential damage occurred should not be fixed when the deed of trust was made, as well as when the land was sold under the deed. The execution of the deed of trust itself was injurious in many ways to the property rights of the plaintiff, and if that act should be fixed as the time at which the statute should begin to run, then this action is barred, as will hereafter appear. It is also contended for the plaintiff that section 155 (2) of The Code, the three years statute—"An action upon a liability created by statute other than a penalty of forfeiture, unless some other time be mentioned in the statute creating it"—does not apply to the facts of this case, but that section 158 (10 years) does. We are of the opinion that section 155 (2) is the statute applicable to the facts in this case, for this action is founded upon a liability created by statute (section 433 of The Code) and there is no other time mentioned in this statute fixing a bar to a cause of action accruing under it. We are of the opinion, further, that the liability of the defendant was a continuous one, beginning from the day on which he failed to properly index the judgment (it was docketed within the time required by law) and continuing until he

ceased to be Clerk of the Court in December, 1886; and that therefore the plaintiff could have brought her action on any day in the intervening time or within three years after he ceased to be clerk, and not later. This case is distinguishable from that of *Hughes v. Newsome,* 86 N. C., 424. There the defendant Sheriff, on an order directed to him by the Clerk, in a suit for the recovery of personal property (76) (horses), to take the property from the defendants and deliver it to the plaintiff, seized the property, but returned the same to the defendant upon the defendant giving him an undertaking, which was not only not according to the requirements of the statute in such cases, but was absolutely void. There the Court held that this default of the Sheriff was absolute and complete; that there was nothing else to be done by the Sheriff; that the right of the plaintiff to bring his suit against him at once accrued, and that the plaintiff could recover full damage if he should make out his case. In the case before us it was the duty of the defendant Clerk, every day during his continuance in office while the judgment was a lien, to have had it properly docketed and indexed. It is to be observed that this action is in the nature of tort and is prosecuted against the Clerk alone. If it had been brought on the official bond of the defendant, section 154 (1) of The Code, the six year statute, would apply. There is

No error.

Cited: Cherry v. Canal Co., 140 N. C., 426; *Mast v. Sapp, ib.,* 539; *Oldham v. Rieger,* 145 N. C., 258; *Lexington v. Indemnity Co.,* 155 N. C., 227; *Roberts v. Baldwin, ib.,* 280; *Ewbanks v. Lyman,* 170 N. C., 506; *Morganton v. Avery,* 179 N. C., 552.

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(77)

HOWELL & JEFFREYS v. J. B. CLOMAN AND WIFE.

Mortgage, Alteration—Issue—Evidence, Sufficiency of, to Warrant Verdict.

In the trial of an action for claim and delivery of mortgaged property, it appeared that a mortgage and crop lien for $500 was signed by defendants, husband and wife, and taken by the latter to plaintiffs' store, where, according to the latter's witnesses, figures were changed from $500 to $1,000 with the husband's knowledge and consent. There was evidence that the instrument was subsequently probated. The husband

denied that the alteration was made before his acknowledgment, and the wife testified that she examined and read the deed at the time she acknowledged it and that it had not then been changed: *Held*, (1) that an issue as to whether the instrument was the deed of the defendants was sufficient to meet the contention of the parties; (2) that it was proper and sufficient to instruct the jury that, the change being admitted, the burden was on the plaintiffs to satisfy them that such change was made with the consent of the defendants or was known and approved by them at or before the acknowledgment for probate; (3) that the admission by the *feme* defendant that she examined and read the deed before acknowledging it contained some evidence to warrant the verdict of the jury that she knew of and approved the change.

CLAIM AND DELIVERY, tried before *McIver, J.*, and a jury at June Term, 1895, of EDGECOMBE.

There was a verdict for the plaintiffs, and the defendants appealed from the judgment thereon. The facts appear in the opinion of *Chief Justice Faircloth.*

John L. Bridgers for plaintiffs.
James E. Moore for defendants.

FAIRCLOTH, C. J. It is admitted that when the defendants signed the mortgage it secured only $500, and that in that condition the
(78) defendant, J. B. Cloman carried it to the plaintiffs' store. The plaintiffs' witnesses testify that it was then and there changed to $1,000, and the husband defendant says it was not so changed when he acknowledged the deed for probate. His wife testified that she examined and read the mortgage at the time she acknowledged it for probate and registration, and that it had not been changed. This conflicting evidence was submitted to the jury, and they rendered a verdict for the plaintiffs upon the issue submitted, to-wit: "Is the mortgage and crop lien for $1,000, dated 27 July, 1891, and probated 9 September, 1891, the deed of the defendants?" Answered, "Yes." The defendants tendered an issue, but his Honor submitted only the one above, which was sufficient to meet the contention. His Honor charged the jury that, the change being admitted, the burden was on the plaintiffs to satisfy them that such change was made with the consent of defendants, or was known and approved by them at or before the acknowledgment for probate and registration. He also instructed them fully how to answer the issue according to their finding on the evidence. His instruction was sufficient and was the substance of that asked for by the defendants on the real contention.

The main insistence of defendants was that there was no evidence of the knowledge or approval of the change, on the part of the defendants, proper for the jury to consider. We think there was. The *feme* defendant admits that she read and examined the deed when she acknowledged it for probate. There must be some evidence in that admission that she knew the contents, and the jury so find.

No error.

Cited: *Wicker v. Jones,* 159 N. C., 111.

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(79)

FRANK & ADLER v. I. HEINER & SON ET AL.

Execution of Deed—Assignment for Benefit of Creditors—Rejection of Trust by the Trustee Named in Deed.

1. A deed is considered executed and the courts will enforce the same where the maker has gone so far with its execution that he cannot control it or recall what he has done, either by delivery to the grantee or to some one for him or by having it probated and registered.

2. The *cestuis que trustent* in a deed of assignment for the benefit of creditors are the real parties in interest and courts of equity will not allow them to be deprived of their estate by the failure or refusal of the trustee to act, but will, if necessary, appoint a trustee to execute the trust.

3. Where the assignors in general assignment for the benefit of creditors informed the person named as trustee that they had selected him, and asked him before registration of the deed whether he would accept and he replied "that he would like to do so, but could not answer until he saw B.," and the deed was then registered and the designated trustee refused to act: *Held,* that the deed was executed and valid as against attachments levied after the registration of the deed, and equity will appoint a trustee in place of the one designated by and refusing to act under the deed.

CASE AGREED, heard by *McIver, J.,* at June Term, 1895, of EDGECOMBE. The facts appearing from the case agreed were as follows:

1. That on 22 May, 1894, the defendants, then residing in the city of Martinsville, Virginia, and doing business under the firm name of I. Heiner & Son in the town of Rocky Mount, N. C., made and executed in said city of Martinsville what purported to be a general deed of assignment for the benefit of their creditors, and therein attempted to

convey all of their property of every kind and description in the
(80) town of Rocky Mount to L. F. Tillery as their trustee, for the purpose of carrying out fully the purposes and intents of said alleged deed of assignment, said property consisting solely of personal property.

2. That Simon Heiner, accompanied by his attorney, resident in the State of Virginia, came to Rocky Mount, and then to Tarboro, when said alleged deed of assignment was duly proven and recorded on 23 May, 1894, in the proper office in said county.

3. That when said Simon Heiner arrived in Rocky Mount, as aforesaid, he, with his counsel, called on Tillery, the aforesaid assignee, and informed him of his selection as assignee and desired to know if he would accept and perform the duties thereof. Tillery replied that he would like to do so, but could not answer until he saw Thomas H. Battle, Esq. (in whose employ he was). Thereupon the said Heiner took the said deed and had same registered; and after said deed had been registered the said Tillery was again called upon to take the place of assignee as named in said deed and perform the duties thereof; this he positively declined to do, and refused to accept the same.

4. That immediately after the refusal of said Tillery to accept the place of assignee the defendants at once executed another deed of assignment, naming as assignee some other person than said Tillery; and thereupon, to-wit, on the————day of————, and after the registration of said alleged deed of assignment to the said Tillery and before the second deed of assignment was offered for registration, the plaintiffs above named levied their several writs of attachment upon all of the said property described and conveyed in said alleged deed of assignment, and under and by virtue of said writs of attachment the property therein described was sold by the Sheriff of Edgecombe County, and the proceeds of sale are now held by him to abide the determina-
(81) tion of this action. The second deed of assignment was never registered.

On the "case agreed" the plaintiffs insisted that the deed of trust or assignment executed by I. Heiner & Son was of no effect, by reason of its nondelivery and nonacceptance by the trustee named therein, and that they, by reason of their attachment, acquired the first lien on the property in question. The plaintiffs further contended that the deed was void also for failure of the assignors to comply with the act of 1893. On the other hand, the defendants, the assignors and the creditors preferred in said deed of trust insisted that equity would not allow the deed of trust to fail for want of a trustee; that if the legal title to the property remained in the assignors such title and property was impressed

with an equity in favor of the creditors whose debts were secured in said deed, and that the court should so hold and appoint a trustee to execute said trusts. His Honor sustained the contentions of the plaintiffs and rendered judgment in their favor, and defendants appealed.

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

FURCHES, J. This appeal comes before us from the court below upon a case agreed, and the only question presented for our consideration is whether the assignment therein mentioned was executed. If it was executed, the plaintiffs should not recover; if it was not, they should recover.

The general rule as to the sufficiency of execution seems to be this: That where the maker of the deed has gone so far with its execution that he can no longer control it or recall what he has done, then the deed is considered executed and the courts will enforce the (82) same. *Kirk v. Turner,* 16 N. C., 14. This may be done by delivery to the grantee or to some one for him, or it will be presumed by his having it probated and registered. *Helms v. Austin,* 116 N. C., 751. And without something to rebut this presumption its registration is a delivery. *McLean v. Nelson,* 46 N. C., 396; *Adams v. Adams,* 21 Wallace (U. S.), 185.

The plaintiffs contend that the presumption arising from the probate and registration is rebutted by the facts that Tillery said to Heiner before the registration, when asked to accept the trust, "that he would like to do so, but could not answer until he saw Thomas H. Battle"; and that, after it was registered and he was applied to, he refused to accept the trust; and rely on *Gaither v. Gibson,* 61 N. C., 532, for this contention. But we do not think so. In the case cited the defendant, before registration, refused to accept the deed upon the allegation of a defect in the title. And the Court held that this refusal of Gibson rebutted the presumption arising from probate and registration.

But in this case there was no refusal by the trustee named to accept the trust before the deed was probated and registered. But the intimation was that he would do so. What was said to Tillery, and by him to Heiner, before the registration is no stronger for the plaintiffs and against the execution of the assignment than if he had known nothing about its execution, as in *McLean's case, supra,* and *Adams' case, supra.* And in *Adams' case,* as soon as the trustee was informed of the deed and that he was named as the trustee, he declined and refused to have any-

thing to do with it. And yet the court sustained the execution of the deed, appointed another trustee and enforced the trusts.

(83) While it is necessary that there should be a legal execution of an assignment like this to a trustee for the benefit of other parties, it must be kept in mind that these other parties, the *cestuis que trustent,* are the real parties in interest. They are the parties for whose benefit the deed was made. They are the equitable owners, and courts of equity will not allow them to be deprived of the benefit of their estate because the trustee named refused to act. Burrill on Assignments, 6 Ed., p. 312, secs. 240, 241. It is a principle of equity that a trust shall not fail for the want of a trustee. If necessary a court of equity will appoint a trustee to execute the trust. Adams Eq., 36, 7 Ed.; Burrill, *supra.*

We are therefore of the opinion that the assignment stated in the case agreed, upon which the judge tried the case. And we do not know under its equitable jurisdiction.

It is stated in the case on appeal "that plaintiffs contended that this assignment was void also for failure of the assignors to comply with the act of 1893." There is nothing about the statute of 1893 in the case agreed, upon which the judge tried the case. And we do not know whether the grantor complied with this statute or not. If he did not it would have been easy to so state in the facts agreed. Had this been stated in the case agreed as one of the facts, it would have ended the case in plaintiffs' favor, under the ruling of this Court in *Bank v. Gilmer,* 116 N. C., 684. But we cannot find the facts, but must take them as agreed to by the parties.

There is error in the judgment appealed from and the same must be Reversed.

Cited: Bank v. Gilmer, post, 425; *Glanton v. Jacobs, post,* 428; *Robbins v. Rascoe,* 120 N. C., 83; *Brown v. Nimocks,* 124 N. C., 419; *Craddock v. Barnes,* 142 N. C., 96; *Buchanan v. Clark,* 164 N. C., 65.

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(84)

GEORGE R. DIXON v. J. O. W. GRAVELY.

Action on Contract—Assumpsit—Quantum Meruit—Work and Labor Done—Trial.

Where an action was brought upon a specific contract to pay money for work performed by the plaintiff on defendant's building, and the parties on the trial treated it as one also on the *quantum meruit* for work and

labor done, and it appeared that the defendant received and used the building for his own benefit after the plaintiff completed his work, the plaintiff was entitled to recover as upon the common count for work and labor done.

ACTION on contract, begun in a justice's court and tried on appeal therefrom before *McIver, J.*, and a jury at June Term, 1895, of EDGECOMBE.

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

John L. Bridgers for plaintiff.
H. G. Connor and Jacob Battle for defendant.

FAIRCLOTH, C. J. The rules of law governing special contracts and *quantum meruit* have been so fully and so often declared by this Court that they are easily understood and their application is not difficult when the facts are clearly presented. In this case, as frequently happens, the confusion grows out of the informality of the pleadings and the difficulty of understanding from the records what really occurred in the proceedings in the Superior Court. If in such cases we miss the point, it results from our inability to rightly apprehend the procedure below.

We gather the following from the record in this case:

That Coghill contracted with defendant to build him a prize (85) house of specific dimensions and for a specific price, the house to be covered with good shingles. Subsequently they agreed to modify the contract by substituting a tin roof, with additional compensation, and Coghill engaged the plaintiff to put on the tin roof, and later gave an order to the plaintiff for $300 for tinning roof, drawn on the defendant, who accepted the same "if roof proves satisfactory." The issues submitted were:

"1. Was the roof mentioned in the pleadings constructed according to the contract?

"2. If not, what damages has the defendant thereby sustained?

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

The first two were offered by defendant and the third by plaintiff, without objection.

The balance due on plaintiff's account, as presented by him and his evidence, was $180.34, and the jury answered the first issue "No," the second "$90.17" and the third "$90.17," and judgment for plaintiff was rendered for the latter sum and costs.

The parties entered the trial and offered evidence of the defective

character of the roof, the payments made, the repairs by the plaintiff of leaks in the roof when discovered, and it is admitted that the defendant accepted the building and has used it for storing tobacco ever since.

It is evident that the action was commenced upon the specific contract, that is, upon the order accepted by the defendant conditionally, and we think it equally clear that the parties on the trial treated it as one also on the *quantum meruit* for work and materials furnished. This we infer from the evidence, the charge of the court and the presence of the third issue without objection, and the responses of the jury to the several issues. Upon no other theory was the third issue
(86) appropriate. No instructions were asked for by the defendant, and his exceptions to the charge were upon the theory that the trial was upon the special contract exclusively, which we find was not the case. The defendant having received and used the building for his own benefit, the plaintiff was entitled to recover as upon the common count for work and labor done (*Dover v. Plemmons,* 32 N. C., 23; *Simpson v. R. R.,* 112 N. C., 703), and the amount is fixed by the jury.

Judgment affirmed.

Cited: *Morrison v. Mining Co.*, 143 N. C., 256; *Raby v. Cozad,* 164 N. C., 289.

J. W. MOORE ET AL. v. W. H. JORDAN ET AL.

Docketed Judgments—Lien on After-acquired Lands—Priorities.

Under section 435 of The Code the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. (Syllabus by the Chief Justice.)

CLARK, J., dissents *arguendo*, in which AVERY, J., concurs.

SPECIAL PROCEEDING, brought by the plaintiffs against the defendants for the sale of certain lands for partition.

The plaintiffs, J. W. Moore and others, and the defendants, W. H. Jordan and others, were heirs at law of Samuel E. Westray, who died domiciled in the county of Nash on 15 February, 1894. He was at the time of his death seized and possessed of lands lying in Edgecombe and Nash Counties. William S. Battle, one of the heirs at law of S. E. Westray, was indebted to various parties who had obtained judgments

against him and had caused the same to be docketed in said counties. The said judgment creditors were made parties to the (87) proceeding for the sale of the lands and consented thereto. Sales were made by commissioners appointed by the court, and upon the coming in of the report the sales were duly confirmed. From the sales of lands lying in the county of Nash the share of the said William S. Battle was $970, from which the sum of $209.31 was allotted on account of his homestead, leaving a net balance of $760.69 to be applied to the judgments docketed and in force in the said county of Nash and against the said William S. Battle. The amounts and dates of docketing of the judgments are set out in the decree rendered herein by the following judgments against the defendant W. S. Battle and others, docketed in the Superior Court of Nash County, to-wit:

1. In favor of E. B. Lewis for the sum of $2,000, with eight per cent interest from 1 January, 1882, less payment of $200 of date 1 December, 1884, and docketed 30 August, 1884.

2. In favor of P. C. Cameron, administrator, for the sum of $3,000, with eight per cent interest.

The Clerk decreed as follows:

"That the judgments aforesaid docketed in the county of Nash prior to the death of S. E. Westray on 15 February, 1894, when the interest of W. S. Battle in the real estate of the said Westray lying in said county was acquired, stand on the same footing and the liens of the same attach at one and the same time; and that the fund arising from the sale of the said lands lying in the county of Nash and remaining in the hands of the Clerk of this Court, after paying the said sum of $209.31 toward the homestead of the said W. S. Battle and its proportional part of the cost hereof as hereinafter provided, (88) shall be disbursed and paid pro rata upon the judgments aforesaid docketed in the Superior Court of Nash County in favor of E. B. Lewis, P. C. Cameron, adm'r, and P. C. Cameron.

"That the funds hereafter arising from the sale of W. S. Battle's interest in said lands lying in the county of Nash are to be disbursed and paid upon the aforesaid judgments docketed in said county prior to the death of the said Westray, in the same manner and proportion as is herein provided."

The defendant E. B. Lewis appealed from the decree of the Clerk of the Superior Court providing that the funds arising from the sale of the Nash County lands should be disbursed and paid pro rata upon the judgments docketed and in force in Nash County in favor of E. B. Lewis and P. C. Cameron, administrator, and P. C. Cameron.

Upon the hearing of the defendant E. B. Lewis' appeal by *James D.*

McIver, Judge, riding the Second Judicial District, the judgment of the Clerk, declaring the judgments docketed in the county of Nash prior to the death of Samuel E. Westray on 15 February, 1894, when the interest of William S. Battle in the real estate of the said Westray lying in said county was acquired, stand on the same footing and the liens of the same attach at one and the same time, was affirmed.

The defendant E. B. Lewis appealed from the said judgment.

R. B. Peebles for plaintiffs.
H. G. Connor for defendant E. B. Lewis.

FAIRCLOTH, C. J. We are now confronted for the first time with the question whether previously docketed judgments take by their priorities, according to the dates when docketed, the after-acquired lands (89) of the judgment debtor, or whether they take pro rata the after-acquired lands cast by descent on the judgment debtor. The defendant Lewis contends that, as was the case under our former system, the lien when it attaches relates back to the day when the judgment was docketed. This is denied by the other defendants. It is conceded that the liens of the several judgments on after-acquired lands attach *eo instanti* and at the moment when the title vests in the judgment debtor, also that the lien of each judgment attaches at the time it is docketed on all lands then owned by the debtor. It will be observed that those liens arise from the docketing, and priorities accordingly are established, and not by any principle of relation. Neither the court nor counsel have been able to find any decided case on this question in any of the States, except one in Oregon, which will be referred to later. We are therefore to construe our statute, The Code, sec. 435, according to its meaning and on general principles of reasoning. At common law no judgment *proprio vigore* was a lien upon land. Under our former system, when an execution issued and was levied upon land, the lien thereby acquired related to the *teste* of the execution, not by reason of any self-executing force in the *fi. fa.* or the judgment proper, but by force of a statute (West. 2) which was enacted expressly to give the lien created by the levy a relation to the *teste* of the writ. The relation was not given upon any idea of rewarding the diligent creditor, but to take from the debtor the power to transfer his property to others and thus deprive the creditor of the fruit of his recovery. This reason does not now exist under our system, because the docketed judgment fixes the lien, and the debtor cannot escape it, and if he sells thereafter the purchaser takes subject to the statutory lien of our Code, and the principle of relation is not necessary to protect the creditor. (90) *Cessante ratione cessat ipsa lex.* Whilst this question was not

presented in *Sawyer v. Sawyer,* 93 N. C., 321, this Court remarked: "This statutory legislation (The Code, sec. 435) must therefore, to no inconsiderable extent, dispense with many rules before in force, and especially that of relation of the execution to its *teste,* as unnecessary and inapplicable to the new procedure and practice." We must, then, look to the act itself for its true intent. The Code nowhere directly or indirectly enacts the doctrine of relation except in section 433, which declares that all judgments rendered in the Superior Court and docketed within ten days after the term "shall be held and deemed to have been rendered and docketed on the first day of said term." So the Legislature did advert to the doctrine of relation, but failed to declare that it should prevail, except in said section 433, and its silence in all other sections affords a fair inference that it did not intend that it should prevail in section 435. *Expressio unius exclusio alterius.* Assuming that the Legislature had power to give the lien a retroactive effect, as was done by Westminster 2, yet it has not done so, and it would be some strain on the legal mind to say that a docketed judgment, even in effect, was a lien upon land during a period when the judgment debtor had no land. A lien cannot antedate its origin without statutory aid.

There seems to be no reason why priority should be allowed when the title to the land and the several liens occur at the same moment. There is no equitable ground on which to place it, because one judgment debt in the eye of the law is as just as any other, and there is no natural justice in the proposition.

The Court, in *Creighton v. Leeds,* 9 Oregon, 215, under a similar statute and in a like case, held that the first docketed judgment had priority over the other judgments on after-acquired lands, and this is the only case yet found. The reasoning in that case is not (91) satisfactory. It is put, first on the ground that such is the meaning of the statute; secondly, that the debtor has an inchoate interest in his future acquisitions, on which the judgment acts and is a lien, and likens it to the inchoate interest of a married woman in the future-acquired lands of her husband during coverture. We fail to see any similarity. The proposition loses sight of the true reason why dower was allowed in such lands. It is true that the marriage contract is the initial point of her rights, but the reason is the "sustenance of the wife and the nurture and education of the younger children," and it was extended to future-acquired lands in order to prevent the husband from defeating the object of the rule, which has no application to The Code, section 435, as to judgments docketed before the estate falls in. The authorities quoted in the Oregon case do not support the conclusion,

and are cited only to call attention to some supposed analogies under the former system. The contention in *Kollock v. Jackson,* 5 Ga., 153, was not between judgment creditors, but between a judgment and a factor's lien for goods and advances made to raise a crop, which factor's lien arose subsequent to the rendition of the judgment, and it was held that the judgment had preference because of their act of Assembly of 1799, which declared that "all property of the party against whom a verdict shall be entered shall be bound from the signing of the first judgment." This decision does not fit the present question. Our conclusion is that the proceeds of the land should be applied to the judgments pro rata.

Affirmed.

CLARK, J., dissenting: The distinction must be clearly kept in mind between the *lien,* which is the right accruing as between the
(92) judgment creditor and debtor to subject the property, and the *priority* in the application of the proceeds of a sale under execution, which is the apportionment of the rights of judgment creditors among themselves.

The manner of acquiring the *lien* as to real estate has been changed by statute. The apportionment of the proceeds of sale according to priority has never been affected by statute and, as the courts possess no legislative power, the law as to priorities among execution and judgment creditors necessarily remains as it has been uniformly recognized for an uncounted number of years.

Prior to the adoption of The Code there was no *lien* on real property till the levy of an execution (as is still the case as to personal property), and if there were two or more executions in the hands of the sheriff, the priority in the application of the proceeds of the sale belonged to the execution of the oldest original *teste* whose chain had been kept up by a successive issue of executions from each succeeding term. The same rule applied as to personal property. It made no difference when the debtor acquired either species of property, whether before or after judgment. There was no *lien* as to either species of property till a levy, but whenever the lien was obtained by a levy the *priority* in the application of the proceeds of sale went to the oldest execution whose chain had been kept up unbroken.

The Code, section 435, provides that the docketing a judgment shall make it "a *lien* on the real property, in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or *which he shall acquire at any time thereafter,* for ten years from the date of the ren-

dition of the judgment." It will be noted that this statute only changes the mode of acquiring liens against the debtor's realty, (93) and does not purport to change the long-settled and well-recognized principle that, though the liens may have been acquired *eo instanti* by a levy of several executions at once (or as in this case by the acquisition of property subsequent to docketing of the judgments), the *priority* among the creditors in the application of the proceeds goes to the oldest judgments in the order of their seniority. As the statute has not changed this, the courts have no power to do so. This section (435) merely does away with the necessity and useless expense of issuing execution from each successive term by making the docketing a *lien* on all the judgment debtor's realty which he has or may subsequently acquire for ten years in the county where such judgment is docketed. *Sawyer v. Sawyer,* 93 N. C., 321.

The statute gives no indication of a disposition to put the diligent creditors who hold the oldest judgments in any worse condition than formerly. This statute (The Code, 435) was indeed for their ease, by relieving them of the necessity of issuing a chain of successive executions to maintain their priority, and it is accordingly careful to make such judgments a lien also on all real property which the judgment debtor *shall thereafter acquire.* This view is sustained by a well-considered opinion in *Creighton v. Leeds,* 9 Oregon, 215, in which State the statute is almost identical with ours, and *Kollock v. Jackson,* 5 Ga., 153; 8 Am. & Eng. Enc., 988. In the Oregon case just cited the Court say (irrespective of the additional fact that with us the law of applying the proceeds to the judgments according to seniority has not been changed) that by the words of their statute giving a lien on subsequently-acquired property (using the same words as our statute) "there is an inchoate right of lien—a remedy for the satisfaction of claims against the debtor—which confers the power of relating back," so that (94) when the liens attach to subsequently-acquired property the proceeds, upon being brought *in custodia legis* by execution sale, are applied according to the seniority of docketing.

Indeed, the exact point at issue has been recognized as settled in *Titman v. Rhyne,* 89 N. C., 64 (on p. 67), where the Court say: "The judgment of Wright became a lien on all the lands of Linebarger which he owned in that county at the date of the docketing *or at any time within ten years thereafter,* and no subsequent lien would displace it; nor would any sale under execution issued upon a *judgment docketed subsequently to it,* operate to discharge it or pass the title to the land, except subject to it *as a prior lien.*"

AVERY, J.: I concur in the above dissenting opinion.

(95)

ANDREW J. BATES v. MORRIS H. SULTAN AND M. E. SULTAN.

Married Woman, Contracts of—Charge on Separate Estate—Guarantee of Wife's Debt by Husband Equivalent to Consent—Action to Subject Land to Charge, Requisites of.

1. A married woman cannot charge her separate real estate with her debt except by deed, accompanied by privy examination.

2. In an action to subject the separate estate of a married woman to the payment of a debt with which she is alleged to have charged it, with the written consent of her husband, it is not necessary that the complaint shall charge that the debt was contracted upon any of the considerations specifically mentioned in section 1826 of The Code or that the wife was a free trader, but only that she did so charge it.

3. A married woman, being engaged in business (not a free trader), made a "statement" of her affairs to a dealer from whom she was about to purchase and did purchase goods, said statement being declared to be for the purpose of establishing her credit and as a basis therefor and containing an agreement, in consideration of credit given her, to advise the dealer of any material change in her affairs, and several days thereafter her husband executed a paper-writing guaranteeing the payment to the dealer of any indebtedness of his wife, contracted before or after the date of the paper-writing: *Held*, (1) that the "statement" made by the wife was sufficient to establish the agreement to charge her separate estate and evidenced her intent to do so as clearly as if she had written: "If you will credit me for goods that I buy of you, I will pay you out of the property mentioned in the schedule I have given you, and your debt shall be a charge upon it"; (2) that the paper-writing executed by the husband was a sufficient consent to her charging her separate estate for the payment of her debt to the dealer.

4. While an action to subject the separate estate of a married woman to the payment of a debt alleged to be a charge upon it is in the nature of a proceeding *in rem*, yet, as her agreement created no lien upon such estate, it is not necessary for the complaint to allege that the separate estate sought to be subjected is the same as that of which she was possessed at the time of the agreement to charge it, or that it is such as was obtained by exchange for, or bought with the proceeds of the sale of, or with the income from the estate owned by her, at the time of such agreement.

5. In such cases it is only necessary to show that the property mentioned in the complaint and sought to be subjected was owned by the *feme covert* at the date of the commencement of the action, and in case of judgment it and the execution should particularize the separate property admitted or proved on the trial to have been owned by her at the commencement of the action.

FURCHES, J., dissents *arguendo*, in which FAIRCLOTH, C. J., concurs.

BATES *v.* SULTAN.

ACTION begun in March, 1894, in the Superior Court of CRAVEN by the plaintiff against the defendants to recover the sum of $1,052.60 and to have the judgment declared a charge upon the separate estate of the *feme* defendant, and heard on demurrer before *Bryan, J.*, (96) at May Special Term, 1895, of said court. His Honor sustained the demurrer, and plaintiff appealed. The facts and the grounds of demurrer appear in the opinion of *Associate Justice Montgomery.*

D. L. Ward for plaintiff.
W. W. Clark for defendants.

MONTGOMERY, J. The *feme covert* defendant, M. E. Sultan, not a free trader, was engaged in merchandise in New Bern, her husband, the other defendant, the while managing the business for her. She, through her husband, on 30 January, 1892, at New Bern, executed and delivered to the plaintiff a writing containing her financial condition, assets and liabilities, the assets consisting of real and personal property, in value about $25,000; her liabilities being only about $1,300. The yearly extent of her business she stated to be $23,000. This schedule was prefaced with a statement and caption, all forming one entire instrument and made a part of complaint as Exhibit A, as follows:

"Statement as a Basis for Credit: Statement to A. J. Bates & Co. of the financial condition of M. E. Sultan, of New Bern, county of Craven, State of North Carolina.

"For the purpose of establishing my (or our) credit with A. J. Bates & Co. and as a basis therefor I (or we) make the following statement as to my (or our) means, which shall apply to all future purchases unless revoked by me (or us) in writing and delivered to them personally; also, in consideration of such credit, I (or we) agree to advise A. J. Bates & Co. immediately of any material change in my (or our) affairs."

Afterwards, on 11 February, 1892, the defendant husband executed and delivered to the plaintiff a paper-writing, made a (97) part of complaint as Exhibit B, as follows:

"For and in consideration of one dollar to me (or us) in hand paid by A. J. Bates & Co. (the receipt whereof is hereby acknowledged), I (or we) do hereby guarantee unto them unconditionally the payment, at all times after maturity, of any indebtedness (not exceeding the sum of one thousand and five hundred dollars) of Mrs. M. E. Sultan, now doing business in New Bern, county of Craven and State of North Carolina, of any purchase or other liability made prior to, or to be

made after, this date, by the said Mrs. M. E. Sultan of the said A. J. Bates & Co., upon a credit of sixty days, or such other time, or at any extension of time after maturity, as may be given by the said A. J. Bates & Co. to the said Mrs. M. E. Sultan.

"And I (or we) hereby waive all demands of payment and notice of protest as the respective bills, notes, acceptances or other indebtedness of the said Mrs. M. E. Sultan fall due.

"This guarantee to be an open and continuous one at all times, to the amount of one thousand and five hundred dollars above named, until revoked by me (or us) in writing."

After the execution and delivery of the two papers the plaintiff sold and delivered to the *feme* defendant in New Bern more than a thousand dollars worth of goods and wares, for which she refused to pay when demand was made upon her. This action was brought to subject the statutory separate estate of the *feme* defendant to the payment of the debt, the complaint containing allegations that the *feme* defendant is in possession of a large separate estate, real and personal; that she intended to charge her separate estate with the debt; that the
(98) consideration of the debt was for the benefit of her sole and separate estate, and that her husband gave his consent in writing to her agreement to buy the goods and to charge her separate estate with the amount. The *feme* defendant demurred to the complaint, assigning numerous grounds under two heads, which will be particularized in the discussion of them.

This Court decided, in the case of *Farthing v. Shields,* 106 N. C., 289, that the lands of a married woman cannot be charged by any undertaking on her part in the nature of a contract unless it be evidenced by deed accompanied by privy examination. In that case, however, it is stated that liens created by statute, chapter 41 of The Code, are not affected by the decision. We can, therefore, in the case before us dismiss from consideration the attempt of the plaintiffs to charge the real estate of the *feme* defendant, for it appears from the complaint that the paper-writing which is relied on to create a charge on her separate estate was not executed by deed with privy examination.

The first division of the demurrer is in the following language: 1. "It is not alleged that said debt was due for her necessary personal expenses, or for the support of her family, or such as was necessary in order to pay her debts existing before marriage, or that the same was contracted with the written consent of her husband, or that she was a free trader."

It was not necessary for the plaintiff to allege in his complaint that the debt due was for any of the considerations specifically mentioned

in section 1826 of The Code, or that the *feme* defendant was a free trader. The cause of action was on account of none of these, but its object was to have subjected her separate estate to the payment of a debt with which she was alleged to have charged it, with the written consent of her husband. The instrument executed by her and called "Statement as a Basis for Credit," heretofore referred to, is what the (99) plaintiff relies on to prove her agreement to charge her separate estate. We are of the opinion that it is sufficient. It appears from it, taken with the paper executed by her husband, that she meant to act under the powers given her by the statute (sec. 1826 of The Code), and the intention to charge her separate estate is apparent. We think when she made the statement and declared in it that "for the purpose of establishing my credit and as a basis therefor, I make the following statement, which shall apply to all future purchases———and in consideration of such credit I agree to advise (plaintiff) immediately of any material change in my affairs," that her intent to charge her separate estate was as clear as if she had written: "If you will credit me for goods that I buy of you, I will pay you out of the property mentioned in the schedule I have given you, and your debt shall be a charge upon it." The property named in the instrument, not the statement containing the description and amount, was the basis—the foundation—upon which the credit was extended and the goods were sold. We are of the opinion, also, that the paper-writing executed by the defendant husband, while it may be a guarantee in case of the wife's default, is also sufficient consent to her charging her separate estate for the payment of her debt to the plaintiff. Consent is embraced in the idea of guarantee. The promise that he will make good his wife's agreement, pay her obligations if she does not, can carry with it no other idea than that he desires and expects her to pay out of her own property her debts, and not cause loss to him as her guarantor for her failure.

The second division of the demurrer is as follows: "It does not allege that the separate estate which this defendant now has is a part of the separate estate which she had at the time the said debt was (100) contracted, or that said estate had been substituted for the separate estate which she had at the time that the debt was contracted, or that the same had been purchased with the income or proceeds of said separate estate which she had at the time the debt was contracted, or that the same had been received in exchange for the separate estate which this defendant had at the time the debt was contracted." It cannot be sustained in this Court. Whilst an action to subject the property, personal (not real), which the defendant admitted she had or which ments as she is allowed to make under our laws is in the nature of a

proceeding *in rem,* yet the creditor gets no lien at the time of the agreement upon the estate of the married woman. She can sell or dispose of her property at any time and give the purchaser for value a good title, and the creditor will be allowed to have his judgment satisfied out of any of her separate estate, whether it be that of which she was possessed at the time of the making of the agreement to charge it, or whether it be such as she may have exchanged it for, or have acquired in any way whatever. If it be denied, however, the plaintiff must prove on the trial that the *feme* defendant had, when the suit was commenced, whatever of the property mentioned in the complaint he wishes to have subjected to the payment of his debt; and the judgment and the execution issued on it should set forth with particularity the separate property, personal (not real), which the defendant admitted she had or which the plaintiff proved that she had at the time of the commencement of the action. If the officer to whom the execution is issued, when he comes to levy upon the separate estate of the *feme* defendant, finds none of it which is described in the execution, or not enough to satisfy it, he will in the latter instance sell what he finds, and in both make proper (101) return of his writ. The creditor then will have such remedy, by supplemental proceedings or otherwise, as he may be entitled to, to reach such property as she may have fraudulently disposed of, or such as has been substituted for such as she had, or such as has been purchased with the income or proceeds of such as she had, or such as she has received in exchange for such as she had, or the proceeds of sale of such as she had disposed of, all subject to her personal property exemption allowed by law. There was error in his Honor's sustaining the demurrer. It should have been overruled.

Error.

FURCHES, J., dissenting: Without entering at length into a discussion of the case, I will state a few of the reasons that prevent me from agreeing to the judgment of the Court. It is true that this appeal comes up upon complaint and demurrer and therefore we can only consider the sufficiency of the complaint. But the complaint makes Exhibits A and B a part of the complaint. These exhibits enable us to see the case, as I think, in its true light; and as they are a part of the complaint they are proper subjects of consideration and review in this appeal.

The defendant M. E. Sultan is a married woman; and as it is her property which has to pay the plaintiff's demand, if it is paid, it is necessary to make a case against her. This the plaintiff tries to do by Exhibits A and B, under the Constitution and section 1826 of The Code. Before the Constitution of 1868 a married woman could make no such contract as this. But upon her marriage all her personal property be-

came the property of her husband. He might spend it or do as he pleased with it. And it has always been my understanding that section 6 of Article X. was put in the Constitution for her protection. It was intended to secure her in the enjoyment of her own property (102) and to take it out of the control of (it may be) a worthless husband. Section 1826 of The Code, in affirmance of the common law, provides that she shall be incapable to make any contract which will bind her real or personal property, except for necessaries, personal expenses or for the support of her family, or such as may be necessary to pay her debts existing at the time of her marriage, "without the written consent of her husband," unless she is a free trader *as hereinafter provided.* Plaintiff contends that Exhibits A and B show a compliance with that clause of section 1826 which allows her to make a contract with the written consent of her husband. In this I do not concur.

For a long time the profession thought that the husband should not only sign the contract with the wife, but he must give his *express consent.* But in *Jones v. Craigmiles,* 114 N. C., 613, it is said if he signs the contract with his wife it will be presumed he gave his consent. This is the furthest our Court has yet gone. But this case, in my opinion, goes a bowshot beyond that. Here we have a husband doing a mercantile business which he says amounts to $23,000 a year, without means of his own, upon the credit of his wife. And on 30 January, 1892, he makes up a statement of his wife's property and signs her name to it—Exhibit A; and on 11 February, 1892, he makes a guarantee (calls it that) guaranteeing for all time to come, if not revoked "by me or us," "my or our" indebtedness, to the amount of $1,500, that has been made or may hereafter be made. Plaintiff then sells defendants goods and charges them to the wife to the amount of $1,052.60, and contends that under Exhibits A and B this is the contract of the wife, with the written consent of the husband. Exhibit A is no contract. It is a statement made by the husband as a basis of credit. Exhibit B is not the contract of the wife. She does not sign it and is no party to it. It is a (103) guarantee of the husband that if his wife does not pay the plaintiff he will.

It seems to me that it is an attempt on the part of the husband to make his wife a free trader without complying with the law (Code, sec. 1827), and then to constitute himself her agent and spend her estate. I do not think that Exhibits A and B are a compliance with section 1826; I think that it would be dangerous for this Court to sanction such a method as this of turning over the estates of married women to be squandered by worthless husbands. I cannot agree to it.

FAIRCLOTH, C. J.: I concur in the above dissenting opinion.

Cited: *Bank v. Ireland,* 122 N. C., 574; *Walton v. Bristol,* 125 N. C., 425, 430; *Jennings v. Hinton,* 126 N. C., 51, 57; *Bazemore v. Mountain, ib.,* 317; *Brinkley v. Ballance, ib.,* 394, 16; *Rawls v. White,* 127 N. C., 20; *Harvey v. Johnson,* 133 N. C., 361; *Ball v. Paquin,* 140 N. C., 93; *Bank v. Benbow,* 150 N. C., 785; *Graves v. Johnson,* 172 N. C., 180.

D. S. BENNETT v. B. F. SHELTON.

Practice—Interlocutory Order—Premature Appeal.

An appeal from an order making an additional party is premature and will be dismissed. The proper practice in such case is to note an exception to the interlocutory order complained of and have it reviewed on appeal from the final judgment.

ACTION to recover a sawmill in possession of the defendant. At May Term, 1895, of HALIFAX W. P. White moved to be made a party defendant in order to set up a cause of action against the Lane Manufacturing Company, as fully set out in his affidavit. His Honor, being of the opinion that White was a necessary party, allowed the motion, and plaintiff appealed.

The affidavit was in substance as follows:

"1. In———, 189—, plaintiff, acting as agent for the Lane Manufacturing Company, contracted with said White to sell him a
(104) Lane Manufacturing Company sawmill, No. —, with uprights opening 36 inches and taking a 56-inch saw, for the price of——.

"2. That under said agreement said plaintiff and the Lane Manufacturing Company shipped to said White the mill now in controversy in this action, representing same to be of the dimensions and capacity above set forth, and said White immediately executed his notes according to the terms of said contract, giving said Bennett, trustee for the Lane Manufacturing Company, a lien, or deed of trust, on said mill to secure the payment of said notes.

"3. That under and by virtue of said lien, or deed of trust, this action is brought by plaintiff.

"4. That when said mill was put together for work said White discovered that said mill was not according to the contract; that it was of smaller capacity and dimensions, being with uprights only 32 inches and taking only a 54-inch saw; said White at once notified said Bennett

and said Lane Manufacturing Company of their violation of the contract. They promised at all times to make good the damages sustained by White by reason of their noncompliance with said contract.

"5. That White has paid all of said notes except about $75, they promising to correct the matter of noncompliance.

"6. That by reason of said breach of warranty and violation of their contract said White has been damaged to an amount larger than the sum due under said notes, to-wit, $150, being the difference between the mill contracted for and the one shipped.

"7. That said White afterwards sold said mill to defendant, Shelton, with warranty of title, who has same in his possession.

"8. That said White has an interest in the controversy and (105) is a necessary party to a complete settlement of the matter."

R. O. Burton for plaintiff.
Claude Kitchin for defendant.

CLARK, J. The plaintiff should have had his exception to the order making an additional party noted in the record, so that if he has suffered detriment thereby (which can rarely be the case) the order may be reviewed on appeal from the final judgment, should it go against him. The appeal is premature and must be dismissed. *Lane v. Richardson,* 101 N. C., 181; *Emry v. Parker,* 111 N. C., 261.

Appeal dismissed.

Cited: *Bernard v. Shemwell,* 139 N. C., 447; *Spruill v. Bank,* 163 N. C., 45; *Joyner v. Fibre Co.,* 178 N. C., 635.

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(106)

STATE EX REL. W. E. DANIEL ET AL. v. J. M. GRIZZARD ET AL.

Public Officer—Failure in Duty—Register of Deeds—Failure to Index Mortgage—Liability of Sureties on Official Bond—Statute of Limitations.

1. The conditions of official bonds are coextensive with the duties required by law of such officers, and a statute making an officer liable on his official bond for all acts "done" by him by virtue of or under color of his office renders him likewise liable for his failure to do what he should have done; therefore:

2. The failure of a register of deeds to properly index the registry of a mortgage renders him liable on his official bond to one injured by such neglect.

3. Though a register of deeds was not, at the time his bond was given, liable for his failure to index the registry of a mortgage, yet where he remained in office after the passage of a statute rendering him liable therefor the sureties on his bond are also liable.

4. The breach of the official bond of a register of deeds by his failure to properly index the registry of a mortgage occurs at the time of such neglect, certainly not later than the expiration of his term of office, during which he could have performed the duty.

5. The cause of action which a second mortgagee has against a register of deeds for his failure to index the registry of a first mortgage, whereby the former suffers loss, arises and the statute of limitations begins to run at the time of such breach, and not at the time of the sale of the mortgaged property under the first mortgage and the application of the proceeds to its payment.

CLARK, J., did not sit.

ACTION by the State on the relation of W. E. Daniel, trustee, and others, against J. M. Grizzard, former Register of Deeds of Halifax, and the sureties on his official bond, and tried on a case agreed before *McIver, J.*, at June Term, 1895, of HALIFAX.

His Honor held that the action was barred by the statute of limitations, and the plaintiffs appealed. The facts are fully stated in the opinion of *Associate Justice Furches.*

McRae & Day for plaintiffs.
R. O. Burton and T. N. Hill for defendants.

FURCHES, J. The defendant was appointed Register of Deeds for Halifax County, and on 13 December, 1882, entered into the usual bond required by law, with the other defendants as his sureties thereto—which office he continued to hold and exercise until 6 November, 1883.

On 15 January, 1883, J. R. Whitaker and wife executed a mortgage to Spier Whitaker for $1,500, which was that day registered by defendant Grizzard; but he failed to index the same as required by law, and the debt secured by this mortgage was kept alive and in date by successive payments until 1894.

(107) On 28 January, 1890, the said J. R. Whitaker and wife executed another mortgage to the plaintiff on the same land for something over $2,000, which was registered and duly indexed on that day.

On the date of the execution of this last mortgage the plaintiff examined the index in the Register's office for the purpose of seeing

whether there was any mortgage or other encumbrance on said land, and, said mortgage not being indexed, plaintiff was thereby deceived and took said mortgage when he would not have done so if the mortgage to Spier Whitaker had been properly indexed.

In 1894 plaintiff was proceeding to foreclose the mortgage to him when he discovered for the first time that there was any such mortgage on said land as that to Spier Whitaker.

It has been judicially determined that the mortgage to Spier Whitaker was valid (*Davis v. Whitaker,* 114 N. C., 279) and therefore had priority over the mortgage of plaintiff.

Under a decree of the Superior Court of Halifax County said lands have been sold and the whole of the proceeds of said sale has been applied to costs and the payment of the Spier Whitaker mortgage. The mortgagor is insolvent and plaintiffs have lost their entire debt.

Plaintiffs therefore bring this action against the defendant Grizzard and his bondsmen and claim that by defendant failing to index the Spier Whitaker mortgage they have lost their entire debt, and ask judgment against defendants for that amount.

Defendants deny the plaintiffs' right to recover on this bond, for the reasons which they assign, and also plead the statute of limitations in bar of plaintiffs' right of action.

The facts of this case are agreed upon, but we have made this summary for the purpose of abridging them as much as we can to retain the substantial facts. And it is further agreed that the (108) facts present but two questions for our consideration: 1. Whether the defendant Grizzard and the sureties on his bond are liable to plaintiffs. 2. Whether the action is barred by the statute of limitations as to said Grizzard and his said sureties or either.

This case presents some very interesting questions of law, which have been well argued on both sides and which have very much assisted us in our investigation.

There is no bond sent in this record, but the case states that on 13 December, 1882, the defendant Grizzard gave a bond in the penal sum of $5,000, with the other defendants as sureties, and was duly inducted into office, which he continued to hold and exercise until 6 November, 1883. So it will be seen that he gave the bond and entered upon the duties of his office before The Code went into effect on 1 November, 1883 (section 3866 of The Code), but that he continued to hold his office for six days after The Code did go into effect.

At the time defendants executed the bond they would not have been liable for failing to index the mortgage to Whitaker unless this was one of the conditions of the bond. *Holt v. McLean,* 75 N. C., 347;

Moretz v. Ray, 75 N. C., 170; *Eaton v. Kelly,* 72 N. C., 110, and that line of cases. But by the adoption of The Code the liabilities of public officers and their bondsmen were very much broadened. The Code, section 1883. And it is now held that the conditions of the bond are coextensive with the duties required by law of such officers. *Kivett v. Young,* 106 N. C., 567; *Thomas v. Connelly,* 104 N. C., 342. It is true that this amendment seems in terms to provide only for acts done by the officer, and not for those which he should do but does not. The amendment is as follows: "And every such officer and the sureties on his official bond shall be liable to the person injured for all acts
(109) done by said officer by virtue or under color of his office." But it would be putting a very narrow construction on the statute to say that he and his sureties are liable for what he did, but not for what he should have done and did not do, although the damage to the party was equally as great.

But we are relieved of any trouble as to this question, as it has been construed by this Court in *Young v. Connelly,* 112 N. C., 646. In that case Connelly was Clerk of the Superior Court and neglected to docket a judgment, by which plaintiff lost his judgment lien and his debt. And the Court said that although it was a neglect of duty it was one of the duties required of him by express statute, and he and his sureties are liable. And so was it one of the duties required of the defendant Grizzard by express statute that he should have indexed the Whitaker deed. The Code, section 3664.

But we have said that this bond was given before The Code went into effect, and it is therefore contended that it is to be construed by the light of *Eaton v. Kelly, Holt v. McLean, supra,* and defendants are not liable.

But it must be remembered that defendant Grizzard continued to hold and exercise the duties of this office under this bond until 6 November, 1883, six days after The Code went into effect, and the defendants were liable for any breach that took place while Grizzard continued to hold the office. The breach in this case being the neglect to perform a duty, it continued as long as he remained in office. He would have had the right to index the Whitaker mortgage any day while he remained in office, and, this being so, he failed to index this mortgage after The Code went into effect and when the penalties of the bond required him to do so.

This, we think, must be so, if the Legislature had the right to increase the liabilities or obligations of the bond during the tenure of
(110) office under it, and this question seems to be settled. A learned author says: "It has been held that all laws enacted during the

continuing contract of an official bond are also part of the contract, and that the obligors entered into the engagement in view of the possible and probable modification of their liability by the legislative branch of the government." Murfree on Official Bonds, section 193. And to the same effect is *People v. Vilas,* 36 N. Y., 458; also see *Prarie v. Worth,* 78 N. C., 169; *Boger v. Bradshaw,* 32 N. C., 229, 232.

We therefore sustain the plaintiffs upon the first question as to the liability of defendants.

Then, is the lapse of time and the plea of the statute of limitations a bar to plaintiffs' action? This depends upon the time when the statute commenced to run. Defendants contend that it commenced when Grizzard failed to index the mortgage to Spier Whitaker as he was required by law to do; while plaintiffs claim that it did not commence until the land was sold and the proceeds applied to the older mortgage.

The statute commenced to run from the time the cause of action accrued—the breach of the bond; and this must have taken place while the defendant Grizzard was in office. He could not commit a breach after that time. This could not make the breach later than 6 November, 1883, and that would be more than ten years before this action was commenced. And the statutory limit for bringing actions on official bonds seems to be six years. The Code, sec. 154.

Then there is to be a limit to such actions or there would have been no statute passed. The breach of the bond—the failing to index the mortgage—was the cause of action. It was not damage—damage is never the cause of action, but the result of the action—the consequences arising from the cause. It seems to us that these propositions are (111) sustained by sound reason and show that the statute must commence to run from the time of the breach complained of. But we are not without the authority of decided cases from some of the highest courts of the Union to support the proposition that the statute runs from the time of the breach.

"The statute of limitations commences to run from the date of the breach of the bond that gives the right of action, and not from the time when the injury resulting from it occurred or was discovered." *Kerns v. Schoomaker,* 4 Ohio, 331, 22 Am. Dec., 757; *Wilcox v. Executors,* 4 Peters, 172; *Lotten v. Gillett,* 95 Cal., 317; *Betts v. Norris,* 21 Me., 314.

We have examined the cases cited by plaintiffs and think they are distinguishable from the one under consideration. *Godley v. Taylor,* 14 N. C., 178, is a divided opinion—*Ruffin, C. J.,* dissenting—and is in direct conflict with *Raynor v. Watford,* 13 N. C., 338. *Godley v. Taylor* was an action upon the warranty in a deed for land, and there was no breach of the warranty until there was an ouster of possession. It

was the breach that gave the right of action—there was none before. So in this case it was the breach—the neglect to register the mortgage—that gave the right of action. And it seems to us this case tends to sustain the position of defendants. It certainly does not conflict with the contention that the breach was defendant Grizzard failing to index the mortgage. The case of *McKinder v. Littlejohn,* 23 N. C., 66, and *Armistead v. Bozman,* 36 N. C., 117, are cases where there was no one *in esse* to sue, and are distinguishable from this case.

We are therefore of the opinion that plaintiffs' cause of action (112) is barred by the lapse of time and the plea of the statute of limitations.

No error.

Cited: Warren v. Boyd, 120 N. C., 60; *Comrs. v. Sutton, ib.,* 301; *Smith v. Patton,* 131 N. C., 398; *Mfg. Co. v. Hester,* 177 N. C., 612.

ALLEN WARREN v. STANCILL & RANDOLPH.

Practice—Order Setting Aside Arbitrator's Award, When Interlocutory —Appeal.

An order setting aside an arbitrator's award in a pending action and directing other proceedings is interlocutory and not final, and no appeal lies directly therefrom. In such case an exception should be noted, so as to be passed on when final judgment is rendered and appealed from.

ACTION heard on award of arbitrator and exceptions thereto before *Hoke, J.,* at December Term, 1893, of PITT. The facts appear in the opinion of *Associate Justice Montgomery.* The plaintiff appealed.

Shepherd & Busbee for plaintiff.
John L. Bridgers for defendants.

MONTGOMERY, J. This action was by consent of the parties referred by the court to E. A. Moye, arbitrator, his award to be the judgment of the court. When the award came in exceptions were filed thereto by the defendants. After hearing the exceptions his Honor gave judgment setting aside the award, making new parties and re-referring the case to the same arbitrator. From this judgment the plaintiff undertook

to appeal to this Court. It is unnecessary for us to consider whether sufficient cause appeared on the face of the award to warrant his Honor in setting it aside. The only question for our considera- (113) tion is whether the judgment is appealable. We are of the opinion that no appeal lay, because the judgment directed further proceedings and was not a final one. It affected no substantial right of the plaintiff which required an immediate adjudication to prevent loss or injury to him. The judgment below only delayed the appeal until the final judgment should be granted, and such delay did not deprive the appellant of any substantial right. *Hailey v. Gray,* 93 N. C., 195. In *Blackwell v. McCaine,* 105 N. C., 460, it is said: "Many cases decide that an appeal does not lie at once from an interlocutory judgment or order, unless it puts an end to the action or may destroy or impair a substantial right of the complaining party to delay his appeal until the final judgment. He must assign error or except and have the same noted in the record and bring the whole up by an appeal from the final judgment." (See the numerous cases cited on these questions of practice in that opinion.) In *Tenant v. Divine,* 24 W. Va., 388, it appeared that a submission to arbitrators was made by agreement of parties *in pais,* the award to be a judgment of the Circuit Court of Montgomery County. The award was set aside, and the defendant in error to the Supreme Court of Appeals claimed that that Court was without jurisdiction because the judgment of the Circuit Court was interlocutory and not final, and that no appeal would lie from any other than a final judgment. It was held, however, that the judgment of the lower court was final, because nothing remained in that court and no further proceedings could be had therein without resorting to a new action either on the original cause of action or the agreement for submission. In the same case it was declared that, if the order of reference had been made in *a pending action* and not upon *agreement* of the parties *in pais,* the rule would have been different, because, though the award was set aside, yet the action still remained in court for further proceedings, and a final judgment might have been had therein without (114) a new action. And so in *Manlow v. Thrift,* 5 Mumford, 493, where the *award* made in *a pending action* was set aside upon the appeal of the plaintiff, the judgment below was held interlocutory and the appeal premature. The appeal must be

Dismissed.

Cited: Harding v. Hart, 118 N. C., 840; *Lipsitz v. Smith,* 178 N. C., 100.

L. F. ELLIOTT v. G. T. TYSON.

Appeal—Costs—Practice—Amendment—Jurisdiction—Appeal from Clerk.

1. An appeal does not lie from an adjudication which relates only to the disposition of costs, except (1) as to the liability of a prosecutor for the costs in a criminal action; (2) where the very question at issue is the liability to a particular item of costs, and (3) where the court in which the action was begun did not have jurisdiction.

2. Where the effect of an order allowing an amendment of a complaint in a particular in which it was ambiguous was to show but not confer jurisdiction, such order is not reviewable on appeal.

3. Although an action be wrongly begun before the Clerk of the Superior Court, yet if it gets into the Superior Court at term, by appeal or otherwise, the latter has jurisdiction of the whole cause and can make amendment of process to give effectual jurisdiction.

PETITION to rehear the case decided at February Term, 1895, and reported in 116 N. C. Reports, 184. The facts appear in the opinion of *Associate Justice Clark.*

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

(115) CLARK, J. As a general rule this Court will not hear an appeal when the only matter to be decided is the disposition of the costs. *Russell v. Campbell,* 112 N. C., 404, and cases there cited; *Futrell v. Deans,* 116 N. C., 38. This is especially so when the subject-matter in dispute has been settled or destroyed, and the only matter left to be passed upon is the adjudication of the costs by the court below. Clark's Code, 2 Ed., p. 560. There are exceptions, among them the liability of a prosecutor for costs in a criminal action (*State v. Byrd,* 93 N. C., 624), and where the very question at issue is the liability to a particular item of costs, as a tax fee or the like. And of course there is a further exception when the court in which the action was begun did not have jurisdiction. In that case the adjudication of the costs is illegal and reviewable equally with any other judgment.

The learned counsel for the petitioner to rehear contends that this case falls within the last exception. The action was brought under the provisions of The Code, sec. 1756, and before the Clerk. The defendant set up two counterclaims, one for fertilizers furnished to the plaintiff, the other for services in grading tobacco. The first the Clerk adjudged to be valid and to amount to $23.50, which was then and there paid by plaintiff and receipted for by the defendant. The

other counterclaim was disallowed by the Clerk, and it was adjudged that the defendant had no lien on the property in controversy. On appeal to the Superior Court the sole issue submitted was as to this second ground of counterclaim. This was found against the defendant and, nothing else appearing, the costs were properly adjudged against him.

The defendant, however, contends that there was lack of jurisdiction, because (1) the amount involved was less than $200; (2) if more than that, still the action should have been brought to term (116) and not before the Clerk.

As to the first point, the complaint avers that "the property in controversy" is worth "about three hundred and fifty dollars." There was an ambiguity in the original complaint, inasmuch as it averred that the defendant had refused to make an equitable division of the crop and asked for plaintiff's part thereof, but left it uncertain whether or not the tobacco in controversy was claimed as plaintiff's part of the crop. The defendant demurred on the ground that the amount in dispute was not clearly stated, and thereupon the plaintiff was allowed to amend by alleging ownership of *all* the property in suit, *i. e.*, the $350 worth of tobacco. There was no exception to this, and even if there had been the amendment was not reviewable, for, the previous allegation being ambiguous, the effect was "not to confer but to show jurisdiction." *Planing Mills v. McNinch,* 99 N. C., 517; *Mfg. Co. v. Barrett,* 95 N. C., 36; *McPhail v. Johnson,* 115 N. C., 298.

As to the second ground of objection it is unnecessary to make a decision, for, even if the action had been "begun wrongly before the Clerk, it having gotten into the Superior Court by appeal or otherwise, the latter has jurisdiction of the whole cause and can make amendment of process to give effectual jurisdiction. Such amendment will be presumed, or the Supreme Court even can amend the process if necessary." *McLean v. Breece,* 113 N. C., 390, 393, citing *Capps v. Capps,* 85 N. C., 408; *Cheatham v. Crews,* 81 N. C., 343; *Robeson v. Hodges,* 105 N. C., 49. Unlike the court of a justice of the peace, the clerk is really a part of the Superior Court, and a case wrongfully instituted before him upon appeal only needs an amendment of process to justify the original service. The Superior Court had jurisdic- (117) tion and rightly adjudicated the costs, as above stated.

Petition dismissed.

Cited: Mills Co. v. Lytle, 118 N. C., 838; *S. v. Horne,* 119 N. C., 854; *Herring v. Pugh,* 125 N. C., 438; *Springs v. Scott,* 132 N. C., 551; *Ewbank v. Turner,* 134 N. C., 80; *Settle v. Settle,* 141 N. C., 569; *Page v. McDonald,* 159 N. C., 41; *Van Dyke v. Ins. Co.,* 174 N. C., 81.

STATE EX REL. W. H. HARRINGTON v. R. W. KING.

Sheriff's Bond—County Commissioners, Duty and Powers of.

The boards of county commissioners being required to take and approve the official bonds of sheriffs, and being liable in damages if they knowingly accept insufficient bonds, the approval or disapproval of such bonds is within their discretion, and the courts cannot compel them to approve and receive bonds which they find to be insolvent or insufficient.

ACTION in the name of the State on the relation of W. H. Harrington and tried before *Coble, J.*, and a jury at March Term, 1895, of PITT.

The relator offered testimony to prove that W. H. Harrington, Sheriff-elect, had tendered to the Board of County Commissioners at its meeting on the first Monday in December, 1894, and again on 21 January, 1895, at a lawfully constituted meeting of said commissioners, good and sufficient bonds required by law of sheriffs-elect, and that the same were wrongfully and erroneously rejected by said board, and that it wrongfully and erroneously failed and refused to induct into said office said relator. The court held that the relator could not prove these facts, for that the decision of the commissioners was final and conclusive and could not be reviewed in this action. Relator excepted. The exception was overruled. The plaintiff submitted to a nonsuit and appealed.

Blount & Fleming for plaintiff.
Shepherd & Busbee for defendant.

(118) FAIRCLOTH, C. J. It is admitted that plaintiff was duly elected Sheriff of Pitt County. It is also agreed that plaintiff tendered his official bonds in due time, and that the Board of County Commissioners refused to accept said bonds and induct plaintiff into office on the ground that said bonds were insufficient in substance to secure the penalties of the said bonds, and that the board so adjudged and declared the office vacant, and filled it by electing the defendant, accepting his bonds and qualifying him to discharge the duties of Sheriff.

On the trial the plaintiff offered evidence to show that the bonds tendered were good and sufficient and that they were wrongfully rejected. His Honor held that such evidence was inadmissible, because the decision of commissioners was conclusive and could not be reviewed in this action. Exception, nonsuit and appeal.

The boards of county commissioners are required to "take and approve the official bonds of sheriffs," and are liable in damages if they accept insufficient bonds knowingly or with good reason or grounds to suppose that the bonds are insufficient. When called upon to take and approve an official bond the commissioners must exercise their discretion in the particular specified, and although this Court can compel them to act in the matter, it cannot compel them to approve and receive bonds which they find to be insolvent or insufficient. We think his Honor's ruling was correct in this action. *Buckman v. Comrs.*, 80 N. C., 121, and authorities cited. In *Gatling v. Boone*, 98 N. C., 573, the question was which party was elected, according to the returns, and no material feature of the present case was in it.

Judgment affirmed.

Cited: Bennett v. Comrs., 125 N. C., 470; *Burke v. Comrs.*, 148 N. C., 47.

(119)

J. H. TUCKER v. L. B. WILLIAMS.

Deed—Rule in Shelley's Case—Nature of Estate.

1. When the word "heirs" appears in a deed in connection with the name of the grantee, or as qualifying the designation of the grantee as the party of the second part, it may be transferred from any part of the instrument and made to serve the purpose of passing an estate in fee simple.

2. Where in the premises of a deed the estate of the grantee was defined as a "freehold and good possession during his natural life and his heirs and their assigns," and the *habendum* was "to him, the said A. S., during the term of his natural life and his heirs, forever": *Held*, that under the rule in *Shelley's case* the word "heirs" must be construed as a word of limitation and not of purchase, and that A. S. took a fee simple.

CASE AGREED, heard by *McIver, J.*, at Fall Term, 1895, of PITT.

The plaintiff had contracted to sell certain lands to the defendant, who declined to accept the deed upon the ground that plaintiff could not convey a fee-simple title.

The plaintiff claimed title by mesne conveyances from one Abner Slaughter, to whom a deed was executed by John and Mary Slaughter, as follows:

"This indenture made and entered into 5 January, 1874, between John Slaughter and Mary Slaughter, his wife, of the county of Pitt

and State of North Carolina, of the first part, and Abner Slaughter (son of John Slaughter and Mary Slaughter), of the same county and State, of the other part: Witnesseth, that the said John Slaughter and Mary Slaughter, for and in consideration of the natural love and affection that we have for and bear toward him, the said Abner Slaughter; and for the further sum of two hundred and fifty dollars valuation, to be his share in the land that we are in possession of this date,
(120) have released, transferred and conveyed unto him a freehold and good possession during his natural life, and his heirs and their assigns we covenant, do here transfer a fee-simple right to them forever, a certain piece or parcel of land lying in the county of Pitt and State aforesaid, situated on the east side Hen Coop Swamp, in Contentnea Township, and bounded as follows: Beginning at a water oak on a ditch in Hen Coop branch, and running with said branch or ditch 7½ poles to a black gum, an old corner; thence north 45½ E. 29¾ poles to a stake, an old corner; thence north 83 E. 90 poles to a stake near a persimmon tree; thence south 20½ E. 65 poles to a short tag pine; thence north 81 west to the beginning, containing 31½ acres, more or less. To have and to hold said lands, with all improvements thereupon, with all privileges appertaining to the same, to him, the said Abner Slaughter, during the term of his natural life, and a fee-simple right to his heirs and their assigns forever."

It was admitted that the said deed was properly probated and recorded.

It was also admitted that Abner Slaughter had heirs *in esse* at the time of the execution of this deed.

The court below held that the deed of John and Mary Slaughter to Abner Slaughter, 5 January, 1874, conveyed a fee-simple title to said Abner of the land described, and gave judgment accordingly, and defendant appealed.

T. J. Jarvis and J. D. Murphy for plaintiff.
L. J. Moore for defendant.

AVERY, J. Under the rule laid down by this Court in *Anderson v. Logan,* 105 N. C., 206, if the word "heirs" appears in a deed in
(121) connection with the name of the grantee, or as qualifying the designation of the grantee as the party of the second part, it may be transposed from any part of the instrument, in construing it, and made to serve the purpose of passing an estate in fee simple. So if

this deed is inartistically drawn, that rule of construction would serve the purpose, if it were necessary, of bringing the word heirs in juxtaposition to the name of the grantee, Abner Slaughter.

In the premises the deed defines the estate of the grantee as "a freehold and good possession during his natural life and his heirs and their assigns." In the *habendum* the operative words are "to him, the said Abner Slaughter, during the term of his natural life and his heirs forever." This language clearly brings the deed within the rule in Shelley's case. An estate is given to Abner Slaughter for his life and by the same conveyance the fee simple to his heirs, and of course the word "heirs" must be construed as a word of limitation and not of purchase. *Starnes v. Hill,* 112 N. C., 1. The law declares the technical effect that shall be given to the language used in this deed, and we are not at liberty to impute to the grantor any intention except that which the law imputes to him in prescribing what interpretation shall be placed upon his language. There was no error in holding that by the deed the fee vested in Abner Slaughter.

Judgment affirmed.

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(122)

W. H. JOHNSTON, EXECUTOR, v. W. T. KNIGHT ET AL.

Will, Construction of—Power of Disposal by Will, Exercise of—Per Capita Distribution of Property.

1. Where the execution by will of a power is not exercised in express terms by reference to the power or the subject, a construction must be given by looking to the whole instrument and giving effect to the intent therein manifested.

2. Unless there is something to show a contrary intention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of property by will.

3. Where the donee of a power to dispose of property by will to certain persons devises the property to such persons by a residuary clause, without referring to the power, the devise will be considered an intentional and not an accidental exercise of the power.

4. The words "to be equally divided," used in a will, require a distribution of the property per capita among the persons named, except when other language of the will or the manifest intent require otherwise.

ACTION for the construction of a will, heard before *Coble, J.*, at May Term, 1895, of VANCE.

Penninah McDowell left a will, in which was the following clause: "That, as my estate is given and devised to my beloved sister Mary L. Howell only during her natural life, I give and devise it at her death as follows, that is to say: To the heirs of my sister Elizabeth O. Knight, to the heirs of my sister Margaret L. Long, to the heirs of my brother Elisha C. McDowell, and to my beloved sister Pattie A. McDowell. The division of my estate after the death of my said beloved sister Mary L. Howell shall be in accordance with her will to the said parties or their heirs, I leaving the amount to be determined for each individual by her, my sister Mary L. Howell." Mary L. Howell left a will, shown in the complaint, in which is the following clause, after making
(123) several specific legacies: "And the balance of my estate, both real and personal, be equally divided between Wm. T. Knight, Pattie McDowell and the children of J. P. and Margaret L. Sugg, and the children of Elisha McDowell."

The parties named in the residuary clause of M. L. Howell's will are the same as mentioned in the will of Penninah McDowell.

His Honor held that Mary L. Howell executed the power entrusted to and reposed in her by Penninah McDowell, and that the distribution of the residuary estate under her will should be *per capita* among W. T. Knight, Pattie McDowell and the children of J. P. and Margaret Sugg, and Elisha C. McDowell.

From the decree the plaintiff, executor, and the defendants, W. T. Knight and Pattie McDowell, appealed.

No counsel for plaintiff.
John L. Bridgers and W. O. Howard for defendants.

FAIRCLOTH, C. J. 1. Was the power given by will by Penninah, or Nina, McDowell to Mary L. Howell executed by the will of the latter? When it is not done in express terms, by reference to the power or the subject, then a construction must be given by looking to the whole instrument and the intent therein, for the intent must govern.

If the donee of the power intends to execute, that intention, however manifested—whether directly or indirectly, positively or by just implication—will make the execution valid and operative.

"The general rule is settled that a general residuary devise will operate as an execution of a power to dispose of property by will, unless
(124) there is something to show that such was not the testator's intention." *Cumston v. Bartlett*, 149 Mass., 243. Not only is there

nothing to show a contrary intention, but the fact that Mary, the donee, devises to the identical persons, and no others, who were designated in Nina's will, produces the conviction that she was then intending to exercise the authority given by her sister. This might have been a mere coincident, but we think it was intentional and not accidental, among near relations. She could not have devised this property to any one else, and we think that a residuary clause includes all property which the devisor could dispose of.

2. Do the devisees take *per stirpes* or *per capita?* Nina authorized the division to be made according to the will of her sister, Mary, who said that "the balance of my estate be equally divided between William T. Knight, Pattie McDowell and the children of Joseph P. and Margaret L. Sugg, and the children of Elisha McDowell." These words require a distribution *per capita.* This has been the rule since *Ward v. Stowe,* 17 N. C., 509, down to the present time, with numerous intervening decisions. The words "equally divided" do not absolutely control in all instances, but yield only when other language of the will or the manifest intent requires it. The argument based on justice and natural affection does not change the rule. That would disturb other parts of the will. Testators usually divert the line of distribution from that marked out by the law for descent and distribution, and no doubt do so "in the light of surrounding circumstances."

Judgment affirmed.

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(125)

C. H. McDONALD v. J. M. McBRYDE ET AL.

Claim and Delivery—Consent Judgment by Defendant on Replevin Bond—Motion by Sureties to Set Aside—Rights of Sureties.

1. Where the defendant in claim and delivery proceedings consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, they not having offered to interplead and claim the property in the manner prescribed by section 331 of The Code.

2. In such case the fact that the defendant consented to judgment before the maturity of the debt is no ground for complaint by the sureties, such consent not being necessarily fraudulent.

3. Where a judgment has been entered, by the consent of the defendant, on the replevin bond given by him in claim and delivery proceedings, it cannot be set aside for fraud at the instance of the sureties by motion in the cause, but only by a new and direct action for the purpose.

CLAIM AND DELIVERY, commenced on 11 September, 1894, by the plaintiff against the defendant, McBryde, to recover possession of a certain crop, raised by McBryde on the lands of the defendant, Pope, and theretofore sold by McBryde to plaintiff. In said action an order of seizure was issued, and the Sheriff took possession of said crop, and defendant James McBryde replevied the crop and gave as his sureties on his replevin bond Henry Pope and H. A. Hodges; this was the first connection of said Pope and Hodges with said action, and neither was party plaintiff or defendant until after judgment was rendered. The summons was returnable to the November Term, 1894, of the Superior Court of Harnett County; plaintiff filed a verified complaint within the first three days of the said term of court; the defendant filed no
(126) answer; at the November Term of said court a judgment was agreed upon by plaintiff and defendant, signed by both, and rendered by his Honor, *Judge Bynum,* in open court, plaintiff and defendant being present. Said judgment was rendered against defendant and his sureties for the recovery of the property, and if recovery could not be had, then for the sum of $225, the value of the property, and costs of the proceeding. After the rendition of said judgment, and about 10 January, 1895, while no cause was pending, the said H. A. Hodges and Henry Pope, theretofore bondsmen of defendant, filed an affidavit before the Clerk of the Court, alleging that the said crop belonged to one or both of them, and prayed to be made parties and to be allowed to interplead. The Clerk, without notice to the other side, gave his consent, and the defendants, Hodges and Pope, gave notice of a motion to vacate said judgment and to set aside, and for an injunction. A restraining order was granted by *Robinson, J.,* returnable before *Starbuck, J.,* at Lillington, and by said order plaintiff was restrained from collecting his judgment. Upon the return day of said order the plaintiff and defendants appeared, with their attorneys, before *Starbuck, J.,* and affidavits were filed by both sides.

The defendants, Pope and Hodges, moved to set aside and vacate said judgment:

1. On the ground that the judgment, was irregular and void.
2. For excusable neglect on the part of defendants' attorney.
3. For fraud.

The plaintiff resisted the motion, and moved to vacate the restraining order granted by *Robinson, J.*, on the following grounds:

1. That the judgment was a regular consent judgment, and was (127) not void or voidable, and that, if it were irregular, only the defendant, McBryde, could attack it.

2. That the defendants, Pope and Hodges, not having filed an application to interplead before judgment, could not be allowed to do so after judgment, and that by becoming sureties on defendant's bond they acknowledged his title and were estopped from asserting the contrary afterwards.

3. That a judgment could not be attacked for fraud by a motion in the cause, but that it must be done in an action instituted for that purpose.

It further appeared to the court that defendants had issued a summons in a new action, returnable to February Term, 1895, of Harnett County Superior Court, in which they were plaintiffs and plaintiff herein was defendant. After hearing affidavits and arguments, his Honor held that the judgment was regular in form, and the process upon which it was obtained valid, and that there was no reason why the judgment should be disturbed, unless it were fraudulent; and that if it were fraudulent, it must be attacked by an action brought for that purpose; and he suggested that defendants might file their complaint in the action then commenced and obtain a restraining order.

The motions made by defendants were refused, and the restraining order dissolved, and judgment rendered in favor of plaintiff and against defendants and their bond for costs.

From the refusal of the court to vacate said judgment and to grant an injunction defendants Pope and Hodges appealed.

Pou & Pou and F. P. Jones for plaintiff.

L. J. Best for defendants Pope and Hodges.

AVERY, J. We concur with the Judge below in the opinion (128) that the bondsmen of the defendant who has consented to a judgment against himself and them, in claim and delivery, for the recovery of certain property, and if recovery thereof could not be had, then for its value, are not entitled to come before the Clerk after judgment and procure an order making them parties defendant, and ask to have the judgment vacated and for an injunction. The bondsmen did not offer to interplead and claim the property in the manner prescribed by law (The Code, sec. 331) and the judgment is none the less conclusive upon the sureties because taken by consent. *Council v. Averett,* 90 N. C., 168. It can now be set aside only by civil action, and not by a motion in the cause. *Stump v. Long,* 84 N. C., 616. It is no ground of complaint on the part of the sureties that the defendant consented to

judgment, if such was the fact, before the maturity of the debt, such an agreement not being necessarily fraudulent. Were it admitted that there was collusion or fraud affecting the rights of the sureties, such as would afford proper ground for impeaching the judgment (which we are not to be understood as conceding), their remedy would be by a new action and not by motion in the cause. *Smith v. Fort,* 105 N. C., 446. No error and the judgment is

Affirmed.

Cited: Nimocks v. Pope, post, 319; *Smith v. Whitaker, post,* 392.

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(129)

J. C. MARCOM, ADMINISTRATOR OF W. H. BLEDSOE, v. P. T. WYATT ET AL.

Practice—Special Proceedings—Sale of Land for Assets—Confirmation—Defendant's Day in Court—Attorney and Client—Appearance on Both Sides.

1. Where adult defendants who have been duly served with summons in a proceeding for the sale of land for assets make no appearance until the hearing of a motion to confirm the sale, they cannot then oppose the confirmation upon the ground that the title to the land is in other persons, strangers to the proceedings.

2. Persons who have not been made parties to a proceeding for the sale of an intestate's land for assets, and have not moved to be allowed to become parties or to file answers, will not be allowed, on the hearing of a motion to confirm the sale, to interpose their objections.

3. The same attorney may not appear on both sides of an adversary proceeding even colorably, and a judgment or decree rendered under such circumstances will be vacated if accepted to in proper time. Hence a decree in a proceeding for the sale of land for assets will be set aside where, on the hearing of a motion to confirm the sale, it appears that the attorney for the plaintiff wrote or dictated the answer for the guardian *ad litem* of an infant defendant.

4. A purchaser at an administrator's sale of land for assets is not entitled to an order for possession when the defendants to the proceeding were not in possession of the land when the order of sale was made, nor claiming through any person who was in possession at the commencement of the proceedings.

SPECIAL PROCEEDING by the administrator of W. H. Bledsoe to sell land for assets for payment of debts, heard before *Starbuck, J.,* at chambers, on appeal from the judgment of the Superior Court Clerk of WAKE.

The decree of the Clerk was affirmed, and defendants appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

T. R. Purnell for plaintiff. (130)
J. C. L. Harris for defendant Bledsoe.

MONTGOMERY, J. This was a special proceeding before the Clerk of the Superior Court of Wake County, instituted by the administrator of W. H. Bledsoe, deceased, against the next of kin of the intestate, one of whom, Moses A. Bledsoe, Jr., was an infant, for the purpose of selling certain lands belonging to the estate of the intestate, the proceeds of the sale to constitute assets for the payment of his debts. The summons was served on all the defendants and also upon the guardian *ad litem* of the infant defendant. There was no answer put in except that of the guardian *ad litem,* in which he admitted the facts set out in the petition and consented to the sale. The Clerk at the proper time made a decree for the sale of the land described in the petition; the administrator made the sale according to the terms of the decree and filed his report on 4 November, 1894. On the 15th of the same month the attorney of the administrator prayed for a confirmation of the sale and for an order for possession. Whereupon Moses A. Bledsoe, attorney, made an appearance for the defendants, and also a special appearance for numerous persons who were not parties to the proceeding, and opposed the confirmation of the sale on the grounds (1) that the persons who made the special appearance through him to oppose the confirmation of the sale were the real owners of the land or had an interest therein, and (2) that T. R. Purnell was attorney of record for the administrator, plaintiff, and the attorney and adviser of the defendant guardian *ad litem.* The Clerk overruled the objections and confirmed the sale, ordered the administrator upon payment of purchase money to make title and granted the motion for an order for possession. There was an appeal to the Judge of the district, and upon his confirming and approving the rulings of the Clerk the matter was brought to this (131) Court.

There was no error in the Clerk's refusal to permit the adult defendants to try to prove title in strangers to the land which had been sold; besides, they had had their day in court and failed to make any answer. Neither was there error in the Clerk's action in confirming the sale against the objection of those persons who were not parties to the proceeding. They made no motion to become parties defendant, nor to be allowed to file an answer in which they might be allowed to set up their rights or title to the land. Their motion was simply to object to a confirmation of the sale without taking upon themselves the responsibility

of making good their claim to the land by answer and trial. If they have any rights in the land they are not precluded from asserting them hereafter, for, not being parties to this proceeding, they are not bound by any decree made therein.

The other objection was valid, and there was error in the Clerk overruling it. The objection was supported by the affidavits of the guardian *ad litem* and of the infant defendant. The guardian *ad litem* affirms that Mr. Purnell approached him and requested him to act as guardian *ad litem* of the infant defendant; that he assured him that it was merely a matter of form and wrote or dictated the answer for him; that from the representations made to him by Mr. Purnell he did not think it necessary nor did he notify or consult the infant defendant, who was about twenty years of age, nor any other person in regard to the matters involved in the proceeding; that he knew nothing of the merits of the case, nor the extent to which the interest of the infant would or could be affected by his answer. The affidavit of the infant defendant affirms that he was not aware that a guardian *ad litem* had been
(132) appointed for him, and that he never conferred with him in reference to the matter, and that the answer was filed without consultation with him or with any of his immediate friends, and that he had been injured in his estate by such action.

It is well settled by the repeated decisions of this Court that the same counsel may not appear on both sides of an adversary proceeding, even colorably, and the law will not permit a judgment or decree so affected to stand if made the subject of exception in due time by the parties injured; and this Court has decided that the drawing by plaintiff's attorneys of an answer for the guardian *ad litem* of infant defendants, without fee and where no improper influence was intended or exerted, was an appearance on both sides. The Judge below found no facts, making his ruling upon the law alone, and therefore, to be just to Mr. Purnell, we think it proper to say there is nothing in the record going to show bad faith in the part he took in preparing the answer of the guardian *ad litem*. The reflections made upon him by the counsel for the defendants in the pleadings and in the language of the affidavit prepared for the infant defendant are undeserved, so far as appears in the record. We are of the opinion, therefore, that the order of sale and the confirmation are irregular and void as to Moses A. Bledsoe, Jr., the infant defendant. The guardian *ad litem* should file another answer after a proper investigation into the facts and the law in the matter, and if he should decline to do so another should be appointed in his place.

The purchaser was not entitled to the order for possession, for the reason that the defendants were not in possession of the land when the

order of sale was made, nor were they claiming possession through any person who was in possession at the commencement of the proceedings. The Clerk may make an order, upon motion of purchaser, that plaintiff, administrator, shall upon the payment to him of the (133) whole amount bid by the purchaser for the land, make a conveyance to her of all the right, title and interest of the adult defendants in and to the land sold. If, however, the purchaser should decline to do this, the administrator may be ordered, if a final decree of a sale is had in this proceeding against the infant defendant, to sell the interest of all the defendants in the land again. If a final decree should not be had against the infant defendant, then the administrator may sell the interest of the adult defendants in the land under the decree already had in the proceeding.

Error.

(134)

IN THE MATTER OF THE WILL OF FRANK PALMER.

Clerk of the Superior Court—Removal of Executor—Appointment of Collector.

1. After a will has been admitted to probate in common form and letters testamentary have been issued, the Clerk of the Superior Court cannot, upon a *caveat* being filed, remove the executor and appoint a collector for the estate without a hearing based on notice to show cause why he should not be removed, the authority given to the Clerk by section 2160 of The Code in the case of *caveat* being entered being limited to the transfer of an issue *devisavit vel non* to the Superior Court for trial and to issue an order to the executor to suspend all further proceedings, except the preservation of the property and the collection of debts, until a decision of such issue is had.

2. A collector of an estate is only appointed when there is no one in rightful charge thereof, section 1383 of The Code being applicable only to cases where there is a difficulty or delay in the admission of a will to probate, or the granting of letters testamentary or of administration, or where a *caveat* is entered *at the time* the will is offered for probate.

MOTION heard on appeal from the judgment of the Clerk of the Superior Court of WAKE, before *Coble, J.*, at August Term, 1895, of said court.

A paper-writing purporting to be the last will and testament of Frank Palmer, deceased, was propounded for probate in open court, and was admitted to probate in common form on 27 May, 1895, by E. A. Johnson, the executor therein named. Whereupon Mary Lyon,

one of the heirs at law, in her own behalf and in behalf of the other heirs at law, came into court on 28 May, 1895, and entered a *caveat* to the probate thereof, alleging that the same was not the last will and testament of Frank Palmer, deceased, or any part thereof, and asking that the said probate be recalled, and the same be repropounded, and that an issue of *devisavit vel non* be submitted.

Thereupon the court ordered that the said probate be recalled, that the letters testamentary issued to E. A. Johnson be revoked, and that an issue of *devisavit vel non* be made up and submitted to the jury.

It was ordered that a citation issue to the heirs at law and next of kin of deceased to appear at the next term of the court to attend proceedings in the cause and to make themselves parties to the said issue, etc. The Clerk thereupon appointed J. C. Marcom collector of the estate.

E. A. Johnson, executor, moved to set aside so much of the foregoing order as removed him as executor, on the ground that there was no legal notice served on him before said order was made, and on the further ground that the removal was illegal without some cause being shown for the same.

The motion was overruled, and Johnson appealed to the Judge from the decision of the Clerk in refusing to set aside the order removing him as executor.

(135) Thereafter Johnson, upon affidavit, petitioned that the said Marcom, collector, be required to come into court and show cause why he should not be removed as said collector and the order appointing him set aside.

Mr. Marcom appeared in person and, by his counsel, filed no affidavit, but relied upon the record heretofore made in the case, citing the same to the court as the basis of his contention. The Clerk thereupon adjudged: "The matter of the revocation of the letters testamentary issued to E. A. Johnson having been heard before and determined, and the issue having been made in the court, I have no further jurisdiction in the matter, and therefore decline to revoke the letters of collection."

From the foregoing judgment E. A. Johnson, executor, appealed.

His Honor, on the hearing of the appeal, rendered the following judgment:

"On 27 May, 1895, the will of the said Frank Palmer, deceased, was probated in common form, and letters testamentary were issued to E. A. Johnson, executor named therein. On 28 May, 1895, a *caveat* was entered, and on 6 June, 1895, the Clerk ordered that the probate be recalled, and that the letters testamentary issued to E. A. Johnson be revoked. The record does not show that any order was issued by the Clerk, as provided in sec. 2171 of The Code, requiring the said E. A. Johnson to show cause why the letters should not be revoked. Neither

does it appear from the record that any cause was shown for his removal. In the fact that no such order was issued there is error; as also in the further fact of the removal of said Johnson as executor without cause shown.

"And therefore there is error also in the Clerk overruling the motion of E. A. Johnson, made 10 June, 1895, to set aside the order of 6 June, in so far as it revoked letters testamentary. (136)

"It follows from the above that the appointment of J. C. Marcom collector on 27 June, 1895, was irregular, and therefore erroneous; and that there was error in the Clerk overruling the motion of said Johnson on 9 August that the letters of Marcom be revoked.

"And the case is hereby remanded to the Clerk to be proceeded with according to law."

From the foregoing judgment the caveators and J. C. Marcom, collector, appealed.

Argo & Snow for Marcom, collector.
Battle & Mordecai for Johnson, executor.

MONTGOMERY, J. The question for consideration is, Can the Clerk of the Superior Court, after a will has been admitted to probate in common form and letters testamentary issued to the executor, remove such executor and appoint a collector for the estate without a hearing based upon notice to show cause why he should not be removed? We are of the opinion that he cannot. In this case the *caveat* was filed after the will had been proved and the executor qualified. Under this condition of facts it was the duty of the Clerk, upon the giving by the caveators of the bond required by law, to have transferred the case to the Superior Court for trial, and also to have issued an order to the executor Johnson, the appellant, requiring him to preserve the property and collect the debts of the decedent until the issue *devisavit vel non* should be determined. The Code, sec. 2160. Instead of doing this he, on the *caveat* being entered, ordered that the probate be recalled and that the letters testamentary which he had issued to the executor be revoked, no notice to show cause why this should not be done (137) having been given, nor any cause shown. The Clerk afterwards refused to set aside his order revoking the letters testamentary, and appointed J. C. Marcom collector.

Section 2160 of The Code is in these words: "Where a *caveat* is entered and bond given as directed in the two preceding sections, the Clerk of the Superior Court shall forthwith issue an order to any per-

sonal representative having the estate in charge to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of the debts, until a decision of the issue is had."

It is clear that the appellant should have received this order from the Clerk, for he was the personal representative—the executor duly qualified—and he it was who had the property of his decedent in charge at the time the *caveat* was filed. Section 2160 of The Code is section 25 of chapter 119 Battle's Revisal, and this Court in the case of *Syme v. Broughton,* 86 N. C., 153, in reference to this statute, said: "The object of the Legislature in enacting it was evidently intended to restrict the powers of an executor or administrator with the will annexed, but that restriction extended no further than to restrain such officer from executing the will according to its provisions, not affecting the other powers of his office." And in the same case the Court went on to say: "We think the proper construction of section 25, ch. 119, Battle's Revisal (sec. 2160 of The Code), is that after probate granted in common form and there is an executor who acts or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the power and is subject to all the liabilities of an administrator or an executor, except that his right
(138) to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit."

The Court meant by the words "during a controversy about the will" a pending issue—*devisavit vel non*—for they were applying the law to a state of facts where the will was proved in common form and letters of administration with the will annexed had been granted to Broughton, the defendant in that action, and where afterwards there was a *caveat* and an issue made up to try the validity of the will. The Court in that case held that the letters granted to Broughton were never revoked, and that this administration was sanctioned and continued by said section 25 during the pendency of the suit. It was decided in *Randolph v. Hughes,* 89 N. C., 428, where the effect of a *caveat* upon the powers of an executor where the will had been proved and letters testamentary issued was discussed, that "It is noticeable that the executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the issue touching the will is made up to be tried; nor is there a necessity meanwhile for the appointment of an administrator *pendente lite.* The functions of the executor are suspended only until the controversy is ended, and he is still required to take care of the estate in his hands and may proceed in the collection of debts due the deceased." In *Hughes v. Hodges,* 94 N. C., 56, this Court said con-

cerning 2160 of The Code: "This provision is manifestly intended, in cases to which it is applicable, to dispense with the necessity of appointing an administrator *pendente lite* and confers very similar powers upon the executor, and more especially when he has entered upon the duties of his office before the *caveat* is entered." There is no way in this State by which an executor or an administrator who has had letters issued to him and who is in charge of his decedent's estate can be removed except after a hearing and upon notice given to show cause why he should not be removed. The causes for such re- (139) moval and the manner of having it done are prescribed in sections 2170 and 2171 of The Code. *Murrill v. Sandlin,* 86 N. C., 54; *Edwards v. Cobb,* 95 N. C., 9.

Section 1383 of The Code, providing for collectors, does not apply to cases where the will has been proved and the executor qualified; but it applies where there are difficulties *in limine* disconnected with controversy or contest over the will, preventing for the time the admission of the will to probate or the issuing of letters testamentary, *e. g.,* protracted absence of witnesses, illness of executor, etc.; and also it applies where a *caveat* is entered *at the time* the will is offered for probate. A collector is appointed only in cases where there is no one in rightful charge of the estate, and in this respect there is a resemblance between him and an administrator *pendente lite* under the old system. Wherever a will has been admitted to probate and the executor or administrator *c. t. a.* qualified, there can be no necessity for the appointment of a collector under The Code, nor would there have been for the appointment of an administrator *pendente lite* under the old system, for the executor or administrator *c. t. a.* had the right to act to the extent of preserving the property and collecting the debts until the contest was decided. *Syme v. Broughton, supra; Floyd v. Herring,* 64 N. C., 409.

In the matter before us his Honor held that there was error in the order of the Clerk removing the executor without notice to him and without cause shown, in the Clerk's refusal to set aside the order revoking the letters testamentary, and in his refusal to revoke the letters he had issued to Marcom. There is no error in the rulings of his Honor.

No error.

(140)

M. E. BRASFIELD, ADMINISTRATRIX OF J. S. BAILEY, v. W. C. POWELL & CO.

Agricultural Lien—Prior Mortgage—Trust.

Where an owner of crops, having previously given to B. a mortgage thereon, executes to another an agricultural lien upon the same crops, and the latter instrument recites that "there is no encumbrance on said crop except that I am to pay B. out of crop $116 and interest," etc., the lienee, by the acceptance of the instrument with such provision, will be deemed a trustee of the crop, or of the proceeds of its sale, to the amount of B.'s debt.

CONTROVERSY submitted without action in WAKE and heard at chambers, 11 April, 1895, before *Starbuck, J.*, who gave judgment for the plaintiff, and defendants appealed. The facts appear in the opinion of *Associate Justice Furches.*

Battle & Mordecai for plaintiff.
R. O. Burton for defendants.

FURCHES, J. This case comes before us from a judgment upon a case agreed.

One Bailey, being indebted to plaintiff's intestate, executed to him a mortgage on his crop to be grown in 1894, which was duly probated and registered on 15 January, 1894. Bailey, being indebted to defendants to the amount of $126.19 and desiring to obtain advances to the amount of $185 from defendants to enable him to make and gather his crop for 1894, executed to defendants an agricultural lien under the statute upon his crop to be grown in 1894, to the amount of $185; and in the same instrument a chattel mortgage on his crop and other property, to secure the $126.19 of other indebtedness, which was duly
(141) probated and registered on 17 January, 1894.

It has been held that an agricultural lien for advances, properly registered under the statute, has priority over a prior registered mortgage. *Wooten v. Hill,* 98 N. C., 48. This would give defendants a priority in the crop to the extent of $185 but for the following clause contained in the instrument to defendants, to-wit: "There is no encumbrance on said personal property, and none on said crop, except that I am to pay J. S. Brasfield out of crop $116 and interest on same from 25 December, 1893."

Then there *is a lien on the crop to be paid out of the crop,* and the defendants accepted this conveyance with this provision in it. And when they did so they accepted it as trustees and are bound to carry out the trust.

Bailey says to defendants: "I will give you a mortgage on my stock and other articles of property, and I will also give you a lien on my crop. But I owe Brasfield $116, which is now a lien on the crop and is to be paid out of the crop."

This, in our opinion, is the same in effect as if Bailey had said: "Brasfield's debt of $116 is first to be paid out of the crop, and then your claim for advances." *Hinton v. Leigh,* 102 N. C., 28. Defendants admit they have a sufficient fund in hand arising from a sale of the crop to pay plaintiff, but not enough to pay both plaintiff and defendants.

No error.

Cited: Millheiser v. Pleasants, 118 N. C., 243; *Range Co. v. Carver, ib.,* 341; *Bank v. Vass,* 130 N. C., 593; *Piano Co. v. Spruill,* 150 N. C., 170.

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(142)

S. T. MOFFITT v. G. H. GLASS ET AL.

Action on Contract—Performance of Contract—Quantum Meruit—Issues.

Where, in an action for a breach of contract for building a house, the plaintiff alleged that under a verbal contract he built for the defendant a house of so many rooms at so much per room, and that defendant accepted the house when completed, it was error on the trial to instruct the jury that, if they should find that the defendant did not make the contract "as alleged," they need not consider the other issues as to whether the house was accepted by defendant, whether it was completed according to contract and as to what amount was due plaintiff, inasmuch as the plaintiff was entitled to recover on a *quantum meruit* if the house was accepted, though he might have failed to prove the contract as alleged.

ACTION for damages for the breach of contract, tried before *Starbuck, J.,* and a jury at April Term, 1895, of WAKE.

There was judgment for the defendants, and the plaintiff appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

B. C. Beckwith for plaintiff.
R. C. Strong for defendants.

FAIRCLOTH, C. J. This is an action for damages for breach of contract in building a house. The complaint alleges:

"2. That in June, 1891, plaintiff and defendants agreed verbally that plaintiff should furnish materials and construct or build a 'lodging house' to contain 56 rooms at $7.50 per room on land at or near the fair grounds at Raleigh, N. C.

"3. That said materials were furnished and the lodging house (143) built according to said contract by the plaintiff, and that the said building or lodging house was received, when completed, by the defendants or their agents.

"5. That on 1 October, 1891, the defendants paid on said amount $35."

The answer denies the second and third allegations, but admits that defendants paid one Patrick $35, with whom they insist their contract was made, and the question of Patrick's agency was inquired into, but that is not now important for us in the view we take of the case.

The following issues were submitted:

"1. Did defendant Glass make the contract with plaintiff Moffitt as alleged?

"2. Was the building accepted by defendant or his agent?

"3. Was the building completed according to contract?

"4. What amount, if any, is now due plaintiff on said contract?"

The jury answered the first issue "No" and did not consider the others. His Honor instructed the jury "that if they found the first issue 'No' they need not consider the other issues." In this there was error.

It may well be that the jury said that the defendant did not make the contract *as alleged,* that is, that the contract did not require 56 rooms, but some less number, or at some other price than $7.50 per room, or in some other respect. It is alleged that when completed the house was received by the defendants or their agents, and that was denied. That matter was important in the event that the specific contract had not been performed, and his Honor was so impressed, as appears by the second issue submitted by him. The plaintiff's right to a *quantum meruit* inquiry does not depend solely upon the contract, but upon the ground that he rendered service in work and labor performed, the fruits of which were received by the defendants, and

that question was fit to be heard under the second issue and third (144) allegation. Then the quality of the material and work and the value thereof could be ascertained. We think the other issues should have been tried. There were other questions of pleading, exceptions and the like discussed before us, but as we must give a new trial we need not consider them.

New trial.

Cited: Morrison v. Mining Co., 143 N. C., 256.

ALICE A. SHAFFER ET AL. V. M. A. BLEDSOE ET AL.

Husband and Wife—Conveyance of Land by Husband Without Joinder of Wife.

Where a marriage took place and land was acquired by the husband before the adoption of the Constitution of 1868, the restriction on the husband's right of alienation contained in section 8, Article X of the Constitution does not apply.

ACTION for the recovery of land, tried before *Starbuck, J.*, and a jury at April Term, 1895, of WAKE.

There was a verdict for plaintiffs, and from the judgment thereon the defendants appealed. The facts sufficiently appear in the opinion of *Associate Justice Furches.*

T. R. Purnell for plaintiffs.
J. C. L. Harris for defendants.

FURCHES, J. This is an action for possession of land, and comes before us on the appeal of defendants. There are several exceptions on the part of defendants to the rulings of the court in refusing to make new parties, and to ruling out evidence offered for the alleged purpose of showing that defendant was only a life tenant and that other parties were the owners in fee of the remainder. We have examined all these exceptions and find no error in the ruling of (145) the court below. We think they were properly overruled and disallowed. This being so, the case comes down to the question of plaintiff's title, which she claims to have been derived from defendant by three lines of conveyances:

1. Through a mortgage from the defendant to G. D. Rand, dated 30 March, 1885; from said Rand to Crowder, dated 9 January, 1888; from

Crowder to N. M. Rand, dated 2 November, 1888; from N. M. Rand to C. H. Belvin, dated 23 January, 1892, and a deed from Belvin and wife to the plaintiff, dated 27 February, 1894.

2. By deed to J. G. Williams from defendant Bledsoe, dated 21 September, 1875, and mesne conveyances from said Williams to the plaintiff.

3. Tax title deed, dated 27 February, 1894.

But as the mortgage to Rand and the mesne conveyances thereunder cover all the land in controversy, and as we think the discussion of this chain of title will dispose of the case, we will not discuss the others. That defendant executed the mortgage to G. D. Rand is not disputed. Nor is it denied that the chain from said Rand to plaintiff is complete. But defendant was in 1885 and now is a married man, and his wife did not join him in the execution of said mortgage. And defendant contends that said mortgage deed is void for the reason that under Article X, section 8, of the Constitution of the State it conveyed no title to Rand. So a long trial, in which there are many exceptions, is narrowed down to this one point. The case states that defendant was married to his present wife in 1860 and that he acquired the land before that time. And these facts being admitted, we are of opinion that the constitutional restriction on the husband's right of alienation contained in section 8 of Article X does not apply in this case; and the mortgage deed from defendant to Rand was effective and conveyed what-
(146) ever estate the defendant had in the land. *Sutton v. Askew,* 66 N. C., 172. It is admitted that expressions—*obiter*—may be found in our reports that appear to conflict with this opinion. But upon examination it will be found they do not, as they were made on a different state of facts and apply to cases where the parties were married or the land acquired since the adoption of the Constitution of 1868.

If it be that there are parties interested in the remainder after the life estate of defendant Bledsoe, they are not parties to this action and will not be estopped by the judgment in this case from asserting any rights they may have after his death.

Judgment affirmed.

Cited: Cawfield v. Owens, 129 N. C., 287.

COMMERCIAL AND FARMERS BANK v. W. H. WORTH, STATE TREASURER.

"Arrington" Committee—Legislative Committee—Expenses and Compensation—Auditor's Warrant—Duty of Treasurer.

1. In the absence of express enactment otherwise the existence of a legislative committee necessarily determines upon the adjournment of the body to which it belongs.

2. By joint resolution (Acts 1895, p. 502) the General Assembly appointed a committee from its own body to investigate certain facts and report to the General Assembly before its adjournment if possible to do so, otherwise to report to the Supreme Court: *Held*, that such committee was not authorized to do any act after the adjournment of the General Assembly except to make a report.

3. Inasmuch as per diem of members of the General Assembly is allowed only during its session, which is limited to sixty days, the members of a legislative committee appointed to investigate certain facts and report to the General Assembly before its adjournment if possible, otherwise to the Supreme Court, are entitled to per diem for services rendered after adjournment when the resolution appointing them only provided "for the necessary expenses of the committee while engaged in the investigation." *Semble*, that reasonable board bills of the committee while detained beyond the adjournment of the Legislature in making their report would be allowed.

4. The Public Treasurer is not required to pay any and every warrant which the Auditor may sign, but only those which are *legally* drawn (section 3356 (3) of The Code), and the fact that the Auditor finds that a claim for which he issues a warrant on the Public Treasurer is authorized by law is not binding upon or a protection to the latter.

MANDAMUS, heard before *Coble, J.*, at September Term, 1895, of WAKE, upon a case agreed as follows, covering the above-entitled action and that of *T. R. Purnell v. W. H. Worth, Treasurer, post:*

The General Assembly of North Carolina at the session of 1895 passed the following concurrent resolution, which is printed on pages 502 and 503, Public Laws of North Carolina, session 1895, to wit:

"A Resolution in Favor of Mrs. Patty D. B. Arrington. Resolved by the House of Representatives, the Senate concurring:

"That A. A. Campbell, J. E. Bryan and J. T. Phillips, members of the House of Representatives from Cherokee, Chatham and Pitt counties, respectively, be and they are hereby appointed a committee of investigation to investigate all matters growing out of litigation, and all

other troubles between herself and husband and all other persons and things concerning or in any other way appertaining to her matters in connection with said litigation.

"The said committee shall have full and complete power and
(148) authority to send for persons and papers and examine the same, and to administer oaths and examine witnesses, and with full power to punish for contempt for disobedience to any lawful order in as full a manner as is now vested in Judges of the Superior Court of the State. They shall find the facts from the evidence and report said facts, and also set out the evidence in full in said report, and make their report to the General Assembly, if it be possible to do so, before its adjournment, and if not, then said report shall be made to the Supreme Court.

"That the Treasurer of the State is hereby authorized to pay the necessary expenses of said committee while they are actually engaged in said investigation, and the said Auditor is hereby authorized to draw his warrant on the Treasurer for said amount.

"This act shall be in force from and after its ratification.

"Ratified 11 March, 1895."

The said session of 1895 of the General Assembly ended 13 March, 1895, by an adjournment *sine die* on that day, and the General Assembly has not been in session, in regular or extra session, since that day. The aforesaid committee made no report to the General Assembly of 1895 before adjournment, and did not organize to hear evidence until after the General Assembly had adjourned as aforesaid.

Subsequent to the adjournment of the General Assembly said committee met in the city of Raleigh and organized, and elected the plaintiff, A. A. Campbell, chairman thereof, and appointed the plaintiff, Thomas R. Purnell, attorney at law, counsel for the committee, deeming the same a necessary expense. The State Auditor, on presentation to him
(149) of vouchers approved by the committee, issued his warrant on the Treasurer in words and figures set out in copies of said warrants hereto attached, marked Exhibits A and B. Said warrants were endorsed and presented to the defendant for payment at the Treasury Department of North Carolina, and the defendant as Treasurer refused and still refuses to pay the same, his contention being that by the terms of the aforesaid resolution the aforesaid committee was not authorized to sit and hear evidence and pursue the investigation provided in the resolution after the adjournment of the General Assembly, and had no authority at any time to employ counsel and incur expenses for fees therefor; and as to the compensation of the committeemen themselves, they, being members of the General Assembly, are entitled to only such compensation as is provided in section 28 of Article II, Constitution of

North Carolina, fixing the pay of members of the General Assembly when in regular or extra session. The plaintiffs are the owners of said warrants, T. R. Purnell being owner of Exhibit A, and the Commercial and Farmers Bank is owner of Exhibit B. There are other claims against the State for per diem and mileage of members of the committee and witnesses, service in keeping the minutes of the proceedings and taking depositions, and services as attorney, which have not been presented for payment; but it is agreed to submit the case as to the two foregoing warrants as a test case, the other claims to abide the decision of the court.

Upon the foregoing agreed facts, the court is asked to decide as matters of law the following:

"1. Has the State Treasurer any lawful right to refuse to pay any warrant drawn upon the State Treasury by the Auditor; or, in other words, must he in every case, without exercising any discretion on his part as to the legality of a warrant, pay it when properly endorsed and presented?

"2. Did the aforesaid committee have power and authority (150) under the aforesaid resolution to organize, sit together and hear evidence, and incur expenses to be paid by the State after the General Assembly had adjourned?

"3. Did the aforesaid committee have power and authority to employ counsel and incur expenses therefor to be paid for by the State?

"4. Is a member of said committee (being a member of the General Assembly) entitled to additional compensation for services on said committee after the General Assembly had adjourned, and if so, is he entitled to the same amount of per diem and mileage fixed by the Constitution for members of the General Assembly while the General Assembly is in session?

"5. Are the warrants set out in the statement lawful warrants?

"6. Are plaintiffs entitled to a writ of *mandamus* to enforce payment of said warrants?"

Exhibit A was as follows:

"RALEIGH, 26 June, 1895.

"THE STATE TREASURER: Will pay to Thos. R. Purnell, or order, forty dollars for services rendered Arrington Investigating Committee as Attorney to said Committee.

"Charge account Arrington Investigating Committee.

"ROBT. M. FURMAN,

"Resolution 11 March, Laws 1895. *State Auditor.*"

Stamped on face: "Auditor's Department, Raleigh, 26 June, 1895, State of North Carolina."

Endorsed on back: "THOS. R. PURNELL."

Exhibit B was as follows:

"RALEIGH, 26 June, 1895.

"THE STATE TREASURER: Will pay to A. A. Campbell, or order, ninety-nine and 40-100 dollars, for per diem and mileage as mem-
(151) ber committee appointed by General Assembly to investigate case Mrs. P. D. B. Arrington.

"Charge account Arrington Investigating Committee.

"Code N. C., Vol. I, sec.———

"Code N. C., Vol. II, sec.———

"Resolution 11 March, Laws 1895.

"ROBT. M. FURMAN,
"State Auditor.

"Per T. P. JERMAN, JR.,
"Chief Clerk."

Stamped on the face: "Auditor's Department, Raleigh, 26 June, 1895, State of North Carolina."

Endorsed on back: "A. A. CAMPBELL."

Also endorsed: "Payment declined, W. H. Worth, State Treasurer."

His Honor adjudged as follows:

"It is considered and adjudged that the plaintiff, Commercial and Farmers Bank, is entitled to the writ of *mandamus* to enforce the payment by the defendant as Treasurer of the State of the warrant, a copy of which is attached to the case agreed and marked Exhibit B, and it is therefore adjudged by the court that the writ of *mandamus* issue in behalf of the said plaintiff, Commercial and Farmers Bank, and against the said defendant as public Treasurer, commanding the said public Treasurer to pay to the said plaintiff the amount of the said warrant mentioned in the case agreed, to-wit, $99.40. And it is further adjudged that the said plaintiff recover its costs, to be taxed by the Clerk against the said defendant.

"It is further considered and adjudged that the plaintiff, Thos. R. Purnell, is not entitled to the writ of *mandamus* to enforce the payment by the defendant as public Treasurer of the warrant, a copy of which is attached to the case agreed and marked Exhibit A, and that the said writ be and the same is not allowed to the said plaintiff, Thos. R. Purnell, in this case, and it is further adjudged that the said
(152) defendant recover of the said plaintiff, Thos. R. Purnell, so much of his costs as are incurred by him by reason of the action of the said Thos. R. Purnell, to be taxed by the Clerk."

From so much of the judgment as decides that the Commercial and Farmers Bank was entitled to the writ of *mandamus* against him the State Treasurer appeals.

T. R. Purnell and J. N. Holding for plaintiff.
W. A. Guthrie for defendant.

CLARK, J. It is not controverted that the Legislature may create a special commission, as, for instance, to examine the Treasury accounts, and require that it shall consist of members to be designated from their own body and fix its compensation. The Code, sections 3360 and 3361. Such special commissioners are not disqualified to hold other offices, as members of the General Assembly, for instance, being expressly excepted by Article XIV, section 7, of the Constitution. Nor can it be denied that the Legislature has power to authorize a committee of its body to sit during vacation, and fix its compensation.

The question before us does not turn upon the power of the Legislature, which is undeniable, but upon the construction of their action. The uniform action of Congress and the Legislature, so far as our researches extend, has been to expressly authorize such committee to "sit in vacation." Inasmuch as the existence of all committees in the absence of legislation necessarily determines upon the adjournment of the body to which they belong, certainly there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or at least a clear unmistakable implication to that effect from the words used in the act or resolution creating the committee. We do not find such to be the case here. The resolution (Laws 1895, p. 502)
simply provides that the committee "shall find the facts from the (153)
evidence, and report said facts and also set out the evidence in full in said report, and make their report to the General Assembly, if it is possible to do so, before its adjournment"—so far there is nothing to distinguish this committee from any other or to prolong its existence beyond the adjournment of the body to which it belonged. Then follow the only words which can be construed to give such power, "and if not, then said report shall be made to the Supreme Court." This confers no power on the committee to do any act after the General Assembly should adjourn except to make its report if it should not be ready. There is no explicit provision or clear implication that the committee should take any other action. Had the Legislature so desired, they would, according to precedent, have provided that the committee could sit in vacation, as they plainly provided that it could report in vacation, if necessary, which necessity seemed to be considered doubtful.

When a committee is empowered to sit in vacation, the resolution

must provide the compensation and for the expenses of the same, otherwise there is no authority of law for their payment. Certainly the members cannot draw per diem as members of the Legislature, for by the Constitution, Article II, sec. 28, the per diem is allowed only during the session of the General Assembly and is limited to sixty days, which the members of this committee had already drawn, as well as their mileage allowed them in such capacity. We must look to the resolution itself for any authority for payment of either compensation or expenses. That provides only for "the necessary expenses of the said committee while actually engaged in said investigation." Since, as stated
(154) above, the meaning of the resolution was that the investigation should be made during the session, merely leaving the report to be filed (if it should be necessary) after adjournment, the necessary expenses would seem to be those of making the investigation, *i. e.*, summoning and expense of witnesses, stationery, etc. But it is not required here to say what would be embraced in necessary expenses, for this warrant on its face is "for per diem and mileage." The per diem is compensation which is not provided for by the resolution, and the mileage is not necessary for members who are simply to remain over a short while to file a belated report, since they drew mileage as members to return home. Whether the reasonable board bills of the committee while detained in making up the report would not be included in "necessary expenses" is not before us, but probably that would be conceded. It was urged on one side that, this resolution being passed so short a time before adjournment, the Legislature must have intended the committee to sit during vacation; and on the other side that, the resolution having been introduced long before, its passage at this late hour indicated an intention that the committee should get rid of the matter by simply reporting that it could not investigate for lack of time. There is nothing in the resolution to show how long or short the investigation would be. We are authorized to make no surmises. The Legislature had power to authorize the committee to sit in vacation and to allow compensation to the members of it. They chose not to do so. They only authorized such continuance for the purpose of filing the report and necessary expenses. The failure to authorize per diem or some compensation is additional evidence that the committee was expected to finish its labors (except possibly as to filing the report) while the Assembly were still in session.

It was strenuously and it would seem seriously argued before
(155) us that, the Auditor having given his warrant, the Treasurer had no choice but to pay it. The Auditor gives no bond, and if the Treasurer must pay any and every warrant that is presented to him the

State Treasury is at the mercy of the judgment of the Auditor, who might mistake or misconceive (as in this instance) the meaning of an act. The laws of this State do not bear that construction. The Auditor examines the items and the amounts and passes upon them, and can require the claimant to be sworn and examined as to the correctness of the account. The Code, section 3350 (17). If he finds the amount correct, and, further, that payment is provided for by law (The Code, section 3350, subsec. 7), he is required to draw his warrant on the Treasurer for payment thereof, but he is also required to put in the face of each warrant drawn by him the act authorizing such payment. This is to give notice to the Treasurer that he may act understandingly, for he is not required to pay any and every warrant which the Auditor may sign, but only "to pay all warrants *legally* drawn on the Treasurer by the Auditor." The Code, section 3356, subsec. 3. Should the Treasurer have reasonable doubts he should consult the Attorney-General, or if he think proper refuse payment, as in this case, and let the matter be determined by the courts. Our government is one of checks and balances. It is not intended that payments out of the public funds should be made on the judgment of the public Treasurer alone or the Auditor alone. The Auditor examines as to the amounts and the performance of the work. It would seem that as to the facts his finding is conclusive. The Code, section 3350, subsec. 5. Certainly it is sufficient protection (in the absence of any collusion or notice of fraud) to the Treasurer. But the Auditor goes further. He examines as to whether the payment of the claim is authorized or provided for by law. If he so finds, his conclusion as to the law is not binding on nor is it a protection to the Treasurer. The Auditor is required to set out (156) the act providing for payment in the face of the warrant (The Code, section 3350, subsec. 9), and on the application of such statute the Treasurer must also pass before payment, and he has authority to take the opinion of the Attorney-General (The Code, section 3363, subsec. 4), or he can act without it at his own risk either in paying or refusing payment of a warrant which in his judgment is not authorized by any statute. It is thus that the law-making power hedges about the safekeeping of the public funds. The Treasurer's bond (The Code, section 3357) is a safeguard not only against his misuse or misappropriation of the funds committed to him, but against his payment of illegal claims, for the bond provides for the "faithful execution of the duties of his office," and one of those duties is to pay out no money except on warrant drawn by the Auditor and to pay all *legal* warrants drawn by him. Illegal warrants, not authorized by law, the Treasurer pays at his peril. The duty of the special commissioners appointed under section 3361 of

The Code is not limited merely to examining whether all warrants are signed by the Auditor, a very simple matter, but they are required by that section to examine also to see whether such payments were authorized by law, as well as by the Auditor. In directing the *mandamus* to issue there was

Error.

Cited: Purnell v. Worth, post, 157; *Garner v. Worth,* 122 N. C., 253, 257; *White v. Hill,* 125 N. C., 200.

(157)

THOMAS R. PURNELL v. W. H. WORTH, STATE TREASURER.

"Arrington" Committee—Legislative Committee—Necessary Expenses—Counsel Fees.

A legislative committee appointed to investigate certain facts and report to the General Assembly is not authorized to employ counsel under a provision for the payment of necessary expenses.

MANDAMUS, heard before *Coble, J.,* at September Term, 1895, of WAKE, on a case agreed, which is fully set forth in the report of the case of *Bank v. Worth, ante.* From the refusal of his Honor to grant the writ the plaintiff appealed.

T. R. Purnell and J. N. Holding for plaintiff.
W. A. Guthrie for defendant.

CLARK, J. The other points arising in this case are disposed of in *Bank v. Worth, ante,* 146. The sole point remaining to be decided in this case is whether an attorney is a "necessary expense" for a committee, for we put out of view for this purpose the admitted fact that these services were rendered after the adjournment of the Legislature, and we have held that the committee was authorized to sit after that time only for the purpose of making its report. The Legislature have unquestionably authority, should they deem it necessary, to authorize a committee to employ counsel. But they did not do so. There is no implication even that this committee should employ counsel. On the contrary, the committee was not authorized to pass upon any legal question or make any judicial determination. Its duties were those of

a jury to "find the facts from the evidence and report said facts, and also set out the evidence in full in said report." There is (158) certainly no indication here of a necessity for the assistance of counsel "learned in law." It is witnesses "learned in the facts" only who are needed. But we would not be understood as holding that, if the committee had been called on by the terms of the resolution to pass on legal questions, in such case counsel would have been a necessary expense. *Non constat* but the committee might be composed of lawyers, or the Assembly might be willing to trust the committee's legal judgment in the first instance, since the reports of committees are subject to the action of the House appointing them. The plaintiff's remedy, if any, is to procure compensation for his legal services by application to the next General Assembly. His Honor rightly held that the employment of counsel was not provided for by the resolution.

No error.

(159)

STATE EX REL. E. D. STANFORD v. J. C. ELLINGTON.

Quo Warranto—Title to Office—Legislature—Election of Officers—Quorum.

1. In an action in the nature of a *quo warranto*, the plaintiff's right to recover depends upon his own right to the office and not upon any defect in defendant's title.

2. Where the title to an office depends upon the passage of a bill acted upon by the Legislature, but not evidenced by ratification and signatures of the presiding officers of the two Houses and by deposit in the office of the Secretary of State, the records or minutes of the proceedings of the two Houses may be resorted to for proof of their action.

3. Where it appeared from the roll call of the House of Representatives that a quorum was present upon its assembling on a certain day, but upon a roll call on an election of an officer and before any record of adjournment appeared a less number than a quorum voted, it will not be presumed that a quorum was present at such election.

4. Where the quorum is not fixed by the Constitution or power creating a legislative body, the general rule is that a quorum consists of a majority of all the members of the body, and a majority of such majority is required to transact business.

5. Where, in the attempted election of an officer by the joint vote of the Senate and House of Representatives, 26 members of the first-named body (being one more than a quorum) voted, but only 48 members of the House of Representatives (being 13 less than a quorum) voted, there was a failure to elect.

QUO WARRANTO, brought by the State upon the relation of the plaintiff against J. C. Ellington, to recover possession of the office of State Librarian, heard before *Starbuck, J.*, at April Term, 1895, of WAKE.

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

T. R. Purnell and MacRae & Day for plaintiff.
E. W. Pou and Shepherd & Busbee for defendant.

FURCHES, J. This is an action in the nature of *quo warranto,* in which plaintiff claims to be State Librarian, and alleges that defendant is in possession of the office and unlawfully withholds the same from him. Defendant, answering, admits that he is in possession of the office, performing its duties and receiving its emoluments; but he denies that he is holding it wrongfully or unlawfully, and alleges that he was duly elected thereto on 8 January, 1895, for a term of two years next ensuing.

Under the view we take of the case it is not necessary for us to consider or pass upon defendant's right to this office. The plaintiff's right to recover depends upon his right to the office. If he is not entitled to it, it is a matter of no importance to him who is. It is true
(160) that if plaintiff is entitled to the office, it necessarily follows that defendant is not; but it does not necessarily follow that defendant is entitled to it if plaintiff is not.

Prior to 13 March, 1895, the Board of Trustees of the State Library under existing law elected to and filled this office. On that day (13 March, 1895) the Legislature passed and ratified an act repealing the law authorizing the board of trustees to elect, and provided for the election of this officer by the Legislature. And on the same day, to-wit, 13 March, 1895, the plaintiff claims that he was duly elected State Librarian by the Legislature pursuant to said act. And this not being a bill enacted into a law, ratified and signed by the presiding officers of Senate and House and deposited in the office of Secretary of State, which then becomes the evidence of its passage (*Carr v. Hoke,* 116 N. C., 223; *U. S. v. Ballin,* 144 U. S., 4), it becomes necessary for plaintiff to introduce the records of the Legislature for the purpose of proving his election and right to the office he was claiming. These records show

that on the morning of 13 March there was a roll call of the House, a quorum answered, and the House proceeded to business. They also show that there was a proposition in both branches of the Assembly (Senate and House) to go into the election of State Librarian; that these motions prevailed, and both the President of the Senate and the Speaker of the House appointed two tellers each to take this vote. And they reported that in the Senate there were 26 votes cast, 25 being for the plaintiff, and one against; and in the House there were 48 votes cast for the plaintiff, and none against him. It is admitted by plaintiff that there must be a quorum present to do business, or in this case to elect the plaintiff to the office he claims. But he claims that, it appearing there was a quorum present that morning, and it not appearing there had been an adjournment since, it will be pre- (161) sumed that there continued to be a quorum present. We think this is undoubtedly true, that the quorum will be presumed until it shall appear there is not one. Cushing on Elections, 2 Ed., 369. This is usually made to appear by what is called a division; and this is usually had after a vote by yeas and nays, when the presiding officer announces the votes and some opposing member doubts the correctness of the announcement and demands a division—a call of the body. Cushing, sec. 1798. And, strictly speaking, this is what is called a division. Cushing Legislative Assemblies, sec. 1814.

The original purpose of a division was for the purpose of ascertaining who voted "Aye" and who voted "No," and it was effected in this way: the ayes occupied one part of the hall and the noes another and there remained until the tellers appointed counted them. In this way it came to be called a division. In more modern assemblies it is more usually effected by a call of the house, a yea or nay vote when each member's name is called. Cushing, sec. 1615. This mode is used for two purposes, one to determine on which side the majority voted and also for the purpose of determining whether there is a quorum present. *U. S. v. Ballin, supra.* In this case there was no *viva voce* vote preceding the roll call. With this exception there seems to have been all done that is usually done before a division, which is now usually had by a call of the roll. Cushing, sec. 1615. Why this was not done we do not know. Article II, sec. 9, requires that in all elections under this Constitution the vote shall be *viva voce.* And if this section applies to this election, it does not mean a roll call, but a vote by voice and not by ballot. And if the vote had been taken that way and announced by the presiding officers in favor of plaintiff and no division called for, (162) the presumption contended for by plaintiff would have availed

him. But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him—a modern division—we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time. Cooley Const. Lim., p. 168; *U. S. v. Ballin, supra.* It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know.

But it seems to be conceded that the Speaker of the House of Representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting, to make a quorum, until the House adopted a rule to that effect. He then counted nonvoting members present to make up a quorum, and the Supreme Court of the United States sustained his action. *U. S. v. Ballin,* 144 U. S., 1. So may the Legislature of North Carolina adopt a similar rule, as there is nothing in the Constitution to prevent its doing so. But it has not adopted such a rule, and under the authority of *U. S. v. Ballin, supra,* we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. This brings us to the consideration of what is a quorum. They are of two kinds, one fixed by the Constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. But where
(163) the quorum is not fixed by the Constitution or the power that creates the body, the general rule is that a quorum is a majority of all the members (*Cotton Mills v. Commissioners,* 108 N. C., 678; Cushing, sec. 247; *U. S. v. Ballin, supra*), and a majority of this majority may legislate and do the work of the whole. There is no constitutional quorum, that is, a number prescribed by our Constitution that shall constitute a quorum. We therefore fall under the general rule applying to legislative bodies. *U. S. v. Ballin, supra.*

The Legislature of North Carolina consists of 170 members, fifty in the Senate and one hundred and twenty in the House. Therefore it takes the presence of 26 Senators to constitute a quorum in the Senate and 61 members of the House. In this election 26 Senators voted, which was a majority of that body, and a quorum. But in the House there were but 48 members who voted. This, we see, was less than a quorum. For this reason plaintiff has failed to establish his right to the office.

There were various questions presented as to the defendant's rights. But the view we have taken of the case makes it unnecessary for us to consider them, and we do not. The judgment of the court below is Affirmed.

Cited: *Day's case,* 124 N. C., 383; *Cherry v. Burns, ib.,* 766.

(164)

NORTH CAROLINA SCHOOL FOR DEAF AND DUMB v. NORTH CAROLINA INSTITUTION FOR DEAF, DUMB AND THE BLIND

State Charitable Institutions—Deaf and Dumb Asylums—Bequest to Poor Mutes—Kelly Trust—White and Colored Beneficiaries—Apportionment of Fund.

In 1851 a bequest for the education of "poor mutes" was made to the North Carolina Institution for the Education of the Deaf and Dumb and the Blind, which had charge of both white and colored mutes and blind persons from 1881 to 1891, in which latter year an institution was established for the education of white deaf mutes of the State. The act establishing the last-named institution did not authorize it to reduce said trust fund into possession: *Held,* in an action by the North Carolina School for the Deaf and Dumb against the North Carolina Institution for Education of the Deaf and Dumb and the Blind for the possession of the fund and a library which had been purchased with the income therefrom, that plaintiff is not entitled to the possession of the *corpus* of the fund or to the whole of the library, but the library and the income from the fund should be divided between the white and colored deaf mutes of the State in proportion to the number of the pupils of each race as shown by the official report of each institution: *Held, also,* that the defendant shall hold the *corpus* of the fund in trust to disburse the income yearly in the proportions stated, and that it shall make at once the division of the library between the two institutions.

ACTION to determine the rights of the parties to the "Kelly Fund" and library in the possession of the defendant, heard before *Starbuck, J.,* at April Term, 1895, of WAKE.

Both parties appealed from the judgment, which, together with the pertinent facts, is set out in the opinion of *Associate Justice Montgomery.*

(165) *Battle & Mordecai for plaintiff.*
Armistead Jones for defendant.

MONTGOMERY, J. The defendant institution had its origin in chapter 37, Laws 1844-45, entitled "An act to provide for the education and maintenance of the poor and destitute deaf mutes and blind persons in this State." Under this act an annual appropriation was made for the maintenance of such poor and destitute deaf mutes and blind persons as were unable to pay for such maintenance and education. The Literary Board was entrusted with the fund and with the selection of the pupils. This board also had the discretion either to send the pupils to the institutions of neighboring States or to "hire" teachers to open school in this State. A beginning was made in Raleigh, and at the session of 1846-47 the General Assembly made an appropriation with which to erect suitable buildings for the conducting of the school, the buildings to be erected under the management of the president and directors of the board. Chapter 4, Laws 1848-49, repealed the act of 1844-45 so far as the last-named act placed the institution under the management of the Literary Board, and vested its management in seven directors. These directors were required to appoint a president out of their number, and the name of the institution was changed to that of the "President and Directors of the North Carolina Institution for the Education of Deaf and Dumb." Another act of Assembly, ratified 25 December, 1852, changed the name to that of the present one of the defendant, "The North Carolina Institution for the Education of the Deaf and Dumb and of the Blind."

The defendants, until a short time before the commencement of this action, had conducted the institution for the education and maintenance of both the deaf and dumb and of the blind at Raleigh.

The plaintiff is a corporation created by chapter 399, Laws
(166) 1891, for the purpose of conducting, near Morganton, a school for the white deaf and dumb children of North Carolina. Section 5 of the last-named act provides that "As soon as the said school shall be ready to receive pupils the board shall cause to be removed thereto the white deaf and dumb pupils, who may then be in the Institution for the Deaf and the Dumb and the Blind in the city of Raleigh." Under this section the deaf and dumb pupils have been removed from Raleigh to Morganton.

In November, 1851, John Kelly, of the county of Orange, died leaving a last will and testament in which he bequeathed to the defendants and their successors in office forever six thousand dollars, the principal to be secured and the interest thereon used for the purpose of educating

"poor mutes." The plaintiffs bring this action to have themselves declared trustees of the *corpus* of this fund, and that the defendants may be compelled to pay it over to them to be used in educating the deaf and dumb under their charge. The defendants admit that they received in 1854 most of this legacy, and that they have on hand of it at the present time $4,000 of 4 per cent State (N. C.) bonds, and also a library of considerable value suitable for the use of the deaf and dumb, but they aver that the plaintiffs are not entitled to the fund or to the books. The defendants in the court below, after answer filed, demurred *ore tenus* to the complaint and moved to dismiss the action upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained in so far as the *corpus* of the fund is concerned, and overruled in so far as the income of the fund and the library are concerned; and it was further adjudged that the "plaintiff is not entitled to the *corpus* of the Kelly fund or any part of said *corpus;* and said *corpus* shall remain with the defendant and in its keeping, but that the plaintiff is entitled to receive a proportionate part of the interest accruing annually, the part of said income (167) to which plaintiff is entitled being the proportion that the white population of this State bears to the colored population thereof, from the said fund; and it is further ordered by the court that this be referred to Hon. J. B. Batchelor to ascertain the amount of said fund and the interest upon same; and what amount, if any, of the interest or principal of the 'Kelly fund,' and if so, how much was used by defendant in purchasing a library, and the portion of said income to which plaintiff is entitled under this judgment."

Both the plaintiff and defendant appealed from this judgment.

We see no error in the chief ruling made by his Honor, but in some of its details we will make slight modifications. There is no express power conferred upon the plaintiffs in the act incorporating them to reduce this fund into their possession, nor does it seem to us that the plaintiffs' possession of it is at all necessary for its preservation and proper disbursement. In proper cases the courts would have the right to remove an old trustee and appoint a new one in his place, but we are of the opinion that the complaint in this action does not set forth matter sufficient to have the trust which the testator reposed in the defendants revoked by the courts and placed in other hands. We are of the opinion, further, that the funds and the library ought to be used for the benefit of the deaf mutes of both the white and colored races. It is true that when the legacy was given to the defendants they had at their school no other than white mutes; yet in none of the acts of Assembly concerning the government of the defendant institution up to

the time of the death of the testator was there any race discrimination in the selection of pupils. The first legislative act directly concerning the government of this institution in which such discrimination
(168) is to be seen is the one of 1854 (Revised Code). Section 8 of this act confines the benefits of the institution to the white deaf mutes. It may be said that such discrimination was implied because of the severe denunciations of the criminal laws against those persons who might teach slaves to read and write, and because of the general policy of the law in reference to the institution of slavery. However this may be, the testator made this bequest after the act of 1848-49, which act explicitly declares that "This institution shall *in all things and at all times* be subject to the control of the Legislature"; and that body, at its session of 1881, in chapter 211, extended the benefits of education and maintenance to the colored deaf mutes of the State. And since the last-named act the defendants have had under their charge, in separate buildings in Raleigh, colored deaf mutes and blind.

We are of the opinion that the judgment below ought to be modified so as to divide the library and the interest of the fund between the white and colored deaf mutes of the State in proportion to the number of the pupils of each race who are or may hereafter be under the care and training of the institutions now established or to be hereafter established by the State; and that the official reports of such institutions as to attendance shall be the basis of such apportionment.

It is the opinion of the Court that the defendants hold this fund in the manner and for the purposes declared in this opinion, disbursing the interest yearly, and that they further give the use and possession of the library to the deaf mutes of both races as herein indicated, making the division of the books at once.

The Court understood in the argument that it was agreed between the counsel on both sides that the defendants had on hand of the
(169) funds in dispute $4,000 in North Carolina 4 per cent bonds, and the library. If, however, there be any contention about the amount or the value of the fund, a commissioner may be appointed to ascertain the same.

Affirmed and modified.

AVERY, J., concurring: Concurring fully in the conclusion of my brother who delivers the opinion of the Court, I cannot yield my assent to the reasons given for holding that colored mutes are entitled to a ratable share of the fund. If the testator had bequeathed six thousand dollars in trust for the education of the colored mute children at the time when his will took effect, the bequest would have been declared void, because at the time it was illegal to educate such children. If in

express words he had named the "white mutes" as the beneficiaries it will be conceded without citation of authorities that it would have been a valid bequest to a class that could be easily ascertained and identified, and that, in the face of such a clear expression of an intent which it would have been at the time lawful to carry out, no part of the interest accruing from the fund could have ever been directed to any other use than that intended by Kelly. But as he refrained from confining its benefits by express terms to white mutes the law presumes that he disposed of his property in contemplation of such changes as might be made in our laws and with intent that his bequest should inure to the benefit of all who should at any time fall within the classes of mutes for whose education the State might in future provide. If the law had been so altered as to extend the benefits of tuition in her public schools to mutes up to the age of forty, those who were made beneficiaries by removing restrictions as to the age of pupils would have been none the less entitled to share in the benefit of this fund, because the alteration was made subsequently to the testator's death. The same principle that would bring them within the class designated by (170) the testator as *cestuis que trustent* would entitle colored mutes, after they were made beneficiaries of the State, to claim the right to share in the testator's bounty.

If it be true that the Legislature did not confine the privilege of receiving instruction in the institution exclusively to white pupils till after the death of the testator, it is not material, since other statutes, which must be construed along with those relating specifically to the education of mutes at that time, made it illegal to open schools for colored pupils. We are not at liberty to impute to the testator an unlawful purpose, and hold that the courts must carry out his intent. But he might have given his bounty intending that its application should be left dependent upon future changes in the law, like the loan which proved a donation by the Federal Government to the State for the benefit of the common schools.

Cited: *Keith v. Scales,* 124 N. C., 511.

(171)

E. W. FAUCETTE v. LUDDEN & BATES.

Pleading—Failure to Reply to Counterclaim—Waiver of Judgment on Counterclaim—Breach of Contract—Damages.

1. Plaintiff, in an action in which defendants set up a counterclaim, failed to reply thereto, and defendants prayed judgment absolute, but did not except to the refusal of judgment or to the order of reference then made: *Held*, that the defendants by such failure to except waived the right to judgment on their counterclaim for want of a reply.

2. Where, in an action by the consignee of goods for commissions on sales, the defendants set up a counterclaim alleging that they are endamaged in a certain sum by plaintiff's violation of an agreement not to sell any goods except those of the defendants, the proper judgment, in case of a failure of plaintiff to reply to such counterclaim, is by default and inquiry and not a judgment absolute for the sum demanded in the counterclaim.

3. Where, in an action by a consignee to recover commissions on sales, the defendants alleged by way of counterclaim that plaintiff had violated his agreement not to sell any goods except those of the defendants and to diligently push the sale of the latter, and it appeared that plaintiff had sold some goods other than those of defendants to three parties to whom he could not have sold defendants' goods, and there was no proof that he had neglected defendants' business: *Held*, that no damage having been proven, defendants could not recover for the breach of contract.

ACTION heard before *Greene, J.*, at March Term, 1895, of DURHAM, on exceptions to report of a referee.

The facts sufficiently appear in the opinion of *Associate Justice Montgomery*. From a judgment for the plaintiff defendants appealed.

Boone, Merritt & Bryant for plaintiff.
Shepherd, Manning & Foushee and Perrin Busbee for defendants.

MONTGOMERY, J. The contract between the plaintiff's assignor and the defendants obligated him to sell musical instruments for them and not to sell any pianos or organs except those of the defendants, and to receive his remuneration in commissions on the sales. The goods were consigned to the plaintiff's assignor in Durham and kept by him in his own salesrooms. After the contract was terminated, the plaintiff's assignor claimed that the defendants owed him, under his terms, a specified amount as commissions on sales made by him, and sold and assigned in writing to the plaintiff. The defendants having refused to

pay the amount, the plaintiff brought this action to recover it. The defendants deny the material allegations of the complaint, and set up a further defense in the nature of a counterclaim, in which they aver that the plaintiff's assignor violated his contract with them in that he sold, during the continuance of the contract, pianos and organs other than those of the defendants and received commissions on such (172) sales; and they aver their damages to be $500, and demand an absolute judgment for that amount against the plaintiff. At the trial term an order of reference was made to W. A. Guthrie, referee, "to take and state the account between the plaintiff and defendants upon the plaintiff's claim and the defendants' counterclaim and set-off, and to report the evidence and his findings of fact and conclusions of law." The defendants filed no exceptions to the order of reference, and went into the investigation of the plaintiff's account and of the matters in which they alleged damages under their counterclaim. A report was made by the referee, in which he found that the defendants were indebted to the plaintiff in the sum of $348.09, with interest as stated in his report. Exceptions were taken and filed to nearly all of the findings of fact and conclusions of law.

There was sufficient evidence to support all of the findings of fact, and they will not be disturbed. Two of the referee's conclusions of law which were excepted to by the defendants bring up all that is necessary for a proper determination of the whole matter. The first one was the referee's refusal to give the defendants judgment absolute for the $500 damages which they claimed in their counterclaim and insisted they were entitled to because of the plaintiff's failure to reply thereto. The motion for this judgment was made by the defendants at the close of the testimony. The ruling of the referee is sustained. The defendants filed no exception to the ruling of his Honor when judgment absolute was demanded before him and refused on the counterclaim. Neither, as we have said before, did they make exception to the order of reference. If it be conceded (which it is not necessary to do) that the counterclaim was drawn with sufficient certainty and that it was a proper plea against the plaintiff, the right to a (173) judgment upon it was waived and abandoned by the subsequent conduct of the defendants. The matters between the parties were investigated by the referee upon the construction of the order that the reference was to ascertain the true relation between the parties, *i. e.*, how stood the account as to commissions between plaintiff's assignor and the defendants, and what actual damages the defendants had sustained by reason of the matters set out in the counterclaim. The defendants went into the investigation, without exception to the order,

and conducted it on their part with that view. In that aspect it is too late after all the testimony was in for them to renew this motion for judgment absolute. Moreover, the defendants' counterclaim is a cross action against the plaintiff, and its statement of the cause of action and the relief demanded is governed by the same rules which apply to the complaint. If a complaint should allege a breach of contract without setting out that the contract provides for the payment absolutely or upon a contingency of a sum or sums of money fixed by the terms of the contract or capable of being ascertained therefrom by computation, and no answer is filed, the proper judgment is one by default and inquiry. The Code, sec. 385. Surely the defendants in this case, whose counterclaim is as general as one could be and which does not even furnish the means of ascertaining damages for a breach of any of its provisions, are in no better condition than the plaintiff in the case last mentioned. Even where the action is in the nature of *assumpsit* for goods sold and delivered, and there has been no express and specific promise to pay an agreed price for them, the judgment must be one of default and inquiry, no answer being in. *Witt v. Long,* 93 N. C., 388.

The second conclusion of law which we find it necessary to
(174) consider is that the referee refused to allow, as a set-off to the amount which he found due to the plaintiff, the amount of the profits made by the plaintiff's assignor in the sales made by him of other instruments than the defendants' as the damages which they had sustained by reason of the breach of contract complained of.

It was encumbent on the defendants to show they had been damaged and to what extent and in what particulars. The contract itself contains no method of ascertaining damages for breach of its provisions. The damages which the defendants aver they have suffered proceed from a violation of the restriction contained in the first article of the contract, which is in these words: "Consignee shall diligently push the sale of the said instruments by all proper means, and will not sell, deal in or be concerned in the sale of any piano or organ except those of said consignor." This must not be considered as a restriction on trade. The purpose of the defendants must be construed to be not that they intended or desired to suppress competition and to break down and destroy the interests of others in their line of business, but to require of the plaintiff's assignor a diligent attention to his business in selling their goods and the honest and faithful endeavor to sell their wares whenever it could be done. There are many general rules for estimating damages for breach of contract, but after all the circumstances and conditions surrounding each particular case make it diffi-

cult often to apply them or any of them. One of the general rules laid down is that "the amount should be what would have been received if the defendant had kept his contract." Now, in applying this rule to the case before us, what would the defendants have been entitled to under their contract more than they had received on account of the plaintiff's assignor having sold three instruments other than their own, on which he made a profit of $220. To answer this the facts (175) must be inquired into. It appears that no complaint during the existence of the contract was ever made by the defendants against the plaintiff's assignor for neglect or bad faith in the conduct of the business. Murray, the plaintiff's assignor, testified that he could not have sold the instruments of defendants to the parties to whom he sold instruments of other dealers; and the testimony of the plaintiff is substantially to the same effect. There was no other testimony on this point. The defendants introduced a letter to them from the plaintiff's assignor, in which the writer states that although he had sold a few instruments of other make than the defendants', yet "your business did not suffer, for it was pushed even more than I had done previously; and, as an evidence that we were pushing your goods, every piano you had here was out on trial when Mr. Wiley reached here (when the contract was terminated), and we had organs out all 'round trying to sell them." From this testimony and the construction which we have put upon the contract we are of the opinion that the defendants, while the contract was violated in the letter, are not entitled to damages, because none were proved.

There was no error in the findings of the referee and none in the judgment of the court pronounced upon them, and the same is

Affirmed.

(176)

W. F. PATTON, SURVIVING PARTNER OF W. F. PATTON, SONS & CO., v. J. S. CARR.

Partnership — Surviving Partner — Receiver — Action by Surviving Partner Against Surety of Deceased Partner—Negotiable Instruments—Accommodation Endorser.

1. A note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, endorses it and receives no benefit from it, cannot be the subject of an action at law against the endorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation endorser unless the firm be insolvent.

2. Where the surviving partner of a firm is appointed receiver of the firm, he cannot maintain an action against one who, as surety and for the accommodation of the deceased partner, endorsed the latter's note, which was discounted by the firm, if it appear that the assets of the partnership are sufficient to pay its debts and leave a surplus against the deceased partner's share of which the note can be charged.

3. The surety of a deceased partner on a debt due to the partnership has the right to compel the application of such deceased partner's share of the assets in the hands of the surviving partner to the payment of the debt in exoneration of such surety's liability.

ACTION by W. F. Patton as surviving partner and receiver of the firm of W. F. Patton, Sons & Co., of Danville, Va., against the defendant on a note endorsed by him for the accommodation of C. H. Conrad, a deceased partner of said firm, tried before *Greene, J.*, at March Term, 1895, of DURHAM, a jury trial being waived.

Upon the facts agreed, the material parts of which appear in the opinion of *Furches, J.*, his Honor gave judgment for the plaintiff for $5,000, and defendant appealed.

(177) *Fuller, Winston & Fuller for plaintiff.*

W. A. Guthrie and Shepherd, Manning & Foushee, for defendant.

FURCHES, J. Counsel in their well-considered arguments presented this case in several aspects; but we are of the opinion that a correct solution of the whole controversy depends on a few well-defined principles of commercial law and of equity.

C. H. Conrad and the plaintiff, Patton, were partners, doing a banking business in Danville, Va., and Conrad, on 17 March, 1893, executed a note payable to the defendant, Carr, for $5,000, due four months after date, which Carr, at the request and for the accommodation of Conrad, endorsed. Soon thereafter Conrad presented this note at the banking house of plaintiff and Conrad, and it was there discounted. Before the maturity of this note Conrad died intestate, leaving the plaintiff the only surviving partner of this partnership concern. Not long after the death of C. H. Conrad, and before the commencement of this action, one C. L. Holland was duly appointed and qualified as the administrator of said Conrad, and the plaintiff, Patton, as said surviving partner, commenced a suit in equity in the city of Danville, Va., for a final account and settlement of said concern, for injunctive relief and for a receiver, in which the plaintiff was appointed, and commenced this action as surviving partner and receiver against the defendant, Carr, as the endorser of said note.

Defendant, answering, admits that he endorsed the note; that he did so at the request of Conrad and purely as a matter of accommodation to Conrad; that Conrad got the entire benefit of the proceeds of said note, and that he, Carr, was never benefited one cent thereby; that in no event can he be considered more than the surety of Conrad; that the said partnership concern of plaintiff and said Conrad was and is now entirely solvent; that after paying all its debts and liabilities, there will be a surplus left in the hands of plaintiff to be paid over by him "to Chas. L. Holland, as administrator of (178) Chas. H. Conrad, deceased."

In addition to the above allegations contained in defendant's answer, he makes the bill of complaint of plaintiff in the court of Virginia in which plaintiff was appointed receiver, and his reports to the court therein, exhibits and a part of his answer, from which it appears that said Conrad at the time of his death had $13,000 on deposit in said banking house to his credit; that since his death $20,000 life insurance has been collected and is now on deposit in said banking house, which Conrad's administrator is claiming. But plaintiff is claiming that one-half of this should inure to the benefit of the firm, and that in plaintiff's report as receiver to the court of Danville, Va., it is shown that the assets of this partnership amounted to $300,289.12. That to all these allegations of fact contained in defendant's answer the plaintiff makes no reply or denial. Plaintiff and defendant, in addition to what has been stated, agree upon a state of facts, and among them are the following:

"The partnership of W. F. Patton, Sons & Co. (and this is the partnership of plaintiff and C. H. Conrad) is solvent, and the receivership aforesaid has not been wound up. There will be a surplus in the settlement of the receivership affairs of W. F. Patton, Sons & Co., to be divided between the plaintiff W. F. Patton and the estate of C. H. Conrad, deceased. Said C. H. Conrad had $13,000 balance deposited to his credit in the bank of W. F. Patton, Sons & Co. at the time of his death. His estate was then and still is solvent." That defendant endorsed the note sued on for the accommodation of C. H. Conrad, and Conrad had it discounted at the banking house of W. F. Patton, Sons & Co., of which Conrad was a partner, and that Conrad got the benefit of the proceeds of the note and Carr got nothing (179) from the transaction, seem not to be disputed as facts.

This in no view of the case could make Carr anything more than the surety of Conrad. And all these facts, being known to Conrad, the partner of plaintiff, in law were all known to plaintiff. 1 Bates Partnership, par. 389. This presents a case in which Conrad was both

payer and payee, and so far as Conrad was concerned never constituted what is known as a *legal* cause of action. *Clement v. Foster,* 38 N. C., 213. It could only be adjusted by the partners themselves, or in equity, upon a dissolution and settlement of the concern. *Clement v. Foster, supra.* Neither would it have been the subject of an action at law against the defendant by the firm if Conrad were still living, as the note—the cause of action—would necessarily disclose the equity of the case. The death of Conrad, leaving the plaintiff survivor, does not change the law of the case and does not authorize the plaintiff to bring an action which he and his copartner would not have had a right to bring if he were living.

We think the plaintiff's cause of action (the note sued on) necessarily discloses the equitable jurisdiction of the case; but if it does not it is certainly raised by the defendant's answer, and must be determined upon equitable principles. It therefore being known to plaintiff that this is in fact the debt of his partner, C. H. Conrad, and that defendant at most is not more than Conrad's surety, he cannot maintain this action against this defendant, either as surviving partner or as receiver, without alleging and showing his equities. 1 Bates, *supra,* par. 750. If he claims to sue as a receiver, he should allege that Conrad's (the principal debtor's) estate is insolvent, and it is necessary to resort to defendant, Conrad's surety, for the benefit of creditors, as creditors have no interest in making the defendant pay Conrad's
(180) debt, if the firm is solvent, which of course includes Conrad's individual estate.

Nor is the plaintiff as survivor interested in making the defendant pay Conrad's debt, if he has funds of Conrad's in his hands and partnership assets sufficient and more than sufficient to pay the firm indebtedness and to pay him his part of the partnership profits. Indeed, it would be unjust and inequitable to do so if he could.

But it is no further contended but that Conrad is the principal and defendant is the surety; that the note was discounted by this partnership, and by the death of Conrad it has fallen into the hands of plaintiff as surviving partner. Still, if Conrad has paid it the defendant should not be required to pay it also. But if Conrad has not *actually* paid it in the strict legal sense of payment, but has abundant means in plaintiff's hands to pay it, and plaintiff as surviving partner is fully authorized, and it is his duty in settling the concern to make the application, should he be allowed to go on and collect it out of the defendant? A surety has a right to compel an application in such cases

in exoneration of the debt of his principal. *Nelson v. Williams,* 22 N. C., 118; Pomeroy Eq. Jur., sec. 1417 and note; *Fealtey v. McDonald,* 8 Norris, 128; *Early v. Rice, ib.,* 297.

We must understand, when the plaintiff says there will be a sufficient amount of the partnership assets to satisfy all of the liabilities of the partnership and a surplus over to be divided between him and Holland, the personal representative, that this claim is included, because he knows that Conrad owes it to the firm, and he would have no right to distribute and pay over assets to Holland as the administrator of Conrad when Conrad was still owing the firm.

It will not be understood from what we have said in discus- (181) sing the facts of this case that a survivor may not ordinarily sue and endorser where there is no connection of the principal in the note with the partnership. There is

Error.

Cited: Sparger v. Moore, post, 452; *Gastonia v. Engineering Co.,* 131 N. C., 363.

ROBERT JORDAN v. G. C. FARTHING.

Action of Debt—Evidence—Issues—Practice—Weight of Evidence—Estoppel—Res Judicata.

1. In an action for debt alleged to be due to plaintiff by defendant, growing out of a long course of dealing, during which the plaintiff has made a mortgage to defendant, endorsements of payments on the mortgage by the defendants are admissible in evidence.

2. The objection that a verdict is against the weight of evidence can only be urged in the court below as a ground for new trial, it being a matter within the discretion of the trial Judge, the exercise of which is not subject to review on appeal.

3. An issue as to whether defendant is indebted to plaintiff, and if so in what amount, is a question of fact and not of law.

4. Unless a party is prejudiced thereby, the submission of one issue covering several material issues tendered, instead of submitting them separately, is not error.

5. Where, in an action to recover a debt alleged to be due to the plaintiff from defendant, growing out of long mutual dealings, during which a mortgage had been executed by plaintiff to defendant, but which plaintiff

alleged had been obtained by fraud and misrepresentation of defendant, and accounting is sought, but not a decree setting aside the mortgage for fraud, the material issue is not the fraud, but the debt and its amount.

6. The fact that the trial Judge, after intimating that he would submit certain issues tendered by the defendant, upon the close of the evidence and after the time for submitting instructions had passed submitted only one issue, cannot be assigned as a ground of error unless the defendant can show that he was prejudiced thereby and prevented from presenting some view of the case which the other issues would have enabled him to do.

7. An instruction assuming admissions by the evidence which are not warranted by it is properly refused.

8. To create an estoppel by a former trial and judgment it must apear that the claim or demand in litigation has been tried and determined in the former action, and the identity in effect of the two actions must appear; therefore:

9. Judgment for the plaintiff, in an action by the purchaser at a foreclosure sale under a mortgage to which the mortgagee was a party and in which the mortgagor set up the defense that there was nothing due on the mortgage at the time of the sale, does not bar an action by the mortgagor against the mortgagee for a debt which he alleges an accounting will show is due to him from the mortgagee.

ACTION heard at March Term, 1895, of DURHAM, before *Greene, J.*, and a jury.

(182) From a judgment for the plaintiff the defendant appealed.

The facts are sufficiently stated in the opinion of *Associate Justice Furches.*

Shepherd, Manning & Foushee for plaintiff.
Fuller, Winston & Fuller for defendant.

FURCHES, J. This is an action to recover money, in which plaintiff alleges that defendant is indebted to him on various accounts $210.54. He also alleges that he and defendant have had many dealings, running over a space of time for more than ten years; that defendant was a merchant in the town of Durham and he was in the habit of trading with him, and they had various other dealings; that plaintiff in different ways paid the defendant various amounts on account of their dealings, in money and otherwise; and during this time he executed his note to defendant and secured the same by a mortgage from himself and wife on his land; that under this mortgage the defendant

sold the land, and one Whitaker became the purchaser at the price of $265; that he is an old, ignorant colored man; that (183) neither he nor his wife can read; that he kept no account of his and defendant's dealings, indeed he could not do so for want of education and understanding; that he had full confidence in defendant and left it all to him. But he is now satisfied, and so alleges, that defendant imposed on him by falsely alleging that plaintiff owed him when he did not, or that plaintiff owed him much larger amounts than were in fact due; and that by these false and fraudulent representations he was induced to execute the note and mortgage above mentioned, and asks that he may have a full and fair account and settlement with the defendant, including the amount defendant received from Whitaker for the land under the mortgage sale, and that he have judgment for the amount found to be due.

Defendant answers and denies the alleged indebtedness, and says he owes plaintiff nothing. He denies the allegation of fraud and misrepresentation, and says plaintiff owes him the various amounts he claims, but admits that plaintiff is an old colored man and cannot read, and that he kept their accounts. And defendant further specially pleads as an estoppel the record, proceedings and judgment had in a certain action of W. B. Whitaker against the plaintiff, Jordan, for the possession of the land sold under the mortgage, in which defendant, Farthing, was made a party plaintiff. Upon these pleadings the case came on for trial, when defendant offered the following issues:

"1. Is the plaintiff estopped to prosecute this action and concluded by the judgment of this court at June Term, 1894, in a case then tried, in which W. B. Whitaker and G. C. Farthing were plaintiffs, and the plaintiff above named was defendant?

"2. Is the plaintiff estopped to prosecute this action by the execution of new mortgages and notes, and by renting of the (184) said Farthing the lands mortgaged as set out in the answer?

"3. Did the defendant on 6 February, 1888, fraudulently represent to the plaintiff that he was indebted to him in the sum of $230, as alleged in the complaint, and did said Farthing induce and procure said Jordan to execute the bond and mortgage for same, and were said representations made with the purpose to defraud the plaintiff?

"4. Is defendant indebted to plaintiff, and if so, in what sum?"

It was agreed that the court should settle the issues, and the court at one time intimated that it would submit all four of the issues tendered by the defendant.

The evidence in the case was closed late in the afternoon, and the court took a recess until next morning, and when the court opened next

morning it announced that, after considering the matter more fully, it would only submit the fourth issue, which is as follows: "Is defendant indebted to plaintiff, and if so in what sum?" To this issue the jury found that defendant was indebted to plaintiff in the sum of $176.34. Defendant moved for a new trial, and assigned the following grounds therefor:

1. That the verdict was contrary to the weight of the evidence.

2. That the issue submitted was one of law and not of fact.

3. That the rule is that all material issues shall be submitted separately.

4. That in this case the material issue was the question of fraud, and the same was not submitted to the jury by a separate issue.

5. That the defendant was prejudiced by his Honor's changing the issue after the evidence was all in and the prayers for instruc-
(185) tion had been handed up, based upon the issues which his Honor had intimated that he would submit, and at a time when the defendant was given no opportunity to change his prayers for instruction so as to fit the issue submitted.

6. For errors in law in declining to give the instructions prayed for by the defendant, 1 to 10, inclusive.

Motion overruled, and exception by defendant.

The defendant assigned the following errors:

1. Admitting improper evidence in the progress of the trial, heretofore pointed out and excepted to.

2. For failing to give the prayers for instruction prayed for by the defendant, numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

3. For submitting one issue instead of the four.

4. For submitting an issue of law depending upon the question of fraud, instead of submitting one issue as to the fraud as well as to the indebtedness.

5. For changing the issues, to the prejudice of defendant, after the time for submitting prayer for instructions had passed, to-wit, on the morning after the night when the evidence was closed.

6. For changing the issues after the evidence was all in.

7. For changing the issues at a time when it was impossible for the defendant to submit to the court any prayers for instructions.

We see only one exception to evidence, and that was as to reading the receipts endorsed on the mortgage after it was proved they were in defendant's handwriting, except one, and that was in the handwriting of a clerk of defendant, who defendant admits was authorized to make collections on this mortgage debt. So this exception is overruled.

Then, as to the grounds of error assigned for a new trial. And the

first is that the verdict was against the weight of evidence. While (186) this may have been a proper ground to urge upon the court below, it has been decided so often by this Court that it is a matter of discretion with the court below and is not the subject of review in this Court that we do not feel called upon to cite authority for overruling this assignment.

The second assignment must also be overruled. An issue as to whether the defendant is indebted to plaintiff, and if so in what amount, is not one of law but of fact.

While the third assignment may be correct as a "general rule," it is not an invariable rule, and cannot be sufficient ground for a new trial unless the Court can see that defendant has been damaged thereby. *Denmark v. R. R.*, 107 N. C., 185, and cases cited. This assignment is overruled.

The fourth ground assigned for a new trial is not true in fact. There is quite a distinction between this case and that of *Denmark v. R. R., supra.* In that case the *gravamen* of the action was the negligence of defendant, causing the injury complained of, and the question of damage was only the result. In this case the *gravamen* alleged is the indebtedness of defendant to the plaintiff; and the fraud and misrepresentation were only incidents alleged in aid of the cause of action for the purpose of removing a presumption of a settlement of the claim sued on. There is no demand to set aside the note or mortgage, or the sale made under the mortgage; and they are not set aside as contracts and conveyances, but only removed out of the way of a settlement, as presumptions or estoppels. And we are of the opinion the issue submitted was a proper and sufficient one, where the contention, as in this case, was debt or no debt, and if debt what amount.

Neither can the defendant's fifth ground be sustained. (187)

The issue submitted by the court is one of the four tendered by defendant and upon which he had prepared his special prayers for instruction. There was no new issue submitted by the court. And unless the defendant can show that the issue submitted prevented him from presenting some view of the case which the other issues would have enabled him to do, and that he was thereby damaged, his ground of exception cannot be sustained. And we have seen that the action is not one of fraud, as contended by defendant, but one of debt in which the allegations of fraud are made in aid of the main relief. And while we do not think it would have been error in the court to have submitted all four of the issues tendered, we do not think it was error not to do so.

The defendant's sixth ground of error must be overruled. The fact that the court declined to submit the first three issues of course pre-

vents some of the instructions from applying to some of the issues by number. But upon an examination of his Honor's charge we think they are all given in substance, except the first; and this we do not think should have been given, as it assumes admissions by the plaintiff in his evidence which are not sustained by the evidence. And though it may be true in part, to entitle the defendant to have it submitted it must be correct in the whole. Upon a careful examination of the charge to the jury we can see where the plaintiff might have had reason to complain if the jury had found for the defendant. But we can see no reason why the defendant should be dissatisfied with the charge. It certainly put the defendant's case to the jury in a very favorable light for him.

This leaves only to be considered the question of estoppel by reason of the record and judgment in case of *Whitaker v. Jordan,* the (188) plaintiff. It is said in *Temple v. Williams,* 91 N. C., 82, that to estop by former trial and judgment it must appear "that the claim or demand in litigation has been tried and determined in the former action, and the identity in effect of the present and former cause of action must appear." *Cromwell v. Sack,* 94 U. S., 357. So, trying this question of estoppel by the rule laid down in that case, we see the *case of Whitaker* was no estoppel. *Whitaker's case* was an action of ejectment for the land sold under the mortgage, and the defendant, Farthing, was made a party plaintiff with Whitaker on the trial. And it is true that the present plaintiff, Jordan, in that action alleged that there was nothing due on the mortgage at the time of sale, when Whitaker purchased. The issue submitted to the jury in that case was, "Was the plaintiff (Whitaker) the owner of the land?" and the jury found that he was. But this would have been so if Jordan had only owed one dollar, or any other small amount. So it is out of the question to contend that the accounts of Jordan and Farthing were tried in that action.

But it is contended by defendant that we have cases which go further than that of *Temple v. Williams, supra,* and he cites *McElwee v. Blackwell,* 101 N. C. 192; *Tuttle v. Harrell,* 85 N. C., 456, and other cases. But upon examination it will be found that none of them sustain defendant's contention as to the Whitaker judgment being an estoppel in this case. But suppose we were to carry the doctrine to the extent contended for by defendant—that the estoppel not only applies where the matter has been actually passed upon and adjudicated, but also as to all matters that might have been passed upon and adjudicated—still it does not apply in this case, as the $265 of plaintiff's claim arose from the sale of the land to Whitaker, and therefore

could not, in the very nature of the thing, constitute any part of (189) the *status* between Jordan and Farthing at the time of the sale. And the amount which plaintiff recovered, $176.45, being about $90 less than Farthing got for the land, tends to show that Jordan was indebted to Farthing at the time of the sale, but not to the amount alleged by Farthing, as he claimed that, including the $265 he received for the land, he owed defendant nothing.

We are of the opinion that the defendant has had a fair trial, and the judgment is

Affirmed.

Cited: Pump Works v. Dunn, 119 N. C., 79; *Wagon Co. v. Byrd, ib.,* 463; *Edwards v. Phifer,* 120 N. C., 406; *Kiser v. Blanton,* 123 N. C., 404; *Comrs. v. White, ib.,* 537; *Tyler v. Capehart,* 125 N. C., 70; *Jenkins v. Daniels, ib.,* 168; *Griffith v. Richmond,* 126 N. C., 378; *Holloway v. Durham,* 176 N. C., 553; *Price v. Edwards,* 178 N. C., 502.

REBECCA J. GATES v. J. G. LATTA ET AL.

Action for Damages—Blasting Rock—Warning to Passers-by—Negligence.

When a servant in blasting rock failed to cover the blast or take other usual precautions to restrict within safe limits the flight of the blasted rocks, and gave no notice sufficient in time for a person walking on a road near by to retreat from danger, it was negligence in such servant, and he and his employer are responsible in damages for injury to such person.

ACTION for damages, tried before *Greene, J.,* and a jury at March Term, 1895, of DURHAM.

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

W. A. Guthrie and Boone, Merritt & Bryant for plaintiff. (190)
Shepherd, Manning & Foushee for defendants.

FAIRCLOTH, C. J. The defendant Latta as the employee of the defendant Geer was engaged in blasting rock in his mill race near the public county road, where it crosses the river Eno, and the plaintiff

was walking along said road when the injury occurred, about dusk, about 100 or 150 yards from the dam. When the blast went off, a five-pound piece of rock struck the plaintiff and broke her arm. They were each engaged in a lawful business, and the question of negligence depends upon the manner or method in which they exercised their rights. The burden was upon the plaintiff to prove to the satisfaction of the jury that she was injured, and that she was injured by the negligence of the defendant; and if contributory negligence is relied upon as a defense in the answer, the burden of proving it to the satisfaction of the jury is upon the party pleading. Laws 1887, chapter 33. The issues submitted were:

"1. Was the plaintiff injured by the negligence of the defendants or either of them? Ans.: Yes.

"2. Did the plaintiff by her own negligence contribute to her injury? Ans.: No."

His Honor instructed the jury that if the defendant set off the blast when it was dusky dark, without giving any warning, this would be such negligence on his part as would make the defendants liable. There was conflicting evidence as to whether the defendant did give an alarm, but from the verdict on the first issue under the above instruction we are to take it that no danger notice was given, and that was assumed as a fact on the argument before us. Under the facts and circumstances of this case we think it was the duty of the defendant to give notice, and that his failure to do so was negligence. Sometimes the blast is covered, or by other means the flight of the dangerous parts is restricted within safe limits, and notice is not necessary, but in the ab-
(191) sence of such precautions a notice, sufficient in time for those near by to make their retreat to a safe place, is a reasonable requirement. It was so held in *Blackwell v. R. R.*, 111 N. C., 151, a case similar to the present, where there is a full discussion of the subject, and we refer to it without repeating it. It was conceded on the argument that if the facts and circumstances of this case made it the duty of the defendant to give notice of the blast, then he was liable, and having held that such was his duty we need not further examine the instructions, unless we could find some manifest error calculated to mislead the jury in a material manner, which we do not. The duty of giving the danger notice in similar cases has been held in other States. *Wright v. Compton,* 53 Indiana, 337; *St. Peter v. Nenison,* 58 N. Y., 416; 51 Am. Dec., 279, n.

No error.

Affirmed.

Cited: Kimberly v. Howland, 143 N. C., 402.

RALEIGH AND WESTERN RAILWAY COMPANY v. GLENDON AND GULF MINING AND MANUFACTURING COMPANY

Practice—Injunction—Damages, Assessment of—Nonsuit—Appeal.

1. It is premature to have the damages growing out of the issuing of an injunction or restraining order assessed before the final determination of the action.

2. Upon the trial of a case in which the plaintiff had obtained a restraining order, upon an intimation of the trial Judge that a recovery could not be had, the plaintiff appealed. The judgment was affirmed on appeal: *Held*, that it was proper to assess the damages resulting from the issuing of the restraining order after the affirmance and certification of the judgment and not at the term at which the appeal was taken.

ACTION heard before *Starbuck, J.*, and a jury at Spring Term, 1895, of CHATHAM, on a motion to assess damages resulting to the defendants from the issuing of a restraining order.

The plaintiffs resisted the motion upon the ground stated in (192) the opinion of *Associate Justice Montgomery*. The motion was granted and the damages were assessed by the jury. From the judgment thereon plaintiffs appealed.

Womack & Hayes for plaintiffs.
W. A. Guthrie and H. A. London for defendants.

MONTGOMERY, J. During the trial of the case in the court below his Honor intimated that the plaintiffs were not entitled to recover. Whereupon they submitted to a nonsuit and appealed to this Court, where the judgment was affirmed. Upon the certification having been made of the transcript of judgment to the Superior Court, the defendants moved against the plaintiffs and their sureties to the restraining bond, which they had executed and filed in the cause, to have their (defendants') damages assessed, which they alleged they had sustained by reason of the issuing of the restraining order. The plaintiffs objected to the proceeding and to the issue framed for that purpose on the ground that such damages should have been determined at the trial of the cause and upon the rendition of the judgment of nonsuit. The objection was overruled, and the jury assessed the damages. It was contended here for the plaintiffs that the defendants lost their right to recover damages when they allowed the plaintiffs to take the nonsuit without objection or exception. This might have been so if the plaintiffs had not in the same breath accompanied their nonsuit with an

appeal to this Court. If the plaintiffs had taken their nonsuit of their own motion and without appeal, the judgment being in that case
(193) a final one, the plaintiffs would have been compelled then and there to lodge a motion for the assessment of their damages or else have lost their remedy. The appeal, when perfected, only suspended the judgment of the lower court and kept the action *in fieri* until the final judgment on appeal should be pronounced; and this Court has decided that, in actions in which injunctions or restraining orders have been issued, it is premature to have the damages growing out of the issuing of the injunction or order of restraint assessed until the final determination of the action. *Crawford v. Pearson,* 116 N. C., 718; *Thompson v. McNair,* 64 N. C., 448. These decisions rest on sound principle. Until the action was ended by a final judgment and the suit thereby disposed of, it could not be known judicially that the restraining order was wrongfully issued, and if the defendants had been allowed to have their damages assessed before final judgment, and afterwards the judgment had been for the plaintiffs, they (the plaintiffs) would have been entitled to recover back the very damages that the defendants had recovered of the plaintiffs. Such proceedings, if permitted, would render the court records not only inconsistent, but contradictory.

Cited: Timber Co. v. Rountree, 122 N. C., 47; *Olmsted v. Smith,* 133 N. C., 585; *McCall v. Webb,* 135 N. C., 365; *Davis v. Fiber Co.,* 175 N. C., 28.

SALLIE J. COOK ET AL. v. L. F. ROSS.

Mechanic's Lien—Superintendent of Work.

One who under a contract assists the owner of a factory in purchasing machinery and superintends the erection of the same and the putting the factory in working order, but does no manual labor himself, is not entitled to a lien, mechanic's or laborer's, under section 1781 of The Code.

ACTION heard on exceptions to a referee's report before *Boykin, J.,* at July Special Term, 1895, of GUILFORD.

(194 His Honor sustained the exception, and plaintiff F. L. Emery appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

L. M. Scott and R. M. Douglas for plaintiff F. L. Emery.
J. T. Morehead and J. N. Wilson for defendant.

MONTGOMERY, J. The plaintiff Emery claimed a balance to be due to him by lien for work and labor done as a mechanic. The matter was referred to T. J. Shaw to take the evidence and find the facts and conclusions of law arising therefrom, who proceeded under the order of reference and made his report. His 5th finding of fact is as follows: "On 7 September, 189—, after having inspected the property and machinery, said Emery and Ross entered into the following contract, to-wit: Emery, in consideration of $6 per day, traveling expenses and board to be paid by Ross, agreed to assist Ross in purchasing such new machinery as would be needed for the Hamburg property, and was to superintend the erection and starting up of the same and the making of such repairs to the mill as might be necessary to put it in good condition for making yarns, and he was to continue in the employ of Ross under said contract from said date till the mill was put in running condition." Upon this finding of fact the referee concluded as matter of law "that defendant is indebted to plaintiff Emery in the sum of $600," etc., "balance due for work and labor done under the contract." The defendant and also some new parties to the original action, who claimed an interest in the premises, excepted to this conclusion of law made by the referee, and say that it should be amended by striking out the words "for work and labor done." His Honor upon the hearing sustained the exception, and the plaintiff appealed.

The only construction which can be put upon the plain lan- (195) guage of the finding of fact ends the plaintiff's contention that he has a lien under the statute, as a mechanic, for work and labor done.

He was superintendent of the work which was done. He was in no sense employed as a laborer for the day to regularly do toilsome and manual labor. His business under the agreement was not to labor with his hands, but to superintend those who were subjected to his authority. *Whitaker v. Smith,* 81 N. C., 340. There was no error in the ruling of his Honor in sustaining the exception, and that puts an end to the plaintiff's claim for a lien under the statute. It is unnecessary for us to consider the other exception.

No error.

Cited: Nash v. Southwick, 120 N. C., 460; *Moore v. Industrial Co.,* 138 N. C., 307; *Bruce v. Mining Co.,* 147 N. C., 644; *Alexander v. Farrow,* 151 N. C., 323; *Stephens v. Hicks,* 156 N. C., 241.

J. W. SCOTT & CO. ET AL. v. V. BALLARD ET AL.

Mortgage Sale—Junior Mortgages—Injunction.

The assignees for benefit of creditors of a mortgagee will not be enjoined from selling the land as it was conveyed in the mortgage, in three tracts, at the instance of junior mortgagees who allege no equitable ground for the injunction, but only that the land, if subdivided and sold in small parcels, would sell for a better price than if sold in three tracts, and further that under an agreement with the defendants (which was without consideration and for the benefit of the junior mortgagees) the plaintiffs had sold the land under their mortgage and had bought it in and caused it to be subdivided into numerous lots, with the purpose of selling them and paying off the plaintiffs' debt.

APPLICATION to continue a restraining order until the hearing, heard before *Greene, J.*, at chambers at DURHAM, on 2 April, 1895. The plaintiffs invoked the equitable aid of the courts to enjoin the defendants, trustees, and B. L. Duke from selling the land conveyed by a (196) mortgage from T. B. Keogh and wife to B. L. Duke. The application was heard on the complaint used as an affidavit and various supporting affidavits.

The complaint was as follows:

"I. That on 7 December, 1892, Thomas B. Keogh and Harriett A. Keogh, his wife, executed to the above-named defendant B. L. Duke a deed of mortgage, wherein they conveyed unto him a large and valuable real estate, situate in the city of Greensboro, to-wit": (here follows the description of three tracts of land.)

"II. That said Keogh and wife afterwards, to-wit, on 18 February, 1893, executed a deed in trust to John N. Wilson, whereby they conveyed the same lands above described in the deed of mortgage to B. L. Duke, unto him, the said Wilson, in trust to secure a debt of $1,066.73 to J. W. Scott & Co., a body corporate doing business in the city of Greensboro; $1,061.08 to Tyre Glenn; $1,403.08 to J. D. White, and $1,805.43 to J. A. Hoskins, with power in the trustee, in case of nonpayment of said sums by 18 February, 1894, and the interest thereon at 8 per cent, to advertise and sell the lands therein conveyed, and out of the proceeds pay the said sums of money, after first retaining all costs and expenses incident to the sale, as will fully appear by a copy of said deed in trust, on record in the register's office of Guilford County, in book 92, page 26, and hereto annexed as a part of this complaint.

"III. That said B. L. Duke, subsequently to the execution of the mortgage aforesaid, made an assignment to defendants V. Ballard

and J. F. Wiley, as trustees, of all his property, to secure his creditors, and amongst the property conveyed he transferred to said Ballard and Wiley the bond secured in said Keogh mortgage, whereby they became entitled to the security of said mortgage for the pay- (197) ment of the sum of $8,500 and the interest thereon.

"IV. That in June, 1894, the creditors secured in the deed in trust to Wilson being anxious to get the property in shape to handle so as to get the Duke debt as well as their own out of it, dispatched Tyre Glenn, one of their number, to Durham to see the said Ballard and Wiley, assignees of B. L. Duke, and it was agreed then that plaintiffs might proceed and sell under their deed subject to the Duke mortgage, and buy and then subdivide into lots and sell in lots, with the understanding that sales should be for cash as to one-third of the purchase money, one-third on six months, and the other third on 12 months, and that the cash received should be paid over on the Duke mortgage, and the proceeds of the notes for the deferred payments should likewise be paid over on the same mortgage, until the whole debt was paid, and all this was agreed to, with the further understanding that said Ballard and Wiley could not specify any length of time during which they could wait for payment in this way, but with the agreement on the part of said Glenn and his coplaintiffs that, if said Ballard and Wiley were obliged to close up the trust estate under Duke's assignment, they were to go and sell and pay over at once as agreed on, in parcel.

"V. That the arrangement was made and appeared to be perfectly satisfactory to all parties, and plaintiffs, having full confidence that the property conveyed in the two deeds was worth and could be sold for enough to satisfy all the debts, in pursuance of such arrangements at Durham, on 6 July caused John N. Wilson to advertise, and on 6 August, 1894, the property was put up and sold and knocked down to the plaintiffs, or to one of them in trust for himself and (198) the others, in order to put themselves in a situation to sell the same in parcels, as had been agreed upon, and accordingly they took title and sought to get possession of the property, but were delayed therein for some two months after their said purchase, and since that time they have rented out the property, and it is still rented out, on terms not inconsistent with a sale or sales, as had been agreed on with Ballard and Wiley.

"VI. That in November, 1894, but a short time after plaintiffs had purchased and got into possession as aforesaid, Mr. Ballard, one of the assignees of B. L. Duke, wrote to plaintiff Glenn making inquiry into what plaintiffs were doing with the property, and to this answer was made apprising him of the very short time they had had posses-

sion, and asking for an extension of time so as to allow them to make sales in lots or parcels, and in reply to this application for extension of time said Ballard wrote back that he would extend the time to 15 December, to have all the money paid down in cash, and on the reception of this last letter the plaintiff Glenn again went down to Durham to see the assignees.

"VII. That on the occasion of this last visit to Durham last above spoken of, the attention of said Ballard was called to the original understanding and contract between them in regard to a sale and purchase by the plaintiffs, and a subsequent sale of the lands in lots, and the payment of the proceeds over to them to the extent of paying the debt of Duke in full, and the terms of the original agreement aforesaid were again assented to, on the assurance of plaintiffs then and there given that in case of any necessity to them to close out the deed of assignment made to them by Duke, they, the plaintiffs, would at once subdivide the property into lots and go on and make sales and pay over the proceeds to them as had been agreed on, and the
(199) plaintiffs well hoped that Ballard and Wiley would carry out this joint arrangement; but two weeks thereafter they wrote to plaintiffs saying they were not willing that the property should be subdivided and sold by plaintiffs at public sale, but might be sold privately, and in bulk and not in lots.

"VIII. That very soon after this last position was taken by Ballard and Wiley, to-wit, on 24 December last, they advertised a sale of said property, to take place on 24 January last past; but they withdrew that advertisement and did not sell on the day appointed; but instead of selling on that day they again advertised on 25 January to sell all the said lands on 1 March, 1895, with a suggestion in the advertisement that the lands may be subdivided before the day of sale and sold in lots or parcels, without saying that they would be so sold.

"IX. That seeing the equivocal language used in said advertisement, in regard to selling, whether *en masse* or in parcel or lots, the plaintiffs, in order to favor the disposition of the property under circumstances to bring the most money, have opened a correspondence on the subject and urged a sale by lots; but in answer to such reasonable request the plaintiffs are now informed by said Ballard and Wiley that they will not sell in lots, but *en masse* only.

"X. Plaintiffs further complaining show unto the court that the lands conveyed by Keogh and wife in the mortgage to secure the debt of B. L. Duke embrace a considerable area of ground, about sixteen acres, situate in the most desirable part of the city of Greensboro for private residences, and that the same is already subdivided to a con-

siderable extent into lots, and is capable of being further subdivided, so as to be capable of being put up to sell in quantities and size of lots inviting to bidders, and within the ability of parties to buy and pay fair prices for the same, as will more fully appear by (200) reference to the Duke mortgage and to a plat of the lands herewith filed and prayed to be taken as a part of this complaint, and they further show that a sale in lots and parcels would pay off the Duke mortgage and in large part, as they believe, their debts secured in the said deed in trust to Wilson; but if sold *en masse,* the debt to Duke being very large, but few persons, if any, besides those interested in the Duke mortgage will have the pecuniary ability to bid at all at the sale.

"XI. That it will be improper and oppressive on plaintiffs if defendants shall go on and sell, as they have announced, in bulk and not in lots, and, besides, plaintiffs show that the notice given of the approaching sale is misleading in that it fails to invite bidders by stating the manner of the sale, whether in bulk or in lots, and instead thereof is suggestive of a sale *en masse.*

"XII. Plaintiffs show, as heretofore alleged, that a sale as proposed by defendants *en masse* is not necessary to the collection of the Duke debt, but the same can be made without delay and with great certainty as readily by a sale in lots, as proposed by plaintiffs, and if it shall be allowed to be made *en masse,* a great and irreparable injury will be done plaintiffs, and it will give those interested in the Duke mortgage the unconscionable advantage of buying without competition of bidders, and the plaintiffs show that the sale will be made, as they are informed, *en masse,* unless restrained by this honorable court. Whereupon plaintiffs demand judgment that defendants be enjoined from selling the lands in the Duke mortgage as threatened, etc.

"XIII. That the plaintiffs herein have begun an action entitled as above in the Superior Court of Guilford County and have issued a summons therein."

The defendants, in reply to said affidavits, filed the affidavit (201) of V. Ballard as answer, as follows:

"I. Paragraph one is true, except that the mortgage referred to is not annexed.

"II. That as to allegations of paragraph second he has not information, but that the deed in trust referred to is not attached.

"III. That the allegations of paragraph third are admitted.

"IV. That some conversation was had between Tyre Glenn and affiant in June, 1894, but that no understanding or agreement was arrived at between them, and except as herein admitted paragraph four is denied.

"V. That so much of paragraph five as alleges that Ballard & Wiley, trustees, made any agreement as to sale of the lands or delay in selling same, as is set forth in five, is denied; that as to what course plaintiffs have pursued in that respect, affiant has no information.

"VI. That on 31 October, 1894, Tyre Glenn came to Durham, N. C., and had a conversation with affiant, the result of which was that an agreement was made that the lands should be sold in lots. But that this agreement was entirely without consideration, and was made at the instance of said Glenn, who stated that much more could be realized by selling in this way than as a whole. That on the following day affiant wrote to said Glenn as follows:

"'DURHAM, N. C., 1 Nov., 1894.

"'TYRE GLENN, ESQ.,

"'*Greensboro, N. C.*

"'DEAR SIR: After thinking over your proposition, as made to us yesterday, we will have to modify it somewhat. We agree to do this:

To wait until 1 December, 1894, and if our mortgage is not satis-
(202) fied by that time, will advertise for 30 days and sell, but cannot agree to sell in lots, and will sell the property as a whole. While we believe that it will bring much more if divided into lots, yet it might not, and then we would not be in a position to protect our interest as fully as if sold as a whole. Some of the lots might sell low, and we would not know just how to bid, and be forced to buy some of the lots and other parties buy some of the others. In other words, while trying to help you gentlemen, we might injure ourselves. But we trust that there may be no occasion to advertise and sell, but that you may make the deal you speak of between now and 1 December, and that you, as well as ourselve, will get your money. We assure you that we have no desire or disposition to take any advantage of you and trust that you may get all that is due you.

"'Yours very truly,

"'V. BALLARD & J. F. WILEY,
Trustees of B. L. Duke.'

"'By V. Ballard.

"And that at the instance of said Glenn affiant did make another voluntary extension of time to pay the money to 15 December, 1894. That such extension of time was given because said Glenn stated that the property would be sold at good prices before said date and the Duke debt be paid off, as well as the debts due under the Wilson trust.

"VII. That the letter above quoted was not written two weeks after Tyre Glenn and affiant had an understanding as to the sale in lots, but was written the next day.

"VIII. That paragraph eight is substantially true.

"IX. That it is admitted that Ballard & Wiley, trustees, refused to sell in lots, but as a whole.

"X. That paragraph ten, being a matter of opinion largely, cannot be admitted or denied, and only sales can demonstrate.

"XI. Paragraph eleven is denied. (203)

"XII. Paragraph twelve is denied, and is immaterial."

Further answering, affiant shows:

"That the necessity for closing up the B. L. Duke trust, spoken of in plaintiffs' complaint, has arisen, and that the trustees have been acting in that capacity since 12 December, 1893.

"That the creditors of said Duke are becoming impatient; some are complaining of delays, and some have taken legal steps to compel said trustees to wind up the estate.

"That said trustees have indulged T. B. Keogh for more than a year in the payment of his debt to B. L. Duke's estate, and that the following voluntary extensions have already been allowed in the matter of the sale of the land conveyed:

"1. The extension mentioned in the letter dated 1 November, 1894.

"2. A further extension to 15 December, 1894.

"3. A few days' extension on 14 December, 1894, and after much correspondence a final extension of time to the sale day, to-wit, 1 March, 1895.

"That said trustees have done all they could, consistent with their duty, to oblige the second mortgagees of T. B. Keogh.

"That said parties accepted a second mortgage on the land in dispute 'with their eyes open.'

"That the debt due by Keogh to B. L. Duke is not denied or disputed.

"That there is no cloud upon the title and no allegation of such.

"That the said second mortgagees have asserted no equity, nor can they do so in this case, calling for the aid of a court of equity.

"That all the conversations between Duke's trustees and the (204) parties holding under the Wilson trust have been mere conferences looking to the best interest of all the parties; have been likewise informal, and any understanding or agreement has been totally without consideration, but wholly voluntary and of no binding force or effect upon any person, and was so understood and intended at the time.

"Wherefore, having fully answered, they pray that they may go hence without day and recover their costs."

His Honor, having heard and read the affidavits, heard other evidence and considered the arguments of counsel representing both plaintiffs and defendants, continued the said restraining order until the hearing, and defendants appealed.

Dillard & King and J. N. Wilson for plaintiffs.
Fuller, Winston & Fuller for defendants.

MONTGOMERY, J. This is not a controversy between mortgage creditor and debtor, in which equitable relief is sought by the debtor on the ground of unconscionable or fraudulent conduct on the part of the creditor, but it is a contest between two sets of creditors, prior and subsequent, as to how the same property which was conveyed to them by the common debtor should be sold, whether under the first mortgage in three tracts or parcels, as it was conveyed, or in numerous subdivisions, as the subsequent creditors insist. The plaintiffs, who are trustees for creditors of the first mortgagee, advertised a sale of the land conveyed in the mortgage and as it was conveyed, in the land conveyed in the mortgage and as it was conveyed, in three tracts, under the power contained in the first mortgage, and also under that given to them (205) in the deed of trust executed to them by the first mortgage.

Whereupon the plaintiff creditors, under a junior deed of trust made by the same debtor upon the same property, procured a stay of the sale in proceedings by injunction before *Judge Greene*. There is no dispute about the debt due to either set of creditors, nor about the execution and validity of the deeds securing the debts. As we have said, the plaintiffs neither set up nor show any conditions or circumstances which entitle them to the interference of the court in the matters complained of. They allege, it is true, that if the property were subdivided into numerous tracts it would bring more money at sale, and they also allege that they had an agreement with the defendants that they, the plaintiffs, might sell the land under their deed of trust and take possession and then sell in subdivisions, applying the money from the sales to the payment of the defendants' claims as fast as received. But the agreement was without consideration and made purely as a favor to the plaintiffs. The plaintiffs, however, did under the agreement sell the land and buy it themselves. After the sale and purchase by themselves they made numerous subdivisions of it, but have been unable to make sales, though the defendants have given them reasonable time for that purpose The plaintiffs do not allege insolvency or even present inability to pay off the defendants' claims, and if the property is really worth what the plaintiffs say it is, it would seem they ought to pay the defendants' claims and take upon themselves the trouble, expense and delay of making sales of the property in subdivisions, and not put those inconveniences on the defendants. Besides, the creditors of the assignor of the defendants are demanding and in some cases threatening legal proceedings for the recovery of their debts. There was error in the

order of his Honor restraining the sale. The defendant must (206) be allowed to proceed with the sale, selling the land in three separate tracts as it was conveyed to their assignor in the mortgage to him.

Error.

Cited: *Montague v. Bank,* 118 N. C., 287.

WINSTON v. BIGGS.

Assignment for Benefit of Creditors—Doubly Secured Debt—Rights of Creditor—Marshalling Assets.

1. The doctrine of marshalling assets does not apply to the distribution by a trustee of an insolvent debtor's estate when one creditor secured in the deed of trust has also a prior and exclusive lien upon a part of the property conveyed to the deed in trust; therefore:

2. Where the plaintiff's debt was partly secured by a mortgage, and the debtor conveyed his equity and redemption therein, together with the property, to a trustee for the benefit of all his creditors, including plaintiff, the plaintiff was rightly adjudged to be entitled to his pro rata share of the funds in the trustee's hands arising from the sale of the debtor's other property, upon the basis of his entire debt and not merely upon the balance that should remain unpaid after applying the value of the independent security he held.

CONTROVERSY, submitted without action under sec. 567 of The Code, heard before *Starbuck, J.,* at Fall Term, 1895, of DURHAM.

From a judgment for plaintiff the defendant appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

Fuller, Winston & Fuller for plaintiff.
A. A. Hicks for defendant.

MONTGOMERY, J. This matter is presented under section 567 of The Code. L. E. Wright made a general assignment of all his property for the benefit of all his creditors to the defendant, Biggs, as trustee. Wright was indebted to the plaintiff in the sum of (207) $3,200, and to the other creditors named in the assignment to the amount of about $6,000, all of which was secured in the deed without preference. The plaintiff's debt is, and was at the time of the execution

of the assignment, partly secured by a lien on Wright's interest in a brick storehouse in Oxford of the value of about $2,800. The defendant, trustee, has on hand for distribution among the creditors about $1,000. The plaintiff has demanded of defendant, trustee, his share of the fund, which, he insists, is 3200-9200 of the amount on hand, but the trustee has refused to settle on that basis, but is willing to pay to the plaintiff in the proportion of 400-6400 (four hundred dollars being the estimated amount which will still be due to the plaintiff after he shall have exhausted his lien on the storehouse and applied the same to his debt *pro tanto*). The question, then, is this: Is the assignee under a general assignment for the benefit of creditors required upon demand to pay a dividend out of funds in his hands for distribution upon the basis of the entire debt of one of the creditors secured in the deed, who has, and who had at the time of the execution of the assignment, a prior security upon a piece of property also conveyed in the assignment, or is the trustee to pay such creditor a dividend only on the balance due after the creditor has exhausted his prior security and applied the same to his debt? Or, to state it more concisely, does the doctrine of marshalling apply where one of the creditors, secured in a general deed of assignment for the whole amount of his debt, has a prior security on a piece of property which was also conveyed in the deed of assignment?

We have no decision in our own reports directly in point. The facts in *Brown v. Bank*, 79 N. C., 244, referred to by plaintiff, are not like the facts in this case. In that case there were two (208) firm debtors, Greer & Alexander and McMurray & Davis, two separate funds, and two separate general assignments for the benefit of creditors, both securing two debts, in one of which one debtor was principal and the other endorser, and in the other debt the relations were reversed, and the question before the Court was: "Shall the two debts secured in both deeds share for their full amounts in the distribution of the trust fund of McMurray & Davis, or shall they be reduced by the sums received from the assignee of Greer & Alexander, and the residue draw only its ratable part?" It was held that marshalling of the funds would not be ordered, for that doctrine was applicable only where there is the same common debtor, and not where the funds are provided by different debtors. In the case of *Butler v. Stainback*, 87 N. C., 216, cited by plaintiff's counsel, marshalling, it is true, was not allowed, but the decision of the Court was put on the ground that one of the securities was expressly declared to be in exoneration of another. The distinguishing point between the well-understood principle of marshalling assets and the distribution of the funds in the hands of a trustee of an insolvent assignor is clearly to be seen. The deed of assignment

conveys to the trustee the legal title to the property, and there passes to the creditors a joint equitable proprietorship, and each creditor owns such proportionate part of the whole as his debt bears to the sum of all the debts, and the trustee holds the legal estate for the benefit of each creditor to the full extent of his debt, regardless of any contract which either one of the creditors may have had with the debtor, by which he secured a collateral lien before the execution of the assignment. It is the debt secured in the assignment, this personal right of the creditor, which is the principal thing to be considered in the settlement of the insolvent's estate, and a former lien of the plaintiff is some- (209) thing collateral to the debt, being only a security for the debt to the extent of its value in case the debt should not be paid in full out of the estate and as directed by the assignor. That is not a factor of the debt, but merely an incident to the debt. The trustee here stands in the same relation to the creditors as if he were in a court of equity administering under its order the settlement of the estate of his insolvent assignor, and he will not be allowed to displace one right to uphold another. The doctrine of marshalling is not founded on contract, but rests, as Chancellor Kent says, "on the basis of mere equity and benevolence," and the trustee, on no sound principle of law or equity, can extend this benevolent principle to impair an advantage which one of the creditors in the assignment had by contract with the debtor before the assignment was made.

As we have said, we have no direct authority on the matter before the Court. There are, however, decisions in many of the courts of sister States holding that a creditor under a general assignment, having also another security, is entitled to a dividend from the assignee upon the whole amount of his debt at the date of the assignment. A leading case is *Patton's Appeal,* 45 Pa. St., 151. In that case one of the creditors secured in the deed of assignment, the firm of S. & W. Welch, had sold the assignor debtor a large quantity of sugar and had delivered to him only a part thereof, when, hearing of the failure and assignment of the debtor, the creditor detained the balance of the undelivered sugar, sold it and applied it to their debt, and claimed afterwards a dividend from the assignee upon the whole of their debt secured in the deed. The Court decided: "When the assignment was made there was due from the assignor to S. & W. Welch the sum of $23,420. Of this, $21,026 was paid out of the proceeds of sale of that part of the sugar which was retained after the failure of the assignor, leaving unpaid (210) the sum of $2,394. If the beneficial ownership of property assigned in trust for creditors is not in the creditors for whose benefit the trust was made, it can be nowhere; for clearly it is not in the as-

signor, nor is it in the trustee. Surely it cannot be maintained that, when an assignment has been made in trust for creditors, it does not operate as much for the benefit of a creditor who holds a collateral security for the debt due him as for the benefit of a creditor who holds no collateral. The appellees were holders of collaterals. When the assignment was made they had two securities, the trust created by it and their lien upon the sugar. Had they retained the sugar until the present time, no one would doubt their title to a dividend out of the trust fund upon the whole amount of the debt due them." The law is decided to be the same as in *Patton's Appeal* in *People v. Remington,* 121 N. Y., 328.

His Honor below gave judgment that the plaintiff is entitled to receive from the trustee and to recover of him upon the basis of his entire indebtedness, and that it is the duty of the trustee to make payment to the plaintiff upon the basis of his debt against said Wright on the day of assignment, and not on the basis of said indebtedness reduced by the amount that the property, upon which plaintiff has a separate lien, will bring upon the sale thereof. There is no error in the ruling, and the judgment is

Affirmed.

Cited: Davenport v. Gannon, 123 N. C., 365; *Chemical Co. v. Edwards,* 136 N. C., 76, 80; *Bank v. Flippen,* 158 N. C., 335.

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(211)

BOARD OF COMMISSIONERS OF CHATHAM COUNTY v. E. A. THORNE, ET AL.

County Lines—Survey by Order of General Assembly—Right of Legislature to Erect New Counties and Change Boundary Lines—Injunctions—Parties.

1. In an action by the Commissioners of Chatham County to restrain commissioners appointed by act of General Assembly to locate the boundary line between Chatham and Alamance counties "according to the original survey of 1770 establishing the county of Chatham," the allegation was that they were not locating the line correctly, and the county of Alamance was not made a party: *Held,* the court, being without jurisdiction, will not give a construction of the acts of Assembly.

2. It is within the power of the General Assembly at its will to establish new counties and change the boundary lines of existing counties, and hence an injunction will not lie to restrain the action of commissioners

appointed by the Legislature to survey and determine the boundary line between two counties, on the ground that such survey will change the boundary and work irreparable damage to one of the counties.

ACTION by the Commissioners of Chatham County against the commissioners appointed under chapter 303, Laws 1895, to restrain them from proceeding further in their survey of the boundary line between Chatham and Alamance counties, and heard before *Greene, J.*, at chambers at Graham on 25 May, 1895, on motion for an injunction, on complaint, answers and affidavits.

His Honor refused the injunction, and plaintiffs appealed.

Womack & Hayes and H. A. London for plaintiffs. (217)
E. S. Parker and J. A. Long for defendants.

FAIRCLOTH, C. J. Chapter 303, Laws 1895, appointed the defendants "to locate the county line between Alamance and Chatham Counties according to the original survey of 1770 establishing the county of Chatham," and provided for the expenses in certain contingencies. Whilst the defendants were engaged in their duties they were restrained from proceeding further on the allegation that they were not locating the line correctly and according to the direction in the said act of Assembly. Upon the final hearing the Judge below vacated the restraining order and refused to grant an injunction, and the plaintiffs, Commissioners of Chatham County, appealed. The main argument before us was upon a construction of the words "according to the original survey of 1770 establishing the county of Chatham" in said act of 1895, in its connection with the other said act, and certain questions of evidence. We find ourselves unable to respond to the argument or to give a construction to said acts, because the court is without jurisdiction in the matter. Alamance County is not a party to this action and would not be bound by any conclusion or order of the court, and the defendants have no official interest in the controversy. They are simply the agents of the Legislature to execute its command. The plaintiffs allege that if the lines are located as now being run by the defendants, Chatham County will sustain an irreparable damage, that is, it would lose territory and financial support, and ask for an injunction on that ground.
That conclusion is not sound. Counties are laid out and the (218) boundaries established as directed by the Legislature, and these boundaries exist at the will of the Legislature, subject to be changed at any time by it, and this is well understood in the organization of the same; otherwise new counties could not be established, nor any subdivisions had unless consented to by the original corporate bodies. So

no injunction can rest upon the idea of irreparable damage. And there is no equitable ground on which to rest an interference of the court by an injunction for the reasons above stated.

We are of the opinion that his Honor committed no error.

Judgment affirmed.

W. W. MILLER v. K. F. POWERS, SHERIFF.

Process—Sheriff's Return—Recitals in Return Prima Facie True.

The recitals in a sheriff's return of process are prima facie evidence of the truth of the statements therein.

PROCEEDING for amercement of the Sheriff of Pender, heard before *Brown, J.*, at Spring Term, 1894, of PENDER.

On 6 February, 1893, an execution was issued upon a judgment in favor of W. W. Miller against George Washington and W. T. Bannerman, surety on his appeal bond, for the sum of fifty-six dollars and eighteen cents, docketed 14 March, 1892, with interest from that date, and the sum of seventy-two dollars and five cents costs. Said execution was delivered to the Sheriff's deputy, W. T. Bannerman, by an attorney for the plaintiff on 6 February, 1893.

(219) On 15 March, 1893, being on the third day of March Term, 1893, which convened on 13 March, the Sheriff returned said execution into the court with the following endorsement: "Returned 15 March, 1893. Served on defendant, Washington, and two dollars received on the within execution. No fees paid or tendered to lay off the defendant's homestead." The court found that no fees were tendered or paid to set apart the homestead of either of the defendants.

The Sheriff and his office deputy, W. T. Bannerman, testified that when the execution was filed in the Sheriff's office by the plaintiff's attorney, the lawful fees, required by law to be prepaid, were demanded and that the plaintiff's attorney paid only fifty cents, and that accordingly the execution was served upon the defendant George Washington, who paid two dollars. That plaintiff refused to pay the fees to set apart the homestead of defendants, and the Sheriff proceeded no further, but made the return of the execution aforesaid.

The plaintiff offered evidence tending to prove that the plaintiff paid to the Sheriff's deputy one dollar and fifty cents at the time the execution was filed in the Sheriff's office, and that nothing more was due.

The evidence is very conflicting. The court, being of the opinion that the burden of proof was upon the plaintiff to show to the court by a preponderance of evidence that he tendered the fees required by law to the Sheriff or his deputy when he filed said execution, adjudged that the plaintiff did not tender to the Sheriff or his deputy the fees required by law for serving the said execution upon the defendants, and further that the plaintiff did not tender the fees setting apart the homestead and personal property exemptions, and therefore discharged the rule against the defendant and taxed the plaintiff with the costs of the proceeding. From this judgment the plaintiff appealed.

H. L. Stevens for plaintiff. (220)
No counsel contra.

AVERY, J. The only question raised by the appeal and discussed on the argument of case here was whether the Judge erred in holding that the burden of proof was upon the plaintiff when he undertook to contradict the Sheriff's return that no fees were "paid or tendered to lay off the defendant's homestead." In *Hunter v. Kirk,* 11 N. C., 277, *Judge Hall* said that, as the sheriff is "a sworn officer, his return cannot be contradicted by" a single affidavit. That case was cited with approval as to this point in *Mason v. Miles,* 63 N. C., 564. If the same amount of artificial weight is not still to be given to such returns, they are at least competent as official acts, and when admitted constitute prima facie evidence of the truth of what the sheriff stated in compliance with the requirements of law. *Simpson v. Hiatt,* 35 N. C., 470; *Loftin v. Huggins,* 13 N. C., 10. "A levy endorsed on the execution," said *Ruffin, C. J.,* in *State v. Vick,* 25 N. C., 491, "has been received as prima facie evidence for the Sheriff upon the ground that such an entry was a contemporaneous act, being a part of his return." If the return was prima facie or presumptively true, nothing further appearing, or until rebutted by contradictory evidence, it was the duty of the court to act on the assumption that it was a correct report of the Sheriff's official acts in reference to the process. Upon the authorities cited we think there was no error in the ruling complained of, and the judgment of the court below must be affirmed.

Affirmed.

Cited: Williamson v. Cocke, 124 N. C., 589; *Comrs. v. Spencer,* 174 N. C., 37.

(221)

C. A. BAUGERT v. WILLIAM B. BLADES ET AL.

Action for Trespass—Res Judicata—Estoppel as Between Several Defendants.

1. While the rule is that a judgment against several defendants determines none of the rights among themselves, but only the existence and legality of the demand, yet, where the respective rights of the parties are drawn in issue by them and adjudicated, the judgment is conclusive between them; therefore:

2. Where in an action to recover land each of two defendants claimed title in himself, and one was adjudged to be the owner of a certain part and the other of the balance, the judgment is *res judicata* as between such defendants and all persons claiming under them.

ACTION for trespass, heard before *Hoke, J.*, at Spring Term, 1895, of JONES, on an agreed statement of facts. Judgment for defendants. Plaintiff appealed.

(225) *H. C. Whitehurst for plaintiff.*
W. W. Clark and P. M. Pearsall for defendants.

FAIRCLOTH, C. J. James McDaniel, Sr., devised certain lands, of which the *locus in quo* is a part, to his son Starkey in fee, de-
(226) feasible in the event that the devisee should die leaving no lawful heir or issue surviving him, in which event the lands should be equally divided between the devisor's surviving sons. It was also declared in the will that if the son Starkey should desire to sell the lands and mills, the five or surviving sons should have the offer of purchase, at a price to be fixed by valuation if they could not agree, should they be disposed to do so.

In *McDaniel v. McDaniel,* 58 N. C., 351, which controls the present action, the devisee asked for a construction of the will, alleging that the five brothers would neither buy the lands nor waive their rights as an encumbrance on the power of the devisee to sell.

In a learned opinion it was adjudged that the five or surviving brothers should be put to their election, under the direction of the court, either to take the land in the manner prescribed or to decline it. What were the rights of the purchaser at the Sheriff's sale and his assignees and of those under the several conveyances from Starkey McDaniel, are questions not now before the Court. Each party claims under and through said Starkey, and the question turns upon the question of

estoppel, arising out of the judgment set out in the records and rendered at Fall Term, 1883, in which Starkey McDaniel was plaintiff and E. R. Page, Lewis M. Pollock and C. M. Pollock were defendants. The plaintiff claimed title in fee and alleged fraud in his conveyance to James McDaniel and demanded that the sale through the Sheriff be declared a trust for his benefit and that he recover the land from said E. R. Page and Lewis M. Pollock, said Page being the party under whom the plaintiff claims title by virtue of a judgment and commissioner's sale in 1888. The defendants Page and L. M. Pollock answered separately, denying the main allegations of the plaintiff, Starkey, and claimed title to the lands of which they were in possession. The judgment was, as set out in the record, that the defendant Lewis (227) M. Pollock was the owner of the part in excess of the homestead (the *locus in quo*) and that Page was the owner in fee of the homestead estate, and the action was dismissed as to C. M. Pollock.

The plaintiff insists that she is not concluded by said judgment, because Page, her grantor, and Pollock answered separately and there was no antagonism between them, each defending for separate parts of the land.

On examination of the record we find that the plaintiff, Starkey, sued for and demanded possession of the whole tract of land, alleging that the Sheriff sold in fact subject to the homestead, but conveyed the entire estate by deed to the purchaser. Defendant Page in his answer denies the material allegations of the complaint and alleges that he is owner in fee of said premises. The defendant Pollock answers and denies all the material allegations and says further that he has had a long and quiet possession and ought not to be disturbed.

It is quite apparent from these pleadings that an intelligent trial required that the rights of the defendants as well as the plaintiff should be fully determined and settled, as appears from the judgment was done, and we think the plaintiff is concluded by the record from denying the ownership of the *locus in quo* to be in Lewis M. Pollock. The rule seems to be that a judgment against several defendants determines none of the rights of the defendants among themselves, but only the existence and legality of the demand. Where, however, the respective rights of the parties are drawn in issue by them and adjudicated, the judgment is conclusive between them. If the party, however, entitled to the benefit of a judgment opens the same in part, it will be open for general purposes in the second action, as if it does not contain within itself orders or directions sufficient to carry it into effect, and can no longer be treated as *res adjudicata*. Par- (228) ties unwilling to be made plaintiffs are frequently made defend-

ants for the very purpose of having their rights adjudicated and to have titles quieted. If the parties have had a hearing and an opportunity to be heard and assert their rights they are concluded as far as it affects their rights presented and passed upon by the decree of the court. This question is discussed in 2 Black Judgments, section 599, in *Corcoran v. Canal Co.,* 94 U. S., 741, also in *Louis v. Brown,* 109 U. S., 162, 167. As to the liability of tenants in fee with an executory devise over, see 28 A. & E., 899, and notes.

No error.

Affirmed.

Cited: Jones v. Beaman, post, 263; *Weeks v. McPhail,* 129 N. C., 77; *Parrish v. Graham, ib.,* 232; *Gregg v. Wilmington,* 155 N. C., 29; *McKimmon v. Caulk,* 170 N. C., 57; *Wilson v. Jones,* 176 N. C., 208; *Hayden v. Hayden,* 178 N. C., 263.

JAMES O. SUTTON v. JOHN R. PHILLIPS.

Qui Tam Action—Appeal—Practice—Weights and Measures.

1. In case of a discrepancy between the case on appeal and the record the latter will govern, but where the verdict set out in the record is susceptible of different meanings and an admission of counsel set out on the case or on the argument is not contradictory but explanatory of the true meaning of the verdict, the latter will be allowed to govern.

2. The statute (section 3841 of The Code) does not make one liable to the penalty therein imposed until after his refusal to allow the standard keeper to seal and stamp the weights.

PETITION to rehear this case reported in 116 N. C., 502.

(230) *R. O. Burton and B. M. Gatling for petitioner.*
N. J. Rouse contra.

CLARK, J. Petition to rehear this case reported in 116 N. C., 502. The rehearing is restricted to the following point, which is stated on page 510: "The jury find in response to the first issue that the defendant sold meat to the plaintiff by 'weights which 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 word '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 sealed and stamped, did sell meat by them." In the case settled on appeal for this Court, signed by counsel, the following appears: "It was admitted when motion was made for judgment that the defendant had not been called on by the standard keeper for the purpose of sealing and stamping his weights and measures."

It is settled by numerous cases that if there is a discrepancy between the case on appeal and the record, the latter governs. *State v. Keeter,* 80 N. C., 472; *Adrian v. Shaw,* 84 N. C., 832, and other cases cited in Clark's Code, 2 Ed., p. 579. If, therefore, the verdict had found explicitly any fact, and in the case on appeal (whether signed by counsel or settled by the Judge) an admission to the contrary of the verdict were set out as having been made during the trial, the record of the verdict would govern. But here the verdict is susceptible (231) of different meanings, and the admission set out as having been made by plaintiff or his counsel on the argument for the motion for a new trial is not contradictory to the verdict, but explanatory of the true meaning thereof, and was in open court, with the evidence fresh in mind. On the rehearing here, counsel for plaintiff did not contest the correctness of this view of the verdict and of his having made the admission thereof.

This rehearing does not call in question so much of the former opinion as passed upon the constitutional question involved, which, besides, was cited and approved in *Burwell v. Hughes,* 116 N. C., 430, 437.

Petition allowed.

B. W. NASH, TRUSTEE, v. S. J. SUTTON ET AL.

Religious Society—Right of Individual Member—Removal of Faithless Trustees—Title of Property—Recovery of Legal Title.

1. Under the provisions of The Code, chapter 54, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created.

2. An individual member of a religious society has an equitable interest in the property held by the church and may maintain an action for

the removal of faithless trustees, who have deprived the society of property held by them in trust, for the purposes and in the manner set forth in chapter 54 of The Code.

3. In such case the judgment may be so framed as to appoint the plaintiff trustee instead of the trustees so removed and to direct a conveyance of the legal title of property to him, to be held in trust for the use and benefit of the society and to convey it as such society may direct.

(232) ACTION tried at Fall Term, 1894, of LENOIR, before *Boykin, J.*, and a jury.

Upon the close of the plaintiff's testimony, his Honor intimated that the plaintiff could not recover, whereupon he submitted to nonsuit and appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

W. R. Allen for plaintiff.
N. J. Rouse for defendants.

MONTGOMERY, J. Chapter 54 of The Code, entitled "Religious Societies," furnishes full security for the protection of the possession and title to lands given, granted or devised for the purpose of religious worship. The trustees to whom the property is or has been conveyed or devised are the owners of the legal estate for the benefit of the church, congregation, denomination or society "for their several use according to the intent expressed in the gift, conveyance or will; and in case there shall be no trustee, then in the said churches, denominations, congregations or societies according to said intent." Section 3667 of The Code further provides that any ecclesiastical body, whether it be called synod, conference or convention, representing any church or religious denomination, may appoint, whenever and in such manner as such bodies, societies or congregation may deem proper, a suitable number of persons as trustees, each for itself, which trustees and their successors shall have the right and power to receive gifts and to buy and to hold property, real and personal, in trust for such church denomination, religious society or congregation. There is a limit to such acquisition of property, however, as to lands not used directly for religious use and worship, which is not necessary to notice here. Section 3668 of The Code provides that "the body appointing may remove such trustees or any of them and fill all vacancies caused (233) by death or otherwise, and the said trustees and their successors may sue and be sued in all proper actions for or on account of the donations and property so held or claimed by them." The plaintiff brings this action in his own behalf as a member of Hickory Grove

Church and as trustee of Union Baptist Association to have set up a lost deed to the property in dispute and to have the defendants, whom he alleges to be faithless trustees of the church, removed; to have himself declared trustee and for the possession of the property to hold for the benefit of the Union Baptist Association. It is alleged in the complaint that a deed was made by J. E. Sutton and wife to the trustees of the church, the defendants, for the land on which the church was built. The deed was made in 1872 for "the use and benefit of the Baptist denomination and church at Hickory Grove"; that the defendants as such trustees took charge of the property, and the church congregation used and enjoyed it as a place of worship for many years thereafter; that the deed was duly registered but has been lost, and the registry containing the registration has been destroyed by fire; that the plaintiff has been unlawfully deprived of the use of the church property and ejected therefrom; and that the defendants abandoned their faith as Baptists, and, with the greater number of the congregation, have joined another denominaton of Christians, and have been for some time using and enjoying the church property exclusively for the benefit of the church which they recently joined, and claim the property as that of the church of their new faith; that the defendants have been removed as trustees by the Union Baptist Association on account of their faithlessness, and the plaintiff has been appointed by the association sole trustee for their benefit, that association claiming the right to remove the defendants and to appoint the plaintiff in (234) their stead under powers conferred on them by the action of the churches comprising the association, including the church at Hickory Grove; and that the plaintiff as such trustee has demanded the property from the defendants, and also a deed from them to him, which the defendants refused to give. The plaintiff on the trial testified to all the material facts set out in the complaint, and upon the conclusion of his testimony the court intimated that the plaintiff could not recover, although the church at Hickory Grove might be disorganized and incapable of transacting its business, as the plaintiff admitted that no conveyance had been made from the trustees of the church to him. There was error in this ruling. It was not necessary that the plaintiff should have had the legal title to the property to entitle him to relief in this action. It is not required of us to pass on the regularity and effect of the appointment of the plaintiff as trustee of the Union Association, for as an interested member of the Hickory Grove Church and of the Union Baptist Association he had an equitable interest in the property sufficient to enable him to bring this action against the defendants, who, as he had alleged and testified, proved faithless to their

trust, and to have them removed for the breach and a new trustee appointed. When the case is heard on the complaint and answer, if the plaintiff shall recover, the judgment can be so framed as to remove the defendants for their bad faith in their office of trustees, and to appoint the plaintiff a trustee in their place to hold the property for the benefit of the Union Baptist Association, he, at any time the association may require, to convey the property as the association may direct.

The defendants may also be required to convey to the new (235) trustee the legal title to the property, and the registration of the judgment be made to operate as the conveyance.

Error.

Cited: Windley v. McCliney, 161 N. C., 320.

NOTE.—In this case in 109 N. C., 550, Mr. W. R. Allen is reported as having an appearance for the defendants. He was not employed but simply read the authorities of Mr. George Rountree, the counsel of the defendant, who was necessarily absent, and at his request and through courtesy to him.

BRUCE WILLIAMS, TRUSTEE, ET AL. v. PINKNEY RICH ET AL.

Action to Foreclose Mortgage — Agency — Evidence — Instruction to Jury—Usury—Agreement to Pay Attorney's Fee in Case of Foreclosure of Mortgage.

1. Where, in the trial of an action to foreclose a mortgage given to secure a note to mortgage company for money loaned to the defendants, the defense was usury and it appeared that the note was payable at Corbin Banking Company's office, that the deed was executed to one S., who represented himself as plaintiff's agent, but that the loan was negotiated by one H., who sent the note and deed to the Corbin Banking Company, which in return sent him $170, of which defendants received $157, and it also appeared from the testimony of H. that he was the agent of the Corbin Banking Company, which to his knowledge was acting in the matter in connection with plaintiff mortgage company: *Held,* that it was proper to submit to the jury the question whether such banking company was the agent of the plaintiff mortgage company.

2. Where, in the trial of an action to foreclose a mortgage or deed in trust, the defense was usury and it appeared that the note given to plaintiff mortgage company was sent to Corbin Banking Company, which remitted the money to its attorney who conducted the negotiations and

who testified that the banking company and the plaintiff mortgage company were connected in the transaction, it was proper to instruct the jury that they should consider the whole evidence as to the agency of the banking company and that, if the latter acted simply as a broker who at defendants' request negotiated the loan from the plaintiff mortgage company and not as the agent of the latter company, the plaintiff mortgage company was entitled to recover notwithstanding the exorbitant commission charged, but that if the banking company was the agent of the plaintiff mortgage company, or even associated or connected with it in business and shared the profits of the transaction, the plaintiffs were presumed to know of the usurious nature of the transaction and could not recover.

3. A stipulation in a note or mortgage for the payment by the mortgagor, or out of the proceeds of the sale, of attorney's fee, in addition to the principal and interest of the note, is evidence of the usurious nature of the transaction.

ACTION tried before *Graham, J.*, and a jury at August Term, (236) 1895, of DUPLIN.

There was a verdict for defendants, and from the judgment thereon the plaintiffs appealed. The facts sufficiently appear in the opinion of *Associate Justice Montgomery.*

Shepherd & Busbee and H. L. Stevens for plaintiffs.
W. R. Allen for defendants.

MONTGOMERY, J. The defendant executed his promissory note to the plaintiff (The American Freehold Land & Mortgage Co., of London, Limited) for $200 payable five years after date with interest at 8 per cent payable annually. Though it was secured by deed of trust on land, it contained an attempt to waive the exemption provided for by the Constitution in all the property the debtor had (237) or might thereafter acquire. The *note* provided that in case the interest was not promptly paid, the unpaid interest should bear interest, and also a provision that if it had to be collected by suit all costs of collection, ten per cent of the principal and interest, as attorney's fees, were to be paid by the maker. The deed of trust was executed by defendant and his wife to one J. K. Sherwood, who represented himself to be the agent of the plaintiff in making the loan, upon a tract of land in Duplin County; and it contained a provision that, in case foreclosure should have to be made to collect the debt, all costs and expenses thereof, including a lawyer's fee of $20, should be paid out of the proceeds. It provided further that the debtor should pay *all taxes upon the land* during the loan, and on the deed of trust

or the note secured thereby. The note was made payable to The Corbin Banking Co., at New York City, and it, together with the deed of trust, was sent by one W. L. Hill to the said banking company, upon the reception of which that company sent to Hill $170, of which sum the defendants received $157. The interest not having been paid promptly, the plaintiffs bring this action to appoint a trustee in the place of one who has died, and for a decree for a sale of the land under the terms of the deed. The defendants admit the execution of the note and deed and plead usury, insisting that the plaintiffs are entitled to nothing but the money actually loaned to them, $157 less $56 which they have already paid. After the testimony was all in the plaintiffs asked the court to give the jury the following instructions: "That there was no sufficient evidence to go to the jury to show that the Freehold company had any connection with the Corbin Banking Company, or that Hill was the agent of the Freehold company." The court declined so to charge, and plaintiffs excepted. Two other
(238) exceptions were entered to certain parts of the charge, and with the first, are sufficiently set out in the plaintiff's four assignments of error, the first two of which can be considered together and are as follows:

"1. For that the court erred in submitting to the jury whether or not the Corbin Banking Company was agent of the plaintiffs, there being no evidence of such agency.

"2. For that the court erred in charging the jury that if the Corbin Banking Company was agent of plaintiffs or even associated in business and sharing the profits with plaintiffs, then plaintiffs were presumed to have knowledge of the usurious transaction and could not recover, there being no evidence of such agency or association in business, the only evidence being to the contrary."

There was no error in his Honor's refusal to charge as requested by plaintiffs, nor in the charge given in reference to the privity between plaintiffs and the Corbin Banking Company, in submitting to the jury whether or not the Corbin Banking Co. was agent of plaintiffs. The testimony of the witness Hill was amply sufficient to be submitted to the jury on these points. Besides, the fact appeared in the note that it was to be paid at the Corbin company's bank. He testified that the defendant agreed to pay the witness forty dollars out of the two hundred dollars; that he, witness, paid the defendant $157, and that the Corbin Banking Company, to whom he forwarded the note and deed of trust, sent him $170, and not $200; that he was its agent and that he knew it was acting with the plaintiffs. The defendant as a witness for himself testified that Hill *came to him* and said that

he represented a company for loaning out money on real estate at 8 per cent, and asked him if he wished to borrow, and witness told him he would take $200; that Hill went out and inspected the land and said that he would let the witness have the money. (239)

The third assignment of error is that "the court erred in selecting the witness Hill's testimony that he was agent of the Corbin Banking Company and knew it was sometimes acting with plaintiffs, and failing to explain to the jury the capacity in which it acted." The witness Hill did not say that he knew the Corbin Banking Company was *sometimes* acting with the plaintiffs, but on the contrary he testified that he knew it was acting with the plaintiffs, though *it sometimes* did business with other parties. The jury concluded from the witness' testimony that almost the entire business of the Corbin Banking Company was with the plaintiffs and for them, and that when they did business with any other person it was the exception. His Honor's charge to the jury on the relation between the plaintiffs and the Corbin company as to their dealings and acting with each other was sufficient. He arraigned the evidence and stated the contentions between the parties, and told them that if they believed from the evidence that the Corbin Banking Company was simply a broker, who at the instance of the defendant negotiated the loan with the plaintiffs, and was not the agent for the plaintiffs, then the plaintiffs were entitled to recover no matter how exorbitant the commissions charged; but otherwise, if they believed the banking company was agent of the plaintiffs, or even associated in business and sharing profits with plaintiffs, then plaintiffs were presumed to have knowledge of the usurious nature of the transaction and could not recover. There could be no reasonable objection to his Honor's instruction to the jury that they might consider Hill's testimony in arriving at their verdict. He did not say: "If you believe him on this point your verdict will be for the defendants." He did not single out the testimony of one particular witness when there were others testifying to the same (240) matter, and charge the jury that if they believed a particular witness they should find a certain way, as was done in the cases of *Jackson v. Commissioners,* 76 N. C., 282, and *Anderson v. Steamboat Co.,* 64 N. C., 399, and which this Court said was improper. He had already set forth the whole evidence and told the jury to consider it all in arriving at their conclusion.

The fourth assignment of error is that his Honor erred in charging the jury "that a stipulation in a note or mortgage, in the event of default of payment of the note and interest and said note should have to be collected by foreclosure of mortgage or suit in court, an attorney's

fee should be due and payable by the maker of the note, in addition to the principal and interest, was evidence of the usurious nature of the transaction." There was no error in this statement of the law. In *Tinsley v. Hoskins,* 111 N. C., 340, it is held that a stipulation in a note "that in case this note is collected by legal process the usual collection fee shall be due and payable therewith," in addition to legal interest, is against public policy and invalid. Such stipulations are in the nature of forfeitures and encourage litigation. They can readily be used to cover usurious agreements, and excessive exactions may be had under the guise of an attorney's fee. We do not mean to say that a reasonable and conscionable attorney's fee may not be charged for the negotiation of a loan for his client, the borrower, and taken out of the money loaned, nor is there any question here as to the costs of foreclosure, but that is not this case.

There was no error in the matters complained of, and the judgment is Affirmed.

Cited: Turner v. Boger, 126 N. C., 302; *Bank v. Lumber Co.,* 128 N. C., 195.

(241)

J. W. BLOUNT ET AL. V. B. D. WARD ET AL.

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

Where an appeal has been dismissed for failure to print the record, it will not be reinstated when it appears that appellant had from May to October to have the record printed, besides ample time after the appeal was docketed, but postponed the duty until within a very short while before the case was reached, when an unexpected delay in the mails prevented the printing.

MOTION to reinstate an appeal dismissed for failure to print the record.

The appeal was dismissed for failure to print the record, and the appellants, upon affidavits, moved to reinstate.

W. R. Allen and A. D. Ward for plaintiffs.

R. C. Strong for defendants.

CLARK, J. This action was tried at February Term, 1895, of the court below, and the case on appeal was settled by the Judge in May, 1895. There was ample time to have had the necessary parts of the record printed, even after the appeal was docketed in this Court, though it might readily have been printed and sent up with the transcript. The appellants chose, however, to put off till almost the very last minute the printing of the record, and if in so doing the unexpected delay in the mail prevented the printing, the appellants, and not the innocent appellees, must suffer from the consequences of the risk thus assumed. The appellees were here by counsel to argue the cause when reached, and as the Court would not permit this to be done on the manuscript record, the appellees had a right upon motion to elect to dismiss the appeal in preference to a continuance *Stevens v. Koonce,* 106 N. C., 255. The motion to reinstate cannot be (242) granted. A little attention to business in proper time is always more effectual than a great deal of attention to it after it is too late. The other parties have the right not to be again called on to give attention to the matter after "the day had in court."

Motion denied.

SARAH A. KORNEGAY ET AL. v. F. W. KORNEGAY ET AL.

Action to Set Aside Deed—Evidence—Expert Witness, Competency of.

1. Where, in an action to set aside a deed for land purporting to have been executed to defendant by one under whose will the plaintiff claimed the same land, the defendant testified to the execution of the deed, it was not error to require the grantee on cross-examination to state whether the signatures to the will and codicil under which plaintiff claimed were the genuine signatures of the testator and alleged grantor in the deed.

2. A witness who testifies that he has been Register of Deeds for several years and engaged for many years in mercantile business, with opportunities for and in the habit of comparing signatures to writings, and that he can by examining and comparing two signatures tell whether they were made by the same person, sufficiently qualifies himself as an expert and is competent to testify whether a signature admittedly genuine is the same as one in question.

ACTION to set aside a deed upon the ground of forgery, tried before *Graham, J.,* and a jury, at August Term, 1895, of DUPLIN.

There was a verdict for the plaintiffs, and from the judgment thereon defendants appealed. The facts are stated in the opinion of *Associate Justice Furches.*

(243) *A. D. Ward for plaintiffs.*
H. L. Stevens and W. R. Allen for defendants.

FURCHES, J. This was an action to set aside a deed held by the *feme* defendant from her father, Henry C. Kornegay, conveying a tract of land to her. Plaintiffs claimed the same land under the will of said Henry C. Kornegay and alleged that the deed to the *feme* defendant was a forgery. There was a verdict and judgment for plaintiffs and defendants appealed.

The record presents four exceptions, but neither of them can be sustained. Both the *feme* defendant and her husband were examined as witnesses in behalf of defendants as to the execution of the deed. And on cross-examination each was shown the will of Henry C. Kornegay and asked the question whether they knew the handwriting and signature of the said Henry, and to state if the signature to the will and the codicil thereto were not said Henry C. Kornegay's. To this they each objected, the objection was overruled and each excepted. They then testified that they were the genuine signatures of the said Henry. These two exceptions, presenting the same question of law, are treated together and must be overruled.

Defendants introduced Henry C. Moore and L. B. Carr as expert witnesses as to handwriting. The witness Moore testified that he had been Register of Deeds for ten years and engaged in mercantile business for forty years; that he was in the habit of comparing signatures to writings and could give an opinion satisfactory to himself in regard to the same. He was then shown the defendant's deed and the will and codicil thereto, and asked if they were in the same handwriting. Defendants objected upon the ground that he had not qualified himself, the objection was overruled and defendants excepted. Witness
(244) then testified that the signature to the deed was in a different handwriting from the signatures to the will and codicil. The witness Carr testified that he had been Register of Deeds for two years and had been clerk in a store and merchant for 15 or 20 years; that he had frequent occasions to examine and compare handwritings, and that he could by examining and comparing two signatures tell whether they were made by the same person or not. He was then shown the deed and the will and codicil, and asked if the signatures were in the same handwriting. Defendants objected upon the ground that witness had not qualified himself as an expert, the objection was overruled and the defendants excepted. Witness then testified that the deed was in a different handwriting from the will and codicil. These two exceptions present the same question and are treated together, and

must be overruled. *State v. DeGraff,* 113 N. C., 688. These witnesses had qualified themselves as experts, and defendants admitting on their cross-examination that the signatures to the will and codicil were genuine signatures of the testator Henry C. Kornegay, they were proper subjects to be used in comparing the deed with them. *State v. DeGraff, supra; Tunstall v. Cobb,* 109 N. C., 316. There is no error.

Affirmed.

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(245)

J. H. COBB ET AL. v. SMITH EDWARDS.

Parol Trusts—Purchase at Judicial Sale for Another—Evidence—Province of Court and Jury.

1. Where one buys land at a judicial sale, having previously, in contemplation of or at the time of the bidding, agreed to buy and hold it subject to the right of another to repay the purchase money and demand a reconveyance, a trust is created upon the transmutation of the legal estate, our statute not requiring that declarations of trust shall be manifested and proved by some writing.

2. In such case the proof must be strong, clear and convincing that the agreement was made before, in contemplation of or at the time of the sale and must be supported by evidence equally strong of independent facts or circumstances inconsistent with a purpose on the part of the purchaser to hold the land for himself.

3. Where, in the trial of an action in which it is sought to establish such a trust, it appears to the court that there is no evidence of the kind required by law to entitle the plaintiff to the relief, he may so declare, but where such evidence does appear it is the duty of the court to tell the jury that the law requires clear, strong and convincing proof to show the agreement, and that it is their province to determine whether the testimony offered does so convince them of its truth.

4. The purchaser at a judicial sale of the land of intestate was W., the husband of one of the four heirs of intestate. J., another heir, was guardian of the two remaining heirs, E. and C. C. testified that he heard J. ask W. to buy it at the sale and that he agreed to purchase it and hold it till "we" could redeem it. Another testified that during the bidding W. asked another person not to bid, as he was bidding for J. and E. Another testified that he heard W. say that his wife and J. had asked him to buy the land for them, and he was going to do so. Another testified that W. said they had asked him to buy it, and he was going to buy it to keep it in the family. Another testified that W. said he would be willing for the heirs to have it back if they would pay his money and interest. Another testified that after the sale W. told him J. had asked

him to buy it, and he agreed to, and if they would pay the money back he would convey the land back. Others testified to declarations of W. that he had bought it for them and had turned it over to J. to rent, the rents to be paid to him till the debt for the purchase money was discharged: *Held*, sufficient to show an understanding that the land was to be bought for the heirs according to their interests.

ACTION heard before *Brown, J.*, at May Special Term of GREENE, on the report of a referee and exceptions of defendants thereto.

The exceptions were overruled and the defendant appealed. The facts are sufficiently stated in the opinion of *Associate Justice Avery.*

(246) *J. B. Batchelor, G. M. Lindsay and S. Galloway for plaintiffs.*
W. C. Munroe for defendant.

AVERY, J. As the argument developed the fact that intelligent counsel differ widely in the interpretation of our own adjudications upon the subject of parol trusts, especially as to the nature and *quantum* of proof necessary to set them up, it is perhaps well to recur to first principles and begin at the foundation the discussion of the doctrine that has been built upon them.

Judge Pearson in *Wood v. Cherry*, 73 N. C., 110, laid down the rule that trusts could be created only in one of four modes, viz., either by

1. Transmission of the legal estate where a single declaration will raise the use or trust.

2. A contract based upon a valuable consideration to stand seized to the use of or in trust for another.

3. A covenant to stand seized to the use of or in trust for another upon good consideration.

4. Where the court by its decree converts a party into a trustee on the ground of fraud.

Where it is proved satisfactorily that the purchaser at a judicial sale of land agreed with another previously, in contemplation of or at the time of bidding it off, that he would buy and hold it when bought subject to the right of the latter to repay the purchase money and demand a reconveyance, it has been repeatedly held by this Court that the beneficial interest to which the agreement relates passes with the transmutation of the legal estate, because there is no such requirement in our statute as that contained in 29 Car. II., that declarations of trust shall be manifested and proved by some writing. *Shelton v. Shelton*, 58 N. C., 292; *Pittman v. Pittman*, 107 N. C., 159;
(247) *Cloninger v. Summit*, 55 N. C., 513; *Cohen v. Chapman*, 62 N. C., 94; *Hargrave v. King*, 40 N. C., 430; *Jones v. Emry*,

115 N. C., 158; *Thompson v. Newlin,* 38 N. C., 338. But where the grantor by a mere declaration engrafts upon his own deed a trust, the declaration must be neither prior nor subsequent to, but contemporaneous with its execution. *Blount v. Washington,* 108 N. C., 230; *Smiley v. Pearce,* 98 N. C., 185. It is also settled law that where land is bought with the money of one person and is conveyed to another, the latter becomes *ipso facto* a trustee for him who furnished the money, without any express agreement between them, because the consideration and followed by actual occupancy and the erection of valuable estate to fraudulently hold and enjoy the beneficial interest which rightfully follows the consideration. *Holden v. Strickland,* 116 N. C., 185; *Thurber v. LaRoque,* 105 N. C., 301; *Leggett v. Leggett,* 88 N. C., 108. But where the legal estate is not conveyed a trust cannot be raised by a parol declaration, even though founded upon a valuable consideration and followed by actual occupancy and the erection of valuable improvements. *Frey v. Ramsour,* 66 N. C., 466; *Pittman v. Pittman, supra*

It is contended for defendant that if there is evidence tending to prove an agreement, it is not sufficiently strong or sufficient in *quantum* to show that it was made before or at the time of the transmutation of the legal estate, nor is it sufficiently explicit in pointing out the *cestuis que trustent* for whom the purchase was made.

Edward C. Cobb, one of the plaintiffs, testified that he was about 19 years old when he heard his brother and coplaintiff, James H. Cobb, who had been appointed by the will of Devereux Cobb guardian of the witness and the other plaintiff, his brother C. E. Cobb, ask W. H. Edwards if he would buy the land, and that Edwards said rather than see it go for nothing he would buy it, and thereupon agreed (248) to purchase and hold it until "we" (which was meant for the owners under the will) could redeem it. J. H. Cobb deposed that while the sale was being made and after W. H. Edwards had bid about the amount of the indebtedness of Devereux Cobb's estate, J. M. Edwards raised the bid once or twice. Whereupon W. H. Edwards approached him and in the presence and hearing of the witness "requested him not to bid on the property, as he was bidding it in for witness and his brother E. C. Cobb." George Warrel testified that he worked with W. H. Edwards and was in the habit of chopping with him daily, and that he heard Edwards say that "Mrs. Edwards and James Cobb had asked him to buy the land for them and he was going to buy it for them." Mrs. Edwards and the three plaintiffs were the tenants in common of the land as devisees of Devereux Cobb and by descent from a deceased devisee, holding in the following proportions, to-wit: J. H.

Cobb seventeen forty-sixths, J. T. Cobb eighteen forty-sixths, Smithey Edwards eight forty-sixths, and E. C. Cobb three forty-sixths. Robert Manuel testified that W. H. Edwards said before the sale "that they had asked him to buy it and he was going to buy it *to keep it in the family.*"

Haywood Edmundson "thought that Edwards told him before, but knew he told him after the sale, that he would be willing for the heirs to *have it back* if they would pay his money and interest." Alfred Sumner testified that Edwards told him after the sale that James Cobb kept coming to him to buy the land and he finally agreed to buy, and if *they would pay the money back, he would convey the land back.*

Besides, several other witnesses not only testified to subsequent declarations of Edwards that he had bought for them, but that he had
(249) turned the land over to J. H. Cobb to rent out, with the understanding that the rents were to be paid to him (Edwards) till the debt for the purchase money should be discharged. The possession was thus put in J. H. Cobb, who, according to the testimony of his brother, afterwards turned it over to him, for a person holds possession either by himself, his servants or his tenants. The relation of landlord and tenant was certainly created, if we are to believe that in consequence of the declarations of Edwards the occupants leased from James H. Cobb and placed themselves in such a position that they were estopped to deny the tenancy under him or his title.

We think that the testimony taken as a whole was sufficiently explicit (if strong enough) to show on the part of W. H. Edwards as well as on the part of J. H. Cobb, acting for himself and his two wards, an understanding that the land was to be redeemed or bought *back* by the owners holding under the will according to their several interests. The inference might be plainly drawn that J. H. Cobb always spoke for himself and his two wards, as it was his duty to do. It crops out also in the testimony that the wife of Edwards joined her brothers in the request to buy and that the object was to keep it in the family. When the plan of paying for it out of the rents was adopted, if we believe the testimony, the object was to make the land relieve the encumbrance with the obviously just result of restoring it to those who before owned it.

Admitting the principle contended for (1 Perry Trusts, sec. 77), we think that the proof tends to show with sufficient distinctness who were to be beneficiaries of the trust, if created.

In addition to the direct evidence that there was a prior agreement to buy and allow the owners to redeem, the plaintiffs offered testimony tending to show subsequent declarations of Edwards, some of

them expressive of his willingness at the time of making them to (250) reconvey upon repayment of the purchase money, but others which amounted to a clear acknowledgment that he had agreed with the plaintiffs, previous to the sale, to reconvey.

Without further recital of the evidence, it may be stated in general terms that there was testimony tending to show an agreement made by Edwards with his wife and her brothers before the sale, and that the terms of it were reiterated in a declaration made to James Edwards a moment before he was declared the highest bidder. The fact, proved by several witnesses, that Edwards stepped aside and had some conversation, while the crier was offering the land, and that James had made one or more bids before, but none afterwards, tends strongly to corroborate the testimony as to what passed between them. While his subsequent declarations of the nature of the mutual understanding with his brothers-in-law and his wife would not of themselves have been sufficient to engraft the trust on the deed made to him, they were corroborative of the evidence that there was such an agreement existing at the time of the sale and therefore enforcible in equity. *Hamilton v. Buchanan,* 112 N. C., 463. The testimony that Edwards acknowledged the possession of J. H. Cobb for himself and cotenants in common by directing the lessees of the land to apply to him for leases, and claiming only that the rents should be applied to the discharge of the debt, and that he suffered J. H. Cobb to turn over the management to his brother, if believed, was a pregnant circumstance, outside of the mere declarations, tending to show the existence of the agreement at the time of the sale. The act of exercising dominion by the persons claiming to be the beneficiaries under the trust, with the assent and under the directions of the alleged trustee, and the refusal of the latter to assert any right except that to apply the rents to the debt (as the plaintiffs contend it was a part of the agreement to do) (251) were, if believed, acts on the part of Edwards and the plaintiffs not only consistent with the existence of such an understanding and the mutual purpose to adhere to it, but inconsistent with a claim of absolute and unqualified ownership on his part. But this case is distinguished by both *Chief Justices Smith* and *Pearson* (*Shelton v. Shelton, supra,* and *Shields v. Whitaker,* 82 N. C., 516) from that class of suits in equity brought "to reform and correct a deed upon the ground of fraud, ignorance, mutual mistake or undue advantage," where evidence of mere declarations is held insufficient, and proof of matters *dehors* the deed and incompatible with the idea that it embodies the intent of the parties is required before equity will interfere. It is not material whether the proof in this case does or does not come up to

the strict requirement in that class of cases, since a different rule is applicable where the plaintiff simply seeks by evidence of a previous or contemporaneous agreement to engraft upon the deed of a purchaser at a judicial sale a trust to hold the legal estate for others who are to repay the purchase money advanced by him. In such cases the proof of an agreement existing at the time of the sale that the purchaser was to buy for the benefit of the claimants must be strong, clear, and convincing, and must be supported by evidence equally strong of facts or circumstances inconsistent with a purpose on the part of the purchaser to hold the land for himself, but the latter purpose may be manifested by conduct subsequent to the sale. As to the *quantum* of proof required, the rule is the same as where the equity grows out of furnishing the purchase money to another who takes title to himself, though, as already stated, no agreement need be shown in the latter class of cases. *Williams v. Hodges,* 95 N. C., 32; *Ferguson v.* (252) *Haas,* 64 N. C., 772; *Link v. Link,* 90 N. C., 235; *Mulholland v. York,* 82 N. C., 510; *Vestal v. Sloan,* 76 N. C., 127; *Vannoy v. Martin,* 41 N. C., 169.

When it appears to the court that testimony has been admitted tending to prove an agreement antecedent to and in contemplation of the sale, or contemporaneously, so that it exists when purchase is made, and that testimony has also been offered tending to prove independent acts or admissions on the part of the purchaser inconsistent with the claim of absolute ownership, it is not the province of the court but of the jury to weigh the testimony and determine, as in other cases, where the *quantum* of evidence is fixed by law, whether it is sufficient according to the requirement of the law as stated to them by the court. The court may declare that there is not evidence of the kind required by law to entitle the plaintiff to the relief sought, but were the Judge to pass upon the credibility of a witness on account of interest or intelligence or the intrinsic character of his testimony, or upon the weight to be given to the evidence of one or all, where the testimony, if believed, might be sufficient to establish a right to the relief asked, he would invade the province of the jury, since the Constitution confers upon the courts no jurisdiction to pass upon the facts in any such case. Where the Judge is not at liberty to say that there is no evidence of the kind required by the rule of law prescribed in such cases, it is his duty to tell the jury that the law requires clear, strong and convincing proof to show the agreement as well as the subsequent acts or admissions, and that it is their province to say whether that offered does so convince them of its truth.

In *Berry v. Hall,* 105 N. C., 154, following *Ferral v. Broadway,* 95 N. C., 551, and in *Helms v. Green,* 105 N. C., 251, this Court has declared that expressions used by the Judges when discussing the facts as chancellors, in cases where it was proposed to impress a trust on deeds, were not to be considered as legal directions to juries (253) exercising a similar province under the new system. The discussions which indicate what convinced the minds of chancellors in the opinions in chancery cases are often discussions of the facts, when the chancellor, performing the office now devolving on a juror, was endeavoring to reach his conclusions upon facts as distinguished from those of law founded upon them.

The Judge has no more right, when the testimony if believed is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof that he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt. In *Hemphill v. Hemphill,* 99 N. C., 436, it was held that where the court was not asked to pass upon the question whether there was evidence *dehors* a deed such as would warrant its submission to the jury to show mistake in its execution no exception could afterwards be taken to its sufficiency.

If, as counsel insisted, there is any language used in the *obiter* statement of the rule in *Harding v. Long,* 103 N. C., 1, or in *Ely v. Early,* 94 N. C., 1, repugnant to what we have said, such expressions must be considered so far modified as to bring those cases into perfect harmony with the law as it has been formulated in this case. The judgment of the court below is

Affirmed.

Cited: Faison v. Hardy, 118 N. C., 146; *Kelly v. McNeill, ib.,* 354; *Lehew v. Hewett,* 130 N. C., 22; *Sallenger v. Perry, ib.,* 138; *Owens v. Williams, ib.,* 168; *Ratliff v. Ratliff,* 131 N. C., 431; *Sykes v. Boone,* 132 N. C., 203; *Jones v. Warren,* 134 N. C., 392; *Wilson v. Brown, ib.,* 405; *Avery v. Stewart,* 136 N. C., 433, 434, 441; *Lehew v. Hewett,* 138 N. C., 10; *Davis v. Kerr,* 141 N. C., 17; *Chappell v. White,* 146 N. C., 573; *Gaylord v. Gaylord,* 150 N. C., 231; *Jackson v. Farmer,* 151 N. C., 281; *Taylor v. Wahab,* 154 N. C., 224; *McWhirter v. McWhirter,* 155 N. C., 147; *Culbreth v. Hall,* 159 N. C., 591; *Anderson v. Harrington,* 163 N. C., 143; *Ray v. Patterson,* 170 N. C., 227; *Champion v. Daniel, ib.,* 332; *Grimes v. Andrews, ib.,* 523; *Allen v. Gooding,* 173 N. C., 95; *Williams v. Honeycutt,* 176 N. C., 103; *Rush v. McPherson, ib.,* 568.

(254)

JAMES B. JONES ET AL. v. SAMUEL JONES.

Action to Recover Land and Rents—Vendor and Vendee—Contract to Purchase—Default—Agreement to Pay Rent—Landlord's Lien.

1. After default by a vendee of land to pay the purchase money, the vendor may by contract become landlord of the vendee so as to avail himself of the landlord's lien given by section 1754 of The Code; the rent, however, to go as a credit upon the purchase price agreed to be paid for the land.

2. Such a contract not being forbidden by statute, nor contrary to public policy, nor forbidden by equity, the courts will not abridge the freedom of contracting by declaring it void.

ACTIONS to recover land and certain crops grown on the land for 1893, begun separately between the parties, and consolidated by order of the court, before *Hoke, J.*, at February Term, 1895, of GREENE.

Defendant demurred *ore tenus* to the complaint to recover crops for 1893, grown on the land in controversy, on the ground that the complaint did not state facts sufficient to constitute a cause of action. Demurrer overruled. Defendant excepted. The court submitted the following issues:

"1. Are plaintiffs the owners of the land described in complaint? Ans.: Yes; subject to defendant's claim under the bond for title from J. P. Britt.

"2. Is defendant in the wrongful possession of the land? Ans.: No.

"3. Is defendant in possession under a contract to purchase made with Britt, deceased, in 1886? Ans.: Yes.

"4. Has defendant been in continuous possession since the execution of said contract? Ans.: Yes.

"5. Did defendant at any time during such possession agree to hold the land as plaintiff's tenant, and for what period? Ans.: Yes; for two years—1892 and 1893.

(255) "6. What amount and value of property has been seized and held by court process, and which was rent under said contract? Ans.: Yes; $67.50.

"7. Has defendant abandoned and relinquished his right under the contract of purchase from Britt? Ans.: No.

"8. What balance is due and owing from defendant to plaintiffs on said contract of purchase? Ans.: The amount of the notes, subject to a credit of 550 pounds of cotton paid J. P. Britt, and $67.50 property seized, by estimating cotton at 8 72-100 cents per pound, with interest

from maturity of each note, subject to above credits, one in the fall of 1886 and second in the fall of 1893, to be calculated, by agreement, by the Clerk."

By consent, B. W. Britt, executor of J. P. Britt, was made a party plaintiff.

It was in evidence: That the defendant entered into possession of the land in the year 1886 under a contract of purchase and bond for title, and gave his note or cotton bonds for the purchase money; that the bond for title was registered in 1886; that the contract of purchase was made with James P. Britt, testator of the plaintiff B. W. Britt; that he died in the year 18—, leaving a will, with B. W. Britt as executor, which will was duly admitted to probate. The bond for title executed by James P. Britt to Samuel Jones on 1 February, 1886, was introduced in evidence, and is set out in the case, conditioned that title is to be made if there be no default in the payment of the notes or cotton bonds given for the purchase money.

The tenth item of the will of James P. Britt, offered in evidence, is as follows: "My will is that the Lane tract and Tom Jones tract of land be sold and proceeds applied to the payment of my debt; also the money collected from my notes and accounts; and if there should be any surplus over and above the payment of debts, that (256) such surplus be equally divided and paid to my surviving heirs." That after B. W. Britt qualified as executor he advertised the land in controversy for sale under power of the will, and plaintiffs became the purchasers, and the same was conveyed by the executor. That defendant had been in possession continually since his purchase, in 1886, and had in his possession the bond for title, and refused to surrender the same when demand was made upon him by the executor prior to the sale, to plaintiffs, and after the sale of the land to Jones & Herring the notes were delivered to them by executor. That the notes for the purchase money are still held by plaintiffs, and were introduced in evidence. The sale of the land to Jones & Herring was in January, 1892. Plaintiffs offered evidence to show a renting by defendant from Jones & Herring, after they had bought at the executor's sale, for the years 1892 and 1893. This evidence was objected to by defendant as incompetent to confer a lien under the landlord and tenant act. Objection overruled. Defendant excepted. It was admitted that the value of the crops seized under claim and delivery proceeding was $67.50, and they were grown on the land in controversy in 1893, and claimed by plaintiffs Jones & Herring for rent and advances for that year. It was in evidence that defendant had never paid any rent for the land.

His Honor charged the jury that, if they believed from the evidence

that defendant agreed to pay Jones & Herring rent for 1893 to the amount of $100, then the jury should respond to the fifth issue "Yes." Defendant excepted to this part of the charge on the ground that the agreement to rent, under the facts of this case, would not confer a lien; and, second, that the issue was a question of law, and was immaterial to the decision of the case. Defendant moved for judgment upon the verdict for $67.50, the value of the crop seized, and costs of
(257) action. Motion overruled. Defendant excepted. Judgment for plaintiffs for amount of contract price, less a payment of 550 pounds of cotton, and less this $67.50, which was held a valid credit on the contract price, the court holding that after forfeiture the plaintiffs could by contract become landlords of defendant, so as to avail themselves of the landlord's lien, but any amount received as rent must go as a credit on the price. Defendant excepted to so much of the judgment as awarded to plaintiffs the crop of 1893, to the value of $67.50, and the costs of the action, and the defendant appealed.

J. B. Batchelor for plaintiffs.
G. M. Lindsay for defendant.

CLARK, J. By the verdict on the several issues it is found that the defendant, being in possession of the land under a bond to make title executed in 1886, and having defaulted in his payments, and the period (1890) within which payments were to be made having expired, entered into an agreement in 1892 with the plaintiffs (who had acquired the interest of the obligor to make title) that he would pay rent for the years 1892 and 1893. Not having done so, this is an attempt to subject the crop of 1893 to the lien for the stipulated rent for that year.

The court below properly held that "after forfeiture the plaintiffs could by contract become landlords of the defendant, so as to avail themselves of the landlord's lien, the amount of rent, however, to go as a credit upon the purchase price agreed to be paid for the land." This is substantially the same point decided in *Crinkley v. Egerton,* 113 N. C., 444, in which this Court sustained a similar ruling of his Honor, who tried the present case. The plaintiffs having the right to demand possession of the premises, it was competent for them to agree
(258) with the defendant that for the time specified the latter might remain in possession as tenant paying rent, and if such contract afforded any opportunity for oppression the relief the defendant is entitled to is not to hold the contract void, but the equitable order (which the court made) directing that the amount of rents so paid should be

credited on the notes given for the purchase money. Had the parties embraced this provision in their contract, there could have been no complaint. *Crinkley v. Egerton, supra.*

This in no wise conflicts with *Taylor v. Taylor,* 112 N. C., 27, relied on by the defendant's counsel but which was noticed and distinguished in *Crinkley v. Egerton, supra.* In *Taylor v. Taylor* it was merely held that a vendee or mortgagor in default was not *ipso facto* a lessee whose crop vested in the landlord under The Code, 1754. That is so in the absence of an agreement to hold as tenant, paying rent. There is nothing in any statute forbidding freedom to thus contract when the parties deem it to their mutual interest to do so, and when by the terms of the contract itself or the decree of the court the rent is applied upon the purchase notes there is no ground upon which equity can intervene. *Taylor v. Taylor* further holds that while an abandonment of a contract of purchase can be made by parol, the vendee thenceforth remaining in possession as a tenant, the evidence of abandonment must be positive, unequivocal and inconsistent with the contract of purchase. That has no application here, for it is not contended that the contract of purchase is abandoned, but the contract simply is that, the plaintiffs being entitled to possession, the defendant is allowed to remain in possession, paying rent. Thereafter the parties may agree to rescind the contract of purchase, or continue the renting until the rents pay off the purchase money, or take other steps as may seem good to them. Such contracts as that herein made, not being contrary (259) to any statute, nor against public policy, nor forbidden by equity, the courts are not authorized to abridge the freedom of contracting by declaring them void.

No error.

Cited: Ford v. Green, 121 N. C., 73, 74; *Cooper v. Kimball,* 123 N. C., 124; *Credle v. Ayers,* 126 N. C., 15; *Hicks v. King,* 150 N. C., 371; *Eubanks v. Becton,* 158 N. C., 238; *Burwell v. Warehouse Co.,* 172 N. C., 80.

J. O. W. JONES, ADMINISTRATOR D. B. N. OF O. W. JONES, v. R. J. W. BEAMAN, ADMINISTRATOR OF R. C. D. BEAMAN.

Practice—Referee, Powers of—Res Judicata—Estoppel.

1. A reference of a cause cannot be ordered when anything is pleaded in bar of plaintiff's right of action, until such plea is tried.

2. A referee has no inherent or original powers and can only do those things expressly enumerated in The Code, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to any pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent.

3. Where a former judgment has been rendered between the same parties and those claiming under them in a former action, and is pleaded in bar of a second action, it is conclusive and operative as a bar only when it appears upon the face of the record or is shown by extrinsic evidence that the precise question at issue was raised and determined in the former suits.

4. Where there is uncertainty in the record of a former action as to what was decided therein, the whole subject may be reinvestigated, unless such uncertainty shall be removed by other evidence, and for this purpose extrinsic and parol proof is admissible.

5. A judgment against an administrator for moneys due the estate is not a bar to a subsequent action for a further sum not known by plaintiff, at the trial of the former action, to be due.

ACTION heard on exceptions to report of a referee before *Graham, J.*, at Fall Term, 1895, of GREENE.

(260) His Honor overruled the exceptions and affirmed the judgment of the referee for the defendant, and plaintiff appealed. The facts appear in the opinion of *Associate Justice Avery.*

Geo. M. Lindsay and J. B. Batchelor for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. In 1879 O. W. Jones died and his widow became his administratrix, who resigned in 1880, and R. C. D. Beaman, intestate of the defendant, became administrator *d. b. n.* and he died and the plaintiff became administrator *d. b. n.* on said estate. R. C. D. Beaman made no final settlement, but made a return to the Clerk showing the sum in his hands due the estate at his death, for which the plaintiff brought suit and recovered $500, the amount found by the jury, the plaintiff not knowing that a greater sum was then due. Afterwards the plaintiff brought suit against the defendant, alleging that a greater amount was due his intestate's estate by the defendant as administrator of his intestate, and demanded an account of the whole administration. At February Term, 1894, the cause was referred by consent to have all issues of law and fact found, the defendant having then filed no answer. Before the referee the defendant was allowed to answer, in which he pleaded the judgment in the former action as

an estoppel. The referee held that the judgment was a bar to this action, and that plaintiff could not recover anything. He so reported and his Honor affirmed the ruling of the referee, and plaintiff appealed.

The irregularity of these proceedings makes it necessary for us to remand the case, to the end that the errors may be corrected. The action of the referee was without authority, and the judgment of (261) the court was erroneous. At the time of the reference no issues were raised by the pleadings, and the plaintiff was entitled to a judgment by default and inquiry, and then a reference was in order, by the court or by consent, to state an account to ascertain the amount due the plaintiff. The referee had no authority to allow the defendant to file an answer except by consent, and when he did so and allowed him to plead the judgment in the former action as an estoppel, he deprived himself of jurisdiction to try anything, because under our practice even the court cannot order a reference, when anything is pleaded in bar of plaintiff's right of action, until such plea is tried. The reason is that if such plea be true, that is an end of the action and no reference is necessary. These pleas are such as statute of limitations, release, full settlement and estoppel, and any plea that denies the plaintiff's right to bring and maintain his action. This has been repeatedly decided by the Court. Clark's Code, pp. 404 and 416, inclusive. Our statutes (The Code, secs. 420, 421, and 422) relating to trials by referees serve a useful purpose and must be liberally construed. They aid and simplify the work which would otherwise fall upon the court and jury, and often expedite the litigation and save the parties from trouble and expensive trials, and are a saving in time to witnesses and attorneys. Here we might rest this opinion, but as the main argument before us was in effect that the plea in the answer, assuming it to have been filed in apt time, was not an estoppel, and that the referee exceeded his power, we think it proper to give our opinion on this question of practice, under the sections of The Code referred to and others bearing on the same subject.

The power of the referee is given in section 422 of The Code. He has no inherent or original power, but it is delegated, and, like all subordinate tribunals, is limited by the terms of the statute (262) conferring his jurisdiction. It is quite liberal, with all necessary power to preserve order, compel attendance, grant adjournments, "and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with like effect." And yet upon this broad language there must be a reasonable limitation, in order that the referee's proceedings may be consistent and in

harmony with the records of the court, and in order to avoid such inconvenience, irregularities and costs as we have before us in the present case. The court does not refer the action, but retains it, pending the reference, with its power to make any necessary and proper order desired by the parties. *McNeill v. Lawton,* 97 N. C., 16. The referee can exercise only the powers expressly enumerated by the statute, and can take no power by implication. The theory of The Code is that the referee is to try whatever the court has sent to him, which is plainly expressed, or ought to be, in the order of reference. "To allow amendments to any pleadings" (section 422) assumes some pleading to be in existence, and means or implies an improvement of it, making it better, and making good that which was before defective in its form of statement, or in making better the issues presented between the same parties, but it does not mean to file other and new pleadings, raising issues unknown to the court when it made the order of reference. We think a reasonable construction of the statute will not go to that extent. If other persons desire to become parties, or some of those present desire to have their names stricken out, they can apply to the court, or the referee may certify the application to the court, as was done in *White v. Utley,* 94 N. C., 511, where the application will
(263) be refused or allowed on the hearing, and such order as the court deems proper may be made, allowing such pleadings to be made as are right and necessary in the cause. The result, then, is that the referee can do only those things expressly enumerated in The Code, and such as he is authorized to do by the court which sends him the case.

When a former judgment has been rendered between the same parties and those claiming under them in a former action, and is pleaded in bar of a second action, the question arises, to what extent is it conclusive between the same parties, that is to say, is it conclusive only as to those matters actually tried, or as to all matters which might have been tried on the pleadings in the first suit? That question has frequently been considered in this and the courts of other states, and decisions are conflicting and cannot well be reconciled. Our conclusion is that the true and correct principle is that, in order to make the former judgment conclusive and operative as a bar, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be uncertainty on this question in the record, the whole subject will be open to a new investigation, unless this uncertainty shall be removed by other evidence showing the precise point involved and adjudicated, and, to show this, extrinsic and parol proof is admissible as evidence. The judgment can be conclusive only so far as it affects

rights presented to the court and passed upon. If, upon the face of the record, anything is left to conjecture as to what was decided, and it is not explained by other proof, then the judgment as evidence is no estoppel. *Baugert v. Blades, ante,* 221; *Yates v. Yates,* 81 N. C., 397; *Bryan v. Malloy,* 90 N. C., 508; *Temple v. Williams,* 91 N. C., 82; *Williams v. Clouse, ib.,* 322; *Armfield v. Moore,* 44 N. C., 157.

It follows, then, if the facts shall be as they now appear from (264) the referee's report, that the first judgment, set out in the record between plaintiff and defendant, will not prevent the former from having an investigation of the account of the latter's intestate. Let this opinion be certified, to the end that the action may proceed in the Superior Court.

Error.

Remanded.

Cited: Royster v. Wright, 118 N. C., 155; *Pump Works v. Dunn,* 119 N. C., 79; *Jones v. Beaman, ib.,* 301; *Wagon Co. v. Byrd, ib.,* 464, 466; *Cummings v. Swepson,* 124 N. C., 584; *Kerr v. Hicks,* 129 N. C., 145; *s. c.,* 131 N. C., 93; *Austin v. Austin,* 132 N. C., 267; *Mauney v. Hamilton,* 132 N. C., 306; *Lumber Co. v. Lumber Co.,* 140 N. C., 442; *Clothing Co. v. Hay,* 163 N. C., 499; *Ferebee v. Sawyer,* 167 N. C., 204; *McAuley v. Sloan,* 173 N. C., 81.

M. H. CURRAN v. F. W. KERCHNER.

Practice—Complaint Containing Two Causes of Action, One Denied, the Other Not—Judgment by Default.

Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other.

ACTION heard at September Term, 1895, of NEW HANOVER before *Greene, J.,* on a motion for judgment by default final for want of answer to the first of two causes of action arising on two notes set out in the complaint, an answer having been filed to the second cause of action.

The motion was refused, and the plaintiff appealed. The facts are sufficiently stated in the opinion of *Associate Justice Furches.*

W. R. Allen for plaintiff.
No counsel contra.

FURCHES, J. This is an action to recover money, brought on two notes, one for two thousand dollars and the other for five thou-
(265) sand dollars, each note set out and alleged as different causes of action—first cause and second cause of action.

This action was returnable to September Term, 1895, of New Hanover Superior Court, at which term the plaintiff filed a verified complaint, and defendant answered as to the $5,000 note set out as the second cause of action, but made no answer whatever to the $2,000 note set out as the first cause of action.

Upon this state of pleadings plaintiff moved for judgment on the $2,000 note, and the court denied this motion and refused to grant the judgment as asked. In this there was error. Sections 382 and 385 of The Code.

There being no answer as to the $2,000 note the court should have given the plaintiff judgment on this note and retained the $5,000 note for trial upon the issues raised by the pleadings. *Parker v. Bledsoe,* 87 N. C., 221. This refusal to allow plaintiff's motion and to give judgment on the $2,000 note was the denial of a substantial right and may be appealed from and reviewed by this Court. *Griffin v. Light Co.,* 111 N. C., 434.

There is error.

Cited: Kruger v. Bank, 123 N. C., 17; *Cantwell v. Herring,* 127 N. C., 83; *Carraway v. Stancill,* 137 N. C., 475; *Adams v. Beasley,* 174 N. C., 119.

BEVERLY SCOTT v. S. H. FISHBLATE.

Courts—Power to Fine for Contempt—Liability of Judicial Officer for Judicial Acts.

1. All courts exercising judicial powers have the inherent right to punish for contempt, and where it is for conduct in the presence of the court the exercise of such power is final and cannot be reviewed in this or any other court.

2. A civil action for damages cannot be maintained against a mayor who, while sitting as judge of a mayor's court, ordered the imprisonment of a person for contempt, although the order was erroneous and made through malice.

ACTION for damages for false imprisonment before *Hoke, J.,* (266) at April Term, 1895, of NEW HANOVER Superior Court.

Issues: "No. 1. Did defendant unlawfully cause the imprisonment of plaintiff as alleged? Ans.: No. No. 2. What damage is plaintiff entitled to recover?"

There was evidence by plaintiff tending to show that in June, 1894, he was arrested for unlawfully burying nightsoil within the limits of the city of Wilmington and taken before defendant, the Mayor, for trial. On affidavit the cause was removed by defendant for hearing before Clowe, J. P., who proceeded to examine the case, but on finding the justice had made the original affidavit on which the warrant had issued he declined to proceed, and thereupon plaintiff expressed his satisfaction at the decision of the justice so rendered in the case. Defendant, who was standing in the court room, under pretense that his court was in session then and there decided that plaintiff had committed a contempt in presence of his court tending to obstruct its business, and ordered the plaintiff to jail therefor, and by reason of said order and in pursuance thereof plaintiff was wrongfully imprisoned for several days in the common jail, suffering much damage. The Mayor's court was not in session at the time. Plaintiff did not even know defendant was anywhere present, and the conduct of plaintiff in no way tended to obstruct or impair the respect due to its authority. There was evidence tending to show that defendant was the Mayor, and at the time of the judgment complained of the Mayor's court, with defendant presiding, was regularly and properly in session, engaged in transacting business of the court, and while so engaged the defendant broke out in a loud and boisterous noise calculated and intended to interrupt the transaction of business, and that it did interrupt such proceedings, and defendant, in exercise of his authority as Mayor, then and there adjudged plaintiff guilty of contempt (267) and ordered him to jail, and plaintiff was imprisoned by virtue of such order for contempt committed in presence of court when same was regularly and properly in session.

Howell, witness for plaintiff: Am Clerk; docket present is the docket of criminal cases tried before Mayor. This was found in office when he went into office and is only one used.

Plaintiff testified in his own behalf as follows: Sometime in June, 1894, he was arrested on a false warrant for burying nightsoil in city limits. Charge was false. He was taken before Mayor at City Hall and, knowing that Mayor had great prejudice against plaintiff, made affidavit and asked for removal. Defendant tried one or two cases and then called plaintiff's case. Examined two or three witnesses on it and

said: "Alderman Clowe can try your case, sir." Got up and went away. This was the last case. Defendant went off to one side in City Hall. Mr. Clowe went on to hear the case and said: "Scott, I will turn your case to Esquire McGowan; I see that I made the affidavit for your arrest." He then rose and plaintiff said: "I thank you, sir, I thank you; I am sure I can get justice before Esquire McGowan," and bowed. Then Mr. Fishblate (the Mayor) called out from way back where he was standing and said in an angry voice: "Clowe, send that fellow to jail for contempt." Clowe said: "I can't do that, I've adjourned the court." Fishblate then came walking from where he was standing and said: "If you don't, Clowe, I will. I can do it. I will send him to jail till he rots." He spoke in a very angry tone. Plaintiff begged and said to Fishblate he was sick and had fever and not to send him to jail. Fishblate wrote out a *mittimus* and said: "I'll try you right here myself; you can't move it anywhere." He told him he had (268) nine children and one of them was about to die. Plaintiff went to jail, and the child died; he got there just as he was dying; intended no contempt and did not know Fishblate was in the house when he spoke. He, Fishblate, has had feelings against him because he was active two years ago against him for mayor and has been mad ever since; caused his arrest several times. Plaintiff was taken off to jail on defendant's warrant for this.

Cross-examined: He has been dealt with several times and put in jail by him several times, has not been convicted before other mayors. Fishblate, when he finished other cases said: "I adjourn court and turn his case over to Alderman Clowe. I'll put him in jail till he rots," and wrote out *mittimus*. White came and turned plaintiff out several days after arrest.

Evans was introduced for plaintiff and testified he was present at Mayor's court in suit against Beverly Scott for burying nightsoil. Scott having made affidavit, Fishblate turned over the case to Clowe, walked across to the water cooler and said: "Scott didn't seem to think I could give him justice." Clowe, after hearing evidence, stopped and said: "I see I issued paper and cannot try case. I therefore turn papers over to McGowan, J. P." Then Scott broke out in a loud and boisterous laugh and said: "I am so glad." Fishblate called out: "Clowe, fine that man $50 for contempt and put him in jail 30 days for contempt of court." Clowe replied: "There is no court in session now. I've turned the case over to McGowan." Fishblate then resumed the chair, called court to order and said: "Scott, I'm tired of this—people swearing they can't get justice before me; it is a city offense and I have a right to try and intend to do it." Scott was put on stand and asked

when and who told him to put nightsoil at certain places, and answered. Fishblate said: "I fine you $50 and imprison you for 30 days for contempt of court." Scott broke down, crying, begged not to be put in jail. This was the last case, and Fishblate didn't take up (269) this case till he resumed his chair second time. DeRosset, witness for plaintiff, said: "When Clowe said he turned case over to McGowan, Scott broke out in a laugh. Fishblate called to Clowe to fine him $50 for contempt. Clowe replied to Fishblate: 'I have no jurisdiction.' Mayor hurriedly went back to chair and said he would try the case himself. He did go on and hear some of the case and said: 'I'll put him in jail,' etc., and plaintiff broke out in a cry that he had nine children dependent on him, etc. Mayor said he wished to put a stop to the impudence in the court room, spoke in an irritated voice. The laugh of Scott was very insulting."

Defendant's evidence: Charter of city introduced. Ordinance 21 for quiet and protection of town. R. B. Clowe was introduced, and said on 4 June last was chief of police, term having begun March, 1893; was also clerk to Mayor on occasion when plaintiff was dealt with for contempt; case called; affidavit made; Mayor transferred case to him, who was a justice, went out for his docket and got it, and put down the case, and discovered he had made affidavit, and said he couldn't try the case, as he had made affidavit. Mayor left the court and went over to the water cooler—had been off the bench some two minutes. He, Clowe, had intended this remark for Fishblate, who was coming back, when he said he couldn't try case. Scott broke out in a loud, boisterous and insulting laugh, very insulting to court; did not transfer or otherwise dispose of case. Fishblate had case and dismissed it, fined plaintiff $50, and to be imprisoned 30 days for contempt. Character of Scott is bad. There was no regular docket while he was acting as clerk. Cross-examined: Fishblate turned case over to him; found he had made affidavit and could not proceed; did not put his hat on when he made the announcement; went out of the court railing, and went around the railing where the water was; no other case to be tried that day; (270) this was the last matter for the day; papers were on table and he had them in his possession. He made this remark to Mayor, or intended that way, "that he had no jurisdiction"; Scott may have said he was much obliged to him. Fishblate testified he was elected Mayor in 1893, had no feeling against plaintiff, was not even aware that he had opposed him politically till he said so this morning. Scott swore he couldn't get justice, and he turned the case over to Clowe and started to water cooler; had not adjourned court and was returning to Mayor's seat when Clowe said he had no jurisdiction, and the negro guffawed out in a loud

laugh, and he called to Clowe as clerk of Mayor's court to fine him $50 for contempt; he fined him as Mayor and liberated him on pleadings of his wife; he resumed and tried the case, saying he was tired of criminals removing their cases because they knew he knew their character, and, being advised he had a right to try them, proceeded to try and dismiss the case. He didn't have a docket, and no one had told him that that was the end of the cases. Cross-examined: Case was not in Clowe's hands when he stated he had no jurisdiction. Plaintiff had been very boisterous before in his court, and he thought the offense deserved the punishment. He once threatened a witness' life in this court; told Clowe to put fine on him as clerk when he went over to water cooler, and turned back and was going to Mayor's seat. Bellamy, a witness testified that Scott's character not good in some respects, bad as a quarrelsome, boisterous man. Character of Fishblate good. Plaintiff contended in his argument: 1. Plaintiff requested the court to charge that Superior Courts and courts superior to those were courts of general jurisdiction and their jurisdiction over any subject-matter was
(271) presumed, but that courts of justices, mayor, etc., were inferior courts whose jurisdiction was not presumed, but when questioned the burden rested upon said courts to show they had jurisdiction, and therefore the burden rested on defendant to satisfy jury he had jurisdiction over the subject-matter as well as the person in this case, and that his court was in session when the alleged contempt was committed, and unless he did so they must find the first issue in favor of the plaintiff. Court refused this instruction. 2. The plaintiff requested court to charge that the defendant having admitted in his answer that plaintiff was arrested upon a warrant issued by him upon a charge for burying nightsoil and, there being no such offense under the laws of North Carolina or the charter of the City of Wilmington, that defendant had unlawfully arrested plaintiff and was guilty of false imprisonment, the jury must find first issue "Yes." Court declined; plaintiff excepted. 3. Plaintiff requested court to charge that, it appearing from defendant's answer that he admits that plaintiff made an affidavit for the removal of his case upon the ground that he could not get justice before the defendant, and that notwithstanding the affidavit the defendant proceeded to try the charge against plaintiff instead of turning the case over to some other justice, there was an unlawful detention of plaintiff's person, a violation of law and false imprisonment, and jury must find first issue "Yes." Declined; plaintiff excepted. 4. The plaintiff requested the court to charge that, it appearing there was no record made of the facts constituting the alleged contempt, either appearing upon record or upon warrant of commitment, the law required before one could be imprisoned

for contempt that the facts constituting the alleged contempt should be set forth on the record or on the warrant of commitment; that the order made by defendant committing plaintiff to jail for alleged contempt was void, and that plaintiff was imprisoned contrary to law, (272) and the jury must answer the first issue "Yes." Refused; plaintiff excepted. Plaintiff filed written prayer for instructions as to the first of the above positions. Court has no distinct recollection as to any written paper for the others, and the prayers themselves have been misplaced by counsel or someone in clerk's office, but all of the positions were contended for by counsel and tendered on appeal in apt time. Plaintiff filed exceptions because the same were not given in charge to the jury. Court explained nature of the action, and among other matters not excepted to charge the jury that the law clothed judicial officers, sitting as a court, with power to protect themselves by punishing for contempt committed in their presence, and this applies to all courts; and if the jury are satisfied from the weight of evidence that defendant at the time of holding court was Mayor, and his court being then regularly in session for business, and while so engaged the defendant was then and there in the presence of the court guilty of disorderly conduct tending to obstruct the business and to impair the respect due the court, and was adjudged guilty of contempt and committed therefor and suffered imprisonment by reason of such judgment, the judgment would protect the defendant in this action and jury should answer first issue "No." But if said court was not in session, but had adjourned temporarily or for the day, and defendant, assuming jurisdiction of plaintiff for his conduct when the court was not in session, adjudged him guilty of contempt, such acts of the mayor would be void for want of power and jurisdiction. The order would no more protect him than if he were a private individual, and in such case defendant would be responsible to plaintiff, and the jury should answer the issue "Yes." The court then minutely and in detail, applying the evidence, defined and (273) explained to the jury under what circumstances the court would be considered in session and when adjourned, and to this portion of the charge, as to when in session and not, there was no exception. Plaintiff excepted to the failure of the court to charge as requested above and as stated by exceptions in the case on appeal and motion for new trial. Plaintiff further moved for new trial because he was forced to accept as juror one Sol Bear, who was a regular juror for the term. He had been excused in the afternoon of the day before for one day at his own request, for reasons personal to himself. Plaintiff's peremptory challenges were all exhausted, and Sheriff was considering the call of another talesman. Court, perceiving that Bear was still in court, having

completed his business sooner than expected and had returned, directed Sheriff to call him into the box, and plaintiff challenged him for cause, and no cause being shown he was impanelled as one of the jury to try the case, plaintiff alleging that he had exhausted his peremptory challenges under the impression that Bear had been excused. Motion overruled. No excepton was noted or asked at the time, but in case on appeal plaintiff filed this as an exception for cause in proceedings against him. Verdict and judgment for defendant; appeal by plaintiff.

T. W. Strange for plaintiff.
W. R. Allen and Ricaud & Weill for defendant.

FURCHES, J. This is an action of false imprisonment. At the time of the act complained of, the defendant was Mayor of the City of Wilmington, and plaintiff was under arrest upon a warrant issued by defendant upon a charge of "burying nightsoil" within the limits of the city. The *gravamen*—the act complained of—is an order for
(274) contempt of court, made by defendant, under which plaintiff was imprisoned in the common jail of New Hanover County for a number of days.

Sufficient appears in the history of this case, as contained in the record, to satisfy us that defendant acted badly on the occasion of making this order; and that he was lacking in that respect for the position he occupied that is usually found in those occupying such positions, and as should have governed his conduct on that occasion. And it seems to us that the testimony of DeRosset and others strongly tended to establish plaintiff's contention that defendant's court was not in session when this order was made; and that it was made hastily and in bad temper; that defendant resumed the chair and took control of plaintiff's case that he had just before made an order to remove, for the purpose of carrying into effect an order he had no right to make when he did make it; and that the claim of defendant, as a reason why he told Clowe (who seems to occupy the convenient positions of justice of the peace, chief of the city police and *clerk* of the Mayor's court) to fine plaintiff for contempt of court, was his order given to Clowe, *as his clerk,* was an afterthought. But this was defendant's testimony, and he introduced other testimony tending to sustain his contention that his court was in session at the time the order was made. But his case presents for our consideration a very grave proposition of law, in which the suffering and damage of plaintiff and the bad conduct of defendant must be subordinated for the present to a discussion of the individual rights of the citizen and the independence of the judiciary.

All courts exercising judicial powers have the inherent right to punish for contempt. This power is necessary to their existence, and where it is for conduct in the presence of the court it is final and cannot be reviewed by this or any other court. *Bradley v. Fisher,* 13 Wallace, 335; *Pratt v. Gardner,* 2 Cush. (Mass.), 63; *Cook v.* (275) *Bangs,* 31 Fed., 640; *S. v. Mott,* 49 N. C., 449; *In re Deaton,* 105 N. C., 59. As we have said, this power exists in all courts having and exercising judicial functions—mayor's courts and justice's courts as well as higher courts having and exercising greater jurisdiction. *Cook v. Bangs,* and *In re Deaton, supra.* The defendant then had the right—the power—to make the order of contempt if he was sitting and his court was open for the transaction of business when he made the order. And if it was made then, it was in the exercise of a judicial power and was a judicial act, a judgment of the court; and a civil action cannot be maintained by the plaintiff against the defendant for damages, though the order complained of was erroneous and made through malice. *Pratt v. Gardner, Cook v. Bangs* and *Bradley v. Fisher, supra.*

This seems to be a wrong without a remedy, which is said to be contrary to the spirit of our institutions, "That where there is a wrong there is a remedy." But if this is so, it is necessarily so; and it must be taken that the plaintiff has agreed that it shall be so.

But for the government, of which he is a part, there would be no law, nor would there be any courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law and the courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law of course might prevail. To have this legal protection, it is necessary to have courts, judges, justices of the peace, including the courts of mayors of towns and cities. And it is the experience and wisdom of our country that these courts cannot exist, or at least cannot discharge their judicial functions, unless they are made (276) free from pecuniary liability for their judgments while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud or corruption in office, because these are public wrongs committed against the government whose servants they are.

This brings us to the real issue in this case, and that is, whether the defendant's court was open for the transaction of business when he made the order imprisoning the plaintiff for 30 days for laughing in his court. And the jury has settled this question, if there are no errors in the rulings and instructions of the court.

There are no exceptions to evidence, and there is no exception to the charge of the court upon the question as to whether the defendant's

court was in session or not when the order committing plaintiff for contempt was made. It is expressly stated that there was no exception to this part of the charge. Nor do we find any exception to the charge of the court, "except that the court did not give the prayers asked by plaintiff." We have examined these prayers with care, and can see no error in the refusal of the court to give them to the jury. The first is principally as to whether the "burying nightsoil" was an offense under the ordinances of the City of Wilmington or not, and whether the defendant would not be liable for issuing the original warrant of arrest. If this had been the *gravamen* declared on in the complaint, it would have presented a very interesting question. *Cook v. Bangs, supra.* But it is not, and we do not feel called upon to discuss this question. The *gravamen,* as we have before stated, is the order for contempt. The only part of this prayer applicable to the case in hand is the closing paragraph, and this was given in substance, accompanied with the statement that there was no exception to this part of the charge.

The other prayers, if asked, and we are treating them as if asked
(277) in writing, are subject to the same reasons given for not giving the first, and we find no error in the court refusing them.

There is another exception, as to the juror, Solomon Bear. And we can very well see from the conflicting evidence as to whether defendant's court was in session or not, and the surroundings, why the plaintiff should not want Bear on the jury. But we are unable to see any legal error in the court made in calling him into the jury box. It seems to be one of the many incidents which take place in the progress of a trial by which a party is prejudiced, and for which the only relief is in the discretion of the Judge. This was asked and refused, and there can be no review of his ruling in this Court. After a careful investigation of the case we find no error entitling the plaintiff to a new trial. The judgment of the court below is

Affirmed.

Cited: In re Briggs, 135 N. C., 129; *McCown, Ex parte,* 139 N. C., 107; *In re Brown,* 168 N. C., 420; *Spruill v. Davenport,* 178 N. C., 365.

J. T. MEDLIN AND WIFE v. MARY BUFORD ET AL.

Action to Foreclose Mortgage—Valid Mortgage—Forged Note—Fraud of Mortgagor's Agent—Rights of Mortgagee.

1. Where, in the trial of an action to foreclose a mortgage, it appeared that plaintiffs' attorney, with whom defendant's agent negotiated a loan to be secured by mortgage on defendant's property, examined the title, prepared the note and mortgage and directed that the latter should be executed and acknowledged before a reputable and honest probate officer, which was done; and it also appeared that the note was forged and that the defendant was induced to sign the mortgage by the fraudulent representation of her agent; and that the defendant received no part of the money; and it further appeared that plaintiff's attorney suspected defendant's agent, with whom he was dealing, to be a forger: *Held*, that the plaintiffs' attorney exercised all due diligence and prudence in the transaction, and the trial Judge properly directed the jury to find that the plaintiffs made the loan without notice or knowledge of the fraud practiced on defendant by her agent.

2. A mortgage, if duly executed to secure a loan made by the mortgagee, can be foreclosed although the note mentioned in the mortgage be forged.

ACTION to foreclose a mortgage executed by the defendants to (278) the *feme* plaintiff, Sallie Medlin, and tried upon certain issues at the April Term, 1895, of NEW HANOVER, before *Hoke, J.*

The following are the issues:

"1. Did the defendant Mary E. McGirt execute the note described in the complaint?

"2. Were the defendants induced to execute the mortgage by the false and fraudulent representations of John C. Davis?

"3. Did the defendants or any one of them receive any of the (279) money at all received by John C. Davis from the plaintiff's attorney, Cutlar, for the note and mortgage sued on?

"4. Did plaintiffs advance the $1,000 to John C. Davis on the mortgage as a present cash loan and on the terms and conditions specified in the mortgage?

"5. Was said loan so made without notice or knowledge of the fraud practiced on the defendants by John C. Davis?"

It was agreed that the first and third issues should be answered "No," and the second and fourth should be answered "Yes."

Mr. DuBrutz Cutlar, a witness for the plaintiffs, testified as follows:

"The note in controversy is in my handwriting, the amount of the note is one thousand dollars and it purports to be signed by M. E. McGirt, one of the defendants. The mortgage is of same date, 12 August, 1891.

The mortgage is signed and acknowledged by all the parties before the Clerk and registered on 13 August, 1891. Only Mrs. McGirt was required to sign the note. All the defendants signed the mortgage because they were interested in the land. John C. Davis applied to borrow this $1,000 for Mrs. McGirt. I examined the title and required the execution of this mortgage. I found the title good and gave him the $1,000 in cash on the note and mortgage now presented. An insurance policy was also procured by Davis, as stipulated for, and handed to me as agreed upon. I had money to lend for the plaintiff, Mrs. Sallie Medlin, and the same was her money and she owns the claim. I have had much experience in the comparison of handwritings and can form an opinion. I think the signature to the mortgage and note are by one and the same person. There is some little difference, one being larger than the other, but not more than the usual difference.

(280) I had nothing to do with Mrs. McGirt in the matter, but dealt with Davis as her agent. I had no idea of any fraud. The signatures were the same, and there was no reason why any fraud should be suspected. I had not the slightest notice of any fraud. J. C. Davis was a man of the highest character at the time, and I supposed it was all right. I never thought anything about it until some months afterwards, when J. C. Davis' character had been exposed and his transactions were being looked into. I saw Mrs. McGirt about it just before bringing suit, and she seemed to think that I should have known J. C. Davis was a rascal and protected her. I thought he was borrowing money for Mrs. McGirt for a proper purpose. Mrs. Medlin, the plaintiff and owner, was not here at the time and knew nothing of it. The matter was conducted entirely by me."

On cross-examination the witness said:

"In July, 1891, Mrs. Medlin put into my hands a mortgage for $1,000.00, purporting to be made by R. H. Smith to her, and at the same time a mortgage for collection was put into my hands, purporting to be made by one Long to Mrs. E. T. Hancock, who is a sister to Mrs. Medlin, plaintiff, and about the same time a mortgage was also given me to collect, purporting to be made by one George Hall to Mrs. M. E. Grafflin, the mother of the plaintiff, and at the same time a mortgage and note for $400.00 by J. R. Parker to M. E. Grafflin, and one for $1,500.00 by R. Williams to E. T. Hancock. I can't recollect that these mortgages were witnessed by John C. Davis, but they may have been. These mortgages and notes were all in my hands before the mortgage in this suit was executed. I recall having a conversation with Mr. Junius Davis and saying I couldn't find any of these men in town, and couldn't find on the records any conveyances to them for the land which

purported to be in the city of Wilmington, and I said to Mr. Junius Davis that I suspected they were forgeries. I told the (281) plaintiff's brother-in-law, Mr. R. H. Berry, that I believed the notes and mortgages were fictitious. I did not know it, but told Mr. Berry I supposed them to be fictitious. Berry had the matter in charge for the plaintiff and her sister, Mrs. Hancock, and her mother, Mrs. Grafflin, and placed these mortgages with me for them. This was all done before the execution of the note and mortgage in controversy in this action. I recollect the time I spoke to Mr. Junius Davis. He said he had three mortgages which he, Mr. Davis, also suspected. The mortgages which I had, and that Mr. Junius Davis had, were all by single persons and not acknowledged, but proved by John C. Davis as witness. I know this now, but I do not recall that the last matter was mentioned in my talk with Mr. Junius Davis; the conversation was before the execution of the mortgage in controversy. I directed that the mortgage in controversy should be examined and acknowledged before Col. Taylor, the Clerk of the Superior Court, who is a conscientious man and does it well, and I am in the habit of having Col. Taylor do this. I was fond of John C. Davis and did not think he would put up a job on me. I had every confidence in him and did not think he would do me a wrong, whatever he might do to other people. I did suspect him at the time as to the other mortgages, and spoke to Mr. Junius Davis about it in confidence. I collected the money on the Parker note and others. The whole five were paid to me by John C. Davis. The money on the R. H. Smith mortgage was paid to me by John C. Davis on the day before the mortgage in controversy from the defendants was taken, and was lent the following day to John C. Davis on the mortgage in controversy. I think it was the next day, certainly shortly afterwards. When I called on Mrs. McGirt to collect the money she told me that she had never seen the note before, nor had she (282) executed it. I did not see Mrs. McGirt before the mortgage was taken, but relied upon what John C. Davis had told me and the examination of the Clerk."

On redirect examination the witness said:

"When the five mortgages were put in my hands I did not know any of the mortgagors and went to John C. Davis and told him I could not find any of the parties on the records and did not know them and could find no titles on the records. John C. Davis expressed surprise at this and said that the reason I did not know them was because they were all strangers here; that they were laboring men he, John C. Davis, had brought down here to work on the Fifth Street Methodist Church; that they were brought by him from Wilson and were then at work

up the road. I supposed John C. Davis and the defendant Mrs. McGirt understood each other, and lent the money. I told John C. Davis in talking about the other mortgages that I would look to him to straighten them up, that it was then very unsatisfactory, that he had transacted the business and I looked to him to straighten it out. He was very plausible about it and said he would get it all straight very soon, and assumed to do it. He did do it and paid me $2,500, the amount due on those five mortgages. John C. Davis' reputation was then very good, and this was the first matter that ever led me to suspect him. It was not long after this before he was exposed and his matters all came out. I suspected J. C. Davis, but was reassured by his statements. I told him I was uneasy and unhappy about it and suspected they were forged. After paying me the $2,500 John C. Davis applied to borrow this money for Mrs. McGirt on the mortgage in controversy, and the other was lent out to parties suggested by John C. Davis."

(283) Thomas Evans, an attorney and expert accountant, examined the papers and testified that the note and mortgages were written by one and the same person—that they were the same signatures.

Mrs. M. E. McGirt, one of the defendants, testified that she lives in Wilmington. Note and mortgage being shown to her, she testified that she had seen both before; that she saw the note for the first time one year after it bears date; never saw it till Mr. Cutlar brought it to her house; never signed the note; the signature resembles hers; was struck at the resemblance. She did not sign the mortgage. She never saw Mr. Cutlar till after or near the time suit was brought.

Mrs. Buford, one of the defendants, testified that she is the mother of Mrs. McGirt, and she was present when the mortgage was signed. "I and my daughter then signed the mortgage, and there was only one paper signed. I first saw the note when Mr. Cutlar brought it to the house."

Mr. Junius Davis, a witness for the defendants, testified as follows: "I knew John C. Davis prior to August, 1891. It was in the latter part of July, 1891, and before the execution of the mortgage in controversy that Mr. Cutlar mentioned to me that he had several mortgages for Mrs. Grafflin and her family. I don't recall how many mortgages Mr. Cutlar said he had. Mr. Cutlar said he could not find any of the parties who executed the mortgages anywhere in Wilmington, and that he was very much worried about it. He showed me the papers, and I called Mr. Cutlar's attention to the strong similarity between the signatures to the mortgages and John C. Davis' handwriting. Mr. Cutlar said either that he suspected that they were forged or that he believed that they were. I then procured three mortgages held by Mrs. Oakley, who

was a client of mine, to examine them, suspecting that they were also wrong. I examined them and could not find the (284) grantors anywhere in town nor the titles on the records. I also found that the property conveyed in the mortgages was all city property and was the property of other people. I told Mr. Cutlar about this, and also that I could not find the parties in town and that my examination satisfied me that they were all forged. I discussed with Mr. Cutlar the fact also that all the mortgages I held and all that he, Mr. Cutlar, held were executed by men alone, and that John C. Davis was the witness. I think that the mortgages held by me were examined by Mr. Cutlar. I am certain that I informed Mr. Cutlar about it. The mortgages were all forged as it turned out, and admitted to be so by J. C. Davis. It was not at that time known positively."

The defendants then put in evidence Book Number 5 of the records of the Register of Deeds' office of the county of New Hanover, which contained at pages 408 and 409 the mortgage of R. H. Smith to the plaintiff Sallie Medlin, referred to by plaintiff's witness, Mr. Cutlar, in his examination, which record showed that the said mortgage was satisfied and cancelled on 13 August, 1891, the same day on which the mortgage in controversy was recorded.

The defendants in apt time and in writing asked the court to charge: "If the jury believe that Mr. Cutlar, the agent and attorney for the plaintiff Sallie Medlin, for several weeks prior to the execution of the mortgage described in the complaint, had in his possession for collection five promissory notes and mortgages, all of which he had good reason to believe, and did suspect, were fictitious and had been forged by John C. Davis; that he knew these mortgages had been admitted to probate on the oath and examination of John C. Davis, who was the subscribing witness to all of them; and that he had told the (285) brother-in-law of the plaintiff that he believed the notes and mortgages to be fictitious, and told him to tell the plaintiff so; that he knew that Mr. Junius Davis had in his possession for collection several notes and mortgages which John C. Davis had given to Mrs. Oakley and which he had been told were forged and fictitious; that John C. Davis asked him, Cutlar, immediately upon the payment of the $1,000 if he would lend it out to him again; that Cutlar said he would; that John C. Davis brought the mortgage sued upon this action to him soon after and got from him, Cutlar, the very identical money he, John C. Davis, had paid him a day or two before in settlement of the mortgage purporting to have been executed by R. H. Smith to the plaintiff, then Mr. Cutlar had notice of facts sufficient to put him upon inquiry, and the plaintiff had notice of the fraud practiced by Davis

upon the defendants, and the jury must answer the fifth issue 'No.'" His Honor declined to give the instructions to which the defendants excepted, and his Honor stated that, there being no conflict of testimony, the facts being admitted as to the circumstances under which Mr. Cutlar advanced the money, and the precautions taken by him in the preparation of the note and mortgage, the delivery of them to John C. Davis with directions to have them executed before the Clerk of the Court, and their return to him by Davis duly probated, and the other facts detailed by him, was all the prudence he was required to exercise, and made the question of notice one of law for the court, and that he would take that issue from the jury and would answer it, as a matter of law, "Yes," which he did, to which the defendants excepted.

There was judgment for the plaintiffs on the verdict, and defendants appealed.

(286) *J. D. Bellamy, Jr., for plaintiff.*
Shepherd & Busbee for defendants.

MONTGOMERY, J. If it be conceded (and it seems to appear clearly so from the testimony) that Cutlar knew, at the time of the execution of the mortgage by defendants, that he was making a loan of money to Mrs. McGirt, one of the defendant mortgagors, through a person who he believed was the agent and attorney of the borrower, and which agent he believed and suspected to be a forger of other mortgages and notes, yet upon the facts brought out in the evidence the plaintiff is entitled to have foreclosure of the mortgage for the satisfaction of her debt. It appears from the testimony, undisputed, that Cutlar, before he loaned the money for his client, the plaintiff, examined the title to the property conveyed in the mortgage, prepared the note and the mortgage, and delivered them to the person who appeard to be acting for the defendants, at the same time directing that the mortgage should be proved by the acknowledgment of the mortgagors themselves before the Clerk of the Superior Court of New Hanover, who as the testimony shows was a man of integrity of character and of business qualifications; and the mortgage was returned to him with the probate in proper form certified by that officer. This was a proper degree of prudence on the part of plaintiff's attorney to protect her interests, and was all that was required of him in law. His Honor therefore committed no error in his ruling and in answering "No," as a matter of law, the fifth issue—"Was said loan so made without notice or knowledge of the fraud practiced on the defendants by John C. Davis?" (a person shortly afterwards declared to be insane by the proper authorities). The note

was by the verdict of the jury found to be a forgery; but that cannot help the defendants, as the mortgage can be foreclosed for the satisfaction of the plaintiff's debt, notwithstanding such finding. (287) This case was before us at the September Term, 1894, and is reported in *Medlin v. Buford,* 115 N. C., 260. The principles of law applicable to the facts, which are about the same in both trials below, are fully discussed in that opinion.

No error.

W. J. BROWN v. THE CATAWBA LUMBER COMPANY.

Contract—Breach, Waiver of—Consideration—Trial.

1. An executory contract of employment may, before the performance of any part of the service or the payment of any money, be discharged by simple agreement, or a new agreement may be substituted for it, without consideration other than the mutual acquittance of each other from the old promise; but after the performance of any service or the payment of any part of the promised price, the contract can only be discharged by a promise either under seal or supported by a consideration.

2. An inconsistent verdict or one that, in connection with the pleadings, requires explanation to make it harmonize with the pleadings and evidence and support a judgment, ought to be set aside when too late to have it reformed by the jury; therefore:

3. Where, in the trial of an action for breach of contract of employment, the contract was admitted, but defendant claimed that plaintiff had waived its performance and that a new agreement had been made, and two issues were submitted, one as to the existence of the contract (which the jury according to instructions answered in the affirmative) and the other being, "Did the defendant wrongfully violate the contract, the plaintiff being in no default," to which the jury answered "No": *Held,* that the second issue, with the response, not being clear or intelligible, the verdict should have been set aside and a new trial granted on new issues.

CIVIL ACTION to recover damages for breach of contract, tried (288) before *Hoke, J.,* and a jury at April Term, 1895, of NEW HANOVER.

The issues submitted were:

"1. Did defendant on or about 5 June, 1894, contract and agree to give plaintiff employment as a band sawyer? Answer: Yes.

"2. Did defendant wrongfully violate such contract, the plaintiff himself being in no default? Answer: No.

"3. What damage is plaintiff entitled to recover?" (No response to this issue.)

The plaintiff testified as follows:

"On 28 May, 1894, I was sawyer at the Parmele mills, at Jacksonville, N. C., at $3 per day, straight time; that is, not to be docked for sickness. On 1 June, 1894, I resigned my place and went to Hickory, N. C. Was induced to do this by letter from defendant company, offering me employment at $4 per day. This letter was written to me in answer to a telegram which I sent to the defendant, offering my services as a band sawyer. Telegram was as follows: 'Will take the band for $4 per day.' The letter, dated 30 May, 1894, is as follows: 'Your message of the 28th received. We would not agree to pay you $4 a day, unless you would guarantee an average of 35 M of I boards per day. We have an A 1 filer. Our mill is run by water power. The mill is speeded up to its full capacity, and if you are the man your telegram makes out to be you can earn $4 per day. If the mill will average 30 M per day, we will pay you $3, if 25 M, $2.50. If you wish to come under these conditions, and have had experience in white pine and poplar sawing, all right. We now have over five million feet of logs. If you expect to come, wire answer, as there are a good many applicants for the place. (Signed) Catawba River Lumber Co., F. R. Whiting, Sec.' I wired answer that I would be there on 4 or 5 of June. (289) Went to Hickory and reached there about 1 p. m. Monday, 5th. Went out to the mill. Didn't see Whiting. While there I saw that there were no logs at the mill. On returning I met Whiting on the road, and he said he would go to the hotel to see me at 9:30 that night. He did not come. Next day I went to the mill, saw Whiting, and Whiting said: 'How long do you want to wait; ten days?' I said, 'No; I didn't come here to loaf'; and he said, 'We haven't any logs here to-day, and will pay you $1.50 until the logs come. That is as much as I have paid any other sawyer.' I replied, 'I came here on the terms of your letter, and those are the terms I will work upon, and no other.' Whiting replied, 'Have you had experience in white pine and poplar sawing?' I said that I had cut some white pine, but not much, but had a great deal of experience in poplar sawing. Whiting then said, 'I will pay you $2 per day, which is more than I ever paid any other sawyer.' I then told Whiting that I had left a $3 job in Jacksonville, had been in business for 15 years, was a competent sawyer, and could cut 35 M if the mill could produce that result. I have had large experience in mills, and am capable of telling what a mill can cut,

and, on seeing the machinery and mill of the Catawba Lumber Co., am sure that it could not be made to produce to exceed 30 M feet. It could not be made to cut 35 M per day with first-class timber. There were no logs there when I arrived. Whiting said they would have plenty of logs within ten days, when the river rose and became in a condition to float them down. I had a contract with the Parmele-Eccleston Co at $3 per day, and they promised me that whenever the band sawyer's place became vacant I should have it, at $5 per day. At that time I acted as band sawyer when the band sawyer was sick or absent. That is a very responsible place. The band sawyer's position in the Parmele company did become vacant within sixty days after I left. When Whiting proposed to pay me $2 per day if (290) I would stay there until they got logs, I declined to take the place, and I borrowed the money with which to return to Wilmington. I spent in cash, as expenses in going to and from Hickory, $40. Upon my return to Wilmington I immediately spoke to the manager of the Parmele company and sought employment, telling them why I left Hickory; also other companies, but without success; and, although I have endeavored to get employment since that time, I have not been able to earn more than $35. Have had experience in sawing poplar, and some in sawing white pine. I sawed some white pine at Taylor's mill, and two or three spars at Northrop's mill." Several witnesses were introduced to corroborate the above statements, and to show that the plaintiff's character was good.

There was testimony as to the competency of plaintiff as a sawyer, and as to the custom, among mill men, of paying employees when mills were idle—that some paid full wages, others half wages.

Defendant then introduced Whiting, secretary of defendant company, who testified as follows: "I wrote to Jacksonville, to one Ellis, saying that I wanted a band sawyer. Received telegram from plaintiff, Brown, saying he would accept the position at $4. I replied by letter (above set out). Brown came on 5 or 6 June. I saw him and offered him $1.50 per day until the lumber could get down, which was what the old sawyer was paid when the mill was idle, and he said he would stay at $2 per day, and that was satisfactory. I told the superintendent to put him to work at once. We could have started upon logs we had, and run from three to four weeks. This was about 10 o'clock in the morning. Brown returned about 11 o'clock that day and said he would like to cancel agreement. I asked why. He said he could do better in Wilmington. I then said it would inconvenience us very (291) much, but finally consented that he might return to Wilmington, and he did go. In a month or two we heard that this suit was

started, and wrote to plaintiff asking him to explain his suit. No reply came. A reply came from Mr. Strange, his attorney. When the letters were written between Strange and the company, the company was without a sawyer and unable to get one, and in a letter to Strange, written in August, I think, we again offered the place to plaintiff. We never hired by the year; only by the day. Brown was to be paid $4 per day when the logs arrived, if he could turn out 35,000 feet per day. Brown said practically he had no experience in sawing poplar, and never sawed any white pine. The reason we had no logs when Brown came was that, subsequently to writing Brown on 30 May, an accident had occurred to one of our dams, and we were thereby delayed in floating our logs down. The custom among mill men is for sawyers to get half pay when mill is shut down. The capacity of our mill was reckoned at 40,000 per day, but prior to that time we had not exceeded 33,000. Our present sawyer turns out 35,000 feet per day." Defendant supported testimony of Whiting by introducing deposition of Wilson, which is substantially as follows: "I live in Asheville. My occupation is that of saw filer. Have known defendant about 8 years. Knew plaintiff when he came to Hickory. I was residing on premises of defendant company at Hickory in June, 1894, and was saw filer and assistant foreman of defendant company. I saw Brown about that time at Hickory, and he said something about having resigned a job to accept this one, because he could get better pay with defendant. He engaged board with me, and said he understood the mill had logs, but had found it had none, and that he had made arrangements to work at re-
(292) duced rates until the logs arrived. My recollection is he said he agreed to work at $2 per day until they got logs. He boarded with me only one day and night, and said he had made up his mind not to work at that pay, and was going home, and did go away. Under Whiting's instructions, I told Brown to begin work, but he refused, and did no work at all. His reason for not working was that he had received a letter from Whiting about his having a lot of logs, and that they did not have them, and he was going home, and sue the company for expenses and salary."

The court charged the jury, among other things, as follows: "That both plaintiff and defendant agree as to substance of contract. Defendant agreed to employ plaintiff at $4 per day as band sawyer, provided plaintiff was able to secure a product from the mill of 35,000 feet of lumber per day, guaranteeing that the mill would produce that result. You will therefore find the first issue 'Yes.' The next issue, then, is, Did defendant violate his contract, plaintiff not being in default? The question is, Who broke the contract? If the defendant, you will answer

the issue 'Yes'; if the plaintiff, you will answer 'No.' Plaintiff says he left because there was no machinery, and the mill was inadequate to produce 35,000 feet per day, and that there were no logs to work upon. Defendant says the machinery and mill were adequate, and plaintiff waived the agreement. If plaintiff was ready and able to perform his contract and, not having agreed to wait, left because the machinery was not adequate, or because there was no present prospect to obtain the logs, you will answer the issue 'Yes.' If the machinery was adequate, and plaintiff agreed to wait for logs at reduced wages of $2 per day, and voluntarily left, you will answer the second issue 'No.' If both parties agreed to set aside the contract, there was an abandonment by consent, and you will answer the second issue 'No.'
If you so answer, you need not respond to the third issue. But (293) if you answer the second issue 'Yes,' the plaintiff is entitled to some damage, that which was in reasonable contemplation of the parties, as to the matters within their knowledge at the time the contract was made, to-wit: the cost of the trip to Hickory and return, and compensation to plaintiff for loss of time at a fair rate of wages, since the injury occurred up to the time of the trial; but you must not go beyond the time of the trial." The jury found the issues as above set forth. The plaintiff thereupon made a motion for a new trial, upon the grounds (1) that the verdict was contrary to the weight of the evidence; (2) for newly discovered testimony; (3) for misdirection on the part of the court, in that: First. The court erred in charging that, if plaintiff left because there was no adequate machinery for logs or the mill would not produce the number of feet guaranteed, the jury must find the issue "Yes"; and insisted that the court should have charged that, even if the machinery was in proper shape and the mill was adequate and the logs were present, if defendant refused to pay the contract price of $4 per day, the jury must find the second issue "Yes." Second. The court erred in charging that if plaintiff was ready and able to perform his contract and left, not having agreed to wait, because the machinery was not adequate and there was no present prospect of obtaining logs, they must answer the second issue "Yes"; and insisted that the court should not have inserted in the instructions the qualification "not having agreed to wait," and contended that whether the plaintiff agreed to wait or not had nothing to do with the breach of contract on the part of defendant, and there was therefore error in inserting that qualification.

Third. The court erred in instructing the jury that if the mill and machinery were adequate, and plaintiff agreed to wait for (294) logs at reduced wages of $2 per day, and voluntarily left, they must find the second issue "No"; and contended that the alleged con-

tract to work for $2 per day was either a new contract, made after the first contract was broken, or that it was a modification of the contract in question; that if it was a new contract the old contract was broken, and plaintiff was entitled to damages for the breach, and that whether there was a new contract or not could not affect the old contract or deprive the plaintiff of damages; that if plaintiff broke the new contract he was liable to defendant for damages, but this could not deprive him of his remedy for breach of first contract. If, however, it was a modification of the contract in question, then it was without consideration and void, and being void, the parties stood upon the same footing that they did before the modification was made, to-wit: a breach of contract on the part of defendant, and plaintiff was entitled to damages. Fourth. That the court erred in charging the jury that if both parties agreed to set aside the contract, this was an abandonment of it, and they must answer the second issue "No"; and contended that there was no evidence to support the contention that there had been any abandonment of the contract by the plaintiff. The motion for a new trial was overruled, and the court gave judgment upon the verdict for the defendant, and the plaintiff appealed.

T. W. Strange for plaintiff.
Shepherd & Busbee for defendant.

AVERY, J. The plaintiff brought suit to recover for a breach by the defendant of a mutual agreement theretofore made between them, by the terms of which the defendant was to pay the plaintiff as band
(295) sawyer at its mill according to the number of feet of boards sawed per day, $4.00 if the product should be 35,000 feet per day, $3.00 if not more than 30,000, and $2.50 if not more than 25,000 feet, and assured the plaintiff that it had on hand over five million feet of logs, and that if the mill should be speeded up to its full capacity it would enable the plaintiff to earn $4.00 per day, which of course involved producing 35,000 feet of boards. When the plaintiff arrived and proffered to carry out his agreement, he was told by the defendant's manager that the company had no logs there that day, and an offer, first of $1.50 per day and subsequently of $2.00 per day, was made plaintiff till a new supply of logs could be floated down the river.

Leaving out of view for the present the question whether the contract was subsequently waived by the plaintiff, it is certain that at this stage the defendant was guilty of a breach of it, as it then stood, in failing to furnish the logs and give the plaintiff the opportunity to show his skill and proficiency as a sawyer by turning off the maximum number

of feet in contemplation of the parties when the agreement was made. But there was no issue directly involving the question whether such a breach had been committed. The first was as follows: "Did the defendant on or about 5 June, 1894, contract and agree to give plaintiff employment as a band sawyer?" To this inquiry, which was too indefinite to determine the specific terms, the court instructed the jury to respond in the affirmative, because both parties testified that there was an agreement made by the telegrams and the letter introduced in evidence. The second issue was as follows: "Did the defendant wrongfully violate such contract, the plaintiff himself being in no default?" The plaintiff's counsel contended that the court erred in inserting in the second issue the qualifying words "the plaintiff himself being in no default," and that two issues ought to have been sub- (296) mitted to the jury, the one involving the inquiry whether the plaintiff had been guilty of a breach of the agreement, and the other raising the question whether there had been a waiver. It was contended that there was an admitted breach by the defendant, and that the fact should have been distinctly and separately found, but that at all events the two questions should not have been confused in one issue so as possibly to mislead the jury.

When the jury responded "No" to this issue with a double aspect, did they mean to answer in the negative to the inquiry whether the plaintiff had been without fault or did they mean to find that the defendant had been guilty of no breach of contract? The defendant had failed to comply with his contract in the first instance, and it would seem that the court might have so told them with the same propriety that he instructed them that there had been, according to any view of the evidence, a contract made.

The well-established rule is that an inconsistent verdict, or one that in connection with the pleadings requires explanation to make it harmonize completely with the pleadings and evidence and support a judgment, will be set aside if it is too late to have it reformed by the jury. *Allen v. Sallinger,* 105 N. C., 339; *Turrentine v. R. R.,* 92 N. C., 642; *Porter v. R. R.,* 97 N. C., 66; *Mitchell v. Brown,* 88 N. C., 156.

If the jury intended to find in response to this issue that the defendant did not violate its contract, the finding was in conflict with any aspect of the evidence, including the testimony of the defendant's agent, Whiting, and the plaintiff had just ground to complain when the opportunity was given to pass upon that question, and specially in this mixed issue. If, being misled and confused by the language, (297) the jury meant to declare that the plaintiff had been in no default, then it is plain that if the opportunity had been afforded them to

give intelligible expression through the issue to their true findings of fact, the plaintiff would have been entitled to a judgment. This being an executory contract and not performed in whole or in part by either, the parties might, without a new consideration other than the mutual acquittance of each other from the old promise, substitute a new agreement for it. Clark Contracts, p. 137. If one person agrees to render service to another at a stipulated price, the contract may be discharged by simple agreement at any time before the performance of any service, or the payment of money under its terms. But after the performance of any service or the payment of any part of the promised price the contract can be discharged only by a promise either under seal or supported by a consideration. Clark Contracts, p. 609. But, while we concede that such is the law without citation of numerous authorities adduced by counsel in support of the principle, it must be recollected that the testimony was conflicting upon this point. If the plaintiff was believed, he did not agree to waive the original agreement till the defendant should get an additional supply of logs, and it could be abrogated only by mutual consent. If the jury gave credit to Whiting, the defendant's agent, there was a mutual understanding that a new arrangement should be substituted for it. It being clearly possible that the jury might have been misled, and the issue with the response not being clear or intelligible, we think it was the duty of the judge to have set aside the verdict so that a new trial could be had upon issues that would enable the court to see plainly that they had understood and discharged
(298) their duty and found a verdict clearly entitling one of the parties to a judgment. We think there was error which entitled the plaintiff to a new trial.

New trial.

Cited: Lipschutz v. Weatherly, 140 N. C., 368; *McKinney v. Matthews,* 166 N. C., 581; *Palmer v. Lowder,* 167 N. C., 332.

J. L. LOCKHART v. SOLOMON BEAR.

Action for Damages for Unlawful Arrest—Abuse of Legal Process—Pleading—Personal Property Exemption—Arrest and Bail.

1. The personal property of a resident debtor to the value of $500 is exempt from any and all process for the collection or the enforcement of payment of debt, and such right to the exemption exists not by virtue of

the allotment, but by virtue of the Constitution which confers it and attaches the protection to the debtor before the allotment or appraisal.

2. Where, in an action for abuse of legal process by the defendant in causing the arrest of the plaintiff for the purpose of compelling him to pay defendant's claim out of property exempt from execution, the complaint alleged that defendant's affidavit, on which the warrant of arrest was issued, stated that plaintiff was about to "remove" himself from the State: *Held*, that it sufficiently appeared from the complaint that plaintiff was a resident of the State at the time the warrant of arrest was issued.

3. Admissions in an answer of a fact necessary to be stated in the complaint will be considered, for jurisdictional purposes, in aid of the complaint which does not state such fact directly, but only by implication; hence, where it was necessary to state in the complaint in an action that the plaintiff was, at the time of his arrest, a resident of the State and entitled to his personal property exemption, a statement in the answer that defendant sent a person to the place within the State where plaintiff did business and where he lived supplied the omission of the direct statement in the complaint of the fact of residence.

4. The arrest of a debtor, in arrest and bail proceedings, to compel the payment of a debt out of property exempt from execution, is an abuse of legal process which renders the creditor liable to the debtor in an action for damages.

5. An action for damages for the abuse of legal process may be maintained before the action in which such process was issued is terminated.

ACTION for malicious abuse of process, in which plaintiff sued (299) for damages compensatory and punitive, tried before *Hoke, J.*, at January Term, 1895, of NEW HANOVER.

The defendant answered, but at the trial demurred *ore tenus* upon the ground that the complaint did not state a cause of action. The demurrer was sustained, and plaintiff appealed.

Thomas W. Strange for plaintiff.
Shepherd & Busbee for defendant.

FURCHES, J. The plaintiff brings this action and files the following complaint:

"1. That on or about 1 June, 1893, the defendant, Solomon Bear, with the purpose and intent of extorting from the plaintiff an order upon one J. M. Wright for the payment to him of the sum of two hundred and sixty-four and 85-100 dollars, claimed by him to be due and owing to him by plaintiff, but which plaintiff denied, out of the proceeds of an insurance policy assigned by plaintiff to the said Wright,

threatened the plaintiff with arrest and imprisonment unless he gave him said order, and upon his refusing to do so made an affidavit in which he falsely alleged that plaintiff was about to remove himself and property from this State with intent to defraud his creditors, and sued out writ of arrest and bail for the alleged purpose of detaining the plaintiff in this State to answer such a judgment which he, the defendant, might obtain in a suit then instituted by him to recover the alleged debt before stated, and which as aforesaid was denied; and upon said writ he had the defendant arrested, deprived of his liberty and incarcerated in the common jail of New Hanover County
(300) for the period of six days and nights.

"2. That at the time the defendant made said affidavit and sued out said writ he well knew that plaintiff was insolvent and that he could not collect this debt, even if it existed, or any other debt by a judgment against him and by detaining him here for that alleged purpose, and that the only way he could collect the said disputed debt was by forcing this plaintiff through fear of arrest to give the said order, which plaintiff had refused to do; and plaintiff alleges, and so charges, that the defendant sued out said writ and *used* it not for the purpose set forth therein or commanded by the exigency of the writ, but for the illegal and malicious purpose of compelling him, the plaintiff, as aforesaid, through the fear of imprisonment either to pay the amount of a disputed debt to him in cash or to give him the said order upon the said J. M. Wright. And the plaintiff charges that by so doing he perpetrated a fraud upon the court and abused its process, to the discredit of the court and the law and to the great wrong and injury of the plaintiff.

"3. That the plaintiff was arrested at night, and when taken to the jail found there awaiting him the defendant, Bear, who told him that if he would give the said order to him he would have him released, but otherwise he must be locked up for the night. And upon plaintiff refusing to do this, the defendant directed the Sheriff to proceed, and the plaintiff was locked up in the common cell used to imprison criminals and other violators of the law.

"4. That, instead of ordering said arrest in the daytime when plaintiff might have sought for someone to bail him and prevent his going to jail, the defendant waited to order the arrest until late at night, when he knew plaintiff, being a stranger, could not procure a bond and
(301) would therefore be compelled either to comply with his demand or spend the night in a felon's cell. And plaintiff alleges that he could not procure bail that night, nor until the expiration of six days and nights thereafter, being a comparative stranger in the city of

Wilmington, and having few friends there; and that for the space of six days and nights he was compelled to endure the pain, mortification and mental anguish of the disgrace of imprisonment in a common jail and the deprivation of his liberty.

"Wherefore, plaintiff demands judgment against the defendant,

"*First.* For five thousand dollars damages for the wrong and injury done to him by defendant's illegal and nefarious acts.

"*Second.* For five thousand dollars punitive damages for his violation and abuse of the law.

"*Third.* For the costs of this suit."

(Verification in New York.)

The defendant demurred *ore tenus*. The court below sustained the demurrer upon the ground that the complaint did not state a cause of action, and plaintiff appealed.

In this ruling there is error. The demurrer admits the allegations of the complaint to be true. And it was admitted by defendant's counsel on the argument that the money in Wright's hands was all that defendant knew of plaintiff having, and that this sum was less than $500. Article I, section 16, of the Constitution of the State declares: "There shall be no imprisonment for debt in this State except in cases of fraud." Article X, section 1, declares: "The personal property of any resident of this State to the value of $500 shall be and is hereby exempted from sale under execution or other final process of any court issued for the collection of any debt." "The words 'personal property' shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership . . . (302) The word 'property' shall include all property, both real and personal." The Code, ch. 59, sec. 3765, subsec. 6. And, though it is not as distinctly stated as it might have been, we think it sufficiently appears from the complaint that plaintiff was a resident of the State at the time the warrant was sued out and plaintiff arrested. It states that defendant's affidavit alleged "that plaintiff was about to remove himself and property from the State." This, we think, clearly implies that plaintiff was a resident of the State. The term "remove himself from the State" would have been improperly used had he not been at that time a resident.

Besides, the admissions in defendant's answer should have been considered for jurisdictional purposes in aid of plaintiff's complaint. *Wilson v. Sykes,* 84 N. C., 215; *Johnson v. Finch,* 93 N. C., 205; *Puffer v. Lucas,* 101 N. C., 281. And the answer states "that on one occasion one of the parties (that defendant sent to collect his debt) went to the store where the plaintiff did business and where he lived." So if there

was any doubt left in the statement of the complaint as to the plaintiff being a resident of the State at the time of the warrant and arrest, we think that is supplied by the defendant's answer.

Whatever conflicts there may appear to be in the opinions of this Court as to when the homestead exemption commences, what is an abandonment, and when it terminates, can have no influence on this question. They are as to the homestead, real estate.

But as to personal property, under Article X, section 1, of the Constitution, $500 worth is absolutely free from any and all process for the collection or the enforcement of payment of debt. The creditor has no lien upon this amount of his debtor's personal property, nor can he have unless it is created by the debtor himself. There is no judgment
(303) lien that attaches; there is no lien by execution until levy, and there can be no levy on this. So it is absolutely free from all process for debt.

It may be claimed, and is claimed, that plaintiff was not entitled to this protection until it is laid off and allotted and assigned to him. We do not think so. It is not the allotment of the appraisers that gives the debtor this protection, but the vigor and force of the Constitution. And if it should be levied before, the debtor is still entitled to have it laid off and assigned to him.

This doctrine may not apply in matters of attachment, where it is alleged the defendant has left the State and lost his right of protection, for the reason that it is personal, attaches to and follows the person wherever he may wish to take it and he may dispose of it as he pleases free from any and all claims of creditors.

But we are now considering and treating the case before us, and not what may be exceptions. And as it is admitted this insurance money in the hands of Wright, amounting to less than $500, was all that plaintiff had, so far as defendant Bear knew, it is manifest that an assignment would have been a vain and useless thing, as there was less than $500, and one that the law would not require, as it never requires vain and useless things to be done.

Then, it is manifest from the allegations of the complaint that the defendant was trying to force the plaintiff by means of the extraordinary process of the court and the fear of imprisonment to pay him out of, or give him an order upon, a fund which the Constitution has declared shall be free from the exigencies of all process and from the debt of Solomon Bear or any one else.

This being so, we must declare that the complaint, aided by the answer, states a cause of action which should have been tried
(304) by a jury. *Sneeden v. Harris,* 109 N. C., 349; *Hewit v. Wooten,*

52 N. C., 182; *Grainger v. Hill,* 33 Eng. Com. Law, 333; *Myer v. Walter,* 64 Pa. St., 283; 2 Greenleaf Ev., p. 752; *Wood v. Graves,* 44 Mass., 365; 59 American Reports, 95. Our judgment in this case, we think, is fully sustained in *Sneeden v. Harris* and *Hewit v. Wooten, supra.* But the leading case on this subject, in which it is probably more fully discussed than any other, is *Grainger v. Hill, supra.* In that case *Tindall, C. J.,* said: "The complaint being that the process of the law has been abused to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded upon reasonable and probable cause."

Defendant contended that this action was like an action for false imprisonment, could not be maintained until the action under which plaintiff was arrested had ended. But the case of *Grainger v. Hill* is authority for saying it was not necessary to the action that the action of *Bear v. Lockhart* should have ended.

Justice Sharswood, in *Myer v. Walter,* 64 Pa. St., 283, discussing this question says: "An abuse of process is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it."

Mr. Greenleaf (Vol. II, p. 752) uses the following language: "But if the action is for abusing the process of law, in order illegally to compel a party to do a collateral act, such as to give up his property, it is not necessary to aver and prove that the process improperly employed is at an end, nor that it was sued out without reasonable or probable cause."

Battle, J., for the Court, in *Hewit v. Wooten,* 52 N. C., 182, says:

"If it appears that the present defendant sued out the writ mentioned in the bill of exceptions against the present plaintiff (305) for the purpose of extorting money from him by reason of his arrest, then the case would be within the principle sanctioned by the Court of Common Pleas in *Grainger v. Hill, supra.*"

In *Wood v. Graves,* 144 Mass., 365 (59 Am. Reports, 95), the Court uses the following language: "There is no doubt an action lies for the malicious abuse of lawful process, civil or criminal, . . . Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or compelling him to sign some paper, to give up some claim or to do some other act in accordance with the wishes of those who have control of the prosecution."

Therefore, after ascertaining the fact that defendant, Bear, had no right by any process of law to have the funds in the hands of Wright

appropriated to the payment of his debt, we are of the opinion that the authorities cited clearly show that plaintiff has a cause of action that should be submitted to a jury under proper instructions from the court as to the law arising upon the pleadings and evidence. We have gone somewhat out of our usual course, in writing opinions, of simply citing the cases we rely upon, and have in this case quoted them at some length. But we do this as we regard it as an important question, and as it was ably and earnestly argued on both sides. There is error, and the nonsuit should be set aside and the case restored to the docket for trial.

Error.

CLARK, J., dissenting: If the action brought by defendant against Lockhart and the ancillary remedy of arrest and bail obtained
(306) therein were not prosecuted bona fide, but were instituted fictitiously, for purposes of oppression or malice, Lockhart would be entitled to an action for malicious prosecution, but only after the first action had terminated adversely to Bear. To permit Lockhart to bring an action for malicious prosecution while Bear's action is still pending against him would be to try "an action within an action," for while the merits of the action of *Bear v. Lockhart* are still pending, Lockhart could not get along in an action against Bear for malicious prosecution without trying the very issues to be determined in the first action. But it is claimed that this can be maintained as an action for "abuse of process" while the former action of *Bear v. Lockhart* is still pending. If so, the cause of action must be something outside of the matters to be determined in *Bear v. Lockhart,* and not dependent upon the merits in that case. In other words, it must be admitted for the purposes of this action that Bear's action against Lockhart is properly brought and that whatever has been done within the scope of that action was rightly done, otherwise the same question, the merits of Bear's action against Lockhart, would be pending in both cases at the same time.

Now, it is within the scope of Bear's action against Lockhart to allege Lockhart's indebtedness and upon proper affidavit to hold him in arrest and bail. This was all Bear did. That he offered for a consideration to release Lockhart from the arrest and bail is not outside the scope of the action. If it turns out that the action was brought for purposes of extortion and malice, that can be inquired into by an action for malicious prosecution after the first action is terminated, but neither the suing out an order in arrest and bail nor the offer to dismiss it upon paying or securing the debt is outside the scope of the

action. They are within its very purview and object. Nor did the fact that the defendant was worth nothing above his exemp- (307) tion exempt him from liability to arrest and bail upon the same affidavit as would have made anyone else liable thereto. It was simply Lockhart's misfortune that he was unable to give bail. It would seriously limit the value and use of the ancillary remedy of arrest and bail if a party, resorting to it in good faith in the cases justified by statute, should become liable whenever the party arrested is unable to give bond. The liability of the plaintiff in such cases depends upon the good faith in the action he is prosecuting, and not upon the pecuniary ability of the defendant therein to give bail.

Neither *Sneeden v. Harris,* 109 N. C., 349, nor *Hewit v. Wooten,* 52 N. C., 182, nor the cases cited from other States, sustain the plaintiff's cause of action. In *Hewit v. Wooten* it was held that an agreement that the Sheriff might accept a sum of money in lieu of a bail bond could not be considered in any other light than an action for malicious arrest or malicious prosecution, which could not be brought till the first action was terminated. In *Sneeden v. Harris* Harris maliciously sued out an order of arrest and bail against Sneeden for alleged slander of title, not for the purposes embraced in the scope of that action, but that, while Sneeden was under arrest, Harris might get into possession of certain real estate held by Sneeden without resorting to an action of ejectment. And all the other cases permitting an action to be brought for "abuse of process" show that the wrong complained for was something done outside of and distinct from the acts which could be done within the scope of the first action. But the wrong here complained of is that Bear sought by his action, which was not decided when this action began, to collect a sum of money which Lockhart denied he owed, that Lockhart was insolvent and could not give bond, and therefore Bear expected to force him to pay the debt, and offered to release him upon securing part of the debt. (308) This is all within the very scope and purport of the proceedings in arrest and bail. If the debtor is solvent, why resort to arrest and bail? It is when it is doubtful whether the judgment can be collected and upon the state of facts authorizing an arrest and bail that this process is resorted to. It must be remembered that if the arrest and bail was issued upon a state of facts justifying a judgment the defendant therein is not entitled to his homestead and personal property exemption against such judgment. *Fertilizer Co. v. Grubbs,* 114 N. C., 470; *S. v. Williams,* 97 N. C., 414. If it turn out that it was resorted to maliciously and for purposes of extortion, then after the termination of the action in favor of the defendant therein (and not before)

he can in turn become plaintiff in an action for malicious prosecution. But when every act alleged in the complaint, not in the inferences argumentatively alleged therein, is done within the scope of the action, as in this case, an action for "malicious abuse of process" does not lie. The Judge below properly sustained the demurrer.

Cited: *Wright v. Harris,* 160 N. C., 546, 548.

WILLIAM H. STRAUSS v. CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION.

Building and Loan Association, Insolvency of—Stockholders—Borrowing and Nonborrowing Members, Rights of—Mortgages—Power of Sale—Receivers—Distribution of Fund of Insolvent Building and Loan Associations.

1. In case of the insolvency of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporator, and every member indebted to it must be treated as a debtor.

2. In winding up the affairs of a building and loan association, every borrowing member indebted to it must be charged with the amount actually received by him, with interest at 6 per cent from the time the money was received, and must be credited with all amounts paid by him, whether as fines, penalties, interest or weekly dues; and every nonborrowing member must be credited with the sums paid in by him, with interest at 6 per cent from the dates of such payments.

3. The appointment of a receiver for an insolvent building and loan association causes the debts due to it by borrowing members immediately to mature, and they can be collected at once—a rule which is applicable only to such associations.

4. The power of sale in a mortgage to a corporation cannot be exercised by a receiver of such corporation; to foreclose the mortgage recourse must be had to an order of the court controlling such proceeding.

5. The courts will not advise a receiver of an insolvent building and loan association as to the mode of distributing its assets until they are in court.

(309) ACTION pending in NEW HANOVER, heard by consent before *Graham, J.,* at chambers on 11 October, 1895, on application of the receivers of the defendant corporation for instructions as to the

method they should adopt in the collection and distribution of its assets.

The material parts of the petition and the judgment of his Honor are set out in the opinion of *Associate Justice Furches.* From the judgment of his Honor the receivers and nonborrowing members of the defendant association appealed.

E. S. Martin and Ricaud & Weill for appellants.
W. R. Allen and Jacob Battle for appellees.

FURCHES, J. The defendant is what is called a "Building and Loan Association," organized as a corporation under the laws North Carolina. Defendant becoming insolvent, the plaintiff brought (310) an action in the Superior Court of New Hanover County to close out and wind up the concern. The petitioners, Iredell Meares and P. B. Manning, were appointed receivers, and filed their petition and asked instructions from the court, in which they say:

"You receivers respectfully report to the court that, in the attempt to collect the debts due to the defendant association by its members, they are met with the difficulty of how to adjust the balances that may be due the association between the amount of the debt and the amount which may have been paid in by the borrowing members on their shares of stock. The complication arises from the fact that the borrowers, who are indebted to the association, are likewise stockholders therein, and as stockholders liable for their pro rata share of whatever losses may have been incurred in the failure of the association. If the relationship between the borrower and the association was simply that of debtor and creditor, the balance could be easily ascertained. The association, however, under its plan loaned money only to its members, and these members made monthly payments on their stock, which, when amounting with accruing profits to the par value of their stock, were expected to be applied to the extinguishment of their loan, the stock being then cancelled. The failure of the association, however, eliminates the possibility of maturing the stock, and necessitates an equitable adjustment between its members for the collection and distribution of the assets."

Upon the hearing *Judge Graham* made the following order:

"This action coming on to be heard before his Honor, *A. W. Graham, Judge* presiding in the Sixth Judicial District, at chambers at Clinton, North Carolina, on 11 October, 1895, by consent of all parties thereto, upon the petition of Iredell Meares and P. B. Manning, (311) receivers of the defendant, the Carolina Interstate Building and Loan Association, praying the court for direction and instruction as to

the winding up and settlement of the affairs of said corporation with and among the members and shareholders thereof, and the same being argued by counsel for said receivers and borrowing members of said defendant corporation, respectively, and considered by the court;

"The court rejects all of the plans of settlement suggested in the petition of said receivers, and now orders, adjudges and decrees, and the said receivers are hereby advised and directed to wind up, adjust and settle the affairs of said corporation defendant and distribute the assets thereof among the respective members or shareholders of said corporation upon the principles and in the manner following, that is to say: In the settlement with members of said corporation who have borrowed money therefrom and secured the said loan either by a pledge of stock or by pledge of stock and mortgage on property, and who are now indebted to said association, the said receivers shall charge the said borrowing member with the amount of money loaned to him by said association, charging interest thereon from the date of said loan to 24 July, 1895, at the rate of 6 per cent per annum. And said member shall be credited with all sums of money paid in by him, whether paid as dues, fines, premiums or in any other manner, and also with interest on all of said payments from the respective dates thereof until the said 24 July, 1895, and the sum so ascertained shall be deducted from the amount of the loan to said member by the association, and the balance remaining shall be the debt due and owing by said member to the said association,
(312) and shall bear interest from the said 24 July, 1895, until paid at the rate of 6 per cent per annum, and be secured by the mortgage executed by said member to the association securing the original loan. And upon the payment of said balance so ascertained, with all interest thereon, the mortgage given as aforesaid shall be released and discharged by said receivers according to law.

"That the said receivers shall ascertain as aforesaid the amount due by each and every member or shareholder of said association, and shall notify him in writing of the same and demand payment thereof, and if the said amount due by such member shall not be paid within thirty days after service of said notice, the said receivers shall in their discretion proceed, either under the power of sale contained in said mortgage or by proceedings in the proper court having jurisdiction, to foreclose said mortgage and sell the property conveyed thereby upon such terms as to said receivers shall seem best or said court may prescribe. And in those cases where only a pledge of stock was made as security for the loan, upon such default the said receivers shall in their discretion bring suit against said member personally to recover the balances due said association by him. Upon the ascertainment in the manner aforesaid

of the balance due by the borrowing members to the association, and the payment thereof, such borrowing member shall cease to be a member of said association and shall be discharged from all further liability to said association either as debtor or stockholder, and shall have no right to participate in the distribution of the assets of said association, but his stock shall be deemed cancelled and surrendered.

"All sums of money collected from borrowing members as hereinbefore directed shall be held by said receivers and applied by them, with all other assets of said association, first, to the payment of costs, charges and expenses of executing the trust of said receivership; (313) secondly, to the payment of the creditors of said association in full; and the residue thereof shall be distributed equally and ratably among the nonborrowing members of the association in proportion to the amounts paid in by them respectively upon the shares of stock held by them, including the interest upon said several payments from the average date thereof until the said 24 July, 1895.

"And the court doth retain this cause for further direction."

To the order of *Judge Graham* the receivers and nonborrowing stockholders excepted and appealed.

This is a new question to us. But it seems to us that the parties have applied too much refinement to their theories of settlement, when one more simple, based on plain business methods, would be better. The receivers say in their application for instructions that the whole trouble grows out of the fact that all the parties interested are both stockholders and debtors to the concern; that if the debtors were not stockholders there would be no trouble in adjusting the matter. This being so, it seems to us to be of easy solution by first considering every one having stock in the concern, whether as creditor or debtor, as a corporator. Endlich B. & L., sec. 527. Then consider each member indebted to the concern as a debtor, and you have the condition of things that the receivers say, if it existed, there would be no trouble in adjusting the whole matter. It seems to us there can be no trouble in the mind separating the parties interested upon the line we have indicated. And if this is so, it would seem that the greatest trouble in the way of a settlement has been removed.

But there are other matters to be considered. On 24 July the (314) first receiver was appointed, and the corporation ceased at that time. Endlich, *supra,* sec. 528. This date is when the receivers' work commenced, and will be the dividing line between the work of the corporation and that of the receiver. Every one who held stock in the concern on that day, whether as a borrowing or nonborrowing member, is a corporator, and must so remain until the concern is closed out, and

will be subject to the burdens and entitled to the benefits according to his amount of stock. Endlich, *supra.*

The capital of the concern will be the shares of stock it has issued and which have not been redeemed; when redeemed in part, then only as to that part unredeemed, and any other available assets it may have. Its assets will be what money and effects it had on hand on 24 July, 1895, including of course what debts were then owing to the corporation. In making collections of the borrowing members, they should only be charged with the amounts they have received. Endlich, *supra,* secs. 527, 528. And under our statutes, as construed in *Rowland v. B. & L. A.,* 115 N. C., 825; *s. c.* 116 N. C., 877; *Meroney v. B. & L. A.,* 116 N. C., 882, these borrowing members can only be charged 6 per cent interest on the amounts they received from the time they received them, and are entitled to credits on the amount for all they have paid into the concern since they borrowed the money, whether it was called fines, penalties, weekly dues or by any other name. The nonborrowing members will be entitled to have interest computed on the amounts due them at the rate of 6 per cent. The receivers should be fully empowered by order of court to proceed to collect in the funds of the concern and to do any other necessary act for the benefit of the concern, to employ attorneys, if necessary, whose pay must be fixed by the court. The appointment of the receivers of this insolvent corporation caused the
(315) debts and mortgages due the concern to mature, and they may be collected at once. Endlich, *supra,* sec. 523. This rule only applies to insolvent building and loan associations, so far as we have been able to see. But we know of no law that will authorize the receivers to foreclose under the power of sale contained in the mortgages, as we see they were made to the corporation, and the corporation alone is empowered to foreclose by sale.

At first we entertained some doubt as to whether we should review the judgment of the court below and give instructions to the receivers. But as it seemed material, if not necessary, to their work, we have gone as far as we thought we were authorized in doing. Beach Receivers, sec. 259. But we must decline to give any instruction as to the distribution of the funds until the receivers have them in court. This we think is the well-settled rule of equity. Therefore, the order appealed from will be modified and reformed in accordance with this opinion.

Judgment modified.

Cited: Hollowell v. Loan Asso., 120 N. C., 287; *Hussey v. Hill, ib.,* 316; *Thompson v. Loan Asso., ib.,* 424, 425; *Meares v. Davis,* 121 N. C., 129; *Meares v. Duncan,* 123 N. C., 205; *Meares v. Butler, ib.,* 207; *Williams v. Maxwell, ib.,* 593, 594; *B. & L. Asso. v. Blalock,* 160 N. C., 492.

R. M. NIMOCKS v. JOSIAH POPE ET AL.

Conditional Judgment—Replevin Bond—Liability of Surety—Compromise by Defendant—Judgment Against Surety.

1. A judgment entered by consent and containing a provision that, if defendant would file within a certain time well-secured notes equal in amount to the amount of the judgment, the judgment should be cancelled by the plaintiff, is not a *conditional* judgment. (*Strickland v. Cox*, 102 N. C., 411, cited and distinguished.)

2. A surety on a replevin bond, given for the return of property in an action of claim and delivery, by signing such bond makes the defendant principal his agent to compromise plaintiff's claim for damages, and upon a compromise being made by such defendant without the knowledge or consent of the surety, the court is authorized to enter up judgment against the defendant and his surety in accordance with such compromise.

MOTION to set aside the judgment, heard before *Norwood, J.,* (316) at May Term, 1895, of CUMBERLAND.

The plaintiff sued defendant Pope in a civil action on a money demand to Cumberland Superior Court, November Term, 1891, and at that term filed his complaint, containing paragraphs I, II, III and IV. Date of summons 11 July, 1891.

The defendant, Pope, filed his answer at the same term, controverting the allegations of this complaint, but admitting some indebtedness.

At November Term, 1892, there was a consent order of reference to take and state an account between the parties and report to next term, which was done accordingly; and to the report the defendant, Pope, filed exceptions at May Term, 1893, which were never passed upon.

On 31 October, 1892, Nimocks commenced claim and delivery proceedings against Pope before the Clerk of Cumberland Superior Court for two mouse-colored mules, the summons being returnable to November Term, 1892, but it was not served until 29 April, 1893. Pope replevied the mules by giving bond, with H. A. Hodges as his surety, in the penal sum of $400, conditioned as the law required. There was no complaint filed in the claim and delivery proceedings, but at November Term, 1893, the plaintiff, by leave of the court, amended his complaint in the civil action by adding thereto paragraphs V, VI and VII, alleging the seizure of the two mules under claim and delivery proceedings, their replevy by Pope, with H. A. Hodges as surety,

(317) and their value at $250; also his ownership by reason of Pope's mortgage to him; and praying judgment against defendant Pope and his bondsman, H. A. Hodges.

The answer of defendant Pope, filed at the same term, controverted the ownership of the mules, and, setting forth certain irregularities in the claim and delivery proceedings, asked for a dismissal thereof.

At May Term, 1894, the "consent judgment," signed by *Judge Bryan,* was agreed to by plaintiff's attorney and by defendant Pope's attorneys —H. A. Hodges, who resides in Johnston County, not being represented by counsel and not being present at the court, and without his knowledge and consent. The judgment is in favor of plaintiff against Pope and Hodges, his surety, $275 with 8 per cent interest until paid; adjudges the title and right of possession in the mules to be in plaintiff; directs their sale by a commissioner named and the application of the proceeds to the payment of the $275 and costs of this action, and winds up with a condition that the judgment is to be marked satisfied and settled, provided Pope by 1 June, 1894, executed two notes of $137.50 each, endorsed by solvent persons and to be entirely satisfactory to said Nimocks.

The two mules were surrendered by Pope to the plaintiff, and were advertised and sold by the commissioner on 8 December, 1894, at public sale, and brought—one $38 and the other $28, netting, less cost of sale —$60.70, which was credited on the judgment.

On 27 March, 1895, the plaintiff sued out execution on the "consent judgment" to the Sheriff of Johnston County, where Hodges resides, for the sum of $275 with interest from 7 May, 1894, and costs $22.95, with credit endorsed of $60.70, returnable to May Term, 1895.

(318) Under this execution the homestead of Hodges was laid off and a levy made upon the excess, 161 acres.

Thereupon Hodges, upon his own and supporting affidavits, applied to and obtained from his Honor, *Judge Hoke,* a restraining order in the case, with order upon plaintiff to show cause why the injunction asked should not be granted and the judgment set aside as to Hodges, returnable before his Honor, *Judge Norwood,* holding May Term, 1895. At May Term, 1895, the motion of Hodges to set aside the judgment as to him and for an injunction was heard by *Judge Norwood* upon affidavits on both sides, and both motions were refused by his Honor, who rendered the judgment of record, from which ruling and judgment H. A. Hodges appealed to the Supreme Court.

R. P. Buxton and MacRae & Day for Hodges.
Robinson & Bidgood contra.

FURCHES, J. This was a motion made at May Term, 1895, to set aside a judgment rendered at May Term, 1894, of the Superior Court of Cumberland County. The judgment which the court was asked to set aside was rendered in an action pending in the Superior Court for debt secured by a chattel mortgage, in which proceedings in claim and delivery had been sued out for a part of the property secured by the chattel mortgage, and two mules were seized by the Sheriff, which the defendant Pope replevied by entering into bond in the sum of $400, with the defendant Hodges as surety. At May Term, 1894, the plaintiff and defendant Pope entered into a compromise, and judgment was entered thereon, signed by counsel for plaintiff and defendant, for the sum of $275. There is no allegation of fraud, but defendant alleges that the judgment is irregular for the reason it was taken against him when he was not a party of record, and for reason that it is a (319) conditional judgment, and cites *Strickland v. Cox,* 102 N. C., 411, for this position. But upon examination we find this not to be a conditional, but an absolute judgment. It is true the judgment contains an agreement of counsel that, if Pope will file two well-secured notes amounting together to the amount of the judgment by a certain time, plaintiff will take them as payment instead of requiring the money, and will mark the judgment satisfied. But this does not make it a conditional judgment. Plaintiff only agrees to take other payment in satisfaction than money if defendant wished to pay in this way. But defendant could have satisfied it at any time with the money. So *Strickland v. Cox* does not apply.

The defendant's other ground is equally untenable. Hodges was bound for the return of the property and for the damage sustained by plaintiff on account of the detention and deterioration. And it must be presumed that these matters were considered in the compromise, and when they speak of interest they considered that the equivalent for detention. But be that as it may, the defendant Hodges, by signing Pope's bond as surety and thereby taking the property out of plaintiff's possession, in law made Pope his agent to compromise plaintiff's claim for damages; and upon Pope's doing so the court was authorized to enter up judgment against Pope and the defendant Hodges upon his bond. *Council v. Averett,* 90 N. C., 168; *Robbins v. Killebrew,* 95 N. C., 19 and 24; *Harker v. Arendell,* 74 N. C., 85; *McDonald v. McBryde, ante,* 125. There is nothing that Hodges could complain of, that the two mules were surrendered up after this judgment and after the time had expired in which he might have satisfied the judgment by filing the two notes, and were sold (admitted fairly) and the proceeds of sale applied in part payment of plaintiff's judgment. (320)

Defendant Hodges has shown no ground for setting aside and vacating the judgment against him. *Stump v. Long,* 84 N. C., 616; *McDonald v. McBryde, supra.* The judgment appealed from is affirmed.

Affirmed.

Cited: Darden v. Blount, 126 N. C., 249.

LEE FORMEYDUVAL v. R. A. ROCKWELL ET AL.

Homestead—Allotment to Widow and Children—Irregularity of Allotment—Collateral Attack—Statute of Limitations.

1. The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow.

2. While the allotment of a homestead to one not entitled to it is void, it cannot be collaterally attacked by the debtor or anyone claiming under him, their remedy being under section 519 of The Code, providing that objections to the allotment shall be filed with the clerk and placed on the civil docket for trial.

3. The homestead right, being a right vested by the Constitution, cannot be destroyed by any irregularity in proceedings for its allotment; therefore:

4. Where, in proceedings for the allotment of a homestead to the minor children of a decedent, the main purpose was accomplished under the direction of the court having jurisdiction of the parties and the subject-matter, and neither party excepted to what was done until after the full benefit of the constitutional provision had been enjoyed by those entitled to it, the allotment will not be declared void so as to permit the statute of limitations to run against a judgment the collection of which has been stayed by the existence of such allotment.

5. The statute of limitations does not run against a judgment during the existence of the homestead.

(321) ACTION tried at July Term, 1895, of COLUMBUS before *Robinson, J.*

Proceedings to sell land for assets to pay debts of intestate of plain-

tiff. A jury trial was waived, and by consent the Judge found the facts as follows:

"That H. C. Rockwell died intestate in the year 1874, and that J. W. Ellis qualified as administrator on the estate of the said Rockwell, 4 March, 1874. The said Ellis died on 10 May, 1883, and the plaintiff qualified as administrator *de bonis non* on 5 September, 1893. That at Spring Term, 1876, in the Superior Court of Columbus County, the following judgments were rendered and docketed against J. W. Ellis as the administrator of said H. C. Rockwell, viz.: One in favor of R. G. W. Gressett for the sum of $500, with interest and cost; one in favor of Warren Baldwin for $253.88, with interest and cost; one in favor of S. J. Formeyduval for $334.79, interest and cost. That on 31 April, 1878, the said J. W. Ellis as administrator of Rockwell filed his petition in the Superior Court of Columbus County before the Clerk against Willie Rockwell, Lucy Rockwell, Chester Rockwell and Robert A. Rockwell, and J. C. Powell, general guardian of said defendants, who were at that time infants, to sell land to create assets. The defendants, by their guardian, filed an answer admitting the allegations of the petition and asking that a homestead be assigned to them. The Clerk on the —— day of ——, 1878, made an order granting license to sell the lands after the laying off and assigning homestead and dower to the widow and heirs at law. That on 25 November, 1878, a homestead was laid off in said proceedings, under said order, to the widow and children, and the return was filed in the Clerk's office with the papers in said proceeding. That said original homestead return was registered in office of the Register of Deeds on 7 April, 1892, but no note was ever made on the judgment docket of said return in said cause. That on (322) 6 January, 1879, the said Ellis, administrator, sold the lands of said estate, outside of said homestead, and reported the same, which was duly confirmed by the Clerk and approved by the Judge of the district.

"The widow and the heirs at law of said H. C. Rockwell continued to occupy the house and lot of the said H. C. Rockwell, assigned as the homestead in said proceeding, from the death of said Rockwell up to the present time. That R. A. Rockwell, the youngest child of said H. C. Rockwell, deceased, arrived at the age of 21 years on the —— day of ——, 1892. This action was begun on 6 September, 1893. No dower was ever laid off and assigned to said widow. That said widow died before the commencement of this action. That the judgments above set out have not been paid. That the homestead return, herewith sent, and the order of the Clerk and Judge, herewith sent, are the only papers in the proceeding relating to the homestead, except the petition and answer in said cause."

Upon the finding of the foregoing facts, the defendants asked the court to hold that the said judgments were barred by the statute of limitations.

The court declined to so hold, and the defendants excepted. The defendants asked to hold that no homestead had ever been laid off and assigned according to law, and that the return made in said proceeding is void.

The court declined to so hold, and the defendants excepted. The court adjudged that the statute of limitations did not bar the claim sued on, and that the homestead relied on to prevent the bar of the statute was valid in this proceeding; that the defendants were estopped by their answer and the judgment in the proceeding of Ellis, administrator, to sell the lands of the said H. C. Rockwell, and by their occupancy (323) of said homestead assigned in said proceeding to deny the validity of said homestead allotment. The court held that neither the seven years statute, the six years nor the ten years statute barred said judgment, the said homestead suspending the operation of said statute of limitations.

The court adjudged that the plaintiff have a license to sell the land described in the complaint, from which judgment the defendants appealed to the Supreme Court.

Lewis & Burkhead for plaintiff.
Shepherd & Busbee for defendants.

FAIRCLOTH, C. J. H. C. Rockwell died intestate in 1874, and J. W. Ellis qualified as administrator on the estate. In 1893 the plaintiff qualified as his successor *d. b. n.* In 1876 judgments were entered against the original administrator, who in 1878 filed a petition before the Clerk against the minor heirs of the deceased to sell the lands for assets. The heirs, by their guardian, answered the petition admitting the allegations and asking that a homestead be assigned to them. The Clerk granted license to sell the lands after laying off and assigning the homestead and dower to the widow and heirs at law. No dower was ever laid off. The widow died and the youngest child arrived at 21 years before this action commenced, they having occupied the homestead premises to the present time. The excess of the homestead was sold, and this action was commenced in 1893 to sell the homestead estate for assets to pay said judgments, etc.

The defendants, said heirs, now answer and allege that said homestead was not legally assigned and rely on the statute of limitations in bar of said judgments. This defense is at least ungracious after the full

enjoyment of the constitutional homestead provision. They say (324) the assignment of the homestead was not according to law in that it was assigned to the children and the widow, and that the return in said proceeding is void.

Referring to the record we find that defendants demanded that their homestead be assigned, and the Clerk ordered that the excess be sold "first assigning to the heirs at law of H. C. Rockwell a homestead of the value of $1,000," from which judgment the plaintiff appealed to the Judge of the Superior Court. The commissioners report that "having been duly summoned and sworn to act as appraisers of the homestead" of the widow and the heirs, they proceeded to do so, and described the lands assigned fully, as exempt from sale by the administrator or under execution according to law, and the Sheriff certifies that the return was made and certified in his presence. The sale was made and confirmed by the Clerk, and the report of sale was confirmed by the Judge. The case sent to this Court states that the homestead return was filed in the Clerk's office with the papers in said proceeding, and that said original homestead return was registered in the office of the Register of Deeds.

The contention of the defendants is that it does not appear that said homestead was laid off as prescribed in The Code, secs. 502-515, inclusive, and is therefore void, and that said judgments are barred by the statute of limitations.

The right to a homestead is guaranteed by the Constitution, and the Legislature prescribes certain methods of laying it off, in the sections referred to, as the convenient and practical modes of doing so. Whilst the record does not set out particularly and in detail the proceedings in the case, still it sufficiently appears that the main purpose was accomplished under the direction of the court having jurisdiction of the parties and the subject of the action, and that neither party (325) excepted to what was done until after the full benefit of the constitutional provision had been enjoyed by those entitled to it. The objection that the assignment was to the *widow* and the children is without force, as it was simply surplusage as to her.

The allotment of a homestead to one having no right thereto is void and may be attacked collaterally, as if it be assigned to the widow alone when minor children are living, and they would not be estopped. *Williams v. Whitaker*, 110 N. C., 393. A complete answer to the defendant's contention is that an allotment of a homestead cannot be collaterally attacked by the judgment debtor or anyone claiming under him. If either party is dissatisfied with the assignment his remedy is found in The Code, sec. 519.

The homestead right is a vested right and cannot be destroyed by any irregularity in the proceedings or want of procedure in the manner prescribed in The Code; therefore, when a failure in those methods occurs, it can, "in order to enforce the right," be accomplished by other methods by the proper tribunal. This has been done by the Superior Court under the direction of this Court in a case where the conditions were such that neither the Sheriff nor a justice of the peace could have the allotment made. *Littlejohn v. Egerton,* 77 N. C., 379. The statute of limitations does not run against a judgment during the existence of the homestead. Laws 1885, ch. 359; Laws 1887, ch. 17; Laws 1895, ch. 397. We find no error in the judgment below.

Affirmed.

Cited: Oates v. Munday, 127 N. C., 447; *Hughes v. Pritchard,* 153 N. C., 251; *Sash Co. v. Parker, ib.,* 132; *Watters v. Hedgpeth,* 172 N. C., 312.

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(326)

D. F. SMITH ET AL. v. M. C. SMITH ET AL.

Action to Set Aside Deed—Undue Influence—Mental Capacity and Will Power of Grantor—Opinion of Witness—Evidence.

1. Where, in the trial of an action to set aside a deed for fraud and undue influence on the grantor, his mental capacity was in issue, it was competent for a nonexpert witness to express his opinion, founded on association with the grantor, that the latter's mental capacity "was good."

2. An ordinary witness, if not an expert, after stating the mental condition, character or temper of a person, is incompetent to go further and express his belief that, in consequence of such character, temper, etc., such person would or would not do an act attributed to him, the capacity to do which is the matter in issue before a jury; for such an expression of opinion would be an invasion of the province of the jury.

3. While a nonexpert witness may be permitted to state his impression, derived from association and observation, as to the mental capacity of a person, when such capacity is in issue, he will not be allowed to gauge the will power of such person and express the belief that no power on earth could influence it, such an opinion being one that the law does not consider inexperienced and untrained men competent to form from association and observation.

ACTION brought for the purpose of setting aside a certain deed and certain bills of sale made by one H. C. Smith, deceased, to his wife,

M. C. Smith, on the grounds of fraud and undue influence, tried at February Term, 1895, of COLUMBUS before *Norwood, J.,* and a jury.

On the trial the defendants introduced as witness one R. R. Bellamy, who testified as follows: "I reside in Wilmington; am a druggist; I have known H. C. Smith for 9 years; I sold him goods during that time; I saw him three or four times a year; sold him goods when he came to town, and also on orders. His mental capacity was (327) good; he was a good business man—clear-headed, and very accurate. He was a man of great will power."

The defendant's counsel then asked the witness whether or not said H. C. Smith could be influenced by others. This was objected to by plaintiffs, but the question was allowed by the court, and the plaintiffs excepted.

The witness answered as follows: "When he made up his mind, he could not easily be moved. He was not easily influenced unless he had made up his mind to be influenced, and I don't think that even his friends could influence him. No power on earth could influence him."

There was a verdict for the defendants and from the refusal of a motion for new trial the plaintiffs appealed.

Lewis & Burkhead for plaintiffs.

J. D. Bellamy, Jr., and DuBrutz Cutlar for defendants.

AVERY, J. Having stated that he had opportunity to judge of the mental capacity of the grantor, whose deed the plaintiffs seek to set aside for undue influence and fraud, the witness Bellamy, though not an expert, was competent to express the opinion, founded upon association with the grantor, that it "was good." *Clary v. Clary,* 24 N. C., 78. No objection was made by the plaintiffs to that or the further testimony that he "was a good business man—clear-headed and very accurate"; and "was a man of great will power." But, conceding that he was competent to show both the mental condition and the marked characteristics of the deceased, did he not transcend the limit prescribed for the ordinary witness, if not for the expert, when he delivered an opinion which, if concurred in by the jury, determined the very question of fact upon which the controversy depended? If the jury believed that H. C. Smith could not be influenced by any "power (328) on earth," whether the effort to divert him from a fixed purpose was made by friend or foe, of course it followed that the execution of the deed and bills of sale to M. C. Smith, his wife, was not procured by undue influence on her part as contended by the plaintiffs. It is the general rule that an ordinary witness, at least if not an expert,

after stating the mental condition, character or temper of a person, is incompetent to go further and give expression to his belief that, in consequence of the state, character or temper as described, such person would or would not do an act attributed to him and upon his capacity or disposition to do which the finding of the jury depends. Lawson Expert Testimony, p. 497 (Rule 65 and p. 502, *et seq.*, B); *Armour v. The State,* 63 Ala., 173; *Carpenter v. Colvert,* 83 Ill., 63; *Fry v. Bennett,* 3 Bos., 201. To permit an ordinary witness to anticipate the action of the jury and attempt to substitute his opinion upon the very matter at issue for their own, would be to clothe him, when testifying as to mental capacity, with the power which our statute denies to the presiding Judge. Upon the same principle counsel may be required to so frame their questions to an expert as to avoid eliciting his conclusions as to the weight of testimony or the credibility of witnesses, or any answer which, if acted on, would decide the issue for the jury instead of leaving them to review the evidence and reach their own conclusion upon the facts. Rogers Expert Testimony, p. 62.

But, apart from the objection that the witness invades the province of the jury by giving them his opinion as to what they should find, the testimony offered is clearly incompetent on another ground. It is only upon the theory that it is necessary to do so in order to get (329) before the jury impressions of witnesses derived from association such as would form the basis of a belief in the mind of each juror if he had had the same opportunity, that the ordinary witness is allowed to state an opinion as to mental capacity. While the non-expert witness is deemed capable of judging of the general question whether a person is sick or well, he is not competent to go further and give an opinion upon the nature of a disease or the extent of the ravages it has made upon the system of the patient. Lawson, *supra* p. 471. For the same reason it does not follow that a witness can gauge the will power of another and give an opinion of the amount of pressure it will withstand, because the law provides that from necessity he may be permitted to state the general impression, derived from observing the countenance, manner, words and conduct of the same person, as to his mental capacity. It is at least questionable whether even the most eminent of alienists would, as experts, venture to testify to the capacity of a sane or an insane patient to resist importunity. It is sufficient, however, for present purposes to say that the testimony was incompetent because it was not a statement of an impression or opinion which inexperienced or untrained men are considered by law competent to form from association and observation.

It is needless to discuss the other assignments of error, as the same questions may not arise again. For the error in admitting the testimony of the witness Bellamy the plaintiff is entitled to a

New trial.

Cited: Tillett v. R. R., 118 N. C., 1042; *Whitaker v. Hamilton*, 126 N. C., 471; *Cogdell v. R. R.*, 130 N. C., 326; *Marks v. Cotton Mills*, 135 N. C., 289; *In re Peterson*, 136 N. C., 29; *Taylor v. Security Co.*, 145 N. C., 396; *Deppe v. R. R.*, 154 N. C., 525; *Stewart v. Stewart*, 155 N. C., 342, 343; *Boney v. Boney*, 161 N. C., 624; *Locklear v. Paul*, 163 N. C., 340; *Hodges v. Wilson*, 165 N. C., 327.

(330)

C. B. TOWNSEND v. GEORGE W. WILLIAMS.

Bank Directors, Duties of—Liability for Deposits of Customers—Bill of Particulars, When Ordered.

1. While directors of a corporation are not insurers or guarantors and therefore liable for its debts, yet they are trustees and liable as such for losses attributable to their bad faith, misconduct or want of care.

2. Where a complaint stated that the plaintiff, having funds deposited in a bank, in consequence of rumors of its embarrassment went to withdraw his deposit, but was assured of its entire solvency by the defendant, vice-president and director of the bank, who said to him: "We have all the money you want; you need never have any fears of this bank as long as I am in it"; and, relying upon such representations, plaintiff allowed his deposit to remain until the bank failed, and the bank was in fact insolvent at the time such representations were made: *Held*, that the complaint stated a cause of action, and defendant is liable personally to the plaintiff for the loss incurred by him by the failure of the bank.

3. While the allowance of a motion for a bill of particulars under section 259 of The Code rests in the trial Judge's discretion, the exercise of which is not reviewable, yet such motions should be liberally allowed when made in apt time, so as not to cause delay, unless clearly useless or merely for the purpose of annoyance.

ACTION heard on demurrer to complaint and motion for bill of particulars before *Brown, J.*, at April Special Term, 1895.

The complaint was as follows:

"1. That, at the times hereinafter named, the defendant was vice-president and director of the Bank of New Hanover, of Wilmington,

N. C., as he is informed and believes, which said bank was a corporation, duly created by the laws of North Carolina.

"2. That, at the times hereinafter mentioned, the plaintiff was Clerk of the Superior Court of Robeson County, and as such Clerk (331) had on deposit various sums of money in said bank, which was then, and continued to be until 19 June, 1893, a banking concern and doing a general banking business in the city of Wilmington, N. C.

"3. That, on or about the————day of February, 1892, plaintiff had to his credit on deposit in said Bank of New Hanover, of Wilmington, N. C., as Clerk Superior Court, a considerable amount of money, and hearing rumors questioning the solvency and safety of said bank he immediately went to Wilmington for the purpose of seeing the defendant and inquiry as to the truthfulness of said rumors and, if said rumors were well founded, with the intention of withdrawing any deposits that he had in said bank; and at this time in the city of Wilmington plaintiff inquired of defendant into the condition of solvency of said bank, and was informed by him that said bank was perfectly solvent and in no danger of failure or suspension, defendant saying to the plaintiff: 'We've got all the money you want; you need never have any fears of this bank as long as I am in it.' That, relying on these statements and representations of defendant, the plaintiff left said money on deposit in said bank and, relying on said statements and representations, continued to make further deposits from time to time until the failure of the bank herein mentioned.

"4. That said bank was, on 19 June, 1893, placed in the hands of a receiver by order of the Superior Court of New Hanover County, and was at the time of the representations aforesaid and is now utterly insolvent, as the plaintiff is informed and believes.

"5. That, further complaining, the plaintiff avers that, at the time of said representations and statements by defendant, the said corporation was utterly insolvent, and that same was well known or (332) ought to have been known to defendant; and that said representations so made by defendant, by which plaintiff was damaged and incurred the loss of said money, were false and fraudulent, and defendant, as plaintiff is informed and believes, well knew or ought to have known the same to be so at the time and before the representations and statements were made.

"6. That the defendant was, on the ——— day of ———, 1892, and since that time up to the failure of said bank, a director and vice-president thereof, and knew or ought to have known the condition of its affairs and assets, and omitted, negligently and carelessly failed and refused to inform plaintiff thereof, well knowing at the time of the

statements and representations aforesaid that the said bank was insolvent and unable to pay its debts, as the plaintiff is informed and believes.

"7. That at the time of the failure of said bank, on 19 June, 1893, the plaintiff had to his credit on deposit in said bank the sum of two thousand two hundred and sixty-three dollars and ninety-three cents, and by his reliance on said representations and statements plaintiff was damaged to the amount of two thousand two hundred and sixty-three dollars and ninety-three cents:

"Wherefore, plaintiff demands judgment against the defendant:

"1. For the sum of two thousand two hundred and sixty-three dollars and ninety-three cents, with interest thereon from 19 June, 1893, less 20 per cent dividends paid by the receiver of said bank.

"2. For costs and such other and further relief as to the court may seem just and proper."

The defendant demurred to the complaint upon the following grounds:

"1. That plaintiff has not set forth in his complaint any facts constituting a cause of action in his favor, as Clerk of the (333) Superior Court of Robeson County, against this defendant, and that upon the facts alleged he not entitled to recover, as Clerk of the Superior Court, any damages of the defendant.

"2. That plaintiff does not allege in his complaint that he informed or notified defendant of his alleged intention to withdraw his deposit, nor that defendant did in fact know of said alleged purpose or intention.

"3. That plaintiff does not allege that defendant intended by his alleged false statements to plaintiff as to the condition of the bank to induce plaintiff to keep his deposits in the said bank.

"4. That plaintiff does not allege that defendant intended by his alleged statements as to the condition of the bank to deceive the plaintiff or induce him to make further or other deposits in said bank.

"5. That plaintiff has not alleged that, at the time of the alleged statements or representations as to the condition of the bank, the defendant actually knew of the insolvency of the bank, but merely that defendant knew or should have known of the said alleged insolvency.

"6. That plaintiff alleges said representations to have been false and fraudulent without setting forth facts sufficient to constitute the fraud.

"7. That plaintiff has not alleged that, before this action was commenced, he made any demand upon defendant for the amount of his alleged deposit or for the amount of his damage.

"8. That plaintiff does not allege that he has made any demand upon the said bank or upon its receiver for the amount of his alleged deposit or any part thereof, or that he has taken any action to recover the same of said bank or its receiver.

"9. That plaintiff has united and blended in his complaint a
(334) cause of action, defectively stated, for a fraud or deceit with a cause of action founded upon defendant's negligence;

"10. Cause of action for a tort with a cause of action for breach of contract."

The defendant moved that plaintiff be required to make his complaint more definite and certain, in the following particulars:

"1. That plaintiff be required to set forth in section 2 of the complaint the amount of the various deposits he had in the Bank of New Hanover and the times at which said deposits were there.

"2. That plaintiff be required to set forth in section 3 of the complaint the day in February, 1892, on which plaintiff alleges he had a considerable sum of money deposited in said bank, and the amount of said deposit, it being also the day on which he alleges that his conversation with plaintiff occurred; and that plaintiff set forth also the amount of deposits made by him after said alleged day in February, 1892, giving the amount of each deposit and the date of each.

"3. That plaintiff be required to set forth in the 5th section of his complaint whether the fact of insolvency of the said bank, which he alleges existed on the said day in February, 1892, 'was well known to defendant,' or whether defendant merely ought to have known it, and not merely indefinitely and alternatively, as he has done, that defendant 'well knew or ought to have known of the said insolvency'; and whether defendant knew or merely ought to have known that his alleged representations to the plaintiff were false and fraudulent, and not indefinitely and alternatively that defendant knew or should have
(335) known of the falsity and fraudulency of said alleged representations.

"4. That plaintiff be required to allege in the 6th section of the complaint whether defendant knew or merely ought to have known of the condition of the affairs and assets of said bank, and the plaintiff be required to set forth the date referred to in said section.

"5. That plaintiff be required to be specific and definite in all his allegations as to defendant's actual knowledge of the facts alleged in the complaint."

The demurrer and motion were overruled, and the defendant appealed.

McNeill & McLean for plaintiff.

Burwell, Walker & Cansler for defendant.

CLARK, J. The demurrer admits that the plaintiff was a depositor in the bank of which the defendant was vice-president; that, hearing rumors questioning the solvency and safety of the bank, the plaintiff went to Wilmington in February, 1892, with the intention of withdrawing his deposits, but was informed by the defendant, the vice-president and a director in said bank, that the bank was perfectly solvent and in no danger of suspension or failure, saying to the plaintiff: "We've got all the money you want; you need never have any fears of this bank as long as I am in it," and that, relying on such representations, the plaintiff permitted his deposit to remain and continued to make deposits therein till the bank failed in June, 1893. The demurrer further admits that the bank was in fact utterly insolvent when the above representations were made to him in February, 1892, by the defendant, and that this fact was at that time well known to the defendant or ought to have been, and that said representations were (336) false and fraudulent.

The bare statement of the material facts admitted by the demurrer shows that a cause of action was sufficiently stated. The grounds of objection set out in the demurrer do not affect the plaintiff's right to recover.

Without citing the numerous cases referred to in the argument, bearing more or less upon the matter at issue, we think the following summary from *Shea v. Mabry,* 1 Lea (Tenn.), 319, 342, is a correct statement of the law: "Directors are not mere figureheads of a corporation. They are trustees for the company, for the stockholders, for the creditors and for the State. They must not only use good faith, but also care, attention and circumspection in the affairs of the corporation, and particularly in the safe-keeping and disbursement of the funds committed to their custody and control. They must see that these funds are appropriated as intended for the purposes of the trust, and if they misappropriate them or allow others to divert them from those purposes, they must answer for it to their *cestuis que trustent.*"

We would not be misunderstood as holding in anywise that the directors of a corporation are insurers or guarantors and therefore liable for the debts of their corporation. But they are trustees and liable as such for losses attributable to their bad faith, misconduct or want of care. They are to direct and supervise the trust confided to them and are not mere figureheads. It was, therefore, immaterial whether the defendant, being vice-president and director, knew that the bank was totally insolvent in February, 1892, when he represented to the plaintiff that it was entirely solvent. He ought to have known. It was his business to know. The plaintiff had a right to rely upon his repre-

sentations and, it being admitted that relying thereon the plain-
(337) tiff permitted his deposit to remain and has suffered loss, the plaintiff is entitled to recover as damages the loss thereby sustained, unless the defendant, choosing to answer over, shall set up valid matter in defense to defeat or reduce the amount of plaintiff's demand.

The motion for a bill of particulars under The Code, section 259, rests in the discretion of the presiding Judge, and its grant or refusal is not reviewable. *S. v. Bryant,* 111 N. C., 693. The words of the section (259) are: "The court *may,* in all cases, order a bill of particulars." While it is discretionary, we think such motions should be liberally allowed by trial courts when made in time to avoid any delay in the trial, unless clearly useless or merely for the purposes of annoyance. As stated in *S. v. Brady,* 107 N. C., 822, and *Wiggins v. Guthrie,* 101 N. C., 661, such motions should be made in apt time. As its refusal was a matter of discretion and therefore not *res judicata,* it is open to the Judge below in his discretion to grant the motion now if renewed in time to avoid delay in the trial. This, however, will not authorize a demurrer to the bill of particulars, whose sufficiency or insufficiency rests with the presiding Judge. Clark's Code (2 Ed.), p. 205. The remedy, if the bill of particulars is defective, is by an application to the court to order a more definite bill.

No error.

Cited: Solomon v. Bates, 118 N. C., 319, 322; *Coble v. Beall,* 130 N. C., 537; *S. v. Van Pelt,* 136 N. C., 669; *S. v. Dewey,* 139 N. C., 558; *S. v. Long,* 143 N. C., 676; *McIver v. Hardware Co.,* 144 N. C., 486; *McRackan v. Bank,* 164 N. C., 35, 40, 42; *Anthony v. Jeffress,* 472 N. C., 279; *Steel Co. v. Hardware Co.,* 175 N. C., 451; *Besseliew v. Brown,* 177 N. C., 68.

(338)

MARGARET A. JOHNSON ET AL. v. ELGATE TOWNSEND.

Witness—Testimony, Competency of—Transaction With Deceased Person.

Section 590 of The Code does not incapacitate a party or person interested in the event of an action from testifying, in a suit in which the personal representative of a decedent is plaintiff, concerning a transaction between such witness on the one side and the decedent and others on the other, when the associates of such decedent in the transaction are living and are coplaintiffs with the decedent's personal representative.

JOHNSON *v.* TOWNSEND.

ACTION tried at April Special Term, 1895, of ROBESON, before *Brown, J.*, and a jury.

There was a verdict for the plaintiffs, and defendant appealed, assigning as error the exclusion of the testimony referred to in the opinion of *Associate Justice Montgomery.*

No counsel for plaintiffs.
McNeill & McLean and G. B. Patterson for defendant.

MONTGOMERY, J. This action was commenced by Margaret Johnson, administratrix of D. A. Johnson, deceased, and Margaret Johnson and Mary Johnson, sisters of the deceased, to recover an amount alleged to be due on a promissory note in the sum of $1,250, executed by the defendant to the intestate and his sister, the plaintiffs. The defendant admitted the execution of the note, but averred that it was void and of no effect in law because it was executed under a covinous agreement between himself and the payees to enable them to defeat and defraud the creditors of the payees. The defendant on the trial testified:
"I had a conversation with Margaret and Mary Johnson, in (339) which they said they were in trouble and wanted to make a deed to me for their land to prevent Royland & McLean getting it. They wanted to know if I would make a deed back to them after it was all over. I said I would. They made the deed and at the same time I signed and executed the note sued on in this action. They came to me about four or five months afterward and wanted me to make a deed back to them. I told them I would if they would pay me what they owed me. I claimed that they owed one or two hundred dollars which was owing to me."

He then offered to prove by himself that D. A. Johnson, the intestate, was present at the time of the conversation testified to by him and heard the conversation and assented to it. This was excluded by the court, and the defendant excepted. The complaint and answer show that the subject of this action was a transaction in which the intestate and the other two plaintiffs were associated and united in interest. Section 590 of The Code excludes the testimony in his own behalf of a party interested in the event of the suit concerning a personal transaction between the witness and the deceased person, as against the personal representative then prosecuting or defending the suit, unless the personal representative has opened the way by giving testimony himself about the transaction. In the case before us the plaintiffs had put in no testimony. The general rule is that "no person offered as a witness shall be excluded by reason of his interest in the event of the

action." Section 590 is the exception, and, unless the matter concerning which the defendant's witness wished to testify fell under the exception, the testimony ought to have been received. The object of section
(340) 590 is to prevent the side of a living party or person interested in the event of the suit from being heard through his own personal testimony to the possible injury of the interests of the decedent's estate, when his personal representative or those who claim under the decedent are parties on the other side. We are of the opinion that the mischief intended to be prevented by section 590 was not liable to occur by the admission of the defendant's testimony in this case. We think that the conversation, transaction, which the witness offered to prove by his own testimony was not strictly a conversation with the intestate, but was one held with him and two others, his sisters, the plaintiffs in this action, who were associated with him in the transaction. A case exactly in point is that of *Peacock v. Stott,* 90 N. C., 518. *Chief Justice Smith,* in delivering the opinion of the Court, says: "The conversation sought to be elicited by the interrogatory was *with three persons* and to show their contract with the witness, so that these two living witnesses to the fact to which the testimony is directed could give their version of it, and the evidence of the witness would not be beyond the reach of correction or contradiction, and the reason for the exclusion would not exist. As, then, the testimony is not within the words of the excluding proviso nor the reason of the rule that it prescribes, we are of the opinion that it ought to have been admitted." The same interpretation of similar statutes to section 590 is had in *Comstock v. Hine,* 73 N. Y., 280; *Kale v. Elliott,* 25 N. Y., 198, and 1 Hampton's Evidence, where the author says that "the exception does not incapacitate when the suit is against codefendants, of whom only one is dead when the contract was made either with the living codefendant or with the living and the dead concurrently." We are of the opinion, therefore, that the testimony ought to have been received.

This makes it necessary to consider the other exceptions. The
(341) plaintiff is entitled to a

New trial.

Cited: Blake v. Blake, 120 N. C., 179; *In re Peterson,* 136 N. C., 16; *Hall v. Holloman, ib.,* 37; *Smith v. Moore,* 142 N. C., 285.

T. A. MCNEILL ET AL. V. J. D. CURRIE ET AL.

Surety on Guardian Bond—Action to Subject Lands of Deceased Surety Before Liability Ascertained—Pendency of Another Action—Abatement.

1. An action cannot be maintained to subject the lands of a deceased surety for a guardian until judgment has been obtained on the guardian bond.

2. A judgment against a guardian invidually for a debt due the ward is not conclusive against the surety, but only presumptive evidence, which the surety may rebut.

3. While an action is pending in one county to ascertain the liability of a deceased surety on a guardian bond; an action cannot be maintained in another county for the same purpose and for the additional purpose of subjecting the decedent's lands to the payment of the unascertained liability.

ACTION heard before *Brown, J.*, at the Special Term, 1895, of ROBESON. A jury trial was waived, and his Honor, by consent, found the facts.

Frank McNeill for plaintiffs. (345)

N. W. Ray, N. A. McLean and W. E. Murchison for defendants.

CLARK, J. When this case was here before (*McNeill v. McBride,* 112 N. C., 408), the Court said: "The objection that the plaintiff Caroline McNeill cannot subject the land of the intestate until a judgment has been obtained upon the guardian bond executed by him would seem to be sustained by the case of *Williams v. McNair,* 98 N. C., 332." The defendant, however, was then held barred from a judgment dismissing the action because the demurrer admitted the liability, but now, an answer having been filed, it has been found as a fact that no judgment has been obtained against the surety ascertaining the (346) amount of the indebtedness, nor that there is any. While a judgment has heretofore been obtained against the guardian individually in the probate court of Cumberland County, no judgment has yet been had upon the guardian bond, a proceeding for that purpose being now pending in the Superior Court of Cumberland. The judgment against the guardian was held conclusive against the surety on the bond in *Brown v. Pike,* 74 N. C., 531, but since then this has been changed by the Act of 1881, now The Code, sec. 1345. *Moore v. Alexander,* 96 N. C., 34.

The judgment against the guardian is now only presumptive evidence, which the surety is allowed to rebut if he can, and which his administrator is now seeking to do in the action pending in Cumberland County. The plaintiffs contend, however, that, though judgment should be obtained to ascertain the liability of the surety on the guardian bond before subjecting the real estate of the deceased surety or the proceeds thereof in the hands of his heirs at law, both remedies can be had in this action (The Code, sec. 267), and that if the venue should have been in Cumberland County, where the guardian resided and the bond was filed (The Code, sec. 193; *Cloman v. Staton,* 78 N. C., 235), objection on that ground was waived by failure to move for removal of the cause to that county before filing answer. The Code, sec. 195; Clark's Code (2 Ed.), p. 112. If both these positions be conceded, still the defendant in his answer (par. 6) has pleaded that an action was already pending in Cumberland County when this action was brought, and is still pending there, in favor of plaintiff and against the guardian bond to ascertain the amount of the liability of the surety thereon, if any, and the court below finds the fact as thus alleged in the answer.

The court below therefore properly held that this action, (347) subsequently begun for the same purpose, could not be maintained (*Claywell v. Sudderth,* 77 N. C., 287; *Woody v. Jordan,* 69 N. C., 189), and if it cannot be maintained to ascertain the extent of the liability of the surety, it cannot be upheld for the purpose of subjecting the realty or proceeds thereof, since that must be based on an adjudication of the debt. *Williams v. McNair, supra.*

No error.

Cited: *Martin v. Buffaloe,* 128 N. C., 309; *Emry v. Chappell,* 140 N. C., 330.

PRIMUS HOLMES v. LUCIAN BREWER.

Practice—Affirmance of Judgment.

When no error is called to the attention of this Court on appeal, and none appears on the record, the judgment below will be affirmed.

ACTION for the recovery of land, tried before *Hoke, J.,* and a jury at August Term, 1895, of MOORE.

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

Black & Adams and W. E. Murchison for plaintiff.
Douglass & Spence for defendant.

FAIRCLOTH, C. J. The defendant has exercised his right of appeal for the pleasure of continuing litigation, or with the hope that something might "turn up" which he could not then foresee, on the theory that accidents will sometimes happen. No error was called to our attention, and on careful examination of the record we are unable to see any. The errors assigned are all overruled.

Judgment affirmed.

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(348)

A. W. SMITH, ADMINISTRATOR OF ALEXANDER SMITH, v. R. P. L. SMITH ET AL.

Confession of Judgment—Validity—Irregular and Void, When.

1. A confession of judgment being in derogation of common right, the statute requires that the consideration out of which the debt arose must be stated and an averment that the debt for which judgment is confessed "is justly due."

2. If all the statutory requirements in a confession of judgment are not complied with the judgment is irregular and void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings.

ACTION heard at Fall Term, 1895, of DAVIDSON, before *Norwood, J.*, to set aside a judgment confessed by Alexander Smith, intestate of plaintiff, A. W. Smith, in favor of defendants.

When the case was called for trial, and before a jury was impanelled, plaintiff's counsel exhibited said confession of judgment and moved to set aside the same for irregularities appearing on the face thereof, in this: "1. That the confession does not state sufficiently the consideration of the note. 2. That the confession does not state said debt was justly due." His Honor granted the motion and adjudged that said judgment is null and void and that the same be set aside. To which ruling defendants excepted and appealed.

The confession of judgment was as follows:

NORTH CAROLINA, Davidson County. } *In Superior Court.*

R. P. L. Smith, L. F. Smith, Plaintiffs,
v.
Alexander Smith, Defendant. } Statement and Confession

On 10 May, 1893, I made and delivered to the plaintiffs my (349) promissory note, or bond, of which the following is a copy, to-wit:

"$610.29.

"One day after date I promise to pay R. P. L. Smith and L. F. Smith the sum of six hundred and ten dollars and twenty-nine cents for value received of them. Witness my hand and— 10 May, 1893.

"ALEXANDER SMITH. [SEAL.]"

The consideration of said note, or bond, was one horse for $30.00, 18 bushels wheat for $18.00, and five hundred sixty-two dollars and twenty-nine cents ($562.29) borrowed money. I promised to repay with interest one day after date, and to secure the payment of said sum the annexed note was given.

I hereby confess judgment in favor of the above-named plaintiffs, R. P. L. Smith and L. F. Smith, on said note, or bond, for the sum of six hundred ten dollars and twenty-nine cents, the principal, which bears interest at the rate of 6 per cent from 10 May, 1893, till paid, and I hereby authorize the entry of judgment therefor against me.

ALEXANDER SMITH.

Alexander Smith, being duly sworn, says the facts stated in the above confession are true.

ALEXANDER SMITH.

Sworn and subscribed before me 13 May, 1893.

H. T. PHILLIPS, *C. S. C.*

On filing the within statement and confession, it is adjudged by the court that the plaintiffs do recover of the defendant the sum of six hundred ten dollars and twenty-nine cents, with three dollars cost, with interest on $610.29 from 10 May, 1893, till paid.

This 13 May, 1893.

H. T. PHILLIPS, *Clerk Superior Court.*

Attached firmly to said confession is the following note, to- (350) wit:

"610.29.

"One day after date I promise to pay R. P. L. Smith and L. F. Smith the sum of six hundred and ten dollars and twenty-nine cents for value received of them.

"Witness my hand and—10 May, 1893.

"ALEXANDER SMITH. [SEAL.]"

Across the face of said note is written these words, to-wit: "Confession of judgment before the Clerk, 13 May, 1893."

Watson & Buxton for plaintiff.
Robbins & Raper for defendants.

CLARK, J. In an adversary proceeding to recover on a bond the seal imports a consideration, and the production of the bond by the plaintiff uncancelled raises a presumption that it has not been paid. This is not the case as to "confessions of judgment" under The Code, sec. 571. That proceeding is in derogation of common right, and to prevent the perpetration of fraud in such cases, that section requires that the consideration be stated and that it appear that the amount for which the judgment is confessed is justly due. If the statutory requirements are not complied with the judgment is irregular and void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. *Davidson v. Alexander,* 84 N. C., 621; *Davenport v. Leary,* 95 N. C., 203. "It is not sufficient to simply confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by The Code, secs. 571 and 572," *i. e.,* authority to enter the judgment and statement of the consideration and that the amount is justly due. *Sharpe v. R. R.* 106 N. C., 308, 319. In the present case the nature of the (351) consideration is sufficiently stated. *Uzzle v. Vinson,* 111 N. C., 138. But there is a fatal defect in the significant failure either to allege or to set out facts which would show that the amount for which the judgment was confessed was still "justly due." The statute requires this to be done to confer jurisdiction. It is true the bond is averred to have been given for a valid consideration, but *non constat* that it was still due. There is no presumption that it was. It must appear by the affidavit. In *Bank v. Cotton Mills,* 115 N. C., 507, relied on by the defendants, it is expressly and fully recited in the power of attorney to confess judgment that the debt is "justly due." In the absence of such statement, or the statement at least of facts showing

that the debt was still due, the judgment was properly held void, for without compliance with the statute on the face of the proceeding the court had no jurisdiction to enter up the judgment.

No error.

Cited: Martin v. Briscoe, 143 N. C., 356, 359.

CORNELIA L. WILSON v. SALLIE L. WILSON.

Action to Recover Land—Equitable Defenses—Lost Deed—Pleading.

Where, in an action for recovery of land, the defendant denied plaintiff's title, unlawfully withholding possession, etc., but averred nothing more, it was not competent on the trial for defendant to prove that she had been in possession for seven years under an unregistered deed which was lost. Such a defense is an equitable one, and to be available must be set up by answer as a defense in a court of equity.

ACTION for the recovery of land, tried before *Bryan, J.,* and a jury at November Term, 1894, of IREDELL.

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

There was a verdict for the plaintiff, and from the judgment (352) thereon defendant appealed.

Armfield & Turner for plaintiff.
No counsel contra.

FAIRCLOTH, C. J. The plaintiff sues for possession of land, making the usual allegations of title in herself and wrongful possession of defendant. The answer denies these allegations and avers nothing more. On the trial the plaintiff showed title, and defendant offered to prove by a witness seven years' possession under an unregistered and lost deed, and by another that she had a deed for the premises which was lost and had not been registered, which evidence was excluded. The offer of this evidence was an admission that defendant could not make out her title in a court of law, and that she had to invoke the aid of a court of equity, as the deed was lost and had not been re-established under statutory provisions. In order to make such evidence competent,

it was necessary for defendant to set up the facts in her answer as a defense in a court of equity, which was not done. This would also have been notice to the plaintiff. *Tripless v. Witherspoon,* 74 N. C., 475; *Hinton v. Pritchard,* 102 N. C., 94.

Affirmed.

Cited: Patterson v. Galliher, 122 N. C., 515.

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(353)

H. Z. SHERRILL v. WESTERN UNION TELEGRAPH COMPANY.

Action for Damages—Telegraph Company—Failure to Deliver Telegram—Negligence—Contributory Negligence—Nonexpert Testimony—Issues—Trial.

1. Where a telegraph company is shown to be negligent in the delivery of a message received by its agent for transmission, the sender may recover compensatory damages for mental anguish suffered by him in consequence of delay in the delivery of the message.

2. Where a rule of a telegraph company required the operator to telegraph back for a better address, if the address given was doubtful, his failure to do so when the sendee could not be found at the given address was negligence which was not excused by the fact that he thought the operator at the sending office had given all the information he could.

3. Where a telegram announcing the serious illness of a person and requesting an immediate answer was sent by a chance messenger, not in the employ of the telegraph company, to a person having the same surname but not the same initials as the addressee, and who lived near the telegraph office, and no answer to the telegram was elicited, and no explanation was sought by the agent why the requested answer to so urgent a message was not returned, and no investigation was thereupon made to ascertain whether the message had been delivered to the proper person: *Held,* that the jury were properly instructed that upon such facts the defendant telegraph company was negligent.

4. Although the sender of a telegram did not exercise due care in making special arrangements for the delivery of an answer, by failing to give his precise address, but did leave a sufficient sum in the hands of defendant's agent to pay for the delivery of the answer at a place where the sender was known to reside and to which there was a daily mail, yet that fact will not excuse the negligence of the telegraph company in delivering the message to a person other than the addressee and in failing to elicit the requested answer to the message so urgently requiring it.

5. The mental state or appearance of a person, or his manner, habit, conduct or bodily condition, as far as they can be derived from mere observation as distinguished from medical examination, may be proved by the opinion of one who has had opportunities to form it. Hence it was competent to prove by the sister of plaintiff, who lived with him, the mental anguish which he experienced (as manifested by his melancholy manner, etc.) by reason of the defendant's failure to deliver a telegram announcing the serious illness of his child.

6. In the trial of an action in which the negligence of defendant is charged and the contributory negligence of plaintiff is set up as a defense, the trial Judge may in his discretion use two or three issues or confine the jury to one.

7. Where an exception arises out of the form of issues or the adaptation of instructions thereto, the true test is whether it appears that the jury were misled or did not have the benefit of instructions prayed for and which could have aided them in passing upon the material facts; hence:

8. Where, in an action for damages for failing to deliver a telegram, three issues were submitted—first, whether defendant was negligent; second, whether plaintiff was guilty of contributory negligence, and, third, whether the contributory negligence was the cause of the injury: *Held*, that the submission of such issues was not prejudicial when accompanied with instructions that, if defendant was negligent in failing to find the addressee of the telegram and in failing to notify the sender of such failure, such omission of duty, and not the remote want of care on the part of the sender in failing to furnish a more particular description of the place where the addressee resided, was the proximate cause of the injury.

(354) ACTION for damages for failure to deliver a telegram, tried before *Norwood, J.*, and a jury, at August Term, 1895, of IREDELL.

Upon the trial defendant admitted the delivery of the message for transmission, the payment of costs therefor and, further, that the telegram had never been delivered to Franklin Sherrill, for whom it was intended. The message was delivered to defendant company at Lebanon, Ind., by the witness Booher, acting for the sender, and was in words and figures as follows:

"Max, Ind., 1 Dec. 1890. Mr. Franklin Sherrill, Statesville, N. C.: Tell Henry to come home. Lou is bad sick. M. C. Sherrill.

"Tel. ans. quick; it's paid for here.

"16 pd. $3.50 gt. spl. dely."

It appeared that plaintiff, who is referred to in the telegram as Henry, was on 1 December, 1890, temporarily residing with his father in Shiloh Township, eight or nine miles from Statesville; that he lived in Indiana; that the sender of the telegram, M. C. Sherill,

(355) is his sister, and Lou, referred to in the message, is his daughter, since deceased.

C. J. Jones, defendant's operator at Statesville, testified that he received the message in question, and that he repeatedly sent out a message boy to find the addressee, whom he did not know; that, the search proving unavailing, he sent the message to Davidson, being informed by J. S. Ramsey that a Frank Sherrill, formerly residing at Troutman, had moved to that place; that he shortly afterwards received a message from one Schofield, who was the operator at Davidson, stating that the message was delivered, and that there was no answer; that on the evening of 2 December he received an inquiry from the operator at Lebanon, and answered that the message had been delivered; that he did not know until after the commencement of this suit that the message had not been delivered to the person for whom it was intended. The witness also testified that there was a rule of the company requiring him to telegraph for a better address if the address is doubtful, but that in this case he did not do so. Rose, the messenger boy to whom the witness Jones delivered the message, testified that he inquired of certain persons for the residence of Franklin Sherrill, and was informed that a man of that name lived in Troutman. W. F. Sherrill, to whom the message was delivered at Davidson, testified that he did not tell defendant company that the message was not intended for him; that his place of business was 400 yards from the telegraph office; and that Schofield, the operator, lived about 350 yards from him. The message was delivered to him by one not in defendant's employment.

The court submitted the following issues:

"1. Did the defendant negligently fail to deliver the said message to Franklin Sherrill? 2. Was plaintiff guilty of contributory negligence, as alleged in the answer? 3. Was such contributory negli- (356) gence the proximate cause of the injury complained of? 4. Was the message mentioned in the complaint sent subject to the stipulation and agreement that the defendant company would not be liable for damage unless the claim for damage was presented to defendant in writing within sixty (60) days from the sending of the message? 5. Did the plaintiff, within sixty (60) days after he found out that said message had been sent and not delivered to him, present to the defendant company in writing a claim for damage for the alleged failure to deliver said message? 6. What damage, if any, has the plaintiff sustained by reason of defendant's failure to deliver said message?"

The following instructions, referred to in the opinion of the Court, were given at plaintiff's request: "5. That if you find from the evidence of Jones that he sent the message to W. F. Sherrill on 2 December, and that he failed to call for an answer to the message, this was negligence and entitled the plaintiff to your verdict on the first issue; and if Scho-

field wired him that there was 'no answer,' this was sufficient to put him on guard, and it was encumbent on him to find out from Schofield why there was no answer. In this state of the case the plaintiff is entitled to recover. 6. That a delivery of the message at Davidson to W. F. Sherrill, as testified to, is negligence in the defendant, and entitles the plaintiff to your verdict on the first issue. 7. That if you should find from the evidence that the sender did not give the post-office address of Franklin Sherrill and the exact spot where he lived to the operator at Lebanon, and that the operator did not require as full and explicit directions as he had the opportunity to obtain, and that both were
(357) guilty of negligence at that time, nevertheless if the message arrived safely to the operator at Statesville, North Carolina, and you should find that he is guilty of negligence in the manner as above explained, the question of contributory negligence is out of the case, and you will find the second and third issues for the plaintiff and answer them 'No.'"

The first paragraph of his Honor's charge was as follows: "1. That if the jury should find that the message in question was received at Statesville at 12:40 o'clock, 1 December, 1890, and within 10 or 15 minutes thereafter the defendant, through its operator and messenger, commenced trying to find out where said Franklin Sherrill lived; and that he, the said operator, and messenger boy made inquiry of W. R. Mills, Chief of Police of Statesville, J. S. Ramsey, cotton buyer, F. A. Sherrill, merchant, W. P. Coone, deputy register of deeds, George W. Clegg, ex-County Treasurer, and then County Surveyor, Lon Cowan, a deputy sheriff, W. H. H. Gregory, cotton buyer, at the post-office in Statesville, at the livery stables of M. Misenheimer and George Daniel, respectively; and that said inquiries were continued, as testified by the witnesses, from 12:40 P. M. of 1 December, 1900, up to 2:30 of the next day; and that said messenger and operator, a short time before 2:30 P. M. on 2 December, 1890, were informed by said parties, or either of them, that W. F. Sherrill lived at Troutman, six or seven miles from Statesville; and that one or more of said parties soon thereafter informed said operator that W. F. Sherrill had moved to Davidson, whereupon said message was immediately transmitted to W. F. Sherrill, the witness, at Davidson, and he received it without giving the defendant notice that said message was not intended for him; and that if you believe the evidence as testified to by all the witnesses for the defendant, there being no conflict, and that they did nothing more, then I charge you
(358) that the defendant is guilty of negligence, and you should find the first issue 'Yes.'"

The jury responded "Yes" to the first and second issues, and "No" to the third and fourth, did not answer the fifth, and to the sixth answered "$1,100." From the judgment on the verdict the defendant appealed.

L. C. Caldwell for plaintiff.
Armfield & Turner and Jones & Tillett for defendant.

AVERY, J. By a series of decisions it has become settled law in this State that the sender of a telegram may recover, where the company is shown to be negligent, damages for such mental anguish as may be caused either by the failure to deliver or delay in the delivery of the message sent. *Young v. Telegraph Co.*, 107 N. C., 370; *Thompson v. Telegraph Co., ib.*, 449; *Sherrill v. Telegraph Co.*, 116 N. C., 655. It was held on the last appeal (116 N. C., 655) that proof of the receipt of a message by the agent of the company with the understanding that it would be sent to its destination, together with evidence of the failure to deliver, constitutes a prima facie case in the action brought by the sender against the corporation to recover for its negligence. When, therefore, these facts were satisfactorily proved, nothing more appearing, the plaintiff was entitled to an affirmative response to the first issue and to compensatory damages for mental anguish suffered in consequence of the delay, as distinguished from that which was due to the distressing nature of the message and which would have been experienced had there been no failure to deliver it. The opinion of the Court on the last hearing puts another question behind us.

Upon the defendant's own showing its agent at Statesville (359) (whose negligence we have heretofore held was that of the company) violated its rules when he omitted, after spending a day in fruitless inquiry, to wire back for a better address and when he neglected to notify the sender before that time of the failure to find Frank Sherrill. The agent at Statesville testified on the last trial that he did not wire back because he had all of the information that the agent could give him, but on cross-examination stated that it was because he presumed that the agent at Lebanon had given him all the information he could. We do not think he was warranted in this assumption. Having failed to furnish any sufficient reason for not complying with the rule, the matter stands as it did before. His admitted and unexplained omission of duty subjected the company to liability unless it was shown that plaintiff's agent was negligent and that her negligence was the proximate cause of his failue to receive the message more promptly. The court was warranted, therefore, in recapitulating the testimony of defendant's witnesses, as was done in the first paragraph of the charge, and telling the jury that admitting it all to be true the defendant was negli-

gent. The agent at Davidson was also in fault when, after seeing the nature of the message he sent it by a person not employed as a messenger to a citizen of that town who lived but a few hundred yards from him, had no receipt taken for it and made no inquiry to ascertain whether he was the person addressed, especially when W. F. Sherrill was known by him to have a wife and seven children at his home there. The failure to elicit a reply to so urgent a message, which upon its face seemed to demand prompt answer, ought to have stimulated a further investigation on his part. It was clearly an omission of duty to seek no explanation of what seemed unnatural conduct if the message (360) had been delivered to the proper person. Had Schofield ascertained, as by proper diligence he might have learned, that the message had been delivered to the wrong person and so notified the agent at Statesville, it was not too late then to save the plaintiff much unnecessary anguish. We think it was not error, therefore, to give the instructions submitted for plaintiff and numbered 5 and 6. The proper construction to be placed upon number 7 of the same prayer, which was likewise given, seems to us to render it unobjectionable upon any tenable ground. Even though it be conceded that the plaintiff's agent at Lebanon did not exercise due care in making special arrangements for the delivery of an answer, precaution was nevertheless taken to leave in the hands of the agent there a sufficient sum to pay for the delivery at Max, Indiana, where the sender of the telegram was known by him to reside, of any notice that might be received by him. It appeared also that there were daily mails from Lebanon to Max and a post-office at Max. So that if Schofield had done his duty, or if Jones, the operator at Statesville, had upon receipt of the message made more diligent inquiry or instructed the boy entrusted with the message with the important information that the person addressed had been represented as living 7 or 8 miles from Statesville, the result might have been different. Ramsey would not have told the messenger that a person represented by the sender as living within the distance mentioned resided then at Davidson. He would have assumed doubtless on such information that the sender must know of the truth of a statement which constituted a part of the description of the person sent with the telegraph address at Statesville. Due diligence on the part of either would have led to the return of a notice of nondelivery to the sender, and would have elicited a more specific description of locality, since it appears that the plaintiff was at the home of the sendee, the location of (361) which she could and would have designated unmistakably when it became apparently necessary to do so. If the exercise of ordinary care by either would have led to such further explanation as

would have enabled Jones to deliver the message to plaintiff, he might have been spared the mental anguish for which he seeks to recover compensation. If, notwithstanding the want of care on the part of the plaintiff's sister and Booher, who acted as her agent in sending the telegram, either Jones or Schofield had exercised due diligence, the suffering complained of would not have ensued. The Judge applied the law correctly to the testimony when he told the jury that the negligent conduct of the agent at Statesville, if the jury found that he had not done his duty, would dispense with the necessity for considering the question of contributory negligence. *Pickett v. R. R., post,* 616; *Deans v. R. R.,* 107 N. C., 686. In reply to a direct question M. C. Sherrill, who was the sender of the telegram, the sister of the plaintiff and resided with him before and after his visit to North Carolina, was allowed to depose (the defendant objecting) that plaintiff's mental anguish was very severe. The exception is insisted on upon the ground that the question whether a person was suffering mentally, when of sound mind, was one upon which no person but an expert was competent to express an opinion. When the subject-matter of the inquiry partakes of the nature of science, art or trade, persons possessing peculiar knowledge, skill or experience derived from previous practice, study or training are allowed to give an opinion, if such opinion is calculated to assist inexperienced persons in arriving at a proper solution of the question. When, however, the inquiry is of such a nature that a person of sound judgment might be reasonably expected to arrive at a conclusion as correct and just without as with the advantage of such study (362) and experience, a witness is not allowed to give an opinion as an expert, and his opinion is held inadmissible because it gives no new light to the jury, who are presumed to be capable of bringing to their aid a fair share of intelligence, common sense and reason in drawing such inferences from the testimony as will lead them to a just conclusion as to the facts. *S. v. Boyle,* 104 N. C., 800; Rogers Expert Testimony, secs. 6 and 7; Lawson Expert Testimony, Rule 28. While the general rule is that witnesses are competent to testify only as to facts and not to give opinions, there are exceptions besides the case of those who qualify themselves to speak as experts. Impressions may be made upon the mind of a witness by observation only, as to handwriting, the identity of tracks or of persons, or in reference to the temper or general mental or bodily state, which cannot be reproduced by verificaton before the jury by descriptive words or pictures of what was actually seen. It it impossible to communicate the information thus derived from the senses, and which influences the minds of all reasonable beings in any other way than by stating the opinion based upon it. An opinion

founded upon such actual observation, said *Gaston, J.*, in *Clary v. Clary*, 24 N. C., 78, "approaches to knowledge, and is knowledge, as far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury." But the rule is different as to the qualification of a witness to speak of temper or mental state from that applicable in the case of experts. It is the exclusive province of the court to pass upon the preliminary question whether the proposed expert has the peculiar fitness claimed for him to testify as to the subjects within the domain of art, science or skill. But where a witness states under oath that he has had opportunity by association to judge of the mental condition of
(363) a person, or, by seeing one write, of his handwriting or (under our statute) by living in a foreign country to understand its laws, he is competent to give his opinion if he claim that he has formed one, and the trial Judge is not authorized, under the rulings of this Court, to exclude the testimony on the ground that the opportunities of the witness have been insufficient to enable him to reach a satisfactory conclusion. *Clary v. Clary, supra; S. v. Behrman,* 114 N. C., 797. The testimony that he has had opportunity to form and has formed the opinion establishes *ipso facto* his competency to state it to the jury. If further examination discloses the fact that his opportunities to judge of the question have been limited, that he is wanting in intelligence, or has based his opinion of sanity upon insufficient grounds, it is the province of the jury to determine what weight, in the light of all that is developed, is to be attached to his opinion. It is a well-establish rule of evidence that only experts are competent to express opinions as to the existence or nature of the disease from which a person is suffering, or to give a diagnosis of his bodily condition. *Lush v. McDaniel,* 35 N. C., 485. On the other hand, not only is hearsay evidence of the declarations of another as to his bodily feeling or mental condition admissible (*S. v. Harris,* 63 N. C., 1; *S. v. Hargrave,* 97 N. C., 457), but the mental state or appearance of a person, or his manner, habit, conduct or bodily condition, as far as they can be derived from mere observation as distinguished from medical examination, may be proved by the opinion of one who has had opportunities to form it. Lawson, *supra,* Rule 64; *Tobin v. Shaw,* 71 Am. Dec., 555. It was competent, therefore, to prove by M. C. Sherrill, the plaintiff's sister, that he seemed to be melancholy or to be suffering severe mental anguish when she was living in
(364) his house and constantly associated with him. Lawson, *supra.* The appearance of the countenance sometimes at least furnishes far more reliable evidence of mental agony than words, which are often

used to give expression to what is feigned, and the impression produced can only be communicated to others as an opinion. Lawson, *supra,* p. 471.

In *Scott v. R. R.,* 96 N. C., 428; *Denmark v. R. R.,* 107 N. C., 185, and other cases which have followed, it has been held that the *nisi prius Judge* may in his discretion use two or three issues or confine the jury to one, where the plaintiff alleges as the ground of action negligence and the defendant sets up as a defense contributory negligence. It is true that the first issue was not so framed as to involve the decision both of the question whether the defendant was in fault and whether its negligence was the cause of the injury complained of. The issues as presented involved three distinct inquiries, first, whether the defendant was negligent; second, whether the plaintiff was negligent; third, not whether the defendant's negligence would have caused the injury notwithstanding the negligence of the plaintiff, but whether the latter's negligence was the proximate cause. When there is evidence, as in this case, to show a want of care on the part of a defendant, supervening after the carelessness of a plaintiff, it is usual and preferable, if a third issue is submitted, to embody in it in substance the inquiry whether by want of ordinary care the defendant lost "the last clear chance" to prevent the injury. But the circumstances, as well as this issue, were peculiar, and the test, where the exception arises out of the form of or the adaptation of instructions to issues, is always involved in the inquiry whether it appears that the jury were actually misled or did not have the benefit of instructions prayed for and which would have aided them in passing upon the material facts. In the case at bar, (365) as we have already seen, if the jury found by their response to the first issue that defendant negligently failed to deliver the message to Franklin Sherrill, that negligence consisted in the omission of either Jones or Schofield, or both, to exercise due diligence in ascertaining where the plaintiff was, and in sending notice of failure to find him to Lebanon, so as to get specific information. If that specific information would have led to the delivery of the message and prevented the mental suffering, then the negligence on the part of defendant's agents at Max or Lebanon was not the proximate cause. So that, in the light of this evidence, the Judge was warranted in telling the jury that, if defendant's agents were negligent in failing to notify the sender of nondelivery, and they so found, that omission of duty, and not the more remote want of care in failing to furnish a specific description of the locality in which Frank Sherrill resided, was the proximate cause of whatever mental anguish the plaintiff suffered. While, therefore, we are not disposed to commend such issues for use in future trials, the defendant has

failed to show that by reason of their defective form there has been a failure to explain, through the medium of instructions, the law applicable to them. For the reasons given we think there was no error and the judgment must be

Affirmed.

Cited: Ellerbee v. R. R., 118 N. C., 1026; *Cashion v. Tel. Co.,* 123 N. C., 270; *Hendricks v. Tel. Co.,* 126 N. C., 310; *Helms v. Tel. Co.,* 143 N. C., 395; *Taylor v. Security Co.,* 145 N. C., 396; *Shaw v. Tel. Co.,* 151 N. C., 641; *Penn v. Tel. Co.,* 159 N. C., 315; *S. v. Thompson,* 161 N. C., 242; *Howard v. Tel. Co.,* 170 N. C., 499.

(366)

J. S. FLEMING ET AL. V. T. H. STROHECKER ET AL.

Parol Trust—Estoppel by Record—Issues.

1. Where land was sold under judicial proceedings and the purchaser died before title was executed to him and the owner of the land (the defendant in the proceedings) in open court consented that the deed should be made to the heirs of the deceased purchaser, he is estopped, in an action by the heirs of such purchaser for possession of the land, to claim that the deceased purchaser bought the land under an agreement to reconvey to him on payment of the amount bid.

2. Where in such case the owner set up an alleged parol trust by one of the heirs of the purchaser that he should have the land upon payment of the amount bid by the ancestor, proper issues should have been submitted to the jury on the proof offered as to the alleged agreement of the one heir raising a trust to the extent of such heir's share in the land.

ACTION tried before *Norwood, J.,* and a jury, at August Term, 1895, of IREDELL.

The plaintiffs brought an action of ejectment to recover possession of a certain tract of land. The defendant G. W. Kerr in his answer set up a parol trust in the ancestor of plaintiffs, alleging that previous to the sale of the land in question in 1871 by C. L. Summers, commissioner, Robert White, the ancestor of plaintiffs, agreed with him, the said Geo. W. Kerr, that he would attend said sale and purchase said land for said Kerr, and that he would convey the same to Kerr whenever he should repay the amount bid for said land at said sale: that in accordance therewith said White did bid off said land in his own name for $215,

and that Kerr has paid a part of said purchase money, to-wit, $89, direct to said commissioner, and has paid the balance of said purchase money to said Robert White. That in 1886, long after the death of said White, some of the plaintiffs—his heirs at law—agreed (367) with Kerr that if he would consent to a decree being made in the original case in which the land was sold, that the legal title should be conveyed to them, the said heirs at law, that they would thereafter upon the payment to them of the difference between $89 and $215, make him a deed in fee simple to said land; that in pursuance thereof said Kerr allowed such judgment to be made in said cause authorizing the legal title to be made to the plaintiffs, and that soon thereafter he tendered them the amount due under said compromise and they refused to accept the same or to make him a deed.

The defendants tendered the following issues, which his Honor refused, and defendants excepted:

"1. Are the plaintiffs the owners of 15¾-acre tract described in the third paragraph of the complaint?

"2. Did R. R. White purchase the lands in controversy at the sale thereof by C. L. Summers, commissioner, for $215 for G. W. Kerr under parol agreement to hold the same for Mr. Kerr and convey the same to him upon the payment of said $215 purchase money?

"3. Did Kerr consent to the decree in said case in 1886 with the heirs at law of said White under a like agreement?

"4. How much of said purchase money was paid by Kerr in his lifetime?

"5. Did the said Kerr, through his agent, tender to the heirs at law of White the balance of said purchase money in 1886?"

The court submitted the following issues:

"1. Are the plaintiffs the owners of and entitled to the 25-acre tract?

"2. Are the plaintiffs the owners of and entitled to the 65-acre tract or any part thereof, and if so, what? (368)

"3. What damages are the plaintiffs entitled to recover?

The defendants requested the following instructions, which were refused:

"1. That if the jury believed that R. R. White, ancestor of plaintiffs, contracted and agreed with G. W. Kerr, prior to the commissioner's sale in 1870 or 1871, to purchase the land in dispute at said sale for said Kerr and to take and hold the legal title to said land and hold the same for Kerr until Kerr should pay him back the purchase money, then the defendants in this action are the equitable owners in fee of said land, and they should answer the first issue 'No.'

"2. That if the jury shall find the facts stated in first prayer to be true, then the judgment in 1886 is not inconsistent with the equitable title of defendants and would not have the effect to defeat the same.

"3. If the jury shall find that G. W. Kerr consented to the judgment and deed in 1886 making title to the plaintiffs, heirs of R. R. White, upon the understanding and agreement with them, or any of them, that the plaintiffs were to take and hold the legal title to said land under said decree and deed until Kerr should pay to them the balance of the purchase money as agreed, then they should find that the defendants are the equitable owners of the land, and shall answer the issue 'No.'

"4. While it is true that it is necessary, in order to establish a parol trust in land, that something more than the simple declarations of the persons sought to be charged therewith is required; and while it is true that there must be proof of acts inconsistent with the purpose on his part to purchase and hold the land for himself absolutely, still,
(369) if the jury find as a fact from the evidence that G. W. Kerr remained in possession of said land until his death, claiming it as his own, cultivating and receiving the profits of the same, returning the same for taxation as his own, and that the plaintiffs allowed and permitted this, these facts are *dehors* the deed and are inconsistent with plaintiffs' claim for title and are sufficient to comply with the rule of evidence that the proof must be clear, strong and convincing."

The plaintiffs prayed for the following instructions, which were given:

"3. And if the defendant Kerr should convince the jury by proof clear and convincing that he had such contract with the plaintiffs to reconvey to him, and the jury should find and be satisfied that it was also understood and agreed that such re-conveyance to Kerr was to be made upon condition that he pay the purchase money for the land, before he can invoke the aid of a court of equity he must do equity and comply with his alleged agreement by paying for the land.

"4. But to establish the trust which the defendants set up and rely on, it is necessary for the agreement between Kerr and the plaintiffs—the White heirs—allowing the defendant Kerr to redeem, as the defendants contend, it is necessary for such agreement to have been distinctly made and entered into between the plaintiffs, all of them, and the defendant Kerr *before* the deed was executed to the plaintiffs; for any agreement since then not in writing is insufficient, even if such had been made, and if made with one and not with the others, it is not binding on any except Kerr, the contracting party, and in considering whether there was such parol agreement the jury should consider the lapse of time and the reasonableness of long delay on the part of Kerr in carrying out his alleged agreement."

His Honor charged the jury, among other things, that accord- (370) ing to the old practice as it existed before the adoption of the new Constitution in 1868, only legal defenses could be made to legal actions—that if one should have an equitable defense he was not allowed to set it up and thus defeat the legal title, but the defendant was forced to submit to the plaintiff's recovery at law and then go into a court of equity and enjoin the enforcement of the judgment at law; but that now law and equity are administered by the same court.

"2. There is a difference between an equitable estate and equitable right. If the defendant G. W. Kerr has not paid the full amount of the purchase money he contracted and agreed to pay, he has an equitable right merely, but not an equitable estate. An equitable estate would be a good defense to this action, but an equitable right is not. If neither G. W. Kerr nor his heirs or assigns have paid or tendered the money for the land, the defendants will have to go out of possession and assert their right, if they have any, after payment of the purchase money according to agreement.

"3. If the jury find the parol contract claimed by plaintiffs to have been made with R. R. White, and if they shall further find that G. W. Kerr, deceased, paid or tendered all the money either to R. R. White or the Clerk, Summers, then the plaintiffs are not entitled to recover, and you should answer the first issue 'No.'

"4. If the jury find there was no such contract with R. R. White, or, there being such contract, that all the purchase money was not paid, neither by G. W. Kerr nor his heirs or assigns, then the plaintiffs are entitled to your verdict unless you find contract such as could give rise to the trust claimed with R. R. White and payment or tender by Kerr, etc., of the purchase money." (371)

There were other instructions by his Honor as to the burden of proof, the *quantum* of evidence and upon other points, which instructions were not excepted to by defendants and hence are not set out here.

There was a verdict for plaintiffs as set out in the record. Judgment by his Honor. Motion for a new trial, assigning as errors refusal to admit defendants' issues; the submission of plaintiffs' issues; instructions of his Honor in paragraphs 2, 3, 4 and 5 of his charge as set forth; refusal to instruct the jury as prayed for by defendants in their prayers for instructions numbered 1, 2, 3, 4; also for instructing the jury as prayed for by the plaintiffs in their prayers for instructions numbers 3 and 4.

The motion was overruled, and defendants excepted and appealed.

Robbins & Long for plaintiffs.
Clarkson & Duls and Armfield & Turner for defendants.

MONTGOMERY, J. G. W. Kerr, now deceased, formerly a defendant in this action, agreed in writing with one Thomas to purchase the tract of land which is the subject of this action. Kerr failing to comply with his agreement, the execution of Thomas and his heirs at law commenced proceedings against him in the Superior Court of Iredell at its Fall Term, 1870, to have the land sold for the payment of the purchase money due under the agreement. Judgment was had against the defendant, G. W. Kerr, for the amount due, to be paid on a day certain, and upon failure of payment the land to be sold by the Clerk of the Court as commissioner at public auction after legal advertisement. The sale was advertised under the decree to be made on 21 January, 1871,
(372) when R. R. White, the father of the plaintiffs, became the last and highest bidder at the price of $215. R. R. White died before the proceedings were concluded. At February Term, 1886, of Iredell Superior Court, the Clerk who was appointed to make sale of the land made report to the Court that he had collected the purchase money and was ready to make title, but that the purchaser was dead, leaving the plaintiffs his heirs at law. Whereupon, an order of court was made that the commissioners make title to the land to the heirs at law of R. R. White, the deceased purchaser, the plaintiffs in this action. The defendant, G. W. Kerr, personally appeared in open court and assented to the decree and order. The deed was duly and properly executed under the order. The present action was commenced against Kerr and the other defendants, who claim under him by recent conveyances. The defendant Kerr had died since the commencement of this suit and after he had conveyed to the other defendant T. H. Strohecker the tract of land in dispute, and his heirs at law have been made parties defendant in this action. The defendant Kerr denied the right of plaintiffs to recover, and set up title in the other defendant, his grantee, by virtue of his deed to him, and alleging his right to convey to be founded on a parol trust concerning the land, to the effect that the father of the plaintiffs, at the request of Kerr, bought the land under the judicial sale of 1870 and agreed to hold it in trust for him (Kerr) and to convey it to him when he should pay him (R. R. White) the purchase money. The defendant Kerr in his answer set up also a second parol trust, which he alleges was entered into between him and all of the plaintiffs at the time of the rendition of the judgment and decree of 1886, to the effect that the plaintiffs agreed with him that if he would consent to the judgment they would hold the land in trust for him, and on the payment by
(373) him to them of the purchase money which their father paid for the land, $215 less $89, which he alleged he had paid to the plaintiff's ancestor under his parol trust with him, they would convey the land

to him, Kerr. The other defendants adopted this defense of defendant Kerr. His Honor allowed testimony to be offered going to show both of these alleged trusts.

Proof of the first ought not to have been allowed to set it up, although competent testimony (not Kerr's) might have been admitted concerning it to corroborate testimony going to show the second trust. The defendants are clearly estopped by the judgment and decree of 1886, for the plaintiffs in that action and the defendant, Kerr, knew that the parol trust with the ancestor, which he seeks to set up here, was directly in question in that proceeding, and he ought to have set it up then and there. As he did not, he is concluded by the record made against him. *Jones v. Coffey,* 97 N. C., 347. The main and principal and only question before the court, when the decree of 1886 was made, was, To whom should the title of this land be made, the purchaser being dead? The defendant came into open court and unequivocally gave his express consent that a decree might be made ordering the commissioner to make the deed to the plaintiffs in this action absolutely. This is an agreement entered into openly in the presence of the court by the defendant and the plaintiffs in that action, and the plaintiffs in this being the privies of the plaintiffs in that, whatever is entered of record, the court acting and pronouncing judgment thereon, neither the defendant nor his privies can afterwards deny. The record and the facts given in the record must be true as to all concerned. *Williams v. Clouse,* 91 N. C., 322; *Johnson v. Pate,* 90 N. C., 334. Whatever error, therefore, the defendants may allege as to the ruling of his Honor in reference to the first alleged parol trust is harmless, for it ought (374) not to have been submitted to the jury as an issue.

We have examined the record carefully as to the testimony introduced for the purpose of proving the parol trust alleged to have been made with all the plaintiffs at the time of the decree made in 1886. Kerr's testimony (by deposition) is as follows: "I concluded to pay their claim and let my debt go at that time. I did not know whether I could bring that in or not. I wanted a deed to the land, and Mrs. Fleming was the administratrix of the estate and said she had no deed and could not give one without she had a deed. I told her I would help her get a deed, and to give me one. She said she and Mr. Fleming would arrange to give me a deed. They claimed the balance of the purchase money, and I thought the deed was to be made to her as administratrix and not to the heirs. I went there with the money and offered it to her and Mr. Fleming, and they would not take it. In a short time after that they got that deed, and they promised to give me a deed and never did it. Agreeable to what was said I tendered the money after they got the deed, ac-

cording to contract. I did not see all of the White heirs, but that was the agreement I had with Mr. and Mrs. Fleming. In fact I did not know them all—the White heirs."

There is not a particle of testimony given by any other witness tending to show that any of the plaintiffs, except Fleming and his wife, had any part in or knew anything of the alleged trust, and his Honor would have been authorized to instruct the jury that if they believed the testimony they should find for their verdict that the plaintiff Pinckney A. White was entitled to recover one-third of the land, and Nannie E. Eagle, Annie D. Bailey and W. A. White to recover one-third between them. The judgment of the court below is therefore modified to
(375) this extent and affirmed as to the rights of said Pinckney A. White, Nannie E. Eagle, Annie D. Bailey and W. A. White.

As to the alleged trust with the plaintiffs at the time of the judgment and decree made in 1886, so far as the same may affect the interest of Fleming and his wife in the land, the matter should have been submitted to the jury on the proof offered, with a proper application of the legal principles involved, which his Honor did not do in the instructions which he gave. He committed no error, however, in refusing the instructions which the defendants requested, as they were framed. The issues submitted were not the best, but, owing to the latitude his Honor allowed in the examination of witnesses, the whole case was developed and no harm came to the parties through the issues submitted. The legal title to the land having been admitted to be in the plaintiffs, it would have been better to have submitted proper issues on the alleged trust set up by the defendants at the time of the judgment in 1886. The judgment as herein modified is affirmed, but for the error as to the failure of his Honor to properly instruct the jury concerning the alleged trust set up by the defendants, so far as it affected the interest of Fleming and his wife in the land, there must be a new trial between Fleming and his wife and the defendants.

New trial.

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(376)

MARGARET FLIPPIN v. J. S. FLIPPIN, EXECUTOR OF SAMUEL M. FLIPPIN.

Where a testator provided in his will that his wife should have a year's allowance for her support for one year not exceeding the amount allowed by law, and the widow and executor by mutual consent selected three men to lay off to the widow her year's support under the will, which was done, and both parties assented to the report in writing en-

dorsed thereon: *Held*, that in the absence of fraud and undue influence the widow is estopped by the award and cannot maintain a proceeding under the statute for a year's allowance.

PROCEEDINGS under the statute, section 2128 of The Code, for the allotment of a year's allowance, heard before *Bryan, J.*, at chambers, during April Term, 1895, of STOKES, on appeal from Superior Court Clerk.

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

A. M. Stack for plaintiff.

Walter W. King and Watson & Buxton for defendant.

FAIRCLOTH, C. J. The defendant's testator, among other things, said in his will: "I will that she (plaintiff) have such a year's allowance out of the crop, stock and provisions on hand as may be necessary for her support for one year, not exceeding the amount allowed by the laws of North Carolina," and appointed the defendant his executor.

The plaintiff and defendant by mutual consent selected three men to lay off to the plaintiff her year's support under the will, who made the assignment and signed and filed their report, which was read to both parties, who endorsed thereon: "We the undersigned, having heard the foregoing report read do agree to same. Martha M. (377) Flippin; J. S. Flippin, executor." It is found as a fact that there is no evidence of fraud in the matter. The plaintiff, after receiving the property so assigned, instituted this proceeding for a year's allowance under The Code, sec. 2128, etc. The Clerk held that the plaintiff was estopped, and his Honor on appeal overruled the Clerk's decision and ordered that the year's allowance prayed for be alloted. In this there is error.

It was not necessary that the widow should dissent, as she was entitled to her year's allowance under the will as well as by statute. The plaintiff's contention was answered by the fact that all of the authorities cited in her behalf were cases of fraud or undue influence by the executor or other parties. After the foregoing proceedings were had the plaintiff was bound thereby, and the award was a plain case of mutual estoppel by writing. *Armfield v. Moore,* 43 N. C., 157; Morse Arbitration, 96, 295-7.

Reversed.

Cited: Tripp v. Nobles, 136 N. C., 109.

(378)

BOARD OF COMMISSIONERS OF STOKES COUNTY v. J. C. WALL ET AL.

Action on Sheriff's Bond—Defaulting Sheriff—Failure to Pay Over Taxes—Allowances for Insolvents.

1. Where an action is brought against a sheriff for failure to collect and pay over taxes, he is properly chargeable with the amount of the tax list, and the burden of proving a discharge of any part thereof is upon him.

2. Where a sheriff failed to settle for taxes within the time appointed by law and not having had allowance made him by the commissioners for insolvents at the time and in the manner prescribed by law, he cannot have such allowances made by the court in an action brought against him on his official bond for the balance due by him on the tax list.

3. In such case the fact that the tax books were attached in a suit against the sheriff by his creditors subsequently to the time when he should have settled with the commissioners was no defense to the action instituted for the collection of the balance of the taxes due, nor can the sheriff be excused upon the ground that he misunderstood the order of reference made in the action.

ACTION brought by the Commissioners of Stokes County upon the bond of the defendant as Sheriff of Stokes County. It was referred to J. W. Neal, who reported that the balance due by the Sheriff for the taxes of 1891 and 1892 was on 5 September, 1894, $1,199.50, of which no part has been paid since said date. He also reported that no insolvents had been allowed by the Board of County Commissioners in any of the various settlements for the year 1892 with defendant, and that the plaintiff, at the time of taking this account, requested a corrected and verified list of insolvents for the year 1892 of the defendant, whereupon the defendant stated that he could not furnish the list demanded, the tax books for the year 1892 not being in his possession.

The referee found as a conclusion of law that the defendant James C. Wall and his sureties are liable for the sum above found due, to-wit, $1,199.50, and the plaintiff is entitled to recover of defendants the said amount.

The defendants excepted to the report of the referee, as follows:

"1. The defendant thought, and so understood, that this case was referred to the Board of County Commissioners to settle an account with defendant, and allow him his insolvents and other just credits and report what balance due, if any.

"2. That, if defendant were allowed credits for the insolvents and other just credits, the amount claimed by plaintiff would be reduced by several hundred dollars.

"3. That defendant is entitled to have his insolvents and other just credits allowed before any judgment against him and his (379) sureties.

"Wherefore defendants ask that this case be recommitted to the Board of Commissioners of Stokes County, to settle with defendant Wall and allow him his just credits and insolvents, and report what balance due, if any."

The affidavit of the defendant Wall was as follows:

"1. That he was Sheriff of Stokes County during the years of 1891 and 1892, with other defendants as his sureties on his several official bonds.

"2. That on 11 April, 1894, the Board of Commissioners of Stokes County and the Board of Education of Stokes County, through their counsel, Stack & Bickett, sued the defendant Wall and his sureties on his official bonds for taxes (general and school) which he had failed to collect and account for. That at Fall Term of this court the cases were referred for settlement and report what due, if anything. That instead of their being referred to the Board of Commissioners of Stokes County, where his just credits and insolvents could be allowed, he is informed that the order was drawn by Mr. Bickett, counsel for plaintiff, referring the cases to J. W. Neil, the chairman of the board, which he thinks was a mistake on the part of Mr. Bickett.

"That on .... August, 1894, and after the commencement of these said actions, Davie & Whittle, a fertilizer company of Petersburg, Va., through their counsel, Stack & Bickett, commenced an action in this court against W. N. Blackburn and defendant J. C. Wall, alleging a partnership in Blackburn & Wall, seeking to recover about seven hundred dollars or more, and at the time had attachments issued against defendant J. C. Wall, and had, by virtue of said attachment, his tax books for the years 1891 and 1892 seized and placed in the hands of J. H. Fulton, the present Sheriff of Stokes County, (380) where they have been ever since, and for that reason he has been unable to make out his insolvent list of taxpayers, to which he would be entitled to credit in his settlement. That there is now pending a motion to vacate said order of attachment, and the defendant is advised and believes the said attachment will be vacated when heard. That if judgment is allowed to be taken against this defendant at the present term of court, then the plaintiffs in this action would sue out executions, and sell the property of his sureties to pay the amount to county in said judgment, and then apply the amount due from taxpayers on the tax books to the payment of such judgment as might be recovered for Davie & Whittle.

"That defendant is advised, and so believes, that the amount due on said tax books, which amounts to one thousand or more dollars, is the property of the county, and the taxes due thereon should be collected and paid on any amount due from defendant J. C. Wall to the county in exoneration of his sureties. The defendant J. C. Wall has heretofore turned over his property to a trustee, which has been sold and applied on said county indebtedness, and that if the plaintifffs, through their counsel, are permitted to take judgments, the defendant and sureties will suffer irreparable injury; whereas, if the taxes are collected and paid to the county on the indebtedness of the defendant J. C. Wall, it will greatly relieve the sureties, which he is advised in equity they are entitled to."

Upon hearing the exceptions at Spring Term, 1895, of STOKES, *Bryan, J.*, overruled the exceptions, and the defendant appealed.

(381) *A. M. Stack for plaintiff.*

Walter W. King, Watson & Buxton and Glenn & Manly for defendants.

CLARK, J. The defendant, being in default by reason of not collecting and paying over the taxes in full, was properly chargeable with the amount of the tax list, and the burden of a discharge of any part thereof was upon him. *Vest v. Cooper*, 75 N. C., 519.

The statute applicable [Laws 1891, ch. 326, sec. 38 (2)] prescribes that no tax due from insolvents shall be credited to the sheriff unless allowed by the county commissioners upon proof as therein required, and before the day of settlement. Section 105 of the same act fixes the time for the sheriff to settle the State taxes "on or before the second Monday in January," and for settlement of county taxes section 109 prescribes "on or before the first Monday in February." Public policy requires promptness in these settlements, otherwise both the county and State governments might become seriously embarrassed for lack of necessary funds. The only extension of the time of settlement beyond the dates above specified is as to county taxes, and as to them section 111 of the said act provides that the county commissioners may extend the time for settlement by the sheriff of the county taxes, but not longer than till "the first of May in the year following that in which the taxes were levied." The defendant, not having settled his taxes within the time appointed by law and not having had the allowance made him by the county commissioners for insolvents at the time and manner prescribed by law, cannot have them allowed to him now by the courts in an action

for the balance due by him on the tax list. The attachment of the tax books was subsequent to the time he should have settled the taxes and have had his solvent list allowed, and can be no defense.

As to the second exception, it is no defense that the defendant (382) misconstrued the purport of the order of reference.

No error.

Cited: Board of Education v. Wall, post, 383; *Williamson v. Jones,* 127 N. C., 180.

BOARD OF EDUCATION OF STOKES COUNTY v. J. C. WALL ET AL.

Action on Sheriff's Bond—Failure to Pay Over Taxes—Right of County Board of Education to Bring Action.

In an action brought by the county board of education against a sheriff, on his official bond, for failure to pay over the taxes levied for school purposes, the complaint need not allege that the county commissioners have refused to bring an action for the purpose, since by section 28, chapter 199, Acts of 1889, The Code, section 2563, was amended so as to make the county board of education the proper relator in such an action.

ACTION by the Board of Education of Stokes County against a sheriff of said county and the sureties on his official bond, heard before *Bryan, J.*, at Spring Term, 1895, of STOKES.

The case was referred to J. W. Neal, who reported that there was a balance due from the taxes of 1891 and 1892 of $143.82, that no insolvents had been allowed for the year 1892, for the reason that the plaintiff's request for a list of insolvents for that year had not been complied with by the defendant. The same exceptions, affidavit and prayer were made in this case as in that of *Commissioners v. Wall, ante,* 377. At the hearing his Honor overruled the exception and gave judgment against the defendants, who appealed.

A. M. Stack for plaintiff. (383)

Walter W. King, Watson & Buxton and Glenn & Manly for defendants.

CLARK, J. All the points raised in this case have been passed upon in *Commissioners v. Wall, ante,* 377, except the objection that the plaintiff cannot maintain the action without an allegation that the county

commissioners have refused to bring an action to recover the amount due the plaintiff. Section 28 of ch. 199, Acts 1889, amends the provisions of section 2563 of The Code by substituting the county board of education for the county commissioners as the proper relators in an action like the present.

No error.

Cited: Tillery v. Candler, 118 N. C., 889; *Comrs. v. Sutton,* 120 N. C., 301.

DAVIE & WHITTLE v. W. N. BLACKBURN ET AL.

Tax Lists—Attachment by Creditors of Sheriff.

1. While a tax imposed is a *debt* and the tax list is an *execution,* when delivered to the sheriff, against every person named thereon, for the amount of his tax, yet the debt does not arise out of contract and is not liable to the incidents of contracts between individuals, nor does the tax list have the force and effect of a judgment and execution, except between the sheriff and the taxpayer.

2. Though a sheriff who has settled for the taxes due on a tax list which have not been paid to him may collect the same within the time allowed by law, yet the debts thus due him cannot be attached by a creditor to whom he is indebted, under the provisions of section 357 of The Code, authorizing attachments to be levied upon "all the property of the defendant," there being no statutory provision enabling the creditor to make any use of the tax book, and it being against public policy to permit proceedings out of which confusing and dangerous litigation might grow.

(384) MOTION to dissolve a warrant of attachment, heard before *Bryan, J.,* at chambers in Winston, N. C., pursuant to an order to show cause, etc., made at Spring Term, 1895, of STOKES.

The motion was allowed, and plaintiff appealed.

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

A. M. Stack for plaintiff.

Watson & Buxton, Walter W. King and Glenn & Manly for defendants.

MONTGOMERY, J. In this action a warrant of attachment was issued and levied upon the tax books for 1891 and 1892 in the hands of the defendant Wall, who was Sheriff of Stokes County when the lists were delivered to him for collection by the county commissioners. On a

motion to dissolve, heard before *Bryan, J.*, the attachment was discharged, and the plaintiff excepted on the grounds: "1. For that his Honor erred in holding that the tax books are not subject to attachment in this action; 2. His Honor erred in ordering the tax books and all moneys collected by Sheriff J. H. Fulton under said tax lists to be delivered to the defendant J. C. Wall; 3. For that said order is contrary to the act of 1895, ch. 93, and is void." It is contended by the plaintiffs and alleged in their affidavits that there is nothing due to the State or county on the tax books, the Sheriff having settled all his taxes for those years. This may be taken to be true, and yet it is an immaterial fact from the standpoint from which the matter will be considered by us.

His Honor ruled that in no case is a tax book in the hands of a sheriff for collection liable to be seized by a creditor of a person who is Sheriff, under attachment proceedings. The other exceptions were abandoned here, and the only question before us then is, Was his (385) Honor's ruling correct? The plaintiffs contend that, as nothing is due to the State or county by the Sheriff, he having settled all his taxes and there being a large amount due on the books to the Sheriff by the taxpayers of the county, the amounts so due are debts and even judgments against the taxpayers, and are therefore such property as may be levied upon by attachment under section 357 of The Code, which authorizes attachments to be levied upon *all the property* of the defendant. It is true this Court has decided that when a tax is imposed the taxpayer becomes a debtor, and what he owes is a debt in the higher sense of that word, as embracing any kind of a just demand. *S. v. Georgia Co.*, 112 N. C., 34. But such a debt does not arise out of contract and is not liable to the incidents of simple contract between individuals. It is also true that this Court has held that the "tax list is a judgment against every person for the amount of the tax, and a copy delivered to the sheriff is an execution." *Huggins v. Hinson*, 61 N. C., 126, cited and approved in *Mulford v. Sutton*, 79 N. C., 276. But these tax lists can only have the force and effect of judgment and execution between the sheriff authorized to collect the taxes and the taxpayer. And there can be no doubt that, after the sheriff has settled his taxes with the proper authorities with his own money in part or in whole, if such a thing should happen, the amounts due on the lists belong to him and are collectible by him within the time allowed by law just as if he had not paid the taxes; and if that time has expired, it can be extended by legislative authority. *Jones v. Arrington*, 91 N. C., 125. We are of the opinion, however, that it is not in contemplation of our laws that a creditor whose debtor happens to be sheriff can be invested by judicial proceedings with the powers which the sheriff has to collect the

(386) taxes and apply the collections to his debt. The creditor can have no such remedies as are given by law to the sheriff, and we have no statutory provision which will enable such a creditor to make any use whatever of a tax book if he could seize it by attachment or other court proceedings. In addition, it would not be safe public policy to permit such proceedings, for almost certainly there would result therefrom much litigation dangerous to the public interests as well as to those of the sureties on the official bond of the sheriff. Seizures of the tax books might and probably would be made on affidavits containing unreliable or inaccurate information, especially as to whether the sheriff has paid all of his taxes, as in this case, and before the mischief could be corrected great harm might be inflicted on the public interest, the collection of revenue delayed if not defeated, and the county and State put to expense and trouble in the litigation.

There is no error in the ruling of his Honor vacating the attachment and ordering J. H. Fulton, who has charge of the tax books, to return them and also the moneys collected on them to the defendant Wall.

No error.

Cited: *Powell v. Wall, post,* 387; *Wilmington v. Cronly,* 122 N. C., 386.

(387)

POWELL, GIBBS & CO. ET AL. v. J. C. WALL ET AL.

Tax List—Taxes Due Sheriff—Attachment.

(For syllabus see *Davie v. Blackburn, ante.*)

MOTION to dissolve warrant of attachment, heard before *Bryan, J.,* at chambers at Winston, pursuant to order to show cause, etc., made at Spring Term, 1895, of STOKES.

The material facts are the same as stated in *Davie v. Blackburn, ante,* 383. The motion was allowed and plaintiff Durham Fertilizer Co. appealed.

A. M. Stack and Jones & Patterson for Durham Fertilizer Company.

Walter W. King, Glenn & Manly and Watson & Buxton for defendants.

MONTGOMERY, J. The plaintiff had attachments issued and levied upon the tax books for the years 1891-'92 in the hands of J. C. Wall, former Sheriff of Stokes County. On motion of the defendant Wall

the attachments were vacated by *Bryan, J.*, on the ground that the tax books were not subject of levy by attachment, and the plaintiff appealed.

There is no error in the ruling of his Honor. The same question has been before the Court in *Davie v. Blackburn, ante,* 383, and the reasons for our decision in this case are set out in that one. There were several questions of practice raised in the case, but it is unnecessary to discuss them, as the plaintiff's action has failed on its merits.

No error.

(388)

H. H. RIDDLE AND WIFE v. TOWN OF GERMANTON.

Trial—Evidence—Maps—Presumption on Appeal—Motion for Judgment on Non Obstante Veredicto.

1. A map is not admissible in evidence except for the purpose of explaining the testimony of a witness and to enable the jury to understand it.

2. Where in the trial of an action a map was introduced, and admitted under objection, and neither the case on appeal nor the record shows for what purpose it was introduced, nor on what ground the objection was placed, and the complaint specifically describes and locates the land, it will be presumed that the map was introduced in explanation of preceding testimony and not to locate the land.

3. A motion for judgment *non obstante veredicto* will not be allowed unless the cause of action is admitted and the plea of avoidance is found insufficient.

EJECTMENT, tried at Fall Term, 1895, of STOKES before *Bryan, J.*, and a jury.

There was verdict for the defendant, and from the judgment thereon plaintiffs appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

J. T. Morehead and A. M. Stack for plaintiffs.
Jones & Patterson for defendant.

FAIRCLOTH, C. J. The plaintiffs brought this action for possession of a lot of land, 20 by 314 feet, in the defendant town, which was covered by a street, with the usual allegations of title and wrongful holding by the defendant.

These allegations were denied, and the defendant futher averred that the *locus* had been dedicated to the town as a street in 1885

by the plaintiff's grantor, who conveyed to plaintiff in 1888, the street then being laid out and in use by the town and the public. The issue submitted without objection was whether the lot in controversy had been dedicated to the use of the town as a public street, to which the jury responded "Yes." The evidence as to the dedication was conflicting. The defendant introduced evidence showing that the street was laid out, opened and accepted by the defendant and it had been in use since 1885, and that plaintiff's grantor declined to accept any damages when the street was laid out.

(389) The defendant offered in evidence a town map showing the new street and another street. Plaintiffs objected to the introduction of the map in evidence, which objection was overruled, and defendant excepted. Neither the record nor the "case" shows for what purpose the map was introduced, nor on what ground the objection was placed. A survey for the owner's convenience is not admissible evidence for him or those claiming under him. *Jones v. Huggins,* 12 N. C., 233. But it is competent to explain the testimony of the witness and to enable the jury to understand it. So with diagrams and plats. *Dobson v. Whisenhunt,* 101 N. C., 645; *S. v. Whiteacre,* 98 N. C., 753. As we are not informed for what purpose the map was introduced, we must assume that it was in explanation of the preceding evidence, and not for locating the lot, as that was specifically done by the complaint.

The plaintiffs after verdict moved for judgment *non obstante veredicto.* This could not be allowed unless the cause of action had been admitted and the plea of avoidance had been found insufficient. The facts are otherwise in this case. *Moye v. Petway,* 76 N. C. 327; *Walker v. Scott,* 106 N. C., 62.

No error.

Cited: Hampton v. R. R., 120 N. C., 537; *Andrews v. Jones,* 122 N. C., 667; *Arrowood v. R. R.,* 126 N. C., 630; *S. v. Wilcox,* 132 N. C., 1135; *S. v. Harrison,* 145 N. C., 411; *Britt v. R. R.,* 148 N. C., 39; *Shives v. Cotton Mills,* 151 N. C., 291; *Baxter v. Irvin,* 158 N. C., 279; *Todd v. Mackie,* 160 N. C., 357; *S. v. Rogers,* 168 N. C., 114.

(390)

J. S. SMITH v. JOSEPH WHITTEN.

Practice—Appeal—Amending Record—Replevin—Undertaking—Additional Bond—Judgment—Parties.

1. While it is the duty of the trial Judge, when requested in apt time to do so, to enter upon the record a statement of the facts upon which he bases his judgment granting or refusing a motion to vacate a judgment, yet, where no facts appear in the record and no request is made to enter them until after judgment, the refusal to grant the request subsequently submitted in a case on appeal tendered is not sufficient ground for an assignment of error.

2. Judgment may be rendered against the principal and surety on a replevin bond, in an action of claim and delivery, without notice to the surety.

3. Where a plaintiff in any case, or a defendant in an action involving the title to land, in obedience to an order to enlarge his bond, files an additional undertaking with new sureties and in a sum named in the order, the first bond is not discharged, and the new bond is not a substitute for but an addition to the original undertaking.

4. Where a defendant in claim and delivery, on his first replevin bond proving insufficient in amount, executes an additional bond with a different surety, and the damages awarded are less than the amount of the first bond, judgment may be rendered against the surety on the first bond alone.

5. Where a defendant in claim and delivery, on a first replevin bond proving insufficient in amount, executes an additional bond with a different surety, plaintiff may have judgment against the surety on the first bond though he has not made the administrator of the surety on the additional bond a party to the action.

CLAIM AND DELIVERY, heard before *Bryan, J.*, at Spring Term, 1895, of STOKES.

R. D. East justified as surety on defendant's replevin bond for $100, and J. S. Smith on an additional bond for $200. There was judgment for plaintiff against defendants Whitten and East, and from a judgment refusing a motion to set aside the judgment as to him R. D. East appealed.

John D. Humphreys for plaintiff.
A. M. Stack for R. D. East.
Walter W. King for Campbell, admr.

AVERY, J. Facts are found to support a judgment at the time of rendering it, not to explain or justify it afterwards. Where the parties waive the right of trial by jury and agree to submit all issues to the Judge or to referees, the statutes provide that the conclusions of fact as well as of law shall be set forth fully, in order that they may constitute the basis of the judgment. But when the duty devolves (391) upon the Judge of deciding a question as distinguished from an issue of fact, there is no such statutory requirement. The rule of practice applicable to the various classes of cases in which a court is allowed or required to make such findings preliminary either to the admission of testimony or the rendition of judgments, such as that appealed from, is by no means uniform. For instance, we have held in *Blue v. R. R., post,* 644, that a Judge is not bound to set forth a formal finding of the facts upon which he holds that a witness offered as an expert has or has not shown himself qualified. On the other hand it is conceded to be the duty of the Judge, when requested in apt time to do so, to enter upon the record the findings of fact upon which he bases his judgment granting or refusing a motion to vacate a judgment. *Carter v. Rountree,* 109 N. C., 29. In that case the Court assumed that the Judge always found definite conclusions of fact, but made them a part of the record proper only when the request was made while the record was still *in fieri.* The statement of the case on appeal constitutes no part of the record proper, and it is too late for the court, except by consent, to insert in it a finding of facts as a foundation for a judgment or to amend it when settling the case on appeal. Where no findings of fact were entered on the record and no request was made to enter them till after judgment, the refusal to grant the request, when subsequently submitted in case on appeal tendered by the appellant, is not sufficient ground for an assignment of error.

The defendant Whitten filed two undertakings, both conditioned as required by the statute, the first one in the sum of $100, signed as surety by the appellant East, and another in the sum of $200, (392) with J. S. Smith as surety. The sworn value of the property seized was $100, as claimed in the affidavit of plaintiff. At Spring Term, 1894, of the Superior Court the jury found the actual value of the mare to be $50, and assessed the damages for detention at $10. Thereupon judgment was rendered against the defendant for possession of the mare and, if possession could not be had, then against the defendant Whitten and his surety, the appellant East, for

the sum of $100 (the penal sum named in the undertaking), to be discharged on the payment of $60 with interest, etc. If this had still remained in full force, the case of *McDowell v. McBryde, ante,* 125, is direct authority to sustain the ruling of the Judge below, and it only remains to see whether East had been discharged by order of court or consent of the parties.

The bond, or undertaking, was justified in the sum of $100 by East, but, the property being valued in the plaintiff's affidavit at the same sum, it became necessary to have a justified undertaking in the sum of $200. The court properly decided that the undertaking signed by East was of itself insufficient. But if that signed by Smith had named as the penal sum only $100, we can see no reason why, if the parties could each justify for the same penal sum, it should not have been held that two bonds were in contemplation of law equivalent to one undertaking in the penal sum of $200. Moreover, it may be that Smith was not actually worth more than $100 above his exemptions, and that the plaintiff would have again objected to the bond but for the fact that he relied on the first one filed to the extent of the penal sum named therein. This view of the matter is presented to show that the ruling was supported by sufficient reasons. But it is needless to cite authority in support of the proposition that where a plaintiff in any case, or a defendant in an action involving the title to land, in obedience to an order to enlarge his bond, files an additional undertaking with new sureties and in the sum suggested by the (393) order of the court, the sureties on the original obligation are not discharged. The new undertaking is not substituted for, but added to, the original indemnity by the other party from liability to pay his own cost in case he should prevail in the action. The plaintiff was under no legal obligation to bring in the administrator of Smith, the surety on the second undertaking. The appellant, East, has agreed to indemnify plaintiff to the extent of $100 and it has not been adjudged that he is liable beyond the limit fixed by himself. For the reasons given the judgment of the court below is

Affirmed.

Cited: Pharr v. R. R., 132 N. C., 423; *Fisher v. Ins. Co.,* 136 N. C., 224; *Abernethy v. Yount,* 138 N. C., 341; *Parker v. Ins. Co.,* 143 N. C., 342; *Lumber Co. v. Buhmann,* 160 N. C., 387; *Gardiner v. May,* 172 N. C., 194.

(394)

J. W. NEAL v. FLOYD E. NELSON.

Adverse Possession—Color of Title—Sheriff's Return—Deed to Deceased Person—Statute of Limitations.

1. A purchaser who has paid the price for which he bought, whether from a public officer at auction sale or from an individual, if he is in occupation of the land bought, holds it adversely to all the world under any writing describing the land and defining the nature of his claim, subject of course to the registration laws of the State.

2. The return of a sheriff upon an execution showing the sale, a description of land, the purchaser's name and the payment of the purchase price is such color of title as will, by adverse possession of the land, ripen into perfect title.

3. A deed to "A and his heirs," A being dead, is void for the reason that the word "heirs" is a word of limitation and not of purchase; if to "A or his heirs," it would be good if the heirs can be identified, for the reason that A will take if living, and he has no heirs until his death.

4. A summons issued, but neither docketed on the summons docket nor returned served, nor followed by an *alias*, will not arrest the running of the statute of limitations.

ACTION commenced 2 November, 1887, and tried before *Winston, J.*, and a jury, at STOKES.

The court submitted, by consent of the parties, the issues as follows, to-wit: "Is the plaintiff the owner of and entitled to the possession of the land described in the complaint?" Answer: "Yes."

The plaintiff introduced in evidence a grant from the State to one McAnally and evidence of surveyors and others tending to show that it embraced the land in dispute. And a deed from W. H. Gentry, Sheriff, to William Lash, Sr., purporting to bear date 2 November, 1869, attached to which deed was a survey purporting to be dated in December, 1871, and recorded in the office of the Register of Deeds of Stokes County on 15 August, 1888, and to support this deed he introduced an execution and Sheriff's return showing the sale of the lands and purchase by W. A. Lash, Sr., on the day this deed bears date.

Plaintiff then introduced evidence to show the death of W. A. Lash, Sr., and proceedings showing the allotment of the land in controversy to Mrs. Powell Hairston, the wife of Cabell Hairston, who was a daughter of W. A. Lash, Sr.

A deed from Cabell Hairston and wife, Powell Hairston, to plaintiff, dated 11 October, 1887, and recorded 14 October, 1887, conveying said lands to plaintiff.

Also introduced evidence tending to show that all these papers embraced the land in controversy. The plaintiff did not connect his title with the grant.

Dr. W. A. Lash testified by deposition that when the land was sold by the Sheriff he bid it off for his father, W. A. Lash, Sr.; that he was a paralytic and witness transacted all his business. "I took possession of the land on 2 November, 1869, and held possession till 7 December, 1870. On 7 December, 1870, I contracted to (395) sell the land to Peter Smith, gave title bond and took notes for purchase money. And Peter Smith held possession from that date till about 14 December, 1877, when he surrendered the possession to me, giving me the title bond, and I surrendered the notes given by him to my father for the purchase money. I have the notes, and now file them to show date of sale and date of surrender of possession and rescission of contract. My father died 27 December, 1877. My father's tenant, George Mounce, held possession of the tract, living on it from 7 December, 1877, till the land was allotted to my sister, Mrs. Powell Hairston. In all the transactions I was acting as agent for my father."

The partition proceedings were introduced, showing date of partition 26 February, 1878.

Peter Smith testified that when he bought the land from Lash he went around the lines and knew the boundaries.

The defendant introduced a grant from the State to himself, dated 2 February, 1881, and recorded 25 February, 1881, and testified that under this grant he took possession during January, 1885, and has been in possession since that date; that his counsel advised him to go and get possession; that he got a key that would unlock the door and went in the nighttime and went in, taking some property with him; that Powell Sands had not finished moving—he had some little property in the house, and some fodder and corn in the kitchen, wheat growing in the fields.

W. H. Gentry testified that he did not make the deed at the day of the sale, nor for a long time afterwards, on account of the boundaries; that there was no survey at that time—not till 1877; that he continued as Sheriff until after the death of W. A. Lash, Sr.; that the deed was not made till the latter part of 1887; Mr. Lash was at the time dead. "I made the deed and delivered it to (396) W. A. Lash, Jr., I think, 1 January, 1878."

R. B. Glenn testified, as attorney for Floyd Nelson, the defendant, in March, 1884: "I began suit for Nelson against Cabell Hairston and wife, Powell Hairston, who were at that time in possession of the land

and before a sale by them to the plaintiff; I got from the Clerk of the Court a summons properly filled up and signed, returnable at the April Term, 1884, and gave the summons to the Sheriff of Stokes County, who deputed J. S. Taylor to serve it; the summons was never returned or docketed on the summons docket, nor was there ever any *alias* summons issued. Cabell Hairston told me that Taylor had served the summons on him, and had left it with him for his wife to accept service. I repeatedly asked him about it, and he repeatedly promised to return it; for this reason I never issued any other summons. After Fall Term of 1884, having heard that Hairston's tenant had moved out, I advised Floyd W. (E.) Nelson to move in at once and take possession, which he did in January, 1885. I heretofore examined the date in the survey plot attached to the Gentry deed; it read 1877—it is now changed to read 1871."

Cabell Hairston testified that J. S. Taylor served some paper on him and left it with him, and he promised to have his wife sign it and return it to court, but it had been misplaced and he could not find it.

The defendant asked the following instructions:

"1. That the issuing of the summons in the name of Floyd Nelson v. Cabell Hairston and wife, Powell Hairston, as testified to by witness for defendant, arrests the running of the statute of limitations (397) from the time of service of the summons on Cabell Hairston in April, 1884.

"2. That plaintiff had no paper title.

"3. That plaintiff had not shown that he had been in uninterrupted continuous possession of the land in dispute under known and visible lines and boundaries for seven years under color of title.

"4. That if the deed of Gentry, Sheriff, was not made and delivered to the purchaser during his lifetime, but was delivered after his death to his personal representative, W. A. Lash, it was void and not color of title.

"5. That the grant to the defendant being recorded in 1881, and the deed of William Lash being recorded on the——day of——, 188—, that the said deed to William Lash was only good from the time of its registration.

"That the deed to William Lash, being recorded after the grant to the defendant and after 1 January, 1886, conveyed no title as against said registered grant."

The court declined to give said instructions, except No. 2, which was given, and the defendant excepted to the refusal of the court to give the other instructions.

The court gave the following instructions to the jury in lieu of those asked: "(The first duty of the plaintiff is to show title to the land out of the State; this he seeks to do by means of the grant which has been read. If the plaintiff has located his grant, and satisfied the jury that this grant covers the land in dispute, then the State has parted with its title. It is for the jury to say if the grant has been located.)

"But this is not all that it is encumbent on the plaintiff to show—he must show title against the world; to do this he relies upon a deed from Sheriff Gentry to W. A. Lash, purporting to have been executed in 1869—partition proceedings of the lands of said Lash among his heirs at law—and a deed from one of the said (398) heirs at law, Cabell Hairston and wife (to whose lot the said lands fell, as plaintiff contends), executed to the plaintiff. The court has already charged you that the plaintiff has no paper title to the land. But he contends that W. A. Lash's deed from Sheriff Gentry constitutes color of title, and that said Lash and those who hold under him have been in the actual adverse continuous possession of said land under known and visible lines and boundaries and under said deed, constituting color of title, for a period of seven years preceding this action, and that hence he is entitled to recover. It therefore becomes material that the jury inquire whether the land in the Lash deed from the Sheriff and in the plaintiff's deed is embraced in the grant. If it is so embraced within the said lines designated on the map as 1, 2, 3, 4 and 5, etc., you will next inquire for how long a time were W. A. Lash and those claiming under him in the actual, hostile, exclusive, continuous possession of said land under known and visible metes and bounds and under said deed. (If the deed to W. A. Lash was not executed until after his death, to-wit: in the year 1878, but if the said Lash had bought the land at execution sale in 1869, and had entered into possession thereof at once under said sale, and he and those renting from him and others claiming under him built houses on the land, cleared the forest, cultivated the soil and went into the actual possession and occupancy of the said land and so remained until the defendant took possession, then the Sheriff's deed would relate back to the execution sale, and the deed would not be void, but would constitute color of title to said Lash and those claiming and holding under him.)

"(And although the survey of the land was not made until 8 December, 1877—instead of 8 December, 1871—still, if from said date the lines and boundaries of said tract as described in the complaint were ascertained and determined, known and visible, and there- (399) after and during the next succeeding seven years said Lash and

those claiming under him were in the actual, exclusive, adverse possession of the said land under the said deed, in this event the plaintiff's possession would have ripened into title.)

"(The issuing of the summons in *Nelson v. Neal,* in 1884, will not, in the circumstances of the case, arrest the running of the seven-years statute.)

"And it is admitted that the defendant took possession in January, 1885—about the middle of January. It is for the jury to say whether the plaintiff's deed from Cabell Hairston and wife, and the deed from the Sheriff to the father of Mrs. Cabell Hairston, to W. A. Lash, include and embrace the land described in the plaintiff's complaint.

"(So far as the deposition of W. A. Lash is concerned, and the testimony relating to the possession of the land in controversy, the court instructs the jury that possession is a mixed question of law and fact, and as there is no evidence that Lash and those claiming under him as renters or purchasers were not in possession of the disputed land, that the jury may consider the evidence in said deposition, that he was in possession of the land, as meaning that he was in the actual possession of the same.)

"(The notes given by Smith to W. A. Lash in payment of the land in dispute have been offered for the sole purpose of fixing the date that Smith took actual possession under the said Lash, and the day he gave possession back to the said Lash; the jury will not otherwise consider the same, except as corroborating witness. The witness Dr. W. A. Lash having sworn that the contract made with Smith in 1870 for the sale of said land has been lost or destroyed and cannot be found, and not having been registered, the court permits the
(400) said Smith and said Lash to testify under what circumstances said Smith took possession of the land and to designate and qualify such possession. If Smith agreed to purchase the land of W. A. Lash and took actual possession of the same under that agreement, cultivating the land, occupying the houses and exercising acts of ownership over it, and afterwards being unable to pay for the same, gave back the land to Lash and cancelled and destroyed the obligation, Smith's possession would be Lash's possession.)"

The court having written out its charge and read the same in the presence of the counsel on both sides, the defendant's attorneys stated that, as the charge practically eliminated all disputed facts from the consideration of the jury, to-wit: the importance of the date of the survey, whether in 1877 or 1871, and also the disputed fact as to the delivery of the Lash deed after the death of the grantee, and other facts which they considered material, they did not desire to address the jury.

Thereupon, under the charge of the court as given above, the jury found the issue in favor of the plaintiff. Motion for new trial overruled and exception. Errors assigned—the refusal of the Judge to give the defendant's instructions numbered 1, 3, 4, 5, 6, errors in the charge as given, and heretofore specifically designated and placed in parentheses.

A. M. Stack, Watson & Buxton and Jones & Patterson for plaintiff.
Glenn & Manly for defendant.

AVERY, J. The plaintiff introduced in support of the deed made by the Sheriff to W. A. Lash, Sr., on 1 January, 1878, but bearing date 2 November, 1869, *"an execution and sheriff's return showing the sale of the lands and purchase by"* said Lash *"on the day this deed bears date."* The irresistible inference growing out of this (401) statement is that the return identified *"the lands"* in controversy and showed that W. A. Lash, Sr., bought. "The presumption is that public officers do as the law and their duty require them to do." Lawson P. Ev., p. 58 (Rule 14). The law required the Sheriff to make due return setting forth the amount of the bid and the fact of the payment of the money by the purchaser, and courts will act on the assumption that the return was true and that it reported the receipt of the money. *Hiatt v. Simpson,* 35 N. C., 72; *Lyle v. Silver,* 103 N. C., 261. It has been held that where the sheriff sells under execution, nothing more appearing, it will be presumed that he complied with the law by making due advertisement. *Jackson v. Shafer,* 11 Johns, 317; Lawson P. Ev., p. 56. Upon the same principle, until the contrary is shown, the law infers that he collected the amount of the bid and reported the fact with the name of the purchaser, which appeared on the return, as it was his duty to do. We have been led into this discussion probably by the omission to bring the execution and return as a part of the transcript, though it was suggested on the argument that there had been some delay in making up a statement on account of the loss of court records and papers. If this return sufficiently described the land, as it is admitted it did, and evidenced—as we must assume it did—the payment of the purchase money, which was the amount offered as a bid, then it identified the subject-matter and defined the nature, extent and foundation of the claim under which the agents and tenants of the purchaser entered 2 November, 1869, and held undisputed possession from that date until 14 December, 1877—more than seven years. If therefore the deed executed by Sheriff Gentry to W. A. Lash, Sr., after his death, was ineffectual as a

(402) conveyance of the legal title and insufficient as color of title, W. A. Lash nevertheless acquired title before his death on 27 December, 1877, if the return of the Sheriff constituted color. We are aware that in *Dobson v. Murphy,* 18 N. C., 586, *Judge Gaston* delivering the opinion of the Court, it was held that such a return upon a *fi. fa.* was not color of title; but it was conceded that *Ruffin, Chief Justice,* yielded to the majority of the Court with great hesitation. In *Tate v. Southard,* 8 N. C., 45, *Judge Henderson* delivering the opinion of the Court, it was decided that the return of a sheriff upon a *fieri facias* was colorable title. When the same case came before the Court a second time it appeared that an attachment had been levied on the land, the return on the writ being "attached one piece of land, that Richardson bought of Kennedy," and that a writ of *fi. fa.* afterwards issued with no other or better description of the land and was returned "satisfied." After giving the definition of color of title, which was substantially repeated by *Gaston, J.,* in *Dobson v. Murphy, supra, Judge Henderson* said: "The color of title set up in this case, not being in writing, for he proves the purchase by parol only, wants one of the essentials before mentioned, and is therefore insufficient. *If the purchase appeared in the Sheriff's return, it would be necessary to examine whether such return professed to pass the title.*" The first opinion in which that learned Judge had passed upon the question directly seems to have remained unchallenged until sixteen years afterwards, when *Dobson v. Murphy* construed his definition as excluding any sort of a sheriff's return on an execution. In *Avent v. Arrington,* 105 N. C., 379, it appeared that there was no seal to the instrument under which the plaintiffs claimed, and this Court, citing (at page 392) *Barger v. Hobbs,* 67 Ill., 592, which rested on the grounds that such an instrument showed the extent of the possession and the (403) nature of the claim, held that it was sufficient as color of title, though it passed only an equity in the land to the grantees.

In *Brown v. Brown,* 106 N. C., 459, *Justice Davis,* delivering the opinion of the Court and referring to the authorities cited in *Avent v. Arrington,* said, in discussing and giving the sanction of this Court to the charge of the Judge below: "The possession of Javan Davis and his assignee under the bond for title was the possession of the vendor, under whom they claim, *until the purchase money was paid.*" Wood, in his valuable work on Limitations (2 vol., pp. 648, 649), says: "But where a contract is made for the sale of land upon the performance of certain conditions, and the purchaser enters into possession under the contract, his possession *from the time of entry* is adverse to *all except his vendor,* and it seems *now* to be well settled that after the

performance by him of all the conditions of the contract, *he from that time holds adversely to the vendor, and full performance is treated as a sale, and the party in possession may acquire a good title as against the vendor by the requisite period of occupancy.*" In a note the author cites numerous authorities from various courts sustaining the doctrine that whenever a person occupying land under an executory agreement of another to convey pays the purchase money and places himself in such a position that he can demand title, his possession immediately becomes adverse to him who has contracted to convey. *Beard v. Ryan,* 73 Ala., 37; *Catlin v. Deller,* 38 Conn., 26; *Stowher v. Griffin,* 20 Ga., 312; *Paxson v. Bailey,* 17 Ga., 600; *Brown v. King,* 5 Metcalf, 173. The Supreme Court of Georgia defined color of title to be "anything in writing, connected with the title, which serves to define the extent of the claim." *Field v. Boynton,* 33 Ga., 242. In *Bell v. Longworth,* 6 Ind., 273, it was held that where one enters into possession of land under any written agreement defining the character and extent of his claim and pays the purchase money, (404) such entry is under color of title and is adverse to all the world. In giving its sanction to the same doctrine the Supreme Court of Illinois, in *McClelland v. Kellogg,* 17 Ill., 501, cite a number of cases, chiefly from the courts of New York and Pennsylvania, to sustain the opinion. These authorities and many others which might be added show that the trend of judicial opinion is towards the reasonable view that a purchaser who has paid the price for which he bought, whether from a public officer at auction sale or from an individual contractor, if he is in the occupation of the land bought, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim. As we find in our decision serious conflict in the definitions of color of title, it seems the more reasonable to return to the consistent view taken by so eminent a jurist as *Judge Henderson,* and from which *Judge Ruffin* departed only because he was powerless, especially when the weight of reason and of authority elsewhere and the liberal tendency of our own later adjudications tend so strongly in that direction. It is but just to the purchaser that when he pays the price and is delayed in getting a perfect title he should have all of the benefit incidental to the ownership of the legal as well as the equitable estate. Of course he would enjoy and exercise such right subordinate to the registration laws of the State, and would understand that it was to his interest to give constructive notice of his claim by registration of his contract or *lis pendens,* or both, where practicable, at the earliest possible moment after acquiring a complete equity.

Though since the passage of the act of 1887, ch. 147, an unregistered deed is available as color of title to one in possession, ordinarily (*Avent v. Arrington,* 105 N. C., 389) the principle will not (405) be extended in its application so far as to defeat the rights of a purchaser without notice; but while litigating with the sheriff when the latter refuses to make title, it seems but just to place him in the same position as if he had obtained a deed on the day when equity declares he has a right to it. The statute has provided for treating him as the owner by subjecting his land to the sale under execution. While he is so exposed, courts administering equity should treat him at least as a colorable owner. It would seem but a fair implication that, when the Legislature declared by the act of 1826 that a complete equity should be subject to sale under execution, the law-making branch of the government meant to treat the owner of such an equity as holding under at least colorable title. In holding that an occupation under a paper-writing in the form of a deed, except that it wants a seal, or under a bond for title after the payment in full of the purchase money, is adverse to all the world and will ripen into a perfect title at the end of the statutory period, this Court is committed to the reasonable principle that one who has a perfect or complete equity in land has color of title. There can be no such thing as a complete equity without some paper-writing signed by the party to be charged and setting forth in terms or by reference to some other paper the same description which will identify the land, as well as the consideration, the receipt of which may be shown *aliunde.* Our own adjudications have established the principle that a void deed is often, if not generally, color of title (*McConnel v. McConnel,* 64 N. C., 342) and that a deed executed in pursuance of an act afterwards declared unconstitutional is to be distinguished from one executed in contravention of an express statute or provision of the Constitution. *Church v. Academy,* 9 N. C., 234; *Ferguson v. Wright,* 113 N. C., 537. The occupant is not generally presumed to know the law in so far as (406) it prescribes the nature of conveyances and the usual requisites as to form and substance, and an instrument though defective or informal will be held sufficient, provided he seems to have acquired a right to land. This liberal rule, however, does not extend so far as to assume that he does not know what is expressly prohibited by law.

Viewing the Sheriff's deed as an attempted conveyance executed to W. A. Lash, Sr., after his death, it would be obviously void for want of a grantee and for failure to deliver. But it was insisted that it

would operate to pass the fee to his heirs, who were known and could be identified. If we were at liberty to treat the words "W. A. Lash, Sr., and " as surplusage, then the delivery to W. A. Lash, Jr., who is known to have been at the date of delivery one of the heirs, would inure to the benefit of the other heirs and tenants in common. But it seems to be a well-established principle of interpretation that a deed executed to A, who is at the time dead, or his heirs, is good if his heirs can be identified, for the reason that he will take if living and he has no heirs until his death. No such uncertainty arises, therefore, as in the case of a grant to A or B both living. 3 Washburne, 279; *Hazon v. Page,* 2 Wallace, 607; *Ready v. Kearsley,* 14 Mich., 224. But a deed to a person not then living "and his heirs" is void because the word "heirs" is a word of limitation and not of purchase. *Hunter v. Watson,* 12 California, 363.

We concur with his Honor in the opinion that the issuing of the summons by Nelson in 1884 did not under the circumstances arrest the running of the Statute. We do not deem it necessary to notice the other assignments of error, though all have been carefully reviewed. We think, therefore, that as the return described the land, named the purchaser, and showed the payment of the purchase money, it was effectual as color to mature title from its date. The jury (407) found under the instructions of the court below that those under whom the plaintiff claims (W. A. Lash, Sr., and his heirs) held continuous possession for seven years, and such possession will subserve the same purpose, if the return was color of title as if the deed had been valid or sufficient as color and had related back to the sale. It is immaterial whether the return of the deed served the purpose of color so far as it affects the rights of the defendant. The error of the Judge, therefore, did him no harm. The judgment is

Affirmed.

Cited: Williams v. Scott, 122 N. C., 550; *Walker v. Miller,* 139 N. C., 455; *Greenleaf v. Bartlett,* 146 N. C., 499; *Bond v. Beverly,* 152 N. C., 62; *Lumber Co. v. Pearce,* 166 N. C., 590; *Thompson v. Lumber Co.,* 168 N. C., 229; *Butler v. Butler,* 169 N. C., 589.

JAMES HAWKINS v. N. M. PEPPER ET AL.

Mineral Rights—Contract—Conveyance—Condition Subsequent—Forfeiture—Re-entry by Grantor.

1. Where an interest in land is conveyed for a nominal consideration and is subject to be defeated by failure to perform a condition subsequent which constitutes the real consideration on the part of the grantor for executing the conveyance, the courts will adjudge that the grantee, if he has taken no steps in a reasonable time looking to and giving promise of a compliance with it, has abandoned the purpose of performing it.

2. Although apt words usually employed in creating conditions subsequent may not be used in a contract or conveyance yet if the performance or nonperformance of an act named is the only consideration or inducement for executing the deed, it should ordinarily be construed as a condition.

3. Where an instrument conveying the mineral rights in land, after reciting a nominal consideration, declared that the grantor should have "full power to convey," and the grantee stipulated that he would examine the land and if he found valuable minerals would pay the grantor one-half the net proceeds thereof or, should such grantee convey to third persons, he would pay the grantor $200 and one-half the net proceeds of the sale: *Held*, that the rights of the grantee under such instrument were forfeited by his failure for eight years to open the mine and prepare it for sale.

4. Where a conveyance of mineral rights in land is defeated by the grantee's failure to perform the particular acts stipulated to be done by him in the instrument itself, and which form the real consideration therefor, a re-entry by the grantor is unnecessary.

(408) ACTION tried before *Brown, J.*, and a jury, at the Fall Term, 1895, of STOKES.

The defendant Pepper was allowed to come in and be made a defendant, as the alleged landlord of the defendant Martin, claiming the property in dispute; whereupon the trespass was claimed to have been committed by virtue of a certain paper-writing or contract, under seal, executed between the plaintiff and said Pepper, a copy of which is set up in the defendant's answer and marked Exhibit A.

The following issues were submitted without objection:

"1. Were the words 'five years,' whereby the duration of Pepper's rights under the written deed of 20 October, 1882, was to be limited to that period, omitted from said paper-writing by the fraud and imposition of the defendant N. M. Pepper, the draughtsman thereof, and the mistake of the plaintiff?" Answer: "No."

"2. Has the defendant, the said Pepper, forfeited all rights under said contract of 20 October, 1882, for failure to operate or sell said mine?" Answer: "Yes."

"3. Did the defendant during 1894, shortly before the commencement of this action, wrongfully and unlawfully enter upon the said lands of the plaintiff, as alleged in the complaint?" Answer: "Yes."

"4. What damage has the plaintiff sustained by said trespass, if any?" Answer: "One penny."

The defendants in apt time objected to the submission of (409) issue No. 2, upon the ground that said paper-writing of 20 October, 1882, was a deed of bargain and sale, and the estate of Pepper therein could not be forfeited.

Objection overruled; exception by defendants.

James Hawkins testified in his own behalf: That he was in possession, and had been for a long number of years, of a farm and a tract of land whereon he resided in the county of Stokes, in which was situated the mica mine and mineral property described in the said paper-writing of 20 October, 1882; that he signed and executed the said paper-writing, and delivered it to N. M. Pepper. That the said Pepper and his associates commenced to operate said mine, and did operate it continuously up to and including the year 1885. "The last work was done on the mine in 1885; since then they have not operated the mine at all.

"I notified the defendants, about three months before this suit was brought, to keep off this land, and demanded said paper-writing be surrendered. After I notified them they commenced to work a part of each day, and put the defendant Martin there to work. It was eight years during which they did not work at all. I brought this suit and got an injunction and stopped it."

The defendants in due time objected to all of the above testimony as to nonuser and abandonment. Objection overruled, exception by defendants.

There was much other testimony given by the plaintiff, as well as the defendants, in regard to the first issue, which it is unnecessary to set out.

The defendant N. M. Pepper and his witness, James A. Pepper, testified: That immediately upon the execution of the contract, dated 20 October, 1882, a copy of which is made a part of defendants' answer, they began to work the mine on the lands of the (410) plaintiff, and got out a considerable amount of mica, and continued to work said mine until about the month of August, 1886, when it was found unprofitable to work the mine, and it was discontinued and not regularly worked again until the year 1894, except on several occasions; during that period the defendants got out some speci-

mens of mica in order to sell the mine. In 1894 they put the defendant Martin there to work. That ever since 1882 the defendant N. M. Pepper has made many efforts to sell the mine, and has during the time sent specimens of the mica over the country and written a great many letters, offering the mine for sale, and has at times obtained proposals for the purchase, which fell through, and as yet has not been able to sell the property. That in 1893 they were negotiating a sale, but it fell through.

At the close of the evidence, the court instructed the jury that upon the entire evidence they should answer the second issue "Yes." The jury rendered a verdict for the plaintiff.

Defendants moved for a new trial, assigning errors as follows:

"1. Error in the admission of evidence on behalf of the plaintiff tending to show that the defendant N. M. Pepper had failed to work the mine between August, 1886, and 1894.

"2. For error in submitting issue No. 2. For error in charge of the court as to issue No. 2, as above set out."

Motion overruled. Judgment for the plaintiff, and defendants appealed.

Exhibit A was as follows:

(411) "STATE OF NORTH CAROLINA,

"Stokes County, 20 October, 1882.

"*Know all men by these presents,* That I, James Hawkins, of the county of Stokes and the State of North Carolina, of the first part, for and in consideration of the sum of one dollar, to us in hand paid by N. M. Pepper of the county and State aforesaid, of the other part, the receipt whereof is hereby acknowledged, have this day bargained and sold, and by these presents do bargain and sell unto N. M. Pepper, his heirs and assigns, all our right, title, interest and claim in and to all the iron, copper and lead ores, and also all other minerals that may be found in, on and appertaining to the lands of said James Hawkins, lying in the county of Stokes, on the waters of Raccoon Creek, adjoining the lands of Joel Hawkins and Joseph Hutchins, beginning at Joel Hawkins' line, thence up the creek to the mouth of Little Branch; thence up the branch as it meanders to the head of said branch; thence south to Joel Hawkins' line; thence with his line to the beginning, supposed to contain five acres: with the privilege of ingress and egress, entering on any part of said land and premises to dig, mine and carry away any of said minerals, ores or metals, and to build machinery of any kind, use any water power for any purpose, build and use tram, rail and other roads over any part of said land, with the right to use any timber or other material necessary to the

mining and working of said minerals to fit the same for any market, all of which rights and privileges the said N. M. Pepper, his heirs or assigns, shall have the full power to convey to other party or parties. For the consideration aforesaid the said N. M. Pepper agrees to make or cause to be made examination of the aforesaid lands, and, if any valuable minerals are found, shall pay the said James Hawkins one-half of the net amount he may receive for the said minerals or metals; or in case the said N. M. Pepper shall convey the rights and privileges hereby granted to other party or parties, then and in that (412) case he, the said N. M. Pepper, shall pay the party of the first part two hundred dollars, and in addition thereto shall pay the said party of the first part one-half the remainder of the net amount he may receive for the said minerals and privileges, after deducting the expense for developing the same, erecting machinery, etc.

"In witness whereof, we have hereunto set our hands and seals, the day and year first above written.

"Witness: JAMES HAWKINS. [SEAL.]
"JAMES A. PEPPER, N. M. PEPPER. [SEAL.]"
"JAY W. PEPPER.

Watson & Buxton and A. M. Stack for plaintiff.
W. W. King and Glenn & Manly for defendants.

AVERY, J. It is a well settled principle that where an estate or interest in land is conveyed for a nominal consideration and is subject to be defeated by failure to perform a condition subsequent which constitutes the consideration on the part of the grantor for executing the deed conveying it, a reasonable time will be allowed for its performance, after which the courts will adjudge that the grantee, if he has taken no steps looking to and giving promise of a compliance with it, has abandoned the purpose to perform it. *Ross v. Tremaine,* 2 Met. (Mass.), 495; *Allen v. Howe,* 105 Mass., 241; 6 A. & E., 903, note 1; 2 Washburne (5 Ed.) p. 12, star pp. 449, 450; *Austin v. Cambridgeport Parish,* 21 Pick, (Mass.), 215.

It is familiar learning that certain apt words will always be construed to create a condition subsequent. But deeds and leases are contracts, and that before us for interpretation contains (413) mutual stipulations and is signed by both of the parties to it. A contract may be construed by looking to all parts of the instrument embodying it, in order to ascertain whether the parties intended to create such conditions, though they may have failed to use the apt words usually employed. 2 Washburne, R. P., p. 27, star p. 459; 1 Wood on L. & T., sec. 233, p. 502; 5 Lawson Rights & Rem., sec.

2511. Though neither the words "on condition," "provided always," "if it shall so happen" nor other equivalent expressions appear in the instrument, and though no clause of re-entry be inserted, and yet it appears "that the performance or nonperformance of an act named is the only consideration or inducement for executing the deed, it should ordinarily be construed as a condition." 6 Lawson R. & R., sec 2760, p. 4499; *R. R. Co. v. Hood,* 66 Indiana, 580, cases cited, p. 585.

The agreement which gives rise to the controversy recites in the first paragraph a nominal consideration for conveying the mineral interest in a certain tract of land with rights of ingress and egress, to work the same and to use "any timber or other material thereon, to fit the same for market," etc. The grantor adds at the conclusion of the stipulations that "the said N. M. Pepper (the grantee), his heirs or assigns, shall have *full power to convey to other party or parties.*" The agreement on the part of the defendant Pepper is as follows: "For the consideration aforesaid the said N. M. Pepper agrees to make or cause to be made examination of the aforesaid lands, and if any valuable minerals are found shall pay the said James Hawkins one-half of the net amount he may receive for the said minerals or metals; or in case the said N. M. Pepper shall convey the rights and privileges hereby granted to other party or parties, then and in that case, he, the said N. M. Pepper, shall pay the party (414) of the first part two hundred dollars, and in addition thereto shall pay the said party of the first part one-half the remainder of the net amount he may receive for the said minerals and privileges, after deducting the expense of developing the same, erecting machinery," etc.

The defendants contend that the instrument is to be construed as an absolute deed to the fee simple in the mineral interest; but if the parties intended that the agreement should operate as an indefeasible conveyance, it is difficult to conceive why the power to convey should be given, as a conclusion to the mutual stipulation of the plaintiff, to one who was already the absolute owner of the interest which he was empowered to alien. This provision is utterly irreconcilable with any other mutual understanding but that the title was conveyed to the defendant in order that, after working it and paying over the royalty agreed upon (one-half the net amount received for minerals sold), the said N. M. Pepper should be empowered to sell the developed mine upon paying two hundred dollars, and in addition one-half of the net proceeds of the sale to the plaintiff. If the contention of defendants' counsel is correct, Pepper has acquired the absolute right to the mineral interest in the land for a mere nominal consideration,

while his covenant to pay half the net proceeds of minerals taken out or of a sale of the whole interest is a mere personal covenant to be performed whenever he or his heirs may see fit to work the mine or develop and sell it. In *Maxwell v. Todd,* 112 N. C., 678, the operative words in the instrument construed to be a lease forfeitable for nonuser were "hereby leases and by these presents does grant and convey to the said parties of the second part, their heirs, executors, administrators and assigns." The term was declared to be 99 years, the object mining for minerals, the royalty one-tenth (415) of the net proceeds of all minerals taken out, and the consideration as in this case one dollar. It was held there that the instrument should be construed as though a clause of defeasance or forfeiture had been expressly embodied in the deed. The same principle is declared applicable to mining leases in *Conrad v. Morehead,* 89 N. C., 31.

We conclude that there was manifestly no intent to vest in the defendant Pepper an absolute and indefeasible estate for the nominal consideration, but that it was the mutual understanding that the fee should pass to him for the temporary purpose of selling within a reasonable time, and that meantime there was an implied condition attached that he should not abandon the work of opening and developing the mine, so that it should be fitted for active operation by Pepper or for examination with a view to purchase by others. The performance of the agreement to open the mine and prepare it for sale was the only inducement to convey, and the facts bring the case within the just principle already stated. The failure by Pepper, according to his own testimony, to work the mine for the years 1886 to 1894 operated in contemplation of law as a forfeiture of his rights under the contract, just as though an express provision had been inserted in it that he should forfeit all rights acquired under it if his running operations should be abandoned for a reasonable time. When his rights were once so lost, it was not necessary for the plaintiff to re-enter, since the estate had vested in Pepper for a particular purpose, which appeared upon the face of the instrument, and not subject only to the performance of an act to be done *dehors,* which should give the right of re-entry and render it necessary to assert the claim to the forfeiture by some such public act.

There was no error in the instruction given to the jury, in effect, that in any aspect of the evidence the rights acquired (416) by Pepper under the deed had been forfeited.

Affirmed.

Cited: Helms v. Helms, 135 N. C., 174.

NATIONAL BANK OF GREENSBORO ET AL. v. J. E. GILMER ET AL.

Resulting Trusts—Assignment for Benefit of Creditors, Validity of—Failure by Assignor to File Schedule of Preferred Debts.

1. To establish a parol trust in land in favor of a person whose money is alleged to have gone into the purchase and improvement of the land, the evidence must show the existence of the facts constituting the trust at the time of the transmission of the legal title.

2. While the act of 1893, ch. 453, does not prohibit bona fide mortgages to secure one or more pre-existing debts, yet where a mortgage is made of the entirety of a large estate for pre-existing debts (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.

3. 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 attaching creditors.

PETITION by defendants to rehear the same case, reported in 116 N. C., 684. The petition was as follows:

"1. That the above-entitled cause was regularly heard at the February Term, 1895, of the Supreme Court of North Carolina, upon the call of the 9th Judicial District, and an opinion rendered by his Honor, *Avery, Justice,* said cause having been taken by appeal from the November Term, 1894, of FORSYTH Superior Court. Your petitioners now make, as part of this petition, the record of said
(417) cause as appears in the Supreme Court aforesaid; and now ask and pray for a rehearing of said cause, upon the following alleged errors of law and matters overlooked, wherein your petitioners most respectfully say they have just cause of complaint.

"2. Your petitioners respectfully say: That the first alleged error was in relation to what is called in the pleadings the Factory Lot, wherein the Court held that the evidence offered by the defendants to establish a trust in said factory lot in behalf of John L. Gilmer and Powell Gilmer was not sufficient; but that the said evidence only created the relation of debtor and creditor between J. E. Gilmer and wife, Laura Gilmer.

"1st error: That the Court committed an alleged error of law, in that they held the said contract of J. E. Gilmer and wife, Laura Gilmer, was executory, and therefore the notes became the property of J. E. Gilmer by his wife's death. (See *George v. High,* 85 N. C., 99;

Dula v. Young, 70 N. C., 450). For that it is manifest, to sustain the trust in this case, the contract between husband wife was executed at the time, and under the express agreement with his wife J. E. Gilmer took his wife's money, which he then had, and purchased the factory lot and constructed the improvements thereon.

"2nd error: For the alleged matters overlooked: The Court said: 'He bought the land with the firm's money, and constructed the building thereon also with the funds of the firm'; whereas the Court overlooked the testimony of J. E. Gilmer, to-wit: 'that the money in the firm of Edmunds & Gilmer was his wife's money, and which he took out of the firm by express agreement between his wife and himself that he should so take out the funds, buy the lot and construct the factory on it.' The Court overlooked the testimony of E. C. Edmunds to the same import.

"The Court further said: 'He subsequently, in 1891, bought (418) his partner out without any directions or instructions from his wife, who was not consulted'; whereas the Court overlooked the testimony of J. E. Gilmer, that he 'bought his partner out by the express direction of his wife, who was consulted about the matter, and by an agreement with her that he would, with the money of hers in the firm, purchase the lot and build the factory thereon.'

"The Court further said: 'In 1892 he executed more notes to his wife and entered credits on those then existing.' In this the Court was misled by the printed record, taken from erroneous copy made by the trial Judge, who inadvertently put in '1892' for '1882,' as this will plainly appear from the notes of the evidence taken by the Judge at the trial in his own handwriting, and by the original notes themselves, which were exhibited on trial.

"3rd error: For alleged errors of law and matters overlooked: In that the Court held that the deed in trust from J. E. Gilmer to J. W. Sheppard was void under the Acts of 1893, chapter 463, for failure to file schedule of preferred debts by trustor, and for failure to file inventory and accounts by trustee, as provided in said act.

"The Court says: 'When a mortgage is made of the entirety of a large estate, for a pre-existing debt, omitting only an insignificant remnant of property, said mortgage comes within the provisions of said act.' The Court overlooked the evidence that there was a large amount of property of greater value than that conveyed in the trust, owned and held by the trustor at the time of the execution of said deed.

"That the Court has overlooked the fact that the trust contained a clause of defeasance, making it an ordinary deed in trust, and not a general assignment for the benefit of creditors. See (419) *Woodruff v. Bowles,* 104 N. C., 197.

"For alleged errors of law: For that the Court held that the deed in trust aforesaid was a general assignment.

"For that the Court held that such deed in trust comes under the provisions of said act, when it is manifest from the provisions thereof that the said act of Assembly is an act regulating and providing for the settlement of the estates of insolvents, by providing that all their debts shall at once become due, and for the settlement of their estates before the clerk.

"Your petitioners respectfully say: The Court having only granted a new trial, there is no order made in the cause that your petitioners must perform before preferring this petition. Your petitioners therefore respectfully ask of the Court, for the alleged errors of law and matters overlooked, that they be allowed a rehearing of said case upon the two restricted and specified points as herein set forth."

On the petition *Avery, J.*, endorsed the following order:

"I am of opinion that a rehearing should be granted upon the questions:

"1. Whether the Court overlooked any testimony tending to take the deed executed by J. E. Gilmer to J. W. Sheppard out of the class of deeds of assignment to which the act of 1893, ch. 453, is applicable.

"2. Upon the question whether, in any aspect of the evidence, there was error in holding that the deed executed by J. E. Gilmer to his sons was without consideration and void as to creditors, and that the agreement of J. E. Gilmer with his wife was executory, and especially upon the question whether the testimony of J. E. Gilmer and E. C. Edmunds was not overlooked by the Court in stating the conclusion of (420) law as to the validity of the said last-named deed.

"AVERY, J."

Watson & Buxton, Jones & Patterson and Glenn & Manly for petitioners.

Dillard & King, D. L. Russell and Ricaud & Weill contra.

FURCHES, J. This case is regarded as one of importance to the parties and to the public, and as two gentlemen of recognized learning, practicing in this Court, have certified that they have examined the opinion delivered at the last term and published in 116 N. C., 684, and the authorities there cited, and that they are of the opinion that there are manifest errors in this opinion, and a rehearing having been ordered, it becomes our duty to give the case a careful reconsideration.

The petition points out two questions involved in the case and decided by this Court as erroneous, and the order for a rehearing is confined to these questions. The first error assigned is as to what is

called in the pleadings the "Factory Lot," which the defendant J. E. Gilmer conveyed to his sons, J. L. Gilmer and Powell Gilmer, on 2 August, 1893. As grounds of this error the petition alleges that the Court overlooked the evidence of the defendant Gilmer, as follows: "That the money in the firm of Edmunds & Gilmer was his wife's money and which he took out of the firm by express agreement between his wife and himself that he should take out the funds, buy the lot and construct the factory on it." We have read the evidence of the defendant Gilmer with care, and fail to find the paragraph noted in the petition, as shown above. The petition also states that one of the notes executed by the defendant Gilmer to his wife in 1892 was error, and should have been 1882; but upon the argu- (421) ment it was admitted by one of the counsel for defendant that it was given in 1892, as it appears of record.

The learned counsel who certify to the manifest error of the Court say that the strongest view of the evidence for the defendants should have been taken by the Court, whereas the Court selected the strongest part of the evidence for the plaintiffs, and quotes the following from the evidence of the defendant J. E. Gilmer, to-wit: "It was an agreement, an understanding between me and my wife that I should use her money in this way." And further on he says: "$9,000 or $10,000 of her money went into the factory. As for money collected in 1892, I put it by her express direction in the factory real estate."

We agree to the proposition that the Court should have considered the evidence most favorable to the defendants—that is, if from the evidence of one witness the jury might have found for defendants, and from the evidence of another, or all the other witnesses, they should have found for the plaintiffs, the court should have submitted the issue of fraud to the jury, as the court could not tell which witness the jury would believe. But that is not this case. Here all the evidence relied upon by defendant comes from the defendant himself, corroborated to some extent, as he alleges, by the testimony of Edmunds and Dr. Lash. Therefore the testimony of the defendant Gilmer, and of Edmunds and Dr. Lash, that contradicts the statement above quoted (and this is the strongest statement for him to be found in his testimony) is of equal credibility as that for him. If none of it is to be believed, then it proves nothing. But if one part of it is to be believed, the other part is to be believed. Therefore, in order to determine whether it proves the proposition—that is, whether it proves that defendant Gilmer used his wife's money in the purchase of the factory property, out of which a trust was created and resulted (422) in her and her heirs—the whole of his testimony upon this point

should be considered together as a whole. It therefore becomes necessary that we should make a few quotations from the evidence of the defendant Gilmer, which we proceed to do as follows: "The money that I used of hers I gave my notes for. These notes were given the time they bear date; amount thereof $9,200 and interest, amounting now to more than $13,000. In 1891 they amounted to $11,000 or $12,000." The notes, ten in number, payable to Mrs. Laura A. Gilmer, put in evidence. "One of these notes was given March, 1892, for her half interest in the Florida lands. Another note for two bonds gotten by her from I. G. Lash's estate. I gave these notes to my wife, and she told me to keep them for her in my safe." These notes were for the large sum of money mentioned in the deed.

Again: "The construction of the warehouse paid for by checks of Edmunds & Gilmer and by currency, some of it belonged to said firm and some of it to myself. . . . In 1894 I bought Edmunds out, giving him checks on the Wachovia Bank. I got the deed 26 May, 1891, paying him $8,000. . . . The notes were my wife's property; I owed them to her at her death and I was keeping them for her in my safe . . . ."

"The money I got from her from 1880 to 1886 I used in general course of business. As for money collected in 1892, I put it by her express directions in the factory real estate."

E. C. Edmunds, former partner, and witness for defendant J. E. Gilmer, testified as follows: "In buying lot in Winston we paid for it $2,400 out of the funds of Edmunds & Gilmer. Mrs. Gilmer had said that we must buy a lot and build factory thereon. The factory (423) cost about $14,500; was paid for by checks of Edmunds and Gilmer; sometimes we would pay cash and be reimbursed from funds that came into the business. We began business in December, 1890, and dissolved in August, 1891. J. E. Gilmer said he wanted the factory to go to his sons. . . . The lot was bought and factory built with assets of Edmunds & Gilmer. Mr. Gilmer paid me for my interest in 1891."

Dr. Lash, brother-in-law and witness of defendant Gilmer, testified as follows: "On two occasions I remember Capt. Gilmer and his wife being present; she told of her money being kept separate; she said he was not to use it in his business, that it was to be kept for her children. In the latter part of 1892 or early in 1893 she told me she had decided to put the boys in the tobacco business, when they finished school. She thought there was a better future for them in tobacco than in merchandising."

This being the evidence in the case upon the question of consideration and resulting trust in Mrs. Gilmer, and (we will say) plaintiff demurs to the evidence, could the Court say that it established a trust in Mrs. Gilmer? Taking the evidence of the defendant Gilmer as a whole, which we are bound to do, and which the jury would be bound to do, acting under proper instructions from the court, can it be justly claimed that there is any evidence which ought to go to a jury to establish the proposition that the factory was bought with Mrs. Gilmer's money? Would it not be better for defendant Gilmer to reconcile this quotation made by the gentlemen who certify to the error committed by the Court (as they think) by saying he used $9,000 or $10,000 he had borrowed from his wife, and for which he gave her his notes, which notes were due and owing her when she died? That it was this money he used in the tobacco business and in buying and building the tobacco factory. Taking his evidence all together, it seems to us it cannot be reconciled in any other way, if it can in this way. (424) But to establish a parol trust the evidence must establish the facts which constitute the trust at the time of the transmission of the legal title. It cannot be created by parol after that time. Here the factory lot was bought by Edmunds & Gilmer in 1890, and factory buildings erected. In 1891 Edmunds sold his interest in the factory building and business to the defendant Gilmer. Gilmer paid him for the same, and he executed a deed to Gilmer therefor on 26 May, 1891. And one of the notes of defendant Gilmer was given the year after he purchased Edmunds' interest, and two years after Edmunds and Gilmer purchased the factory lot from Whitaker and erected the buildings thereon. It was after Gilmer purchased Edmunds' interest in the factory that Mrs. Gilmer directed him to collect the Reynolds debt and put it in the factory. It was the last of 1892 or early in 1893, says Dr. Lash, that Mrs. Gilmer told him she had "decided to put the boys in the tobacco business when they finished school." And Edmunds says that in May, 1892, when defendant Gilmer bought him out, he said "he wanted the factory to give to his sons." So it appears that all of Mrs. Gilmer's money which went into the tobacco business by her direction was after the property had been bought and paid for, and deeds executed, and at a time when a parol trust could not be constituted. We find no error as to this assignment.

The other question called to our attention by the petition in which it is alleged the Court committed error is as to whether the application of chapter 453, Acts 1893, which requires the *"trustor or assignor"* to file a sworn schedule of preferred debts, etc., within five days, is

mandatory and not directory. It was so held in this case at the last term, and has been so held in *Frank v. Heiner, ante,* 79, and in
(425) *Glanton v. Jacobs, post,* 427, and we see no reason for changing this ruling as to cases in which it applies. Besides the cases of *Frank v. Heiner* and *Glanton v. Jacobs,* this ruling is sustained by *Turnipseed v. Schefer,* 76 Ga., 109; *Mather v. McMillan,* 60 Wis., 506; *Pratt v. Stevens,* 26 Hun., N. Y., 229; *Ferry v. Butler,* 43 Barb., 395; *Cook v. Kelly,* 12 Abb., N. Y., 35.

The only question left for our consideration is as to whether the deed of defendant Gilmer to Sheppard is a *deed of trust* or assignment within the meaning of the statute of 1893. It was stated in the opinion of this Court at last term, when considering this case, that it did not apply to a mortgage given to secure a present or pre-existing debt, but only to such trust as amounted substantially to an assignment. The statute uses the terms *deeds of trust* and assignments. This conveyance is by "indenture" to J. W. Sheppard, "trustee," but this would have been the formal parts of a mortgage, deed in trust or assignment. So, it becomes necessary to look to the scope, object and result to determine whether it is such *trust* or assignment to which the statute of 1893 applies. We find that the defendant Gilmer, in his evidence, referring to it quite a number of times, with but one exception calls it "my assignment," and once he calls it *"my deed of trust."* It is made to secure and pay twenty-odd debts and a number of creditors. The debts named amount to over $49,000, and the property assigned to the trustee brought only $25,000 when sold. Besides the debts named in the assignment or deed of trust to Sheppard, the defendant owed and was liable for about $150,000, and this conveyance conveyed substantially all the property the defendant owned, liable to execution, so nearly so that when plaintiff issued executions upon the judgments the Sheriff returned them "unsatisfied,
(426) and no property out of which to satisfy them to be found."

This, it would seem, has all the substantial elements of an assignment, or at least is such a *deed in trust* as it was intended the act of 1893 should be applicable to.

But it is contended by defendant that this *deed in trust* has a clause of defeasance and this distinguishes it from an assignment, and authorities are cited to sustain this distinction. We do not say that this distinction is usually observed. But if allowed to prevail in cases like this, as is said in the opinion at the last term, it would put it in the power of any insolvent debtor to avoid the provisions of this statute by leaving out some inconsiderable amount of property, or even by inserting a defeasance clause though everything was conveyed, thereby rendering the statute a nullity. We cannot agree to this.

We agree with counsel for defendant that the act of 1893 was not intended to prevent preferences. But it was intended to prevent fraudulent *deeds in trust* and assignments, which had become to be of such common occurrence. To do this it required the assignor and *trustor*, where it was equivalent to an assignment, to file a verified schedule of the debts preferred, stating when such debts were made and the circumstances under which they were made, and required that the schedule shall be filed within five days from the date of registration and the trustee or assignee shall not sell any property for ten days from the date of registration. The act seems to make this a necessary part of the execution of such conveyances, and if the assignor does not comply with this requirement the courts will pronounce it a legal fraud and void. *Knight v. Packer,* 1 Beasley, ch. 216; *Hill v. Alexander,* 16 Lea, Tenn., 496.

We therefore fail to find that the Court mistook or omitted (427) any important fact in considering this case at the last term. Nor do we find any error in the judgment then pronounced. Therefore the petition to rehear is

Dismissed.

Cited: Glanton v. Jacobs, post, 428; *Cowan v. Phillips,* 119 N. C., 30; *Cooper v. McKinnon,* 122 N. C., 449; *Brown v. Nimocks,* 124 N. C., 419; *Martin v. Buffaloe,* 128 N. C., 308; *Odom v. Clark,* 146 N. C., 552; *Powell v. Lumber Co.,* 153 N. C., 57.

GLANTON & COTTON ET AL. v. JOE JACOBS, TRUSTEE, ET AL.

Assignment for Benefit of Creditors—Failure by Assignor to File Schedule of Preferred Debts—Registration of Deed.

1. Failure to file schedule of preferred debts within five days after registration of deed of assignment for creditors, as required by Acts 1893, ch. 453, renders the deed void.

2. Under Acts 1893, ch. 453, requiring schedule of preferred debts to be filed within five days after "registration" of deed of assignment for creditors, time for filing schedule commences to run from date of filing deed for registration, irrespective of the actual registration.

ACTION to declare void a deed of assignment made by the Sneed Furniture Company to the defendant Joe Jacobs, trustee, upon the ground of fraud, etc., tried before *Bryan, J.,* and a jury, at May Term, 1895, of FORSYTH.

There was a verdict for the plaintiffs, and from the judgment thereon the defendants appealed. The facts are sufficiently stated in the opinion of *Associate Justice Clark.*

Watson & Buxton and J. L. Patterson for plaintiffs.
Glenn & Manly and E. B. Jones for defendants.

CLARK, J. As was said in *Bank v. Gilmer,* 116 N. C., 684, 707, "Chapter 453, Laws 1893, is not a mere recommendation from the Legislature to insolvents as to the form of assignments and pro-
(428) ceedings thereunder, but in its very nature the act is imperative. If not complied with by the assignor in filing schedule as required, the assignment is invalid." This has been cited and approved in *Frank v. Heiner, ante,* 79 and *Bank v. Gilmer, ante,* 416. These decisions are sustained by the great weight of authority in other States, the numerous cases being cited in the excellent brief filed by plaintiffs' counsel. The statute being mandatory, it is necessarily so as to time. *Mather v. McMillan,* 60 Wis., 456, is in point, in which the deed of assignment was held invalid because recorded one day too late. Familiar instances are our own cases in which the service of notices of appeal and cases on appeal, and the like, has been held invalid when not made within the prescribed time. *Wade v. New Bern,* 72 N. C., 498; *Taylor v. Brower,* 78 N. C., 8; *Adams v. Reaves,* 74 N. C., 106. The deed of assignment was filed for registration 6 January, 1894. The schedule of preferred debts, which is required to be filed within five days after the registration was not filed till 12 January, 1894. "Excluding the first day and including the last," the mode of computation prescribed by The Code, sec. 596, this was not in time. That section excludes Sunday only when it is the last day of the time limited, so the case would not come within the decision in *Barcroft v. Roberts,* 92 N. C., 249. If The Code, sec. 596, applies, as it seems, only to times limited for services, etc., prescribed by The Code of Civil Procedure, then Sunday, even if it had been the last day, would not have been excluded in the computation. *Branch v. R. R.,* 77 N. C., 347; *Keeter v. R. R.,* 86 N. C., 346. Nor does it aid the defendant that the Register of Deeds in point of fact did not register the instrument till 8 January, for the filing for registration is in law registration, and all rights and liabilities accrue from the
(429) date of filing and do not depend upon the greater or less diligence of the register in performing his duty. *McKinnon v. McLean,* 19 N. C., 79; *Motts v. Bright,* 20 N. C., 258; *Parker v. Scott,* 64 N. C., 118; *Davis v. Whitaker,* 114 N. C., 279.

No error.

Cited: *Bank v. Gilmer, ante,* 425; *Burgess v. Burgess, post,* 448; *Cooper v. McKinnon,* 122 N. C., 449; *Brown v. Nimocks,* 124 N. C., 419; *Carter v. R. R.,* 126 N. C., 442; *Taylor v. Lauer,* 127 N. C., 161; *Lumber Co. v. Satchwell,* 148 N. C., 317; *Powell v. Lumber Co.,* 153 N. C., 57; *Power Co. v. Power Co.,* 175 N. C., 673.

T. L. VAUGHN v. BOARD OF COMMISSIONERS OF FORSYTH COUNTY.

County Courthouse—Necessary Expense of County—Discretion of Commissioners.

1. The cost of the erection of a courthouse is a necessary expense of a county, and the exercise of the discretionary power of the board of commissioners in providing to meet it is not reviewable by the courts.

2. Under section 707, subsection 9, of The Code, as amended by ch. 135, Acts of 1895, authorizing county commissioners to erect necessary county buildings and raise by taxation the money to pay for the same, the board of commissioners have the discretionary power to issue and sell or discount the notes of the county to provide the means to pay for a courthouse, and such discretion will not be interfered with by the courts.

3. The fact that ch. 343, Acts of 1889, authorizing the County Commissioners of Forsyth County to issue bonds for a new courthouse, required the assent of a majority of the qualified voters to such issue is no bar to the power of the commissioners conferred by a later act of the Legislature (ch. 135, Acts of 1895) to erect necessary public buildings and to raise by taxation the money therefor.

ACTION by T. L. Vaughn in behalf of himself, etc., against the Board of Commissioners in Forsyth County to restrain defendants from issuing county notes to pay for the cost of a new courthouse, heard, on motion for an injunction, before *Brown, J.,* at chambers.

His Honor rendered the following judgment: (433)

"This cause coming on to be heard, the court being of opinion that the finding of the defendants that a construction of a courthouse is a necessary expense is not reviewable, and that the defendants have full power to issue the notes and build the courthouse, the motion for an injunction is denied."

The plaintiff appealed.

Watson & Buxton for plaintiff. (434)

Glenn & Manly for defendants.

AVERY, J. The Code, section 707 (9) is so amended by chapter 135 of the Laws of 1895 as to make the concurrence of the justices of the peace no longer necessary, and to clothe the Board of County Commissioners of Forsyth County with the power "to erect and repair the necessary county buildings and to raise by taxation the money therefor." It is absolutely essential to the administration of justice that a suitable courthouse and jail should be built at every county site in the State. It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of the necessary expenses of a municipal corporation. But, conceding as we do that the cost of erecting courthouses and jails, like that of building bridges and of constructing public roads, is one of the necessary expenses of a county, we have no authority vested in the commissioners of determining what kind of a courthouse is needed or what would be a reasonable limit to the cost. *Broadnax v. Commissioners,* 64 N. C., 244; *Satterthwaite v. Commissioners,* 76 N. C., 153. "For the exercise of powers conferred by the Constitution," said *Pearson, C. J.,* "the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. The Court has no power, and is not ((435) capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities." If the inhibition contained in Article VII, sec. 7, does not extend to the necessary expenses of a county, it is immaterial, in so far as the authority of the courts is affected, whether the board of commissioners povide for raising the money needed to erect the courthouse by issuing evidences of indebtedness and realizing on them, so as to pay the cost of building as the work progresses, or whether they prefer to make a contract to pay in installments and incur the risk of creating a floating debt. We are not at liberty to declare that the more prudent course is, as far as possible, to pay cash in the hope of securing better terms for the county, but we are not authorized to question the wisdom of the board of county commissioners when they arrive at the same conclusion and act upon it. The Legislature of 1895 restored to the boards of county commissioners the same discretionary power exercised by them before the passage of the act of 1876-'77, ch. 141, and it is no bar to the exercise of its authority to show that an intervening Legislature vested in the commissioners, under chapter 343, Laws of 1889, the specific power which they are now assuming to exercise, but conditioned upon a favorable vote by the people of Forsyth County, which vote, however, proved adverse to the proposition. The defendants now have authority under a later

statute which confers this and other powers upon the board of every county, and it is like the execution of a second general power of attorney in place of one which was not only specific, but restricted by a condition precedent that was never performed.

We think the cost of a courthouse is a necessary expense to a county, and that the exercise of the discretionary authority of the commissioners in providing in this case to meet it is not reviewable by (436) the courts. The judgment is

Affirmed.

Cited: Vaughn v. Comrs., 118 N. C., 639; *Williams v. Comrs.*, 119 N. C., 524; *Mayo v. Comrs.*, 122 N. C., 15, 17, 21; *Herring v. Dixon, ib.*, 422; *Stratford v. Greensboro*, 124 N. C., 132; *Bear v. Comrs., ib.*, 212; *Hornthall v. Comrs.*, 126 N. C., 30; *Black v. Comrs.*, 129 N. C., 125; *Wadsworth v. Concord*, 133 N. C., 598; *Glenn v. Comrs.*, 139 N. C., 419; *Collie v. Comrs.*, 145 N. C., 188; *Hightower v. Raleigh*, 150 N. C., 571; *Burgin v. Smith*, 151 N. C., 566, 568; *Howell v. Howell, ib.*, 579; *Haskett v. Tyrrell*, 152 N. C., 715; *Pritchard v. Comrs.*, 159 N. C., 637; *Comrs. v. Comrs.*, 165 N. C., 634; *Hargrave v. Comrs.*, 168 N. C., 628; *Kinston v. Trust Co.*, 169 N. C., 209; *Jackson v. Comrs.*, 171 N. C., 382.

N. A. LEWIS v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Company—Delay in Delivering Message—Contract—Notice of Claim.

In the trial of an action against a telegraph company for damages for delay in delivering a telegram, it appeared that the contract under which the company transmitted it was that the company should not be liable for any claim not presented in writing within sixty days from the time of filing the message for transmission, and it also appeared that no written notice was given of plaintiff's claim within such period: *Held*, that the plaintiff could not recover.

ACTION for damages for delay in delivering a telegraphic message, tried before *Battle, J.*, at August Term, 1894, of FORSYTH.

On the trial it appeared that the brother of the plaintiff filed a message, prepaid, with the agent of the defendant at Barksdale, Va., at 8 o'clock A. M., 21 November, 1891, for transmission to plaintiff at Winston, N. C., where he lived. The telegram announced the serious

illness of plaintiff's sister and requested him to come to her at once, and was delivered to plaintiff at 10:30 o'clock A. M., 23 November, 1891. No notice of a claim for damages for the delay was given within 60 days from 21 November, 1891. The message was written upon a blank, upon which was printed the stipulation that the telegraph company should not be liable for any damages for delay in delivering the message unless presented within 60 days from the time of filing the message for transmission.

His honor held that plaintiff was not entitled to recover, and so instructed the jury, who returned a verdict for the defendant, and plaintiff appealed.

(437) *Glenn & Manly for plaintiff.*

R. C. Strong and Watson & Buxton for defendant.

FURCHES, J. This case turns on one point. The action was not commenced, nor was there any written notice given the defendant of plaintiff's claim, for more than 60 days from the time when the telegram was sent, or when it was received. On the argument before us it was stated by counsel that the sender made no contract with the defendant to give notice of any claim for damage against defendant on account of negligence within 60 days, as a condition necessary to plaintiff's right of action. And that the condition contained in the printed matter on the paper containing the message delivered to the plaintiff was not the contract and did not bind the plaintiff. Upon this state of facts we were prepared to agree with plaintiff that the notice on the message delivered to plaintiff was not the contract, and that plaintiff was not thereby restricted to 60 days in which he must commence his action, and was only limited by the statute of limitations. As a matter of fact, what was stated by plaintiff's counsel as to the condition upon which this message was sent from the defendant's office in Virginia may be true. But as a court of appeals we are confined to the record, and upon an examination of this we fail to see any statement sustaining this statement. While on the other hand we find in the statement of the case on appeal the following statement: "The plaintiff introduced the following evidence, to-wit: A telegram from J. F. Lewis to N. A. Lewis, plaintiff, a copy of which is hereto attached as Exhibit No. 2."

Exhibit No. 2, after stating many other conditions, contains the following: "Nor in any case where the claim is not presented in
(438) writing within 60 days after the message is filed with the company for transmission." The plaintiff introduces this as his evidence of the contract, and we have no right to make any other for him. He shows no reason for making his case an exception to the general

rule that his delay was caused by any act of defendant. Therefore this case falls within the rule laid down in *Sherrill v. Telegraph Co.*, 109 N. C., 527, and the judgment of the court below must be affirmed.

And while we affirm this judgment, we do so because we find the law so written and not because we believe the defendant discharged its duty to the plaintiff. The facts in this case show the grossest negligence and the greatest indifference on the part of defendant in discharge of its duty to plaintiff, in a case that would have appealed to the better sentiment of humanity in almost any one. The repetition of this case and other similar cases which have been before this Court is calculated to create a public sentiment which will before a great while correct such conduct as this on the part of the defendant by doing away with a lot of fine printed conditions on the blanks upon which a quasi-public servant writes the telegrams sent over its line, and which are never read by the sender; or the government will be compelled to take charge of this line of communication and destroy this overgrown monopoly and protect its citizens; but this is a matter for legislation.

Affirmed.

Cited: Mfg. Co. v. R. R., 128 N. C., 283; *Helms v. Tel. Co.*, 143 N. C., 394; *Sykes v. Tel. Co.*, 150 N. C., 433; *Deans v. R. R.*, 152 N. C., 172; *Barnes v. Tel. Co.*, 156 N. C., 154; *Penn v. Tel. Co.*, 159 N. C., 315; *Lytle v. Tel. Co.*, 165 N. C., 505; *Forney v. R. R.*, 167 N. C., 642; *Meadows v. Tel. Co.*, 173 N. C., 249.

(439)

E. E. GRAY v. T. B. BAILEY, TRUSTEE.

Husband and Wife—Estate by Entirety—Conveyance by Husband Alone.

1. Where land is conveyed to husband and wife, they are both seized of an entirety, and a conveyance by one without the joinder of the other is void.

2. Where land was conveyed to husband and wife, and the husband subsequently and without the joinder of his wife conveyed his interest to a trustee, who sold, and the wife became the purchaser and died, devising the land to a trustee, a purchaser at execution sale under a judgment against the husband, docketed before the death of the wife, is entitled to recover against the devisee of the deceased wife.

ACTION for the recovery of land, tried before *Brown, J.*, at Fall Term, 1895, of DAVIE, on a case agreed, the material facts of which appear in the opinion of *Chief Justice Faircloth*. His Honor held that the plaintiff was not entitled to recover, and rendered judgment accordingly, and plaintiff appealed.

A. E. Holton for plaintiff.
E. L. Gaither and Glenn & Manly for defendant.

FAIRCLOTH, C. J. In 1888 the land in controversy was conveyed by deed in fee to F. M. Johnson and his wife, A. L. Johnson. On 3 December, 1891, F. M. Johnson conveyed his interest in the land to Bailey & Gaither in trust for the purposes recited. In May, 1892, the trustees sold the land, and the wife became the purchaser, who died 29 October, 1892, leaving a will in which she devised the land to the defendant. On 8 December, 1891, a judgment was obtained against F. M. Johnson and docketed, and on 2 July, 1894, the Sheriff sold the land to
(440) satisfy the judgment, the husband still living, and the plaintiff purchased the land at the said sale, and brings this action for possession.

It will be noticed that the judgment was entered before the death of the wife, and that her husband made the deed in trust during coverture.

The question presented is, Can the husband alone sell his interest during coverture in land held by him and his wife jointly? The affirmative of the question was earnestly argued before us. This question has been much discussed and often decided, and we are called upon to decide it again. Confusion sometimes arises by not keeping in mind the distinction between an estate in joint tenancy and the *entirety* estate held by husband and wife, by reason of the fact that the doctrine of survivorship applied to each. The former may be changed by the act of either tenant in destroying either of the requisites, as by alienation, in which event the alienee and other tenant become tenants in common, whereas the *entirety* estate of the husband and wife cannot be changed, or destroyed, or partitioned by the act of either party. This requires the consent of both parties.

By the common law of England, which is the law of this State except where it has been changed or modified by statute, a conveyance to husband and wife does not make them joint tenants, nor tenants in common. They are in law one person, and take not by moieties but the entirety. They are each seized of the entirety, and the survivor takes the whole.

The estate of joint tenants is a unit of divisible parts, several holders of different portions, and upon the death of one the survivor takes a new

estate by acquiring the moiety of his cotenant. The *entirety* estate of husband and wife is also a unit, but is composed of indivisible parts. It is true they are two natural persons, but in law they (441) are one person, and upon the death of either the survivor takes no new estate. It is merely a change in the legal person holding, and not an alteration in the estate holden. When the contingency of death disappears or is removed, the legal personage holding the estate is reduced to an individual identical with the natural person, and this is the result although the same words used in the conveyance creating this *entirety* estate would make any other two persons joint tenants. Upon the death of the husband or wife, the survivor takes the whole as in joint tenancy, not by survivorship but by virtue of the original estate, because the *jus accrescendi* does not exist between husband and wife. The survivor simply remains in possession of that which he or she already had, relieved of all uncertainty in regard to the future control of the estate. There can be no remainder in the case, as was argued to us, either vested or contingent, because the right of survivorship is simply an incident to the estate granted to this one legal personage, arising out of the peculiar relation of husband and wife, to whom the whole fee passed, and no remainder could be left.

As a further illustration: if an estate be granted to husband and wife and to two others, the husband and wife take one-third in joint tenancy and the question of survivorship between them applies only to their third. If an estate be granted to a man and woman who afterwards marry, as they took originally by moieties, they will continue to hold by moieties after the marriage. Then, can the husband convey his interest in the entirety estate during the coverture? "The consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 Bl. Com., 182. "They are both seized of the entirety, and neither can sell without the consent of the other, and (442) the survivor takes the whole." 2 Kent Com., 132. "They are seized *par tout* and not *par my*. They must join in the conveyance. They are both necessary to make one grantor, and the deed of either without the other is merely void." *Doe v. Howland,* 8 Cowen, 277. "The sole conveyance of the husband, whether in terms broad or narrow, carries with it no estate, and is a mere nullity, not only as against the wife but also as against himself." Bishop Law Married Women, 621. "This species of tenancy is *sui generis* and arises from the unity of husband and wife. There can be no partition, for this would imply a separate interest in each; and for the same reason neither can alien without the consent of the other; and hence, the legal necessity results

that the survivor must take the whole. This consequence necessarily results from the nature of the estate and the legal relation of the parties." *Ketchum v. Wadsworth,* 5 Wis., 95.

In *Bruce v. Nicholson,* 109 N. C., 202, this Court held that the husband could not convey his interest in such entirety estate during coverture, nor could it be sold under an execution. We have cited only this one of our decisions; it refers to several others to the same effect. The act of Assembly, 1784, The Code, sec. 1326, declared that "in all estates, real or personal, held in joint tenancy the part or share of any tenant dying shall not descend or go to the surviving tenant," but shall go in the same manner as if the estate had been held by tenancy in common. In construing this statute, this Court held that it had no application to an estate granted to husband and wife, on the ground that it was not an estate in joint tenancy, but an entirety estate, and such is still the construction. *Motley v. Whitmore,* 19 N. C., 537.

Our conclusion is that F. M. Johnson's deed passed no interest (443) to his trustees; and that the Sheriff's deed passed the estate to the purchaser, the plaintiff, upon the case as now presented to this Court.

Reversed.

Cited: Spruill v. Mfg. Co., 130 N. C., 44; *Ray v. Long,* 132 N. C., 896; *Freeman v. Belfer,* 173 N. C., 582; *Moore v. Trust Co.,* 178 N. C., 124.

N. W. DUNCAN v. JOHN HALL ET AL.*

Ejectment—Survey—Location—Location of Boundaries—Pleading.

1. A corner admitted or ascertained by the usual marks, or established by testimony to the satisfaction of a jury, is to be considered by them as a fact incorporated in the deed so as to make it a part of the description.

2. Where the location of land conveyed by deed is disputed, but one of the corners is determined, the location made by running the line from such corner in the same direction as it is run by the deed is to be adopted rather than one ascertained by running in the opposite derection.

3. A simple denial in an answer in ejectment (brought before the passage of ch. 6, Acts of 1893) that defendant is wrongfully and unlawfully in

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

possession of land consisting of a virgin forest cannot be used as evidence that he is exercising such control over the land as will subject him to a possessory action.

ACTION for the recovery of land, begun in February, 1892, and tried before *Battle, J.*, at Fall Term, 1894, of WILKES.

The main question involved was one of boundary, depending on the proper location of the south boundary of a grant called the "Moravian Grant."

This grant commences at an island in the Yadkin River; thence west; thence south to a beech tree on Moravian Creek, near the mouth of a branch; thence east, and thence to the beginning.

The land in dispute lies on the east line, running from Mora- (444) vian Creek. There was a survey ordered; but the surveyor commenced at the island, and ran by the reversed calls in the grant, and by this survey located this line according to plaintiff's contention.

But defendants contended that the survey should have been made from the beech on Moravian Creek east, and offered evidence tending to show, if run in this way, the line would be where defendants contended, and defendants would not be in possession of plaintiff's land; and asked the court so to charge—that is, that the survey on this line should have been made east, and not west.

This the court declined, and defendants accepted.

This east and west line being a very long one, the survey lacked more than a mile of going to Moravian Creek.

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

Glenn & Manly for plaintiff.
Dula & Welborn for defendants.

AVERY, J. The court refused the request of defendants' counsel, made in apt time, to instruct the jury in effect that in fixing the location of the lower line of Moravian Grant the proper and lawful method of conducting the survey was to run with the calls of the deed from an admitted corner, or from one which the jury believed was located by the testimony, instead of reversing the calls from such points. A corner admitted, or ascertained by the usual marks, or established by the testimony to the satisfaction of the jury, is to be considered by them (as was said by *Pearson, J.*, in *Safret v. Hartman*, 52 N. C., 199) "a fact incorporated into the deed so as to make it a part of the description." If the principle contended for by the defendants' counsel is cor-

rect, it was immaterial whether the plaintiff admitted or the jury
(445) found from the testimony that the beech tree on Moravian Creek was a corner of the Moravian tract. Whether established by proof or admission, it being in evidence that the line was reversed, when by running forward a different result would have been attained, it was error to refuse to instruct the jury that the location made by running, as the deed was originally run, from a known corner or one established by proof was to be adopted rather than one ascertained by running in the opposite direction. It is a fact of which the courts must take and have taken notice that the measurements of boundary lines in making the original surveys for deeds and grants are often, if not always, inaccurate. Those discrepancies between the distance called for and the actual measurement occur much more frequently, too, in an undulating or mountainous section, because, as is a matter of general knowledge, it often happens that in the original surveys of grants only two or three lines of a square or parallelogram were actually run and that the earlier surveyors, at least, universally adopted surface measurement. In running long lines from the top of one high and precipitous mountain to that of another, the area or acreage sold by the State to its citizens would have appeared much less than it actually was if the level measurements had been adopted in laying off large grants. It is therefore a well-known fact that, owing to inaccuracies in measurement, different results will follow from adopting one or the other of the two methods of surveying where many of the old monuments have perished or been removed. In determining which is correct the courts proceed upon the idea that the object of legal investigation and inquiry is to find the lines, corners and monuments which were agreed upon by the parties to the original conveyance, and that in order to attain that object the lines should be run in the direction and
(446) order adopted by them. *Harry v. Graham,* 18 N. C., 76; *Norwood v. Crawford,* 114 N. C., 513. There are some exceptional instances in which it is manifest that reversing a line is a more certain means of ascertaining the location of a prior line than the description of such prior line given in the deed, but such cases are the rare exceptions to a well-established general rule. *Harry v. Graham* and *Norwood v. Crawford, supra,* at p. 521; *Safret v. Hartman, supra.* The general rule is an established law of evidence adopted as best calculated to ascertain what was intended to be conveyed, and it is encumbent on a party asking the courts to depart from it to show the facts which bring the particular case within the exception to the rule.

We have rarely, if ever, had occasion to review a more confused statement of a case on appeal, but construing all parts of it together we

think the defendants Denny and Cowles are entitled to the benefit of this assignment of error. The appeal as to the other defendant was dismissed for failure to print the record.

The defendants Denny and Cowles are entitled to a new trial upon this ground. But we deem it proper, as a guide to the court below, to add that if it be true, as we understand the statement of the evidence and the exceptions, that the court below allowed the plaintiff, in the face of objection, to use the simple denial of the defendants in their answers that they were wrongfully and unlawfully in possession as evidence that the defendants were exercising such dominion over a virgin forest as to subject themselves to a possessory action (*Hamilton v. Icard,* 114 N. C., 532, and *s. c., post* 476), that ruling was also erroneous. It is true that under the late act of the Legislature (Laws 1893, ch. 6) a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claim- (447) ant of the land in controversy. But where he alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. It seems, however, that this action was brought before 31 January, 1893, and the plaintiff can only recover upon a cause of action then existing.

The appeal of defendant Hall is dismissed. A new trial is awarded to the defendants Denny and Cowles.

Cited: Stack v. Pepper, 119 N. C., 438; *Tucker v. Satterthwaite,* 123 N. C., 519, 531; *Lindsay v. Hall,* 139 N. C., 467, 469; *Land Co. v. Lang,* 146 N. C., 315; *Hanstein v. Ferrall,* 149 N. C., 243; *Gunter v. Mfg. Co.,* 166 N. C., 166.

ELLEN BURGESS v. JOHN C. BURGESS ET AL.

Sale of Lands for Taxes—Tax Deed, Date of—Validity.

Where a tract of land was sold for taxes on 3 May, 1892, a deed made on 3 May, 1893, by the Sheriff in pursuance of such sale is void, inasmuch as by sec. 66 of ch. 323, Acts of 1891, the deed must be made "within one year after expiration of one year from date of sale," and the computation of time under sec. 596 of The Code must be by excluding the first day and including the last.

ACTION for the recovery of land, tried at Fall Term, 1894, of ALEXANDER, before *Brown, J.,*

Upon an intimation by his Honor that he could not recover, the plaintiff submitted to a nonsuit and appealed. The facts sufficiently appear in the opinion of *Associate Justice Montgomery.*

A. C. McIntosh and R. Z. Linney for plaintiff.
Shepherd & Busbee and R. B. Burke for defendants.

(448) MONTGOMERY, J. This action was brought to recover the possession of a tract of land held by the defendant under a deed from one Turner, who claimed to be the assignee of the bid of the Board of County Commissioners of Alexander County at the Sheriff's sale of the land for the taxes of 1891. The tract contained 55 acres, the plaintiff's title was in fee, and the bid of the commissioners was $1.98 for the whole tract. The plaintiff was formerly a resident of Alexander County, but four years ago went to the county of Burke to live. She had paid the taxes for 1890.

We do not know what the consideration was in the deed from Turner to the defendant, as the deed does not appear in the record; but it is reasonable to presume that, his title being a tax title, the amount paid was not the value of the land. The plaintiff had offered to Turner what he had paid for the land and his expenses if he would convey to her, but he refused. The defendant, too, had been the agent of the plaintiff in the payment of her taxes on this land one year. It seems to be clear that neither Turner nor the defendant has learned to practice the rule, "Whatsoever ye would that men should do to you, do ye even so to them." Hardships such as the one attempted to be perpetrated here could only occur under revenue laws necessarily stringent, where forfeitures are inflicted and presumptions allowed to enforce the collection of taxes. Some of these presumptions were invoked in this case in behalf of the plaintiff's title, but their consideration is not necessary in the determination of this matter. On the trial the plaintiff introduced a deed for the *locus in quo,* and the defendant set up his deed from Turner. The sale was made by the Sheriff on 3 May, 1892, and the deed to Turner was executed on 3 May, 1893.

Section 66 of chapter 323 of the Laws of 1891, under which (449) the land was sold for taxes, provides: "At any time within one year *after the expiration of one year* from the date of sale of any real estate for taxes . . . the sheriff shall execute and deliver to the purchaser, his heirs or assigns, a deed," etc. It is the general rule that when the computation of time is to be made from an act done, the day in which the act is done is to be excluded. *Jacob v. Graham,* 1 Black (Ind.), 393. The 3 May, 1892 (the date of the sale), would therefore be excluded, and the 3 May, 1893, included, to complete the

year. The 4 May, 1893, would be the first day after the expiration of the year. The same method of computing time *within* which an act is to be done is enacted in section 596 of The Code and decided in *Keeter v. R. R.*, 86 N. C., 346; *Bancroft v. Roberts*, 92 N. C., 249, and *Glanton v. Jacobs, ante*, 427. The deed, therefore, from Turner to the defendant was void, and the plaintiff ought to have recovered in the action.

There was error in the ruling of his Honor and the nonsuit must be set aside.

Error.

New trial.

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(450)

JAMES H. SPARGER v. W. A. MOORE ET AL.

Insolvent Partnership—Realty Considered Personalty—Dower in Partnership Realty—Trustee of Surviving Partner—Equitable Jurisdiction.

1. The real estate of an insolvent partnership will be considered personalty for the payment of the firm debts and for the exoneration of a surety's liability as against the claim of dower of the wife of a deceased partner.

2. The value of the real estate of an insolvent partnership cannot be taken into consideration in estimating the dower of the widow of the deceased partner in his individual real estate so as to increase such dower allotment.

3. One to whom the property of an insolvent firm was conveyed for the payment of the firm's debts should proceed, through an order of court, to enforce the trust by a sale of the property, and distribute the proceeds.

4. The Superior Court, in the exercise of equitable jurisdiction, has power, in a suit to enjoin the sale of land subject to dower, which was estimated by taking into consideration the decedent's interest in the realty of an insolvent firm, to adjust the rights of the widow and firm creditors.

ACTION pending in SURRY to enjoin the sale of real estate and for other relief, heard before *Battle, J.*, at chambers on 6 December, 1894.

The temporary restraining order was dissolved and injunction refused, and plaintiff appealed. The facts appear in the opinion of *Associate Justice Furches.*

A. E. Holton, Watson & Buxton and G. W. Sparger for plaintiff.

Glenn & Manly for defendants.

FURCHES, J. This case is not very clearly developed by the complaint, which seems to have been used by plaintiff as an affidavit in the application for an injunction. And we are not certain that we fully understand all the facts. But, as it is an application for ancillary relief only, in which there can be no final judgment, if we should mistake some of the facts the parties will not be bound by them on the trial, and they may there be corrected. We are of opinion, however, that enough does appear to entitle the plaintiff to the injunctive relief prayed for. It does appear, as we think, that the plaintiff is the surety of J. F. and W. A. Moore, partners, for over $9,000, which has been reduced to judgment; and that this partnership has been dissolved by the (451) death of J. F. Moore, and is *insolvent*. That since the death of J. F. Moore the surviving partner has made a mortgage or deed in trust to W. F. Carter, trustee, of the partnership property for the benefit of the plaintiff and other firm creditors. That a considerable portion of the partnership property consisted in lands owned by J. F. Moore and W. A. Moore, at the death of J. F. Moore. That some time prior to the death of J. F. Moore the firm of J. F. & W. A. Moore borrowed of the United Brethren of Salem $6,000 and executed a mortgage therefor on their individual real estate, and the defendant R. A. Moore, then the wife of J. F. Moore, and now his widow, joined in said mortgage, and that something over $4,000 of said last-mentioned debt remains due and unpaid. That the owners of this debt and the holders of this last-named mortgage, the trustee, W. F. Carter, W. A. Moore in his own name and as administrator of J. F. Moore, and the said R. A. Moore (the widow) have all been made parties to this action.

It further appears that R. A. Moore has applied for dower, and that the same has been assigned to her as the widow of J. F. Moore; and in the allotment of the dower the whole of the lands owned by her husband have been estimated and valued at their fee-simple value, without considering the encumbrance on the same, but that she has been allowed to have the real estate owned and held by the insolvent partnership of J. F. & W. A. Moore estimated, valued and considered in making her allotment of dower, in this way causing the dower to cover almost the entire real estate owned by the deceased husband; and that the defendant W. A. Moore as the administrator of J. F. Moore has procured an order from the Superior Court (the Clerk) to sell the lands of the said J. F. Moore, subject to the encumbrance of the dower of the (452) defendant R. A. Moore, for assets.

Upon these facts it seems to us the plaintiff is entitled to equitable relief. This partnership being insolvent, its creditors have a right to have its assets applied to the payment of the partnership debts and

in exoneration of plaintiff's liability. Pomeroy Eq. Jur., secs. 1417, 1419; *Patton v. Carr, ante,* 176. The partnership being insolvent, the real estate owned by the partnership will be considered personalty for the payment of debts. *Shanks v. Klein,* 104 U. S., 18. And this being so, the widow, R. A. Moore, cannot have dower assigned to her out of the same. Lindley on Partnership, 341. Nor could she have it taken into consideration in estimating her dower so as to increase the same. It is in legal contemplation personalty. All the property of the said J. F. Moore being liable for the partnership debts, subject to the rightful dower of his widow, she cannot have its value greatly diminshed by having her dower erroneously increased. While this defendant has an equity to have her dower relieved from encumbrances out of the individual estate of her husband, she has no right to have this done out of the firm assets, as these are first to be applied to the payment of the firm debts. W. A. Moore as surviving partner having conveyed the partnership estate to W. F. Carter in trust to pay the debt for which plaintiff is liable and other partnership debts, it seems that this created an equitable estate in Carter, though not a legal estate, which he should proceed to enforce, and sell the estate so conveyed to him and apply the proceeds. *Shanks v. Klein, supra.* But this trust should be enforced through an order of court, that there may be no dispute as to the title, and that the land so conveyed to him may bring its full value.

We have had some trouble as to how these equities should be (453) administered, especially in the matter of the dower. But we find that courts of equity have jurisdiction of matters of dower, especially so where equitable estates and equitable principles are involved. *Campbell v. Murphey,* 55 N. C., 357. It is also in equity, or under the equitable jurisdiction of the court, that trust estates are administered and partnerships settled. When the Superior Court once acquires jurisdiction of a case, it will administer all necessary incidental matters connected with the litigation. *Oliver v. Wiley,* 75 N. C., 320; *Gulley v. Macy,* 81 N. C., 356. Therefore, as all the parties interested in this matter appear to be before the court, we see no reason why, upon a properly constructed complaint setting out fully all the facts, the whole matter might not be adjusted and settled in this case. This would be in the spirit of the present system of practice. Thus seeing this case, and not seeing that the continuance of the injunction would have injured any one, we think it should have been continued. *McCorkle v. Brem,* 76 N. C., 407. In not issuing the injunction there was

Error.

Cited: Featherstone v. Carr, 132 N. C., 802; *Ingram v. Corbit,* 177 N. C., 321.

MOLLIE PASS ET AL. V. J. C. LYNCH ET AL.

Fraudulent Conveyance—Estoppel.

1. A purchaser of land, knowing that another claimed title thereto under a mortgage which was obtained by fraudulent representations, cannot attack the mortgage on the ground that it was so obtained.

2. A purchaser of land under a mortgage having knowledge at the time of purchase that a prior mortage was made with intent to defraud mortgagor's creditors, cannot attack such prior mortgage upon such ground, he not being a creditor of the mortgagor.

(454) PETITION for partition, filed before the Clerk of the Superior Court of SURRY, and, upon issues joined, transferred for trial to the civil issue docket at term and tried before *Brown, J.*, at Fall Term, 1895, of said Court.

The facts appear in the opinion of *Associate Justice Montgomery.* The jury under instructions from his Honor answered the issue in favor of the plaintiffs, and from the judgment thereon the defendant Hattie L. Pass appealed.

Glenn & Manly for plaintiffs.
A. E. Holton for H. L. Pass.

MONTGOMERY, J. This was a proceeding before the Clerk for the partition of real estate. The plaintiff alleges a tenancy in common with the defendants Hattie L. Pass and Nellie Lynch, and claims her interest by deed of purchase from E. H. Pass, mortgagee of John W. Pass and his wife, Hattie L. The defendants deny the plaintiff's right and aver that her alleged interest belongs to the defendant Hattie, who holds the same by deed from Phillips and other *subsequent* mortgagees of John W. Pass and his wife, Hattie L. The priority of the mortgage to E. H. Pass is admitted, and also the deed from E. H. Pass, the mortgagee, to the plaintiff; but the defendants aver that the mortgage to E. H. Pass was void because it was made to defraud the creditors of John W. Pass, and that the plaintiff knew it. These issues of fact were sent up to the Superior Court, where upon the trial the defendant Hattie L. Pass introduced her husband, John W. Pass, as a witness to prove that the mortgage executed by him and his wife to E. H. Pass "was made by reason of false and fraudulent representations of E. H. Pass." Objection to this testimony by the plaintiff was sustained by his Honor,

and the defendant Hattie L. excepted. It is evident that the defendant intended by this question to prove by the witness that (455) there was fraud between him (the witness) and E. H. Pass in the execution of the mortgage other than to defraud the witness' creditors, as was averred in the answer, for the very next thing the defendant Hattie offered to prove was that she had no knowledge of the *fraudulent purpose of John W. Pass and E. H. Pass in executing* the mortgage to E. H. Pass at the time when she signed the same. Fraud there was, she admits, in the minds of her husband, the mortgagor, and his brother, the mortgagee. If John W. Pass executed the mortgage to E. H. Pass for the purpose of defrauding purchasers, and this must have been the kind of fraud which the defendant Hattie intended to prove, for later on in the trial she undertook to prove the fraud set up in the answer, to-wit: that the mortgage was executed to defraud the creditors of John W. Pass, the court below committed no error. The defendant is bound by the prior mortgage and purchase under it by the plaintiff, because she had knowledge of it before she purchased under the subsequent mortgage to Phillips. The 27 Elizabeth, amended by our act of 1840, does not protect her against the prior mortgage and the purchase under it by the plaintiff, because of the knowledge on her part. *Hiatt v. Wade,* 30 N. C., 340; *Triplett v. Witherspoon,* 70 N. C., 589. The defendant Hattie L. Pass also offered to prove by the same witness that the mortgage from him to E. H. Pass was made as averred in the answer for the purpose of defrauding the creditors of the witness; that E. H. Pass was a party to such a purpose, and that the plaintiff knew of it. The plaintiff objected. The court sustained the objection, and the defendant Hattie excepted. There is no error in this ruling. If it be admitted that the mortgage was executed to defraud creditors, as alleged in the answer, yet the defendant is bound by the sale and purchase by the plaintiff under prior mortgage, because the defendant is not a creditor, nor are there any creditors of John W. Pass parties to this proceed- (456) ing. *Triplett v. Witherspoon, supra; Helms v. Green,* 105 N. C., 251.

Affirmed.

JASPER CLAYBROOK v. BOARD OF COMMISSIONERS OF ROCKINGHAM COUNTY.

Municipal Bonds—Elections—Qualified Voters—Registration.

1. The registration list is prima facie evidence as to who constituted qualified voters in a municipality, notwithstanding the list was recorded in the same book in which the municipal authorities kept a record of their proceedings.

2. The purchaser of municipal bonds is not required, when looking into the validity of an election on the issue of bonds for a subscription by a municipality to the stock of a railroad company, to go further than to find from the certificate of the registrar that a majority of the qualified voters of the municipality voted for the subscription.

3. One who, before buying bonds issued under a vote of the qualified voters of a town, examines the election proceedings and finds that a majority of the registered voters voted in favor of the issue need not inquire whether the voters were legally registered, where the registrar certified that each voter was so registered, and the returns of the canvas by the registrar and judges of election were approved by the county commissioners, though the result of the election was not formally declared by such commissioners as required by Laws 1887, ch. 87.

ACTION tried before *Bryan, J.*, and a jury, at January Term, 1895, of ROCKINGHAM, and was brought for the purpose of contesting the (457) validity of an election held on 3 November, 1888, at the town of Stoneville, in Rockingham County, upon the subscription by said town of $5,000 to the capital stock of the Roanoke & Southern R. R. Company. The material facts appear in the opinion of *Associate Justice Avery*. There was verdict and judgment for the defendants, and plaintiff appealed.

Reid & Reid and Dillard & King for plaintiff.
Watson & Buxton and A. E. Holton for defendants.

AVERY, J. It seems that the main questions before us were virtually settled by the carefully considered opinion of *Justice MacRae* on the former appeal. *Claybrook v. Comrs.*, 114 N. C., 453. The suggestion then made was that in consequence of the failure of the Board of County Commissioners, after approving of the returns, to formally declare the result of the election, the plaintiff was left at liberty to impeach the validity of the bonds by showing that a majority of the qualified voters of the town of Stoneville did not vote in favor of the subscription. The parties agreed upon the single issue: "Did a majority of the qualified voters of the town of Stoneville vote in favor of the subscription?" It was not denied that the burden was upon the plaintiff to show ground for impeaching their validity. The registered voters are presumably the qualified voters. The defendant commissioners, as appears from their minutes, had previously ordered a registration. The registrar certifies a list of 25 names as that of the registered voters of the town, and the records of the town show that the same 24 persons originally, and subsequently seven others, were registered as voters in the same book in which the records were kept. Twenty-one of these electors are returned as

voting in favor of subscription. All of the testimony tended to show, what already appeared from the returns, that 21 of the (458) whole number cast their ballots in favor of subscription, and constituted a majority of the qualified voters. While the return of the canvass by the judges of the election and the registrar and the approval of the Board of County Commissioners were not conclusive, they are prima facie correct. Hence it was that the plaintiff started out with the laboring oar. In order to overcome the presumption that the election had been conducted fairly and lawfully, the plaintiff proposed to offer every elector who voted, and did introduce a number of them to show that, while they had voted, they either did not register or had no recollection of having done so. They also offered one J. W. Moore, who testified that he was appointed registrar, but that he made out and recorded in a book the names of the voters without swearing them and pursuing the course prescribed by law in registering voters, though he afterwards voluntarily certified that he had registered every one of these names and forwarded his certificate as a part of the return of the election to the Board of County Commissioners.

We do not understand the rule to be that the holder of the bond is bound in prosecuting his inquiries to go behind what appears upon the records of the town to be a registry of voters, however informal, and also behind an official certificate of the municipality, after finding it to be true that a majority of those very persons actually cast their ballots for the subscription. The question presented by the issue is not whether the electors were sworn and complied with all of the requirements of the law in having their names recorded upon the registered list of voters, but whether, being registered, however irregularly, a majority of the whole number gave their assent to the creation of the proposed municipal debt. As was said in *Bank v. Comrs.*, 116 N. C., 339, "The imperative requirement of the Constitution is that there shall be a (459) concurrence of the legislative and 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 their ballots in favor of creating the debt." The authority for holding the election was declared ample, and the form of the ballots was adjudged legal on the former appeal. The question whether "the sense of the voters was fairly taken" is all of the original controversy left to be now settled. The plaintiff has not only failed to prove that a majority of the qualified electors did not signify their assent to the creation of the proposed debt, but the evidence shows beyond all question that a large majority voted for the subscription. The registration book was prima facie evidence as to who constituted the qualified voters (*Rigsbee v. Durham,* 98 N. C., 81), no matter

how informally the registration was done, and notwithstanding the fact that the list was recorded in the same book in which the municipal authorities kept minutes of their proceedings.

The principle which underlies the decision in *McDowell v. Construction Co.*, 96 N. C., 514, is that where elections are held to ascertain the sense of the qualified voters of a municipality as to the creation of bonded indebtedness, the subscriptions may be set aside, or the bonds if issued may be invalidated by a direct proceeding in which it is shown that a majority of the qualified voters did not vote or were deprived of the opportunity to vote. In that case the plaintiff proposed to show that qualified voters who desired to vote against the subscription were prevented from doing so on account of the willful failure of the constituted authorities to provide for registration. The proposition there was to show that if the sense of the electors had been fairly and lawfully
(460) ascertained, it would have appeared that a majority of the qualified voters were opposed to, or at least not in favor of, making the proposed subscription. The court was there asked, upon affidavits tending to show that the sense of the voters had not been fairly ascertained, to grant an injunction till the hearing. The court granted the extraordinary relief sought, in the interest of fair play, until it could be determined whether, by a failure to comply with the forms of law, the voters whose province it was to pass upon the question had been deprived of the opportunity to exercise the power vested in them by the Constitution. But here there is no pretense that the certificate of those who held the election, in so far as it sets forth that an overwhelming majority voted for subscription, is not entirely correct. If the failure to declare the result made the record of the county commissioners under the act (Laws 1887, ch. 87) inconclusive, and put the purchasers of the bonds on notice to look behind the returns, they were not bound to go further when they found an apparent registration and a vote of a majority of the qualified voters for subscription. It was not encumbent on them to interview the registrar to see whether his certificate was correct, but they had a right to assume that he had done his duty. They were not required, after ascertaining that those whose names were borne upon the certificate and the informal registration books constituted the registered and presumably the qualified voters of the town, to interview each one and allow him to contradict the fact of registration. When an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied upon to establish the disqualification. *Boyer v. Teague,* 106 N. C., at page 633. Being put upon notice, the purchaser in this case must be presumed to have invested his money

upon the idea that the registrar certified to the truth as to the registration, and a court of equity will not permit the registrar (461) and the voters who fairly exercised the privilege of voting to contradict and stultify themselves in order to avoid an obligation which they seemed not only willing but anxious to incur. Courts of equity will lend their aid to prevent fraud and deception, but where mere irregularities and informalities in conducting an election are relied upon as ground of impeachment, they will not countenance an attempted repudiation by taxpayers of a municipality who have by casting their ballots signified their assent to the creation of a bonded debt and enjoyed the benefits of the improvement for which the money of the holder of the bonds was expended. In this view of the evidence it is not material to inquire in this proceeding whether a particular voter or voters were rgistered informally or without taking the prescribed oath. Whatever might have been the consequences to the registrar or voter in another action, it is certain that the purchaser of a bond is not bound to see, in order to protect himself, that every voter or a majority of the electors were registered on their own application or took the oath prescribed by law in such cases. There is a reasonable limit to the duty of inquiry imposed by the failure to declare the result, and we think that it is reached when the proposed purchaser finds that in truth a majority of the qualified voters have by casting their ballots assented to the creation of the debt, and that the vote has been regularly canvassed by the officers who held or purported to have held the election and were authorized to certify the result to the Board of County Commissioners. The purchaser should not be required to do more than it was the duty of the county board to do, preliminary to announcing the result—ascertain that the sense of a majority of the voters was clearly ascertained to be (462) in favor of making the subscription.

In pursuing the investigation suggested by the failure to declare the result, the purchaser was only bound to see that there had been, according to the records of the registration and voting, a substantial compliance with the requirements of the statutes as to matters merely formal. *R. R. v. Comrs.*, 116 N. C., 563. It was his duty to see that the Legislature had authorized the holding of the election, and that the sense of a majority of the qualified voters had been expressed by casting their ballot in favor of creating the debt. *Bank v. Comrs., supra.* There was

No error.

Cited: Glenn v. Wray, 126 N. C., 731; *Debnam v. Chitty,* 131 N. C., 680; *Asheville v. Webb,* 134 N. C., 77; *Hill v. Skinner,* 169 N. C., 109; *Comrs. v. Malone,* 179 N. C., 608.

IN RE HUGH D'ANNA.

Habeas Corpus—Divorce—Custody of Child.

1. Where, in habeas corpus proceeding for the custody of a child of divorced parents, it appeared that both the father and the mother were of good character and able to support and educate the child, but that the mother had married again and that her new husband was a man of dissipated and vicious habits, it was proper to award the custody of the child to its father.

2. In such case the mother should not be restricted to one year in which to again apply for the custody of the child, but she should have that privilege, upon showing cause, so long as the child is within the jurisdiction of the courts of the State.

HABEAS CORPUS proceeding by Alice Murrill, step-grandmother and S. D'Anna, the father, against Mary Thompson, the mother of a
(463) child, Hugh D'Anna, for its custody, pending in CATAWBA, and heard before *Timberlake, J.*, at chambers at Louisburg on 31 October, 1895.

His Honor found the following facts:

"1. That S. D'Anna and May Murrill were married in this State in the year 1883, and there were born to them of this union two children, Victor, eleven years of age, now in the custody of his father in Kentucky, and Hugh, seven years of age, now in the custody of his mother, temporarily in North Carolina, but a resident of Washington City, D. C.

"2. That on 22 June, 1893, in the courts of the State of Kentucky, a divorce was granted to Mrs. D'Anna, now Mrs. Thompson, but that in said divorce proceedings no order was made in regard to the custody of either of the said children.

"3. That the children were in possession of either parent, without objection on the part of either, until shortly before the decree of divorce. They have not been in the possession of Mrs. Thompson since the said decree, she having shortly prior thereto returned said children to said D'Anna on account of her financial inability at that time to take care of them.

"4. That said children remained in his custody ever since, until October, 1895, when Mrs. D'Anna (then Mrs. Thompson) went to the school in Hickory, N. C., where Hugh D'Anna had been placed by instruction of his father, and then and there took the said child away from said school, for the purpose of taking him to Washington City, D. C.

"That she refused to surrender possession of said child, and that a writ of *habeas corpus* in this matter was sued out by plaintiffs, Alice Murrill and S. D'Anna.

"5. That by advice of physician the father S. D'Anna, placed the infant Hugh in Hickory, N. C., for the benefit of his health, in care of his step-grandmother, and later in school at that place, the child still boarding with his step-grandmother, the father, S. D'Anna, (464) residing at Lexington, Ky.

"That since being placed there his health has been much improved, and he is in every way well cared for.

"6. That S. D'Anna is a man of character and education—makes about two thousand dollars a year, and is in every way suitable, competent and capable to provide for the infant Hugh and to give him a liberal education.

"7. That some time in the year 1894 Mrs. D'Anna intermarried with one C. P. Thompson, who is a drunkard and gambler, and, though possessed of large means, is a spendthrift.

"That Mrs. Thompson has personal property in her own right sufficient to take care of the children, but said property has been settled upon her by Mr. Thompson.

"That Mrs. Thompson is a woman of high character, but on account of the drinking and gambling habits of her present husband, is not a fit and suitable person to have the care and custody of the said child, and it would be against the best and highest interest of said child for her to have the care and custody thereof.

"Wherefore, it is considered and ordered and adjudged by the court:

"1. That said infant, Hugh D'Anna, be surrendered to the custody and control of his father, S. D'Anna.

"2. That the said D'Anna shall not within two years remove the said child from this State or out of the jurisdiction of this court.

"3. That the mother, Mrs. Thompson, shall have access to said child and shall visit him when she desires and sees fit; and upon her application, and upon payment to him of his fees, it will be the duty of the Sheriff of Catawba County to take her to the said child, and at such times she shall only be under such restraint as may be (465) necessary to keep the child in the jurisdiction of this court.

"4. That Mrs. Thompson shall have the right to make, at any time within one year after the date hereof, for cause then to be shown, application to the resident Judge of the Tenth Judicial District or the Judge holding the court thereof, to have the care and custody of the said child transferred from Mr. D'Anna to herself, and thirty days notice of said application on the person in whose control or possession the said child may be at the time shall be sufficient notice to the said S. D'Anna; and in case the said child is hereafter removed from the State, so that personal service of notice cannot be made, then publication of a notice for thirty days in some paper in Hickory shall be sufficient.

"That if the said Mrs. Thompson shall attempt to take possession of the said child without due process of law, then so much of this judgment as allows her to see said child shall be void."

Mrs. C. P. Thompson excepted to so much of said judgment as ordered her to surrender the custody and control of Hugh D'Anna, and to so much thereof as refused to award her the care and custody of said infant, and to so much thereof as awarded the care and custody thereof to the said S. D'Anna.

Exception overruled. Appeal prayed and granted to the Supreme Court.

Cilley & Huffman for petitioners.

S. J. Ervin and C. M. McCorkle for respondent.

MONTGOMERY, J. This matter was heard before *Judge Timberlake* in *habeas corpus* proceedings. The father of the child, who was once the husband of the respondent, appears from the findings of fact (466) by his Honor to be a man of character and education, with a good income, and in every way suitable, competent and capable to provide for the child and to give him a liberal education. The mother of the child, who is now married to one C. P. Thompson, also appears from the Judge's findings to be a woman of high character. His Honor finds, however, as a fact that the present husband of the child's mother is addicted to the vicious habits of both drinking and gambling, the former to great excess, and concluded that it would not be for the best interests of the child to place him in the same household with the man. The judgment of his Honor awarded the custody of the child to the father. In the judgment certain privileges of visiting the child were allowed to the mother, and certain restrictions put upon the father as to the removal of the child from this State. That part of the judgment which restricts the mother to one year in which to make application to the courts for the transfer of the care and custody of the child from the father to herself is modified so as to give her that right at any time while the child may be in the jurisdiction of the courts of this State, for the present condition of affairs may not always continue. Upon the surface, his Honor's ruling may appear to make of the mother a vicarious sacrifice for the sins of another, but its foundation is the law of the land, which, as well as the moral law, oftentimes requires such offerings to be made.

The judgment of his Honor is affirmed in all respects, except as herein modified.

Modified and affirmed.

Cited: McDonald v. Morrow, 119 N. C., 674; *In re Jones,* 153 N. C., 317.

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T. A. LOVE v. LEGRANDE GREGG.

Trial—Immaterial Evidence—Issues—Instructions—Expressions of Opinion by Judge, What is not.

1. Where, in the trial of an action to recover land, the controversy was as to a certain portion of the tract, and a deed was offered in evidence which did not refer to the land in question, it was proper to exclude it, as it was immaterial.

2. Where, in the trial of an action to recover land, the controversy was as to a certain portion only of a tract claimed by plaintiff, it was not error to refuse to submit an issue relating to land other than that in question.

3. Where a single and uncontradicted witness testifies to a fact on a trial, it is not error in a trial Judge to instruct the jury, if they believe the witness, to find according to his testimony.

ACTION for the recovery of land, tried before *Timberlake, J.*, at Spring Term, 1895, of MITCHELL.

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

No counsel for plaintiff.
E. J. Justice for defendant.

FAIRCLOTH, C. J. The plaintiff sues for possession of three tracts of land, and the defendant denies his title and wrongful possession in himself. On the trial below and in this Court the parties, without objection, used a map on which the lands were marked out. One tract was designated as E. F. H. J., with straight and parallel lines, inside of which was a 50-acre tract with straight and parallel "red lines," corners marked 1, 2, 3 and 4. The trial settled down on the title to the land within the "red lines." The plaintiff offered his evidence and rested. The defendant showed a grant from the State and mesne conveyances for certain lands, and proved (468) open, continuous, notorious and adverse possession of the land within the "red lines" from 1850 to the present time, which land was within the limits of the grant. It was proved by Noah Webb that Tyre Webb and those claiming under him had been in such possession under color of title since 1850 of the land within the "red lines," and there was no evidence conflicting with Noah Webb's

evidence, but some confirming the same. The defendant claims through this chain of title. The parties failing to tender any issues, his Honor, after the evidence was closed, submitted an issue whether the possession of the defendant in the "red lines" was wrongful, being the only possession shown by the plaintiff. The court then charged the jury that if the plaintiff had located the land as contended by him, he would be entitled to recover unless the defendant and those under whom he claimed had ripened title in themselves by possession, and that if the jury believed Noah Webb, and if Tyre Webb had been in open adverse possession under color of title within the red lines for seven years, then the plaintiff could not recover. There was a verdict and judgment for the defendant.

The plaintiff excepted to the refusal of the court to admit a copy of a deed offered in evidence which had not been probated. The copy was immaterial, as it did not refer to the land in the red lines, and the exception is overruled.

The second exception, that the court failed to submit a separate issue as to the location of plaintiff's land, is overruled because the controversy was exclusively as to the land within the "red lines."

The third exception was to charge that, if the jury believed Noah Webb, the plaintiff could not recover. This is also overruled because it is not error to charge the jury that if they believe a single (469) uncontradicted witness the case is made out, and where there is no conflict of evidence the Judge should direct the verdict to be entered, if the jury believe it. This is no expression of opinion on the evidence. *Hannon v. Grizzard,* 89 N. C., 115; *Purifoy v. R. R.,* 108 N. C., 100; *Chemical Co. v. Johnston,* 101 N. C., 223.

Affirmed.

Cited: Holton v. R. R., 127 N. C., 257.

HUGH GWYN v. T. J. COFFEY ET AL.

Sale by State Commissioners—Statute Directing Time of Sale.

1. Where a statute authorizing a sale limits the operation of the license within a designated period, a sale outside of the prescribed limits is a nullity; therefore:

2. Where, under ch. 445, Acts of 1893, providing for the sale by commissioners of the State's interest in a certain company and declaring that the

commissioners should on or before 1 July, 1893, advertise that they would on a day fixed not less than 20 days nor more than 30 days, sell said interest, a sale made by them after 31 July, 1893, is void.

ACTION tried before *Timberlake, J.,* and a jury, at Spring Term, 1895, of CALDWELL.

The facts appear in the opinion of *Associate Justice Montgomery.* Upon an intimation by his Honor that he could not recover, plaintiff submitted to a nonsuit and appealed.

George N. Folk, Edmund Jones and W. C. Newland for plaintiff.
S. J. Ervin for defendants.

MONTGOMERY, J. The plaintiff's counsel prepared and submitted a painstaking and learned brief upon important legal questions raised in the court below, but which can be of no avail to their (470) client here. His Honor held that, "it appearing from the admissions in the pleadings that the sale under which the plaintiff claims was made 3 August, 1893, and so admitted by his counsel in open court, the same being outside of the limit of time prescribed by the act of the Legislature for making the sale, he would hold the sale to be void." Whether or not that ruling is correct is the only question for our decision.

Chapter 445 of Acts 1893 provides for a sale of the State's interest in the Caldwell & Watauga Turnpike Company. Section 3 of the act fixes the time of such sale as follows: "That said commissioners shall on or before 1 July, 1893, cause to be advertised in the *Lenoir Topic* and *The Watauga Democrat,* newspapers published at Lenoir and Boone, North Carolina, a notice setting forth that said commissioners will on a day fixed, not to be more than 30 days nor less than 20, sell for cash the State's interest in said company as herein provided." It is perfectly clear that the commissioners empowered to make the sale became *functi officio* after the last of July, 1893. There is not a line in the act that provides for a sale after that time under any circumstances or in any contingency. They had under the act four months in which to perform their duty, and no longer. "If the statute under which a license to sell is granted limits the operation of the license within a designated period, a sale outside of the prescribed limits is a nullity." Freeman Void Judicial Sales, sec. 30, and cases there cited. It was suggested here, as a reason why the act as to the time within which the sale was limited should be construed as directory simply, that the commissioners might be sick, or storms or floods might occur on the day advertised for the sale, and thereby the sale become

impossible. We cannot see how such conditions or mishaps
(471) could restore a power which had ceased to exist under the act which gave life to the power. But we do think such possible contingencies should have put the commissioners on their guard and cautioned them against delaying the sale until near the last day of the four months allowed them by the statute. We do not see any analogy between the principle involved in this case and that in *Greer v. Asheville,* 114 N. C., 678. There the city charter provided that the aldermen should appoint a marshal at their first meeting after their election. If the board failed to discharge its duty at its first meeting, it did not relieve itself of the legal obligation to do so at the next meeting, for it owed the duty at all times during its term of office to furnish the city with a proper police head and thereby administer to the safety and well-being of the city.

Affirmed.

(472)

T. B. LENOIR, EXECUTOR OF W. W. LENOIR, v. LINVILLE IMPROVEMENT COMPANY.

Insolvent Corporation—Officers' Claims for Salaries—Contract—Discharge of Receiver.

1. While it is true that the powers of stockholders and directors of a corporation cease upon the appointment of a receiver, and they can make no contract to bind the company thereafter, yet where after the appointment of a receiver an officer of a corporation filed a claim for salary for a year ending after the appointment, it was error to decree that he was entitled to compensation only up to the date on which the receiver took charge, without hearing evidence or giving such officer an opportunity to show that he had a contract of employment with the company for the entire year.

2. Where a receiver is appointed for a corporation at the suit of one creditor, it is for the benefit of all creditors, and the party procuring the appointment has no right to have the receiver discharged against the protest of an unsatisfied creditor.

ACTION pending in the Superior Court of MITCHELL, in which a receiver of the defendant corporation was appointed 1 September, 1893. A motion was made by the defendant and heard by his Honor, *Judge Timberlake,* at chambers in Lenoir on 3 April, 1895, for the discharge of a receiver. The motion was denied, but it was provided in the order continuing the receiver that any party to the action

might renew or make a motion for the discharge of the receiver at Spring Term, 1895, of Mitchell Superior Court. Such motion was made and heard at chambers in Burnsville on 22 May, 1895, before *Judge Timberlake,* who subsequently at chambers in Louisburg rendered a judgment discharging the receiver and discontinuing the action.

Prior to the hearing of the motion at Lenoir, in April, 1895, Thos. F. Parker filed a claim before the receiver for salary claimed by him to be owing to him from the company for services as president thereof from 1 September, 1893, to 1 September, 1894. Harlan P. Kelsey likewise filed a similar claim for salary as secretary of the company from 1 September, 1893, to 1 September, 1894.

These two claims were rejected and refused by the said receiver, and also by a special master to whom the matter had been referred, and also by his Honor, *Judge Timberlake,* at the hearing at Lenoir on 3 April, 1895, and have not been paid.

All of the debts which were owing from the defendant company at the time of the commencement of this action and of the appointment of the receiver herein have been paid and satisfied.

Prior to the application for the discharge of the receiver, on motion it was ordered by his Honor, *Judge Allen,* then presiding and holding the courts in the Tenth District, that the receiver should not pay out any moneys to the plaintiff upon his said debt until he should have made and filed a bond to indemnify or repay to (473) the defendant company any and all such damages as it might sustain by reason of loss because of failure of title to the lands for which said debts were contracted. The debts to the plaintiff Lenoir were subsequently paid by the defendant company in money or bonds, without taking indemnity.

It was insisted on the part of the appellants that there were serious dissensions among the stockholders of the defendant company in relation to the general policy proposed to be pursued by the officers in control, and especially in respect to the method of liquidating the outstanding indebtedness and encumbering the property of the company, the said officers having a bare majority of the stock, the said points of difference being stated in the affidavits filed by the parties, respectively, and this was argued as a reason against the discharge of the receiver.

The plaintiffs Parker and Kelsey appealed from the order of his Honor discharging the receiver and dismissing the action.

Davidson for Parker and Kelsey.
Davis for defendant.

FURCHES, J. The defendant is a domestic corporation and the plaintiff is a stockholder and creditor of the defendant corporation. Plaintiff, for the reasons alleged in his complaint, commenced this action for the recovery of his debt, and for the appointment of a receiver; and a receiver was appointed on 23 August, 1893, who entered on the discharge of his duties on 1 September, 1893. At the time the receiver was appointed Thomas F. Parker was the president of the defendant corporation, and H. P. Kelsey was secretary, elected at the last annual meeting, in July, 1893, and, as they allege, for the term of one year from that time next ensuing.

It is true these facts are not presented with much clearness in the record. But it was alleged on the argument by Mr. Davidson, who
(474) represented these parties, that they were elected at the July meeting, and this was not denied as a fact by Mr. Davis, who represented the defendant corporation.

Both Parker and Kelsey are parties to this action, and both presented claims for payment—one as president and the other as secretary—as the record states, from the "1 September, 1893, to 1 September, 1894." The receiver, under the order of court, paid their "salaries" to 1 September, 1893, the time when the receiver took charge, and refused to pay them anything more. Under this state of the case the matter was referred to Isaac T. Avery as a special master, and, without hearing any evidence from either party, he reported "that as a matter of law" neither Parker nor Kelsey was entitled to recover anything, and the court affirmed the ruling of the special master. So, without passing upon this ruling as a proposition of law, taking the court to use the word "accrue" in the sense of "originating," still we do not think the ruling correct. It excluded these parties from the right to produce evidence as to the facts of their claims, and we think the case turns upon this ruling. These parties (Parker and Kelsey) could not recover this as a part of a salary due them as officers. *Eliason v. Coleman,* 86 N. C., 235. But if they were entitled to pay, it was upon contract. If the defendant employed these parties, one as president and the other as secretary, for a term of one year at a fixed and certain price, we do not see why it should not be bound by the contract.

It is true the defendant may show, if it can, that Parker and Kelsey acted in such manner as to release the defendant from its obligations altogether, or that they have earned that amount or some part of it, at something else, which the company is en-
(475) titled to have applied in part or in whole in discharge of its liabilities. But it must be the act of these parties, and not that

of the corporation, that will discharge the obligation of the contract.

In the case of *Eliason v. Coleman, supra,* although the plaintiff was not allowed to recover against the defendant Coleman, it is right clearly intimated that he had a cause of action on contract against the company. The same intimation is made in the cases of *Barnes v. Newcomb,* 89 N. Y., 114, and *In re Croton Ins. Co.,* 3 Barb. ch. 642.

If these parties have valid claims, as they were parties to this action, it was a right they had to have them considered and settled before the receiver was discharged. And in this case it seems not only their right, but their only chance to get anything, as the corporation has placed a mortgage on everything, it has for $60,000, which will be a prior lien to any judgment they might be able to recover.

We recognize the rule to be that the powers of the stockholders and directors cease upon the appointment of a receiver, and they can make no contract to bind the company after that; and our ruling in this case is put upon the supposition that Parker and Kelsey would have been able to establish a contract with the company prior to the appointment of the receiver. This they may not be able to do, but the error was in not allowing them the opportunity to do so if they could.

It seems to have been held in some of the early opinions that when the party who had procured the appointment of a receiver had been satisfied he had the right to have the receiver discharged. But this does not seem to be the rule now. It is held in more recent adjudications and by later text writers that when a receiver is appointed it is for the benefit of all the creditors, and the party procuring the appointment has no right to have him discharged against the (476) protest of a nonsatisfied creditor, who it appears might be damaged by the discharge. High Rec., sec. 837. This, it seems to us, is the better rule, and we think there was error in discharging the receiver before the claims of Parker and Kelsey were heard and disposed of. And as it appears there were funds sufficient to satisfy their claims, if it should turn out upon investigation that they are entitled to said claims, or any part of them, the receiver should not be discharged until they are satisfied. There is error as herein pointed out.

Error.

Cited: *S. c.,* 126 N. C., 931.

(477)

A. J. HAMILTON v. J. P. ICARD ET AL.

Adverse Possession of Land—Test of—Cultivation of Various Portions of Land.

1. The best test of the sufficiency of possession to ripen title is the liability to which the occupant subjects himself to a possessory action.

2. The fact that a person planted tobacco beds on different portions of land for more than the statutory period, but not on one spot for more than two years in succession (the land not being inclosed except during the period of cultivation), is not evidence of adverse possession.

ACTION for the recovery of land, tried before *Timberlake, J.*, and a jury, at Spring Term, 1895, of CALDWELL.

There was a verdict for the plaintiff, and defendants appealed. The facts sufficiently appear in the opinion of *Associate Justice Avery.*

Edmund Jones for plaintiff.

George N. Folk and Lawrence Wakefield for defendants.

AVERY, J. The exception to the modification by the court of the defendants' first prayer for instructions in adding "the Graham grant" is without merit. The surveyor, Beard, had testified that he had located the four grants offered by the plaintiff to show that the title was out of the State (including No. 3844, the Graham grant) and that they covered the land. As the satisfactory location of these grants rendered it no longer necessary to prove possession under color of title for 21 years, but reduced the statutory period to 7 years, it was proper to submit the question of location of the grants precisely as it was raised by the testimony. *Hamilton v. Icard,* 114 N. C., 532.

The second assignment of error is equally untenable. On the former appeal the testimony tended to show what counsel aptly called a peripatetic possession by the planting of tobacco beds on the land every year, but never more than two years in the same spot. On the former trial it was in evidence that a tenant of plaintiff had planted tobacco seed for more than ten years before the action was brought, upon precisely the same spot. It was held on appeal that in order to mature title under color it was necessary to show that defendant had subjected himself to liability to a possessory action by a continuous possession of the very same locality for the requisite statutory period, whether that in the particular case was 21 or 7 years. *Hamilton v. Icard, supra.* The court was not therefore in error in telling the

jury that, if they did not believe the plaintiff held uninterrupted possession of the field mentioned by the witnesses for seven years, he could recover, but, if such possession was not shown, he could not recover unless the jury should find that the tobacco beds were planted on the same spot for 7 successive years. Where it is in evidence, as in the case at bar, that the land in controversy is situated in territory where landowners are no longer required to keep lawful fences (478) around their cultivated lands, the possession is not deemed abandoned when it is shown that the plaintiff used the land from year to year as is customary amongst farmers. The use of the land for one or two years for meadow or for pasture between the different plantings of cereals, or of the sowing of a tobacco bed on the same spot without constructing a fence around it, would be such a possession as would subject the occupant to a possessory action during the whole period, and the liability to such an action is always the best test of the sufficiency of possession to ripen title. *Osborne v. Johnson,* 65 N. C., 22; *Hamilton v. Icard, supra,* and authorities there cited. The entry of the occupant to cut grass on meadow land differs from the occasional exercise of dominion by cutting timber trees for boards or rails, in that it is such use of the land as prudent husbandmen, in a country where grass grows readily, make of some of the arable portions of their farms almost every year. *Shaffer v. Gaynor, post,* 15.

What has been said disposes of all of the grounds of exception, and the judgment must be

Affirmed.

(479)

MORGANTON LAND AND IMPROVEMENT COMPANY v. T. M. WEBB ET AL.*

Trespass—Injunction—Irreparable Damage—Pleading.

1. If a threatened injury can be compensated for in damages, injunctive relief will not be granted, but if it is such as cannot be atoned for or if, in case of trespass, the trespasser is insolvent and unable to respond in damages, a court of equity will interfere by injunction to prevent it.

2. Where defendants, claiming the right under statute to drain the lowlands of a creek, commenced to cut a canal for that purpose whereby a small portion of a large tract of land belonging to plaintiff would be cut off, and plaintiff sought to enjoin the cutting of the canal on

*AVERY, J., did not sit.

the ground of irreparable damages, alleging that the defendants were trespassers and that the portion cut off was intended as a park to be attached to a hotel site and derived its chief value from its picturesque surroundings, and that it would be rendered less valuable by the proposed canal, but there was no allegation that the hotel would soon be built, or that the cut-off would be an attachment thereto, or that the defendants were insolvent: *Held*, that the petition did not state facts sufficient to justify the grant of an injunction.

APPLICATION for the plaintiff for the continuation of an injunction, heard before his Honor, *Bryan, J.*, at chambers in Morganton on 24 August, 1895.

His Honor, after considering the pleadings, affidavits and arguments of counsel, refused the motion for an injunction and dissolved the restraining order, and plaintiff appealed.

The grounds upon which the injunction was asked are stated in the opinion of *Chief Justice Faircloth.*

I. T. Avery and M. Silver for plaintiff.
J. T. Perkins and S. J. Ervin for defendants.

FAIRCLOTH, C. J. This is an action for trespass on land, and an application for injunction to prevent an irreparable damage. The ownership of the land in the plaintiff is admitted, and the alleged entry also, and the defendant avers authority to do so under the act of Assembly 1879, ch. 146, for the better drainage of the lowlands of Silver Creek, which enters Catawba River on its south side. The waters of the two streams, flowing in nearly opposite directions, cause the water of the creek to back up stream and overflow the lowlands.

Opposite the *locus in quo* is an island in the river. The plaintiff's contention is that the two streams surrounding the island com-
(480) pose the river, whilst the defendants insist that the creek curves near the upper end of the island and empties into the river below the lower end of the island and below the mouth of the proposed canal, which is proposed to be 70 yards long, 40 feet wide and 15 or 20 feet deep. This canal cuts off about three-fourths of an acre of the sandy tongue of land lying between the said waters, which is part of a 60-acre tract of land belonging to plaintiff.

The plaintiff, in aid of its allegation of irreparable injury, says that it holds said land "with a view to using the same for a park to be attached to a hotel site on said land, and it derives its chief value from its picturesque surroundings—and that it will be disfigured and rendered much less valuable." The court below required the defendants to file a good bond in the sum of $1,000 to meet any damage ascertained at the final hearing, and discharged and vacated the pre-

liminary injunction. Since the case was filed in this Court an affidavit has been filed stating that the canal has been finished, and that the waters of the creek are now running through the canal. If this be so, any further action by this Court would be a vain proceeding. In order to dispose of the present contention, however, we will consider that the canal is not finished. Then, will the act complained of result in an irreparable injury? What kind of trespass is remedied by compensation, and what kind by an injunction to prevent it, has frequently been decided in this Court. The rule is that if the threatened injury can be compensated in damages, then injunctive relief will not be given, but the parties will be left to work out their grievances in a court of law. If the prospective injury is such as cannot be atoned for in damages, or if, in case of an ordinary trespass, the trespasser is insolvent and unable to respond in damages, (481) then injunctive relief will be granted in order to prevent injustice in any event. The *peculiar* jurisdiction of a court of equity will be exercised only when the legal remedy does not furnish an adequate remedy, and the nature of the subject-matter must be considered. Irreparable injury means that which cannot be repaired, retrieved, put back again, or atoned for. The injury must of a *peculiar* nature, so that compensation in money cannot atone for it. If grass be cut in the field and sold; if trees in the woods be cut for timber, staves or shingles, and sold, damages may be recovered for their commercial value, and in that way the injury is retrieved and atoned for. If, however, the oak standing upon the resident lot, affording shade and comfort, be cut down, it cannot grow again, and damages for its commercial value be recovered, that does not satisfy or atone for its ornamental value, nor for its picturesqueness so much cherished by its owner, with which no one should interfere, and preventive relief will be given. In the case before us, the allegation is general and prospective. It does not certainly appear that a hotel will be built or that the point of land would ever be an ornamental or necessary attachment thereto. When special remedies are asked for specific facts should be set out. In the mind of the Legislature, the object is for public benefit, and the question of damages will be inquired of at the hearing.

There is no allegation here of insolvency, and the real mouth of the creek will be located at the trial in the appropriate way. *Gause v. Perkins,* 56 N. C., 177; *Frink v. Stewart,* 94 N. C., 484.

No error.

Cited: Wilson v. Featherstone, 120 N. C., 450; *Porter v. Armstrong,* 132 N. C., 67; *Griffin v. R. R.,* 150 N. C., 315; *Rope Co. v. Aluminum Co.,* 165 N. C., 576.

(482)

M. S. SIMPSON ET AL. V. D. BROWN ET AL.

Motion to Set Aside Judgment for Excusable Neglect—Inexcusable Negligence.

Where, on a motion to set aside a judgment for excusable neglect, under section 274 of The Code, it appeared that defendant was present at the August Term of court following the January Term to which he had been summoned, and then knew that the attorney whom he had employed had died; that he filed no answer; that the case was continued to the following January Term and was published in the calendar of cases for a month in two weekly newspapers, and that defendant lived on the railroad 19 miles from the courthouse, and that judgment was taken by default, no other attorney having been employed or answer filed: *Held*, that the negligence of defendant was inexcusable and the judgment will not be set aside.

MOTION by T. A. Fowler to set aside a judgment rendered at January Term, 1895, of UNION, heard before *Timberlake, J.*, upon affidavits alleging excusable neglect, etc. His Honor refused the motion, and defendant appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

F. I. Osborne for plaintiff.
H. B. Adams and MacRae & Day for defendant.

FAIRCLOTH, C. J. This is a motion to set aside a judgment for excusable neglect, under The Code, section 274.

Facts: The summons was served and returned to January Term, 1894, when the defendant Fowler employed an attorney to attend to the case. The attorney died on 18 March, 1894, having failed to enter an appearance. At August Term, 1894, the defendant was present and knew his attorney was dead, but employed no other attorney.

(483) One month before January Term, 1895, the case was put on the calendar and was set for trial on 4 January, 1895, and the calendar was published in two weekly newspapers at Monroe for one month. The defendant lived 19 miles from the courthouse, directly on the railroad running daily trains. At January Term, 1895, a judgment was rendered, the defendant not attending and having employed no attorney. On 13 August, 1895, the defendant filed an affidavit and made a motion to have the judgment set aside.

This was a plain case of inexcusable negligence. *Kivett v. Wynne,* 89 N. C., 39. The numerous decisions upon inexcusable negligence under this section are found in Clark's Code, pp. 231, 232, 233, 234.

Affirmed.

Cited: Cahoon v. Brinkley, 176 N. C., 8.

(484)

J. A. PINCHBACK & CO. v. BESSEMER MINING COMPANY.

Contract—Principal and Agent—Authority of Agent to Contract—Trial—Evidence.

H., as agent of defendant corporation, made a contract with plaintiff to clean out certain streets for the defendant. After plaintiff had performed part of the work H. wrote to him as follows: "In relation to your personal application for permission to clean out the streets and wait for the money, which has been appropriated by the directors, I have to say: Article 2d of the by-laws reads: 'The Board of Directors shall have entire control and management of the property and affairs of the company.' The resolution reads as follows: 'Authorized and directed to expend 50 per cent up to $1,000 of the receipts from the sale of lots in improvement of streets and avenues.' The by-laws and resolutions admit of but one construction. I have no authority, express or implied, to anticipate the expenditure of one dollar until I have the money in hand to do it with, nor do I wish to encourage the expenditure of money on your part by a *quasi* agreement on the part of the company through me. I therefore suggest that you await the action of the . . . directors, if you desire to change in any manner the carrying out of the resolution as adopted. I am amenable to the . . . directors for my action, and hence it is impossible for me to deviate from their instruction. I cannot assume to put a construction on any resolution, nor seek to accomplish a result in any other manner than as strictly prescribed by authority. It is the literal carrying out of the instruction of the board which must be my guide, without regard to my personal opinion or judgment. . . . [Signed] H., Special Agent": *Held,* that there was sufficient evidence of the authority of H. to make the contract to take the case to the jury.

ACTION commenced before a justice of the peace and brought by appeal to the Superior Court of GASTON, and tried before his Honor, *E. W. Timberlake, J.,* and a jury, at September Term, 1895.

The jury being impanelled to try the case, the Court sub-
(485) mitted to them the following issue, to-wit:

"Is the defendant indebted to the plaintiff; if so, how much?"

To which the jury, under the charge of the Court, returned a verdict of seven dollars and twenty-four cents ($7.24), as appears of record.

On the trial the plaintiff testified in his own behalf that under a contract made between himself (J. A. Pinchback), in behalf of J. A. Pinchback & Company, with one L. L. Hotchkiss, agent of the defendant company, about 10 December, 1892, he did the work and labor sued for.

On cross-examination of the witness (plaintiff), he admitted that he was a stockholder in the defendant corporation, and said L. L. Hotchkiss was known and designated by the title of "special agent"; that on 17 December, 1895, he received from said L. L. Hotchkiss a letter, which is set out in the opinion of *Associate Justice Furches.*

The plaintiff further testified that, prior to the receipt of said letter from L. L. Hotchkiss, special agent, he had done work for which the defendant was chargeable, amounting to seven dollars and twenty-four cents ($7.24).

The plaintiff further testified that L. L. Hotchkiss acted as agent for the said defendant company in a general manner, receiving moneys due the company and receipting for same, and drawing checks in payment of the debts of the company.

The plaintiff further testified that the term "special agent" was a title given the said L. L. Hotchkiss to designate this position as an officer or employee of the said company, and did not imply, nor intend to imply, that he could only perform special duties, as claimed by the defendant.

The court charged the jury that upon the evidence the plain-
(486) tiff could not recover any more than seven dollars and twenty-four cents ($7.24), with interest from 17 December, 1892, and directed the jury to find the issue accordingly. To this charge and direction the plaintiff excepted. Verdict for plaintiff for $7.24 and interest. From the judgment the plaintiff appealed.

C. P. Moore for plaintiff.
W. A. Guthrie for defendant.

FURCHES, J. This is an action upon contract for work and labor done. Defendant filed no answer or plea of any kind. On the trial plaintiff testified that the work sued for was done under a contract with L. L. Hotchkiss, agent of defendant company, about 10 December, 1892. This testimony is not contradicted. And if it had been the

court could not have held it was not true, and it would have presented a question for the jury. The only evidence defendant introduced was a copy of a letter from L. L. Hotchkiss to the plaintiff, dated 17 December, 1892, which is as follows: "Bessemer City, N. C., 17 December, 1892.—Mr. Pinchback, Dear Sir: In relation to your personal application for permission to clean out Maryland, Washington, Virginia, Alabama, Georgia, and Louisiana avenues and 10th, 11th, 12th and 14th streets, between the avenues named, and wait for the money which has been appropriated by the directors, I have to say: Article 2 of the by-laws reads:

" 'The Board of Directors shall have entire control and management of the property and affairs of the company.' "

"The resolution reads as follows:

" 'Authorized and directed to expend 50 per cent, up to $1,000, (487) of the receipts from the sale of lots in improvement of streets and avenues.'

"The by-laws and resolution admit of but one construction. I have no authority, express or implied, to anticipate the expenditure of one dollar until I have the money in hand to do it with, nor do I wish to encourage the expenditure of money on your part by a *quasi* agreement on the part of the company through me. I therefore suggest that you await the action of the board of directors if you desire to change in any manner the carrying out of the resolution as adopted. I am amenable to the board of directors for my action, and hence it is impossible for me to deviate from their instruction. I cannot assume to put a construction on any resolution, nor seek to accomplish a result in any other manner than as strictly prescribed by authority. It is the literal carrying out of the instruction of the board which must be my guide, without regard to my personal opinion or judgment.

"Respectfully submitted,

"L. L. HOTCHKISS, *Special Agent.*"

Plaintiff then testified that $7.24 worth of the work for which the action was brought was done before he received this letter.

It was not denied that the work was done by plaintiff and that it amounted to the sum claimed. But defendant contended that this letter shows that Hotchkiss had no authority to make the contract with plaintiff; that it was in excess of his authority as agent and *ultra vires,* and if this were not true, it discharged defendant from the obligation of the contract from the time it was received by plaintiff.

And this is evidently the construction his Honor put upon it in holding that plaintiff was entitled to recover for the work done before that time ($7.24). We do not think this letter had the effect

(488) claimed for it, as a matter of law. It virtually admits the contract. It is true it calls it "a *quasi* agreement on the part of the company through me." It suggests to the plaintiff not to proceed under it until a meeting of the directors. It construes the resolution of the board not to authorize him to make the contract. It discloses the fact that the work plaintiff did was under the control of defendant, and also of Hotchkiss, as defendant's agent. It is true he signs his name as special agent, and if this is true there is more evidence of his being a special agent for this particular work than for anything else. Then, if the agency of Hotchkiss extended to this work, whether as general or special agent, he had the right to contract with the plaintiff, and defendant would be bound thereby. *Clowe v. Pine Product Co.*, 114 N. C., 304. So, without undertaking now to decide what the right of the parties may be when this matter of agency and the terms, extent and conditions of the contract are fully developed by the evidence, we hold that there is sufficient evidence of a contract appearing from the evidence of plaintiff to entitle him to have the question submitted to the jury. As the record comes to us, it is not a case in which the court was authorized, as a matter of law, to direct the finding of the jury, and there must be a

New trial.

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(489)

WILEY & BALLARD, TRUSTEES OF B. L. DUKE, v. BESSEMER CITY MINING COMPANY.

Practice—Appeal—Dismissal—Rules of Court—Failure to Print Essential Parts of Record.

Where on appeal an exception is that the judgment does not properly guard the rights of the minority stockholders of a company, "and for other reasons appearing on the face of the judgment," and no printed copy of the judgment accompanies the record, the appeal will be dismissed under Rule 28 (115 N. C., 843, 844), which requires so much and such parts of the record to be printed as may be necessary to a proper understanding of the exceptions.

ACTION heard before *Timberlake, J.*, at Fall Term, 1895, of GASTON.

The plaintiffs appealed. In this Court the defendant moved to dismiss for failure of appellants to print necessary parts of the record.

Fuller, Winston & Fuller for plaintiffs.

W. A. Guthrie for defendant.

CLARK, J. Rule 28 requires the printing "of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned." The power of the Court to make such rule and the necessity for it are stated in *Horton v. Green,* 104 N. C., 400; *Hunt v. R. R.,* 107 N. C., 447, and numerous other cases. To prevent any possible misconception of the rule, it was enlarged and made more specific in 115 N. C., pp. 843, 844.

When this case was reached on the regular call of the docket, the appellants did not aid us by supporting their grounds of appeal, either by oral argument or brief filed, and the appellee moved to dismiss because the record is not printed as fully as necessary for (490) the purposes of an argument. Looking into the record we find that there has not been a satisfactory compliance with the rule (28) as to printing. Without referring to other exceptions and other omissions in the printed record, it is sufficient to quote the 9th exception, "For that the said report and judgment based thereon do not properly guard the rights of the minority stockholders; for other reasons appearing on the face of said judgment." This renders the careful consideration of said judgment necessary, and it should have been printed. The judgment covers five pages in manuscript, and it is not in compliance with our rules to expect that the single copy of that judgment shall be considered by the five members of the Court, as could be readily done if printed. The neglect of this rule has been so often called to the attention of appellants, and the intention of the Court to adhere to it has been so frequently expressed, that it is proper now to enforce the rule, and entirely unnecessary to give further warning that we intend to do so. *Paine v. Cureton,* 114 N. C., 606; *Carter v. Long,* 116 N. C., 46; *Dunn v. Underwood, ib.,* 525. The printing was insufficient in other particulars, but this is enough to show a substantial noncompliance.

Appeal dismissed.

Cited: Bank v. School Committee, 118 N. C., 384; *Causey v. Mills, ib.,* 396; *Garret v. Pegram,* 120 N. C., 289; *Fleming v. McPhail,* 121 N. C., 185; *Calvert v. Carstarphen,* 133 N. C., 26.

(491)

WILEY & BALLARD, TRUSTEES OF B. L. DUKE, v. BESSEMER CITY MINING COMPANY.

Motion to Reinstate Dismissed Appeal—Failure to Print Necessary Parts of Record—Negligence of Counsel.

Where an appeal has been dismissed for failure to print such parts of the record as are essential to an understanding of the exceptions, as required by Rule 28, it will not be reinstated upon the alleged grounds of negligence of counsel.

Upon motion of appellant to reinstate the appeal.

PER CURIAM: For the reasons given in the opinion dismissing the appeal, the motion to reinstate is denied. Every exception in the case is based upon the judgment, and that not being printed, the case when reached was not in a plight to be intelligently argued (*Avery v. Pitchard,* 106 N. C., 344), and the Court was compelled either to continue the cause or dismiss it. The appellee, having made the motion in writing to dismiss, was entitled to have it allowed. The requirement as to printing the parts of the record which are essential to be considered on appeal is a necessity demonstrated by the experience of the Court, and hence is not a purely arbitrary matter to be dispensed with at will. It was not adopted without full consideration, and its nonobservance will not be excused without good cause. *Whitehurst v. Pettifer,* 105 N. C., 39. The appellant generously places the failure to print the record upon counsel, but this is no excuse. *Edwards v. Henderson,* 109 N. C., 83; *Stevens v. Koonce,* 106 N. C., 255; *Dunn v. Underwood,* 116 N. C., 525. In this case the failure to print the judgment is a patent nonobservance of the requirement as to printing, but to avoid any possibility of mistake henceforth the rule will be amended at this term to require that hereafter the judgment appealed from shall be printed in all cases.

Motion denied.

(492)

JOHN W. KENDRICK ET AL. v. PHILIP DELLINGER

Action to Recover Land—Deed, Date and Delivery of—Presumption—Trial—Exceptions—Questions for Jury—Exceptions.

1. A deed is presumed to have been delivered at the time it bears date, unless the contrary is satisfactorily shown.

2. Whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether it is rebutted by parol evidence introduced for the purpose must go to the jury unless the truth of such rebutting testimony is admitted; hence:

3. If a party having the right to insist upon the presumption that a deed was delivered at the time of its date controverts the truth of the rebutting testimony, it is for the jury to decide whether the presumption has been overcome by such testimony.

4. A party is not precluded from the privilege of contradicting his own witness by testimony inconsistent with that of the latter, but cannot impeach him by attacking his credibility; hence:

5. The fact that a witness testified that a deed was delivered at a time subsequent to its date did not preclude the party offering such witness from relying on the presumption to the contrary.

6. An exception to an instruction which does not point out the specific error complained of is too general to be considered.

7. Where, in an action to recover land, plaintiff introduced evidence tending to show grants from the State and mesne conveyances connecting with them, and also possession for seven years under color of title, it was proper to submit to the jury the question of his right to recover.

8. Where a party did not ask for specific instructions, he cannot object to those given on the ground that they are too general.

ACTION for the recovery of land, tried before *Timberlake, J.*, and a jury, at Fall Term, 1895, of GASTON.

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

Jones & Tillett for plaintiffs.
D. W. Robinson for defendant.

AVERY, J. The assignments of error are so restricted as to preclude us from the consideration of most of the points made by defendant's

counsel in his clear and well-considered argument. The defend-
(493) ant does assign as error, however the refusal of the court to in-
struct the jury that in any aspect of the testimony the plaintiff has failed to show even prima facie evidence of title in himself when the action was brought, and that they should therefore respond to the issue in the negative.

A deed is presumed to have been delivered at the time it bears date unless the contrary is satisfactorily shown. *Lyerly v. Wheeler,* 34 N. C., 290; *Meadows v. Cozart,* 76 N. C., 450. The summons was issued on 28 February, 1894. The deed under which the plaintiff claims bears date of 11 February, 1894, and nothing further appearing is presumed to have been delivered at its date. The deed takes effect from the time of its actual delivery, however, if it is shown by parol testimony to the satisfaction of the jury to have been subsequent to the date. The party having the right to insist upon the presumption may admit the truth of the rebutting testimony, but if he controvert its truth it is the province of the jury to pass upon the question of its sufficiency to overcome the presumption. *Vaughan v. Parker,* 112 N. C., 96. It is settled law that whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether it is rebutted by parol evidence introduced for the purpose must go to the jury, unless the truth of such evidence be admitted. A party who offers a witness, whether the adversary party or another, is not precluded from the privilege of contradicting him by testimony inconsistent with his, but only waives the right to impeach him by attacking his credibility. *Helms v. Green,* 105 N. C., 251; *Coates v. Wilkes,* 92 N. C., 376. The plaintiff was at liberty, notwithstanding the fact that his witness Adderholt testified that the deed was not delivered till September, 1894, to insist that the date was rather to be relied upon as fixing the time
of delivery than the treacherous memory of a witness. Such an
(494) argument would have been legitimate, and the jury would have been the judges of its weight. It may be that they discredited the testimony of Adderholt on account of his demeanor or the chances of inaccuracy. We must infer that this contradictory testimony was weighed and passed upon by the jury, because the Judge told them that unless they were satisfied by a preponderance of evidence that the plaintiff had title to the land in dispute when the action was brought, they must respond in the negative to the issue. The broadside exception to the instruction given, without pointing out any specific error, is too general to be considered. *McKinnon v. Morrison,* 104 N. C., 354. There was no error in refusing to tell the jury that the plaintiff had not offered sufficient evidence to be submitted to the jury,

when he had introduced testimony which tended to show grants from the State and mesne conveyances connecting with them, as well as possession for seven years under color of title to land, the title to which was out of the State.

In the absence of a more specific request it is not such error as the defendant could avail himself of to instruct the jury in the general terms employed by the court. But we deem it proper to exclude the conclusion that we approve of leaving the jury to search out the truth with so little assistance as was afforded them by the abstract propositions which are embodied in the statement of the case as given in lieu of the instruction asked. It may be that the whole of the charge was not sent up. But if it was, it would have been of benefit to the jury, and it was but just and proper, though so far as we can see not the legal duty of the court, to have told them in plainer terms how the plaintiff claimed to have shown title. It nowhere appears plainly that they were instructed specifically as to the possession and the rebutting testimony. But the defendant was in fault in not praying (in writing if he chose) that they be told how to determine (495) whether the plaintiffs had acquired title before bringing the action. The defendant has not by due diligence shown his right to complain of error, if it was committed, and the judgment must be

Affirmed.

Cited: Burnett v. R. R., 120 N. C., 519; *Craft v. Timber Co.,* 132 N. C., 159; *Turrentine v. Wellington,* 136 N. C., 313; *Simmons v. Davenport,* 140 N. C., 410; *Fortune v. Hunt,* 149 N. C., 362; *Walker v. Walker,* 151 N. C., 167; *S. v. Yellowday,* 152 N. C., 797; *S. v. Davenport,* 156 N. C., 611; *Belk v. Belk,* 175 N. C., 76.

J. M. GREEN v. JOHN BURGESS.

Guardian and Ward—Right of Guardian to Recover Money Paid by Him Personally as Surety on Prosecution Bond—Remedy of Surety —Jurisdiction.

1. Where a guardian, having given a bond for the prosecution of a suit by him on behalf of his ward and signed the same individually, was compelled to pay the costs of the suit out of his individual estate, he cannot recover the same under the provision of section 2093 of The Code, which gives a summary method for reimbursement of a surety who has paid money for another.

2. In such case the remedy of the guardian is to have the amount so paid by him allowed by the Clerk of the Superior Court, who appointed him guardian, in his settlement with his ward, provided the Clerk finds that the expenditure was made properly and in good faith.

ACTION tried before his Honor, *Timberlake, J.*, at Fall Term, 1895, of CLEVELAND, on appeal from the judgment of a justice of the peace. Upon an intimation by his Honor that, upon all the evidence, the plaintiff could not recover, the latter submitted to a nonsuit and appealed.

The facts are stated in the opinion of *Associate Justice Montgomery.*

D. W. Robinson for plaintiff.
Webb & Webb for defendant.

(496) MONTGOMERY, J. The plaintiff, who was guardian of the defendant, then a lunatic, instituted a suit as such guardian to recover possession of certain property belonging to his ward, becoming surety as an individual on the bond for the prosecution of the suit. He failed in the action, judgment for the costs was rendered against him, and the amount collected out of his personal estate by the Sheriff under execution. If this action was instituted by the guardian in good faith and in the exercise of a sound discretion, of course the guardian is entitled to have the costs so paid by him repaid out of the ward's estate. We are of the opinion, however, that the only way in which this relief can be afforded the plaintiff is to have the whole matter, as to the amount paid, the good faith and propriety of the action, passed upon by the Clerk of the Superior Court by whom the letters of guardianship were issued. If, after an investigation of the whole matter, it appears to the Clerk that the amount of the costs so paid by the guardian was properly expended for the benefit of the ward's estate, then the same should be allowed to him and charged in the guardian account in his favor and against the ward. *McNeill v. Hodges,* 83 N. C., 504. The Clerk who issued the letters of guardianship must pass upon the correctness of the guardian's account before the guardian can institute any suit for any balance that may be due to him. Besides, the object of the Code practice is to discourage a multiplicity of suits; and connected with this very matter there appears to be a balance due to the guardian by an account rendered to the Clerk before the commencement of this suit, upon which an action might be brought—that balance forming no part of the subject-matter of this suit. The present proceeding was commenced under section 2093 of The Code, which allows any person who may have paid money for or on account of those

for whom he became surety to have a remedy for its collection. This provision of The Code was not intended to embrace such (497) a case as the one before us, for, as we have said, before any recovery can be made by a guardian against his ward on any matter connected with the guardianship account, the same must be passed upon and approved by the Clerk who issued the letters of guardianship.

We are of the opinion, therefore, that the justice of the peace before whom this proceeding was originally brought had no jurisdiction of the subject-matter. His Honor intimated that upon the testimony the plaintiff could not recover, and in so ruling he committed

No error.

MARTHA NICHOLS ET AL. v. RUFUS C. GLADDEN ET AL.

Rule in Shelley's Case—Deed.

1. The common-law doctrine known as the rule in *Shelley's case* is in force in this State.

2. The rule in *Shelley's case* is a rule of law and not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker; hence:

3. Where land was conveyed to persons named "to have and to hold same to their use during the term of their natural lives and then to their heirs after them," the rule in *Shelley's case* applies and the persons named in the deed take the whole estate in fee simple.

ACTION heard before *Timberlake, J.*, at Fall Term, 1895, of CLEVELAND, it being agreed that if the rule in *Shelley's case* should be held to apply in the construction of the deed for the land in controversy, judgment should be rendered for defendants, other- (498) wise for the plaintiffs. The deed was as follows:

"STATE OF ALABAMA, Benton County.

"Whereas, I, Joseph Gladden, of the county of Benton and State of Alabama, have two sons living in the county of Cleveland and State of North Carolina, viz.: Harvy I. Gladden and Rufus C. Gladden, and

being desirous to secure to them a home, and land for their occupation and support during the term of their natural lives, have thought proper and do by these presents give, grant, convey, release, enfeoff and confirm unto the said Harvy I. and Rufus C. Gladden all that tract of land lying and being in the county of Cleveland and State of North Carolina, to-wit: Commencing on two chestnuts and running thence S. 26 W. 50 poles to a post oak, thence S. 40 W. 50 poles to a small black oak, thence S. 51 W. 66 poles to a stake, thence N. 29 poles to a stake in the field, thence W. 136 poles to a small dogwood, thence N. 158 poles to a pine, rotten down, thence E. 42 poles to a black oak and hickory, thence N. 76 poles to a stake, thence E. 86 poles to a post oak, thence S. 15 poles to a pine, thence E. 98 poles to a pine on the road, Wm. Lackey's and Jno. M. Patterson's corner, thence to the beginning, to have and to hold the same to their use during the term of their natural lives and then to their heirs after them, and for the confirmation of the above I do hereby bind myself, my heirs and assigns, and will warrant and defend the same from myself, my heirs and from every person lawfully claiming the same, guaranteeing in law and equity unto the said Harvy I. and Rufus C. Gladden the right to the free use and occupation of the same during the term of their natural lives, and after their deaths I do hereby give, grant and convey the land above described unto the heirs of the said Harvy I. and Rufus C. Gladden, their
(499) heirs and assigns forever in fee simple.

"As witness my hand and seal this 11 August, 1854.

"JOSEPH GLADDEN."

His Honor, being of opinion that the rule in *Shelley's case* did not apply, gave judgment for the plaintiffs, and defendants appealed.

Geo. E. Wilson and W. J. Montgomery for plaintiffs.
Webb & Webb for defendants.

MONTGOMERY, J. It was agreed by the parties in the trial below that if the rule in *Shelley's case* was applicable to the provisions of the deed before the court, judgment should be rendered for the defendants, but that if the rule was not applicable, then judgment should be entered for the plaintiffs. His Honor was of the opinion that the rule did not apply, and gave judgment for the plaintiffs. The defendants appealed from the judgment.

The law known as the rule in *Shelley's case,* Mr. Fearne in his work on Remainders says, was adopted in the reign of Edward II., and had prevailed in England through the years down to the time when he wrote. It is still the law in England. It is the law in North Carolina,

although in our own reports in the cases of *Mills v. Thorne,* 95 N. C., 362; *Jenkins v. Jenkins,* 96 N. C., 254; *Howell v. Knight,* 100 N. C., 254, and other cases, there were doubts expressed by the Court as to whether the rule had not been abolished by section 1329 of The Code, which is sec. 5 of ch. 43 of the Revised Code. But in *Starnes v. Hill,* 112 N. C., 1, that question was put at rest, the Court decid- (500) ing that the rule was in force in this State, *Chief Justice Shepherd* in the opinion construing the meaning of The Code sections and showing that they did not and were not intended to affect the rule. *Leathers v. Gray,* 101 N. C., 162, and *King v. Utley,* 85 N. C., 59, referred to the rule as having been in force here before The Code sections referred to. The foundation of the rule rests upon the aversion of the common law to the inheritance being in abeyance; and its adoption facilitated the alienation of land by vesting the inheritance in the ancestor, thereby enabling him to convey the property at once without the delay attendant upon contingent remainders. A good definition of the rule, and the most general, is as follows: "That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase." 1 Coke, 104. Difficulties have arisen, however, in applying it to particular cases, because of an inclination on the part of some of the courts to respect more the intention of the makers of instruments, as a matter of construction, rather than the rule as one of law. Nevertheless the courts seem to agree in the general statement that it is a rule of law and not of construction; that is, if the words "heirs" or "heirs of the body" are used with no explanation, with no superadded words which to a certainty show that other persons or individuals are meant than the heirs general of the first taker, the rule must apply inexorably as one of law, and the intention of the grantor or devisor is not to be considered. It appears also to be generally held that the rule does not apply where the grantor or testator (for the rule applies to both deeds and devises) uses in connection with the words "heirs" or (501) "heirs of the body" such explanatory and descriptive words or phrases as make it perfectly clear that the words "heirs" or "heirs of the body" mean and refer to certain particular individuals answering the description of heirs at the death of the ancestor. To state it in another way: if the words "heirs" or "heirs of the body" stand alone without such sufficient explanatory words, the law will, even if the grantor or devisor expressly and unequivocally declare his intention that the grantee or devisee shall not have the estate longer than his life,

or except for his life, or during his life—or whatever words he may use in conveying the estate of the first taker, whether he gives the free use or the occupation free to use for a home during his life and no longer—just so the law construes it to be in effect a life estate, declares the word "heirs" to be a word of limitation and vests the whole interest in the ancestor. It is not the estate which the ancestor takes that the law considers, but the estate intended to be given to the heirs. The superadded words must show that the grantor or devisor intended to change the rule of descent, that he intended to make the word "heirs" a *designatio personarum* as contradistinguished from "heirs" as *nomen collectivum,* or the rule will apply, though the grantor or devisor purposed and intended to give the ancestor only a life estate and his intention be expressed in a manner perfectly clear.

The authorities on these propositions are numerous. In *Daniel v. Whartonby,* 17 Wall., 639, the learned Judge who delivered the opinion of the Court, in speaking of the general rule that the intention of the testator must be fully carried out so far as it can be done consistently with the rules of law, but no further, said: "A declaration, however positive, that the rule shall not apply or that the estate of the ancestor shall not continue beyond the primary expressed limitation, or (502) that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule. . . . The rule is one of property and not of construction."

In 2 Washburn, R. P., 273, it is written: "Wherever the rule does apply it is as a rule of the common law so imperative that, though there be an expressed declaration that the ancestor shall only have a life estate, it will not defeat its union with the subsequent limitation to his heirs. It was said in *Baker v. Scott,* 62 Ill., 88: "That though an estate be devised to a man for his life, or for his life *et non aliter,* or with any other restrictive expressions, yet if there be afterwards added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former and make him tenant in tail or in fee. The true question of intent would turn not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body." It was held concerning the rule in *Trumbull v. Trumbull,* 149 Mass., 200: "It was a rule of property and not of construction, and therefore no declarations, however unequivocal, when an estate was thus created, that the ancestor should have an estate for life only, or that his estate should be subject to all the incidents of a life estate, or that the heirs should take as purchasers, would be operative." In *Crockett*

v. Robinson, 46 N. H., 454, the Court said: "In determining whether the rule in *Shelley's case* shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. The material inquiry is, what is taken under the second devise. If those who take under the second devise take the same estate that they would take as his heirs or as heirs of his body, the rule applies." The decisions of this Court, in cases (503) where the rule in *Shelley's case* has been the matter for consideration, are to the effect that the rule is one of law and not of construction, and are in harmony for the most part with the opinion we have expressed in this case. However, in *Jenkins v. Jenkins,* 96 N. C., 254, it is intimated that the word "use," which was the word descriptive of the life tenant's estate, was conclusive "that no gift in fee was intended;" but the case was not decided on that point, but upon the effect of superadded words in the will going to show that the word "heirs" meant a *designatio personarum* and not heirs generally. In *Howell v. Knight,* 100 N. C., 254, it is true also that there are some expressions which would indicate that the true principle of the rule was confused with the principle of construction of the intention of the grantor, but upon an examination of the case it will be seen that the decision rested upon the superadded words explaining the word "heirs." In the later cases of *Leathers v. Gray, supra,* and *Starnes v. Hill, supra,* there can be no misunderstanding of the meaning of the Court. The rule is treated as one of law and not one of construction. *Leathers v. Gray* was before the Court last upon a petition to rehear. In that case a life estate was given to the first taker "and after her death to the begotten heirs or heiresses of her body forever." On the first hearing it was held that the rule did not apply, and that the word "heirs" was one of purchase. On the rehearing the judgment was reversed and *Justice Merrimon,* who delivered the opinion of the Court, said: "But after hearing the case reargued and having given the question raised much further consideration, we are of opinion that, although the intention of the testator may have been—no doubt was—such as we declared it to be, he failed to express his purpose consistently with a settled rule of law which it is our duty to uphold and enforce. (504) . . . If there were words in the context clearly showing that the testator did not use the word 'heirs of her body' in their technical sense, but to imply children of the devisee, then in that case these words would be treated as words of purchase." In the further course of this opinion it was said: "In our efforts heretofore to effectuate what seemed to us to be the real intention of the testator, we followed to some extent the case of *Jarvis v. Wyatt,* 11 N. C., 227. In our

further researches we find that case to be questionable authority. Indeed, it has in effect, not in terms, been overruled by numerous decisions." In *Starnes v. Hill, supra, Chief Justice Shepherd* learnedly discussed the rule, citing numerous authorities, American and English, and arriving at the same conclusion reached by the Court in *Leathers v. Gray,* and also by us in this case, as to the effect and meaning of the rule. In the case before us it is perfectly clear that the grantor intended to give to the life tenants an estate for life and no more. But as the word "heirs" stands unattended with superadded words going to change or qualify their ordinary legal meaning, we are of the opinion that the rule in *Shelley's case* does apply, and that judgment ought to have been rendered in the court below for the defendants. There was error in his Honor's ruling, and in the judgment entered, and it is reversed. The court below will proceed to judgment in accordance with this opinion.

Reversed.

Cited: Dawson v. Quinnerly, 118 N. C., 190; *Chamblee v. Broughton,* 120 N. C., 175; *Byrd v. Gilliam,* 121 N. C., 327; *May v. Lewis,* 132 N. C., 116, 117; *Cooper, Ex parte,* 136 N. C., 132; *Tyson v. Sinclair,* 138 N. C., 25; *Price v. Griffin,* 150 N. C., 538; *Cotten v. Moseley,* 159 N. C., 9; *Smith v. Smith,* 173 N. C., 125; *Cohoon v. Upton,* 174 N. C., 89; *Nobles v. Nobles,* 177 N. C., 245; *Smith v. Moore,* 178 N. C., 374, 375.

HEATH, MORROW & CO. v. JOHN F. MORGAN ET AL.

Claim and Delivery—Parties—Defective Designation of Parties—Pleading—Demand.

1. The designation of the plaintiffs in a summons and complaint in an action of claim and delivery as "H. M. & Co.," without setting out the individual names of the persons composing the firm, is a fatal defect on demurrer.

2. In an action against a married woman for the possession of personal property claimed by the plaintiff under a chattel mortgage given by her husband, where it is alleged in the complaint and admitted by demurrer that the husband is a nonresident and a fugitive from justice, the husband is not a necessary party.

3. Where, in an action of claim and delivery for the possession of personal property, the complaint alleges that defendants are "in the unlawful

and wrongful possession of the property and unlawfully withhold the possession from plaintiff," and the defendants admit that the complaint by demurrer, the complaint is not defective in its failure to allege a demand.

4. It is no ground for demurrer to the complaint that the summons describes one defendant as "Mrs. M.," where her name is given in full in the complaint.

ACTION heard upon complaint and demurrer before *Timber-* (505) *lake, J.*, at Fall Term, 1895, of STANLY.

The action is brought for the recovery of certain personal property, and plaintiffs invoke the remedy of claim and delivery and file the usual affidavit and undertaking.

Plaintiffs complaining allege:

"1. That they are the owners and entitled to the immediate possession, by virtue of certain chattel mortgages executed to plaintiffs by S. F. Morgan, of the following described property, to-wit: One mouse-colored mare, one red-horned cow, one pied-horn cow, one white-pied cow, one red cow, one white bull, described and conveyed in the said chattel mortgage.

"2. That the property is worth about the sum of one hundred dollars.

"3. That defendant Mrs. S. F. Morgan, wife of S. F. Morgan, and defendant J. F. Morgan, son of said S. F. Morgan, are in the unlawful and wrongful possession of the property and unlawfully and wrongfully withhold the possession from plaintiffs.

"4. That S. F. Morgan, husband and father of defendants, is not now living with his family and has gone out of this State under a charge of felony and is a nonresident of this State, as he (506) was at the time of the commencement of this action. Wherefore, plaintiffs demand judgment for possession of the property; for the value in case actual possession cannot be had; for $50 damage for unlawful detention and deterioration in value, and for general relief and costs."

The case having been removed to Stanly County for trial, the defendants in due time filed the following demurrer to the complaint:

"1. For that the names of the parties plaintiff, either in the summons or complaint, are not given.

"2. For that the action is brought against a married woman to foreclose a chattel mortgage executed by her husband, and the husband is not made a party.

"3. For that the action is brought against the defendants, who are alleged to be in the possession of certain personal property mortgaged

to plaintiffs by the husband of the *feme* defendant, but the complaint does not allege that a demand for the possession of said property was made of the defendants before action commenced, nor a wrongful conversion of the property by defendants.

"4. For that the summons in the action simply designates one of the defendants as Mrs. Morgan.

The court overruled the demurrer, and the defendants excepted. Plaintiffs then moved for judgment on the ground that the demurrer was frivolous, and the court gave judgment declaring the demurrer frivolous and for the recovery of the property or its value. Defendants excepted and appealed.

(507) *F. I. Osborne and D. A. Covington for plaintiffs.*
Brown & Jerome for defendants.

FURCHES, J. This is an action for the possession of personal property described in the complaint. The action is brought by "Heath, Morrow & Co." This is the only description given of plaintiffs in the summons and complaint. To this complaint defendants demur, and assign as one of the grounds of demurrer: "I. For that the names of the parties plaintiff, either in the summons or complaint, are not given."

This we think is a fatal defect to plaintiff's action. *Palin v. Small,* 63 N. C., 484. Our attention was called to *Cowan v. Baird,* 77 N. C., 201, where the action was in the name of "Cowan, McClung & Co," against the defendant Baird and others, in which defendants demurred and the demurrer was overruled. But this action was upon a note given by defendants to "Cowan, McClung & Co.," and while the grounds are not given upon which the court rested its judgment, it must have been for the reason that defendants had contracted with plaintiffs in this name and were estopped thereby to deny the partnership. As in the case of *Attorney-General v. Simonton,* 78 N. C., 57, where it was held that parties claiming to be a bank, though they had never organized under the charter, were estopped to deny the existence of the bank as to their creditors.

This view reconciles *Cowan v. Baird, supra,* with *Palin v. Small, supra,* while they would be in conflict but for this distinction in the cases.

The cases of *Wall v. Jarrott,* 25 N. C., 42, and *Lash v. Arnold,* 53 N. C., 206, while they sustain judgments taken in the firm name, both admit that if the objection had been to the "writ" it would have
(508) been good. This was evidently the rule under the old practice. And while The Code has made many changes in the forms of actions and mode of procedure, we do not think it has made any change in this respect.

We have examined the other grounds assigned in the demurrer, and do not think they can be sustained. The second ground is that the action is brought against a married woman without joining her husband. But the complaint alleges that the husband is now a fugitive from justice and nonresident of the State. The Code, sec. 1832; *Finley v. Saunders,* 98 N. C., 462. And besides, this is an action for the possession of personal property which plaintiffs allege belongs to them and that defendants are wrongfully withholding from plaintiffs. This the defendant's wife admits by her demurrer, but says: "My husband has fled the State, and therefore you cannot get your property from me." This cannot be the law.

The third assignment is that no demand was made before the action was brought. But plaintiffs allege that they are the owners of this property, and that defendants are "in the unlawful and wrongful possession of the property and unlawfully withholding the possession from plaintiffs." This is admitted by the defendants' demurrer, and yet they say it was necessary for plaintiffs to make a demand before bringing their action. The reason why a demand in any case is required is that defendant may surrender the property without the trouble and cost of a suit. And when it appears, as in this action, that defendants still claim the right to hold the property, no demand is necessary. *Wiley v. Logan,* 95 N. C., 358; *Rich v. Hobson,* 112 N. C., 79.

The fourth assignment is "for that the summons in the action simply designates one of the defendants as Mrs. Morgan." But defendants do not and cannot demur to the summons, which is only for (509) the purpose of bringing the defendants into court. This they have done, and filed their demurrer, which put them in court. But the complaint, to which they demur, states the defendants as being "Mrs. S. F. Morgan and John Morgan." So this assignment, as well as the second and third, is without merit and is overruled.

But the first assignment is sustained, and in the judgment of the Court overruling it there was

Error.

Cited: Brown v. Brown, 121 N. C., 10, 11; *Shannonhouse v. Withers, ib.,* N. C., 381; *Moore v. Hurtt,* 124 N. C., 29; *Thomas v. Cooksey,* 130 N. C., 151; *Kochs v. Jackson,* 156 N. C., 328; *Daniels v. R. R.,* 158 N. C., 427; *Rosenbacher v. Martin,* 170 N. C., 237.

H. BARUCH ET AL. v. Z. F. LONG ET AL.

Creditors' Bill—Action to Set Aside Judgments and Sale of Personal Property for Fraud—Venue—Removal.

1. Docketed judgments confer no estate or interest in real estate within the meaning of section 190 (1) of The Code, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside judgments as fraudulent and for the appointment of a receiver need not be brought in the county where the property upon which such judgments are liens is situated.

2. An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by ch, 219, Acts of 1889, amending section 190 (4) of The Code.

3. An objection to the venue of an action upon the ground that it does not appear that the plaintiff resides in the county where the action was brought is too late when made for the first time in this Court. Even if that fact should affirmatively appear it does not oust the jurisdiction unless motion to remove is made in apt time.

(510) CREDITORS' BILL to set aside as fraudulent certain judgments suffered by the defendant Z. F. Long and the transfer by him of personal property, brought in MECKLENBURG Superior Court against the said Long and others, to whom he had conveyed personal property and in whose favor he had suffered judgments to be taken against him. The defendants were residents of Richmond County, and the judgments were taken and the personal property was situated in that county. The defendant Z. F. Long also had real estate in said county of Richmond.

The defendants moved that the action be removed for trial to Richmond court for the following reasons:

"1. That the said action is for the determination of a right of interest in real property situated in Richmond County.

"2. That the action is for the recovery of personal property situated in Richmond County."

The motion was refused, and defendants appealed.

Jones & Tillett and Clarkson & Duls for plaintiffs.
Thomas C. Guthrie and Shepherd & Busbee for defendants.

CLARK, J. This is a creditors' bill brought in Mecklenburg County to set aside, because fraudulent and void as to creditors, the transfer of certain articles of personal property and certain judgments suffered by the defendant Long, who resided in Richmond County, said personalty being also in Richmond County and the judgments being dock-

eted in the Superior Court thereof; also for the appointment of a receiver and an injunction. The defendants move to remove to Richmond County upon the grounds (1) that the said action is for the determination of a right or interest in real property situated in Richmond County; (2) that the action is for the recovery of personal property situated in Richmond County.

Neither ground can be sustained. The docketed judgments (511) confer no "estate or interest" in real estate within the meaning of The Code, section 190 (1), but merely the right to subject the realty to the payment of the judgments by sale of the same under execution. It is a lien, taking priority according to the date of docketing. It is true it is said in *Gambrill v. Wilcox,* 111 N. C., 42: "The lien of a docketed judgment is in the nature of a statutory mortgage," and so it is, but it is not said that a judgment when docketed conveys an interest or estate in realty, as a conveyance by mortgage does. *Springer v. Colwell,* 116 N. C., 520, merely holds that a proceeding on appeal from an allotment of homestead would be an action "for the determination of an interest or right in real estate" and properly triable in the county where such land lies.

Nor is this an action to recover personalty. The receiver, if appointed, must bring such action in the county where the personalty is located, since the act of 1889, ch. 219, amending The Code, sec. 190 (4). The Judge in his discretion might remove the action if the convenience of witnesses or the ends of justice would be promoted by the change [The Code, sec. 195 (2)], or if satisfied that a fair trial cannot be had in the county where the action is pending (The Code, secs. 196, 197), but he cannot be required to remove the cause upon the grounds stated. The objection that it does not appear that the plaintiffs reside in Mecklenburg County comes too late when made for the first time in this Court. *Devereux v. Devereux,* 81 N. C., 12. Even if it had affirmatively appeared that the plaintiffs did not reside in Mecklenburg County, the action might be tried in that county unless a motion to remove on that ground had been made in apt time in the court below. The Code, sec. 195; *Cloman v. Staton,* 78 N. C., 235; *Leach v. R. R.,* 65 N. C., 486; Clark's Code (2 Ed.), p. 112.

No error.

Cited: Hines v. Vann, 118 N. C., 7; *Lucas v. R. R.,* 121 N. C., 508; *Gammon v. Johnson,* 126 N. C., 66; *Connor v. Dillard,* 129 N. C., 51; *Norman v. Hallsey,* 132 N. C., 9; *Eames v. Armstrong,* 136 N. C., 394; *Jones v. Williams,* 155 N. C., 193; *Brown v. Harding,* 170 N. C., 266; *Craven v. Munger, ib.,* 425; *Ludwick v. Mining Co.,* 171 N. C., 62; *Wofford v. Hampton,* 173 N. C., 688.

(512)

SADDLER GILLESPIE ET AL. V. R. W. ALLISON ET AL.

Partition—Life Estate—Estate Durante Viduitate—Present Value.

Chapter 214, Acts of 1887, extending to remaindermen in all cases of life estate with remainder over the privilege of partition during the existence of the life estate given by section 1909 of The Code, does not apply to an estate *durante viduitate* as there is no practicable rule by which the present value of such estate can be determined; hence, where land to which an estate *durante viduitate* attached was sold for partition under authority of this Court (115 N. C., 542) and the proceeds are in custody of the court below, they cannot be divided among the widow and the remaindermen, against the will of the remaindermen, but will remain real estate until partition can be made at the termination of the estate *durante viduitate.*

SPECIAL PROCEEDINGS for the partition of certain real estate in the proceedings described. The defendants denied the right of the plaintiffs to partition, owing to the existence of an estate during the widowhood of Alice Owens in the realty. In 1894 *Judge Winston* rendered a decree in the case, ordering a sale for partition, and among other things adjudged as follows:

"The court is further of the opinion and adjudges that the widow is not entitled to have the value of her life estate determined and paid to her in cash, but that she is entitled only to the interest on the value of her life estate, to be received and paid to her annually. The fund arising from such sale the commissioner will pay into court, and the same will be invested and secured to said widow and remainder-

(513) men in such manner and with such safeguards as the court shall decree and deem wisest and best for all the parties to this proceeding."

From this decree the defendants alone appealed to the Supreme Court. The plaintiffs made no exception to it, and did not appeal. (See *Gillespie v. Allison,* 115 N. C., 542).

The defendants in the appeal contended that, as their rights accrued prior to 1887, to-wit, in 1866, the act of 1887, ch. 214, was not applicable to this case.

This Court affirmed the judgment of the Superior Court, holding, among other things, that the act of 1887 was applicable to this case.

At June Term, 1895, of Mecklenburg Superior Court, his Honor, *W. S. O'B. Robinson,* rendered a decree in which he directed "the proceeds of the sale of the said real estate, when collected by the commissioner, to be paid to the Clerk of the Superior Court, to be by him invested upon bonds secured by deeds in trust upon real estate in the city of Charlotte of sufficient value to secure the repayment of the loans

so made by him, said loans to bear the highest interest allowed by law, and that the Clerk collect the interest on such loans and pay the same to the plaintiff Alice Owens or to her assignee during the life or widowhood of the said Alice Owens; and upon her marriage or death the *corpus* of the fund be paid to the parties entitled thereto according to their interests."

Clarkson & Duls for plaintiffs.
Geo. E. Wilson and Burwell, Walker & Cansler for defendants.

FAIRCLOTH, C. J. This was a petition to sell land for partition, and under authority of this Court (*Gillespie v. Allison,* 115 N. C., 542) the lands have been sold and the proceeds are now in custody of the court. By certain devises Alice B. Owens became the owner of the land during her life or widowhood, and upon the happening of (514) either event the possession of the land vested in the other parties to this action in remainder and as tenants in common, proportional to their several rights. The widow and some of the remaindermen now pray the court to have the present value of the several estates ascertained, including the value of the estate of the widow for life, and that the amounts so ascertained be paid to the several parties in severalty and absolutely, the widow offering to give solvent bonds to refund, in the event of her marriage, the amount to which she would not be entitled in the event of such marriage. The other remaindermen resist the motion, and the sole question is, Have we the power to grant it?

At common law, tenants in common in remainder or reversion could not have partition during the existence of a widow's dower estate, because the requisite of possession was wanting. *Wood v. Sugg,* 91 N. C., 93. The right of remaindermen to have partition whilst a dower estate is outstanding was given by statute (The Code, sec. 1909) by allowing the widow to take her share, estimated during the probable period of her life, in severalty and absolutely. This privilege was extended in all cases of a life estate and remainders over by act of 1887, ch. 214. The life estate of the widow in this case is *contingent* by reason of the condition annexed, which would defeat it before its natural termination, and we are not aware of any practicable rule by which to find the present value of an estate *durante viduitate.* The act of 1887, ch. 214, does not embrace such an estate, and we see no common-law or statutory authority to grant the motion against the will of the remaindermen. The proceeds of the sale remain real estate until partition is made.

Affirmed.

Cited: Makely v. Shore, 175 N. C., 124.

(515)

KEYSTONE DRILLER COMPANY v. W. E. WORTH ET AL.

Right to Trial by Jury—Reference—Exception to Referee's Report—Practice.

1. A party cannot be deprived of the right to a trial by jury except by his own consent.

2. The right to a jury trial may be waived by failure of a party to appear, or by the written agreement of himself or his attorney, or by oral consent entered on the minutes of the court, or by submission to a reference.

3. Where an action is once referred the order of reference cannot be annulled except by the consent of all parties.

4. Failure to object to an order of reference at the time it is made is a waiver of the right to a trial by jury.

5. Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report.

6. Where there was a compulsory reference objected to by defendants, and the referee filed fourteen findings of fact, some of which related to questions not in issue under the pleadings, and defendants filed exceptions to the findings, a demand at the end of their exceptions for a jury trial on all the issues raised thereby was too general to entitle them to such a trial.

ACTION which came on for trial before *Robinson, J.*, at June Term, 1895, of MECKLENBURG, upon exceptions to the report of a referee. The case had come on for trial before *McIver, J.*, and a jury, at Fall Term, 1893, when, neither party having tendered issues, the court undertook to make up the issues during the trial. A jury was impanelled and a part of the testimony taken, when the court, without taking up the issues, found from the pleadings and the evidence introduced that the examination of a long account was necessary and required for
(516) the trial of the issues involved, and of his own motion ordered that the case be compulsorily referred to George F. Bason to try the issues of fact and law joined between the parties.

To this order of *Judge McIver* the defendants excepted on the ground that the court did not have the power to make an order of reference in this case, and demanded a trial by jury, without tendering any issues for such a trial.

The referee filed his report at Fall Term, 1894, finding all the issues of fact and of law in favor of the plaintiff. To this report the defendants filed their exceptions at December Term, 1894, but did not at that time make up and tender any formal issues raised by the pleadings, nor did the defendants demand a trial by jury of any issues in the case except that at the end of their list of exceptions they demanded "a jury trial of these exceptions in case the Court should hold to the opinion that the reference was properly made."

When the case came on for trial upon the referee's report, at June Term, 1895, his Honor made the following order:

"This cause coming on to be heard at this term of the court upon the report of the referee, the defendants tendered the issues numbered 1 to 11 inclusive, contained in the paper-writing hereto annexed, marked 'A,' and also insisted that issues be submitted on each of their exceptions numbered 2 to 15, both inclusive, but no formal issues were tendered except as stated in said paper-writing marked 'A.' The plaintiff thereupon moved to confirm the report of the referee, and contended that the issues tendered by the defendants were not the proper ones to be submitted to the jury, and that the only issues proper to be submitted to the jury were the issues raised by the pleadings, which are designated by the exceptions. The court holds and adjudges that the defendants are entitled to an issue upon every fact found by the referee to which they have taken exception, and hereby orders that the (517) issues tendered by the defendants be submitted to the jury at the next term of this court, this not being a term for the trial of jury cases.

To this ruling the plaintiff excepted. The court overruled the motion of the plaintiff to confirm the report of the referee, and also refused to consider and pass upon the exceptions to the referee's report, except for the purpose of submitting issues to the jury. To both of these rulings the plaintiff excepted and appealed, assigning as error said exceptions, being numbered from 2 to 15, both inclusive.

"1. That the court erred in refusing to consider and pass upon the exceptions to the referee's report.

"2. That the court erred in overruling the plaintiff's motion to confirm the referee's report.

"3. That the court erred in holding that the defendants were entitled to an issue upon every fact found by the referee to which they had taken exception.

"4. That the court erred in not holding that the only issues to which defendants were entitled were those raised by the pleadings, which are designated by the exceptions.

"5. That the court erred in ordering that the formal issues tendered by the defendants and numbered 1 to 11, inclusive, be submitted to a jury."

Burwell, Walker & Cansler, Geo. E. Wilson and H. W. Harris for plaintiff.

Jones & Tillett and Clarkson & Duls for defendants.

AVERY, J. The Constitution of North Carolina (Article I, section 19) guarantees to every person the right, which is declared "sacred and inviolable," to demand a trial by jury of the issues of fact aris-
(518) ing "in all controversies at law respecting property," and he cannot be deprived of the right except by his own consent. *Andrews v. Pritchett,* 66 N. C., 387; *Armfield v. Brown,* 70 N. C., 27.

It is provided also in the Constitution (Article IV, section 13) that "in all issues of fact joined in any court the parties may waive the right to have the same determined by a jury." It being left to the Legislature to determine in what manner a party to an action should manifest his willingness to waive his constitutional right and submit all issues of fact as well as of law to the Judge instead of the jury, it is provided by statute (The Code, sec. 416) that his failure to appear shall be construed as equivalent to his express consent to a different mode of trial, and that his actual assent may be given either by the written agreement of himself or his attorney, or by oral consent entered in the minutes of the court. The effect of this submission of the whole controversy to the Judge is to invest him with the additional capacity of a juror, in which he hears the evidence, subject to the right of the parties to have him, in his other capacity of Judge, pass upon its competency when offered. *Puffer v. Baker,* 104 N. C., 148. Another method provided by statute (The Code, sec. 420) of substituting by agreement of parties a different mode of trying issues of fact raised by the pleadings from that which either has the right to demand, is submission to referees. When the consent of the parties is once given to the substitution of a refree for the jury, the order of reference cannot be annulled and the right of trial by jury reinstated, except by the same authority which authorized its entry upon the minutes—the concurrent consent of all the parties. *Smith v. Hicks,* 108 N. C., 251; *Perry v. Tupper,* 77 N. C., 413. The referee, once appointed, is, like the Judge when there is a waiver of jury trial, invested with the powers of both judge and jury, but with the difference that the authority is con-
(519) ferred upon the referee not for a particular term or limited time, but until the final hearing of the cause. The difficulty of

examining or taking long and often complicated accounts in the progress of a trial, so as to enable the jury to reach a satisfactory conclusion in reference to the bearing of such evidence upon their verdicts, rendered it necessary also to confer upon the trial Judge by statute (The Code, sec. 421) the power to order a compulsory reference for the purpose of making calculations and presenting results instead of *data,* which could not be readily made available by a jury. The preliminary question whether a party is entitled to a decree, as it was called under the former practice, *quod computet,* must be settled by the court, and when once determined without exception can never be raised again. *Barrett v. Henry,* 85 N. C., 321. In *Kluttz v. McKenzie,* 65 N. C., 102, *Chief Justice Pearson* delivering the opinion of the Court, it was held, without adverting to the application of the constitutional guarantee as well to controversies which under the former pactice would have been suits in equity as those that would have been actions at law, that a party had no right to demand a trial by jury of an issue involving a complicated account. But the Court subsequently called attention to the inadvertence, and declared the ruling modified (*Armfield v. Brown, supra; Lippard v. Roseman,* 70 N. C., 34, and 72 N. C., 427) so as to concede the right, if not barred by failure to demand it in apt time. The correctness of the ruling in the case at bar depends upon the questions when and how a constitutional right may be waived.

"Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and consent to such action as would be invalid if taken against his will." Cooley Const. Lim. (6 Ed. (520) by Angell), 214. Not only has the Legislature declared how a party may waive the benefit of the provision of the Constitution in reference to trial by jury, but the courts have from time to time declared that the waiver may be made by conduct inconsistent with the intent to insist upon it. Where a party omits at an opportune moment to declare his purpose to claim the constitutional protection and thereby so misleads his adversary as that to insist upon it at a later stage of the proceeding would place the opposing party at a disadvantage by delaying the adjudication of his rights, it is competent for the courts to so far restrict and regulate the right as to prevent needless or wanton infringements upon the rights of others. Therefore, though it is error to order a compulsory reference until a trial is first had and a finding adverse to the pleader returned upon an issue raised by a plea in bar, the failure to object when the order is made is deemed a waiver of the right. Silence under such circumstances is inconsistent with the purpose to insist upon the settlement of an issue decisive of the whole con-

troversy by any other tribunal than the referee, and to allow a party to do so would be to give him the chance of prevailing by a second mode of trial after his adversary had been induced by his silence to incur costs, often very heavy, in meeting him in another forum, to which he had not objected. *Clements v. Rogers,* 95 N. C., 248; *Grant v. Hughes,* 96 N. C., 177. For a like reason, where a party promptly insists upon reserving his right and causes his objection to be entered of record when the compulsory order of reference is made, he may still waive by failing to assert it in his exceptions to the referee's report. *Harris v. Shaffer,* 92 N. C., 30; *Yelverton v. Coley,* 101 N. C., 248. The law implies that the party objecting will give timely notice of the specific
(521) points upon which he elects to demand a trial by jury instead of submitting to the findings of the referee, in order that the opposing party may know how to prepare to meet him by summoning the material witnesses, if necessary. Any other ruling would authorize the perversion of a provision of the organic law to the purpose of subjecting others to delay and needless expense. It is the duty of the courts, on demand properly made, to enforce a constitutional guarantee of right, but not in such a manner and to such an extent as to unnecessarily inflict injury on others. The courts must often declare, when there are conflicting rights contended for, when and how it is reasonable for one to demand the protection of a provision even of the organic law. The problems which have confronted the courts at every stage in the development of the common law have grown out of the application of the golden rule of that system, that one must so use his own property as not to injure another. We have here the application of the rule to one's birthright to the specific protection promised him by the Constitution. The application of this doctrine of the waiver of constitutional rights by this Court is not confined to cases of this kind. The principle has been held to be an all-pervading one. *R. R. v. Parker,* 105 N. C., 246; *Spencer v. Credle,* 102 N. C., 68; *Yelverton v. Cooley, supra.* We think that the court erred in holding that the defendants were entitled to a jury trial upon any exception which did not embody a definite and specific demand for a trial by jury upon that particular exception. It was error also to hold if such specific demand had been made that the right extended further than the issues "raised by the pleadings." *Yelverton v. Cooley, supra.* The referee submitted findings of fact numbered from one to fourteen, some of which were decisive issues raised by the pleadings, and some of which related to questions of
(522) fact not raised. The demand, made at the end of the exceptions filed, was a general one for a trial upon each and every issue raised, not by the pleadings, but by the exceptions to the report, how-

ever immaterial. It was in utter disregard of the right of the plaintiff to such notice as would enable him to prepare his case for trial. We have held in *McKinnon v. Morrison,* 104 N. C., 354, that exceptions to a Judge's charge will not be considered on appeal unless they are specific. The provision of The Code upon which that rule was predicated had been previously declared to be "but a legislative expression of a pre-existing rule of practice," which was founded upon the reason that it was "conducive to fair trials," in part at least, because it enabled counsel to prepare for the argument of the case. *Bost v. Bost,* 87 N. C., 477. It is very important, if not essential, in the preparation for trial of the facts that a party should have some definite idea of the range of the proposed investigation. It is with a view to facilitate preparation and prevent surprise that only the issues raised by the pleadings are to be submitted, and that the statute provides for the tender of issues by counsel. This Court has under the Constitution the right to impose reasonable rules of practice in the Supreme Court, and even the Legislature (it has been held) is powerless to invade its province in this respect. *Horton v. Green,* 104 N. C., 400. It is but a reasonable requirement that the demand for a jury trial should be deemed waived if not made by specific exception and limited to the points upon which there has been a joinder in the pleadings, though this limit is fixed as to the manner of making the demand, not by virtue of any authority in this Court to prescribe rules of practice, but in order that both parties may be protected in the assertion of conflicting rights. By the enforcement of such a rule of practice the protection of a constitutional right to trial by jury is made consistent with the other fundamental (523) principle that every litigant is entitled to a fair trial and to such definite notice of what is involved in the controversy as will enable him by diligence to avail himself of the means within his reach for the redress of wrong or the protection of right on his part. For the reasons given we conclude that there was

Error.

Cited: Collins v. Young, 118 N. C., 266; *Taylor v. Smith, ib.,* 128; *Driller Co. v. Worth, ib.,* 747; *Whitley v. R. R.,* 119 N. C., 728; *S. v. Mitchell, ib.,* 786; *Wilson v. Featherstone,* 120 N. C., 488; *Belvin v. Paper Co.,* 123 N. C., 150; *Kerr v. Hicks,* 129 N. C., 145; *Lumber Co. v. McPherson,* 133 N. C., 291; *Roughton Co. v. Sawyer,* 144 N. C., 767; *Ogden v. Land Co.,* 146 N. C., 444; *Bruce v. Mining Co.,* 147 N. C., 644; *Riley v. Sears,* 151 N. C., 188; *Pritchard v. Spring Co., ib.,* 250; *Simpson v. Scronce,* 152 N. C., 594; *Mirror Co. v. Casualty Co.,* 153 N. C., 374; *Rogers v. Lumber Co.,* 154 N. C., 109; *Wynne v. Bullock,*

ib., 383; *Ford v. Lumber Co.*, 155 N. C., 352; *Keerl v. Hayes*, 166 N. C., 556; *Alley v. Rogers*, 170 N. C., 540; *Marler v. Golden*, 172 N. C., 825; *Bradshaw v. Lumber Co., ib.*, 220; *Ziblin v. Long*, 173 N. C., 236; *Drug Co. v. Drug Co., ib.*, 514; *Godwin v. Jernigan*, 174 N. C., 76; *Robinson v. Johnson, ib.*, 273; *Lee v. Thornton, ib.*, 293; *Baker v. Edwards*, 176 N. C., 231.

E. K. BYRD ET AL. V. C. H. BYRD, ADMINISTRATOR OF CHARLES BYRD.

Administrator, Action Against—Rights of Heirs to be Made Parties—Plea of Statute of Limitations.

1. The heirs or next of kin of a decedent have no right to be made parties to an action on account against the administrator, although they allege collusion between the plaintiff and the administrator.

2. Where, at the term at which the action stood for trial, the heirs of the decedent were, by consent of the administrator, made parties to an action by a creditor against him to recover a debt alleged to be due by the decedent, such consent by the administrator being upon the condition that they should not plead the statute of limitations, they had no right to interpose such plea, or any other, without the consent of the court.

ACTION to recover judgment for $268.00, being an action simply to ascertain the debt, and heard by *Timberlake, J.*, at Spring Term, 1895, of YANCEY, on a motion made by J. C. Byrd and A. J. Burton, the husbands of two of the heirs at law of the defendant's intestate, C. H. Byrd, to make the heirs at law of said intestate parties defendant in said action and allow them to defend the same. The motion was resisted by both plaintiffs and defendant for the reason that the said (524) heirs at law were in no way necessary parties. They both offered to consent that the said heirs at law might be made parties and make any defense other than plead statute of limitations, which offer the said A. J. Burton and J. C. Byrd declined.

His honor made the following order:

"The heirs at law of Charles Byrd, the intestate of defendant, administrator, having asked leave of court to make themselves parties defendant, and the court having ordered that the heirs be allowed to make themselves parties defendant on condition that they do not set up as a defense the statute of limitations, and the said heirs having re-

fused to become parties on such condition: It is ordered that the request of said heirs be not granted, and that they shall not be made parties defendant to this action."

To this refusal the said Burton and J. C. Byrd excepted and appealed.

E. J. Justice for plaintiffs.
No counsel contra.

FURCHES, J. This is an action for the recovery of money alleged to be due by account. The defendant, C. H. Byrd, is the administrator of Charles Byrd, and the appellants are two of the heirs and next of kin to said Charles. At the trial term they filed an affidavit in which they alleged that the claim sued on is barred by the statute of limitations; that defendant had not pleaded this defense, and alleged fraud and collusion between plaintiffs and defendant, and asked to be allowed to make themselves parties defendant and that they be allowed to file an answer and defend the action.

To this affidavit and motion to be made parties the defendant, without admitting affiants' right to be made parties, agreed that they might be so made, as they had alleged fraud and collusion with (525) plaintiffs, and that they might put in any defense they pleased except the statute of limitations; that this he would not agree they should do, as he knew the claim sued on was a just debt and should be paid.

Upon this statement of the defendant administrator, the court stated to affiants that they might make themselves defendants and make any defense they had to the claim except the statute of limitations; the court would not allow them to plead the statute of limitations and defend on that ground. Affiants declined to make themselves parties upon the terms proposed by the administrator and adopted and proposed by the court as above set forth, and appealed to this Court.

We can see no ground upon which they can maintain this appeal. Though they were heirs at law and next of kin to the intestate, Charles, they were strangers to this action and had no more right to make themselves parties than they would have had if the intestate, Charles, had been living and had been sued for this claim instead of his personal representative. The Code, sec. 1507; *Spier v. James,* 94 N. C., 417. They had no interest in the subject-matter of this action, and therefore no right to demand that they should be made parties. *Colgrove v. Koonce,* 76 N. C., 363; *Wade v. Saunders,* 70 N. C., 270.

To have entitled them to this right, they must not only have been interested in the subject-matter, but jointly interested in the subject of litigation, so as to make them necessary parties to a final determina-

tion. *Jones v. Asheville,* 116 N. C., 817; *Lytle v. Burgin,* 82 N. C., 301. In actions of ejectment against a tenant the landlord may be allowed to make himself a party and defend the possession of his tenant, as he is the principal party interested. *Bryan v. Kinlaw,* 90 N. C., 337, and many other cases. But these cases do not conflict (526) with the reason or the rule announced in *Colgrove v. Koonce, supra,* and that line of cases. But if affiants had made themselves parties, as the time for pleading allowed by law had passed, they had no right to plead without the permission of the court. And the ruling as to this was a matter of discretion, and this Court has no right to review the same. *Turner v. Shuffler,* 108 N. C., 642. But, as affiants had no right to make themselves parties, they had no right to appeal. And their appeal must be dismissed.

Appeal dismissed.

Cited: Best v. Best, 161 N. C., 516; *Barnes v. Fort,* 169 N. C., 435; *McNair v. Cooper,* 174 N. C., 567.

NATIONAL BANK OF ASHEVILLE v. J. S. BRADLEY ET AL.

Inland Bill—Accepted Draft—Notice to Drawer of Nonpayment—Protest Not Necessary—Reasonable Notice.

1. A draft having been accepted, the drawee becomes primarily liable and in the event of dishonor notice must be given to all who are secondarily liable as drawer and endorser.

2. If the paper is in fact accommodation paper then, notwithstanding its form, the drawee is *primarily* liable and not entitled to notice, but the burden of showing this is upon the holder.

3. In the case of an inland bill protest is not necessary, but notice of dishonor must be given with the same promptness as of a protest.

4. Reasonable notice of dishonor of an inland bill is one which is sent by the first post after the day of dishonor.

ACTION tried at December Term, 1894, of BUNCOMBE, before *Boykin, J.*

On 10 October, 1891, the defendant Gilliam made his draft upon the Asheville Furniture and Lumber Company, payable to his (527) own order, of which the following is a copy:

"$400. ASHEVILLE, N. C., 10 October, 1891.

"Ninety days after date pay to the order of A. W. Gilliam four hundred dollars, value received, and charge the same to account of

A. W. GILLIAM.

"To Asheville Furniture and Lumber Co., Asheville, N. C."

On the same day the draft was duly accepted by the drawee, payable at the National Bank of Asheville. Soon thereafter Gilliam, for value, endorsed and delivered the draft to defendant Bradley, who, on 30 October, following, transferred and endorsed it to the plaintiff and received the money, less discount of six or eight per cent thereon.

The Asheville Furniture and Lumber Company failed about 1 November, 1891, and then became and has ever since remained insolvent. Defendant Bradley resided at Old Fort, in the county of McDowell, a station on the Western North Carolina Railway about 30 miles east of Asheville, and this fact was known to the plaintiff; the defendant Gilliam resided three or four miles from Old Fort, but neither he nor his address was known to the plaintiff.

The draft, not being paid at maturity, to-wit, on 11 January, 1892, on 13 January, 1892, was protested, and notice thereof was mailed to the defendant Bradley at Old Fort, who testified that he received it at about 4:30 P. M., on 13 or 14 January. Banking hours in Asheville began at 9 o'clock A. M., and closed at 4 P. M. There was but one mail each day to Old Fort, and the train which carried it left Asheville about 2 o'clock P. M., and it was the custom of the (528) bank to prepare its mail during business hours and at the close thereof to post it. This custom was not known to the defendants.

Upon receipt of the notice Bradley sent immediately for Gilliam, who went to Old Fort, where they had a conversation about the matter, in which Bradley showed Gilliam the notice and asked him if he had received one, and Gilliam replied he had not. A few days thereafter Bradley went to Asheville and had an interview with W. W. Barnard, plaintiff's president, in which he, Bradley, said that notice had not been sent Gilliam; thereupon a notice was sent Gilliam through the mail, which he received on 19 January. The notice was dated 11 January, but the post-mark of Asheville office on the envelope bore date of 18 January.

Gilliam was solvent at the time of the maturity of the draft and is yet solvent.

The following issues were submitted to the jury:

"1. Was said draft at its maturity duly presented to the drawee, the Asheville Furniture and Lumber Co., for payment?" This issue was answered by consent by the court.

"2. Was due notice of the nonpayment of the draft given to the defendant A. W. Gilliam

"3. Was due notice of the nonpayment of the draft given to the defendant J. S. Bradley & Co.?"

The plaintiff prayed the court to instruct the jury:

"1. If the jury find that the bill of exchange, or draft, was dated 10 October, 1891, and was payable 90 days from date, and banking hours in Asheville closed at 4 P. M.; that the train carrying the mail to Old Fort left Asheville at 2 o'clock P. M., and that notice of non-
payment was put into the office on 13 January addressed to
(529) the defendant Bradley at his usual place of residence, the
said notice was given within reasonable time, although Bradley may not have received it until the following day.

"2. The draft or bill of exchange being drawn by defendant Gilliam payable to his own order and endorsed by him, he is liable as upon a promissory note, and is liable without notice."

His Honor refused to give these instructions (to which plaintiff excepted), and instructed the jury that the plaintiff should have given notice to Gilliam and Bradley at the latest by the mail leaving Asheville on 12 January, and if it had not done so they were discharged from all liability thereon, unless they had waived notice by subsequent promise to pay.

To these instructions the plaintiff also excepted.

There was testimony offered by both plaintiff and defendants as to an alleged waiver of notice by subsequent conduct and promise to pay by the latter, but as there was no exception to his Honor's charge on that point, it is not set out.

The jury responded to the first issue "Yes"; and to the second and third issues "No."

Motion for new trial overruled, and judgment was rendered upon the verdict for defendants, to which plaintiff excepted and assigned the following errors on appeal:

"1. That the court refused to give the instructions prayed.

"2. That the court instructed the jury that notice given to Bradley was not due notice.

"3. That the court instructed the jury that defendant Gilliam was entitled to notice."

Davidson & Jones and W. W. Jones for plaintiff. (530)
J. H. Merrimon for defendants.

CLARK, J. The draft having been accepted, the drawee became primarily liable, and in the event of dishonor notice must be given to all those who are secondarily liable as drawer and endorsers. *Denny v. Palmer,* 27 N. C., 610; Tiedman Com. Paper, sec. 336; 3 Randolph Com. Paper, sec. 1238; 2 Daniel Neg. Inst., sec. 995; The Code, secs. 42 and 49. Notice of dishonor must be given to the drawer. *Brown v. Teague,* 52 N. C., 573. If it had been in fact accommodation paper, then, notwithstanding the form of the paper, the drawer would have been primarily liable and not entitled to notice, but the burden to show this is on the holder, and there being no evidence to that fact the form of the paper governs, and the drawer was entitled to notice. It is true that, being an inland bill, protest was not necessary, but notice of dishonor must be given with the same promptness as of a protest. *Hubbard v. Troy,* 24 N. C., 134; *Bank v. Lutterloh,* 95 N. C., 495; *Shaw v. McNeill, ib.,* 535. The insolvency of the drawee does not excuse the holder for failure to give notice to the parties secondarily liable. *Denny v. Palmer, supra;* 2 Daniel, *supra,* secs. 1171, 1172. The Law Merchant always required notice to be given to the parties secondarily liable in reasonable time, what was reasonable time being a question of law. *Brittain v. Johnson,* 12 N. C., 293. This leading to endless litigation as to what was reasonable notice under varying circumstances, it has now been long settled that reasonable notice is one which is sent by the first post after the day of dishonor, and when there is a daily mail, as here, this necessarily means the next day, if the next day's mail does not leave before (531) business hours, as it did not in this case. The acceptance not having been paid at maturity on 11 January, notice of dishonor should have been mailed on the 12th. *Hubbard v. Troy* and *Denny v. Palmer, supra;* 2 Daniel, *supra,* sec. 1039; 3 Randolph, *supra,* sec. 1260; 1 Parson Bills and Notes, 507; 3 Kent Com. (13 Ed.), 106, 107; Tiedman, *supra,* sec. 337. In the charge of the Court below there was

No error.

Cited: Bank v. Warlick, 125 N. C., 596.

W. A. BLACKBURN ET AL. v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

Trial—Evidence—Admissions by Pleadings.

1. It is not error to exclude evidence as to a fact admitted in the pleadings; hence:

2. Where, in an action by plaintiffs (husband and wife) to recover on a fire policy, it was alleged and admitted by the answer that the wife owned the property insured and that the husband was the assignee of the policy by defendant's consent, and on the trial the only issues were, "Did the plaintiffs conspire to burn the property"? and, "Did the husband wilfully burn it"? it was not error to exclude, as evidence offered by defendant, the assignment on the policy, it having been admitted by the pleadings.

ACTION tried before *Robinson, J.*, and a jury, at December Term, 1895, of Buncombe.

There was judgment for the plaintiffs, and defendant appealed. The facts are stated in the opinion of *Chief Justice Faircloth.* (For former appeal, see 116 N. C., 821).

J. H. Merrimon, C. M. Stedman and Moore & Moore for (532) *plaintiffs.*

Burwell, Walker & Cansler and A. M. Fry for defendant.

FAIRCLOTH, C. J. At the last term (116 N. C., 821) the judgment in this case was affirmed in all respects, except that a new trial was granted only as to the 8th and 9th issues, to-wit: "Did plaintiffs agree, conspire and confederate together to burn the hotel and furniture?" "Did W. A. Blackburn wilfully burn or cause to be burned the hotel and furniture described in the complaint?"

On the trial of these issues, from which this appeal comes, the defendant conceded that the burden of proving the affirmative of the issues was upon it, and offered in evidence the assignment on the policies, without stating for what purpose. The court excluded the evidence, and the defendant offered no other evidence. The court directed the jury, as the defendant had introduced no evidence, to answer each issue "No," which they did.

In this Court the defendant excepts because the evidence offered was ruled out, insisting that that would constitute a basis of an argument as to the motions of the plaintiffs bearing on the 8th and 9th issues.

The fact appearing from the assignment, to-wit, that W. A. Blackburn was the assignee of the policies (by consent of the defendant) and that C. A. Blackburn was the owner of the property insured, was distinctly alleged and admitted in the pleadings, and was relied upon in the former trial as a main ground of defense, and was so argued in this Court. There was then no need to prove a fact agreed upon or admitted in the record, and the rejection of the evidence offered for that purpose was not error. No reason appears why a judgment *non obstante veredicto* should have been rendered in favor of the defendant, as urged by it. This Court could consider no (533) argument except on questions arising out of the last trial. All other matters were *res judicata*. *Gordon v. Collett*, 107 N. C., 362. Affirmed.

IN RE FRANK E. ROBINSON.

Contempt of Court—Publication of Court Proceedings—Trial for Contempt.

1. The power of a court to punish summarily for contempt, for an act committed in its presence or so near its sittings as to disturb its proceedings, or that is calculated to disturb the business of the court, impair its usefulness or to bring it into contempt, cannot be taken away from the court by legislation.

2. The power of the courts, which existed at common law, to punish for contempt offenders committing acts not in the presence of the court, but calculated and intended to impair the usefulness of the courts and to bring them into disrespect, may be regulated by legislation.

3. Where, in a proceeding for contempt in publishing a report of a case tried in court, the respondent in his answer to the rule stated that he believed the statement published by him to be correct and that it was not made to bring the court into contempt, he was entitled to have the issue tried, not by a jury but by the court, if there was nothing on the face of the publication to show that it was grossly incorrect or calculated to bring the court into contempt.

4. As to the intent with which a publication was made, the sworn answer of the respondent is conclusive.

PROCEEDINGS to punish for contempt Frank E. Robinson, editor of *The Asheville Citizen*, heard before *Ewart, Judge* of the Western Criminal Circuit Court, at July Term, 1895, of the Criminal Court of BUNCOMBE.

His Honor issued the following order:

"It is ordered by the court that the following notice shall (534) be issued *instanter* and served on Frank E. Robinson, editor, etc., of *The Asheville Daily Citizen,* and is in words and figures as follows: In *The Citizen,* an afternoon paper published in the City of Asheville, under date, 24 July, 1895, appears an editorial entitled 'The Removal,' In this appears the following:

" 'The reasons that *Judge Ewart* gave for the removal of the cause were founded on the unintentional error, corrected by the context, which *The Citizen* made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that in their opinion Sumner could not obtain an impartial trial in Buncombe. The error was corrected the next day; but if it had gone uncorrected it could have misled no man who had sufficient intelligence to read and comprehend the report of the testimony; the mistake is too shallow and too flimsy to deserve the consideration *Judge Ewart* seems to have given it.

" 'If *Judge Ewart* be justified in remvoing the case, any case of importance can always be removed, for anyone of standing can always get friends to say that in their opinion the county wherein the crime is committed is not the proper place to try the accused.

" '*Judge Ewart* knows very well that it is far beyond the power of the Lance family, or of any other family, or of an unintentional error in *The Citizen,* to so mould the public sentiment of Buncombe County as to make it impossible for one of her citizens to obtain justice in a trial for his life.

" 'The statute requires the court to be satisfied that justice cannot be done before a case can be removed. How can an intelligent citizen come to the conclusion that in this case this court was satis- (535) fied on this point? It is now *Judge H. G. Ewart's* work to satisfy the people of Buncombe that he has acted wisely in this matter.

" 'The removal of the case to Henderson is unnecessary, expensive, and a reflection on the intelligence of Buncombe County.'

"It appearing to the court this publication is a grossly inaccurate report of the proceedings of this court had in this cause, to-wit, the case of State against Jesse Sumner, and was made with intent to misrepresent this court and to bring it into contempt and ridicule, it is ordered that a rule issue against Frank E. Robinson, editor of *The Citizen,* to appear before this court on Saturday next at 9 A. M. and show cause why he should not be attached for a contempt of this court. This 25th of July, 1895."

The defendant answered as follows:

"1. Frank E. Robinson, answering the above-entitled rule served upon him, after being duly sworn, says:

"That he admits that he is the editor of the *Daily Citizen,* as alleged in said rule, and he further says the he published the article and publication which appeared in the said *Daily Citizen* under date 24 July, 1895, entitled 'The Removal.'

"2. That, as affiant is informed and believes, the said publication is not a grossly inaccurate report of the proceedings of this court had in the case of the State against Jesse Sumner, and that he makes this denial on information and belief for the reason that he was not in court when said proceedings were had, and wrote said publication in good faith from information received by him from persons who were present and in whom this affiant had and now has great confidence, and that he then believed and now believes said publication contains a true, full and fair report of the proceedings had in said case with reference to its removal, and that said article and publication was written and made in the exercise of the constitutional rights of the press to fairly, justly and in good faith inform the pub- (536) lic of the acts and doings of public officers; and fairly, justly and in good faith to criticise the action of public officers; and that said article and publication does not contain any comment as applied to a public elective office not allowed by the freedom of the press, as understood by this affiant, and as defined, as affiant is advised and believes, in the Constitution of the United States and the State of North Carolina.

"3. Affiant states that said publication was not made with intent to misrepresent this court or to bring this court into contempt and ridicule."

The following is the judgment of the court in this case, and is in these words and figures, as follows:

"STATE OF NORTH CAROLINA,
"Buncombe County.

Criminal Circuit Court, July Term, 1895.

"State
v. } Rule to Show Cause.
"Frank E. Robinson,

"This proceeding having been brought before the court for hearing upon the answer of the respondent, Frank E. Robinson, to the rule issued against him,

"His Honor entered the following judgment:

"It is considered that the answer is not responsive to the rule.

"Whereupon it is adjudged by the court that the respondent, Frank E. Robinson, is guilty of a contempt of this court, and is hereby adjudged to pay a fine of two hundred and fifty dollars, and further, that he be imprisoned in the common jail of Buncombe County for the space of thirty days, and that he pay the cost of this proceeding, to be taxed by the Clerk."

From the foregoing judgment the respondent, Frank E. Robinson, after exception appealed.

(537) *Moore & Moore, Locke Craig and J. S. Adams for respondent. W. W. Jones and J. M. Moody contra.*

FURCHES, J. It is a delicate matter for a court to sit in judgment when it is in any way connected with the matter under consideration. It is contrary to the spirit of our institutions, and should only be done when the public good and the public service demand it; then it should be done promptly, firmly and without personal consideration.

Our courts constitute one of the co-ordinate departments of our government, established by the Constitution and the legislation thereunder. They are not only a part of the government, but are necessary to the enforcement of the law and the protection of the lives, the liberty and the property of our citizens. This they cannot do without the power to protect themselves by enforcing order and respect for the court and obedience to its mandates. To this end it is clothed with inherent power to punish summarily for any act committed in its presence or so near its sittings as to disturb the proceedings of the court in violation of its rules or orderly conduct, or that is calculated to disturb the business of the court, or to impair its usefulness, or to bring it into disrespect and contempt. *S. v. Mott,* 49 N. C., 449; *Ex parte Schenck,* 65 N. C., 353; *Ex parte Moore,* 63 N. C., 397; *In re Deaton,* 105 N. C., 59, and case cited.

These powers, it is conceded, cannot be taken from the courts by legislation. But at common law there were many other acts, not committed in the presence of the court, which were considered
(538) as calculated and intended to impair the usefulness of the courts and to bring them into disrespect, and which the courts treated as contempts and punished the offenders. And it is held that this class of contempt may be regulated and prescribed by legislation. *Ex parte Schenck, supra,* and cases cited in the argument in that case.

The case we are now considering falls under this class, and whatever may have been the law before, the act of 4 April, 1871, governs this

case. *Ex parte Schenck, supra.* It is contended that respondent violated section 648, subsection 7 of The Code in publishing the article set out in the rule to show cause, and is on that account guilty of contempt. This section is as follows: "The publication of grossly incorrect reports of the proceedings in any court, about any trial or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for contempt in publishing a true, full and fair report of any trial, argument, decision or proceedings had in court."

The only part of the article complained of that seems to undertake to give a report of the proceedings of the court is as follows: "The reasons that Judge Ewart gave for the removal of the cause were founded on the unintentional error, corrected by the context, which *The Citizen* made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that in their opinion Sumner could not obtain an impartial trial in Buncombe." The respondent, in his answer to the rule, says this statement is not grossly incorrect and that he believes it is a full and true report of the proceedings of the Sumner case.

There is nothing inherent in this statement that shows that it is grossly incorrect; the respondent says that, as he is informed and believes, it is correct. The answer makes the issue as to (539) whether it is correct or not, and while we do not agree with the counsel for respondent that he was entitled to have it tried by a jury (if he had demanded a jury, which he did not), yet we are of the opinion that he was entitled to have this issue tried by the court, unless the court chose to submit it to a jury; because, if it was a correct statement of the facts, then under the statute it was no contempt to make the publication. It does not appear that the matter was tried in any way, the court simply holding that respondent's "answer was not responsive to the rule," and adjudged him guilty of contempt.

We do not see that that part of the publication purporting to give an account of the proceedings, of itself, is calculated to produce disrespect and contempt for the court; but, if it had been found to be grossly incorrect, pointed as it is by the comments that followed, we do not say it would not amount to contempt under the statute.

But we must hold that, under the statute of 1871, the respondent cannot be punished for contempt for the language used in his comments upon the court, that we think were calculated and must have been intended to bring the court into ridicule and contempt only as they might point and furnish evidence of the intent with which the misrepresentations as to the trial were made, if it had been found they were grossly erroneous.

It is our duty to declare the law as we find it, and it is not within our province to say whether it is wise or not. There are two sides to it—one one side the protection of the citizen, on the other the usefulness and efficiency of the courts. The most of our citizens and many of our newspaper men recognize the delicate position a judge occupies—that his position neither allows him to defend himself physically (540) nor through the public press against false and slanderous charges, and these do not consider it manly to make such charges—and no judge ought to object to just and fair criticism by the press.

But respondent also puts his defense on another ground; he says, under oath: "3. Affiant states that said publication was not made with intent to misrepresent this court or to bring this court into contempt and ridicule."

It is not for the court to judge whether this was false or true; the law made him his own judge—his own trier—and as to how well he did this he will answer at another bar; we must take his verdict. *Ex parte Biggs,* 64 N. C., 202.

There is error in the judgment.

Error.

Cited: In re Briggs, 135 N. C., 129; *In re Parker,* 177 N. C., 468.

(541)

R. A. HAVENER v. WESTERN UNION TELEGRAPH COMPANY.

Telegraph Company—Delay in Delivering Telegram—Negligence—Damages—Mental Anguish.

1. Where the nature and importance of a telegraphic message appear on its face and, through negligence of the telegraph company, the massage is not delivered in a reasonable time, damages may be recovered for the mental anguish caused thereby.

2. Where, in an action for delay in delivering a telegram to plaintiff that his mother was not expected to live and to come at once, the allegation was "that by reason of said gross negligence and wilful conduct of the defendant in the failure to deliver the message within said reasonable time this plaintiff has suffered great damages, both in body and mind, to-wit, the sum of $2,000," and the evidence was conflicting as to whether plaintiff could have reached his mother's bedside before her death, even if the telegram had been promptly delivered, but

the jury found that plaintiff was injured by defendant's negligence: *Held*, that the pleading was sufficiently broad to cover any damages, and the court properly refused an instruction to the jury that in no event could plaintiff recover more than nominal damages.

ACTION for damages, tried before *Shuford, J.*, and a jury, at August Term, 1894, of BUNCOMBE.

There was a verdict for the plaintiff, by which he was awarded $600 in damages, and from the judgment thereon defendant appealed. The material facts appear in the opinion of *Chief Justice Faircloth.*

Moore & Moore and F. A. Sondley for plaintiff.
Jones & Tillett and Strong & Strong for defendant.

FAIRCLOTH, C. J. "Lincolnton, N. C., 18 October, 1892. R. A. Havener, Asheville, N. C.: Your mother not expected to live. Come at once. Answer. "A. B. HAVENER."

This is an action for damages for failure to deliver the above message within a reasonable time. The usual route was by railroad from Asheville to Newton, and then into the country near Lincolnton. It was shown that the message was not delivered until 3 o'clock on the same day, four or five hours after it was received at Asheville, where the sendee lived, and also that the last train on that day left the latter place at 2:30 P. M., and that there was no other train until 9 A. M. next day. Newton is more than 100 miles from Asheville. The defendant alleged that it made every reasonable effort to find the sendee and deliver the message. His Honor instructed the jury "That if they shall find that the defendant, after receiving the message, placed it in the hands of a carrier, and the carrier called and inquired of the hotels and of citizens as to the place of Havener's business or his whereabouts and did not consume unreasonable time in so doing before asking a better address, and after such inquiry failed to find him or his place of business in time for the plaintiff to take the 2:30 (542) train for Newton, the defendant exercised reasonable diligence in delivering the message, and the failure to find the plaintiff or his place of business in time for the train was not negligence, and the plaintiff cannot recover." This was a proper charge, and was as much of the defendant's request as it was entitled to. The finding of the jury on this question was against the defendant, so that negligence in the delivery is established.

The plaintiff arrived next day, some time after the death of his mother. The evidence was conflicting as to whether he could have ar-

rived before her death or not, provided he had taken the 2:30 P. M. train on the 18th. The defendant's contention is that the plaintiff could not have arrived at his mother's bedside before her death or total unconsciousness if the message had been promptly delivered, and as he had sued for such disappointment only, he could recover only nominal damages, and requested the court to instruct the jury accordingly. The plaintiff's 7th allegation was in these words: "That by reason of said gross negligence and wilful conduct of the defendant in the failure to deliver the message within said reasonable time, this plaintiff has suffered great damage, both in body and mind, to-wit, the sum of $2,000." This allegation is broad enough to embrace any damage to which the plaintiff in law was entitled. The second issue, "Was the plaintiff injured by such negligence on the part of the defendant?" was answered "Yes" by the jury. The verdict of the jury is conclusive on all material facts submitted, provided it was rendered under proper instructions from the court. His honor properly refused to instruct the jury that in no aspect of the case could the plaintiff recover more than nominal damages, as he was requested to do.

The defendant requested the court to charge, and the court did charge the jury "(1) That if plaintiff could not have reached (543) his mother before her death or unconsciousness, even if the message had been promptly delivered, the jury must take that fact into consideration in diminution of the plaintiff's damages. (2) That the mental anguish which the plaintiff would have suffered on account of his mother's death, if he had been with her in her last hours, cannot be considered in assessing damages in this case. (3) That in no aspect of the case can the jury award punitory or vindictive damages." It is settled that the plaintiff may recover compensation for the mental anguish inflicted on him by the negligence of the defendant. *Young v. Telegraph Co.*, 107 N. C., 370. The evidence on that question was submitted to the jury.

When the nature and importance of the telegraphic message appears on its face, as it does here, and through negligence it is not delivered in a reasonable time, damages may be recovered for the mental anguish caused thereby. *Sherrill v. Telegraph Co.*, 116 N. C., 655.

Several other exceptions appear in the record, but all were abandoned or found to be unimportant except those we have considered. We find no error in the proceeding below.

Affirmed.

Cited: Cashion v. Tel. Co., 123 N. C., 270; *Kennon v. Tel. Co.*, 126 N. C., 235, 236; *Helms v. Tel. Co.*, 143 N. C., 394.

(544)

THE FRIEDENWALD COMPANY v. ASHEVILLE TOBACCO WORKS.

Corporations—Transfer of Property and Franchise by a Corporation to a New One with Same Stockholders—Liability of New Corporation for Contracts of Old—Complaint—Amendment—Fraud—Necessary Parties.

1. Where a corporation engaged in business transfers its entire property, rights and franchises to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change.

2. Where such novation arises, a complaint against the new corporation, alleging indebtedness on its part growing out of contracts with the old company, may be amended by alleging the history of the merger without being amenable to the objection that it sets up a new cause of action.

3. Where an old corporation is by a transfer of all its property, franchises and privileges merged into a new corporation, with the same stockholders and directors as the old, which assumes all the liabilities of the old corporation, section 667 of The Code, providing for a continuance of a corporation for three years after its charter expires to wind up its business, does not apply so as to make the old corporation a necessary party to the action against the new.

4. Where, by merger of an old into a new corporation a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name.

5. In an action against a corporation for specific performance of a contract, the defense that it is not in writing with the corporate seal attached or signed by an officer (as required by section 683 of The Code), must be taken advantage of by plea and not by demurrer.

6. In an action against a corporation charged to be fraudulently in possession of the assets of another corporation which had been merged into it, the officers of the corporation are not necessary parties.

ACTION heard, on demurrer to the amended complaint, before (545) *McIver, J.*, at Spring Term, 1894, of BUNCOMBE. The demurrer was overruled, and defendant appealed.

The amended complaint was as follows:

"1. That on or about 20 January, 1892, The Asheville Tobacco Works, a corporation chartered and organized under the laws of the State of North Carolina, contracted in writing with the plaintiff, and so bound and obligated itself unto him, to purchase, and by said contract in writing did purchase, from the plaintiff one hundred and fifty thousand (150,000) 'Asheville Air Tens' cigarette boxes, and eight hundred and fifty thousand (850,000) 'Junaluska Tens' cigarette boxes, at the price of $1.33 per thousand boxes, and five hundred thousand (500,000) 'Asheville Air Twenties' cigarette boxes, at $1.75 per thousand boxes, and in writing agreed, and so bound itself unto the plaintiff, to pay for said boxes, at the prices above set forth, within sixty days from their shipment.

"2. That thereafter, to-wit, on 25 February, 1892, the said The Asheville Tobacco Works contracted in writing with the plaintiff, and so bound and obligated itself unto him, to purchase, and by said contract in writing did purchase, from the plaintiff forty thousand pasteboard boxes, commercially known as packers or 'cartons,' at the price of $24 per thousand boxes, and bound and obligated itself unto the plaintiff to pay for said 'packers' or 'cartons,' at the said price, within sixty days from the date of their shipment.

"3. That, as the plaintiff is informed and believes, on or about (546) 23 March, 1892, and after the dates hereinbefore mentioned, the said The Asheville Tobacco Works, by resolution of and other actions of its stockholders and board of directors, transferred all of its assets of every kind and description, including its capital stock, which was $50,000, without any actual or *bona fide* consideration other than is hereinafter mentioned, to the defendant, The Asheville Tobacco Works and Cigarette Company, a corporation chartered and organized under the laws of the State of North Carolina on or about 22 March, 1892, and by further resolution or action of its stockholders and board of directors dissolved the said corporation, The Asheville Tobacco Works.

"That, as plaintiff is informed and believes, this action was taken for the purpose of merging the said The Asheville Tobacco Works into the defendant corporation, The Asheville Tobacco Works and Cigarette Company, and for the purpose of consolidating the two said corporations to enable them under the name of the defendant corporation to increase their capital stock and to engage in a wider range of business than permitted by the charter of The Asheville Tobacco Works.

"That, as plaintiff is informed and believes, in consideration of the transfer as set forth above in this paragraph, the defendant, The Asheville Tobacco Works and Cigarette Company, issued to the stockholders of The Asheville Tobacco Works two shares of stock of The Asheville Tobacco Works and Cigarette Company for each share of The Asheville Tobacco Works held by said stockholders, said shares of stock being in each corporation of the par value of $100 per share; and further, as plaintiff is informed and believes, the defendant, The Asheville Tobacco Works and Cigarette Company, agreed to and did assume the debts and liabilities of the said The Asheville Tobacco Works, including the debt and liability of the latter (547) to the plaintiff.

"That, as plaintiff is informed and believes, The Asheville Tobacco Works and Cigarette Company had at the time of said transfer the same officers and stockholders as The Asheville Tobacco Works had at the time of its dissolution; and said The Asheville Tobacco Works and Cigarette Company, as did also its stockholders and officers, had full and complete knowledge of all the debts and liabilities of The Asheville Tobacco Works, including the debt and liability of this plaintiff, and is therefore in law, as it is advised, under the circumstances of said transfer to it of the property of The Asheville Tobacco Works, bound for the payment of all debts and liabilities of The Asheville Tobacco Works, without the said The Asheville Tobacco Works and Cigarette Company formally having assumed the same.

"4. That just prior to and about the time of the said transfer stated in the preceding paragraph, the plaintiff was informed in writing by The Asheville Tobacco Works of the proposed change in the style of the corporation, and requested to alter the engravings on the cigarette boxes and packers, or 'cartons,' so ordered as hereinbefore set forth, to correspond to the new name of the corporation, The Asheville Tobacco Works and Cigarette Company, and the plaintiff did make such requested alterations, for which it has charged the defendant the sum of fifteen dollars, which charge is reasonable and just.

"5. That thereafter, to-wit, on or about 21 April, 1892, the said plaintiff sold and delivered to the defendant a bill of merchandise consisting of five reams of wrapping paper, at the value of and at the agreed price of twelve dollars and fifty cents ($12.50), which sum said defendant agreed to pay to the plaintiff for said bill of merchan- (548) dise within sixty days from said date.

"6. That thereafter, to-wit, on or about 16 May, 1892, the said defendant contracted in writing with the plaintiff, and so bound and obligated itself unto it, to purchase, and by said contract in writing did pur-

chase, from the plaintiff five thousand (5,000) 'Junaluska showcards,' or hangers, at the price of $210, and agreed, and so bound itself unto the plaintiff, to pay for said showcards within sixty days from the date of shipment.

"7. That between 21 April, 1892, and 21 July, 1892, the plaintiff shipped to the defendant, The Asheville Tobacco Works and Cigarette Company, the cigarette boxes, 'cartons,' wrapping paper and showcards, or hangers, so ordered as hereinbefore set forth, all of which were duly received and accepted by said defendants. An itemized bill for said goods, wares and merchandise so shipped as aforesaid is hereto attached, marked 'Exhibit A,' and is hereby made a part of this complaint. Said bill, including the charge for extra engraving, as set forth in paragraph 4, and the customary and proper charges for boxing and drayage, twenty-two dollars and fifteen cents ($22.15), amounts to thirty-three hundred and fifty-seven dollars and seventy-nine cents ($3,357.79), which sum was due and payable by the defendant to the plaintiff within sixty days from 16 June, 1892, which last-named date is the average date of the shipment of said goods, wares and merchandise so ordered and shipped as aforesaid.

"8. That no part of said sum has ever been paid, and the sum of $3,357.79, with interest thereon from 16 August, 1892, is now justly due and owing by defendant to the plaintiff."

(549) For a second cause of action, plaintiff alleges:

"1. That on 18 August, 1892, the defendant made and executed its promissory note in writing, in words and figures as follows:

" '$638.49. ASHEVILLE, N. C., 18 Aug., 1892.

" 'Sixty days after date we promise to pay to the order of The Friedenwald Company six hundred thirty-eight and 49/100 dollars, at the Western Carolina Bank, Asheville, N. C. Value received, without interest.

" 'Due 17-20 Oct.

" 'THE ASHEVILLE TOBACCO WORKS AND

" 'F. A. HULL, *Sec. and Treas.*' CIGARETTE COMPANY.

"Which said note was duly delivered by the defendant to the plaintiff, who is now the owner and holder of the same.

"2. That on said 18 August, 1892, the defendant made and executed its other promissory note in writing, in words and figures as follows:

" '$638.49. ASHEVILLE, N. C., 18 Aug., 1892.

" 'Four months after date we promise to pay to the order of The Friedenwald Company, six hundred and thirty eight and 49/100 dollars,

at the Western Carolina Bank, Asheville, N. C. Value received, without interest.

" 'Due. " 'THE ASHEVILLE TOBACCO WORKS AND CIGARETTE COMPANY.

" 'F. A. HULL, *Sec. and Treas.*'

"Which said note was duly delivered by the defendant to the plaintiff, who is now the owner and holder of the same.

"3. That on the said 18 August, 1892, the defendant made and executed its other promissory note in writing, in words and figures as follows:

" '$1,276.99. ASHEVILLE, N. C., 18 Aug., 1892.

" 'Six months after date we promise to pay to the order of The Friedenwald Company, one thousand two hundred and seventy-six and 99/100 dollars, at the Western Carolina Bank, Asheville, N. C. Value received, without interest.

" 'THE ASHEVILLE TOBACCO WORKS AND CIGARETTE COMPANY.

" 'F. A. HULL, *Sec. and Treas.*' (550)

"Which said note was duly delivered by the defendant to the plaintiff, who is now the owner and holder of the same.

"4. That said three notes described and set forth in the preceding three paragraphs, and aggregating $2,553.97, were credited on said account for $3,357.79, as set forth in said 'Exhibit A,' leaving a balance due upon open account of $803.82.

"5. That said three notes were duly presented for payment on their respective dates of maturity at the Western Carolina Bank, Asheville, N. C., when payment was refused and the notes for $638.49 each, maturing respectively 21 October, 1892, and 21 December, 1892, were protested for nonpayment, at a cost of four dollars ($4) to the plaintiff.

"6. That no part of either of said three notes has ever been paid, but they are still justly due and owing from the defendant to the plaintiff, with interest from their respective dates of maturity until paid, and protest fees, $4.

"Wherefore the plaintiff demands judgment against the defendant for the sum of $3,357.79, with interest from the times when the component parts of said sums respectively became due, together with four dollars protest fees and the cost of this action, to be taxed by the clerk of this court.

(551) The defendant's demurrer was as follows:

"The defendant demurs to the complaint styled 'Amended complaint,' filed herein on 14 February, 1894, and for causes of demurrer alleges:

"1. That there is a defect of parties defendant in the omission of the corporation named in the first paragraph of said 'Amended complaint,' to-wit, The Asheville Tobacco Works.

"If the said The Asheville Tobacco Works was dissolved and its charter in any manner annulled on or about 23 March, 1892, as alleged in the third paragraph of said 'amended complaint,' said corporation is nevertheless still a corporation by force of the provisions of section six hundred and sixty-seven (667) of The Code of North Carolina, and a necessary party to the first cause of action alleged in said 'amended complaint.'

"2. That several causes of action have been improperly united. In paragraphs one to four, inclusive, of the first part of said 'amended complaint' the plaintiff has alleged certain contracts, promises and agreements between The Asheville Tobacco Works and himself, but has not, in any one of said paragraphs, or elsewhere in said 'amended complaint,' alleged with respect to any of said contracts, promises and agreements that the defendant was in privity with the plaintiff, or that the defendant had at any time, upon any consideration whatever, in any manner whatever, made to the plaintiff a promise to assume in any manner or in anywise to become liable or answerable to the plaintiff for or upon any of said contracts, promises and agreements between said The Asheville Tobacco Works and said plaintiff.

"In paragraph five of said first part (or cause of action) of said 'amended complaint' the plaintiff alleges a cause of action against the defendant, to-wit: That plaintiff sold and delivered to defendant
(552) a bill of merchandise; and in paragraph six of said 'amended complaint,' and also in paragraph seven thereof, the plaintiff alleges causes of action against this defendant, as in said paragraphs appear.

"That said causes of action alleged in paragraphs one to four, inclusive, of said first part of said 'amended complaint,' in so far as they affect this defendant, if they affect it at all, are not, nor is either of them, founded on contract and are not in form *ex contractu* as regards the defendant, but lie in tort and are improperly united with the causes of action stated in said fifth, sixth and seventh paragraphs of said first part of said 'amended complaint,' and the causes of action stated in said fifth, sixth and seventh paragraphs are improperly united with the causes of action stated in said paragraphs one to four, inclusive.

"3. That said complaint, in respect of the causes of action set forth in paragraphs one to four, inclusive, of the first part of said 'amended complaint,' does not state facts sufficient to constitute a cause of action.

"The first and second of said paragraphs allege contracts between the plaintiff and The Asheville Tobacco Works.

"The third of said paragraphs alleges that The Asheville Tobacco Works transferred all its assets, etc., to the defendant; and by resolution, etc., 'dissolved the said corporation, The Asheville Tobacco Works, and that the defendant agreed to and did assume the debts and liabilities of the said Asheville Tobacco Works, including the debt or liability of the latter to this plaintiff, and is therefore in law, as he is advised, under the circumstances of said transfer to it [the defendant] of the property and assets of the Asheville Tobacco Works, bound for the payment of all the debts and liabilities of The Asheville Tobacco Works, without the said The Asheville Tobacco Works and Cigarette Company formally having assumed the same.' (553)

"It appears upon the face of the complaint that The Asheville Tobacco Works is and has ever since its creation been a corporation; that it has not been dissolved or annulled in any manner allowed by law. It is not alleged in the complaint that the plaintiff was ever in any manner notified by The Asheville Tobacco Works, or by the defendant, or by any other person or corporation, that the defendant had 'agreed to and did assume the debts and liabilities of the said The Asheville Tobacco Works, including the debt and liability of the latter to this plaintiff.' It is simply alleged that the plaintiff 'is informed and believes such to be the fact.' It is not alleged by the plaintiff in his complaint that he ever gave the defendant notice that he accepted it as his debtor in respect of the said debts and liabilities of the said The Asheville Tobacco Works to him, and he could have no cause of action against said defendant in respect of said debts and liabilities until he gave him such notice. If filing this 'amended complaint' might be regarded as such notice, then no such notice was given defendant until long after this action was begun, as appears upon the face of the complaint, or 'amended complaint,' and as such causes of action did not exist at the commencement of this action, they cannot be maintained. There is no allegation in the complaint, or 'amended complaint,' of any express promise or agreement by defendant to the plaintiff that the plaintiff should be paid by defendant any debt or liability due to him from The Asheville Tobacco Works, nor are there any facts alleged in said 'amended complaint' from which any such promise or agreement can be implied or inferred.

"It is not alleged in said 'amended complaint' that the plaintiff had done anything whereby the Asheville Tobacco Works became dis-
(554) charged from or ceased to be liable to the plaintiff for said debts and liabilities of the said The Asheville Tobacco Works to the plaintiff, nor is there any averment whereby it can be seen how it is possible for the defendant and the said The Asheville Tobacco Works to be jointly and severally liable to the plaintiff for said alleged debt. It will be necessary for the plaintiff to establish his debt against the said The Asheville Tobacco Works before he can have any right to call upon the defendant to apply any assets it holds of the said The Asheville Tobacco Works to the satisfaction of said debt."

Moore & Moore and F. A. Sondley for plaintiff.
J. H. Merrimon for defendant.

AVERY, J. A corporation chartered and doing business in the corporate name of The Asheville Tobacco Works became, about 23 March, 1892, completely merged, by a transfer of all its property, rights and franchises, into a new company incorporated and organized by the same stockholders and directors as the Asheville Tobacco Works and Cigarette Company, the shareholders of the former company receiving two shares of stock in the new in lieu of every one previously held in the old corporation. The new organization continued the business and adopted the contracts already made by its predecessor, including that for the material for which the debts sued on was created. The effect of such a merger was to create a novation, so far as the creditors of the old company were concerned, and to substitute the new one as debtor for it. 2 Cook on S. & S., sec. 669, note 3; 1 Spelling on Pr. Corp., sec. 93. As the nature and objects of the old were substantially the same as those of the new association and the latter was organized merely for the purpose of
(555) enlarging its business, it was not necessary to obtain the consent of the creditors of the former to the change, since their rights continued after such a merger or consolidation the same as against the new as against the old corporation, before any transfer of stock or property was made. 2 Morawitz Pr. Corp., sec. 811. Changes of this kind are to be distinguished from the reorganization of insolvent corporations, which is provided for by statute in some of the States. 2 Beach Pr. Corp., sec. 791.

The new corporation being formed by the same stockholders and managed by the same officers that composed and governed its predecessor, the adjudications to which we have adverted, and which permit such mergers without the assent of creditors, rest upon the idea that the old association under a new name is, by virtue of an implied agreement,

the debtor under the same contracts and in the same amounts as if no change had been made. With the knowledge that the law makes them answerable for all such outstanding indebtedness, it is difficult to understand why the same officers and persons acting under a new name should be surprised when sued for debts created by them, and should not be able to understand and make defense to the claims of indebtedness without a recitation by the pleader of the history of their conduct of the business. Besides the stipulation which the law would imply to pay the debts of the old concern, the new association after its organization, as is alleged both in the amended complaint and the two first filed, made an express promise to assume the indebtedness for which the two actions were brought, and if that be true the transfer of the property was a sufficient consideration to support such a promise.

The plaintiff had at first instituted two actions in the Superior Court of Buncombe, by summons dated respectively 23 October and 24 October, 1892, and the two were subsequently consolidated by (556) order of the court. In the complaints first filed in each of the distinct actions the plaintiff had in general terms alleged an indebtedness on the part of the new corporation growing out of the contracts made by the old. After the consolidation, and after a trial and verdict, which was set aside by the presiding Judge, an order was made in the court below allowing plaintiff to file the amended complaint, in which there is a recital of the history of the merger. Was such a complaint amenable to the objection that it set up a new cause of action? We think not. The theory that underlay both of the original declarations was that the association last formed stood in the place of its predecessor and made the former liable for all of the outstanding debts. If we should conclude that the new allegations were essential to the maintenance of the action, not, as contended by the plaintiff, a mere recital of evidential facts, it is nevertheless clear that the cause of action was the same whether defectively or sufficiently stated. We think that the order allowing the plaintiff thirty days to amend warranted the substitution of the amended complaint for the two theretofore filed, and that it set forth more fully the cause of action originally relied on in both actions, but stated no new cause.

If it be true that the plaintiff could, by virtue of the provisions of section 685 of The Code, have attached some conveyance made by the original corporation to that in which it was merged within sixty days after its execution, it does not appear that any such steps were taken. The charter of the first corporation was not annulled, nor did it expire, but its existence was merged into a new one. Hence the statute referred to in the demurrer (The Code, section 667) has no bearing upon the question before us.

The objection that two causes of action, the one arising out of tort and the other out of contract, have been improperly joined, is
(557) untenable. The new organization, as we have seen, was effected merely to enable the same persons, with the same and possibly a little additional capital, to enlarge the business. The law treats the new organization, if formed as alleged in the complaint and admitted by the demurrer, as to all intents and purposes the same body, still answerable for its own contracts made under a different name. If the old company has ceased to exist and been merged in the new, it has no separate entity, is not liable to be dissolved, and cannot be made a party to the action.

The only question presented by the appeal is whether there was error in overruling the demurrer. If the objection to the validity of a part of the contract declared upon could be drawn in question by demurrer *ore tenus,* and if it were well taken, the fact would still remain that a part of the demand is predicated upon a different contract. But we do not understand that the action was brought to enforce an executory contract, and if not, the objection is without merit, or at all events the defendant could avail itself of the statute, if at all, only by plea, as in the case of the statute of limitations, and not by demurrer. *Curtis v. Piedmont Co.,* 109 N. C., 401; *Cozart v. Land Co.,* 113 N. C., 294; *Roberts v. Woodworking Co.,* 111, N. C., 432.

The action is against the corporation and founded upon the identity of the two bodies, but if it had been alleged that the defendant had perpetrated a fraud, it would not have followed that its officers were necessary parties. *Mining Co. v. Mining Co.,* 99 N. C., 445.

It seems to us, after a careful consideration of the grounds specified in the demurrer, that there was no error in overruling it. The judgment is

Affirmed.

Cited: Bank v. Hollingsworth, 135 N. C., 579; *Grocery Co. v. Express Co.,* 178 N. C., 324.

GEORGE E. TANKARD v. ROANOKE RAILROAD AND LUMBER COMPANY.

Action for Damages—Accident at Railroad Crossing—Negligence—Contributory Negligence—Judge's Charge—Evidence.

1. While it is the duty of one crossing a railroad in a vehicle to exercise ordinary care for the safety of the animal he is driving, he has the right to assume that the railroad company has discharged its duty to the public by keeping the crossing in safe condition.

2. Where one drove up to a crossing and saw that the space between the end of a railroad car and the end of the plank crossing was wide enough to allow his vehicle to pass, he was not culpable in attempting to cross without delay unless there was reason to apprehend danger from an approaching car or unless he had warning of a defect in the crossing and disregarded it.

3. In the trial of an action for damages for injury to plaintiff's mule at a railroad crossing, it appeared that before plaintiff's servant attempted to drive over a crossing partially obstructed by defendent's car, but leaving eight feet of highway, the defendant's servant told him to wait a minute and the train would move on, and his son and companion said to his father, "You had better not drive on, the mule is scary"; plaintiff's servant struck the mule saying, "There is room enough," and as he was crossing the mule became frightened and, shying from the car, stepped into a hole between the tracks, but within the limits of the highway, and was injured: *Held*, that in no aspect of the testimony did the defendant have the right to demand the submission to the jury of the question of contributory negligence. (*Quære*, whether it was not negligence on the part of the defendant to fail to warn the driver against the defective plank and whether that omission of duty would not have been deemed the proximate cause of the injury, even if the driver had been guilty of antecedent contributory negligence).

4. Where testimony is admitted for a purpose for which it is competent, but which, without explanation, might mislead the jury upon another aspect of the case, a caution from the Judge in his charge that it is to be considered only in the view in which it was admitted removes all ground for exception.

5. Where, in the trial of an action for damages resulting from a defective crossing, the question of defendant's negligence depended upon the finding as to the defects in the highway, it was competent to elicit from a witness a description of the exact condition of the crossing.

6. It was competent for a witness in the trial of an action for damages for an injury resulting from a defective crossing to use a diagram of the crossing, which he testified was a correct representation of it, the purpose being to illustrate his testimony as to the relative position of objects and their distances from each other.

(559) ACTION for damages for an injury to plaintiff's mule caused by a defective railroad crossing, tried before *Boykin, J.*, at Spring Term, 1895 of BEAUFORT.

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

Charles F. Warren for plaintiff.
John H. Small for defendant.

AVERY, J. It was conceded by counsel on the argument, and appeared also from the undisputed testimony, that the defendant's car partially obstructed the crossing, but left about eight feet of the highway covered by plank unoccupied, and that there was ample room for plaintiff's servant to cross with his mule and cart. The defendant's counsel contended that the hole in which the animal's leg was caught constituted no part of the highway which it was the duty of the defendant to keep in safe condition. In passing upon the first issue, which involved the question whether the injury was caused by the negligence of the defendant, the jury must have believed from the evidence that the hole into which the mule thrust his leg was located "at a place in the crossing over which one might ordinarily drive his team with safety," because if they had believed it was situated outside of the highway "at the
(560) end of the 16-foot plank next to the rail and over the slope or wash of the ditch," as defendant contended, it would have been their duty, acting under the very explicit instruction given them, to have responded in the negative instead of the affirmative to that issue.

The only question involved in the appeal as presented here is whether in any aspect of the testimony the defendant was warranted in insisting upon its right to present the question of contributory negligence to the jury. If the court below erred in holding and instructing the jury that there was no view of the evidence in which the culpable conduct of the plaintiff's servant might be found to be the proximiate cause of the injury, the error consisted not in the submission of one instead of two issues, because it was the province of the court to determine whether one or both of the issues should be submitted, and the duty of the Judge to adapt the instruction, upon any phase of the evidence tending to show contributory negligence, either to one issue or both. *Scott v. R. R.*, 96 N. C., 428; *Denmark v. R. R.*, 107 N. C., 185; *McAdoo v. R. R.*, 105 N. C., 140. The controversy is therefore narrowed down to the single question whether there was any evidence of contributory negligence, and in passing upon it we must assume that all the testimony offered for the defendant was true. It is admitted, therefore, that Sears, who was in charge of defendant's train and business, said, when Riddick drove up

with his cart: "Hold on, old man, the boys will have on this log in a minute and we will move on," and that thereupon the elder Riddick took the whip from his son, who was with him in the cart, and struck the mule, saying as he did so: "There's room enough." It must be admitted for the same reason that Riddick's son said to his father: "You had better not drive on, the mule is scary," and that the mule did become frightened at the car, and in shying from it stepped into the hole. If the (561) facts admitted are conclusive evidence of contributory negligence, then it was the duty of the court to so tell the jury, or if a reasonable mind could draw as an inference from them any conclusion of fact that would show a concurring culpability on the part of Riddick, it is the province of the jury to determine whether any such inference could be fairly deduced. It was legally encumbent on plaintiff's servant, the elder Riddick, to exercise ordinary care for the safety of the animal he was driving; but he was warranted in assuming that the defendant had discharged its duty to the public by keeping the crossing in safe condition. *Russell v. Monroe,* 116 N. C., 720; *Bunch v. Edenton,* 90 N. C., 431. When, therefore, he drove up to the crossing and saw that the space between the rear end of defendant's car and the end of the plank crossing was sufficinetly wide to allow the cart to pass, he was no more culpable in attempting to cross without delay than are the hundreds of persons, who when there is no apparent danger of collision with a passing train, daily drive through openings between cars left for the purpose, often in obedience to a town ordinance limiting the time of obstructing a street to five or ten minutes. When a train is approaching, it of course has the superior right to the use of its track as a public carrier (*McAdoo's case, supra*), but the weight of authority and of reason is in favor of the proposition that persons in vehicles are not culpable for driving through a sufficient opening left between the cars that are standing across a highway, and that persons on foot are not negligent in climbing over the steps of such cars, though not under them, provided they exercise ordinary care to avoid collision with moving trains. *Alexander v. R. R.,* 112 N. C., 720; 2 Shear. & Redf., sec. 479.

In this case there was no reason to apprehend danger from an aproaching train, and Riddick was not wanting in care when he (562) acted on the assumption that the crossing was in safe condition, unless the language used by Sears was such a warning of danger as to warrant a prudent man in questioning the correctness of what he had previously taken for granted as to the condition of the highway. In order to determine what was ordinary care on the part of Riddick, it is proper to look at the surrounding circumstances from his standpoint. The advice of his son was not sufficient to put him on the alert as to the condition of

the highway. Conceding, as he doubtless did, that the mule might become frightened, it did not follow as a result to be reasonably expected that its leg would be endangered by a hole, which the father had rightfully assumed was not there and of which he still had no notice. The law required of him to act with reasonable caution upon what appeared to him to be the facts, not upon the volunteered opinion of anyone who happened to be present. *Roseman v. R. R.*, 112 N. C., 719. Riddick did not at any time lose entire control of the mule, and the mere fact that in shying momentarily its leg was caught in a hole in that portion of the crossing that was required to be kept safe for the passage of horses is not deemed evidence of the concurring negligence of the driver, because all horses are liable "to swerve momentarily from the track." 9 A. & E. 387, 388, note 1; *Aldridge v. Gorman*, 13 A. & E. Corp. Cases, 688.

This Court held in *Roseman's case* that it was not culpable in a conductor to refuse to act upon the gratuitous opinion of another, who did not appear to have had a better opportunity to judge of the situation than himself, as to the danger of injury to one who had been ex-
(563) pelled from the train. But the exclamation of Riddick's son is not to be interpreted as meaning that he knew anything about the condition of the crossing or that he apprehended any danger, except that the mule might become frightened and kick or run away. The father had equal knowledge of the mule, the same opportunities for forming an opinion as to the danger, and probably more experience of the kind that would fit him to form a correct judgment as to what it was proper to do under the circumstances.

As from his standpoint Riddick saw the situation, it appeared that there was abundant room to pass over a safe road. 2 Shearman and Red., sec. 479. When Sears said to him: "Hold on, old man, the boys will have this log on in a minute and move on," it was perfectly natural that Riddick should infer that Sears did not think he had left sufficient space for the cart to pass in rear of the car, and the reply, "There is room enough," clearly showed that such was the construction he placed upon the language. Had Sears said: "Look out, there is a dangerous hole in the crossing on that side; I will move off so you can avoid it," the case would have been materially different from that before us.

In *Russell's case, supra,* this Court said: "A person is not negligent in failing to provide against what could not reasonably have been expected, much less against a danger that she was warranted in assuming did not exist. *Blue v. R. R.*, 116 N. C., 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. We are not called upon to discuss the legal effect of disregarding an explicit warning of the particular danger which confronts a person, when it comes from one who is in a position to know the situation and whose duty it is to give (564) such caution." It was the duty of defendant to keep the crossing repaired, and of the manager to observe and know its condition. Another question suggested in this connection is whether it was not negligence on the part of the defendant to fail to warn Riddick of peril from the defective condition of the plank, and whether that omission of duty would not have been deemed the proximate cause of the injury, even though some antecedent contributory negligence on the part of the plaintiff's servant had been shown. 2 Shearman, *supra,* sec. 346. But since we have reached the conclusion that there was no evidence of the culpability of the plaintiff, it is needless to discuss this phase of the case, and it is suggested only as an argument in support of the position that the court below did not err in holding that there was not sufficient evidence of contributory negligence to require the submission of the question to the jury.

We cannot conceive how the reason given by the court for refusing to submit the question of contributory negligence could have mislead the jury in passing upon the main issue involving the culpability of defendant. It was the duty of the company to keep the crossing in safe condition, and when the jury were told that it was negligence on its part to leave holes between the planks, into which a horse's foot might be thrust, in the portion of the road passed over by vehicles, but not on that part where persons did not pass, we fail to discover any just ground for complaint of the charge. 2 Shearman, *supra,* sec. 346.

It is settled law that where testimony is admitted for a purpose for which it is competent, but without explanation might mislead a jury upon another aspect of the case, a caution from the Judge in his chage that it is to be considered only in the view in which it was admitted removes all ground for exception. This disposes of the first exception, as the court cautioned the jury to consider the (565) testimony only as it tended to show a demand.

The question intended to elicit from a witness a description of the exact condition of the crossing was also plainly competent. In view of the fact that we have approved of the charge of the court, which made the question of defendant's negligence dependent upon their finding as to the defects in the highways, it would seem needless to discuss the exception further. It was competent for the court to allow a witness to use a diagram of the crossing, etc., which he testified was a correct representation of it. *S. v. Whiteacre,* 98 N. C., 753. This is not an instance

of offering a map to show location, where that is the main question, but to illustrate the testimony of the witness as to the relative positions of objects and their distance from each other, as bearing upon an issue involving the exercise of proper care by both parties.

For the reasons given we conclude, after a careful review of all the exceptions, that there was

No error.

Cited: *Sheldon v. Asheville,* 119 N. C., 609; *Raper v. R. R.,* 126 N. C., 566; *Arrowood v. R. R., ib.,* 630; *Harrison v. Garrett,* 132 N. C., 174; *S. v. Rogers,* 168 N. C., 114.

FRANK HANSLEY v. JAMESVILLE AND WASHINGTON RAILROAD COMPANY.

Action for Damages—Exemplary Damages—Railroad Companies—Negligence—Failure to Supply a Train.

1. The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or (in the absence of personal injury) insult, indignity, contempt, etc., to which the law imputes bad motive towards the plaintiff.

2. Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to his starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is *ex contractu* and not in *tort*, and hence exemplary or punitive damages cannot be recovered. *Purcell's case,* 108 N. C., 414, which was overruled in *Hansley's case,* 115 N. C., 602, is reinstated, but the ground of the judgment is changed.

CLARK, J., concurring in part.

(566) PETITION to rehear case reported in 115 N. C., 602.

Chas. F. Warren and L. T. Beckwith for petitioner.
John H. Small, McRae & Day and W. B. Rodman contra.

FURCHES, J. This is a petition to rehear this case, decided at September Term, 1894, of this Court, and published in 115 N. C., 602. The defendant is a corporation under the laws of this State, running and operating its road between the towns of Washington and Jamesville, transporting both freight and passengers as a common carrier for pay.

The plaintiff, a citizen of Washington, wanting to go to the town of Edenton and back, on 7 September, 1892, purchased a ticket of defendant to Jamesville, and from Jamesville back to Washington on the 9th. The defendant carried plaintiff to Jamesville on the 7th, and he went on to Edenton and was in that town on 8 September. (It is not stated in this case that plaintiff went to Edenton and was there on the 8th, but this was stated and agreed to by counsel on the argument.)

On 8 September, soon after leaving Jamesville for Washington, the axle of defendant's engine broke, and when the plaintiff returned from Edenton to Jamesville on the 9th, the defendant was unable to carry him on its road from Jamesville back to Washington, as it (567) had contracted to do. Thereupon plaintiff brings this action for damages, which he lays at $500, and alleges that defendant's roadbed was in a bad, shakling and ruinous condition; that defendant had but two engines, both of which were worn and in bad condition, one of them at that time being in the shops for repair and not in a condition to be used; that the bad condition of defendant's roadbed had rattled the other one so as to cause the axle to break; that all this showed such wilful negligence on the part of defendant towards the public and towards the plaintiff as to entitle him not only to compensatory damages, but to exemplary damages.

The defendant answered denying the allegation of negligence, admits that the road was not in good condition, says it was poor and struggling for existence, and that it was expending the whole earning of the road and more in trying to keep it in good repair, and was not able to do so. Therefore, defendant denies that it is liable to plaintiff for anything, and certainly not for punitive damages.

And, without reviewing the evidence, it is such as to warrant us in saying that the roadbed was in a bad, dilapidated and ruinous condition, and that defendant had but two engines, and they were old, worn and in bad condition.

That plaintiff is entitled to compensatory damages there can be no doubt. But as to whether he is entitled to exemplary damages is the question.

It is said that railroads are quasi-public servants; that they are created by the public (the Legislature) and owe duties to the public in return for their right of franchise. And while this is true, it can only be considered by us as a reason for establishing the law as we shall find it, and not as a reason for us to establish the law.

Nor can we consider the question as to whether defendant's road is a poor corporation, struggling for existence, and expending all its earnings and more on its road or whether it is a rich corporation. (568)

These are questions we have no right to consider in passing upon the question of law as to whether the plaintiff is entitled to recover damages against defendant or not. *Taylor v. R. R.*, 48 N. H., 317.

The legal question involved in this case is conceded to be an important one, and is entitled to our best consideration. It is one that has been so much discussed by law writers and by the courts in judicial opinions, in which different phases or facts appear, that it is somewhat difficult to establish ourselves on what we consider solid ground.

Often a very slight difference in the facts changes the reason upon which a case is decided. We find that decided cases, unless closely attended to, are often misleading. Also often a misunderstanding of some of the facts, or an inadvertence to some fact in the case, leads to error. This we think was the case with the learned Justice who wrote the opinion we are now reviewing. In stating the facts in *Purcell v. R. R.*, 108 N. C., 414, he stated that, when the defendant's train passed the depot, it "was overloaded," when there was evidence tending to show that there was room for a number of other passengers. And this was the hypothesis upon which the court was asked to charge the jury, and which was refused by the court. This inadvertence, we think, led the Court to overrule *Purcell's case, supra.*

After as full investigation as we have been able to give to this case, we are of the opinion that the true ground for allowing exemplary damages is personal injury to plaintiff caused by the negligence of defendant (and we do not undertake here to enumerate all the causes for exemplary damages where there is personal injury). And where there is (569) no personal injury there must be insult, indignity, contempt, or something of the kind, to which the law imputes bad motive towards a plaintiff, and when they are allowed they are in addition to compensatory damages. 1 Sedgwick Damages, 520; 5 A. & E. 43, note, and cases cited.

This principle we find is recognized and enforced in the following cases:

A railroad conductor kissed a lady passenger on his train, and she was allowed to recover punitive damages upon the ground that it was a personal indignity. 5 A. & E. 43.

Where a railroad conductor refused to carry a passenger after he had paid his fare, the road is liable to exemplary damages. 3 Sutherland Damages, secs. 935 and 937. This is upon the same ground.

Plaintiff is not entitled to exemplary damages unless there is a wilful or intentional violation of plaintiff's personal rights. *R. R. v. Hanes,* 91 U. S., 489.

Where a railroad carried a lady passenger a few hundred yards beyond the station, and upon application of the passenger refused to back the train to the station, but put the passenger out in a driving rain with her infant child and baggage, the defendant was held to be liable to punitive damages. But this was put upon the ground of personal indignity and insult, as all cases we have cited are, and the fact that the passenger could not use her umbrella, got wet and was sick from the effects was only allowed in evidence upon the measure of damages. But the *gravamen* of the action was the personal indignity with which the plaintiff had been treated by the defendant. *R. R. v. Sellers,* 93 Ala., 13. We might cite many other cases to sustain the principle we have laid down, but do not deem it necessary. (570)

We make no question, under our system of liberal pleading, that plaintiff may recover either in contract or tort if he has made out his case. But he can no more recover in tort without making out his case than he could recover in contract without making out his case.

The fact that the defendant's road was in bad condition was no insult or indignity to plaintiff. And, as there was no personal injury on account of its bad condition, this affords him no cause of action. The fact that defendant's engine broke down on the 8th, when plaintiff was in Edenton, was no personal insult, indignity or intentional wrong to plaintiff. No doubt the defendant regretted the breaking down of the engine as much as plaintiff. The fact that plaintiff had a right of action for breach of the contract, gives him no right of action for tort against the defendant. And, unless he had the right to maintain an action of tort, he had no right to punitive damages. There can be no damage recovered when there is no right of action. Damages are not the cause of action, but the result of the action.

Taking all the evidence in the case offered by the plaintiff, or that may be considered in his favor, we do not think it makes a cause of action against the defendant in tort, and we think that the defendant was entitled to have his second prayer for instruction submitted to the jury, to-wit: "Taking the entire evidence in view, the plaintiff is not entitled to punitive damages." This was refused by the court, and we think there was error.

We have arrived at our conclusion by a different treatment of the case, to some extent, from that adopted by the Court in the opinion published in 115 N. C., 602. But our judgment is the same. And in this opinion we do not think it necessary to disturb the judgment as announced in *Purcells' case, supra.* But the judgment in that case should be put upon the ground that the defendant treated the plaintiff Purcell with indignity and contempt in rushing by the station at (571)

faster speed, when there was room for other passengers, or at least when there was evidence tending to show this, and the court refused the prayer for instruction submitting this question to the jury. The petition is Dismissed.

CLARK, J., concurring in part: Concurring in the opinion so far as it reinstates the authority of *Purcell v. R. R.*, 108 N. C., 414, the vast and growing importance of the principles involved in this case to everyone who shall travel over, or ship freight by, these great public agencies, forbids my acquiescence in some of the reasoning relied on in the present case.

In the recent case of *R. R., v. Prentiss,* 147 U. S., 106, *Mr. Justice Gray* commends the historical instruction of *Chief Justice Pratt* (afterwards Lord Camden): "A jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as a proof of the detestation of the jury of the action itself." And *Mr. Justice Gray,* for the Court, adds: "The doctrine is well settled" that the jury, in addition to compensatory damages, "may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly . . . or with criminal indifference to civil obligations." In the present case his Honor below charged the jury: "If defendant failed to provide proper means for transportation of passengers, as for instance the plaintiff in this case, as it had undertaken to (572) do, *wantonly and wilfully,* the jury may give punitive or punishing damages; and the amount of such is largely a matter for the jury to determine, but the court will supervise so as to see that no wrong is done." This sums up in a few words the whole controversy in this case, and it is this charge which "is this day brought into question." In *Purcell's case, supra,* this Court in a unanimous opinion laid down the wholesome and it would seem the necessary principle that for the *wilful and wanton* violation by a railroad corporation of the regulations prescribed for its control and conduct by the lawmaking power (The Code, sec. 1963), such corporation is liable to punitory damages. These words, *"wilful and wanton,"* have a well-defined meaning in our courts and have been construed in *S. v. Brigman,* 94 N. C., 888, and *S. v. Morgan,* 98 N. C., 641, to mean "purposely, intentionally and with reckless disregard of the rights of others." Our courts have upheld the authority to grant punitory damages in all proper cases, and if they could ever be granted against a corporation in any case, it would seem certainly they should lie whenever the conduct of its officials has shown a

"wilful, intentional violation" of the statutes enacted by the Legislature for the control of these corporations, and a "reckless disregard of the rights of the traveling public" or shippers of freight.

The sovereignty which through its agents created and gave existence to this corporation has recognized this rule as wholesome and just, for in the act creating the Railroad Commission (Laws 1891, ch. 320, sec. 11) it is provided in almost identically the same words (indeed, the very same, leaving out the word "wantonly") that for a "wilful violation of the rules and regulations made by the Commissioners, railroad companies are liable for exemplary damages." It would be the strangest of anomalies if a railroad corporation is liable to exemplary damages for the wilful violation of the regulations of the Rail- (573) road Comimssion, but is not thus liable for the wilful and wanton violation of the regulations prescribed by the legislative power which created them both. And we should have this further anomaly in the law: A telegraphic dispatch announcing the critical illness of a near relative is sent; if not delivered promptly the sendee, as is properly held by numerous decisions of this Court, is entitled to exemplary damages, though he has suffered no personal injury nor has any indignity been inflicted upon him. *Young v. Telegraph Co.*, 107 N. C., 370; *Thompson v. Telegraph Co., ib.*, 449 *Sherrill v. Telegraph Co.*, 116 N. C., 654. The reason is that, being put upon notice by the tenor of the dispatch, it is *wanton and wilful* violation of the duties for which it was incorporated for the company to fail to deliver the message promptly, and the highest reasons of public policy require that exemplary damages should be imposed. Now, suppose the dispatch is delivered and the sendee starts for his home, but the railroad corporation, finding that it can send a larger number of passengers to another point, stops its car—as in the present case they stopped it because it was cheaper to send a broken piece of machinery to Norfolk to repair than to keep necessary repair shops or another engine—and by this wilful and wanton violation of its statutory duties to furnish sufficient transportation the recipient of the telegram does not reach the bedside of his dying wife, would it not be an anomaly that, for a wilful and wanton violation of its duty to deliver the telegram promptly, the telegraph company is liable to exemplary damages, but for an equally wilful and wanton violation by the railroad corporation to transport the passenger according to schedule, that company is only liable to pay the passenger's board bill during his detention. In a case where the corporation failed to bring (574) the passenger home on his round-trip ticket, as the defendant in this case failed to do, punitive damages were sustained in *Head v. R. R.*, 79 Ga., 358.

But it was contended on the argument that, though the railroad corporation is liable for the wilful and wanton violation of its statutory duty in running its trains by a station without stopping and thus failing to take on a passenger when there happens to be a vacant seat, it is not so liable if, with full notice of more passengers waiting at a station than the cars can carry and in time to add more cars, it fails to do so. It is difficult to recognize the authority to hold that this act of wilful violation of its statutory duties and wanton disregard of the rights of the public does not subject the corporation to punitive damages, while the same wilfulness and wantonness is running by a station without stopping does so subject the corporation if there happens to be a vacant seat. It is the same wilfulness and wantonness to fail to have sufficient seats, when the corporation has notice in time and cars in its control, as not to stop to fill the empty seats. The statute authorizes no such discrimination. It provides (The Code, sec. 1963): "Every railroad corporation . . . shall furnish *sufficient accommodation* for the transportation of *all* such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of stopping and . . . at the *usual stopping places* established for receiving and discharging passengers and freight for that train, . . . and shall be liable to the party aggrieved in damages for any neglect or refusal." The statute nowhere intimates any distinction whereby one wilful and wanton violation of the statute is cause for exemplary damages, and another equally wilful and wanton violation of the same statute incurs no such liability.

The reasonable and impartial rule laid down by a unanimous (575) Court in *Purcell v. R. R.* is that if the breach of the statute "was mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves, which rendered it unsafe to take a greater number aboard, and the company *could not by reasonable diligence* have increased the number of cars, then the plaintiff could only recover compensatory damages. If, however, . . . the defendant by *reasonable diligence* could have ascertained that the number of cars was insufficient and made no effort to supply the deficiency, but, regardless of its duties and of the rights of those whom it had invited to present themselves at its regular station for passage, *or* if, having room for additional persons, it passed without stopping, this displayed a gross and wilful disregard of the rights of the plaintiff, which entitles him to recover punitive damages." This is sustained by numerous authorities in other States. *Heirn v. McCaughan,* 32 Miss., 1; *R. R. v. Hurst,* 36 Miss., 660; *Silver v. Kent,* 60 Miss., 124; *Wilson v. R. R.,* 63 Miss., 352; *R. R. v. Sellers,* 93 Ala.,

9; 3 Sutherland Dam., sec. 937. It was urged on the argument that it would be difficult often to decide what state of facts would or would not constitute a wilful and wanton disregard of statutory duties. But that does not authorize a judicial repeal of the statute either in whole or in part. It must in each case be determined whether the facts proved show a "wilful and wanton disregard of statutory regulations," and if they do the jury is empowered to impose exemplary damages subject to the protective supervision of the court to prevent abuse by setting aside the verdict.

But it was further argued before us that, while a railroad corporation is by statute liable for a "wilful violation" of the regulations of the *Railroad Commission,* it is not liable for "a wilful and wanton violation of *statutory* regulations." And, hence, when (576) a train with several vacant seats passes its regular station without taking on a passenger waiting there, the liability is only because of the *indignity* offered the intending passenger. But it will be noted that this is a mere substitution of words. The sole indignity offered him is the wilful and wanton disregard of his rights as guaranteed by the statute (The Code, sec 1963), that "sufficient accommodation for transporation shall be afforded at the usual stopping places," and the same *indignity* is equally offered him by the violation of the same statute, if the company knows in reasonable time that the number of cars is insufficient and can supply them and fails to do so, running by without stopping, though with crowded cars because it chose not to supply enough. The duty to furnish sufficient cars is clearly stated in *Branch v. R. R.,* 77 N. C., 347, independently of the express requirement of the statute (The Code, sec. 1963, above quoted).

In the present case the learned Judge charged the jury, in accordance with the ruling of this Court, that if the defendant was guilty of wilful and gross negligence the plaintiff could recover, otherwise not, and further that, if the accident occurred which they could not have in the ordinary course of their business foreseen and provided for, this would not be wilful negligence, but "if the character of the negligence was such as to satisfy the jury that the defendant did not care or was indifferent as to whether they had the train there (to bring the passengers home), it would be wilful negligence." It was in evidence that when the plaintiff, who held a return ticket, applied for transportation, the official in charge gave himself no concern whatever, made no effort to have the plaintiff brought home, and refused the use of the handcar. His Honor, after stating correctly and more

(577) fully what facts would constitute wilful negligence and what would not, instructed the jury that only in the event they found wilful negligence could the plaintiff recover. There was ample evidence to submit to the jury the inquiry whether or not there was wilful negligence. Both authority and reason sustain the proposition that "the liability of a railroad company for exemplary damages cannot be made to depend on the ability of the corporation to earn enough money to keep its road in such condition as to be operated with safety." *R. R. v. Johnson,* 75 Texas, 158, 162; *Taylor v. R. R.,* 48 N. H., 304, 317. If the company is unwilling or unable to furnish money to run its trains according to the statutory requirement it should cease to hold itself out to the public as a common carrier.

The jury having found that there was a wilful violation by the defendant of its statutory duty to transport the plaintiff and a wanton disregard of the plaintiff's rights in that respect, it is not the province of this appellate Court to review the facts and disturb the verdict.

The principle involved is one of universal interest. It is nothing less, when reduced to its last analysis, than whether these corporations, primarily created for the convenience and advantage of the public, with the incidental benefit of profit to their owners, are subject to exemplary damages when they *wilfully and wantonly* violate the statutes passed for their regulation by the power which created them. If they are not, then clearly and unmistakably the public are in the power and at the mercy of the arbitrary will of corporations which, daily aggregating into larger and larger masses, are powerful beyond any control other than the law. And if they possess the power of violating *wilfully and wantonly* the statutory regulations prescribed for the protection of the public, without fear of punishment by the imposition of exemplary damages at the hands of a jury, then (578) the lawmaking power in creating them is like the magician in the Eastern story evoking a spirit which mastered and destroyed him. The rights of the people are too much at stake in maintaining the principle that railroad corporations are liable to exemplary damages for the "wilful violation" of statutes passed for their regulation, equally with similar violations of the regulations of the Railroad Commission, for any denial or limitation of such principles to pass unnoticed.

Cited: Brooks v. R. R., post, 578; *Cable v. R. R.,* 122 N. C., 901; *Thomas v. R. R., ib.,* 1006; *Chappell v. Ellis,* 123 N. C., 262; *Smith v. R. R,* 130 N. C., 307, 312; *Story v. R. R.,* 133 N. C., 63; *Coleman v. R. R.,* 138 N. C., 354; *Jackson v. Tel. Co.,* 139 N. C., 356; *Hutchinson v. R. R.,* 140 N. C., 127; *Wilson v. R. R.,* 142 N. C., 340; *Williams v.*

R. R., 144 N. C., 503; *Stewart v. Lumber Co.*, 146 N. C., 68, 69; *Warren v. Lumber Co.*, 154 N. C., 38; *Peanut Co. v. R. R.*, 155 N. C., 154, 157; *Saunders v. Gilbert*, 156 N. C., 478; *Webb v. Tel. Co.*, 167 N. C., 488; *Brown v. R. R.*, 174 N. C., 696.

L. F. BROOKS v. JAMESVILLE AND WASHINGTON RAILROAD COMPANY.

(For syllabus, see *Hansley v. Railroad, ante.*)

PETITION to rehear same case reported in 115 N. C., 609.

FURCHES, J. The facts in this case are substantially the same as in *Hansley's case,* and for the reasons there assigned the petition to rehear in this case is

Dismissed.

(579)

FARMERS CO-OPERATIVE MANUFACTURING COMPANY v. ALBEMARLE AND RALEIGH RAILROAD COMPANY.

Navigable Waters—Obstruction—Right of Action—Liability for Damages—Measure of Damages—New Trial—Practice.

1. Navigable waters include all those which afford a channel for useful commerce, and such are public highways of common right.

2. While the damage recoverable in a civil action founded upon the obstruction of a public highway must be special, and such as is not common to every one who actually does pass or may travel on it, yet the wrong may be to a number or to a class of persons, and each may have a right of redress.

3. The construction of a bridge across a navigable stream without any draw therein to permit the passage of boats will render the wrongdoer liable for special damage to a boat owner whose business, in common with other boat owners, requires the transportation of material for manufacturing purposes from a point below to a point above the obstruction.

4. In such case it is immaterial whether the owner's boat is licensed or does business as a common carrier, as well as for the transportation of the owner's own materials.

5. Where the owner of a boat was compelled by an obstruction across a navigable river to unload his cargo of cotten seed, but instead of procuring another conveyance, left the seed exposed to the weather, and it was injured: *Held*, that the measure of damages was the value of the boat for the time it was delayed, including reasonable wages paid to the crew, but that no recovery could be had for injury to the seed from exposure or for the cost of unloading it.

6. Where plaintiff in an action for damages recovers judgment, and the only error is in an instruction as to the measure of damages, a new trial may be granted for the determination of that question alone.

ACTION to recover damages from the defendant for the obstruction of the passage of plaintiff's boat by defendant's bridge across Tar River, Tarboro, tried before *McIver, J.*, and a jury, at June (580) Term, 1895, of EDGECOMBE.

The complaint, after alleging that plaintiff corporation is the owner of a boat called the Beta, duly authorized and licensed to navigate Tar River, a navigable stream, from the town of Tarboro up to Shiloh, the place of business of the plaintiff, alleged as follows:

"5. That the defendant constructed across said river, at and near the town of Tarboro, a bridge without a draw therein so as to permit the boat of plaintiff to pass under said bridge, as it in common with other boats had a right to do; and by reason of the failure of defendant to have any such draw in said bridge it became a nuisance, and the defendant thereby obstructed the said navigable stream so that plaintiff's boat could not pass along said navigable stream as aforesaid with its freight.

"6. That the plaintiff used said boat principally for transporting cotton seed and other freight to and from the cotton seed oil mill, situated at Shiloh, as above stated.

"7. That long prior to the commencement of this action and the damage hereinafter complained of, the plaintiff requested the defendant to abate said nuisance and to remove said obstruction to navigation by placing a draw in said bridge, so as to permit its boat to pass under said bridge, but the defendant delayed and refused to do so until after the commencement of this action.

"8. That on or about 1 April, 1890, to 5 April, 1890, inclusive, the plaintiff's boat, loaded with freight, to the great loss and damage of plaintiff, was delayed and prevented from navigating said stream by passing under said bridge for five days; and on 17 March, 1891, to 31 March, 1891, inclusive, the plaintiff's boat, loaded with (581) freight, was delayed and prevented, to the great loss and damage of the plaintiff, for a period of 10 days, by reason of the ob-

struction and nuisance aforesaid, on account of not being able to pass under said bridge, whereby the plaintiff was damaged to the extent of $525.00.

"Wherefore the plaintiff demands judgment against the defendant for the sum of $525.00 and for costs of this action and for such other and further relief as plaintiff may be entitled to."

The answer of the defendant denied that the plaintiff's boat was duly authorized and licensed to navigate Tar River, and also denied that Tar River was navigable between the defendant's bridge and Shiloh, being of such low water that for many months of the year it would not float plaintiff's boat, which was the only boat plying on the river above the bridge, and its trips were dependent on the quantity of rainfall. The defendant also averred that the boat plied on the river for the purpose of transporting such articles as the plaintiff or its stockholders might require from time to time. The answer further states:

"It is true that defendant constructed a bridge across said river, but it denies that it thereby created a nuisance. Said bridge was constructed many years before the plant of said plaintiff was erected and before it purchased a boat to ply on said river for its convenience in transporting its cotton seed and other freight. That, when said plaintiff began to ply its said boat on said river, the said bridge had been constructed for many years as aforesaid, and that the said boat could, the water being sufficient, safely pass under the bridge, except in very high freshets, and these do not often occur in said river. That said bridge was constructed about twelve years ago, and that at that time there was no attempt of any kind, by any person or any corporation, to navigate said stream above said bridge; nor since until about three years ago the plaintiff put said boat (582) on the river and attempted to navigate the same above the said bridge for its own uses and purposes; and even now the said plaintiff is the only person attempting to navigate said river above said bridge, and it has only the one boat, which makes only occasional trips, as the needs of the plaintiff may demand."

The isues submitted, and responses, were as follows:

"1. Is Tar River from the defendant's bridge to Shiloh a navigable stream?" Answer: "Yes."

"2. Was plaintiff's boat obstructed and prevented by the defendant's bridge from navigating said river between said points on the days named in the complaint?" Answer: "Yes."

"3. What damage has plaintiff sustained thereby?" Answer: "$402.70, no interest."

E. V. Zoeller, secretary and treasurer of plaintiff, testified that the plaintiff corporation manufactures cotton-seed meal, etc., at Shiloh, three miles up Tar River from Tarboro, and owns the steamer *Beta,* which plies between Washington and Shiloh, and is used for carrying the company's own products and those of its customers. The witness further testified:

"The *Beta* was obstructed in passing up the stream a number of times, but we made no complaint for detention until from 17 to 31 March, and from 1 to 5 April, inclusive of all dates, 1890. Again 15 to 29 January, 1892, both dates inclusive. Again 2 to 5 March, 12 to 28 April, 1892, both dates inclusive. Again numbers of times since action was brought. Complaints were made to defendant in writing.

"Damages were $225. Damage sustained 17 March to 5 April, 1890,
(583) $8 to $10 per day expenses of maintaining the boat and crew, and $5 per day estimated loss of profit on freight; we were earning $100 per week freight; 15 to 29 February, 1892, damages, expenses of unloading cargo and returning to Sparta for other freight which was waiting for boat, and reloading, $7.29 and $6.75. Damage to plaintiff's cotton-seed, which boat had to unload on landing at Tarboro on account of boat not being able to pass under defendant's bridge on way to Shiloh, $76.66; board and wages of crew, $122.50; estimate profit on freight, if we had been running, $140; total, $343.20. Could not get under railroad bridge and had to unload and go back to Sparta to save some seed there. Letter book, page 5, 2 to 5 March, 1892, shows wages and board of crew, 4 days $30, loss on freight by not running, $30; total, $60. Damage arrived at the same way as the other. Page 6, letter book, 12 to 23 April, 1892, board and wages of crew, $40; estimated loss of profit on freight, $30; total, $70.

"Tar River is navigable from bridge to Shiloh. Been running boat from fall of 1888 or 1889. Draw put in bridge about three years ago, since the commencement of these actions. The railroad replied to first letter. Has not paid the plaintiff for the damages.

"Railroad bridge is an obstruction in high water. It requires from 17 to 18 feet from bottom of bridge to water to let this boat pass under. When water rose it shortened this distance. We unscrewed exhaust and steam-whistle pipe several times so that boat could pass under bridge. There was a boat on river prior to ours. Beginning about October, as a rule, continue to run until May or 1 June. We commenced last year between middle of September and 1 October; sometimes there was not enough freight and sometimes not enough water; we have not been stopped this season on account of

low water; stopped by county bridge some few times, by high water since the draw was put in defendant's bridge; boat will carry from 35 to 40 tons; draught from 15 to 18 inches; loaded, about 3½ feet; navigating the river has been a paying business for our (584) company.

"Navigation of river by boat does not depend on rainfall. Can navigate above bridge in ordinary low water; water lower than ordinary low water now, and was last week; my boat was stuck just below mill last week, and I got some mill hands to shove her off; first time this season. Take her off in summer for want of freight as much as water; I think it probable that I stated 25 May, 1893, that boat was taken off on account of want of water. We always accept freight subject to want of water. Sometimes the river is not navigable."

Witnesses for the defendant testified that the boat *Beta* could not navigate the river above Tarboro in ordinary low water.

The defendant moved the court to dismiss the plaintiff's action for that the complaint therein does not state a cause of action:

"For that it appears from said complaint: That Tar River is a navigable stream; that the defendant has built a bridge across said stream; that said bridge obstructs the free passage of all boats navigating said river; that said bridge is a public nuisance; and that the complaint fails to state and allege that the damage claimed was:

"1. Special and particular to the plaintiff's boat.

"2. That the said obstruction by the defendant's bridge was the immediate and direct cause of said damage.

"3. That the said obstruction was the special and direct cause of the damage which the plaintiff claims."

The motion was denied, and defendant excepted.

The court, after recapitulating the testimony, charged the jury as follows:

"Gentlemen of the jury, the first issue submitted to you is: (585) 'Is Tar River from the defendant's bridge to Shiloh a navigable river?' Now, on that issue, I charge you that, if you find from the evidence that the water in Tar River from Tarboro to Shiloh is of sufficient depth for a considerable portion of the year and with such regularity that prudent business men can calculate as to its condition with such certainty as to enable them to navigate the river with profit and permit the passage of boats and steamers in common use for internal commerce, you will answer that issue 'Yes.' If not, then you will answer it 'No.' If your answer to this issue shall be 'No,' that would be an end of this case, and you need not consider the others. But if you should answer this issue 'Yes,' you should consider

the second issue, 'Was the plaintiff's boat obstructed and prevented by the defendant's bridge from navigating said river between said points on the days named in the complaint?' As to that issue, if you believe the testimony, it will be your duty to answer it 'Yes.' Then as to the third issue, 'What damage has the plaintiff sustained thereby?' I charge you, in considering this question of damage, that it is your duty to consider the number of days the boat was detained, the cost of maintaining the crew, the damage to cotton seed, if there was any, and the cost of unloading and reloading the boat, if you find that the detention made it necessary to do so and the same was actually done. I charge you that, if you find from the evidence that the plaintiff's boat had, at any of the times of the alleged stopping of its boat on its way up the river, passed under the defendant's bridge and was stopped by the county bridge, the defendant would not be liable for any damage caused by that stopping, and you should deduct this from the plaintiff's claim. I am asked to charge you, and do so, that the measure of damages is not the amount the boat might have
(586) earned in freight, but the amount of actual expense while the delay lasted, and actual damage to cotton seed and the cost of unloading and reloading the boat. If you find from the evidence that the plaintiff could have pursued its business on that part of the river below the bridge, and it was not necessary for the boat to remain tied up and idle, then the damage would be the maintenance of the crew, the damage to the cotton seed and the cost of unloading and reloading the boat.

"As to the interest, that is a matter with you; can allow it or not as you please."

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

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

AVERY, J. The most interesting question presented by this appeal is whether the plaintiff in any aspect of the evidence has shown such special damage as would entitle him to redress by civil action for a public nuisance.

The law provides an adequate remedy for the wrong to the public, and thereby prevents a multiplicity of vexatious private actions. But in order to the maintenance of a civil action by an individual, in addition to the indictment by the State, it is not made encumbent on him to show an injury from which he is the sole or even a peculiar sufferer. The damage recoverable in a civil action founded upon the obstruction

of a public highway must, however, be such as is not common to every one who actually does pass or may travel over the highway. It must be unusual or extraordinary, but not necessarily singular. While the wrong must be special, as contradistinguished from a grievance common to the whole public who have the right to use the (587) highway, it may nevertheless be the common misfortune of a number or even a class of persons and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction. For instance, in the familiar case of the plaintiff who was injured by falling into a ditch dug by another across the public highway, referred to by the elementary writers and the courts to illustrate the principle upon which civil actions are maintainable in such cases, it would not have impaired the right of the first man who suffered from falling into it if a dozen of his neighbors had tumbled into it afterwards on the same day and had received more serious injury than he. So, in *Downs v. High Point,* 115 N. C., 182, where the municipality created a public nuisance by negligence in allowing a sewerage ditch to discharge its contents in a place where the nauseous smell annoyed the whole public, but gave to the plaintiff a right of action because of his sickness and that of members of his family, due solely to the disagreeable odors, it would have been none the less competent for him to claim the right to show special damage, or such as was not common to the whole public, because it appeared that other families in the vicinity and on all sides of the defective ditch had suffered in a similar way and claimed like redress in the courts.

Bishop, in his work on noncontract law, section 424, by way of illustrating the principle we are discussing, says: "So, likewise, it is a nuisance to obstruct a navigable stream; therefore if one is by such obstruction prevented from fulfilling his contract, he can maintain a civil suit against the obstructor." The first authority cited to sustain the author's view was *Dudley v. Kennedy,* 63 Me., 465, (588) where the facts were that the plaintiff, who had engaged to transport rocks and gravel in boats on the Kennebec River, which is a navigable stream, was prevented from carrying out his contract by a boom placed across the river between the point at which the rock and gravel were procured and the point of delivery, and the Court held that the defendant was liable in a civil action for special damage. Though few of them are so directly in point as the case just cited, there is no dearth of authorities in which the general principle, as we have formulated

it, is so fully sustained as to make its application to the case at bar obvious and the deduction inevitable. *Guesley v. Codling,* 2 Bingham (9 English Com. Law), 407; *Chichester v. Lithbridge,* Nile's Reports (C. Pl.) 70, 74; *Hughes v. Heiser,* 2 Am. Dec., 459 (1 Binney), 463; *Rose v. Miles,* 2 M. & S., 101; *Burroughs v. Pixley,* 1 Am. Dec., 56 (1 Root, 362).

It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a plant located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier as well as for the manufacturers who owned it. The case of *Dunn v. Stone,* 4 N. C., 241, falls far short of sustaining the defendant's contention. There the plaintiff claimed special damage because a dam placed by the defendant across the stream below the plaintiff's riparian possessions obstructed the passage of fish and prevented the plaintiff from catching and using them. The Court seem to have rested
(589) the decision entirely upon the ground that the fish were not the property of the plaintiff, but were subject to become the property of any person living on the stream upon reclaiming them. *Chief Justice Taylor,* delivering the opinion, said: "But what property could plaintiff have in the fish in their wild state before they ascended to the water flowing over his land? In animals *ferae naturae* a man may have a qualified property, which continues only while they are in his possession or under his control; and *so long they are under the protection of the law.* But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own waters, and thus have done an equal injury to the plaintiff's fishery." The cotton seed which the plaintiff was transporting up the river was its property, and was in a boat which was private property, and was entitled under the protection of the law to pass over the highway without obstruction and damage growing out of detention. We understand the Court to broadly intimate that, had the injury complained of in *Dunn v. Stone, supra,* grown out of the detention of property instead of fish by the obstruction, a different principle would have applied. Though any and every person had the right to transport goods and chattels along the river, just as the whole public might have enjoyed the use of the highway which was traversed by the ditch, a right of action accrued only to those who attempted to avail themselves of this privilege and suffered by the detention of goods in the one case and from

injury to their persons or property in the other. *Rose v. Miles, supra.*

"Navigable waters include all those which afford a channel for useful commerce. Such waters are public highways of common right." 16 A. & E. 236. "It is not necessary that such waters be fit for navigation at all times, but their capacity therefor must recur (590) with regularity. 16 A. & E. 243, note 1; *Comrs. v. Lumber Co.,* 116 N. C., 731. Upon the testimony, which was not controverted, the defendant clearly had no cause to complain of the instruction which left the question of navigability to the jury under the foregoing rule.

We are of opinion, however, that the court erred in allowing the jury to consider the cost of loading and unloading the cotton seed, and of damage to the cotton seed by exposure after they were unloaded. The damage to the cotton seed was caused directly by leaving them exposed, not by the obstruction. If they had been kept in the boat or stored in a well-constructed warehouse, they would have remained uninjured after being detained with the boat for want of a draw in the bridge. The plaintiff was clearly entitled, as damages, to the reasonable worth of the boat for such time as it was detained by the obstruction; and, in determining what the boat was worth, it was competent to consider wages, if reasonable, paid to the hands, as the value of its services were to some extent dependent upon the cost of the crew. *Guesley v. Codling, supra.* If the plaintiff, during the period of detention, had provided other means of transporting the cotton seed around the bridge to the mill above, the rule would have been the same as that applicable to detained passengers (*Hansley v. R. R.,* 115 N. C., at page 609, and the authorities there cited), and the reasonable cost of carrying them by another route might have become an element of the damage assessed. In the case of *Rose v. Miles, supra, Lord Ellenborough* said: "He (the plaintiff) has been impeded in his progress by the defendants wrongfully moving their barge across, and has been compelled to unload and carry his goods overland, by which he has incurred expense, and that expense is caused by the act of the defendants. If a man's time or his money is of any (591) value, it seems to me that this plaintiff has shown a particular damage." *Bayley, J.,* said that the defendants had placed the plaintiff in a situation where he unavoidably must incur expense in order to carry his goods another way, while *Damper, J.,* said: "The expense was incurred by the *immediate act* of the defendants, for the plaintiff was forced to unload his goods and carry them overland. If this is not a particular damage, I scarcely know what is." *Chichester v. Lithbridge, supra.* But the plaintiff, instead of procuring another con-

veyance for the cotton seed, left them exposed, so that they were injured. The measure of damage, therefore, was the reasonable cost of the boat, which was in the employment of the plaintiff, during the period of detention. It is true that, upon a familiar principle, the defendant might have claimed a deduction from the aggregate value of its services, during such time, of any sum which the boat and crew actually earned, but no evidence of that nature was introduced. *Hassard-Short v. Hardison,* 114 N. C., 482.

A different case might have been presented if the plaintiff had been transporting a cargo to a market above and had lost the advantage of the market (*Dudley v. Kennedy, supra*), but the *gravamen* of the complaint here is the cost incurred by detaining the boat. See *Guesley v. Codling, supra.*

We conclude, therefore, that there was error in the instruction given as to the proper measure of damage, while there was no error in the other rulings complained of, and a new trial will be awarded only upon the question of the amount of damage which the plaintiff is entitled to recover. *Tillett v. R. R.,* 115 N. C., 662. New trial as to damage.

Partial new trial.

Cited: *S. v. Baum,* 128 N. C., 605; *Reyburn v. Sawyer,* 135 N. C., 336; *Pedrick v. R. R.,* 143 N. C., 496; *Tise v. Whitaker,* 144 N. C., 512; *Staton v. R. R.,* 147 N. C., 436; *McManus v. R. R.,* 150 N. C., 661, 666; *Pruitt v. Bethell,* 174 N. C., 457.

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(592)

W. E. DANIEL, ADMINISTRATOR OF KEY, v. PETERSBURG RAILROAD COMPANY.

Action for Damages—Common Carriers—Railroad Companies, Liability of for Wrongful Acts of Servants.

1. Except where the proximate cause of an injury to a passenger is the act of God, or the public enemy, and beyond the power of a common carrier, exceeding all reasonable effort to prevent it, the carrier is liable as an insurer and is bound to exercise the greatest practicable care and the highest degree of prudence and utmost human skill to protect its patrons against loss or damage, and this duty exists from the inception to the end of the relation created by the contract of carriage.

2. A patron of a common carrier while on the premises of the latter, on business connected therewith, is entitled from the agents of such common

carrier to protection from assault, injury and insult, and violent language or conduct of the patron will not justify or excuse the violent language or conduct of the agent of the carrier.

3. A common carrier is liable for the violent conduct of its agent when acting within the scope of his employment or line of duty.

4. Whether the wrongful act of a servant, for which its employer is sought to be held responsible, was committed by the servant while in the service of his employer, and in the scope of his employment, is a question for the jury.

5. Where, in an action against a railroad company for damages for the wrongful killing of plaintiff's intestate by defendant's depot agent, it appeared that decedent, while at the defendant's depot taking out his baggage which, as a passenger, he had left there, was shot and killed by the depot agent on account of abusive language which the decedent used to the agent, and the jury found for their verdict that the agent was acting in the line of his employment as such, its verdict will not be disturbed.

6. In such case, when the killing was shown, the burden of showing extenuating circumstances by a preponderance of evidence was on the defendant.

AVERY, J., concurs, but dissents from so much of the opinion of the Chief Justice, as (according to his construction of it) makes the liability of defendant dependent upon the question whether the agent was acting within the scope of his employment, he holding the view that the liability of a common carrier for the acts of its servants is absolute as to injuries inflicted by them on persons under their protection. He also emphasizes his view that the principle decided by this case applies to common carriers, and not to master and servant generally.

ACTION tried before *McIver, J.*, and a jury, at May Term, (593) 1895, of HALIFAX, to recover damages for the killing of plaintiff's intestate by one John F. Lifsey, agent for defendant, at Garysburg, N. C.

The following issues were submitted to the jury by consent of counsel:

"1. Did defendant wrongfully kill Key through its agent, Lifsey?

"2. What damage has the plaintiff sustained by reason of said killing?"

It appeared in evidence that the deceased (the intestate of plaintiff), having a pass (issued for valuable consideration), was a passenger on the defendant's railroad on 22 December, 1892. His baggage was checked to Garysburg, but he left the train at Bellfield, north of Garysburg, retaining his baggage checks.

The plaintiff introduced Robert Harris, who testified that he lived at Garysburg, and was studying telegraphy under John Lifsey, who

was telegraph operator and agent at that depot and had charge of all the railroad's business there. He further said:

"On 29 December, 1892, Key came to the depot after his baggage. When he got there he walked in the depot and said 'Good morning' to Mr. Lifsey and myself. Mr. Lifsey said 'Good morning.' He
(594) then said, 'I have come after my trunks.' Mr. Lifsey said, 'All right,' and told him there were charges on them amounting to $1.70. Mr. Key said, 'Are you going to make me pay that?' Mr. Lifsey said, 'Those are my instructions.' Mr. Key said, 'Write me a receipt for it; I intend to see where it goes.' Mr. Lifsey told him, 'All right.' He then handed him a five-dollar bill, I think. He then asked me to help him put in the trunks. I went out to help him get the trunks in the buggy, and he said, 'Do you think I can take both at the same time?' I told him I did not. He then said, 'I will go back in the office and get my receipt and change and come back after the other.' He then went back in the depot and went in the room where Mr. Lifsey was sitting, and took a seat opposite the stove. He went up to Lifsey and said, 'I intend to see where this money goes. I intend to see that you don't steal this. You and your ——— ——— father-in-law, a ——— ——— rascal, have been trying to defraud me out of every ——— —— cent I have made since I have been at this place; and, now, ——— ——— you! I intend to have revenge or blood ——— ——— you!' Mr. Key then said, 'Hand me the receipt and change.' Mr. Lifsey gave him his receipt and change, and Mr. Key started to go out, and as he got within two steps of the door Mr. Lifsey shot him in the back of the neck."

Q. "Did Mr. Key bring down his checks with him when he came?"

A. "Yes, sir; I think he did."

Q. "When he was going out of the office, did you see the money and the receipt in his hands as he was going out towards the door?"

A. "Yes, sir."

Q. "Were they both in one hand, or the receipt in one and the money in the other?"

A. "I don't remember."

Q. "Did he make any remark as he was going out of the door?"

A. "No sir; I don't think he did."

Q. "Who had charge of the company's business at that depot?"
(595) A. "John Lifsey."

Q. "Whose business was it to take care of the premises and to preserve and keep order there?"

A. "Mr. Lifsey's." (Objection by defendant; objection overruled; exception.)

Q. "Whose business was it to attend to baggage stored and to deliver baggage at that place?"

A. "Mr. Lifsey's."

Q. "After Mr. Key fell with his face on the doorsill, about where did the doorsill strike his body? How did he fall?"

A. "He fell foremost out of the door, with his breast on the door-plate, but his feet inside of the house, and with his head, I think, on the first or second step."

The witness further said that when Key started away from Lifsey the latter was sitting at the table where the telegraph instruments were, and arose as soon as Key walked off toward the door, and got his gun from a table on the other side of the room. Witness tried to prevent Lifsey from shooting Key, but before he could interfere Lifsey shot Key in the back of the neck. The latter fell with his face down on the front doorsteps. Witness asked Lifsey, "Why did you shoot that man?" The reply was, "How can I help it when a man comes in my office and curses and abuses my father-in-law and myself as he did?" Witness testified further that Lifsey had charge of the company's business and premises at Garysburg, and also attended to the care and delivery of baggage.

John Lifsey, witness for defendant, testified as follows: (596)

Q. "Will you state the circumstances under which the killing of Mr. Key occurred?"

A. "I was the agent for the Petersburg Railroad at Garysburg. On the morning of the 24th, I think it was, I am not sure, I had made arrangements to go home to hunt, and the day I was to leave this trunk came down, and I knew he did not know about the new rules in regard to the storage of baggage, and I notified Mr. Harding and Kit Foster to tell him when he came that we had new rules in regard to charging storage, and if the trunks remained after a certain time we would have to charge storage. If he removed them by Monday it was all right. When he came they told him about it. When I got back I found the trunks still there and asked why they had not been removed. I then told Kit Foster to tell Mr. Key that the charges were still going on and ask him to remove the trunks, and said, 'I don't want him to have to pay storage on it.' On the morning the trouble occurred I had asked permission from the company to go hunting for a few hours and they had given permission to go until 12 o'clock. Just as I was in the act of leaving, Mr. Key came in for the trunks. I asked him if he had his checks, and he said he had. I told him I was sorry I had to charge him the storage, but was compelled to do it under the rules or pay it myself, and he said, 'The hell you are!' I told him

yes, it was my instructions. He then said, 'I understand it; I understand it all; take your money,' and handed me a five-dollar bill. He said, 'You and that ——— ——— daddy-in-law of yours have been trying to steal from me ever since you have been in the town.' While I was writing the receipt he was walking behind me cursing and stamping the floor. I asked Mr. Harris to help him put the trunk or the buggy. When he got back to the office I handed him the receipt and change, and he stepped back to the lattice door and said, 'I will
(597) see that you do not steal this. You and that ——— ——— old daddy of yours have been trying to steal from me, but now I am going to have revenge,' and he put his hand on his back pocket, and I grabbed the gun and shot him."

Witness further testified that before he shot Key he thought the latter was going to shoot him, having heard threats that he intended doing so. Witness further said he was very much frightened, because Key was a larger man than himself. Witness said he did not shoot deceased in the performance of any duty he owed to defendant; and that he had done nothing to provoke deceased. Witness was subsequently tried for the homicide and was acquitted.

The defendant prayed for the following instructions:

"1. If the jury believe the evidence, the killing of Key by Lifsey was not done on behalf of defendant, nor in furtherance of the business of the defendant, and the response to the first issue should be 'No.'"

Declined; defendant excepted.

"2. There is no evidence that Lifsey killed Key by authority, direction or order of defendant, either express or implied, and therefore the response to the first issue should be 'No.'"

Declined; defendant excepted.

"3. If Lifsey killed Key because of the insult offered him by Key, and not for the purpose of protecting defendant's goods or preventing a trespass on defendant's property, the jury should respond to the first issue 'No.'"

Refused, except as given in charge; defendant excepted.

"4. Unless you have been satisfied by a preponderance of evidence that Lifsey killed Key with a view to defendant's service, or by order of defendant, the jury should respond to the first issue 'No.'"

Declined, except as given in charge; defendant excepted.

"5. If the killing of Key by Lifsey was the result of the in-
(598) sulting or threatening language and actions of Key, and because of a previous grudge, it was not done in the service of defendant, and the jury should respond to the first issue 'No.'"

Declined, except as covered by charge; exception by defendant.

"6. If the company owed any duty of protection to Key while he was in the warehouse, if you believe the testimony, his conduct while there was so violent and abusive that he broke the contract and forfeited all right to said protection."

Declined; exception by defendant.

The Judge charged the jury as follows:

"This is a civil action brought by the plaintiff, administrator of Charles Key, to recover damages for the wrongful killing of the said intestate by the defendant company through its agent, John Lifsey. The plaintiff alleges that on 29 December, 1892, his intestate had two trunks in the defendant's warehouse, or depot, at Garysburg, N. C., which a few days before had been shipped from Petersburg, Va., and for which the said intestate held checks; that on said 29 December, 1892, in compliance with a notice from defendant's agent, John Lifsey, he went to Garysburg to pay the charges and to get the trunks; that he paid the charges, $1.70, and while engaged in removing his trunks, and before he had completed their removal from the depot, the defendant, through its agent, John Lifsey, wrongfully killed his intestate.

"The defendant says that it is true that John Lifsey was its agent at Garysburg, and as such had charge of the defendant's business there on 29 December, 1892; that on said day it sustained the relationship of warehouseman to the said Key; that it owed to the said Key the duty of caring for his trunks and of delivering them when called (599) for. It is also admitted that on 29 December, 1892, the said Key came to pay the charges and take his said trunks and before they were removed from the said depot, and while said Key was engaged in removing his trunks, he was shot and killed by the defendant's agent, John Lifsey; but the defendant says that it is not liable in this case in damages for two reasons:

"1. That the killing of Key was not wrongful; that at the time of the killing Lifsey had reasonable grounds to believe and did believe he was in danger of losing his own life or suffering great bodily harm, and so shot and killed the said Key in self-defense.

"2. The defendant says it is not liable, even if the killing was wrongful, because the said John Lifsey was not acting within the scope of his employment, and that the act was in no way connected with the business of the defendant. This is substantially the contention of the parties, and to determine the matter by agreement, these issues are submitted to you, which you are to answer according to the testimony as you have it from the witnesses and the law as you have it from the Court:

"First issue—Did the defendant wrongfully kill Key through its agent, John Lifsey?

"Second issue—What damage is the plaintiff entitled to recover on account of said killing?

"If the jury find from the evidence that at the time of the killing Lifsey had reasonable grounds to believe or did believe he was about to lose his life or suffer great bodily harm at the hands of Key, the killing was not wrongful, and your answer to the first issue should be 'No.' And this would be so whether there was any real danger or not. But of the reasonableness of this apprehension the jury, and not Lifsey, must be the judge. (The killing being admitted, the burden is upon the defendant to show justification by a preponderance of proof.)

(600) You are instructed that no language, however abusive or insulting, will justify killing, or even an assault. If you find the killing was wrongful, you will next inquire whether at the time Lifsey was acting within the scope of his employment. If the jury find that the killing was in consequence of an old quarrel or grudge about land, and not connected with the delivery of the trunks, Lifsey was not acting within the scope of his employment and the defendant would not be liable, and your answer to the first issue should be 'No,' even if you find the killing was wrongful. And in pasing upon this question it is your duty to take into consideration the acts and words of Key concerning Lifsey. But if the quarrel arose and the killing was the result of the quarrel about the delivery and storage of the trunks and the payment of the charges thereon, then Lifsey was acting within the scope of his employment and the defendant would be liable, and you should answer the first issue 'Yes,' provided you find the killing was wrongful. So, if you find from the evidence that the killing was wrongful, and that at the time Lifsey was acting within the scope of his employment, as I have just explained, you will answer the first isue 'Yes'; otherwise you will answer 'No.' If your answer be 'No,' that ends the case; but if your answer be 'Yes,' you will next consider the second issue, What damage is the plaintiff entitled to recover on account of said killing? The damage is a money consideration only, as a compensation for what Key, if he had lived, could reasonably have been expected to render to his family, and in passing upon this question it is your duty to consider the age of Key, his physical condition, habits, skill, industry and means of making money. If you believe the evi-

(601) dence, he was a skilled workman and mechanic; he was earning one hundred dollars per month; he was thirty-two years old, in good health, and, by the mortuary table, had an expectancy of thirty-four years. This is the law of the case as I understand it, and you must apply the facts and consider this case as you would a case between two of your neighbors."

Defendant excepted to his Honor's charge to the jury as follows:

"1. The killing being admitted, the burden is upon the defendant to show justification by a preponderance of proof.

"2. You are instructed that no language, however abusive and insulting, will justify a killing or even an assault.

"3. But if the quarrel arose and the killing was the result of the quarrel about the delivery and storage of the trunks and payment of the charges thereon, then Lifsey was acting within the scope of his employment, and the defendant will be liable, and you will find the first issue 'Yes,' provided you find the killing was wrongful.

"4. If you answer the first issue 'Yes,' you will next consider the second issue, What damage is the plaintiff entitled to recover on account of said killing? The damage is a money consideration only, as a compensation for what Key, had he lived, could reasonably have been expected to render to his family. In passing upon this question it is your duty to consider the age of Key, his physical condition, habits, skill, industry and means of making money. If you believe the evidence, he was a skilled workman and mechanic; he was earning $100 per month; he was thirty-two years old, in good health, and, by the mortuary table, had an expectancy of thirty-four years."

5. The defendant further excepted for that his Honor failed to charge that the burden was upon the plaintiff to show by the preponderance of the testimony that the killing of Key was done by Lifsey in the furtherance of the business of the railroad com- (602) pany.

This exception was made for the first time in case on appeal, except as made for refusal to give instructions asked.

6. Defendant further excepted to the refusal of his Honor to give the instructions embraced in the defendant's prayers for instructions.

The jury responded to the first issue "Yes," and to the second issue "$12,000."

Defendant moved for a new trial for errors as set out; motion denied; judgment for plaintiff, and appeal by defendant.

R. O. Burton for plaintiff.
MacRae & Day and Thos. N. Hill for defendant.

FAIRCLOTH, C. J. When the plaintiff's intestate purchased his ticket at Petersburg and had his baggage checked to Garysbury, the contract for their safe delivery at the latter place was complete. The passenger's exit from the train at Bellfield discharged the contract as to him as a passenger, and we have only to consider the duties and liabilities of the parties as to the baggage, consisting of two trunks. The contract as

to the baggage, however, continued to the point of delivery and until the delivery was made.

Common carriers are insurers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which have been demonstrated by experience to be practicable. They are so held upon the grounds of public policy, reason and safety to their patrons. (603) The exceptions are the acts of God and the public enemy. If these be the *proximate cause,* and without any neglect on the part of the carrier, then he is not liable in damages. He is, against all perils, bound to do his utmost to protect against loss or damage and must use efforts proportioned to the emergency to ward it off. If he fails to do so he remains liable, although the act of God may have been the immediate cause of the mischief.

Passengers are entitled to protection from the carrier's agent against assaults or insults from their own employees, from other passengers or persons on the train, whether such persons are rightfully on the train or not. The reason of the above rigid rules is that the passenger and his baggage, during the transit, are in the possession of and under the immediate supervision and control of the carrier's agents, such as the conductor and baggage master, and hence the difference in degree of the liability of the defendant as a carrier and as a warehouseman. We have not undertaken to cite the authors and decisions on the above questions. They are numerous and are collected in 16 A. & E. Enc., on page 387.

The contract was to deliver the baggage at the terminal point, and it continued until the delivery was made. The transfer of the baggage from the train to the warehouse did not terminate the contract, but affected only the degree of care required in the two positions. The reason for the strict rule to be observed by the carrier as such, already pointed out, did not, in the nature of the circumstances, apply to him as a warehouseman, as the baggage could not be at all times under his immediate observation. In the latter capacity the defendant was only required to exercise ordinary care whilst the goods remained in his custody. *Example*: In *Neal v. R. R.,* 53 N. C., 482, it was held that goods in an ordinary wooden house at the station, fastened with iron (604) locks and bars, the agent residing 200 yards from the warehouse, was ordinary care, and the railroad was not liable for the loss of the goods by theft. If the passenger does not claim his baggage within a reasonable time after arrival at its destination, the carrier becomes a mere bailee. Under this modified obligation of bailee, or warehouseman, he is bound to exercise ordinary care in keeping the baggage

until called for or disposed of in some legal way. This modified obligation of the carrier is not an independent one, arising from the accidental circumstance of the baggage being left on his hands, but is imposed by the contract of carriage, and rests upon the carrier with whom the contract was made. It is not suggested, however, that the trunks were not properly cared for in this case. The defendant was not a gratuitous bailee, as it had the right to charge for storage and did charge and collect it.

On application the plaintiff's intestate had received one trunk when he was informed of the storage charge (the other trunk not being yet delivered), when he became angry and, whilst the agent was writing and delivering the receipt and receiving the money, he severly abused the agent in his office and, receiving his receipt and change, started out of the office and was about the door when the agent picked up his gun and shot him in the back of the neck, when he fell out on the door steps and soon died from the shock.

A patron of the defendant, whilst in his warehouse on business connected with the road, is entitled, from defendant's agent, to protection against assaults or insults from any one. The language of the deceased to the agent was rude and wrong, for which the agent had a right to expel him from the premises by using such force as was neces- (605) sary and no more. The offensive language of the deceased, however, did not justify or excuse the violence of the agent, and if his violent act was done within the scope of his employment or line of duty, then his employer, the defendant, is liable in damages for the injury complained of, by reason of the original contract and the act of the agent whilst so engaged. Was the agent's act in the course of his employment and whilst about the master's business? No decisive test can be given, but in all cases the question whether the act was committed by the servant in the service of his employer or for his own purpose is one for the jury, in view of all the circumstances. Wood Master and Servant, 594; *Hussey v. R. R.*, 98 N. C., 34. In this case that question was submitted to the jury in the charge of the court, and by their verdict the fact that the agent was acting within the line of his employer's business is settled in the affirmative.

The full briefs of counsel and their able argument on each side assisted the Court greatly in the consideration of this case. We do not find it necessary to refer to their numerous citations, but will do so as to some of them. *Jones v. Glass,* 35 N. C., 305, relied upon by defendant, was in the case of an overseer engaged in his employer's business. In the exercise of his proper duties, he used excessive force and seriously injured the slave, and his employer was held liable. The

quotation from the opinion on page 308 was that the driver left the track and ran over a man, and the master was held not liable, because the driver was not doing the business his master had put him about. No authority is cited, and without controverting that statement it is sufficient to say that, according to the verdict, the agent in the present case was in the line of his duty.

Wesson v. R. R., 49 N. C., 379. Here the defendant had let out the building of the road to contractors, who whilst working com-
(606) mitted a trespass on adjacent lands without the knowledge of the defendant. The Court said a master is not liable for the wilful trespass of a servant. He is liable in an "action on the case" for an injury caused by the negligence or unskillfulness of a servant while doing his business, but not in an action of trespass *vi et armis*. But there is another ground to support that conclusion, to-wit, that a contractor is not a servant proper. His is an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished. He is not subject to the orders of the other contracting party in respect to the details of the work, but is only bound to do the specific work according to an agreed plan. *Baron Rolfe,* in *Reedie v. R. R.*, 4 Exch., 244, said: "But neither the principle of the rule (of master and servant) nor the rule itself can apply to a case when the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."

Hussey v. R. R., 98 N. C., 34, was an action for slander by defendant's general superintendent and came to this Court upon demurrer. This Court overruled the demurrer and sent the case back for such action as the defendant might be advised.

The first five prayers for instruction by the defendant were in substance that there was no evidence that the agent was acting in the line of his duty to his employer, or that if they believed the evidence they should answer the first issue "No." These prayers assumed the very question which the jury had to consider and that was properly left to the jury. The last prayer is answered in another part of this opinion.

We think the charge of the court presented the case to the jury fully as favorably as the defendant could ask. The exceptions
(607) to the charge were that the court refused to give the prayers to the jury. We think the court gave the defendant's prayers, as far as was proper, to the jury, and the exceptions are overruled. Whilst the abusive language of the deceased would have justified his expulsion by necessary force, it could not extenuate such excessive violence on the part of the agent.

The burden of proving and making out a case, at least presumptively, was upon the plaintiff throughout the trial, but when the killing was admitted, then the burden of showing extenuating circumstances, by a preponderance of evidence, was upon the defendant. That was a material part of his defense, and the jury was so instructed. *S. v. Willis,* 63 N. C., 26; *Joses v. R. R.,* 142 U. S., 17.

After mature consideration of this case, by reason of its importance, we are unable to see any error in the trial below.

Affirmed.

AVERY, J., concurring: The correctness of the ruling in the court below depends, not upon the general principles governing the liability of the master for the torts of his servant, but upon the nature, extent and duration of the duty of protection which is implied in contracts for the carriage of passengers. *Stewart v. Brooklyn,* 90 N. Y., 588, 594. It is important, therefore, to define the duty particularly and clearly, and to determine when it arises and when it ceases to exist. From the inception of the relation between them until it ends, the law imposes upon the carrier the duty of protecting its passenger absolutely against its own servants and qualifiedly against all other persons. Though the conduct of the employee or officer in doing violence to the passenger may be wholly unauthorized, beyond the scope of his authority, and even wilful and malicious, the obligation to respond in dam- (608) ages for any injury done still rests upon the principal just as fully as it would had the master commanded or encouraged the commission of the act. Hutchinson Carriers, secs. 595, 596, 597; *Jeddard v. R. R.,* 57 Me., 202; *Sherley v. Billings,* 8 Bush, 47; *People v. Brunswick,* 60 Ga., 282; *Stewart v. Brooklyn, supra; R. R. v. Jackson,* 6 A. & E. R. R. cases, 178; *R. R. v. Slexam,* 103 Ill., 546; *R. R. v. Turner,* 72 Ga., 292; *R. R. v. Sheehan,* 29 Ill. App., 90; *Dwenelle v. R. R.,* 120 N. Y., 117; *R. R. v. Kertle,* 16 A. & E. R. R. cases 337; *Bryan v. Rich,* 106 Mass., 180.

In the case of the female passengers the weight of authority goes further, and extends the obligation to them so far as to impose the legal duty upon the carrier of protecting them not only against indecent assaults, but against insulting proposals or insolent abuse, obscene or offensive words. *Crake v. R. R.,* 36 Wis., 657; *Bryan v. R. R.,* 16 A. & E. R. R. cases, 335; *R. R. v. Ballard,* 85 Ky., 307; *Campbell v. Car Co.,* 42 Fed., 484.

A railroad company is bound also to use reasonable vigilance to protect a passenger against violence at the hands of fellow passengers or of intruders, or of any person permitted by it to come on its premises, and where it appears that its conductor knew or had reasonable ground

to apprehend that the safety of a passenger or passengers was endangered by any threatened force from within or outside of the train, and failed to use every available means to avert the threatened wrong, the company is liable to respond in damages for any assault that ensued. *Hutchinson, supra,* sec. 553a; *Britton v. R. R.,* 88 N. C., 536;
(609) *Spehm v. R. R.,* 87 Mo., 74; *R. R. v. Burke,* 53 Miss., 200; *Spehm v. R. R.,* 101 Mo., 417; *R. R. v. Pillow,* 76 Pa. St., 510; *R. R. v. Hines,* 53 Pa. St., 512; *Flint v. Transportation Co.,* 34 Conn., 554; *R. R. v. Flexam, supra;* Angell Carrier, sec. 521, p. 462, note *a; R. R. v. Riley,* 39 Ind., 568.

Where the servant of the railway company is actually assaulted, he has the same right as other persons to repel force by resistance, but, having overcome it, he becomes liable himself and renders the carrier answerable if he further pursue and punish the wrongdoer. *Hanson v. R. R.,* 62 Me., 84. Insulting language is never deemed in law provocation sufficient to justify an assault or to warrant the use of excessive force in the expulsion of intruders. But the servant of a company that owes the duty of protection to one on its premises by its invitation or to transact business with it, stands in a relation to such person somewhat analogous to that which a peace officer sustains to a prisoner in his custody. It is therefore clear that the defendant was liable to answer in damages for the killing of plaintiff's intestate, who was at the time, in contemplation of law, under its protection, and, as will appear from the authorities already cited, the liability is in no wise dependent upon the question whether the agent was acting within the scope of his authority. *R. R. v. Hines,* 53 Pa. St., 512. The fact that the intestate was on the premises and under the protection of the company, if such was his status, gave him the right to claim absolute immunity from injury at the hands of any of its servants. The duty of insuring his safety against injury by intruders might possibly depend upon the question whether a servant was at the time on duty at the place of the threatened injury. But for any injury sustained at
(610) the hands of its servant, whether on or off duty, a person on its premises by its invitation may hold a railroad company unconditionally responsible. The contract of carriage begins not later than the time when a person enters upon the premises of a carrier for the purpose of securing passage; but where carriages are furnished by it to transport passengers to a station a person entering such vehicle, or even halting one for the purpose of boarding it with the same object in view and under the implied invitation of the carrier, is entitled to the same right of protection as after the purchase of a ticket. *Hutchinson, supra,* secs. 556 to 561; *Dwenelle v. R. R.,* 120 N. Y., 117; *Bryan*

v. Bennett, 54 Eng. Com. Law, 603; *Hansley v. R. R.,* 115 N. C., 602; *R. R. v. True,* 88 Ill., 608; Thompson Car Pas., p. 42, note. The contract for the carriage of the person with implied right of protection ceases ordinarily when the passenger is safely landed at his point of destination and has left or had reasonable time to leave the premises of the carrier. *Johnson v. R. R.,* Mass., 125; Patterson Railroad Accident Law, secs. 221, 320; *Imhoff v. R. R.,* 20 Wis., 344; *R. R. v. Krouse,* 30 Ohio St., 222. But even when only so much of the implied contract is in question as imposes the duty of carrying to its destination the person of the passenger, the law looks to his safety by requiring of the carrier the exercise of ordinary care in keeping in good condition every part of the usual way which is to be traveled by him in getting off the premises. Hutchinson, *supra, secs.* 516, 519, p. 593; *Dodge v. R. R.,* 148 Mass., 207. It was held by some of the courts formerly that the proprietors of public conveyances which carried passengers were not responsible for their baggage unless a distinct price was paid for its carriage. "But the law is now settled otherwise, and when the carrier contracts for carriage of the passenger, either expressly or by receiving him upon its conveyances, the carriage of his reason- (611) able and ordinary baggage is regarded as being undertaken as incidental to the principal contract, and as equally obligatory upon the carrier." Hutchinson, *supra,* sec. 678.

But though the legal obligation to transport the ordinary baggage is incidental to the agreement to carry the person, the liability of the carrier for its safety until a reasonable time after the passenger reaches his destination extends not simply to responsibility for want of ordinary care, as in the case of the passenger himself, but is the same as that of carrier of goods. Hutchinson, *supra,* sec. 678. Every obligation growing out of contract continues so long as the contract continues. *Dwenelle v. R. R.,* 120 N. Y., 117. After a reasonable time, if the baggage is not called for or removed from the station, the liability as insurer ceases, and the law substitutes for it that of warehouseman. *Hoeger v. R. R.,* 63 Wis., 100.

When the relation of carrier with the obligation of an insurer ceases, that of warehouseman takes its place, not under any new agreement, but under the original contract of carriage, which still binds the carrier to as high a degree of diligence in caring for it as it was at any time bound to exercise for the safety of the passenger, while on its carriage or premises. Hutchinson, *supra,* sec. 712. "The fair construction of the contract (says Hutchinson, sec. 713) is said to be that the carrier agrees for a consideration to transport the passenger and his baggage to his destination and deliver the latter to him on his arrival if called

for, and if not called for that it shall be properly stored and reasonable care shall be exercised to prevent injury or loss, until it is *called for* or is lawfully disposed of." The plaintiff's intestate went upon the premises of the company, as he had a right to do, in order to surrender his checks and receive the baggage still held under the
(612) original contract of carriage. He paid his fare to that station and acquired the incidental right to have it transported. A passenger does not lose his character as such by alighting at a station before reaching his destination (*Parsons v. R. R.*, 113 N. Y., 356) and he may get off and stop over at any intermediate point, and still in his egress from and ingress to the station he is under the protection of the carrier while on its premises. While declaring explicitly that the rule governing the master's liability for the torts of his servant does not apply "to the case of an assault committed upon a passenger by a servant entrusted with the execution of a contract of a common carrier," the Court of Appeals of New York, in *Stewart v. R. R.*, 90 N. Y., 588, 594, state the rule to be: "The carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passenger." Whether the doctrine might not have been extended even further, it is not necessary for the decision of this case to determine. The station agent was discharging a duty which the defendant owed to the plaintiff's intestate in receiving the checks and delivering the baggage. Before that duty was fully performed and while the intestate was on the premises, under the original contract of carriage, to receive his trunks stored in its warehouse, its agent made a deadly assault upon him with no pretense or other ground of excuse or justification than the use of insulting language, which in law is no provocation at all. This appeal presents a grave question, which has received mature consideration. While in this particular instance it may impose a burden upon the carrier to answer for the wilful act of its agent, it is not probable that with a full understanding of the law such wilful conduct will be heard of again in the next half century. The law
(613) must hold the carriers to the duty of so managing their own servants as to insure the safety of the lives and limbs of persons under their protection. The carriers may provide for their own protection by care in the selection of servants and the use of wholesome discipline where the employees fail in the discharge of their duty. The other questions are unimportant.

The fact that the plaintiff's intestate had come upon the premises by invitation of the company gave him a right to the protection of the company through its officers and servants. The contract of carriage and

the fact that he was receiving the baggage that had been transported under it being admitted, the company was, nothing further appearing, liable for an injury to him by its servant. I think there was no error in instructing the jury that under the admitted facts the burden of proof was shifted upon the defendant to show that he was justified in making the deadly assault upon the plaintiff's intestate. While I concur with the majority of the Court in the conclusion reached, I do not agree to the opinion of the Chief Justice in so far as it seems to make the liability of the defendant dependent at all upon the question whether the servant was acting within the scope of his authority. The liability for acts of servants is absolute as to injuries inflicted by them on persons under their protection. I wish to emphasize the view that the principle governing this case affects the relation of master and servant only when the former is a common carrier, and while the opinion of the Court has been modified, it is still open to objection upon this point.

The body of the foregoing opinion, submitted as a tentative (614) one, was rejected by the Court, but I still think that it places our conclusion upon the only impregnable ground.

Cited: Tillett v. R. R., 118 N. C., 1046; *Whitley v. R. R.*, 119 N. C., 727; *Manning v. R. R.*, 122 N. C., 831; *Williams v. Gill, ib.*, 969, 971; *Whitley v. R. R., ib.*, 989; *Strother v. R. R.*, 123 N. C., 198; *Redditt v. Mfg.*, 124 N. C., 103; *Lamb v. Littman*, 128 N. C., 364; *Lovick v. R. R.*, 129 N. C., 433; *Palmer v. R. R.*, 131 N. C., 251; *Lyman v. R. R.*, 132 N. C., 725; *Seawell v. R. R., ib.*, 859; *Jackson v. Tel. Co.*, 139 N. C., 354; *Pineus v. R. R.*, 140 N. C., 451; *Sawyer v. R. R.*, 142 N. C., 6, 8; *Hollingsworth v. Skelding*, 142 N. C., 247; *Stewart v. Lumber Co.*, 146 N. C., 66, 87; *Jones v. R. R.*, 150 N. C., 480; *Bullock v. R. R.*, 152 N. C., 67; *Peanut Co. v. R. R.*, 155 N. C., 164; *May v. Tel. Co.*, 157 N. C., 421; *Fleming v. Knitting Mills*, 161 N. C., 437; *Wharton v. Ins. Co.*, 178 N. C., 439.

JOHN F. WHICHARD v. WILMINGTON AND WELDON RAILROAD COMPANY.

Diversion of Waters by Railroad—Appeal—Record—Surveys.

In an action for the diversion of surface water or the water of natural streams by the construction of railway lines, surveys of the locality, made under order of the court, must be introduced and accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing, on penalty of

liability to dismissal of appeal or affirmance of judgment on the ground that it is impossible to review the alleged errors.

ACTION tried at December Term, 1894, of PITT, before *Mebane, J.*, and a jury.

The action was for damages for diversion of water by defendant on the lands of the plaintiff. There was judgment for the plaintiff, and defendant appealed.

J. E. & L. I. Moore and J. L. Fleming for plaintiff.
J. L. Bridgers for defendant.

PER CURIAM: In nearly all of the cases that have for some years past been brought up to this Court to test the liability of railway companies for flooding lands, the statements have been confused, and we have encountered great difficulty in comprehending the facts, mainly for want of clear discriptions of the relative positions of points of which it has seemed almost essential that we should be able to fix the locations.

(615) We have concluded, therefore, to give notice of a rule that in every case where an action is brought to recover for the diversion of surface water or the water of natural streams, either in the original construction or subsequent improvement of railway lines, parties who go to trial without having a survey made and sending up, as exhibits to the statement of the case on appeal, fifteen maps of the locality where the injury is alleged to have been sustained may expect that the judgment of the court below will be affirmed or the appeal dismissed. The surveys must be made under an order of court appointing two surveyors, one selected by each of the parties, where they cannot agree to the appointment of any particular person, and requiring that the relative positions of the intersections of ditches or natural streams with each other or with the railroad line and the location and area of swamps, where material, shall be laid down upon such maps with explanatory notes, showing by letters or figures where all points that it may be material to locate are situated.

Hereafter, unless an appellent can show that he has made diligent effort to have such maps prepared, and has been prevented by the court or the opposing party from accomplishing that end, he may expect the appeal to be dismissed or the judgment below affirmed, on the ground that it is impossible to review the alleged errors. *Durham v. R. R.*, 113 N. C., 240. In this case it is adjudged that a new trial be granted, to the end that the contentions of the parties may be presented to the court below and to this Court in a more intelligible manner.

New trial.

Cited: Stephens v. McDonald, 132 N. C., 135.

(616)

WILLIAM F. PICKETT, ADMINISTRATOR OF ALBERT WILLIAMS, DECEASED, v. WILMINGTON AND WELDON RAILROAD COMPANY.

Action for Damages—Railroad Companies—Duty of Engineer—Negligence—Contributory Negligence—Proximate Cause—Issues—Instructions—Damages, Measure of—Partial New Trial.

1. If a negligent act becomes injurious only in consequence of the intervention of the distinct wrongful act or omission of another, the injury will be imputed to the last wrong as the proximate cause and not to that which was more remote.

2. When the Court adopted the rule that engineers of railroad trains were required to keep a constant lookout for cattle and stock, even between public crossings, and for obstructions, it follows that it is negligence in the engineer to fail to see a helpless person on the track, whether drunk or disabled from other causes.

3. It is negligence in a railway engineer to fail to exercise reasonable care in keeping a lookout for apparently helpless or infirm beings on the track, and the failure to do so will be deemed the proximate cause of a resulting injury to one so lying on the track, notwithstanding such person may have been negligent in going upon the track, the true rule being in such cases that he who has the last clear chance to avert an injury, notwithstanding the previous negligence of another, must be considered as solely responsible for the injury.

4. It is within the sound discretion of the trial Judge to frame the issues in the trial of an action, and it is incumbent upon a party complaining of the exercise of that discretion to show that it operates to his injury.

5. Where a case hinges on a controverted allegation of negligence, the court may, in its discretion, submit one or more issues, with appropriate instructions.

6. Where an issue raised not only the question whether the defendant was negligent, but also whether it was the proximate cause of an injury complained of, the trial Judge was at liberty to tell the jury that, if they should find that the defendant was negligent and its negligence was the proximate cause of the injury, it was immaterial to determine whether the plaintiff had been previously negligent.

7. In an action for a negligent killing, an instruction that the expectation of one 17 years old would 44 2-10 years, and that the mesure of damages would be the net moneyed value of intestate's life to those dependent on him had he lived out his appointed time, is erroneous, because it leaves uncertain the date which should be the basis of the final calculation, instead of informing the jury that it is the present value of such net moneyed value which should be considered.

8. Where, in an action for death by wrongful act, the only error is in an instruction as to damages, a new trial may be granted upon that issue alone. (*Tillett v. R. R.*, 115 N. C., 662, followed.)

(617) ACTION to recover damages for the alleged negligent killing of the plaintiff's intestate by the defendant, tried at February Term, 1895, of DUPLIN, before *Hoke, J.*, and a jury.

The defendant denied the allegation of negligence, and alleged that the intestate of the plaintiff was guilty of contributory negligence.

On the trial P. G. Wilson testified as follows: "In morning deceased and another boy passed me going up towards railroad. They got up on culvert arch and sat down and commenced whistling—sat there half an hour and then went up higher and laid down on embankment; could see boys, deceased from his knees up, and he was on embankment on the west side of the road so I couldn't tell where his feet were; knees must have been on the stringer which ran along the ties. This stringer was the guard rail running across the trestle and ran 12 to 14 inches from the iron; trestle had been filled up, making the earth on either side of track higher than track, sloping toward track on one side and down on other. They lay on this dirt with their feet towards track. Heard train blow at Magnolia; heard train blow at crossing three hundred yards from them. I rushed towards them calling out, but didn't rouse them.

(618) They lay still, as if asleep. No bell was rung before they were struck; train passed three or four hundred yards before it took up; was going very rapidly. Deceased was one of these boys. His mouth was bruised, one of his feet cut off either above or below the knee, his clothes were torn, his body bruised, and he was dead. He didn't move at all before train struck him." Witness had noticed them still this way for some time before train came and thought all the time they would get up, and finally went to them. "It was a passenger train of two cars and locomotive, known as Shoo Fly train. At point where they were killed there was a straight track from Magnolia on one side of trestle to Rose Hill on the other, straght line for five miles. There was straight track from boys towards train for two miles and a half, and way was open. The earth where they were lying was yellow dirt and gravel. The train approached bodies on a down grade. It is a pretty smart grade and cut all the way from Magnolia to trestle."

Cross-examined: "Accident occurred half-past eight in morning in May. Train came along about regular schedule time; and they had been in habit of seeing train—would ride on it a little way, then jump off. They sat on the arch of the culvert a while and then went higher up embankment. Both laid down on their stomachs—one with face on arm, one with his face up road and one down. This earth on either

side was higher than track, and at points there was a little depression. This point was just over the trestle, and I can't say whether there was any depression at that point. Crossing three hundred yards from accident. It was a fair day."

W. F. Pickett testified: "Man on engine could have seen anything the size of a small pig on the railroad for half a mile from direction whence train came. I saw place where boy was day before and day after, and this was its condition: Earth was a little higher than track (619) on either side, where it had been dumped in filling trestle, but not much, not more than an inch or so, and there was no depression or hollow large enough to hide a man; it was nearly level; the whole embankment wasn't more than three feet."

Miss Annie Wilson testified: "Was in sight of place where boys were killed. I was down in the field; they were there when we went down to field, and they remained still on track in same place till train ran past. No bell or signal given by train to arouse them. It had blowed once several hundred yards back. We could just see the heads of boys; one was lying on face with his arm under his head; don't recollect how other was lying; didn't see them move at all; didn't see them at exact time train struck them; some bushes were then between us and boys. Boys had been on track half to three-quarters hour before train come."

Captain Johnson testified for the defendant: "I am road master and superintendent of track of defendant road between Wilmington and Wilson; lived in Magnolia five years and have been superintendent of this division since March, 1888, and have been in railroad service for 24 years; was on train day boys were killed. It had been a trestle and had been filled up under my supervision; filled with common material leaving 16 feet wide at top, sloping one to one, and had hauled sand alongside for purpose of taking out trestle timbers. This sand was shoveled off flat on either side guard rail as high as two and a half feet in some places and others not more than one. There were depressed places—irregular—when two cars came end to end there would be very little dirt, and here it would be low—at point where blood was where boys were killed, and they were lying in one of the low places. The place where they were lying was ten inches lower than usual height. I was on a lever car the next day after the accident and (620) standing on seat and approached place as train came, and height was perhaps a foot lower than engineer; approached 275 feet before seeing a hand lying in this place; couldn't then tell it was a man; when cross-tie put up to iron couldn't tell 275 feet; when it was put off iron could see it 275 feet. Last load of earth was put there Saturday before accident; gravel came up ten inches above the hole where body was

lying; down grade from Magnolia to this trestle, and is twenty-four feet to mile. It's steep and so considered." He knows boy very well; knew him all the time when witness lived in Magnolia. "I was Mayor last three years; never saw him work any except on street under sentence for jumping on train. Train had a large class engine and brakes, two cars. Train could have been stopped in 300 yards and not sooner. The crossing was not a public crossing."

John Neimeyer: "Have been an engineer since 1854; was engineer on this train; were running 45 or 50 miles an hour, and 125 yards from place first saw sign of anything on track; thought it was a cross-tie. In fifty yards saw it was was a human being; one foot on track; did everything to stop train but could only do so in 200 yards beyond bodies; was thirty or forty yards from body before saw it was a man's foot; body was in depression; knees on guard rail and foot only out on track. I thought it was an old tie some one had dragged up there. Depression in dirt hid them. They were not exposed to view. They were in one of these depressions and lying flat on their stomachs. The grade was twenty-five or thirty feet to mile. Had a big, heavy engine and two cars. At that speed on that grade could not have possibly
(621) stopped it under 300 yards. Harder to stop a light train with air brakes or a train with a few cars than a larger number. I pointed place to Captain Galloway and Captain Johnson. It is not dangerous to run over a man, but is to run over cross-ties. Brakes were in good working order."

Cross-examined: "Three hundred yards is shortest time train could have been stopped. In saying ran 200 yards beyond bodies I only estimated. The schedule running time was forty miles an hour, including stops; was five minutes late and was running faster to make the next stop on schedule time. I was keeping careful lookout, but at speed of train and the engine vibrating couldn't distinguish an object till nearly on it. The body was in one of these depressions and track was not obstructed. I was noticing centre of track. I might have seen a white object three or four hundred yards, but not in the declivity, which obstructed view. I am 63 years old."

Redirect: "I was running at regular speed and under regulations of the company. Have to stop at every station, and it required all speed to make time."

L. G. Wilson testified: "Am a farmer, live near track and have ridden on trains and think I have sufficient knowledge to give an opinion as to what distance required to stop a train. I don't know the effect or power of air-brake appliances." Defendant proposed to ask the witness as expert what distance it would have required to stop this train. Court

decided he was no expert, disallowed question, and defendant excepted.

His Honor submitted to the jury the following issues, which with the responses were as follows:

"1. Is the plaintiff, Wm. F. Pickett, the duly qualified administrator of Albert J. Williams, deceased?" Answer: "Yes."

"2. Was the said Albert J. Williams killed by the negligence of the defendant company?" Answer: "Yes."

"3. Did the said Albert J. Williams by his own negligence (622) contribute to his death?" Answer: "No."

"4. What damages is the plaintiff entitled to recover?" Answer: "Nine hundred dollars."

The following requests for instructions were asked by the defendant in writing and in apt time:

"1. If the jury believes that the deceased went upon the road of the defendant company and laid down upon it for the purpose of going to sleep, and did go to sleep upon it in such a position that a part of his body was upon the track, and while so asleep was run over and killed by the cars of the defendant, the defendant would not be liable unless the engineer actually saw the deceased in time to avoid the injury.

"2. That if the jury believe that the intestate of the plaintiff was tired and sleepy, and being conscious of this fact, went upon the roadbed of defendant and laid down with a part of his body upon the track, and while in this position was unexpectedly overcome by sleep and was killed by the defendant's train, the defendant would not be guilty of negligence, and the jury should so find, unless the jury believe further that the engineer of the defendant actually saw the intestate of the plaintiff in time to stop.

"3. That in determining whether the engineer of the defendant saw the plaintiff's intestate or could have seen him in time to avoid the injury, it is the duty of the jury to consider the duties imposed upon the engineer and the circumstances surrounding him. That it is their duty to consider the fact that he owed a duty to the passengers upon the train and had to care for his engine, and that he was upon a rapidly moving train.

"4. That if the jury believe that the engineer of the defendant saw an object on the track in time to avoid the injury, but could not discover that it was a person, and they believe further that, after (623) discovering that it was a person, the engineer could not stop in time to avoid the injury, the defendant would not be guilty of negligence.

"5. That if the jury believe that the engineer of the defendant could have seen an object on the track in time to avoid the injury, but not in time to discover that it was a person, and they believe further that,

after he could have discovered that it was a person, the engineer could not have stopped in time to avoid the injury, the defendant would not be guilty of negligence.

"6. That the plaintiff is entitled to recover nothing of the defendant on account of pain, grief or mental suffering, and nothing as a punishment to the defendant.

"7. That the measure of damages is the present value of the gross income of the plaintiff's intestate less the cost of living and his expenditures, that is, his net income, and these damages could not exceed what the jury believe to be the present value of the accumulations to the estate of the plaintiff, based upon the expectancy of life."

These instructions were refused, except as they are contained in the charge of the court hereinafter set out, and defendant excepted.

His Honor charged the jury as follows:

The court explained to the jury the nature of the action and the defenses relied upon, making four issues for their decision, and charged the jury on the first issue, to which there was no exception.

On second issue, with other matters not excepted to, the court charged the jury: That ordinarily negligence was some breach of duty which one person owed another, causing damage. That their inquiry in (624) second issue would be as to what duty the defendant company owed the plaintiff's intestate, and whether there had been a breach of that duty which caused the death of the intestate. That an engineer's first duty was to care for the safety of his passengers on his train, to give every necessary attention to matters in and about his engine, and also to keep a lookout for things on the track or so near it as likely to become an obstruction to his train. That, as to persons in or upon the track, if they were adult and awake, he had a right to suppose that such persons would use their faculties for their own safety and get out of the way, and in such case the engineer had a right to act on that supposition and continue the speed of his train, but if persons are on the track, down and helpless—giving every indication of being asleep and unconscious—then it is the duty of the engineer to take note of their presence, if he sees them or could do so in the exercise of due care, and if the engineer could see persons in such a condition on the track ahead of his train, and by keeping a proper lookout, in the exercise of due care, could have observed them far enough off to stop his train, his duty was to regard their presence and stop his train, if necessary for their safety, and if he failed in this duty and thus caused the death of the persons, he has been guilty of a breach of duty, and his company would be responsible. And, in this present case, if the intestate was down upon the track helpless and giving every indication of

being asleep and unconscious, and he was so placed that the engineer by keeping a proper outlook and in exercise of due care could have observed him, and that it was a person upon the track, for 500 or 1,000 yards—far enough off to have gotten his train under control—in this case if they believed the evidence, such distance being 300 yards and more, it was the engineer's duty to have seen the intestate and stopped his train, if necessary for his safety, and if he failed to do so under such circumstances and thereby caused the death of the intestate, the engineer was guilty of negligence, and the jury should answer the second (625) issue "Yes."

If, however, the intestate was lying in such a position and was so placed as to prevent the engineer from seeing that a person was upon the track until he got so close to him he could not get his train under control, and because it was so placed the engineer failed to see it in time, then the killing would be an accident. The defendant company would not be responsible, and the jury should answer the second issue "No."

The court here explained the nature of the ground, grade, etc., stated the evidence tending to show that a trestle had been filled up nearly to a level with ordinary earth preparatory to taking out timbers, which had been hauled and placed on either side of track, higher than track and uneven in surface, making depressions, etc.; the evidence tending to show the body was out and exposed and that tending to show it was hidden in one of these depressions, etc., and told the jury it was for them to determine from the evidence whether the body was so placed that the engineer could have seen it was a person down and helpless in time to have stopped his train or whether it was so that the engineer could not have seen it in 270 feet or 125 yards, too late to have gotten his train under control. The court further charged on this issue that the burden was on the plaintiff to make good the allegation and issue by the greater weight of evidence. The law presumed that persons did their duty, and required a person who charged a breach of duty to establish it by proof. That if the evidence satisfied them by the greater weight that there had been a breach of duty by engineer causing the death of intestate, issue should be answered "Yes." If not, they should answer the issue "No." And if the minds of the (626) jury were left in doubt about the matter, if they were unable to determine from the evidence how it was, they should answer the issue "No," because the burden of this issue was on the plaintiff.

On the third issue the court charged the jury that if the intestate voluntarily went upon the track and there carelessly and negligently went to sleep and, being unconscious and asleep, was run over and

killed by the defendant's train, and he could have been seen and observed by the engineer of the defendant company and was ngligently run over and killed by the defendant's train, as explained in the second issue, then the jury should answer the third issue "No." That the negligent act of the intestate in going upon the track was remote in point of time and not the proximate and concurrent cause of the injury, and so not contributory.

On the fourth issue the court charged the jury that the measure of damages was the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who would have been dependent upon him had he continued to live out his natural life. That the tables in The Code which had been offered were evidence on the question of probable duration of the life of the deceased and, taking his age at 17, if accepted, would make such duration between 44 and 45 years (44 2-10), and the damage would be the net moneyed value of the intestate's life to those dependent upon him had he continued to live out his appointed time. That on this question the jury should consider the strength of the intestate, his habits, capacity and disposition to work. The court here recited the evidence for plaintiff and the defendant on these matters and told the jury to consider the evidence and the suggestions and arguments which had been made and award what in their judgment would be a fair and just
(627) compensation for the pecuniary injury done by the death of the intestate.

The defendant excepted to the charge upon the second issue as follows:

"1. For that his Honor charged the jury that it was the duty of the engineer to keep a lookout for things so near the track as likely to become an obstruction to his train, upon the ground that, while true as an abstract principle of law, it is a duty to the passengers on the train, and not applicable to this case.

"2. For that his Honor, in view of the evidence, placed the nonliability of the defendant upon the fact that the intestate was lying in a depression in the ground, whereas the defendant contended that the intestate could not have been seen in time to avoid the accident, although not lying in a depression.

"3. For that his Honor assumed throughout the charge that the intestate was upon the track, whereas there was evidence to the contrary.

"4. For that his Honor substantially expressed the opinion that 270 feet or 125 yards is the distance within which it was too late to stop the train, whereas the evidence was to the contrary, and his Honor had not the legal right to express an opinion as to the fact."

The defendant excepted to the charge of his Honor upon the third issue as follows:

"1. For that it was equivalent to telling the jury that if they answered the second issue 'Yes,' and believed the evidence they should answer the third issue 'No.'

"2. For that he instructed the jury that the negligent act of the intestate in going upon the track and falling asleep there was remote and not the proximate and concurrent cause of the injury, and not contributory."

The defendant excepted to the charge on the fourth issue as follows:

"1. For that his Honor told the jury that the damages would be the net money value of the intestate's life, etc., whereas he ought to have told them that it was the present value of the net moneyed (628) value of the intestate's life, etc.

"2. For that his Honor told the jury to award what in their judgment would be a fair and just compensation for the pecuniary injury due by the death of the intestate, leaving the whole matter to the discretion of the jury."

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

A. D. Ward and N. J. Rouse for plaintiff.
W. R. Allen and H. L. Stevens for defendant.

AVERY, J. The most important question presented by the appeal is whether the court erred in refusing to instruct the jury that if the plaintiff's intestate deliberately laid down upon the track and either carelessly or intentionally fell asleep there, the defendant was not liable unless the engineer actually saw that he was lying there in time, by the reasonable use of appliances at his command, to have stopped the train before it reached him. In the headnote to *Smith v. R. R.*, 114 N. C., 729, it seems that the intelligent reporter deduced from the opinion of the Court the principle that while the mere going upon the track of a railroad is not contributory negligence, any injury subsequently inflicted by a collision with a passing train is deemed to be due to the carelessness of the person who goes upon it, unless it is shown that he looked and listened for its approach. While such an abstract proposition may be fairly drawn from the reasoning upon which the opinion is founded, the new trial was in fact awarded because the court below refused to instruct (629) the jury that if the plaintiff's intestate was drunk, though he

was lying apparently helpless upon the track, the defendant was not liable unless its engineer actually saw that he was in danger in time to avert the injury by reasonable care.

The learned counsel who argued this case for the defendant, without citing *Smith's case* in support of his contention, obviously invoked the aid of the principle there decided when he rested his argument upon the proposition that one who carelessly or purposely falls asleep on a railway track is not only negligent in exposing himself upon first going there, but that, though he afterwards becomes utterly unconscious, there is, in contemplation of law, a continuing carelessness on his part up to the moment of a collision, which is, concurrently with the fault of the defendant, a proximate cause of an ensuing injury, or operates to quit the carrier of what would have been culpable carelessness and a *causa causans* if the injury had been inflicted on a horse, a pig, a cow, or person rendered insensible in any manner than by drunkenness or deliberately or carelessly falling asleep. So that we are again called upon to review *Smith's case* and to determine whether we will modify the principle there laid down or extend its operation to other cases coming within the reason upon which it is founded.

The language of *Judge Cooley,* which is cited in *Clark v. R. R.,* 107 N. C., p. 449, is: "If the original wrong only becomes injurious in consequence of the intervention of the distinct wrongful act or omission by another, the injury will be imputed to the last wrong which was the proximate cause, and not to that which was more remote." If

(630) in the case at bar the plaintiff's intestate was in fault in lying down upon the track and his carelessness culminated in doing so, then it is clear that the engineer was in fault in failing to keep a proper lookout, if he could by doing so have seen the deceased in time through the reasonable use of the appliances at his command to have averted the injury, and his carelessness of course intervened after that of plaintiff's intestate. If he had looked and stopped the train the collision would have been prevented notwithstanding the previous want of care on the part of the boy who was killed. In *Herring v. R. R.,* 32 N. C., 402, this Court followed what was at the time the generally accepted doctrine that persons who went upon railroad tracks at places other than public crossings were trespassers, to whom the carrier owed no duty of watchfulness and for whose safety it was in no wise liable unless its engineer actually saw that there was danger of injury from a collision and wilfully refused to use means by which he could have averted it.

In *Gunter v. Wicker,* 85 N. C., 310, this Court gave its sanction to the principle first distinctly formulated in *Davies v. Mann,* 10 M. &

W. (Ex.), 545, that "Notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." This doctrine was subsequently approved in *Saulter v. Steamship Co.*, 88 N. C., 123; *Turrentine v. R. R.*, 92 N. C., 638; *Meredith v. Iron Co.*, 99 N. C., 576; *Roberts v. R. R.*, 88 N. C., 560; *Farmer v. R. R., ib.*, 564; *Bullock v. R. R.*, 105 N. C., 180; *Wilson v. R. R.*, 90 N. C., 69; *Snowden v. R. R.*, 95 N. C., 93; *Carlton v. R. R.*, 104 N. C., 365; *Randall v. R. R.*, 104 N. C., 108, and it was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout (631) not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so, supervening after the negligence of another, where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury.

It was after all of these precedents following *Gunter v. Wicker, supra,* that the Court in *Deans v. R. R.*, 107 N. C., 686; was confronted with the question whether a railway company was liable where by ordinary care its engineer could have stopped his train in time to prevent its running over a man lying asleep upon its track, under the doctrine of *Gunther v. Wicker,* or whether, the accident having occurred at a place other than a public crossing, the company could be held answerable, under the rule as stated in *Herring v. R. R.*, only where it was shown that the engineer actually saw the trespasser and had reasonable ground to comprehend his condition. Upon mature consideration the Court overruled *Herring's case* and stated the rule applicable in such cases to be: "If the engineer discover or by reasonable watchfulness may discover a person lying on the track *asleep or drunk,* or see a human being who is known by him to be insane, or otherwise insensible to danger or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of human life and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it." This rule was approved in express terms in *Meridith v. R. R.*, 108 N. C., 616; *Hinkle v. R. R.*, 109 N. C., 472; *Clark v. R. R.*, 109 N. C., 444 and 445; *Norwood v. R. R.*, 111 N. C., 236; *Cawfield v. R. R.*, 111 N. C., 597.

In *Smith's case, supra,* the same questions were again presented, and this Court was asked to overrule the doctrine of *Deans v. R. R.* and reinstate *Herring v. R. R.* as authority. The Court (632)

declined to overrule *Deans' case* and others which had followed it, but held that, in so far as the opinions purported to bring within the protection of the rule a person who is lying upon the track in an insensible state brought about by drunkenness, they were entitled only to the weight of *dicta.* No member of the Court adopted this particular view but the *Chief Justice,* who delivered the leading opinion. The other members of the Court were either in favor of sustaining without any modification or of overruling *in toto* the principles as enunciated in *Deans' case.* The learned counsel for the defendant now contend that one who deliberately incurs the risk of lying down upon the track is no more entitled to the protection of the law than a drunken person, and that where he is killed his personal representative cannot invoke the benefit of the rule which subserves the purpose of shielding even brutes from the same unnecessary peril. At common law in England the owner of cattle was required to keep them in or restrain them from trespassing on the lands of others. 2 Shearman & Red. Neg., secs. 418, 626, 627. But in this country the rule has been either modified by statute or in a much larger number of states entirely disregarded, because the reason upon which it was founded, under different conditions, had ceased to operate. 2 Shearman & Red. Neg., secs. 419 to 422. The principle deduced from *Davies v. Mann,* 10 M. & W., 545, as is said by discriminating law writers, is that "The party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." 2 Shearman & Red. Neg., p. 165. This rule has now been adopted in almost all of the Southern and Western States, but it has been construed in some of them and by a number of text writers as applying to injuries done by moving trains only where the engi-
(633) neer actually sees an animal or a person. But this Court, soon after adopting the rule laid down in *Davies v. Mann* (in *Gunter v. Wicker, supra*), construed it in its application to animals in *Wilson v. R. R.,* 90 N. C., 69, followed by *Snowden's, Carlton's, Bullock's,* and *Randall's cases, supra,* to mean that an engineer was not only negligent in failing to avert an injury to animals actually seen, but those which might by proper vigilance have been seen by him in time, by the use of the appliances at his command and without peril to the safety of persons on the train, to avert the accident.

It is settled irrevocably in North Carolina that a railway company is answerable in damages for an injury to any valuable domestic animal, due to the failure of the engineer to exercise reasonable care in observing the track in his front, and to passengers on a train, when caused by want of a similar vigilance on the part of the same servant

in keeping an outlook for obstructions. The question presented in this case, therefore, as in *Smith's case, is whether,* by any sort of legal fiction, we can hold a servant faultless for failure to see one who has voluntarily fallen upon the track and yielded to the influence of sleep, or who, overcome with drunkenness, lies prostrate in the way of a train, when either or both are sandwiched between obstructions; animals, children or persons unconscious from sickness, or known by the engineer to be deaf, whom the law declares it is his duty to see, if it is possible for him by the exercise of ordinary care to do so. The opinion of the Court in *Smith's case* not only concedes, but adduces much authority to sustain the correctness of the ruling in *Deans v. R. R.* and the later opinions approving it, as therein interpreted, but proceeds upon the idea that in so far as any previous opinion had stated that a railway company owed the duty of watchful- (634) ness to drunken persons lying on its track, or became liable for failure to discharge it, unless actually seen by the engineer, they were *dicta* only. It was true, however, as to *Deans'* and *Clark's cases,* that there was some evidence tending to show that in the one instance the person who fell asleep on the track was drunk and in the other that the man killed was intoxicated when he went upon the trestle.

To illustrate the operation of the conflicting rules as they now stand: suppose that the engineer is approaching a straight cut, through which he can see for one-fourth of a mile, or for a sufficient distance to stop his train without breach of his duty to those on it before reaching the cut, and that at the entrance nearest him a sleeping child, ten feet further a cow, and ten feet futher still a large boulder with a drunken man, or one who deliberately laid down, resting asleep and unconscious upon it, are arranged successively. Suppose, then, that the engineer carelessly fails to look out and see the sleeping child, the cow or the boulder, and by successive collisions kills the child, the cow and the man on the boulder, and the train is wrecked by striking the boulder, so that a number of passengers are likewise killed. The result would present a legal paradox under the law as it now stands. The servant who now represents the company would render it liable for his omission of duty of keeping a lookout, for which the company could be mulcted in damages by the personal representatives of the child and of the passengers and by the owner of the cow, and yet, though the engineer could not discharge the duty, which never ceased, of watching for the boulder without seeing the drunkard or the sleeping man, the failure to see either is, in contemplation of law, no culpable breach of duty. The learned counsel for the defendant has given, it seems to us, quite as cogent reasons for holding that a railroad com-

(635) pany is absolved from duty to one who wilfully or carelessly exposes himself to peril by sleeping upon a track as to one who falls down in a state of utter unconsciousness superinduced by drinking, and cited equally as strong and numerous authorities in support of his contention. But the reasons and the authorities relied upon emanate generally from courts which hold that both persons and animals upon a track are trespassers and entitled to consideration only where actually seen in time to save them. It is not strange that courts, where it is held that railway companies owe no duty to anyone who goes on their track and is not seen, should have sought support for their position, where a drunken man happened to be the victim of carelessness, in the theory that he was deemed to be still concurring up to the time of the accident and was less deserving of consideration than a sober trespasser. But it must not be forgotten that in the last analysis, notwithstanding the additional reason assigned, the drunkard, in the States holding to the principle that we have repudiated, is excluded from the right to recover because he is a trespasser, just as his sober neighbor would be barred of the right if he were injured by his side, and when actually seen the same duty of protection arises as to both.

The admitted test rule to which we have adverted, that he who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible, must be applied in contemplation of the law which prescribes and fixes their relative duties. The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track, and if by reason of his omission to look out for cows, horses and hogs he fails to see a drunken man or a reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of

(636) duty. If he is guilty of a breach of duty we cannot controvert the propositions which necessarily follow from the admission that but for such omission, or if he had taken advantage of the last clear opportunity to perform a duty imposed by law, the train would have been stopped and a life saved. It cannot be denied that in a number of the States which have adopted the doctrine of *Davies v. Mann,* 10 M. & W., 545, it has also been held that both man and beast were trespassers when they went upon a railway track, and except at public crossings or in towns it was not the duty of the engineer to exercise care in looking to his front with a view to the protection of either. Where the law does not impose the duty of watchfulness it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing

himself and the accident, unless he be actually seen in time to avert it. The negligence of the corporation grows out of omission of a legal duty, and there can be no omission where there is no duty prescribed. But when this Court declared it the duty of an engineer to exercise reasonable care in looking out for animals on the track, it became equally a duty as to all those classes of persons who, if actually seen by him, would be entitled to demand that he use all the means at his command to avert injury to them.

Where the rule prevails that no liability attaches for a failure of the engineer to keep a lookout except in towns and at crossings, the same test is applied by the courts. So soon as the duty arises the failure to perform it, if intervening after the negligence of a person in exposing himself to peril, is held to be the last clear opportunity to discharge it, and therefore the proximate cause of the injury, if it could have been averted by the use of the means at his command after the law required him to have seen it. As we hold that the duty on the part of the engineer of watchfulness to protect life (637) is an ever-present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of duty performed are coextensive with the duty prescribed and may arise wherever it exists. We are of the opinion that, when by the exercise of ordinary care an engineer can see that a human being is lying apparently helpless from any cause on the track in front of his engine, in time to stop the train by the use of the appliances at his command and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If by the performance of that duty an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann* and *Gunter v. Wicker,* the breach of duty was the proximate cause of any injury growing out of such accident, and where it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. The court committed no error of which the defendant could justly complain in stating the general rule which we have been discussing.

Considered in connection with other portions of the charge, the statement of the distances as proved by defendant's witnesses was but

a fair submission of the view argued by defendant's counsel, and affords no ground for exception. Under the general principle laid down in *Emry v. R. R.*, 102 N. C., 246, and the numerous cases which have followed it, it was within the sound discretion of the court to
(638) frame the issues, and the defendant must show that the exercise of that discretion operated to his injury if he would assign it as error. But in *Scott v. R. R.*, 96 N. C., 428, and *Denmark v. R. R.*, 107 N. C., 189, and other cases, it has been declared that the Judge was clothed with discretion to submit one, two or three issues where the controversy hinges upon a controverted allegation of negligence, as he might think best, provided he should give appropriate instructions. Where the first issue (here the second) raises not only the question whether the defendant was negligent, but also whether it was the proximate cause, the Judge is at liberty to tell the jury that if they should find that the defendant was negligent and its negligence was the proximate cause of the injury, it was immaterial to determine whether or not the plaintiff had been previously negligent.

The question propounded to the witness Wilson was intended to elicit an opinion, which it was the province of the court to decide that he had not qualified himself to give. *S. v. Hinson*, 103 N. C., 374.

The court below was requested, however, in substance, to instruct the jury that the measure of damage for the loss of a human life was the present value of the net income, which would be ascertained by deducting the cost of living and expenditures from the gross income, and that the jury could not allow more than the present value of accumulation arising from such net income based upon the expectancy of life. The court, in lieu of the instruction asked, told the jury that the measure of damage was the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who would have been dependent on him, had he continued to live out his natural life; that the expectation of one 17 years old would be 44 2-10
(639) years, and the damage would be the net moneyed value of intestate's life to those dependent upon him, had he continued to live out his appointed time. Though the court stated the abstract proposition, as we find it formulated in the books, in the first clause of that portion of the charge relating to damages, we think that the substitution of the subsequent portion of it for the more specific instruction to which the defendant was entitled and for which he asked was erroneous. The instruction given, viewed without reference to the prayer of the defendant, was objectionable in that it left the question of the date which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that

the net income would be estimated as of the period when those dependent on him would have realized the benefits of his labor had he not come to an untimely end.

We are of the opinion, therefore, that, following as a precedent *Tillett v. R. R.*, 115 N. C., 662, a new trial should be granted for the error complained of, only as to the issue to which the erroneous instruction related. The jury found the fact upon full instruction as to the law in connection with other issues, which left the defendant no just reason to complain. But another opportunity must be given to assess the damage in the light of a more explicit statement of the law applicable. A new trial is granted, therefore, solely for the purpose of inquiring as to damages. The case will be remanded to the end that the jury may ascertain what is the present value of intestate's life.

Partial new trial.

Cited: *Sherrill v. Tel. Co., ante,* 361; *Doster v. R. R., post,* 663; *Chesson v. Lumber Co.,* 118 N. C., 68; *Lloyd v. R. R., ib.,* 1011; *Baker v. R. R., ib.,* 1019; *Nathan v. R. R., ib.,* 1070; *Little v. R. R., ib.,* 1076; *Styles v. R. R., ib.,* 1088; *Pharr v. R. R.,* 119 N. C., 756; *Mayes v. R. R., ib.,* 769; *McCracken v. Smathers, ib.,* 619; *Fulp v. R. R.,* 120 N. C., 529; *Coley v. Statesville,* 121 N. C., 317; *Purnell v. R. R.,* 122 N. C., 844; *Williams v. Gill, ib.,* 968; *Benton v. R. R., ib.,* 1009; *Strother v. R. R.,* 123 N. C., 200; *Benton v. Collins,* 125 N. C., 90; *Arrowood v. R. R.,* 126 N. C., 631; *Cook v. R. R.,* 128 N. C., 335; *Coley v. R. R., ib.,* 542; *Bogan v. R. R.,* 129 N. C., 157; *Jeffries v. R. R., ib.,* 240; *Lassiter v. R. R.,* 133 N. C., 247; *Davis v. R. R.,* 136 N. C., 121; *Stewart v. R. R.,* 136 N. C., 390; *Carter v. R. R.,* 139 N. C., 501; *Plemmons v. R. R.,* 140 N. C., 288; *Poe v. R. R.,* 141 N. C., 528; *Sawyer v. R. R.,* 145 N. C., 27, 30; *Smith v. R. R., ib.,* 103; *Hawk v. Lumber Co.,* 149 N. C., 13; *Wilkinson v. Dunbar, ib.,* 26; *Farris v. R. R.,* 151 N. C., 491; *Snipes v. Mfg. Co.,* 152 N. C., 45; *Edge v. R. R.,* 153 N. C., 215, 216; *Guilford v. R. R.,* 154 N. C., 608; *Cabe v. R. R.,* 155 N. C., 411; *Boney v. R. R., ib.,* 113; *Holman v. R. R.* 159 N. C., 46; *Fry v. R. R., ib.,* 363; *Speight v. R. R.,* 161 N. C., 86; *Smith v. R. R.,* 162 N. C., 33; *Johnson v. R. R.,* 163 N. C., 452, 453; *Shepherd v. R. R., ib.,* 521; *Lynch v. Mfg. Co.,* 167 N. C., 102; *McNeill v. R. R., ib.,* 400; *Norman v. R. R. ib.,* 540; *Hopkins v. R. R.,* 170 N. C., 488; *Horne v. R. R., ib.,* 652; *Ingle v. Power Co.,* 172 N. C., 753 *Smith v. Electric R. R.,* 173 N. C., 493; *McManus v. R. R.,* 174 N. C., 737; *Comer v. Winston,* 178 N. C., 388; *Enloe v. R. R.,* 179 N. C., 89.

(640)

WILLIAM MATTHEWS v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Railroad Companies—Injury to Person on Track—Negligence—Contributory Negligence.

1. The engineer of a train may reasonably assume that a person whom he sees walking on a footpath at the end of the cross-ties, along the railroad track, and going in the same direction as the train, will either stay on the path or will step further off from the track when he sees the train.

2. Where a person walking on a footpath at the end of the cross-ties along a railroad track, in the daytime, and on the approach of a train going in the same direction became confused and moved towards the track, instead of away from it, and was struck by the train and injured, his negligence and carelessness, being the immediate cause of the injury, will preclude him from recovery, although the engineer may have been negligent in not giving a warning whistle or signal.

ACTION tried before *Hoke, J.*, and a jury, at May Term, 1895, of LENOIR.

On the conclusion of the testimony his Honor intimated that upon the evidence the plaintiff was not entitled to recover and the plaintiff submitted to a nonsuit and appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

N. J. Rouse for plaintiff.
P. M. Pearsall and W. W. Clark for defendant.

FAIRCLOTH, C. J. It is not necessary to enter into a general discussion of the duties and liabilities of a railroad when running its train. The question in this case depends upon the testimony of the plaintiff, as the court held that upon all of his evidence he could not recover, and the case was not submitted to the jury.

The plaintiff testified: "I am 22 years old. Before the injury I was healthy and strong. I lost my arm near Caswell on defendant
(641) road. Was between two culverts, three and a half miles this side of Dover. Was hurt by the connecting rod of the engine; was coming towards Goldsboro and was on right-hand side coming this way, walking in a side-track near the track, and the train was on me before I knew it. I was so alarmed or blinded, instead of turning away from the train I turned towards it. The train did not blow, and was on me before I knew anything about it. Before I knew anything I

was struck. I had been taking quinine and was deaf that day. The first person who came to me was Mr. Hawkins. Drs. Woodley and Hyatt were called in. They amputated my arm. I was confined two months and suffered much, like to have died. I was between two crossings, was as far from front crossing as from here to front door of building. The road at that point was straight and level. I could not hear well; the wind was blowing hard that day and I had been taking quinine. I was coming from Dover towards Kinston, and had not looked back from the time I left Dover till I was struck by the train."

Cross-examined: "It was the mail train in the morning, as train was going towards Goldsboro. I had worked at saw-mill near the train. Don't know whether it was schedule time or not. I was hurt by the engine rod as train was moving. I turned towards the train. I had been walking on sidewalk of track, and when I did hear it the train was right on me, and instead of turning away from train turned towards it in my confusion, and was struck by reason of turning towards the train."

It is suggested that it was the engineer's duty to sound his whistle and give plaintiff notice of the approaching train. If we assume that he should have done so when a person was walking ahead on the main track, we see no reason, and presumably he did not, why he should blow the whistle when the plaintiff was walking on (642) the sidewalk of the track, by which is meant the footpath at the ends of the cross-ties, because he was then out of danger and the engineer reasonably assumed that he would either stay there or step further off from the track when he saw the train. For some singular and peculiar reason the plaintiff moved into a dangerous position at a critical moment, an event which the engineer could not foresee nor anticipate. If the defendant was negligent in not giving a signal sound, the act of plaintiff was much greater carelessness and was the immediate cause of the injury, and he cannot be excused for such disregard of his personal safety. *Parker v. R. R.*, 86 N. C., 221; *High v. R. R.*, 112 N. C., 385. We see no error in the ruling of the court or in the record, and the judgment is affirmed.

Affirmed.

Cited: Markham v. R. R., 119 N. C., 717; *Pharr v. R. R.*, 133 N. C., 611; *Crenshaw v. R. R.*, 144 N. C., 322; *Patterson v. Power Co.*, 160 N. C., 580; *Ward v. R. R.*, 167 N. C., 150; *Davis v. R. R.*, 170 N. C., 589.

JOHN McNEILL v. RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY.

Practice—Appeal—Case on Appeal—Service.

1. Where a case on appeal is served by an improper officer within the time or by a proper officer after the time limited for its service, it will not be considered.

2. The failure of service of case on appeal within the time limited cannot be cured by the Judge settling the case.

ACTION tried before *Hoke, J.,* and a jury, at August Term, 1895, of MOORE, to recover damages for killing plaintiff's cow through negligence of defendant. There was verdict for the plaintiff, and defendant appealed from the judgment thereon.

It appears from the record that the defendant's case on appeal was filed with the Clerk of the Superior Court and handed him by counsel for plaintiff within the time prescribed, and was served by the (643) Sheriff after the time for service had expired. In this Court plainitff's counsel moved that the statement of case on appeal be not considered and that the judgment be affirmed.

Black & Adams and W. H. McNeill for plaintiff.
Robert C. Strong for defendant.

CLARK, J. Notice of appeal was properly given and in apt time, hence a motion to dismiss the appeal would not lie, and in fact was not made. The appellant's case on appeal, unless service was accepted, could only be served by an officer. *Forte v. Boone,* 114 N. C., 176; *Allen v. Strickland,* 100 N. C., 225; *S. v. Johnson,* 109 N. C., 852; *S. v. Price,* 110 N. C., 599. The failure of service in due time, if it were made to appear, could not be cured even by the Judge settling the case (*Forte v. Boone, supra*) and when the case is not settled by the Judge, it must appear affirmatively that the case or counter case was legally served and in due time to avail the party relying upon it. *Mfg. Co. v. Simmons,* 97 N. C., 89; *Peebles v. Braswell,* 107 N. C., 68; *Howell v. Jones,* 109 N. C., 102. The attempted service by the Clerk was a nullity (*Cummings v. Hoffman,* 113 N. C., 267), as was also the service by a proper officer after the time limited by law. *Rosenthal v. Roberson,* 114 N. C., 594; *Cummings v. Hoffman, supra.* Had there been counter affidavits that in fact there had been service by a proper officer in due time, the case might be continued that, on

motion below, the Judge should find and certify the facts, as in *Walker v. Scott,* 102 N. C., 487. Such is not the case here, but simply an attempted service within the proper time by one not authorized to make it, and then service by a proper officer, but (644) after the time limited for service had expired. Both these acts being null and of no effect, and there being nothing to excuse the laches, as in *Watkins v. R. R.,* 116 N. C., 961, there is nothing before us except the record proper. On inspection we find no error therein and must affirm the judgment. *Lyman v. Ramseur,* 113 N. C., 503.

Affirmed.

Cited: Smith v. Smith, 119 N. C., 317; *Westbrooks v. Hicks,* 121 N. C., 132; *Barnes v. R. R., ib.,* 505; *Cowan v. Lumber Co.,* 126 N. C., 1153; *Barber v. Justice,* 138 N. C., 22.

DANIEL BLUE v. THE ABERDEEN AND WEST END RAILROAD COMPANY.

Action for Damages—Expert Testimony—Discretion of Court—Railroad Companies—Right of Way—Fires from Engine Sparks.

1. Whether a witness offered as an expert has the necessary qualifications is a matter largely within the discretion of the court, and where there is any evidence of it the finding, like that of the jury, is not reviewable in this Court.

2. The refusal to permit a witness who has testified that he is a professor of civil engineering, and has made the law of moving bodies a study, and can tell how far a train will move by its momentum, to testify as an expert as to the distance such train would travel, in order to contradict the testimony of other witnesses testifying from practical experience, will not be disturbed on appeal.

3. A railroad company is liable for any damage that may result to owners of land adjacent to its right of way, caused by the spreading of fire which originates from the falling of sparks from its engine upon grass or other inflammable material negligently left upon the right of way.

4. In an action against a railway company for damages from fire alleged to have been started by sparks from defendant's engine, an instruction that it was defendant's duty to keep its track clear of substances liable to be ignited by sparks, as far as might be necessary to prevent fires, even to the full width of the right of way, was proper.

5. In such case an instruction that it was defendant's duty to equip its road with modern appliances "sufficient to guard against the escape of fire," and to have its engines manned by competent men, and that if the jury "were satisfied" that the engine had modern appliances to guard aginst fires, and was manned by competent men, and was carefully operated, there would be no negligence in respect to the engine, sufficiently shows the duty of defendant.

6. Such instruction sufficiently places the burden on defendant of satisfying the jury that its engines were properly equipped and manned.

(645) ACTION for damages, tried before *Hoke, J.,* and a jury, at August Term, 1895, of MOORE, in which plaintiff sought to recover damages for injury to property caused by fire alleged to have originated on the defendant's right of way from sparks from the defendant's engine falling on inflammable material alleged to have been negligently left thereon. There was judgment for the defendant, and plaintiff appealed. The facts necessary to an understanding of the opinion are sufficiently adverted to therein.

Shepherd & Busbee, W. E. Murchison and J. W. Hinsdale for plaintiff.

Douglass & Spence, Black & Adams and Shaw & Scales for defendant.

AVERY, J. The exception to the ruling of the court that the witness Riddick had not qualified as an expert seemed to be relied on with more confidence than any one of the great number taken on the trial. After the court had found, upon objection of defendant, that on a previous preliminary examination the witness had not shown that he had the peculiar skill and knowledge which proved his fitness to testify as an expert, a re-examination elicited the following statement from him:

(646) That he was a professor of civil engineering and mathematics in the North Carolina College of Agriculture and Mechanic Arts; that he had made the subject of mechanics and of moving bodies a special study, that there are certain mathematical rules by which it can be ascertained how far moving bodies, such as trains, will go by their own momentum; that he was thoroughly acquainted with these rules and had applied them frequently, and that he thought in half an hour he could make a calculation by which he could ascertain the distance that this train would go at the place named, with the momentum described, and upon the grade as testified to by him. Witness said he had no actual experience in running railroad trains. He was not asked the question whether he could give an opinion satisfactory to himself.

The plaintiff thereupon renewed the following question: "If the jury should find that a train, as described by defendant's witnesses, was moving up the long grade and was traveling when it reached the top at the rate of 15 miles an hour, and they should find that the grade and the level of the road were as described by you, how far, according to the laws of moving bodies, would a train go by its own momentum?" The fireman and superintendent had testified that they had ascertained by actual experiment that it required little steam to carry the engine along the level track to the landing after passing the highest point of the upgrade. H. A. Page, an engineer, had testified that since the last trial of this case he had come over the top of the grade beyond Hicks' Landing (where, according to plaintiff's theory, the fire was started by sparks emitted from the engine) at a speed of 15 miles per hour, and had run from there to West End without more power than the momentum of the train. The question whether any or how much steam was used to propel the engine with the train over the level track after passing the highest point of the grade had become material because of the greater tendency to emit sparks from the engine when the power is increased. "The preliminary (647) question whether a witness, offered as an expert, has the necessary qualification is for the courts, and is largely discretionary with them" (1 Greenleaf E., sec. 440, note B), and "where there is any evidence of it the finding, like that of the jury, is not reviewable in this Court. *S. v. Davis,* 63 N. C., 578, and other intermediate cases down to *Smith v. Kron,* 96 N. C., 392." *S. v. Hinson,* 103 N. C., 374. But it is contended for the plaintiff that this was not a ruling that there was not sufficient evidence, but in effect an opinion that certain facts admitted did not qualify the witness, and therefore raises a question of law which is reviewable. The plaintiff insists that every one of the six cases cited to support the ruling of the court in *Smith v. Kron, supra* (*S. v. Davis, supra; S. v. Andrews,* 61 N. C., 205; *S. v. Vann,* 82 N. C., 631; *S. v. Sanders,* 84 N. C., 728; *S. v. Efler,* 85 N. C., 585; *S. v. Burgwyn,* 87 N. C., 572;), involved the admissibility of confessions, and that the rule as substantially stated in all was the same, it being held in every instance that the question whether a prisoner was influenced by hope or fear was one of fact where there was any evidence to sustain the Judge's finding, but that it was the province of the court to decide, when such questions were raised, whether there was any evidence at all, or whether the facts found would warrant the admission of the testimony offered.

Conceding the fact that the substance of these rulings is as contended, and giving the plaintiff the full benefit of the deduction he

seeks to draw from them, the principle relied upon has no application to the case at bar. The Judge stated the testimony of the witness in full, doubtless, but set forth in detail no formal statement of the facts found by him. The court upon the testimony held that (648) the witness had not qualified himself as an expert, and in the absence of any statement to the contrary we must assume that this was his conclusion of fact. Whether he did not believe the witness at all, or whether he thought the witness was mistaken when he expressed the opinion that he could calculate with mathematical certainty how far a train which he had heard described by witnesses would move by the force of the momentum acquired at a speed of 15 miles per hour over a level surface, of which he had acquired a knowledge by observation and not by running or seeing a train run over it, and without regard to the condition of the track, it is not material that we should inquire. Courts are at liberty to instruct jurors that, while the opinions of learned experts upon questions as to which they have had opportunity to learn by observation, study and experience are not conclusive, they are entitled to peculiar weight. *S. v. Owen,* 72 N. C., 605; *Flynt v. Bodenhamer,* 80 N. C., 205. The court must determine the preliminary fact whether a witness has shown that he is what it is claimed he is, and that involves the decision of the other question, whether "the witness has had the necessary experience to enable him to testify as an expert." *Flynt v. Bodenhamer, supra,* at page 207; *S. v. Slagle,* 83 N. C., 630; *Leak v. Covington,* 99 N. C., 559. There was direct testimony here that other men had been making actual tests of the very question which the witness, without practical experience, proposed to solve so as to contradict them. The Judge was acting within the limit of his peculiar province in passing upon the fact whether all of the testimony satisfied him that the witness had the necessary experience to give any peculiar value to his opinions and to show that the question was indeed one as to which such evidence was admissible, or whether from the data he could make the proposed calculation for the purpose of contradicting the engineers. *S. v.* (649) *Boyle,* 104 N. C., 800. This Court cannot review his findings, and therefore need not express an opinion upon the question whether, treating the testimony as a finding of fact, the witness was qualified to speak as an expert. The Judge did not find the fact in detail, and there is no requirement in law that he should have done so. His decision upon the question of fact is therefore final. *Hammond v. Schiff,* 100 N. C., 161; *S. v. Brady,* 107 N. C., 822; Rogers Ex. Tes., pp. 211, 533.

The right of way of railway companies is by judgment of condemnation made subject to occupation where and only where the corporation finds it necessary to take actual possession in furtherance of the ends for which the company was created. The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. Unless the land is needed for some such use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. *Ward v. R. R.*, 113 N. C., 566, and *s. c.*, 109 N. C., 358. The defendant company was liable, if grass or other inflammable material, negligently left upon its right of way, was ignited by sparks from its engine, for any damage to adjacent landowners caused by the spreading of the fire. 8 A. & E. 14; *Black v. R. R.*, 115 N. C., 667. The court instructed the (650) jury that it was the defendant's duty to keep its track and its roadbed clear of substances liable to ignite by sparks or fire from its engine, as far as might be necessary to prevent such inflammable material from being ignited by them, even to the full width of the right of way. The court, in the absence of any proof of title, told the jury the liability extended over the full width of the right of way over which the witness testified that defendant company had asserted control. We find in this no just ground for complaint on the part of the plaintiff.

The jury were instructed in the first paragraph of the charge that it was the duty of defendant company to have its road properly equipped with modern appliances *sufficient to guard against the escape of fire*, and to have the engine carefully operated by skillful and competent men. From a subsequent section of the instruction it appears that the court also told the jury that if they *"were satisfied* that the engine had modern appliances to guard against fire and that the same was manned by competent men and was carefully and skillfully operated at the time, in that event there would be no negligence in respect to the engine; and in such case, if fire originated from a spark from the engine and commenced beyond the right of way, the issue should be answered 'No.'" Construing these detached portions of the charge to-

gether, they were sufficient to enable the jury to understand what the duty of the defendant was, and that they must be *"satisfied"* that the duty had been performed before they could, by their response to the issue, acquit the defendant of carelessness. We think the charge placed the burden of satisfying the jury upon the defendant and applied the rule to the evidence as specifically as was necessary.

We understand that counsel finally abandoned the objection
(651) to the instruction as to the character of appliances, but, however that may be, we think that when the Judge told the jury it was the duty of the defendant to furnish appliances which were sufficient to guard against the escape of fire, it was not material to the plaintiff whether they were approved by a majority or minority of people or railway managers. If it was the duty of the defendant to provide such as were sufficient for the purpose, it was not material when or on what pattern they were constructed, so that they afforded the desired protection. The defendant is not appealing, and there is no just ground of objection on the part of the plaintiff.

We do not deem it our duty to discuss in detail the 42 exceptions which appear in the record, nor some of the number which seem to be relied on by some of the counsel and not by others, where they appear to have no merit in them. There was no error, and the judgment is

Affirmed.

Cited: Smith v. Whitten, ante, 391; *R. R. v. Sturgeon,* 120 N. C., 228; *Beach v. R. R., ib.,* 503; *Geer v. Water Co.,* 127 N. C., 355; *Shields v. R. R.,* 129 N. C., 4; *Williams v. R. R.,* 130 N. C., 119, 129; *Ins. Co. v. R. R.,* 132 N. C., 78; *Hodges v. Tel. Co.,* 133 N. C., 232; *Brinkley v. R. R.,* 135 N. C., 656; *Davis v. R. R.,* 136 N. C., 117; *Brown v. Power Co.,* 140 N. C., 347; *R. R. v. Olive,* 142 N. C., 265; *Parks v. R. R.,* 143 N. C., 293; *Hanford v. R. R.,* 167 N. C., 278; *Hopkins v. R. R.,* 170 N. C., 486.

ROBERT DOSTER v. CHARLOTTE STREET RAILWAY COMPANY.

Action for Damages—Street Railway Companies—Liability for Injuries Caused by Frightened Animals.

1. Where a person voluntarily exposes himself, his buggy and mule to the risk of an accident which may result from the animal's taking fright at a noise usually incident to the running of an electric car, and there

is no testimony tending to show that the motorman in charge of the car wantonly or maliciously made unnecessary noise for the purpose of scaring the animal, the street railway company is not responsible on account of its failure to stop the car (in the absence of a collision) for injuries caused by the frightened animal.

2. Where in such case the animal rushes upon the track in front of the car, the company is answerable for the consequences of a collision only where, by proper watchfulness on the part of the motorman, the danger might have been foreseen and the injury prevented by using the appliances at his command to stop the car.

ACTION tried before *Winston, J.*, and a jury, at December (652) Term, 1895, of MECKLENBURG, on appeal from justice's court.

The action was to recover damages for alleged injuries to plaintiff's buggy and mule, caused by the negligence of the defendant in running its street cars.

Verdict and judgment for plaintiff; appealed by defendant. (661)

James A. Bell for plaintiff.
Burwell, Walker & Cansler for defendant.

AVERY, J. The plaintiff voluntarily exposed himself, his buggy and his mule to the risk of any accident which might be caused by the animal taking fright at the usual noise incident to running a street car by electricity, there being no testimony tending to show that the motorman wantonly or maliciously made unnecessary noise for (662) the purpose of scaring the animal. Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision. *Snowden v. R. R.*, 95 N. C., 93; *Wilson v. R. R.*, 90 N. C., 69; *Carlton v. R. R.*, 104 N. C., 365. Where the engineer on a railway train actually sees a person driving a team in the direction of a crossing in his front, or in the act of passing over it, it is not his duty to stop unless he has reasonable grounds to believe that the horse or vehicle is in some way fastened or detained upon the track, or that some emergency has arisen which may be reasonably expected to cause a collision with consequent injury to person or property. *Bullock v. R. R.*, 105 N. C., 180; *Rigler v. R. R.*, 94 N. C., 604.

It may often happen that greater care is obviously necessary to avoid injury to a loose frightened animal (as in *Wilson v. R. R., supra*), than

to a man in the same position on or off a track, because if apparently in possession of all his powers and faculties the man may be reasonably expected, up to the last moment, to avoid peril, while the excited animal is as ready to rush into as to run away from danger.

There was no testimony tending to show that the mule was upon the track in front of the car, or that there was any apparent danger that it would rush upon it. The motorman was the servant of the (663) quasi corporation, which enjoyed privileges granted to it by the Legislature in consideration of its duty to transport passengers safely and more speedily than they are ordinarily carried in vehicles drawn by horses. People who pay their money in the reasonable expectation of being carried expeditiously are not to be delayed by every person who ventures to test the nerve of a horse or a mule by driving it along the same street on which a company runs its street cars by electricity. Where persons subject themselves to such risks and no collision with the moving car ensues, injuries caused by the conduct of frightened animals are deemed in law to be due directly to their own want of care. Where the animal rushes upon the track in front of the car, the company is answerable for the consequences of a collision only where, by proper watchfulness on the part of the motorman, the danger might have been forseen and the injury avoided by using the appliances at his command to stop the car. Where there is apparent danger of running over or coming in contact with persons or animals, either the principle announced in *Pickett v. R. R., ante,* 616, or that laid down in *Wilson v. R. R., supra,* may be applicable. But it does not appear that the plaintiff was on or very near to the track. The car, according to the undisputed testimony, was stopped 15 feet distant from the place where his mule had stopped.

There was error in refusing to charge the jury that in no aspect of the evidence could they find in response to the issue that the injury was caused by the negligence of the defendant. For this error a new trial must be awarded.

New trial.

Cited: Rittenhouse v. R. R., 120 N. C., 546; *Everitt v. Receivers,* 121 N. C., 522; *Malloy v. Fayetteville,* 122 N. C., 484; *Moore v. R. R.,* 128 N. C., 458; *Moore v. Electric Co.,* 136 N. C., 556; *Crenshaw v. R. R.,* 144 N. C., 323, 326; *Patterson v. Power Co.,* 160 N. C., 580; *Barnes v. Public-Service Corp.,* 163 N. C., 365; *Hall v. Electric R. R.,* 167 N. C., 285.

(664)

MARY F. SCOTT v. B. L. KELLUM.

Disputed Boundary, Establishment—Answer—Practice.

Where in a proceeding to establish a boundary line under chapter 22, Acts of 1893, which requires the answer only to contain a denial of the line set out in the petition, the defendant filed an affidavit entitled in the cause and denying fully and unequivocally the correctness of the line as claimed by the plaintiff: *Held*, that while such practice is not commended, such affidavit should be treated as an answer, although its original purpose was to obtain time to file a formal answer in which might be incorporated the results of a survey which defendant proposed to have made.

SPECIAL PROCEEDINGS, heard before *Boykin, J.*, at chambers in Clinton, on appeal from the ruling of the Clerk of the Superior Court of ONSLOW.

His Honor reversed the judgment of the Clerk, and the plaintiff appealed. The facts appear in the opinion of *Associate Justice Montgomery.*

Battle & Mordecai for plaintiff.
R. O. Burton and B. M. Gatling for defendant.

MONTGOMERY, J. This was a proceeding under chapter 22, Laws of 1893, to have established a disputed boundary line between the lands of the plaintiff and those of the defendant. On the return of the summons the defendant filed an affidavit the object of which was to procure time to file his answer. In the affidavit he stated that in the time he might be allowed he desired and intended to have a survey made of the disputed line and to get other information about it, and incorporate the same in his answer. The affidavit further contained a full and unequivocal denial of the correctness of the line claimed by the plaintiff and an allegation as to where he thought the true line was set out, (665) in a legal and orderly way, as follows:

"Affidavit of Defendant:

"Banister L. Kellum, the defendant, being duly sworn in the above-entitled proceedings, makes oath:

"1. That the true location and bed of Mill Run, or that part of Mill Run which the plaintiff claims to be a boundary [between] her and the defendant, Banister L. Kellum, is not where it is alleged to be in the third (3) article of the plaintiff's petition, or complaint. That from the marked gum and pine near the point where Mill Run crosses the

public road, called for as one of the termini of the line alleged to be in dispute, as set out in article 3, for the distance of about 200 yards down said Mill Run, this defendant does not understand to be in dispute, if located where he thinks it is, but the remainder of said line is in dispute, and is not where it is claimed by the plaintiff to be, but said Mill Run, from said point about 200 yards from said terminus near the public road, to its mouth, or very near its mouth, is to the north or northeast of said alleged location, making a slice or piece of land in dispute of about four acres, to this defendant's best belief."

At the end of the time allowed to the defendant to file his answer, none having been put in, the plaintiff moved, after notice to the defendant, for judgment to have her line established according to her petition, on the ground that defendant had failed and neglected to file an answer. The defendant opposed the motion, insisting that the affidavit was a sufficient answer, for the reason that it denied the location of the line as claimed in the petition, and praying the Clerk to be allowed to use it as an answer. The Clerk gave the plaintiff judgment according to the petition. Judgment was reversed by *Judge Boykin* on the defendant's appeal, and the matter remanded to the Clerk to the end that an
(666) order of survey be entered and the merits of the controversy be determined.

All that the act requires for the answer to contain is a denial of the line set out in the petition. The affidavit entitled the cause and made as explicit denial of the location of the line set out in the petition as was possible to have been made if the fullest answer had been filed. It is most probable that after the filing of the affidavit the defendant learned that the survey which he affirmed he wished to have made and inserted in his answer was superfluous work, as under the law the surveyor would run the line and make the survey. The Clerk should have allowed the defendant to use his affidavit as an answer, for it was all the act required, and a full and complete denial on every point required by law of the plaintiff's petition. Such pleading is not to be commended, and in few instances only would it be allowed; but in the present matter and for the reason given we deem it sufficient. The issue, and the only issue, was squarely and clearly raised by the petition and affidavit, and substantial rights were involved. There is no error in the order reversing the order and judgment of the Clerk, and that officer will proceed with the matter under the direction of his Honor's order.

Affirmed.

(667)

JULIA W. THOMAS ET AL. v. N. S. FULFORD.

Homestead—Determinable Exemption—Reservation of Homestead in a Deed of Trust—Docketed Judgment, Lien of on Homestead.

Where T., being embarrassed but having no docketed judgments against him, gave a mortgage upon his land without his wife joining in the deed, reserving to himself "the homestead and the right to a homestead therein," and afterwards judgments were docketed against him, his homestead was laid off and the mortgagees sold, his wife becoming, through mesne conveyances, the purchaser of the land and with her husband contracting to sell the land to the defendant: *Held*, in an action for specific performance, that T. and his wife cannot make a good title to the land under section 8 of Article X of the Constitution. (*Avery* and *Montgomery, JJ.*, dissenting.)

(Syllabus framed by the Court.)

ACTION pending in BEAUFORT, and heard before *Brown, J.*, at chambers, upon a case agreed as follows:

1. On and prior to 15 January, 1892, the plaintiff A. W. Thomas was seized in fee simple of a lot or parcel of land situated in Beaufort County and in the town of Washington, viz.: A lot of land in that part of said town known as "Bonner's Old Part," and being a part of Lot No. 26, and being the part thereof occupied by the store building now rented to S. H. Reid and fronting on Market street twenty and one-half feet and running back from said street fifty-five and one-half feet, it being all that part of the quarter lot conveyed by Thos. P. Bowen and wife to said A. W. Thomas, except that hereinafter to Mary W. Bowen, and being the same parcel of land also described in a deed, A. Mayo and S. R. Fowle, trustees, to Joseph W. Bowen, and attached as Exhibit B.

2. That on the said 15 January, 1892, the said A. W. Thomas (his wife not joining therein) executed a deed in trust to A. Mayo (668) and S. R. Fowle, trustees, in which he conveyed all his property, including the above-named lot of land, in trust for the benefit of his creditors. In said deed in trust the said A. W. Thomas excepted from the operation thereof his "homestead estate and the right to a homestead therein."

3. The homestead of the said A. W. Thomas was regularly allotted to him and included the part of lot of land described in paragraph one hereof, which said return and allotment is recorded in the register's office of Beaufort County in Book ——, page——, and is herein referred to and made a part hereof, and it is admitted that the allotment of homestead was valid and regular in all respects.

4. Under the power of sale contained in the said deed of trust from A. W. Thomas, the said A. Mayo and S. R. Fowle, trustees, on 3 July, 1894, sold the parcel of land described in paragraph one hereof to Jos. W. Bowen, and executed a proper deed therefor in fee.

5. On 25 July, 1894, the said Jos. W. Bowen conveyed the said parcel of land to the coplaintiff, Julia W. Thomas, by proper deed in fee.

6. That on or about 1 September, 1894, the plaintiffs contracted and agreed with the defendant to sell and convey to him by proper deed a good and indefeasible estate in fee simple to the lot of land described in paragraph one hereof, and also another parcel of land adjoining the same and described as follows, viz.: A lot or parcel of land situated in the town of Washington and in that part of said town known as "Bonner's Old Part," and being a part of lot No. 26, beginning at a point on the east side of Market street a distance of one hundred and five feet from the southwest corner of said lot No. 26 at the corner of Main and Market streets, and thence running northwardly along Market Street a (669) distance of six feet; thence eastwardly in a line parallel to Main street a distance of one hundred and five feet; thence southwardly in a line parallel with Market street a distance of six feet, and thence a distance of one hundred and five feet to the point of beginning on Market street. And the defendant agreed to pay therefor the sum of twelve hundred and fifty dollars, which said agreement is in writing and duly executed.

7. That there were no judgments docketed or in force against said A. W. Thomas at the time of the execution by him of the deed of assignment to said Fowle and Mayo. See Exhibit A. That subsequent to the execution and recording thereof, and at the time of the laying off, allotting the homestead of A. W. Thomas in the *locus in quo,* there were docketed certain judgments against said A. W. Thomas and in favor of certain creditors, which judgments have not been satisfied.

The existence of these judgments, which defendant claims are liens upon said land, is wherein defendant says the title offered to him by plaintiffs is defective.

8. The plaintiffs, A. W. Thomas and Julia W. Thomas, have tendered to the defendant a deed appropriate in form conveying in fee simple both the above-described parcels of land, but the defendant declines to receive the said deed or to pay the purchase money therefor as agreed, upon the ground that the plaintiffs are not seized of an estate in fee simple in the lot of land described in paragraph one hereof. It is admitted that the plaintiff Julia W. Thomas is seized in fee of the second lot of land embraced in the agreement to convey and described in this paragraph.

The question submitted to the court upon this case is as follows: "Are the plaintiffs seized of an estate in fee simple in the lot of land described in paragraph one hereof?" (670)

If this question is answered in the affirmative, then judgment is to be rendered against the said defendant, N. S. Fulford, for the amount claimed, viz., the sum of twelve hundred and fifty dollars, and for costs; provided the plaintiffs shall tender and deliver to the defendant a good and sufficient deed in form conveying an estate in fee simple in both the parcels of land described in paragraph six thereof.

If this question is answered in the negative, then judgment is to be rendered against the plaintiffs, dismissing the action.

His Honor being of the opinion that plaintiffs, A. W. Thomas and Julia W. Thomas, could conjointly execute a good title in fee to the lots, adjudged that they should execute and deliver a deed therefor in fee simple, duly probated and with proper privy examination, and that they should recover from the defendant the sum of $1,250 and costs. From this judgment the defendant appealed.

J. H. Small for plaintiffs.
W. B. Rodman for defendant.

FURCHES, J. The homestead provision of the Constitution of 1868 has given rise to many interesting and troublesome questions. And it must be admitted that some of our decisions are not in harmony, and the homestead is by no means a settled question. We do not propose in this opinion to give a critical examination to the many cases we have on the homestead, but to treat it mainly as an original question, referring only to a few cases which we think sustain our view or illustrate our argument.

The case presents very nearly every question of the homestead that has come before this Court for its consideration.

It presents these questions: What is a constitutional homestead? When does it commence and how long does it continue? When and how can the homesteader sell his homestead estate and what does the purchaser get? Is the homestead exemption personal (671) in its nature and operation, or is it *in rem?*

Then, what is this homestead? In some of the early decisions it is treated as an estate and called a determinable fee; but this doctrine has long since been abandoned and we have numerous decisions that hold the homestead is not an estate, but an exemption only. This we think is true. But what is it that operates and how does it operate to exempt the homesteader's land from sale by execution—is it *in personam* or is it *in rem?* We admit that our more recent decisions are disposed to

treat it as a personal privilege. This we think is an error and has led to most of the troubles we have had in construing the homestead, and has brought about the great conflict in our decisions.

We are of the opinion that it is not personal, but is *in rem;* that it is a condition, a quality created by the Constitution which attaches to the land, whereby an estate is exempt from sale. This, it seems to us, is the great question in the case and first to be determined.

Then, what is exempted? Land. What is it exempted from? Execution—*fi. fa.* It is land the creditor is trying to sell —not the debtor. The homestead provision exempts the debtor from nothing. It is like a warranty attached to the land, and runs with the estate wherever it goes and inures to the benefit of anyone that shall hold the estate, until the homestead shall end.

The next question is, When does this homestead condition attach, and can the homesteader (if a married man) sell the homestead without his wife's joining in the conveyance? And our opinion is that
(672) the homestead condition attaches at the moment when the conditions are complied with; that the condition created by the Constitution is always present, and as soon as it finds a resident of the State, the owner and occupier of land, the condition attaches. And the homesteader can no more sever it from the estate than he could sever a warranty that had attached from the estate. A sells to B with warranty. B sells to C without warranty. Still C gets the benefit of A's warranty because it was attached to and ran with the estate. And B could not sell the estate and reserve the warranty. Neither could he sell the estate to C and the warranty to D, for the reason that it was attached to and ran with the estate. So, if we take the definition of a homestead given above—"that it is not an estate, but only an exemption"—and add to it the definition given by that great jurist, *Chief Justice Pearson,* in *Littlejohn v. Egerton,* 77 N. C., 384: "A homestead right is a quality annexed to land whereby an estate is exempt from sale under execution for debt" and "is not a personal trust," we have a full and complete definition of a constitutional homestead.

Then it follows, as a general rule, that the homesteader cannot sell the homestead unless the wife joins him in the conveyance. Article X, section 8, of the Constitution provides that any sale he makes of the homestead estate without his wife joining him in the deed of conveyance shall be void. And if, as we have seen, the homestead conditions attach as soon as it finds a resident of the State, the owner and occupier of land, there never is a time when he can sell the *homestead* estate without his wife joining him in the deed of conveyance. Doubtless there are exceptions to this general rule. But they are the exceptions and not the rule.

We would think, where a homestead had been laid off and located, the husband might sell and convey any land he owned outside of this boundary without his wife's joining him, for the reason (673) that the constitutional protection does not attach to his other land outside of this boundary. There may also be an exception where the marriage took place and the land was acquired before the Constitution of 1868, under the principle in *Sutton v. Askew,* 66 N. C., 172. And there may be other exceptions that do not occur to us now.

We are aware it has been held otherwise in *Hughes v. Hodges,* 102 N. C., 236, in *Fleming v. Graham,* 110 N. C., 374, and probably in other cases. In *Hughes v. Hodges* it is held that the general rule is that the homesteader can convey without the joinder of his wife, and where it is necessary for her to join is the exception. And four conditions are specified in which it is necessary for her to join—all grounded upon the idea that there is no homestead until the homesteader is about to become insolvent. This position, we think, must be incorrect. It is not the condition of the homesteader that creates the homestead condition, but the force of the Constitution attaching to and acting upon the land. The construction we give to section 8, Article X, of the Constitution is in accord with the plain and simple language of that article; while the construction given it in *Hughes v. Hodges* is, as we think, adding to what is contained in the Constitution. This interpretation of the homestead estate relieves the Court from many troublesome questions, such as to when it is necessary for the wife to join in the conveyance, and as to the duration of the homestead exemption in the hands of a purchaser; that a sale of the *homestead* estate by the homesteader without the joinder of his wife is void and passes nothing; that if he sells and his wife joins in the conveyance, and there are no encumbrances at the time of the sale, the purchaser gets whatever estate the grantor had, free from encumbrances, but if there are judgment liens on the land at the time of the conveyance by hus- (674) band and wife, the purchaser takes the estate subject to such liens, but protected from sale under execution upon said judgments to the same extent that the homesteader and his family would have been if they had not sold, because the homestead exemption is a condition that runs with the estate.

But there are other questions involved in this case, Thomas, being embarrassed, though there were no docketed judgments against him, made a mortgage to Fowle and Mayo without his wife joining him, in which he made the following reservations: "Provided that the party of the first part hereby excepts and reserves from the operation of this deed the homestead estate and the right to a homestead therein." Since the mak-

ing of the mortgage judgments have been docketed against Thomas, his homestead has been laid off, the mortgagees have sold, and by mesne conveyances from the mortgagees Thomas' wife has become the purchaser. And she and her husband have contracted to sell to the defendant, and he refuses to comply with the terms of the sale, alleging that the plaintiffs cannot make him a good title to the land.

It is admitted by the plaintiffs that if Thomas reserved the estate in the land, the docketed judgments would be a lien, and they could not convey perfect title. But they contend that he did not reserve the estate, but only the homestead exemption. And this being so, there was no estate for the judgment liens to act upon and attach to. And it is further contended that, there being no judgments against Thomas at the date of the mortgage, he had a right to make this mortgage without his wife's joining him in the conveyance. *Hughes v. Hodges, supra.*

Treating the mortgage for the present as an effective convey-
(675) ance, it is perfectly manifest to us that he reserved the estate. He says that he "excepts and reserves from the operation of this deed the homestead estate," and what authority have we for saying that he did *not*? But he further says "and the right to a homestead therein." Why make this last exception and reservation if he had reserved this and nothing more in the first exception and reservation?

But we have shown in a former part of this opinion that he could not sell the estate and reserve the homestead, which is a condition attached to the land and runs with the estate. And, besides the other reasons we have given why he could not convey without his wife joining him in the deed as provided in section 8 of Article X of the Constitution, we now propose to show that he could not do so under the decision of *Hughes v. Hodges, supra,* as it is contended he could. That case makes four exceptions to the general rule that the husband can convey without his wife's joining in the conveyance. And the third exception is where the husband makes a mortgage reserving the homestead, which has to be laid off before the trust can be foreclosed. So we see that this third exception contained in *Hughes v. Hodges* is direct authority for holding that the mortgage deed of Thomas to Fowle and Mayo was utterly void and passed no estate.

FAIRCLOTH, C. J. Concurring in the opinion of *Furches, J.*, I will not repeat the argument, but only write a short opinion in addition thereto. Prior to *Littlejohn v. Egerton,* 77 N. C., 379, the homestead has not been well defined. That case was fully and thoroughly considered, and the Court unanimously held that "a homestead right is a quality annexed to land whereby an estate is exempted from sale under execution for debt, and cannot be defeated by failure of a sheriff

to have the homestead laid off by metes and bounds," like a con- (676) dition annexed to land whereby an estate may be defeated. At the next term of the Court the case of *Bank v. Green,* 78 N. C., 247, was decided. That was an action by a creditor to subject another tract of land, which had been paid for by the income of the homestead and personal property exemption, and did not raise the question of a homestead definition. The justice who wrote the opinion, after deciding the case, took the occasion to say: "The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him," and it is suggested that this mere *dictum* was a new definition of a homestead and overruled *Littlejohn v. Egerton, supra.* This seems to be a strained conclusion. It is quite improbable that the same Court, in the short space of six months, would, by a simple *dictum,* have overruled their conclusion in *Littlejohn v. Egerton,* without any intimation that they so intended. The words *"him"* and *"particular property"* in the dictum are emphasized for the conclusion that the homestead right is *personal* and divorces the right from the homestead estate, sometimes called the reversion. That view is illogical. Suppose A conveys land by deed to B and warrants the title. The warranty is annexed to the land and follows it wherever it may go. Suppose, then that the grantor had said in the deed, "I warrant the title to *him,* the grantee, in respect to the *particular property conveyed* to him." Would that have separated the warranty, as a *personal* thing, from the land? The question furnishes the (677) answer. I cannot see any difference in substance in the definition given in the two cases above referred to. If the homestead right can be severed from the homestead estate, then the husband may sell the latter to A without his wife's signature, subject of course to her dower right, and he and his wife may then sell the right or homestead exemption to B. Now, if the homesteader and his wife should die, leaving no other land, the minor children will have lost the homestead to which they were once entitled, and in a manner other than that provided in the Constitution, which could not be done under the definition in *Littlejohn v. Egerton, supra.* The definition in *Littlejohn v. Egerton* has been repeatedly recognized and approved by this Court. In *Gheen v. Summey,* 80 N. C., 187, *Ashe, J.,* who wrote careful opinions, said: "It is settled by the construction of this Court that the homestead right is a quality annexed to land whereby an estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the Constitution, and is in no

wise dependent on the assent or action of the creditor." In *Adrian v. Shaw,* 82 N. C., 474, *Ashe, J.,* said: "The vendee must take it (the homestead estate) with the same quality annexed that had attached to it in the possession of the vendor, . . . for the homestead is a right annexed to the land and follows it like a condition into whatsoever hands it goes, without regard to notice."

In *Markham v. Hicks,* 90 N. C., 204, *Smith, C. J.,* refers to the definitions in *Littlejohn v. Egerton* and *Bank v. Green, supra,* and says the latter is correct, without any intimation that it overrules the former.

In *Gardner v. Batts,* 114 N. C., 496 (1894), the Court recognizes the same principle as in *Littlejohn's case* and copies the language of the Court in *Adrian v. Shaw, supra.*

In *Stern v. Lee,* 115 N. C., 429 (1894) the Court refers to *Adrian v. Shaw, supra,* and "the long line of cases of like import" on this
(678) question—*Adrian v. Shaw* resting expressly on *Littlejohn's case.*

It must be admitted that the recent decisions of this Court on the homestead matter are not easily reconciled and that they have led to uncertainty and confusion in the mind of the legal profession.

CLARK, J. Concurring with *Furches, J.,* and *Faircloth, C. J.,* in the result, I concur fully with *Avery* and *Montgomery, JJ.,* that "the right to a homestead in a tract of land may be lawfully reserved by the owner in a deed of assignment for the benefit of creditors which purports to convey the fee simple to the land subject to such right," and that the homestead right is "not an estate, but a determinable exemption," which is conferred not on the land, but on the homesteader, the right being personal and not *in rem,* and not running with the land.

These positions seem to me to be settled by the numerous authorities cited in their opinions. I also concur with brother *Montgomery* that the constitutional restriction against the conveyance of the homestead without the joinder of the wife applies only where such homestead has been allotted. If, therefore, no judgments had been docketed against the homesteader after the deed of assignment was executed, I would concur in their conclusion that said homesteader, with the joinder of his wife, could convey a good title in fee to the defendant. But such docketed judgments are unquestionably liens upon the homestead, though they cannot be enforced till the homestead right ceases. *Burwell, J.,* (for the Court) in *Vanstory v. Thornton,* 112 N. C., 205. Now, the homestead right, being personal to the debtor, ceases as to the allotted homestead whenever the lot is conveyed in the manner required by the Constitution, *i. e.,* by deed with the joinder and privy examination of
(679) the wife. Whenever, therefore, the allotted homestead ceases to be a homestead by such conveyance, the exemption, being personal

and not a quality annexed to the land, ceases as to that land necessarily, and the judgment liens, if any, come into force ahead of any conveyance. If there are no judgment liens the grantee gets a good title, but if there are judgment liens, when the exemption extended over the land on account of the right of exemption personal to the owner and occupier ceases, the judgment liens come in force; hence in this case I concur in the conclusion of *Justice Furches* and the Chief Justice that the plaintiffs cannot convey a clear, unencumbered title to the purchaser. The plaintiff having reserved the *homestead* in making the mortgage, that did not pass from him, but was laid off to him, and the docketed judgment became a lien on it. Therefore an unencumbered deed for the homestead lot cannot be made. The *homestead right,* on the other hand, being personal and inalienable, could not be conveyed to another, with or without the homestead lot.

This view of the homestead, it seems to me, is the one plainly authorized by the Constitution. It was so held by a unanimous Court in *Fleming v. Graham,* 110 N. C., 374, and is sustained incidentally by *Allen v. Bolen,* 114 N. C., 560. It is recognized by *Shepherd, J.,* in *Jones v. Britton,* 102 N. C., 180, when he aptly says that the homestead is "a mere stay of execution, nothing more, nothing less;" by *Bynum, J.,* in *Bank v. Green,* 78 N. C., 247 (a very able opinion), when he terms it "a determinable exemption from the payment of debts" conferred upon the homesteader "in respect to the particular property allotted to him;" by *Avery, J.,* in *Hughes v. Hodges,* 102 N. C., 236, when he points out that *Pearson, C. J.,* had corrected his inadvertence of terming the homestead in *Littlejohn v. Egerton* a "quality annexed to (680) land" by immediately adding, "whereby it is exempted from sale under execution;" by *Chief Justice Smith,* in *Simpson v. Wallace,* 83 N. C., 477, when he speaks of the debtor's right as the homestead "privilege;" in *Campbell v. White,* 95 N. C., 344, when he speaks of it as "the measure of the privilege secured to the debtors," and in *Markham v. Hicks,* 90 N. C., 204, where quoting *Bank v. Green,* he italicises that the privilege is bestowed *"upon him,"* "in order," as has been pertinently and forcibly said by *Avery, J.,* "to exclude the idea that any new quality attached to the land and impress the principle that it was in fact a personal privilege conferred upon the debtor, as has since been held distinctly in numerous cases." If, therefore, the homestead, as so many cases hold, is not a quality or estate in the land, but a "determinable exemption personal to the homesteader," a *"cessat executio,"* a "mere stay of execution," a "privilege conferred on the debtor," then it would seem to follow, as the night follows the day, that when the homesteader, with the wife's joinder, conveys the homestead, as he is authorized by the

Constitution, this personal right and privilege do not attach to the land and follow it in the hands of the grantee, but, being personal, it is attached to and follows the person of the homesteader, who can assert it as a "privilege," a *"cessat executio,"* a "stay of execution" to "exempt from sale under execution" any other lot upon which he may fix his residence. Thus, he may change his homestead from time to time, and not lose it in changing his residence as he would if the homstead right was annexed to the first homestead he had allotted him and on its conveyance by him should pass to the grantee, to be enjoyed by such grantee *pur auter vie,* while the homesteader, like the bowman who has shot his last arrow, would be defenseless, or henceforward, like the Wandering Jew, unable to claim the shelter of a home from the storms and
(681) vicissitudes of life.

There have been conflicting decisions, it must be admitted, and two opinions by a divided Court have been lately rendered taking a contrary view to this (*Vanstory v. Thornton,* 112 N. C., 196, and *Stern v. Lee,* 115 N. C., 426), the latter made by a bare majority. But it must be observed that the Court could not amend the Constitution, and amid this conflict of decisions the path of safety is to return to the letter of the Constitution "lest we make the word of none effect by our traditions." The words to be found in the Constitution provide this—merely this and nothing more: "Every homestead . . . not exceeding in value one thousand dollars . . . *owned and occupied* by any resident of this State . . . shall be exempt from sale under execution." Clearly this is a *cessat executio,* an exemption from sale of that lot in favor of the *"owner and occupier."* When by conveyance in the constitutional mode he ceases to be owner and occupier, the exemption from sale ceases. He cannot assign and convey the exemption from sale to any one else, nor is his right to a homestead forfeitable. It is personal and follows him as a constitutional right, to be asserted by him as long as he lives, and by his minor children if he leaves any at his death, to any future lot which he may select as his homestead, and as often as he changes his residence by conveying the one he has. It is said, and doubtless with truth, that the Constitutional Convention of 1868 voted down the proposition to make the homestead a fee simple and made it a life exemption on the ground that the latter was more favorable to the debtor, for if the homestead were an estate in fee simple annexed to and running with the land, a conveyance of it would deprive the grantor of all future right to homestead, since it "could not exceed $1,000," whereas if
(682) it were, as it was made, a mere exemption from execution, the debtor being authorized to convey the land (with his wife's assent), he could assert a new homestead exemption whenever, in the re-

quirements of our busy modern life, he might find it convenient to change his residence. However this may be, seeing the constitutional provision in the light it is given me to see it, and placing on it the construction which in my imperfect judgment numerous decisions of this Court and the palpable patent meaning of the words require, I concur, though reaching this result by a different process of reasoning, with the conclusion of *Mr. Justice Furches* and the Chief Justice that the judgment below should be reversed. Almost the identical point discussed in their opinions was held opposite to their contention by *Pearson, C. J.,* in *Jenkins v. Bobbitt,* 77 N. C., 385, where it was decided that a mortgage reserving the homestead was valid without the joinder of the wife, since she could have no interest (except of course the contingent right of dower) either in the excess over the homestead or, the reversion, and that case was cited and approved by *Smith, C. J.,* in *Murphy v. McNeill,* 82 N. C., 221; hence I dissent from their reasons.

MONTGOMERY, J., dissenting: Beyond question the decisions of this Court on the homestead right are regarded by the legal profession as sometimes inconsistent. And beyond doubt the profession is divided, as the Court has been, in their views respecting those decisions involving the nature and quality of the homestead interest, from a constitutional standpoint particularly; some regarding the homestead right as a "determinable exemption personal to the homesteader," a "mere stay of execution," and others regarding it as a quality—estate—inseparable, annexed to the land. The first view seems to me to be the settled determination of this Court, and it is best in my opinion to let the rule *stare decisis* prevail. Under the decisions made under the first- (683) mentioned view, many titles to land have been acquired through confidence in their correctness and stability, and they should be a rule of property. "When solemn determinations acquiesced under have settled precise cases and become a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute." *Lord Mansfield* in *Wyndham v. Chetwyrd,* 1 *Burr,* 419.

I cannot concur with *Justice Furches* in holding that *Chief Justice Pearson,* when he said in *Littlejohn v. Egerton,* 77 N. C., 379, that "a homestead right is a quality annexed to land whereby an estate is exempted from sale under execution from debt," meant that this quality was annexed inseparably to every foot of land acquired by a married man since the adoption of the Constitution in 1868, however much that might be, and however free from debt he might be, and that as a consequence every deed for land acquired after 1868, made by a married man

without the joinder of his wife in the deed, is absolutely void and the purchaser has and can have no title under it. It must follow from such a construction as a matter of course that, if the homesteader with his wife should convey his homestead, the purchaser would get the interest of the homesteader, under the decision of *Adrian v. Shaw,* 82 N. C., 474, and the homesteader can nexer have another homestead, because if so he would in effect have two, or more, which the law could not permit. And further, this view, it seems to me, puts an end to those estates which insolvent debtors have reserved to themselves in deeds of assignment made for the benefit of creditors, in which they have reserved their homestead exemptions and authorized the trustee to sell all the land except the homestead exemption. For in making such conveyances (684) they have separated the homestead right from the body of the land, and this decision decides that this cannot be done.

I cannot believe that this is the proper interpretation of *Chief Justice Pearson's* language in *Littlejohn v. Egerton,* as quoted above, and my reasons are partly as follows:

In *Lambert v. Kinnery,* 74 N. C., 348, *Judge Bynum* for the Court (*Pearson* being Chief Justice) said: "The defendant, having a vested estate in the homestead conferred by the Constitution, can lose or part with it only in the mode prescribed by law, to-wit, by deed with the consent of the wife evidenced by her privy examination. Constitution, Art. X, sec. 8." But this Court, in the case of *Mayho v. Cotten,* 69 N. C., 289, the same Judges composing the Court, had construed the meaning of the words quoted above in *Lambert v. Kinnery* by declaring that Article X, section 8, of the Constitution referred to the homestead after it had been allotted. And further, *Chief Justice Pearson* never afterwards referred to *Mayho v. Cotten* with disapproval, nor to *Hager v. Nixon,* 69 N. C., 108, which practically decided the same point. It is not to be denied, however, that there was conflict between these cases and the cases of *Adrian v. Shaw,* 82 N. C., 474, and *Gheen v. Summey,* 80 N. C., 187, and the inconsistency had to be removed either by modifying the positions laid down in *Adrian v. Shaw,* or by directly overruling the clear statement in *Mayho v. Cotten,* so as to fix a certain principle of interpretation of Article X, section 8, of the Constitution.

In *Hughes v. Hodges,* 102 N. C., 236, this Court, with its personnel entirely changed, *Smith* being Chief Justice, confirmed and approved the ruling in *Mayho v. Cotten, supra,* with limitations which were deemed necessary, without altering the principles of interpretation (685) adopted in the last-named case. These limitations disabled the owner of land from conveying the same without the joinder of the wife, (1) where the land in question has been allotted to him as a

homestead, either on his own petition or by an officer in accordance with law; (2) where no homestead has been allotted, but there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted; (3) where no homestead has been allotted, but he has made a mortgage reserving an undefined homestead, which mortgage constitutes a lien on the land, which could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors and no homestead has been allotted in other lands.

In *Scott v. Lane,* 109 N. C., 154, the following is the opinion of the Court: "According to the defendant's testimony, he was indebted to no one else when he executed the mortgages, and there is nothing in the pleadings and evidence to indicate that the mortgaged property had theretofore been allotted as a homestead. There was no restriction, therefore, upon the owner's *jus disponendi,* and the purchaser at the sale under the mortgage acquired a good title as against the defendant mortgagor, subject to the contingent right of dower of the wife if she should survive him. A case exactly in point is *Hughes v. Hodges,* 102 N. C., 236."

In *Fleming v. Graham,* 110 N. C., 374, this Court said: "In *Mayho v. Cotten,* 69 N. C., 289, it is said that section 8, Article X of the Constitution applies only to a conveyance of the homestead after it is laid off. This is cited and approved in *Hughes v. Hodges, supra.* It appears, therefore, from the authorities that Article X, section 8, of the Constitution has been construed by this Court for nearly 25 years as applying only to the conveyance of the homestead after it had been allotted. There were some rulings in the meantime inconsistent with this principle of construction, but the decisions for a half dozen years (686) past have removed these conflicts and established the former rules.

As to the case before the Court, the debtor did not attempt to convey his homestead at all, but expressly reserved it from the operation of the deed in trust. I cannot concur with the Court in its disposition of this case.

AVERY, J., dissenting: The five opinions filed will require careful consideration in order to determine how our former adjudications are affected by the decision in this case.

The Chief Justice and *Justice Furches* place, as I think, an entirely novel construction upon the language of *Chief Justice Pearson* in *Littlejohn v. Egerton,* 77 N. C., 379. They are of opinion that it necessarily follows from accepting the definition that "a homestead right is a quality annexed to land whereby an estate is exempt from sale under execution for debt" that even where husband and wife join they cannot reserve in

their deed the right to the enjoyment of the rents and profits of the homestead land until the end of the period of exemption, and convey the reversionary interest in fee simple. This conclusion seems to be founded upon the idea that the learned Chief Justice and the Court for whom he spoke meant that the right of exemption was indissolubly annexed or fastened to the fee simple estate. Such an application of an abstract principle would, in my opinion, overturn the whole structure of homestead law thus far built up by the arduous labor and the indefatigable research of all of the Justices who have served the State for 25 years, and would lead to the still more deplorable and disastrous consequence of unsettling titles founded upon the rules of property enunciated in them. *Justice Clark* concurs upon this question with my brother *Montgomery* and myself, and thus maintains the authority of many of our ad-
(687) judications, but concurs with the Chief Justice and *Justice Furches* upon other grounds in maintaining that the judgment below should be reversed, while *Justice Montgomery* and myself are of the opinion that it should be affirmed. That *Chief Justice Pearson,* who formulated the definition, did not give to it the construction now placed upon it by my brethren is evident from the fact that at the term immediately preceding that at which *Littlejohn v. Egerton* was decided he concurred in the opinion of *Justice Reade* in *Barrett v. Richardson,* 76 N. C., 429, that where land was sold at execution sale "subject to the homestead" the purchaser acquired the fee simple, to take effect at the falling in of the homestead right. *Chief Justice Pearson* had too accurate a knowledge of the adjudications of the Court over which he presided to overrule a decision within a year after its rendition without knowing it, and both he and his associates were too manly to designedly make such a change and conceal or fail to state the facts. Any such imputation upon their candor or consistency can be avoided, however, if we adopt the theory for which I now contend, that in applying this abstract definition the Court meant that the quality attached only till the period of exemption ceased, or ordinarily till the death of the homesteader and the attainment by the youngest child of its majority. The termination of that period fixed a contingent limit, after which the unencumbered right to enjoy the fee simple might be conveyed or reserved. The same learned Justices who then composed the Court had prior to that time distinctly recognized, as their successors afterwards did, the authority of the Legislature first to provide for the separate sale of the reversionary interest in homesteads and subsequently, after thousands of such sales had been made, to prescribe by the act of 1869-
70, ch. 121, that no such sales should thereafter be made. *Mc-*
(688) *Donald v. Dixon,* 85 N. C., 248; *Cotten v. McClenahan,* 85 N. C.,

254; *Cobb v. Hallyburton,* 92 N. C., 652; *Lowdermilk v. Corpening,* 92 N. C., 333. We must note the fact in this connection that the reversionary interest of thousands of the persons who filed petitions in bankruptcy was sold by decree of the Federal courts and bought by our people under the impression that we would adhere to our decisions and protect their rights.

But if the right of enjoyment during the period of exemption cannot be sold as an interest separate and distinct from the right to enjoy the fee after expiration of such period, this Court at every subsequent stage of its history has continued to misapprehend the meaning of the definition in *Littlejohn v. Egerton* as completely as did the Court in 1877 when they failed to declare *Barrett v. Richardson* overruled. Four years later (in 1881) *Justice Ruffin,* one of the ablest jurists and most diligent and painstaking students who ever adorned this bench, again reiterated the ruling that a valid sale might be made "subject to the homestead." *Wyche v. Wyche,* 85 N. C., 96. Again, still later (in 1885), *Chief Justice Smith* delivering the opinion, in *Lowdermilk v. Corpening,* 92 N. C., 333, the Court gave its sanction to the separation by a sale "subject to the homestead," and both he and *Justice Ruffin* based their conclusions not upon the ground that the sales were made to satisfy old debts, but in spite of that fact, or, as the idea was expressed by the latter, "even though the debt be one against which no such right existed." The two last-named cases expressly refer to *Edwards v. Kearsey,* and declare that it does not affect the principle enunciated. In *Long v. Walker,* 105 N. C., 90, the Court again held that, though the execution creditor might, when his debt had been created before the homestead provision was engrafted in our Constitution, sell the whole fee, he might also at his option sell "subject to the homestead." As late as the period (689) when the opinion in *Ladd v. Byrd,* 113 N. C., 466, was filed (September Term, 1893) another Court gave its sanction to the power of the execution creditor to sell "subject to the homestead." It thus appears that not less than fourteen Justices have been inadvertent to any such possible construction as it is now proposed to place upon the language of *Chief Justice Pearson,* and through such inadvertence have invited the confidence of the legal profession and the people in the rules of property, which would be overturned by the new doctrine.

It is conceded that the sanction of the Court was given to the validity of the reservation of the homestead right by assignors in making general assignments of their property both in *Bank v Whitaker,* 110 N. C., 345, and *Davis v. Smith,* 113 N. C., 94, and that *dicta* to the same effect appear in *Bobbitt v. Rodwell,* 105 N. C., 236, and in *Eigenbrum v. Smith,* 98 N. C., 207. *Ladd v. Byrd, supra,* and cases which had

preceded it, had authorized the separate sale of the reversionary interest, subject to the encumbrance of the homestead right, and it had been expressly held in that case, as well as in *Lowdermilk v. Corpening, supra,* that in such cases the purchaser of the reversionary interest must await the expiration of the period of exemption before his right accrues. In *Bank v. Whitaker, supra,* and *Davis v. Smith* the right of the debtor by reservation in his deed to make the separation, just as the husband of the *feme* plaintiff did in the case before us, was as fully recognized. If, then, any respect is to be paid to these adjudications, or any consideration is to be given to the fact that titles depend upon them as rules of property, we should adhere to them and hold that Thomas passed the title to the reversionary interest, reserving his right of home-
(690) stead. If authorities are worthy of a moment's consideration, we might add that *Adrian v. Shaw* and a number of cases in which the same doctrine has been approved establish the principle that the deed of the homesteader with the joinder of the wife passes the right of enjoyment, free from sale under execution, for the life of the homesteader at least, thus again indicating a possible limit to the right of enjoyment when the liens are not removed. *Justice Furches* in his opinion says: "We have shown in the former part of this opinion that he (the homesteader) could not sell the estate and reserve the homestead, which is a condition annexed to the land and runs with the estate." The proper construction of this language is admitted by him to be that the portion of the estate covering the period of exemption can in no case be separated from the reversionary interest, and upon this abstract proposition it is insisted that *Hughes v. Hodges,* the overruling of which seems to be the objective point, cannot stand. But neither can any early case in which the courts, State and Federal, recognized the sales of reversionary interests of bankrupts, if the construction contended for is to be placed upon *Littlejohn v. Egerton.* How many titles depend on the validity of these sales? How many sales of reversionary interests were made before the act of March, 1870? Must all of these fall under the executioner's axe in order to reach *Hughes v. Hodges?*

It is not possible that *Chief Justice Pearson* did not understand his own language when he agreed to these decisions, and also to *Barrett v. Richardson,* or that *Ruffin, J.,* failed to make the discovery when he wrote *Wyche v. Wyche, supra.* It is manifest that *Chief Justice Smith* did not take this view, because he not only wrote *Lowdermilk v. Corpening, supra,* sanctioning a sale made "subject to the homestead," but he afterwards followed *Bynum,* speaking for the old Court, when
(691) in *Bank v. Green* he said that the homestead right was a personal one "conferred upon" the homesteader, thus modifying *Little-*

john v. Egerton, so as to make the homestead a mere personal privilege, as my brother *Clark* contends, from the beginning. However, that difference amongst my brethern may be adjusted. The next question raised is whether *Hughes v. Hodges* is founded upon a correct principle:

1. The opinion is based upon the fundamental idea that the right of alienation is a vested right which is restricted only in so far as the government for the good of society has found it necessary to restrict it. The only case cited on the point was *Bruce v. Strickland,* because it was unnecessary to cite other authorities to sustain this hand-book principle.

2. The next proposition was that the power of the male owner to alien his land was restricted only by the inchoate right to dower and homestead, and there was no constitutional or statutory provision prohibiting his conveying, subject to the contingency of dower.

3. It was held that the restriction as to the homestead did not arise till the right to the homestead accrued, and the fundamental right of alienation remained unrestricted till that period.

4. It was held that the right did not arise till something occurred which proved the husband's insolvency, unless the husband upon his own voluntary petition caused a homestead to be dedicated to his family.

5. It was declared that when the homestead was allotted in his petition, the right accrued by his own voluntary surrender of his right of alienation.

6. It was held that an outstanding lien in favor of a creditor, whether by judgment or recorded mortgage, was evidence of insolvency, and that when it was found that a deed was executed to defraud (692) creditors, the right *ipso facto* attached.

If in our case the deed of Thomas had been attacked on the ground that it was executed in fraud of creditors and the jury had found the allegation of fraud to be true, then, under *Hughes v. Hodges,* the homestead right would have attached and the mortgage deed would have been declared void. But the deed has not been assailed, and must be deemed to have been made in good faith.

The opinion of *Justice Furches* assumes that the reservation of a homestead *ipso facto* proves insolvency. Can that be true? Does a voluntary petition to allot a homestead show insolvency? If not, why should the reseration of the right to have one allotted prove it? If this is not true, then the facts in this case do not bring it within the exception in *Hughes v. Hodges.*

The opinion of my brother *Clark,* as I understand it, is founded upon the views heretofore presented by him in two dissenting opinions as to the right to alien a homestead, and the speculative question whether a resi-

dent of the State may sell one homestead with the joinder of the wife (as prescribed in Article X, section 8, of the Constitution) and invest the proceeds of sale in another. If it were pertinent to embark in the discussion, or if it were still an open question, another extensive field for investigation and inquiry would be presented. But it would seem that if decisions affecting the homestead are not legal anomalies, the agitation of these questions ought to cease. I refer without further comment to *Stern v. Lee,* 115 N. C., 429; *Baker v. Leggett,* 98 N. C., 304; *Adrian v. Shaw,* 82 N. C., 474, and the *same case* on the rehearing, 84 N. C., 832; *Vanstory v. Thornton,* 112 N. C., 196, and the *same case,* 114 N. C., 375; *Gardner v. Batts,* 114 N. C., 496, and *Ladd v.*
(693) *Byrd,* 113 N. C., 466.

The Chief Justice and my brother *Furches* do not concur with my brother, nor does he with them, as to the grounds upon which they reach the conclusion that the judgment in the case at bar should be reversed. So that, as no more than two members of the Court concur in any new theory advanced, the net result of the discussion is to develop a wide divergence of views, but to overrule no opinion heretofore delivered by this Court, as no one of the five opinions filed is, as a whole or beyond the order reversing the judgment below, the ruling of the Court, it may avoid confusion to call special attention to that fact. Personally, I think it fortunate for the State that these rules of property have come through the conflict of views undisturbed. Whether right or wrong, when every one of the questions settled by them was *res integra,* now that titles have been founded upon them, they should be deemed sacred. Indeed, such is the respect paid to this principle by the Supreme Court of the United States, that while it is the custom of Federal tribunals to adopt the construction placed by the highest appellant court of a State upon its own Constitution and statutes, that principle will be departed from where the State tribunal by overruling its own adjudications destroys a rule upon which property rights have been founded. The supreme judicial authority of a State may bring itself within the inhibition against impairing the obligation of contracts by interfering with rights vested under its decisions, just as a legislature may subject itself to the same condemnation by attempting to devest rights vested under statutes passed by it. 7 Myers Fed. Digest, p. 93; Patterson Fed., etc., on State Action, pp. 146, 147; *Olcott v. Supervisors,* 11 Wall., 678; *Ford v. Sargent,* 97 U. S., 694; *Ohio, etc., v. Devot,* 11 How., 432; *Havmeyer v. Iowa City,* 3 Wall., 303. We cannot, however, as has been suggested, overrule our own adjudications, because it would be a violation of the Constitution of the United
(694) States to give to the new ruling a retroactive effect. To violate

our obligation to support the Federal Constitution, upon such ground, would be to recognize the vicious theory that we may do what is morally wrong, in the hope that the end may justify the means of attaining it.

Not concurring with some positions taken by the Chief Justice and *Justice Furches* on the one hand, and taking issue with my other brethren upon some other points, none of which will acquire the force of adjudication by a majority of the Court, I wish to enter my dissent only to the conclusion of the majority that the purchaser did not acquire a valid title. When Thomas executed the deed of assignment, there was no outstanding lien of any kind upon the property. It was therefore valid, as conceded by my brother *Clark,* on the day of its execution. It does not appear that any judgment liens were acquired between that date and the sale of the reversionary interest under the deed of trust, nor does it appear when the homestead was actually allotted. But before the allotment a judgment was docketed. Whether the judgment was acquired before or after the sale by the trustees is not material, for if the deed of assignment was valid for a moment, the lien acquired under it could not be ousted by that of the subsequent judgment, which was inferior to it. If Bowen, the purchaser under the deed of assignment, acquired title to the reversion, then, his good faith being unquestioned, he passed it on to the *feme* plaintiff. If the *feme* plaintiff acquired the reversionary interest in her own right, with the constitutional authority to convey the same with the written assent of the husband signified by his joinder in the deed, and if the two are expressly empowered by the Constitution, Article X, section 8, to convey the homestead, I am utterly unable to conceive why the (695) deed tendered in this case was not a good one. True, in *Mayho v. Cotten,* there was an intimation that the husband's *jus disponendi* was not taken away by the homestead provision until there was an actual allotment made, but the inhibition upon his right was further extended in *Hughes v. Hodges, supra.*

I cannot concur in the opinion that the provision of the Constitution allowing the alienation of homestead shall be annulled by so interpolating the proviso that the right shall be limited to instances where no lien is acquired before allotment.

Per Curiam.

Reversed.

Cited: *Bevan v. Ellis,* 121 N. C., 235; *Jordan v. Newsome,* 126 N. C., 558; *Cawfield v. Owens,* 130 N. C., 644; *Joyner v. Sugg,* 131 N. C., 333, 339, 349; *s. c.,* 132 N. C., 588, 590, 595; *Miller v. Bank,* 176 N. C., 161.

STATE v. BURT GREEN.

Trial—Practice—Sufficient Evidence—Withdrawal of Case from Jury.

It is only where the evidence, in no aspect of it, would reasonably warrant the jury in drawing the inference that the defendant is guilty, that the trial Judge should withdraw the case from the consideration of the jury.

INDICTMENT for larceny, tried before *Bryan, J.*, and a jury, at Spring Term of CRAVEN.

The defendant was convicted and appealed. The facts appear in the opinion of *Associate Justice Clark.*

Attorney-General for the State.
L. J. Moore for defendant.

CLARK, J. The prosecutor lost a spotted hog with marked ears, and weighing about 140, pounds, from his pen, on which blood was found. Blood was tracked down the road to the house in which defend-
(696) ant and his mother lived; back of the house the entrails of a freshly-killed hog were found in a sack, and also, concealed in a marshy place in front of the house, hog meat freshly killed and cut up, but badly cleaned, so that it could be seen to have been a spotted hog and apparently about the weight of the one the prosecutor had lost. The ears had been cut off. The meat was left there and watched. That night the defendant came to the meat and was about to pick it up, but was arrested and carried back to the house, and the mother was told about it in the defendant's presence, when she said she was "sorry for it; that is what boys get by being in bad company." To this the defendant made no reply. He introduced no evidence. The court properly held that there was sufficient evidence to be submitted to the jury. *S. v. Christmas,* 101 N. C., 749. The evidence in *S. v. Wilkerson,* 72 N. C., 376, falls very far short of the accumulation of incriminating facts in this case, but even that case was doubted in *S. v. Christmas, supra.* It is the combination of circumstances, rather than any isolated one in particular, which justified the submission of this case to the jury.

As pointed out in *S. v. Kiger,* 115 N. C., 746, 751, the test is not whether the Judge, sitting himself as a juror, would have found the defendant guilty. If that were the rule, then the mere fact that the Judge submitted any case to the jury would necessarily go to them with the strongest of intimations on the part of the Court that the jury ought to convict. It is only when the evidence, in no aspect of

it, would reasonably warrant the jury in drawing the inference that the defendant is guilty, that the court should withdraw the case from the tribunal whose exclusive province it is to pass upon the facts.

No error.

Cited: S. v. Beal, 119 N. C., 811; *Ladd v. Ladd,* 121 N. C., 120; *S. v. Gragg,* 122 N. C., 1087, 1091; *Powell v. R. R.,* 125 N. C., 372; *S. v. Shines, ib.,* 731; *McCord v. R. R.,* 134 N. C., 59.

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STATE v. GEORGE DARDEN ET AL.

Indictment for Larceny—Stealing Temporary Use of Horse—Indictment—Harmless Surplusage—Practice.

1. A bill of indictment is not vitiated by the use of superfluous words; hence,

2. An indictment for stealing the temporary use of a horse in violation of section 1067 of The Code, is not defective because it charges the stealing of the temporary use of a buggy also.

3. Where sufficient matter appears on the face of a bill of indictment to enable the court to proceed to judgment, an arrest of judgment is forbidden by section 1183 of The Code.

INDICTMENT, under section 1067 of The Code, for the stealing of the temporary use of a horse, tried before *McIver, J.,* at Fall Term, 1895, of PITT.

The defendants were convicted and appealed. The facts are stated in the opinion of *Associate Justice Clark.*

Attorney-General for the State.
J. B. Batchelor for defendants.

CLARK, J. The defendants were found guilty on a charge of stealing the temporary use of a horse and buggy. The Code, sec. 1067. After verdict there was a motion in arrest of judgment for "defects in the face of the indictment." The indictment on its face is good and sufficient as a charge for stealing the temporary use of the horse. The addition of the buggy does not vitiate the indictment as to the horse, and was simply harmless surplusage so far as the face of the indictment goes. *Utile per inutile non vitiatur.* The defendants were not

harmed if the Judge charged properly. The presumption is that he did, and there is no exception that he did not. If there had been any doubt, upon the evidence, that the defendants did not steal the horse, but only took the buggy, if anything, then the defendants' remedy (698) was by request to charge that in such event the jury should find the defendants not guilty, or if the Judge had charged that if the defendants had stolen either the horse or buggy they would be guilty, there would have been ground for just exception. But nothing of this kind appears. The verdict finds defendants guilty of taking both horse and buggy, as alleged in the indictment. It is simply the case of a sufficient bill of indictment which is not vitiated because of the use of superfluous words. *S. v. Hart,* 116 N. C., 976. "Sufficient matter appears in the bill to enable the court to proceed to judgment," and when that is the case The Code, sec. 1183, forbids an arrest of judgment.

No error.

Cited: S. v. Hester, 122 N. C., 1052; *S. v. Shine,* 149 N. C., 481; *S. v. Wynne,* 151 N. C., 645; *Clark v. Whitehurst,* 171 N. C., 2.

STATE v. PAYNE PERKINS.

Indictment for Bastardy—Pauper Appeal—Affidavit—Evidence Impeaching Prosecuting Witness on Collateral Matter.

1. It is not necessary that an affidavit to obtain leave to appeal as a pauper (Code, section 1235) should state the name of the counsel by whom the applicant is advised that he has reasonable grounds for appeal.

2. Where, on the trial for bastardy, the prosecuting witness testified that the defendant was the father of the child, which the defendant denied, and on cross-examination she testified that she had never had intercourse with any other man, the fact thus brought out was a collateral matter and, hence, evidence offered by defendant that she had intercourse with other men, at or about the time she testified the child was begotten, was inadmissible to impeach her.

BASTARDY, tried before *Coble, J.,* at Spring Term, 1895, of PITT.

The defendant was convicted, and appealed as a pauper. In this Court the Attorney-General made a motion to dismiss the appeal (699) upon the ground that the affidavit upon which the application to appeal as a pauper was based was insufficient in that it did

not state the name of the counsel who advised that he had reasonable ground of appeal. The motion was refused. The facts of the case and the exception upon which the appeal is based are stated in the opinion of *Associate Justice Furches.*

Attorney-General for the State.
Argo & Snow for defendant.

FURCHES, J. This is a charge of bastardy, and appeal by defendant as a pauper, under section 1235 of The Code.

Upon the call of the case the Attorney-General moved to dismiss the appeal upon the ground that the affidavit upon which the appeal was granted was insufficient. But upon examining the affidavit we find it complies with the requirement of the statute, "that he is wholly unable to give security for the cost, and is advised by counsel that he has reasonable cause for the appeal prayed and that the application is in good faith."

But it was contended that this Court added another requisite to those contained in the statute, which the Court should respect as a rule of practice; that, in addition to the requirements contained in the statute, the Court had held that it was necessary that the affidavit should state the name of the counsel who gave the advice that defendant "has a reasonable cause for the appeal prayed."

But upon examination we fail to find that the Court has made any such decision. In *S. v. Divine,* 69 N. C., 390, and *S. v. Moore,* 93 N. C., 502, the Court suggest that it would be proper to state in the affidavit the name of the attorney that gave the advice, but both these are but suggestions of the Court, and do not amount to an *obiter.* (700) The Court in both cases decided the affidavits insufficient for the reason that they did not comply with the terms of the statute, and not for the reason that the attorney was not named. And this suggestion of the Court is not noticed in the headnotes of either case, nor can we find that it is noticed in any of the digests. Therefore we do not feel called upon to follow these suggestions as putting a construction on the statute; and, treating it as an original question, we are of the opinion that the affidavit is sufficient, and the motion to dismiss the appeal is refused.

This brings us to a consideration of the question involved in the appeal. The prosecuting witness, upon her cross-examination, testified that she had never had sexual intercourse with anyone but defendant. The defendant was examined and testified that he had never had intercourse with prosecutrix but once, and that was in December, 1892.

The defendant then offered to contradict the prosecuting witness by proving that she had sexual intercourse with other men about the time when the prosecutrix said the child was begotten. This was objected to, and excluded by the court.

The issue was whether the defendant was the father of the child. The prosecutrix swore he was and defendant swore he was not. But on cross-examination she swore that she had never had sexual intercourse with any other man but defendant. Defendant then offered to *contradict* the prosecutrix by showing that other men had intercourse with her about the time she said the child was begotten. This testimony, that she had never had intercourse with any other man, was called out by defendant on cross-examination. It was collateral to the issue before the court, and defendant was bound by it. The evidence was (701) offered for the purpose of *contradicting* the prosecuting witness. This he could not do on a collateral matter that he had called out. *S. v. Parrish,* 83 N. C., 613. In this case defendant offered to prove that Tom Carroll and others had sexual intercourse with prosecutrix about and just before the child was begotten, and this was held to be incompetent. This opinion is supported by *S. v. Bennett,* 75 N. C., 305; *S. v. Patterson,* 74 N. C., 157.

But our decisions are not in harmony as to the competency of such evidence as that offered by the defendant and ruled out by the court; but, leave out of this case the fact that defendant testified that he was not the father, and we have almost the exact case of *S. v. Parrish,* 83 N. C., 613, in which case the Court ruled that such evidence, offered for the purpose of impeaching the prosecuting witness upon a collateral issue, was incompetent. But in the case of *S. v. Britt,* 78 N. C., 439, where the defendant swore that he was not the father, the Court held that this impeaching evidence was competent. We fail to see the logic of this distinction, that because the defendant testified he was not the father would make the testimony, not offered to corroborate the defendant, but to impeach the prosecuting witness, competent, that before was incompetent. The learned Chief Justice who delivered this opinion says the evidence that other men had intercourse would not be sufficient to overcome her testimony without other testimony. This, it seems to us, could not make evidence which was incompetent competent. But as this is the latest expression of the Court on this subject and as we do not wish to overrule the Court on such a matter as this, we must say there was error and a new trial is ordered.

Error.

Cited: S. v. Warren, 124 N. C., 808, 809.

(702)

STATE v. NICK DEBOY.

Indictment for Betting at a Game of Chance—Games of Chance, What Constitute—Raffling—Trial of Skill—"Progressive Euchre" and Similar Games.

1. Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game.

2. In misdemeanors all aiders, abettors and accessories are principals, and one who gets up a raffle or throws dice for those engaging in it is liable as a principal.

3. Chapter 29, Acts of 1891, making it "unlawful for any person to play at any game of chance at which money, property or other thing of value is bet, whether same be at stake or not," has no application to the long prevailing custom of "shooting for beef" and other similar trials of skill, for which the participant pays for the "chance" or privilege of shooting, there being no "chance" in the sense of the acts against gambling.

4. Nor does such statute of 1891 prohibit the social diversions in which a hostess offers prizes for the most successful or least successful player at cards or other games, for, although the games are games of chance, the players bet nothing.

THIS was an indictment under chapter 29, Acts 1891, against the defendant, Nick DeBoy, tried at July Term, 1895, of WAKE, before his Honor, *E. W. Timberlake.*

The indictment was as follows:

"The jurors for the State, upon their oath, present: That Nick DeBoy, late of the county of Wake, on 25 March, 1895, with force and arms, at and in the county aforesaid, unlawfully and wilfully did play at a game of chance, namely, a raffle, at which money, property and other things of value were bet, contrary to the form of (703) the statute in such case made and provided, and against the peace and dignity of the State. And the jurors for the State, upon their oath, do further present: That Nick DeBoy, late of the county of Wake, on 25 March, 1895, with force and arms, at and in the county aforesaid, unlawfully and wilfully did bet at a game of chance, namely a raffle, at which game of chance money, property and other things of value were bet, 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 bill, and the discharge of the defendant thereunder, for that it did not charge any offense. The court overruled the motion, and defendant excepted.

Thomas Pence, a witness introduced by the State, testified that some time in the fall of 1894, the defendant, who kept a store near the market house, in the city of Raleigh, had turkeys on hand for sale; that on one occasion he offered a turkey at a fixed price, to be raffled for; that he, the witness, and a number of others bought the privilege of throwing dice for the turkey, giving ten cents for the privilege of throwing one time; that the privileges were ten cents apiece, all the chances being taken; and that of those who took chances the one that threw the highest number, as counted upon the dice, took the turkey; that he did not know whether defendant bought a chance, but that he saw him throw off the chances for some who had bought them.

James Jones, another witness for the State, testified to the same effect.

The defendant demurred to the evidence, and asked the court to instruct the jury that upon the evidence he was entitled to a (704) verdict of not guilty. The court refused the instructions, and the defendant excepted. Verdict of guilty was rendered, and the defendant moved in arrest of judgment upon the same ground as that of the motion to quash. The court overruled the motion, and the defendant excepted and appealed.

Attorney-General for the State.
Argo & Snow for defendant.

CLARK, J. If several parties each put up a piece of money and then decide by throwing dice who shall have the aggregate sum, or "pool," this is unquestionably a game of chance. The sum put up by each is his bet and the pool gamed for is the stake.

This is exactly what the parties did in this case. The only variation is that when the pool was raised it was exchanged for a turkey, which stood in lieu of and became the stake, and, further, they chose to style the transaction a raffle, and it is contended that a raffle is a kind of lottery and hence not a game of chance. But lotteries are a species of gambling, and because thereof the Supreme Court of the United States has held that they were immoral and their circulars and tickets could be excluded from the mails.

Technically, a person cannot be said to *play* at a lottery. The tickets are drawn out of a wheel. But in this case the parties played dice for the possession of the turkey, and success depended "on the hazard of

the die." The defendant is liable both because he threw dice as agent for one of the players and because he got up the game. In misdemeanors all aiders, abettors and accessories are principals.

The transaction was simply gaming with dice, with ten-cent bets and for a turkey as a "pool." The case of *S. v. Bryant,* 74 N. C., 207, merely holds that the transaction there described was a (705) lottery, and the keeper thereof and the purchasers of tickets therein were not indictable for playing at a game of chance, under chapter 32, section 72, Battle's Revisal (now The Code, sec. 1045), though the seller would be liable under The Code, secs. 1047, 1048. Another "gift enterprise" was held a lottery and the holder of it liable to indictment under The Code, sec. 1047, in *S. v. Lumsden,* 89 N. C., 572, and such lottery was held to be a "game of hazard." There is no adjudication as to the liability of the purchasers of the tickets.

Whatever defects there were in the law of gambling were intended to be cured by Acts 1891, ch. 29, which makes it "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 at stake or not, and those who play and those who bet thereon shall be guilty of a misdemeanor." This covers the present case and all other forms of raffling.

It must be noted that this statute and this decision have no application to the long prevailing custom of "shooting for beef," shooting at turkeys and other similar trials of skill. It is true there each participant pays for the privilege or so-called "chance" of shooting for the prize, but there is no chance in the sense of the acts against gambling. These are trials of skill, which the law has never discouraged, and not games of chance in any sense. Nor does the statute prohibit the social diversions in which the hostess offers prizes for the most successful player at cards or other games. In such cases, though they are games of chance, the players bet nothing. They lose nothing if unsuccessful, and pay nothing for the chance of winning.

No error.

Cited: S. v. Martin, 141 N. C., 840; *S. v. Lumber Co.,* 153 N. C., 613.

(706)

STATE v. WILLIAM YEARGAN.

Indictment for Gambling—Minor Under 14 Years of Age Not Indictable for Misdemeanor.

1. An infant under fourteen years of age is not liable to criminal prosecution for an ordinary misdemeanor unless the facts exhibit brutal passion, the use of a deadly weapon, the infliction of maim or other acts of like character; therefore:

2. An infant under fourteen years of age, who played at a game of chance known as "shooting craps," well knowing the difference between right and wrong, but who did not know the act was unlawful, is not indictable for gambling.

INDICTMENT for gambling, tried at Fall Term, 1895, of WAKE, before *Coble, J.*, and a jury. The jury rendered a special verdict as follows: "Defendant was bound over by the Mayor of Raleigh for playing a game of chance, and was indicted at September Term, 1895, for playing at a game of chance and betting money thereat, the particular game being known as 'shooting craps.' Defendant did play at said game of chance of shooting craps, and did bet money thereat, and said game of chance was played by throwing ordinary square dice with numbers on each square. Defendant was 13 years old on 6 June, 1895, and did not know he was violating the law when he played at said game and bet money thereat. That, as to other offenses, such as assault and battery and stealing, the defendant knew that to commit them was to violate the law; that he already knew the difference between right and wrong. If upon these facts the court be of opinion that the defendant is not guilty, the jury find that he is not guilty; if otherwise, the jury find that he is guilty."

The court, being of opinion that defendant was not guilty, gave judgment discharging him, and the State appealed.

(707) *Attorney-General for the State.*
J. C. L. Harris for defendant.

FAIRCLOTH, C. J. The defendant is indicted for playing and betting money at a game of chance, called "shooting craps," by throwing dice with numbers. The jury render a special verdict and say that he did play and bet at such game. They also say he is over 13 and under 14 years of age; that he did not know he was violating any law, and that

"he clearly knew the difference between right and wrong." His Honor held that defendant was not guilty, and the State appealed.

An infant under 7 years of age cannot be indicted and punished for any offense, because of the irrebuttable presumption that he is *doli incapax*. After 14 years of age he is equally liable to be punished for crime as one of full age. His innocence cannot be presumed. Between 7 and 14 years of age an infant is presumed to be innocent and incapable of committing crime, but that presumption in certain cases may be rebutted, if it appears to the court and jury that he is capable of discerning between good and evil, and in such cases he may be punished. The cases in which such presumption may be rebutted and the accused punished when under 14 years are such as an aggravated battery, as in maim, or the use of a deadly weapon, or in numbers amounting to a riot, or a brutal passion, such as unbridled lust, as in an attempt to commit rape, and the like. In such cases, if the defendant be found *doli capax*, public justice demands that the majesty of the law be vindicated and the offender punished publicly, although he be under 14 years of age, for malice and wickedness supply the want of age. Our case presents the question of a simple misdemeanor by one who, the jury say, knew right from wrong, but did not know he was violating any law, and presumably had no intention of committing any offense. (708) Among persons of full age ignorance of the law is no excuse, nor is the absence of any intent to violate it available as a defense, but it is the intent to do an act which is a violation of law that makes the actor guilty. In our examination of the early criminal law books, such as Blackstone, Russell, Hale and Wharton, we have been unable to find an instance in which for a simple misdemeanor, unattended with aggravating circumstances such as the above, an infant under 14 years has been indicted and punished. All the cases treated by those writers are felonies. The question, it seems, has not heretofore been presented to this Court, and the professional opinion has been that in all cases when capacity to distinguish right from wrong has been made to appear, the defendant may be punished, although under 14 years of age.

In *S. v. Pugh*, 52 N. C., 61, the question was not directly presented but was appropriately referred to by the Court when *Pearson, J.*, stated that "the wisdom of the common law is illustrated in the rule that for an ordinary assault and battery a boy under the age of 14 is not liable to indictment . . . and is better to leave such matters to the correction which the parent or schoolmaster may in their discretion inflict rather than to give importance to it by a public trial before a court and jury." In *Reg. v. Owen*, 4 Car. & P., 236, the defendant (10 years) was indicted for larceny, and *Littledale, J.*, told the jury that "the de-

fendant ought not to be convicted unless the evidence satisfies you that at the time of the act she had a guilty knowledge that she was doing wrong, and that the evidence should be strong and pregnant." We think it better to adopt that rule of the common law, with the limitations above indicated.

No error.

(709)

STATE v. JAMES GRIFFIS.

Indictment for Trespass—Practice—Suspension of Judgment on Payment of Costs—Right of Appeal.

Where a defendant is found guilty by a justice of the peace of an offense of which the latter has final jurisdiction and an order is made without defendant's consent that judgment be suspended upon payment of costs, the defendant is entitled, as a matter of right, to an appeal to the Superior Court for a trial *de novo* and need not resort to the circuitous remedy of a *recordari*.

THE defendant was found guilty before a justice of the peace of a trespass on land, and from an order suspending judgment on payment of costs he appealed to the Superior Court of WAKE, when at July Term, 1895, it was heard before *Timberlake, J.* Counsel for State moved to dismiss the appeal upon the ground that, on the record as certified to by the justice, no appeal could lie.

The record was as follows:

"Affidavit: 'Edith M. Partin, being duly sworn, says that James Griffis did on or about 10 April, 1895, wilfully and unlawfully enter and trespass upon her land in Middle Creek Township by hacking and cutting certain pine trees thereon, after having been forbidden, contrary to the statute,' etc.

"Warrant: 'To any constable,' etc. 'For cause stated in the above affidavit, you will forthwith arrest James Griffis and bring him before me or some other justice of the peace of Wake County, to answer the charge of trespass upon the land of Edith M. Partin after having been forbidden. Herein fail not,' etc. Thereupon the defendant was arrested and tried.

"Judgment: 'The warrant in the above case having been re-
(710) turned before me, the same was taken up for trial on Saturday, 11 May, 1895, the defendant appearing in person and by attorney, and pleading not guilty. Upon hearing allegations and proofs of the State and argument of counsel, no evidence being offered by de-

fendant, it is adjudged that defendant is guilty of the offense charged in the warrant; and it is further adjudged that the judgment in the case be suspended upon defendant's paying the cost, amounting to $15.00.' "

His Honor allowed the motion to dismiss, and defendant appealed.

Attorney-General for the State.
Argo & Snow for defendant.

AVERY, J. We have had occasion in *S. v. Crook,* 115 N. C., 763, to comment upon the fact that the practice adopted in the courts of this State of suspending judgment upon the payment of cost is a peculiar one, for which we have searched in vain for precedents elsewhere. Indeed, it has proved difficult to find adjudications in other courts furnishing any analogies which would aid us in reaching a conclusion as to the force and effect of such order. It appears, however, that a practice somewhat similar had prevailed for many years in the courts of Massachusetts before it received the legislative sanction by enactment into a statute. *Commonwealth v. Dondican,* 115 Mass., 136. But that Court and those of Florida and Mississippi (*Gibson v. State,* 68 Miss., 241; *Ex parte Williams,* 25 Fla., 310), where the Massachusetts idea seems to have been transplanted, though they may differ as to the manner or details of the proceeding, concur in holding that the sentence of the court, whether upon a finding or a confession of guilt, can be suspended only with the consent of the defendant. But (711) as the postponement of punishment, with the possibility that it may never be inflicted, is deemed a favor to him, it is presumed by the Court that he assents to such an order when made in his presence and without objection on his part. *S. v. Crook, supra, at p.* 766; *Gibson v. State, supra.* Where, under the practice prevailing in Massachusetts, the order was made that the judgment lie on file, it was entered with the consent of both the defendant and the Commonwealth's attorney, and left either at liberty to have the case reinstated on the docket and to demand that the court proceed to judgment. We have heretofore had occasion, in *S. v. Crook, supra,* to call attention to the fact that the authorities which we have cited sustained the right of the court to pronounce judgment for the costs in the same order that provides for the suspension of sentence of fine or imprisonment indefinitely or to a time certain. Every defendant who is convicted before a justice of the peace of any criminal offense has a right to appeal and have the issue tried *de novo* in a higher court. Had the justice adjudged that the defendant be fined or imprisoned, and thereupon refused to allow him to prosecute an appeal demanded in apt time and in the manner prescribed by law, it cannot be questioned that he would have had the right to

invoke the power of such higher court to compel the transmission of the record to the end that the trial *de novo* might have been had above. *S. v. Sykes,* 104 N. C., 700. The law does not tolerate the invasion of an acknowledged right by indirection when it cannot be done directly. It is in order to preclude the possibility of such an infringement of individual right that the authority of the court, on conviction, to postpone the infliction of punishment has been conceded only where the defendant either expressly assents or, being present, fails to object, and is therefore presumed to give his consent to the order. This theory
(712) has been approved by us in *S. v. Crook,* but, were that not true, it would be a manifest invasion of the right of appeal guaranteed by the statute (The Code, sec. 900) to every defendant on conviction in a criminal prosecution to impose upon him against his will a tax which is ordinarily an incident to a rightful conviction. But where he gives notice of appeal at the time of trial, as we must assume the defendant did, that is unmistakably a dissent to the postponement of judgment, and the court before which he was convicted must not be allowed to adopt a practice which would put it in the power of justice's courts to load innocent defendants with heavy burdens by refusing indefinitely to pronounce any judgment except that as to costs.

As long as the judgment of the justice, from which the defendant appealed, stands, it gives rise to the inference that it was entered with his consent, and where a judgment is entered upon a confession of guilt or upon a plea of *nolo contendere,* or in any way upon a submission of a defendant to the authority of the court, he is not allowed by appeal to controvert his voluntary acknowledgment. *Rush v. Halcyon,* 67 N. C., 47; *Philpot v. State,* 65 N. H., 250; *Edens v. Beck,* 47 Mo., 234; 12 A. & E., 487. A defendant may put himself in this predicament of his own free will, but no justice of the peace can compel him to forego the right of appeal which the law gives him. It does not seem to us necessary to the determination of this appeal that we should pass upon the question whether the usual order of a trial court, made at the request or with the assent of a defendant, that judgment be suspended upon the payment of costs, is reviewable by appeal to the Supreme Court from a Superior or Criminal Court as a
(713) conviction, or whether it is, when entered in a justice's court, a sentence which gives to a defendant the right to a trial *de novo* on appeal to the Superior Court under our statute. The Code, secs. 900 and 1234. The question presented here is not whether such judgment, when entered by consent of the defendant, is a conviction or sentence in contemplation of law but whether an appeal lies when such order is entered against the will of the defendant, as is evinced in this

case by his asking immediately for an appeal. This is not on the other hand, in the ordinary sense a refusal to proceed to judgment, but a persistent claim of the right, on the part of the inferior tribunal, to enter an order that upon its face involves the false assumption that it is entered with the defendant's assent. It is true that the defendant had the right to demand that he be sentenced, though a prayer for judgment upon himself would have been a somewhat novel practice, but while he did not make such motion, the appeal is his protest against and exception to the order made. Was the Superior Court authorized to proceed to trial *de novo?* Or was it necessary for the defendant to bring up the case by writ of *recordari,* get an order in the nature of a *procedendo,* and wait for redress till by that tedious practice the justice should be compelled to enter an appealable judgment?

In the cases of *S. v. Swepson,* 79 N. C., 632; 81 N. C., 571; 83 N. C., 584, and 84 N. C., 827, it was held that the refusal of the Superior Court to entertain a motion to amend a record, upon the erroneous idea of want of power to amend, was reviewable not by appeal, but by *certiorari* under the supervisory power of the Supreme Court. If the same circuitous practice is to be adopted by the Superior Court in supervising the proceedings of an inferior tribunal which is not a court of record, it would follow that the judgment of the court below dismissing the appeal must be sustained, and the defendant must seek re- (714) dress by a *recordari,* which is a remedy peculiar to this State. He would be compelled, according to that practice, to first file his petition for *recordari,* and also *supersedeas* in order to protect himself from arrest for costs, and upon the granting of the order, after notice to the prosecution and the filing a second time of the certified proceeding, which is now already before the Superior Court upon the first hearing, an order in the nature of a *procedendo* would issue to the justice to proceed to judgment, so as to allow the defendant at a subsequent term to bring the case up for trial *de novo* in the higher court. When brought up, after so much circumlocution and loss of time, the case would stand for trial upon precisely the same record now sent, with the addition, if the justice acted in good faith in making his former order, of a judgment for sixpence and the cost.

As a rule the writ of *recordari* is used to bring up the proceedings of justice's courts either for the purpose of trial *de novo* or for reversal of judgment for error (*Leatherwood v. Moody,* 25 N. C., 129), and upon the ground either that the petitioner was not made a party to the action (*Critcher v. McAden,* 67 N. C., 399; *Carmer v. Evans,* 8 N. C., 55) or that he was deprived of his appeal by fraud, accident, surprise,

excusable neglect or denial of his right by the justice. *Satchwell v. Respess,* 32 N. C., 365; *R. R. v. Vinson,* 53 N. C., 119; *Richardson v. Debnam,* 75 N. C., 390. In a case where the appeal has not been lost by misconduct of the justice of the peace the petitioner is required to show merit in the application. *Pritchard v. Sanderson,* 92 N. C., 41; *S. v. Warren,* 100 N. C., 489. The writ of *recordari,* which is said to be used only in this State, and the writs of error and *certiorari* substituted for it elsewhere "are not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity (715) of taking the ordinary statutory appeal." 12 A. & E., 489; Murfree Justice's Prac., sec. 718. It seems, therefore, that we are dealing with an unusal case arising under a peculiar practice, and should not therefore look for precedents or analogies to jurisdictions where no such practice is adopted, but rather to reason and the policy of the law. The defendant did not neglect to take an appeal, but prayed promptly for his right at the time when the justice's order was made, and it was then and there allowed. The justice had then done everything that he contemplated doing. That court was not a court of record, and it has been held that its proceedings may be proved by parol. *S. v. Green,* 100 N. C., 419; *Reeves v. Davis,* 80 N. C., 209. In the exercise of supervisory power over an inferior court, where proceedings are only *quasi* records susceptible of proof by parol, it does not seem that the same care is required as in the use of the writ of *certiorari* sent to a lower court of record, because it is the duty of the higher tribunal to see that the records of the inferior court, where they supplement its own, not only import verity, but speak the truth, while no such obligation grows out of the lower when its proceedings are only *quasi* records. Moreover, on appeal from the Superior to the Supreme Court, if no error is shown, the judgment below stands affirmed, but error in a justice's judgment is corrected by entering the proper judgment in the Superior Court on appeal. It is of little importance in such cases that the *quasi* record, kept by the justice of what was done by him, is right or wrong. The enduring record made above on appeal imports verity, and is not a mere supplement of that below.

For the reasons given we think it unnecessary to compel the defendant to follow so circuitous a route to obtain the adjudication of his rights, when the policy of our law is to grant him a speedy (716) hearing in all of our courts. We can conceive of no evil consequences that can result from the general application of a rule so just in its enforcement to the particular case before us. We are aware that the statutes of some of our sister States have made it the

duty of justices of the peace to impose a sentence of imprisonment or fine, though the fine may be nominal, in every case. But we have recognized as lawful and commended in some instances as a salutary practice the suspension of judgment in the Superior and Criminal Courts. The trend of legislation is towards enlarging the jurisdiction of justices of the peace, and in the absence of legislation we are not empowered to prohibit them from exercising the authority which is conceded to be incidental to the jurisdiction to try in the Superior Court the very same offenses after the lapse of twelve months from the time they are committed. Besides, while the power may be abused, as in the case at bar, it may on the other hand be used to bring about reformations or to extend needed indulgence to those who are guilty of petty offenses and prefer to earn the costs by their labobr rather than suffer imprisonment and subject the public to the expense of their maintenance.

We are of the opinion that the court below erred in refusing to proceed to trial *de novo*.

Judgment reversed.

Cited: *Mitchell v. Baker,* 129 N. C., 64; *Hunter v. R. R.,* 161 N. C., 505; *S. v. Tripp,* 168 N. C., 153.

(717)

STATE v. JOHN V. SHERRARD.

City Ordinance—Disorderly Conduct—Profane Language.

1. City ordinances are valid which forbid "disorderly conduct" not amounting to an indictable nuisance or other offense forbidden by the general law of the State.

2. To call one a "damned highway robber" in a public restaurant, in a voice so loud as to be heard on the street, is properly punishable under a city ordinance prohibiting disorderly conduct.

CRIMINAL ACTION for violation of an ordinance of the town of Goldsboro, tried on appeal from a judgment of the Mayor before *Starbuck, J.,* and a jury, at the April Term of WAYNE.

W. E. Burnett, a witness for the State, testified: "Defendant came to Agnes Cox's place and asked 'Where is the professor?' (meaning witness). 'Doesn't he board here?' She answered 'Yes.' Defendant then said: '———— him, his throat ought to be cut,' and kept cursing

three or four minutes; anybody going along the street could have heard him; it was in a loud manner. He also said I was a ——— ——— highway robber. Agnes Cox's place is a public restaurant. I was in the adjoining room."

Agnes Cox testified that the defendant came into her restaurant and cursed Burnett; she couldn't remember the words he said or how long he cursed. Witness said it was loud enough to have been heard on the street.

Jno. V. Sherrard, the defendant, testified: "I told Agnes to tell Burnett to pay the rent or he would have to get out. I was the collecting agent for the house which Burnett rented. I did say Burnett was a ——— highway robber, but never used the word 'God,' said it in an ordinary tone, and could not have been heard outside. The doors and windows of the restaurant were shut; nobody was present except Agnes and a child."

The defendant requested the court to charge that if the defendant did not use the word "God," what he said was not profanity and the jury should find him not guilty. The court declined to give this instruction, the warrant charging the defendant not with profanity, but with disorderly conduct. Defendant excepted.

(718) The court charged the jury that if they were satisfied beyond a reasonable doubt that the defendant used the language as testified to by the witness Burnett, in a public restaurant, in a violent and abusive manner, and in a voice so loud that it could have been heard on the street, the defendant was guilty, and that he would be guilty if he uttered a profane expression but a single time, provided it was uttered in the manner just described.

But if what the defendant said and the manner in which he said it were as testified to by him, he was not guilty.

The defendant excepted to that part of the charge in regard to using a single profane expression. Verdict of guilty.

Defendant moved in arrest of judgment on the grounds that the ordinance is unconstitutional and that the warrant does not charge a criminal offense.

Motion denied; exception. The court fined the defendant a penny, and from this judgment the defendant appealed.

Attorney-General for the State.
T. R. Purnell for defendant.

CLARK, J. The defendant was tried for breach of the following city ordinance: "Sec: 2. That all disorderly conduct . . . within

the city limits shall subject the offender to a fine of $10 for each offense. Sec. 3. That if any person shall commit a breach of the peace or engage in any riotous or disorderly conduct within the limits of the city, he shall pay a fine of $50: *Provided,* that this section shall not be construed to relieve the Mayor from the duty of binding over the offender, according to law, if the offense is one properly triable before a higher court."

The ordinances are valid under the ruling in several cases that the town may forbid by ordinance "disorderly conduct" which from the evidence did not amount to an indictable nuisance or (719) other offense forbidden by the general law of the State. *S. v. Cainan,* 94 N. C., 880; *S. v. Debnam,* 98 N. C., 712; *S. v. Warren,* 113 N. C., 683; *S. v. Horne,* 115 N. C., 739. Disorderly conduct *per se* is not forbidden by the general State law There are acts amounting to disorderly conduct which come under the ban of the general law, and there are other acts not amounting to criminal offenses against the State which would also be disorderly conduct. To this latter class of cases do the city ordinances against disorderly conduct apply.

In *S. v. Cainan, supra, Merrimon, J.,* says of a somewhat similar ordinance: "The ordinance has reference to and forbids such acts and conduct of persons as are offensive and deleterious to society, particularly in dense populations, as in cities or towns, but which do not *per se* constitute criminal offenses under the general law of the State." The same is repeated and elaborated in *S. v. Debnam.* The court told the jury that if they were satisfied beyond a reasonable doubt that the defendant used the language testified to by the witness Burnett (the only witness for the State as to the language used), in a public restaurant, in a violent and abusive manner and in a voice so loud that it could have been heard on the street, the defendant was guilty, and that it made no difference if he uttered a profane expression but a single time, provided it was uttered in the manner described. This brings th present case so exactly under the ruling in *S. v. Debnam* and *S. v. Cainan, supra,* the facts in those cases being very similar to those in this, that no further discussion is needed. His Honor charged that if the facts were as testified to by the defendant he was not guilty. Both the prosecuting witness and the defendant testified that (720) the latter called the witness a "damned highway robber." His Honor correctly held that this and the other language testified to by Burnett, if used in the loud and boisterous manner he stated, would make the defendant guilty. Such conduct is not amenable to the State law, for the language was not so repeated and so public as to become a nuisance to the public. *S. v. Jones,* 31 N. C., 38. It was properly.

cognizable only under the town ordinance. Such conduct as that testified to by the prosecuting witness is not prohibited by the general State law, yet it would, if it could not be punished by the city ordinance, become a serious annoyance to the public passing along the streets, hearing such loud boisterous and unseemly language and threats of violence.

No error.

Cited: *S. v. Moore,* 166 N. C., 372.

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(721)

STATE v. A. F. SURLES.

Indictment for Disposing of Mortgaged Property—Indictment, Counts in Repugnancy — Chattel Mortgage — Description — Correction of Record—Trial—Remarks of Counsel—Discretion of Judge.

1. Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed.

2. Where, in an indictment for disposing of mortgaged crops, the lands upon which the crops were grown were described, as in the mortgage, as "18 acres on my (the defendant's) own land in A Township, H. County"; *Held,* that the description was sufficient to sustain a conviction for disposing of the mortgaged property.

3. Where the transcript of the order of removal of a prosecution to another county is insufficient, the proper course, on a motion to quash for such reason, is to have a writ of *certiorari* issued to the clerk of the county from which the case was removed for a full and true transcript of the record, or, in case of a motion to arrest judgment on such ground, to suspend judgment until such true transcript can be had. But, in such case, this Court may, on appeal, have such record sent up by *certiorari* to the county whence the case was removed.

4. In the trial of an indictment for disposing of mortgaged crops, with intent to defraud G., the manager of an association, the fact that G. was such manager may be proven by parol, though the books of such association contain a minute of his election.

5. It is within the discretion of the trial Judge to permit prosecuting counsel, in argument to the jury, to make severe strictures upon the character of defendant, as disclosed by his evidence, to show that the testimony of the defendant was unworthy of credit.

6. A chattel mortgage given for a past debt, or for supplies to be afterwards furnished, is based on a sufficient consideration.

7. In the trial of an indictment under section 1089 of The Code, the burden is upon the defendant to disprove a criminal intent in disposing of the mortgaged property.

INDICTMENT for disposing of mortgaged property, tried before *Starbuck, J.,* and a jury, at Spring Term, 1895, of HARNETT.

The defendant was convicted and appealed. The facts sufficiently appear in the opinion of *Associate Justice Montgomery.*

Attorney-General for State. (722)
F. P. Jones for defendant.

MONTGOMERY, J. The defendant was indicted in Harnett County under section 1089 of The Code for disposing of mortgaged property; and at August Term, 1893, of the Superior Court of Harnett, the case was removed to the county of Johnston for trial. When the case was called the defendant moved to quash, upon the following grounds: (1) That the counts in the bill of indictment were repugnant; (2) that the description of the land in the mortgage and bill was insufficient; (3) that the transcript of the order of removal was insufficient. Upon the motion being denied by the court, the defendant excepted. There were two counts in the bill, in one of which it was charged that the defendant disposed of the property with intent to hinder, delay and defeat the rights of "J. A. Green, business manager of the Farmers' Alliance Exchange of Harnett County," and, in the other count, to hinder, delay and defeat the said "J. A. Green, business manager and agent of the Farmers' Alliance Exchange of Harnett County." The defendant contends that the further descriptive word, "agent," in the second count creates a repugnance and contradiction between the two. There is nothing in this position. The two counts relate to one transaction, varied simply to meet the probable proof, and the court will neither quash nor force an election. *S. v. Parish,* 104 N. C., 679. Besides, there is no difference between the terms "agent" and "manager," and the latter word may be treated as surplusage in this connection.

The lands upon which the mortgaged crops were grown were described in the mortgage and bill as "18 acres on my [defendant's]

own land in Averasboro Township, Harnett County, North
(723) Carolina." The land was sufficiently described. *S. v. Logan,* 100 N. C., 454; *Woodlief v. Harris,* 95 N. C., 211.

The transcript from Harnett was not sufficient in form or substance, and his Honor should have continued the cause upon the motion to quash, and have had a writ of *certiorari* issued to the clerk of that county for a full and true transcript of the record in the case. If the imperfection of the transcript had not been discovered until a motion in arrest of judgment, he should have suspended the judgment until a full transcript should be sent from Harnett. This Court has, by *certiorari,* procured a full and perfect transcript from Harnett County, and it is sufficient in all respects. This proceeding on our part finds precedent in the cases of *S. v. Craton,* 28 N. C., 164; *S. v. Randall,* 87 N. C., 571.

In the course of the trial the defendant objected to the introduction of the mortgage, because of insufficient description of the land conveyed therein upon which the crops were grown. This objection has been disposed of already, in discussing the motion to quash.

J. A. Green, a witness, testified that he was the business manager of the Alliance, and that there was a minute of his election on the books of the Alliance. The defendant insisted that this was a matter of record, and should be proved by the record itself. His Honor overruled the objection, and his ruling was correct. It was a collateral matter, purely, and could be proved by parol. *S. v. Wilkerson,* 98 N. C., 696; *S. v. Credle,* 91 N. C., 647 (641.)

In the argument of the case the Solicitor, in addressing the jury concerning the defendant, who had been examined as a witness in his own behalf, made use of the following language: "You are asked to repudiate the evidence of Mr. Green, a man of good character,
(724) and to accept in full the evidence of this immaculate gentleman, the defendant, who defies the law with perjury. Such unblushing audacity I have never seen surpassed on the witness stand. Where a man comes on the witness stand, and tells you that he cannot remember whether he made more than one bale of cotton on 18 acres of land or not, especially under such circumstances as surround the defendant, you know that statement is perjured. You are expected to accept the statement of a man who admits that he has sneaked around in the nighttime and has induced other persons to steal horses, for which offense they have been sent to the penitentiary while he goes free." His Honor refused to restrain the Solicitor, and the defendant excepted. The testimony of the defendant witness, upon which the remarks of the Solicitor were based, was as follows: "Have been

indicted for false pretense. Turned State's evidence on other men for horse stealing. I swear I do not recollect whether I made more than two bales on both the tracts I cultivated in 1891 or not. Sold Mr. Young four or five bales in 1891, but sold them for other people. Didn't sell any cotton of my own that year, except one bale to the Alliance. Never told Green if I got the proceeds of the three bales I sold him I would arrange for the balance. Sold cotton in my own name. Acted detective in the horse case, with the approval of the Solicitor. Acquitted in the false pretense case. Sued for malicious prosecution. Suit was compromised by my attorney." The defendant admitted that he induced other persons to go with him and steal the horses in question. Under the circumstances his Honor properly allowed the Solicitor to proceed. It was a matter left to his sound discretion, and this Court will not review his action; for, while the reflections of counsel were severe, they seem to have been warranted *Goodman v. Sapp,* 102 N. C., 477; *Pearson v. Crawford,* (725) 116 N. C., 756.

In his charge his Honor told the jury that the mortgage rested on a good consideration, whether it was given, as testified by defendant, for a balance due on a former debt, or whether, as testified by the witness Green, for supplies furnished, after the date of the mortgage. The defendant excepts, but on what ground it is not clear. His Honor was correct in the ruling. *Woodlief v. Harris, supra; Harris v. Jones,* 83 N. C., 317.

The Court further charged the jury: "The State must satisfy you beyond a reasonable doubt that the defendant disposed of the mortgaged cotton raised on his own land—which is the only crop in question—with intent to defeat the rights of the mortgagee. If you believe the defendant disposed of the cotton to persons other than the mortgagee, and at the time of the disposition the debt secured by the mortgage was unpaid, then the burden is on the defendant to satisfy you that he made such disposition without the intent to defeat the rights of the mortgagee. This he may do by showing that he honestly believed he had a set-off against the Alliance for cotton delivered in 1890, and corn sold on their order, sufficient of itself, or together with the bale delivered in 1891, to extinguish the mortgage debt. But you must remember that, before the defendant can be called upon to make an explanation as to his intent in the disposition, the fact of the disposition must be proved by the State beyond a reasonable doubt, and also the fact that the mortgage debt had not at the time of the disposition been paid by the corn claimed to have been sold by the defendant on account of the Alliance, or by the bale of the '91 crop

claimed to have been delivered, or in any other way. Of course, if he brought all the cotton he made on his own land to the Alliance,

he is not guilty, and the State must prove he did not do
(726) this. If he disposed of all or part of the crop, believing he had paid or had a set-off sufficient to extinguish the debt, he is not guilty; or if, disposing of part of the crop, he reserved enough, as he believed, of itself, or together with the payments he believed he had made, or the set-off he believed he had, to satisfy the debt, he is not guilty. If upon all the evidence in the case you have a doubt reasonably consistent with the defendant's innocence, you will find him not guilty." The defendant excepted to that part of the charge. There was no error in the charge. It was proved on the trial that the defendant made cotton on the 18 acres of land described in the mortgage; that he had sold to other persons all that he had made, without the knowledge or consent of the mortgagee; and that he had promised to pay the debt often. It then became necessary for the defendant to disprove the criminal intent shown prima facie by the sale and disposal of the property so made. *S. v. Ellington,* 98 N. C., 749; The Code, sec. 1089.

There was a verdict of guilty, after which the defendant's counsel moved for a new trial for errors in the charge, as pointed out, failure to correct the Solicitor in his address to the jury, and that the mortgage had been improperly recorded and probated (there were no exceptions to the registration or probate of the mortgage). The motion was denied, and the defendant appealed. There was no error in his Honor's refusal to grant a new trial. The defendant then moved in arrest of judgment upon the grounds set forth in the motion to quash, which motion his Honor denied, and pronounced judgment, and the defendant appealed. There was no error in any of the rulings of the court, and the judgment is

Affirmed.

Cited: *S. v. Tyson,* 133 N. C., 696; *Burns v. Tomilson,* 147 N. C., 635; *Christmon v. Tel. Co.,* 159 N. C., 199; *Brown v. Mitchell,* 168 N. C., 314.

(727)

STATE v. S. B. JEFFRIES.

Indictment for Disposing of Mortgaged Property—Intent—Evidence as to Collateral Offense to Prove an Offense Charged.

1. It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a distinct substantive and collateral offense will be admitted to prove the intent with which the offense charged was committed; hence,

2. On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed.

INDICTMENT for disposing of mortgaged property, tried before *Starbuck, J.*, and a jury, at Fall Term of GUILFORD.

The defendant was convicted, and appealed upon the ground stated in the opinion of the *Associate Justice Montgomery.*

Attorney-General for the State.
J. T. Morehead for defendant.

MONTGOMERY, J. The defendant owed J. A. Smith $45 by note, and in July, 1894, executed to him a chattel mortgage upon a bicycle, a horse and wagon. On 1 October of the same year he pledged the bicycle to one Morris, in Greensboro, to secure the repayment of $8 which he had borrowed from him at that time. In March, 1895 (five months after he had pledged the bicycle), the defendant offered to sell the wagon to one Hodgin. The defendant was indicted, under section 1089 of The Code, for disposing of the bicycle with intent to hinder, delay and defeat the rights of the mortgagee, Smith, and on the trial the State was allowed, after objection made (728) and overruled, to introduce testimony concerning the defendant's offer to sell the wagon, for the purpose of proving his unlawful and corrupt intent in pledging the bicycle.

The court committed error in permitting the introduction of this testimony for that purpose. There are some few exceptions to the almost universal rule of law that evidence of a distinct substantive offense cannot be admitted in support of another offense. One of these exceptions is when the *quo animo* enters into and forms a neces-

sary part of the imputed offense, and proof of a corrupt and unlawful intention is indispensable to establish the guilt of the person charged, testimony of another offense committed by that person, provided it tends to establish such intent, is admissible. When these exceptions are brought into practical operation in criminal trials, however intelligently they may be administered, they are liable to be attended with great injustice to the defendant. It is very difficult for juries to understand clearly the precise purpose for which such testimony is allowed, and more difficult still for them not to be influenced in making up their verdict by the general impression of the testimony, rather than by the particular effect intended for it to have. On this account, in many of the States, there are respectable authorities which do not recognize these exceptions.

This Court has, however, decided that such testimony is admissible; but we are not in the least disposed to extend the practice beyond that settled in the decisions. In *S. v. Murphy,* 84 N. C., 742, a witness for the State, after objection made and overruled, testified that he was with the prosecutor on the premises of the defendant,

(729) who was then on trial and charged with the larceny of a hog, the property of the prosecutor, and heard the prosecutor identify and claim his property, which the defendant had confined on his premises with one of the witness'; that the defendant refused to deliver the hog to the prosecutor for the reason, he said, that some other person would claim it, it being unmarked. The witness further testified that the other hog in the pen was his, and that he then and there claimed it and demanded its delivery to him. This Court said that there was no error in admitting this testimony, because this "collateral offense" tended to prove the guilty knowledge of the defendant, and the evidence constituted a part of the *res gestae.* In *S. v. Thompson,* 97 N. C., 496, the State, after objection made and overruled, was permitted to show that, at the same hour and on the same night when the outhouse was burned, the dwelling house, some 15 yards off, was also attempted to be set fire to by means of fagots of wood tied up with a rope belonging to the defendant, while both buildings had been saturated with kerosene oil. In this Court the ruling of his Honor was sustained on the grounds (1) that the testimony tended to identify the person who burned the outhouse, and (2) because it showed that the burning of the outhouse and the attempt to burn the dwelling house, both on the same night, were parts of one continuing transaction.

In the case before us the transaction about which the witness was allowed to testify took place five months after the offense with which the defendant is charge was alleged to have been committed. We think

that, after the lapse of so considerable a time, no presumption of the defendant's unlawful and corrupt intent in disposing of the bicycle can be raised. Such testimony about a transaction so far removed in point of time from the date of the alleged offense for which the defendant is indicted has no tendency to prove his guilt. If such testimony be admissible to prove such intent, the "collateral (730) offense" sought to be proved must be confined to a time before or just about the time the offense charged against the defendant is alleged to have been committed.

We have considered this case as if the defendant had sold and disposed of the wagon. Such is not the fact. The case shows that the sale was not consummated, and the wagon was afterwards delivered to the mortgagee, who sold it and applied the proceeds as a credit on his debt against the defendant. There is error.

New trial.

Cited: *S. v. Frazier,* 118 N. C., 1258; *S. v. Graham,* 121 N. C., 627; *S. v. McCall,* 131 N. C., 800; *S. v. Hullen,* 133 N. C., 660; *S. v. Adams,* 138 N. C., 694; *S. v. Hight,* 150 N. C., 819; *Ins. Co. v. Knight,* 160 N. C., 594; *S. v. Fowler,* 172 N. C., 910.

STATE v. J. F. HOLLOWAY ET AL.

Indictment for Malicious Trespass—Evidence—Interested Witness.

Where, on a trial of an indictment, the defendants testified in their own behalf, it was error in the trial Judge to instruct the jury that they had "the right to scrutinize closely the testimony of the defendants and receive it with grains of allowance on account of their interest in the event of the action" without adding that, if they believed the witnesses to be credible, then they should give to their testimony the same weight as other evidence of other witnesses.

INDICTMENT for malicious trespass, tried before *Green, J.,* at Spring Term, 1895, of ORANGE.

The indictment was as follows:

"The jurors for the State, upon their oaths, present that J. Frank Holloway and Bill Gilbert, late of the county of Orange, on 1 February, A. D., 1895, with force and arms, at and in the county aforesaid, unlawfully and wilfully did enter upon the lands of one J. J.

(731) Carden there situated, they, the said J. Frank Holloway and Bill Gilbert, not being then and there the owner or owners, nor the bona fide claimant or claimants, thereof, and did then and there, with a felonious intent, unlawfully, wilfully and feloniously carry off from the said lands 70 cedar fence posts of the value of $20, the property of the said J. J. Carden, the same having been before erected, set up, planted and fixed in the ground, and then and there standing on said lands as fence posts, to the great damage of the said J. J. Carden, contrary to the form of the statute," etc.

"Second Count. And the jurors aforesaid, upon their oaths aforesaid, do further present that J. Frank Holloway and Bill Gilbert, on 1 February, 1895, with force and arms, at and in the county of Orange, unlawfully and wilfully, in and upon the lands of one J. J. Carden, situated in the county aforesaid, and in the possession of said J. J. Carden, the said J. F. Holloway and Bill Gilbert, not being then and there the owner or owners, nor the bona fide claimant or claimants thereof, and in and upon which they had no legal right of entry, did enter and 70 cedar posts of the value of $20, the property of the said J. J. Carden, then and therebefore erected, set up, provided, planted and fixed in the ground on said land, and then and there standing and being on said land, unlawfully, wilfully, maliciously, mischievously and with malice towards its owner did pull down, take, carry off, demolish, destroy and burn, and thereby they, the said J. Frank Holloway and Bill Gilbert, then and there did maliciously commit great damage, injury and spoil upon the said land, to the great damage of the same, and of him, the said J. J. Carden, contrary," etc.

The defendants were convicted, and appealed, assigning various (732) errors, the principal one being that stated in the opinion of *Chief Justice Faircloth.*

Attorney-General and Messrs. Boone, Merritt & Bryant for the State.
Frank Nash and P. C. Graham for defendants.

FAIRCLOTH, C. J. On the trial the defendant Holloway was introduced in his own behalf as a witness, and testified. In his charge his Honor told the jury "they had a right to scrutinize closely the testimony of the defendants, and receive it with grains of allowance, on account of their interest in the event of the action." To this the defendants excepted as error, and we think the exception well taken. This charge is capable of misleading the jury into the impression or belief that the evidence of interested parties is to be to some extent discredited, although the jury may think the witness is honest and has

told the truth. His Honor should have gone forther and explained to the jury, after having properly called their attention to the interested relation of the witness, that, if they believed the witness to be credible, then they should give to his testimony the same weight as other evidence of other witnesses.

As further expressive of our opinion, we will copy the charge given and approved by this Court in *S. v. Boon,* 82 N. C., 637. "That such evidence [of relation] must be taken with some degree of allowance, and the jury should not give it the same weight as that of disinterested witnesses, but the rule which regards it with suspicion does not reject it nor necessarily impeach it; and if from the testimony, or from it and other facts and circumstances in the case, the jury believe that such near relations have sworn the truth, then they are entitled to as full credit as any other witnesses." See, also, the (733) approved charge in *S. v. Byers,* 100 N. C., 518, and the cases there cited. There were other questions argued before us, but as we must order a new trial we will not enter into them except to say we think the second count in the indictment is sufficient under The Code, sec. 1070.

Venire de novo.

Cited: S. v. Collins, 118 N. C., 1204; *S. v. Lee,* 121 N. C., 546; *S. v. Apple, ib.,* 585; *S. v. McDowell,* 129 N. C., 532; *S. v. Graham,* 133 N. C., 652; *Herndon v. R. R.,* 162 N. C., 321; *In re Smith,* 163 N. C., 467; *Ferebee v. R. R.,* 167 N. C., 298, 301.

STATE v. B. J. FISHER.

Indictment for Obstructing Highway—Highways—Title by Prescription—Dedication.

1. Where the public claims title to the easement in a highway by user, the burden is upon the State, or its agencies, to show title by adverse possession.

2. The best evidence of user by the public of a highway is the fact that the proper authorities have appointed overseers and designated hands to work and assumed the responsibility of keeping it in repair.

3. The owner of land cannot, by executing a deed to the public conveying a right of way to a highway, compel the authorities to assume the

burden of repairing it unless the properly constituted agents of the municipality accept it.

4. In order to acquire title to a street as laid out by the owner of land in an addition to a town, there must be an acceptance before the owner revokes the offer.

5. Where an owner of property adjoining the city had offered to dedicate certain parts of it to the public as highways, by platting the same as an addition to such city, an entry upon one of such streets or highways by a street railway company, under a license from the city, after the owner had recalled his offer, cannot operate as an acceptance thereof by the city.

6. Where one prosecuted for obstructing a highway is shown to have thrown open the street in question to the use of the public by platting the ground of which it had formed a part as an addition to the city which it adjoined, the facts that he refused, subsequently, to grant the city a right of way over the alleged street, after the city limits were extended, and that the city then proceeded to institute condemnation proceedings to acquire the same, sufficiently show that defendant had revoked his offer.

(734) CRIMINAL ACTION for obstructing a public street and highway tried before *Starbuck, J.*, and a jury, at the August Term, 1895, of GUILFORD.

The indictment was as follows:

"The jurors for the State, upon their oath, present that on 1 August, A. D. 1895, there was and theretofore had been and still is in the county of Guilford a certain public road and street and common highway leading from the courthouse in Greensboro, in said county, in a northerly direction towards, unto and beyond the corporate limits of said city of Greensboro in said county, called North Elm Street, for all good people of said State to go, return and pass on foot or horseback, and with their coaches, carts and carriages, at their free will and pleasure, in which said county of Guilford, on said 1 August, A. D. 1895, B. J. Fisher, late of said county, with force and arms, at a certain place within the corporate limits of said city of Greensboro, unlawfully, wilfully and injuriously, upon and across the said public road, street and common highway a certain trench and ditch of the depth of three feet and of the width of four feet then and there did dig, cut, open and make, by which said public road, street and common highway last aforesaid was so obstructed, altered and changed that the good
(735) people of the State aforesaid, in, by, through and over and along the said public road, street and common highway could not go, return and pass on foot, on horseback, with their coaches, carts and

carriages so freely as they ought and were wont to do, to the great damage and common nuisance of all the good citizens of the State going returning, passing and repassing in, along and through the last mentioned public road, street and common highway, to the evil example of all others in like cases offending, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

To this indictment the defendant pleaded not guilty, and a jury was sworn and impanelled, and returned the following special verdict:

"That in 1890 the defendant graded and threw open to the use of the public a way through land owned by him, lying north of and adjoining the corporate limits of the city of Greensboro; that North Elm Street was in 1890 a street in the city of Greensboro, extending to the northern limit of the said city, said limit being also the boundary of the defendant's lands; that the said way was constructed from the northern *terminus* of and was of the same width and direction as North Elm Street; that in 1891 the charter of said city was so amended as to include within the city limits said land of the defendant.

"That the way opened by the defendant was used by the public for purposes of general travel without interruption from the time of its opening till June, 1895.

"That contemporaneously with the construction of said way the Steel and Iron Company, owning land lying north of defendant's land, opened a way beginning at the north boundary of defendant's land, at the *terminus* of the way opened by the defendant, leading through (736) the land of said company and terminating in a field. The ways opened by said company and the defendant were constructed according to surveys made by the same surveyor. The way opened and graded by the defendant, at its northern terminus, when it reached the beginning of the way opened by the company, was on a grade from 18 to 36 inches lower than the grade of the latter way; some time thereafter the company so changed the grade as to make the grade of the one way fit that of the other. Said company also opened crossways on its land leading into said way constructed by it. There are houses built along said crossways; the way opened by the defendant, connecting with that opened by the company, affords the most direct, but is not the only, route from said houses to the centre of the city.

"That the defendant has sold no part of his land through which said way passes.

"That in April, 1891, the aldermen of the city divided the city into six wards, and by resolution established the boundary between two of the wards in the following words, as appears from the minutes of their

proceedings: 'The eastern line of Ward No. 1 and the western line of Ward No. 2 shall be North Elm Street and its extension to the new corporate limits.

"That in October, 1891, said aldermen adopted a resolution that North Elm Street be extended from the old corporation limits to the new.

"That in the year 1891 the city instituted a proceeding to condemn the way opened by the defendant, and made it a public street, and judgment was rendered by the Board of Aldermen condemning the same; from this judgment the defendant appealed to the Superior Court, and at August Term, 1893, judgment was rendered quash-
(737) ing the proceeding.

"Pending said appeal one J. D. Kase purchased two lots from the Steel and Iron Company on the way opened by said company, being induced to make said purchase by the belief that the way opened by the defendant was a public street.

"Also pending said appeal the city granted permission to the Belt Line Railway Company to construct a street railway on said way; said railway was thereupon constructed and used for a time, but has not been used since said judgment of the Superior Court; the track still remains.

"That in 1895 the defendant was present at a stockholders' meeting of the Steel and Iron Company; at said meeting the Steel and Iron Company effected a sale of its interest in said railway to the Cone Company. This was done by a unanimous vote, but the defendant at the meeting claimed the way over which said railway was in part constructed as his own property.

"That in 1890 the defendant had a map made of his property, showing therein North Elm Street and the said way constructed by him from the *terminus* of said street, and also crossways leading over his property into said way, with lots platted thereon; but said crossways were never opened, nor were any of the lots ever sold.

"That in June, 1895, the defendant cut a ditch three feet wide and two feet deep across said way, thereby obstructing travel thereon.

"That neither the county nor city authorities have ever worked said way, or exercised any acts of control or supervision over it, or publicly recognized the same as a public highway, unless the permission granted to construct the railway thereon or the establishment
(738) of the boundary line between the wards, as shown by reference to the minutes of the board, be such acts of recognition.

"If upon these facts the court should be of opinion that as a matter of law the defendant is guilty, then the jury so find; if upon these

facts the court should be of opinion that as a matter of law the defendant is not guilty, then the jury so find."

His Honor, being of opinion that upon these facts the defendant was not guilty, adjudged that the defendant was not guilty and that he be discharged, from which judgment the Solicitor appealed.

Attorney-General for the State.
D. Schenck and R. M. Douglas for defendant.

AVERY, J. As a rule the right to the easement in a public highway is acquired either by dedication, the exercise of the power of eminent domain, or user. *Kennedy v. Williams,* 87 N. C., 6. After the execution of grants to the easement or the rendition of a final decree in condemnation proceedings, controversies seldom arise as to the existence of the servitude imposed by either of the two methods. Where the public claims title to the easement by user, however, the burden rests upon the State or its agencies, such as towns, as it does upon an individual claiming the right to pond water upon the land of another, to show title by adverse possession. The public, like an individual attempting to establish title under like circumstances, must prove such acts as indicate a continuous and unequivocal assertion of the right by the public for twenty years, and the best evidence of such user is the fact that the proper authorities have appointed overseers and designated hands to work, and assumed for the public the responsibility of keeping the way in repair. *Kennedy v. Williams, supra; Frink v.* (739) *Stewart,* 94 N. C., 484; *S. v. Purify,* 86 N. C., 682; *S. v. McDaniel,* 53 N. C., 284. The continuous use by the people living in the neighborhood or in the State for a period of even sixty years does not deprive the owner of his right to resume control, nor does it devolve upon the properly constituted authorities of the county or the town, as the case may be, the duty, with the incidental expense to the public, of its reparation. *S. v. McDaniel, supra; Boyden v. Achenback,* 79 N. C., 539; *S. v. Johnson,* 33 N. C., 647. In *Johnson's case, supra, Judge Pearson* said that 20 years was "the shortest time that there should have been the presumption of a dedication," and added, in discussing the facts of that case: "Still, that has not been done, and so there has neither been an express user nor implied dedication." A mere verbal license or permission, to enter upon the land of another for the purposes of a private way excuses the person entering pursuant to it from liability for a trespass, but is always revokable at the option of the owner who grants it. *R. R. v. R. R.,* 104 N. C., 658. Where it is the intent of the parties in case of a mere license "to

pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it is then not only necessary to be evidenced by writing, but would only be made effectual by deed." *McCracken v. McCracken,* 88 N. C., 272. The owner of the land cannot, by executing a deed to the public conveying a right of way to a highway, compel the authorities to assume the burden of repairing it unless the properly constituted agents of the county or town accept it. *Kennedy v. Williams, supra.* The ordinary but not the only method of signifying such acceptance is by working it in the usual way as a public street, or the appointment of an overseer and the assignment of hands to work it by the county. The
(740) implication that the dedication is accepted may arise from other acts of dominion which show an unequivocal claim by the public to the benefits or the burdens incident to its full and complete enjoyment.

When the defendant opened up the street, then outside of the confines of the city of Greensboro (in the year 1890), if, before the subsequent passage of the act (Laws of 1891) which extended the limits so as to include it, he had sold a single one of the lots abutting on this apparent extension of North Elm Street, he and those claiming under him would have been estopped from denying the right of such purchaser and those in privity with him to use the street, as laid down in the plot and called for as his boundary line in the deed conveying it to him, to all intents and purposes as a highway, and this dedication of the easement appurtenant to the land sold would have been, as between the parties, irrevocable, though the street had never been accepted by the town for public use. *Moose v. Carson,* 104 N. C., 431. The estoppel *in pais,* arising out of the fact that the grantee in such cases have been induced to part with money or its equivalent upon the representation of the grantor that a highway would be opened, makes the street as between them what it was represented to be. *Grogan v. Haywood,* 4 Fed., 164. The offer of the easement to the public, as well as the grant of the appurtenant right to its use as a highway, would thus have been made irrevocable, and though the city of Greensboro could not have been, against the wish of its governing officers, subjected to the burden of keeping the open way in repair, yet they might have accepted, as a continuing offer to the city at any future time, the street which, as between the parties to the deed, the grantor could not deny was dedicated to public use. But there was no such sale and consequent estoppel to prevent the defendant
(741) from revoking a license apparently given to the public to use the

extension, or from recalling the offer. Whatever might have been the effect of its acceptance at an earlier period, the city did not signify in the proper manner its willingness to assume the responsibility of making it a part of the highway under its care, until the alleged offer was revoked.

The jury find, as a part of the special verdict: "That in the year 1890 the defendant graded and threw open to the use of the public a way through land owned by him, lying north of and adjoining the corporate limits of the city of Greensboro." The Attorney-General insists that this was a dedication of the street for the use of the city though not then within its boundaries. The Legislature by Laws 1891, ch. 300, ratified 7 March, extended the corporate limits of the city as to include the extension of the street opened by the defendant. On 4 September following the Mayor and Aldermen passed a resolution looking to the condemnation of the way opened by him, and thereby instituted the proceeding for that purpose which was quashed on appeal to the Superior Court at August Term, 1893. Under permission granted by the city, while the appeal was pending, a street railway was constructed over the extension of Elm Street by the Belt Line Co., but it was not operated after the judgment of the court in 1893. The Attorney-General insists that this was an adverse occupancy which in contemplation of law amounted to an acceptance. He contends further that in 1895 the authorities of the city divided it as extended into wards, calling for the extension of Elm Street as a boundary, and by this recognition of it as a street accepted it. It was contended by the learned counsel for the defendant that, while the public could accept and use the easement acquired by the purchaser of an abutting lot by way of estoppel, a dedication could not be made directly to the State or to one of its agencies by estoppel, but only by (742) grant; and that proof of twenty years adverse user by the public (as was said by *Pearson* in *Johnson's case, supra*) raised a presumption of dedication by actual grant or of purchase under condemnation proceedings. The defendant insisted in support of this contention that it had never been held in North Carolina that the public, though possession was taken with the assent of the owner, could acquire an easement any more than an individual by the exercise of actual dominion for a less period than twenty years, and that in no case had a defendant been convicted where the charge was prededicated upon the existence of a highway and dedication was shown by user, without actual grant for a less period than twenty years.

It is not necessary to pass upon this question involving the application of the statute of frauds in disposing of this appeal. If it be

conceded that the finding that the defendant threw open the street to the public in 1890, before it became a part of the town, was a dedication of it for the purposes of a public street, we would still be confronted by the significant fact that, when the defendant refused in September, 1891, to grant the right of way, the city proceeded to institute condemnation proceedings; and if he had in any way verbally dedicated or offered the right to the public, it was withdrawn when he subsequently refused to execute the grant and a controversy arose involving the right of way. It is needless to cite authority to show the right of the landowner to revoke until bound by acceptance or estoppel. Whatever other differences may exist, that is admitted by all. If the defendant had offered to dedicate and had recalled his offer, the subsequent entry upon the street under a license from the city by
(743) the street railway company was in no view an acceptance.

There was no error, and the judgment is

Affirmed.

Cited: Collins v. Patterson, 119 N. C., 603; *S. v. Gross, ib,* 870; *Smith v. Goldsboro,* 121 N. C., 353; *Wiseman v. Greene,* 123 N. C., 396; *Collins v. Land Co.,* 128 N. C., 569; *Davis v. Morris,* 132 N. C., 436; *Milliken v. Denny,* 135 N. C., 22; *S. v. Godwin,* 145 N. C., 465; *Tise v. Whitaker,* 146 N. C., 376; *Jeffress v. Greenville,* 154 N. C., 493; *Wittson v. Dowling,* 179 N. C., 545, 546.

STATE v. ED. JEFFREYS.

Indictment for Assault with Intent to Commit Rape—Evidence, Sufficiency of.

1. To constitute an assault there must be a hostile demonstration of violence which, if allowed its apparent course, would do hurt.

2. To convict one charged with an assault with intent to commit rape the evidence must show not only an assault but an intent on the part of the defendant to gratify his passion on the person of the woman notwithstanding any resistance she might make.

3. Where, on a trial of a defendant charged with an intent to commit rape, the evidence was that defendant, while in a sitting posture on a path leading from the prosecutrix's house to a well, solicited her, as she passed on her way to the well, to have sexual intercourse with him;

that on her replying that she was not that kind of a woman, he followed her, with his privates exposed, to a fence near the well, but did not go beyond it, and that he was at no time nearer to her than 12 feet: *Held*, that the evidence of the felony was not sufficient to be submitted to the jury.

INDICTMENT for assault with intent to commit rape, tried before *Starbuck, J.*, at Spring Term, 1895, of GRANVILLE.

The defendant was convicted, and appealed. The facts appear in the opinion of *Associate Justice Avery.*

Attorney-General for the State.
A. A. Hicks for defendant.

AVERY, J. The defendant was sitting down in the path lead- (744) ing from the house of the prosecutrix to her well, a distance of 175 yards, when she passed in going for a bucket of water. Without at the time changing his sitting position, he solicited her to have sexual intercourse with him. When she replied that she was not that kind of a woman and went on towards the well, the defendant, after saying that "he was going to have it anyway," and taking out his privates, followed her (as we infer from the evidence, slowly) and threw his foot upon the fence, but went no further then nor afterwards. The prosecutrix crossed the fence and stopped at the well, which was 16 or 18 feet beyond the fence, until she drew a bucket of water. The defendant was 15 feet from the fence when he made the proposition, and was never at any time nearer to the prosecutrix than 12 to 15 feet. The prosecutrix, after drawing the bucket of water, went rapidly, or ran, about 100 yards on the opposite side of the well from her own dwelling to the house of Mrs. McDaniel, and in doing so spilled most of the water.

The court refused the prayer of the defendant to instruct the jury that there was no evidence of an assault with intent to commit a rape, and that they "could not find him guilty of a greater offense than a simple assault."

"In order to convict a defendant on the charge of an assault with intent to commit rape," said this Court in *S. v. Massey,* 86 N. C., 658, "the evidence must show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so at all events, not withstanding any resistance on her part."

There was no battery, because the defendant was never nearer to the prosecutrix than 12 to 15 feet. While a mere menace does not

of itself constitute an assault, it is not essential that the assailant
(745) should be in striking distance of the person upon whom he is charged with committing the offense. The attempt or offer to strike, which constitutes an assault, is often complete when the parties are not at the time or afterwards within striking distance. An offer to strike by one at the time rushing upon another in such a manner and so near that the latter has reasonable ground (or such as would influence a man of ordinary firmness) to believe that he will instantly receive a blow unless he strike in self-defense, is an assault. *S. v. Davis*, 23 N. C., 125. And where one places himself in front of another and by a menacing attitude and using threatening language prevents the latter, through reasonable apprehension of violence, from going where he had a right to go and would have gone if not so threatened, the act is no longer a mere menace, but a complete criminal offense. *S. v. Hampton*, 63 N. C., 13. It is the apparently imminent danger of violence, and not the present capacity of the assailant to inflict injury, that distinguishes mere menace from an assault. *S. v. Vannoy*, 65 N. C., 532.

If the defendant had touched the person of the prosecutrix against her will, with the view to having sexual intercourse with her, he would have been guilty of assault and battery. If his conduct gave her reasonable ground to apprehend that he was about to take hold of her person against her will, the apparent attempt to touch her rudely was an assault. Bishop says that the lesser offense, when there is no actual battery, is "committed whenever a reasonable apprehension of immediate physical injury, from a force already partly or fully put in motion, is created." 1 Bishop Cr. Law, sec. 548 (1); 2 Bishop C. L. sec. 71 (1). The same learned author (1 Cr. Law, sec. 604), after laying down the familiar principle that words of themselves cannot amount to an assault, adopts the language of *Judge Gaston*
(746) in *S. v. Davis, supra*, where, in drawing the line between violence threatened and violence attempted or begun, the learned Judge said: "We think, however, that where an unequivocal purpose of violence is accompanied by an act which, if not stopped or desisted from, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted." The author continues: "Thus, riding after a person so as to compel him to run into a garden for shelter, to avoid being beaten, has been adjudged to be an assault. And so of threats of violence by an armed assailant apparently designing an attack. But there must be some hostile demonstration of violence which, if allowed its apparent course, would do hurt."

The defendant did not by pursuit or any actual demonstration of force give the prosecutrix reasonable ground to believe that it was his purpose to overtake and use violence upon her person, and in this aspect of the evidence there is no testimony tending to show even a simple assault. But the fact that the defendant followed to the fence, after using the threatening language and assuming the posture which the prosecutrix described, and there took such a position that he could intercept her if she returned to her home with the water, as she had contemplated doing, and induced her, through fear of his touching her, to go in the opposite direction, tended to show that he was guilty of a simple assault. This evidence, if believed, brought the case within the principle to which we have adverted, as stated in *S. v. Hampton, supra.*

But, though the question whether he was guilty of a simple assault might have been properly left to the jury, as his counsel requested, we think the court erred in holding that in any aspect of the testimony there was sufficient evidence to prove an assault with the intent to commit rape. Mere words without acts amount to menace only, and do not constitute even a simple assault. Apart from the lan- (747) guage used by the defendant, there was no act which tended to show an unequivocal intent to gratify his passion by force in case she should resist his solicitations to the end. "Guilt," say the Court in *S. v. Massey,* 86 N. C., 658, "is not to be inferred because the facts are consistent with guilt, but they must be inconsistent with innocence." It was in evidence, both in *S. v. Massey, supra,* and *S. v. Neeley,* 74 N. C., 425, that the accused pursued, calling upon the prosecutrix to stop, until she had reached a point where she would probably be heard and protected by others. In our case there was no pursuit, the defendant refraining from following even as far as the well, though the prosecutrix turned her back upon him and stopped there until she could draw water and fill her bucket. The conduct of the defendant was very indecent and, it may be, rendered him liable to punishment upon another charge as well as for a simple assault; but it is consistent with all of the testimony to suppose that he awaited the movements of the prosecutrix, upon the supposition that if she should then return towards her house at the risk of passing so indecent a spectacle as was presented, he might well accept her conduct as inviting further solicitations and approaches. When the evidence presents this and other aspects consistent with a purpose to urge and perhaps to take hold of the prosecutrix on her return, but to stop short of an attempt to force her to sexual intercourse against her

will, we do not think that the question of the defendant's guilt of the felony should have been left to the jury. There is less evidence of the intent to commit rape in this case than in either *S. v. Massey* or *S. v. Neeley,* and if so, the court erred in refusing the instruction asked. This error entitles the defendant to a

New trial.

Cited: S. v. Williams, 121 N. C., 631; *S. v. Daniel,* 136 N. C., 575; *S. v. Smith, ib.,* 686; *S. v. Davenport,* 156 N. C., 609; *Humphries v. Edwards,* 164 N. C., 159.

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(748)

STATE v. SAM PIGFORD.

Indictment for Carrying Concealed Weapons—Intent.

The criminal intent to constitute the offense of carrying concealed weapons is the intent to carry the weapon concealed; and where one charged with the offense had the right to carry it openly, but concealed it about his person, it was incumbent upon him to satisfactorily explain why he did not carry it openly.

INDICTMENT for carrying a concealed weapon, tried before *Graham, J.,* and a jury, at September Term, 1895, of PENDER.

The evidence was that the defendant was arrested on his own premises on 1 August, 1895, on a warrant for failure to work the public road, and was compelled by the officer to go with him immediately to be tried before a justice of the peace. The justice found the defendant guilty and sentenced him to the county jail for three days. The jailor in searching the defendant found a pistol concealed on his person. The defendant had the pistol concealed on his person when arrested on his own premises and when compelled to go with the officer to trial and from trial to jail. Before defendant's sentence of three days had expired the jailor on affidavit procured a warrant for his arrest for carrying a concealed weapon and had him arrested, tried and bound over to court as soon as his term of imprisonment expired. There was no other evidence that defendant carried a concealed weapon.

His Honor instructed the jury that if they believed the evidence the defendant was guilty. There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General for the State.

No counsel contra.

CLARK, J. The defendant was not prohibited from carrying (749) the pistol on his own premises, and if it had been made to appear that when arrested he had asked to be allowed to leave it at home and the officer had refused, there would have been some semblance of a defense, but even in that event it would still have been incumbent on the defendant to explain satisfactorily why he did not carry the pistol openly, as he had a right to do, after leaving his premises, and not concealed about his person.

The criminal intent is the intent to carry the weapon concealed. *S. v. Dixon,* 114 N. C., 850. There was no conflict of evidence, and his Honor properly instructed the jury, if they believed the evidence, to find the defendant guilty.

No error.

Cited: S. v. Hinnant, 120 N. C., 573; *S. v. Reams,* 121 N. C., 557; *S. v. Brown,* 125 N. C., 705; *S. v. Boone,* 132 N. C., 1110; *S. v. Southerland,* 137 N. C., 704; *S. v. Simmons,* 143 N. C., 617; *S. v. Woodlief,* 172 N. C., 888.

STATE v. WILL BYNUM ET AL.

Indictment for Larceny—Larceny from the Person—Indictment and Proof—Autrefois Convict.

1. Acts 1895, ch. 285, sec. 1, provide that, where the property stolen does not exceed $20, the punishment for the first offense shall not exceed one year. Section 2 provides that, if the larceny is from the person, section 1 shall have no application: *Held,* that it was not necessary to allege in the indictment that the larceny was from the person in order to prove that fact and take the case out of section 1 of said act.

2. Where money was taken from each of two persons at the same time, a conviction for having stolen the money of one is not a bar to a prosecution for stealing the money of the other.

LARCENY, tried at August Term, 1895, of MOORE, before *Hoke, J.,* Defendants were indicted in ordinary form for stealing money from one Harris in the one case, and from one Barbee in the other case. The evidence established that Barbee and Harris were (750) wagoners in camp together in Moore County, and were asleep by a camp fire, and at night their camp was assaulted by four or five

negroes. Two by the name of Rice pointed pistols at Barbee and Harris and compelled them to hold up their hands. Barbee, not holding up quick enough, was fired at, and while both were covered by pistols the pockets of each were rifled by defendants, and money taken from the person of each, and all other things about the camp fire were taken and carried away. There was no evidence that the value of the entire property and money taken was over $20. Defendant Bynum was there aiding and abetting. The witnesses testified they had never seen the negroes before, but they were identified by other evidence. The evidence established that the money taken from Barbee and Harris was the separate property of each. The defendants were convicted and sentenced to a term of seven years each in the penitentiary. There was no evidence introduced as to whether defendants, or either of them, had before been convicted of larceny. This was in case No. 115. Defendants excepted to the sentence of the court as against Laws 1895 on larceny.

At the same term of the court, in No. 149, the defendants were indicted for stealing money from the person of the other wagoner, W. W. Harris. They pleaded former conviction and not guilty, the pleas being together by consent. The evidence was the same as in the other case, except in this case the bill charged the defendants with stealing money from the person of Harris. The court charged the jury that there was no evidence of former conviction, and defendants excepted. Verdict of no former conviction and of guilty as to both defendants, and they were sentenced to seven years in penitentiary concurrently with the other case. Defendants excepted and appeald in both cases,
maintaining in the first case that the bill was not sufficient to
(751) justify the sentence, and in the second case that, being the same
occurrence, the defendants were protected from a second prosecution by the verdict and judgment upon the first bill.

Attorney-General and Messrs. Douglass & Spence for the State.
R. L. Burns and H. E. Norris for the defendants.

FAIRCLOTH, C. J. The defendants are indicted in the ordinary form for stealing the money of B. E. Barbee, and were convicted and sentenced to the penitentiary for seven years. The evidence showed that the defendants assaulted said Barbee and W. W. Harris, and took from each his separate money during the same assault. They were convicted and sentenced at the same term of the court for the taking of the money of said Harris. The defendants plead former conviction and excepted to the sentence of seven years as in violation of Laws 1895, ch. 285, as

follows: "Sec. 1. That in all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall for the first offense not exceed imprisonment in the penitentiary or common jail a longer term than one year.

"Sec. 2. That if the larceny is from the person or from the dwelling, by breaking and entering in the daytime, section 1 of this act shall have no application.

"Sec. 3. That in all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

There was no evidence that the value of the entire property and money taken was over $20, and the verdict was guilty in the manner and form charged in the indictment. The case is taken out of the first section by the second section, as the proof showed that (752) the taking was from the *person*.

There was no evidence of former conviction, as the case referred to and relied upon was for the larceny of the money of W. W. Harris at the same time by the defendants. *S. v. Nash,* 86 N. C., 650. It was not essential that the State should have alleged in the indictment that the taking was from the person, so as to take the case out of section 1 of the act, as that was a matter of proof to be shown in defense, the second section being a separate and distinct part of the act. *S. v. Downs,* 116 N. C., 1064.

Affirmed.

Cited: *S. v. Harris,* 119 N. C., 813; *S. v. Davidson,* 124 N. C., 844; *S. v. R. R.,* 125 N. C., 671; *S. v. Hankins,* 136 N. C., 625.

STATE v. WILL BYNUM ET AL.

Practice—Autrefois Convict.

When the separate property of two persons is stolen from each at the same time, a conviction of theft from one is not a bar to a prosecution for the theft from the other.

LARCENY, tried before *Hoke, J.,* and a jury, at August Term, 1895, of MOORE.

The defendants were convicted and appealed.

The facts are stated in the opinion of *Chief Justice Faircloth,* and in the report of another case against same parties at this term. (See *S. v. Bynum et al., ante,* 749.)

(753) *Attorney-General and Messrs. Douglas & Spence for the State. R. L. Burns and H. E. Norris for defendants.*

FAIRCLOTH, C. J. The defendants are indicted in the ordinary form for stealing money and one pocketknife from the person of W. W. Harris, and were convicted and sentenced to the penitentiary for seven years. The evidence showed that said Harris and B. E. Barbee were asleep at night by a camp fire when defendants assaulted and took from each one his separate money at the same time. The defendants excepted the judgment of seven years confinement as a violation of the act of 1895, ch. 285, and relied on the plea of *autrefois convict.* The record relied upon for the latter plea failed to support it, as it showed an offense against another man, *i. e.,* B. E. Barbee, committed at the same time. *S. v. Nash,* 86 N. C., 650. The first exception is disposed of in the other case at this term against the same parties; also the bill in this case charges the offense against the person under section 2 of the act.

No error.

STATE v. FRED WILLIAMS.

Practice—Statute—Repeal of Statute—Evidence of Good Character of Defendant—Election.

1. Where it appears from the case on appeal that no exceptions were taken by the appellant on the trial below, and no error appears on the record, the judgment will be affirmed.

2. The re-enactment by the Legislature of a law in the terms of a former law, at the same time it repeals the former law, is not in contemplation of law a repeal, but is a reaffirmance of the former law, whose provisions are thus continued without any intermission.

3. The date in an indictment is not material.

4. On the trial of one charged with an offense it is competent for the State to prove any number of offenses of the kind charged, in which case the defendant's remedy is, at the close of the evidence, to ask the court to require the solicitor to elect on which offense he relies, and where no such request is made and refused the conviction will not be disturbed.

(754) INDICTMENT for intimidation of voters, under section 2715 of The Code, tried before *Boykin, J.,* and a jury, at November Term, 1894, of GREENE.

The defendant was convicted, and appealed.

Attorney-General for the State.
Geo. M. Lindsey for the defendant.

CLARK, J. The appellant having accepted the Solicitor's amendment to his statement of the case on appeal, it appears from the case as thus amended that there were no exceptions taken by defendant. The Attorney-General's motion to affirm the judgment below must therefore be allowed unless there are errors on the face of the record proper. *Taylor v. Plummer,* 105 N. C., 56; *S. v. Brown,* 106 N. C., 645, and numerous other cases cited in Clark's Code (2 Ed.), 582. Upon examination we find none. The indictment sufficiently charges intimidation of a voter under The Code, sec. 2715. The defendant contends that, this section having been repealed by chapter 159, Acts 1895, pending the appeal, the court has no jurisdiction. But said act in section 41 thereof re-enacts verbatim the provisions of The Code, sec. 2715. The re-enactment by the Legislature of a law in the terms of a former law, at the same time it repeals the former law, is not in contemplation of law a repeal, but is a reaffirmance of the former law, whose provisions are thus continued without any intermission. Bishop's St. Crime, sec. 181; *S. v. Sutton,* 100 N. C., 474. On the argument the defendant's counsel strenuously urged as error (755) that, though the indictment laid the offense on the 7th of the month, the State was allowed to show intimidation of the voter on the 8th. The date in an indictment is not material (The Code, sec. 1189) and, besides, it is competent for the State to prove any number of offenses of the kind charged, and the defendant's remedy is at the close of the evidence to ask the court to require the solicitor to elect. *S. v. Parish,* 104 N. C., 679; *S. v. Allen,* 107 N. C., 805. But it does not appear that such motion was made and refused in his case. Indeed, as we have said, there was no exception of any kind.

Affirmed.

Cited: Wood v. Bellamy, 120 N. C., 224; *S. v. Boggan,* 120 N. C., 591; *Robinson v. Goldsboro,* 122 N. C., 214; *Abbott v. Beddingfield,* 125 N. C., 261; *S. v. R. R.,* 125 N. C., 673; *S. v. Leeper,* 146 N. C., 659; *S. v. R. R.,* 149 N. C., 510; *S. v. Mostella,* 159 N. C., 461.

STATE v. JOHN GOFF, JAMES KEARNEY AND FRANK KEARNEY.

Indictment for Affray—Witness—Impeachment—Testimony, Competency of—Evidence of Motion.

1. Where, in the trial of four persons indicted for an affray, three of them testified and the fourth, their antagonist, was called in his own behalf, the other defendants had the same right to impeach him on cross-examination as though he had been a witness instead of a codefendant.

2. On the trial of several persons for an affray, testimony that one of the defendants, who was the antagonist of the others, had stated to third persons on the day of the difficulty that if one of the other defendants should come to his house that night he would kill him was admissible for the purpose of impeachment, but incompetent to prove motive.

3. It is error to exclude testimony offered for several purposes if it is competent for one of the purposes.

4. Error in excluding testimony which is competent for the purpose of impeachment can only be remedied by *venire de novo*, though the facts excluded may have been subsequently brought out by other witnesses.

(756) INDICTMENT for affray, tried before *Graham, J.*, and a jury, at Spring Term, 1895, of GREENE.

The four defendants were tried jointly for the affray charged. Two witnesses were introduced on behalf of the State.

Henry Gerganus, the first State's witness called, testified substantially as follows: "I am a cousin of the defendant Gerganus; am distantly related to him. This difficulty occurred at his house on the night of 2 January last. The defendants and I were all under the influence of liquor; had been drinking wine at the wine shop about 400 yards from defendant Gerganus' house John Goff and the Kearneys became noisy, and the defendant Gerganus ordered them to leave his house. They did so, and the door was closed and fastened. Soon they returned with rails and pieces of scantling to the door and beat upon it and forced it open. Defendant Goff came in first and seized defendant George Gerganus and threw him and held him down, and the Kearneys soon followed him into the house, one of them, James Kearney, I think, having a fence rail. Nora Gerganus, daughter of the old man (meaning defendant Gerganus), pulled Goff off her father. The old man, George, had a gun in his hand when he ordered Goff and the Kearneys to leave, and also when they returned. When they (Goff and the Kearneys) were leaving the house, the old man fired off his gun at the door, holding the muzzle up almost straight, and I don't think he shot

at any one. He also had a pistol, and while they had him down he drew his knife. Goff got cut in the face during the difficulty. I don't know who cut him. The two Kearneys are brothers. One of them, Frank, is a son-in-law of defendant John Goff.

Joe Goff, the witness next examined on behalf of the State, testified substantially as follows: "I am a son of the defendant John Goff. He and I were invited to that house that night by de- (757) fendant Gerganus. The old man (defendant) Gerganus was very much intoxicated, and all of us were under the influence of liquor. Defendant John Goff turning sick from the effects of the wine, one of the defendant Gerganus' daughters arranged the bed in the front room for him to lie down on. He lay crosswise, with his feet off the bed. At the request of the old man (defendant Gerganus) the defendant John Goff gave him permission to take his horse and road cart to go to a neighbor's house, about a mile and a half distant. I accompanied him. We got back about 11 o'clock. When we returned, defendant John Goff was asleep and still lying across the bed. Defendant Gerganus pulled off one of defendant Goff's boots, and this awoke him. At this time a quarrel arose between defendant Gerganus and his daughter Nora, and both used very angry words to each other. She had a hatchet raised, and her father slapped her, or slapped at her. At this point the defendant Goff, who had then become sober, rose up and tried to pacify the old man and his daughter. The defendant Gerganus then became greatly enraged, and seemed to be crazed from drink and anger, and he seized a gun and walked into the adjoining room and talked with Henry Gerganus about fifteen minutes. Then he came into the front room, gun in hand, and ordered all the other defendants out of the house. The defendants James and Frank Kearney were the first to go out, and defendant Goff followed. As defendant Goff went to pass out, the old man fired off his gun towards him and the door was suddenly pushed by some one inside, thereby pressing one of defendant Goff's legs between the door and the facing. Then defendant Goff turned his face toward the door and pushed it away, to release his leg, and there stood defendant Gerganus with his gun in one hand and pointing a pistol at the defendant Goff with the other. (758) Thereupon defendant Goff seized defendant Gerganus and pushed him backward toward the bed, laying him down upon the bed and holding him down and trying to take the pistol from him, and at the same time he called for help to take the pistol from Gerganus. He had already got the gun from his grasp, and threw it on the floor. When he called, Jim Kearney and Frank Kearney came in and helped defendant Goff to disarm Gerganus. In this struggle the defendant

Gerganus drew a knife from his pocket with his left hand, and on rising he cut defendant Goff, giving him a severe and dangerous stab on the left cheek. Thereupon Goff pressed Gerganus down on the floor and kicked the knife out of his hand. Then defendants Goff and James and Frank Kearney left, I went off with them. Neither of them was armed, or made any effort to use any weapon or hurt Gerganus, and neither one of them used any more violence or force than was necessary to disarm Gerganus. They did not force the door or attempt to break in, nor enter after they were ordered out, except to aid in taking away the weapons of the defendant Gerganus."

Here the State rested its case.

The defendants John Goff and James Kearney were then sworn and examined on their own behalf, relating the facts of the difficulty, in all material points, as the State's witness, Joe Goff, had done. Then they introduced some character evidence, and rested their case.

The defendant Gerganus' name occurring last in the indictment, his witnesses were examined after the conclusion of the evidence for the other defendants. The defendant Gerganus was the last witness examined on his own behalf. He testified (among other things) that,

(759) one of his daughters objecting to the noise in the house and the intoxication of the visitors, he ordered the other defendants to leave, whereupon they did so, but that they returned and beat on the door, swearing their purpose to break in, and that at last they forced open the door and re-entered the house that, as they were going out, he had discharged his gun out of the door, shooting upward, his purpose being to discharge the load so that the gun could not be used by the other defendants; that on the re-entry of the other defendants, the defendant Goff seized him violently and struck him on the forehead, inflicting a severe hurt, and they beat and bruised him as they held him down on the bed, causing him to bleed freely, and his clothes were cut in several places; that some of the defendants had knives in their hands; that he, himself, did have the pistol in his hands, but it was only for the protection of himself and his family; that he did not remember cutting the defendant Goff, and did not know how that cut was inflicted, etc.

During the defendant Gerganus' cross-examination, he was asked by the counsel for defendants Goff and Kearneys this question, namely: "On the day of the night of that difficulty, did you not tell Merrimon Ginn at your house that if Goff and his friends came to your house that night you would kill you a man?" The witness answered that he did not.

He was then asked, on behalf of the same defendants, this question,

namely: "On the same day and at the same place, did you not tell Thomas Kearney that you were expecting John Goff at your house that night, and that if he came you would kill him, or hurt him badly?" This was also answered in the negative.

On the conclusion of the testimony on behalf of the defendant Gerganus, no further evidence being offered by the State, the defendants John Goff, James Kearney and Frank Kearney called in Merrimon Ginn and Thomas Kearney, the persons referred to in the (760) cross-examination of defendant George Gerganus, and both of whom had been duly sworn.

His Honor inquired for what purpose those witnesses were called in.

The counsel for said Goff and the Kearneys informed the court that he proposed by these witnesses to contradict defendant Gerganus as to the threats referred to, and to prove the declarations of defendant Gerganus as set out in the questions specified, and this was to show the *animus* of that defendant towards the defendants John Goff and James and Frank Kearney, as affecting his testimony, as well as to account for his conduct on the night of the difficulty.

The said Merrimon Ginn was then first ordered with that view.

The Court refused to permit the witness to testify on the point named, and stated that it would not allow the proposed testimony from either of the witnesses, as the matter was collateral.

The defendants John Goff, James Kearney and Frank Kearney excepted to this ruling of his Honor.

Verdict of "Guilty" against John Goff, James Kearney and Frank Kearney, "Not Guilty" as to Gerganus. Judgment against the convicted defendants, who appealed.

Attorney-General for the State.
Swift Galloway and J. B. Batchelor for defendants.

AVERY, J. This was an indictment for an affray, in which the theory of the State was that the defendants John Goff and the two Kearneys were the guilty combatants on the one side, and the defendant Gerganus, who was acquitted by the jury, was a willing participant on the other side. After offering two witnesses on behalf of the State, (761) the Solicitor, following the usual practice, rested and gave the parties the opportunity each to offer testimony criminating his antagonist or antagonists in order to exculpate himself. In such a contest the witnesses for the one side stand, as to the parties on the other, in the relation of prosecuting witnesses and defendants, and hence it is the universal practice to compel them to submit to cross-examination with

all of the rights which are incident thereto when they are examined in chief on behalf of the State. The appellants had introduced their testimony, and when Gerganus was upon the stand as the witness in his own behalf the other defendants had the same right to impeach him on cross-examination as though he had been a witness on behalf of the State instead of a codefendant. The State might have impeached him (*S. v. Efler,* 85 N. C., 585), and the same privilege should have been allowed to his codefendants. If the questions propounded by the counsel for defendants tended to elicit testimony showing the temper and bad blood of Gerganus towards his codefendants, and it was offered not alone as substantive testimony against him as a defendant, but also in order to impeach him as a witness, it was unquestionably competent to examine the witnesses whose names had been mentioned in connection with the time and place of making the declarations, to contradict his denial that he made them. *S. v. Patterson,* 24 N. C., 346; *S. v. Sam,* 53 N. C., 150. The history of the ruling excepted to and assigned as error, as it appears in the statement of the case, is as follows: "During the defendant Gerganus' cross-examination, he was asked by counsel for defendants Goff and the Kearneys this question, namely: 'On the day of the night of that difficulty, did you not tell Merrimon Ginn at your house that if Goff and his friends came to your house that
(762) night you would kill a man?' The witness answered that he did not. He was then asked, on behalf of the same defendants, this question, namely: 'On the same day and at the same place did you not tell Thomas Kearney that you were expecting John Goff at your house that night and if he came you would kill him, or hurt him badly?' This was also answered in the negative. On the conclusion of the testimony on behalf of Gerganus, no further evidence being offered by the State, the defendants John Goff, James Kearney and Frank Kearney called in Merrimon Ginn and Thomas Kearney, the persons referred to in the cross-examination of defendant Gerganus, and both of whom had been duly sworn. His Honor inquired for what purpose those witnesses were called in. The counsel for Goff and the Kearneys informed the court that he proposed by these witnesses to contradict Gerganus as to the threats referred to and to prove the declarations of Gerganus as set out in the questions specified, and this was to show the *animus* of that defendant towards John Goff and James and Frank Kearney, as affecting his testimony, as well as to account for his conduct on the night of the difficulty. Merrimon Ginn was then first offered with that view. The court refused to permit the witness to testify on the point named, and stated that it would not allow the proposed testimony from either of the witnesses, as the matter was collateral. Defendants John Goff and James and Frank Kearney excepted to this ruling."

If the testimony was competent for either of the purposes indicated by counsel for the appellants, it was error to exclude it. It was clearly not competent to explain the conduct of Gerganus by connecting it with proof of motive. The guilt or innocence of Gerganus depended entirely upon the facts and circumstances connected immediately with the transaction. *S. v. Norton,* 82 N. C., 628; *S. v. Harrell,* 107 N. C., 944; *S. v. Skidmore,* 87 N. C., 509. If the court had admitted (763) the testimnoy to contradict Gerganus it would have become necessary to caution the jury to consider it only for the purpose of impeaching. But it is not the less error to exclude testimony offered for a purpose for which it is competent because coupled with that offer is a proposition, which is not tenable, to admit it on another ground. Such an error is not cured even by allowing other witnesses to testify to the very same facts which were excluded on a cross-examination, but, said *Pearson, C. J.,* in *S. v. Murry,* 63 N. C., 31, "can only be remedied by *venire de novo.*" It is true that Gerganus testified to facts which, if believed, would have corroborated the defendant Gerganus and tended to show that John Goff and the two Kearneys fought willingly. But the jury, if they believed the other witness for the State, Joseph Goff, might have inferred that the other defendants did not fight willingly and used no more force than was necessary to disarm the defendant Gerganus and provide for their own safety. They all testified to substantially the same state of facts as Joseph Goff. As the testimony of Henry Gerganus and his kinsman would, it seems, if believed, have left no doubt as to the guilt of the other three, it was all-important, in view of such a conflict, that the three appellants should have the benefit of any competent impeaching testimony; *non constat,* if it had been admitted, but that Gerganus might have been found guilty, and they might have been acquitted. It may be that the testimony of Henry Gerganus, going to the jury as it did, unimpeached and corroborated by that of Henry, led them to give credit to him instead of to Joseph Goff and the three appellants. Whatever would have been the result if no erroneous ruling had been made, or whatever may be the consequence hereafter, it seems clear that the appellants have (764) been deprived of testimony of which we know not the weight or worth, to the benefit of which they are justly entitled. The cases of *S. v. Ballard,* 97 N. C., 443, and *Clark v. Clark,* 65 N. C., 655, are not in conflict with the principles we have stated as governing this case. There was no proposition in the case at bar to go into particulars of other transactions or difficulties and set them up as tending to show bias. In such case the danger of raising numberless issues to distract

the minds of the jury would be obvious. But the proposition was to prove a threat of bodily harm, to be carried into execution on that night and at his own house, where the difficulty occurred. While this was not competent as evidence of motive, it was admissible to show temper. We conclude that the appellants are entitled to a

Venire de novo.

Cited: *Johnson v. R. R.*, 140 N. C., 588; *S. v. Kimbrell,* 151 N. C., 704, 708; *S. v. May,* 153 N. C., 602.

STATE v. JAMES SHAW.

Indictment for Perjury—Indictment, Sufficiency of.

An indictment for perjury which omits the word "feloniously" as characterizing the charge is fatally defective under ch. 205, Acts of 1891, which makes all criminal offenses punishable by death or imprisonment in the State penitentiary felonies.

INDICTMENT for perjury, tried before *Robinson, J.,* and a jury, at July Term, 1895, of COLUMBUS.

The defendant was convicted, and moved in arrest of judgment because the bill did not charge the offense to have been feloniously
(765) committed. The indictment was as follows: "The jurors for the State, upon their oaths, present that James Shaw, of Columbus County, did unlawfully commit perjury upon the trial of an action in justice's court before A. F. Toon, a justice of the peace in Columbus County and Whiteville Township, wherein the State of North Carolina was plaintiff and James Shaw and John Field and others were defendants, by falsely asserting on oath that he was not present at and did not attempt to assist and did not assist in an attempt to rescue B. L. Jones from the jail of Columbus County on or about 3 June, 1894, for which offense the said defendant stood then charged, knowing the said statement or statements to be false, or being ignorant whether or not said statements were true; contrary to the form of the statute," etc.

The motion in arrest of judgment was sustained, and the State appealed.

Attorney-General for the State.
Lewis & Burkhead for the defendant.

AVERY, J. Since all criminal offenses punishable with death or imprisonment in a State prison were by statute (Laws 1891, ch. 205) declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class of cases, have been declared fatally defective. *S. v. Wilson,* 116 N. C., 979; *S. v. Skidmore,* 109 N. C., 795.

Whatever force there might be in the suggestion of the Attorney-General that section 1189 of The Code renders it unnecessary to embody in the charge what it is not material to prove, if it had been made before the latter statute had been so often construed, it is now our (766) duty to adhere to our decisions.

There was no error in sustaining the motion in arrest, and the judgment of the court below is

Affirmed.

Cited: S. v. Harris, 145 N. C., 458; *S. v. Holder,* 153 N. C., 608; *S. v. Hyman,* 164 N. C., 413.

STATE v. L. M. FOUSHEE.

Indictment for Removing Crops—Indictment—Proof—Variance.

Where an indictment for removal of crops without notice to the landlord charged an agreement by defendant to raise a crop on the land of G., and on the trial the proof showed the title to be in another, who rented the land to G.: *Held,* that there was no variance.

INDICTMENT for removing crops without notifying landlord, tried before *Hoke, J.,* and a jury, at the August Term, 1895, of MOORE.

On the trial John L. Godfrey, alleged landlord, testified that he held the land under some agreement or contract with the owner, a Mrs. ———, either of rental or under contract of purchase—court does not now recall which; and that, while so holding said land under his said contract, he rented same to the defendant for the year ———, being the year of the alleged removal and within two years before and prior to bill of indictment, at an agreed rent. That witness managed the entire business of the rental and had entire control of the land under his contract and looked after the whole matter himself. That defendant, without paying rent and without giving witness a notice, (767) etc., removed the crop grown on said land for said year, etc.

The defendant asked the court to instruct the jury that defendant could not be convicted, for that there was variance between allegation and proof, and that the evidence disclosed that title to land was in some person other than John L. Godfrey, the alleged landlord. 2. Because there was no evidence that notice might not have been given to some agent of landlord John L. Godfrey.

The court declined so to instruct the jury, and defendant excepted. There was a verdict of guilty, and from the judgment thereon the defendant appealed. Motion for a new trial for error and refusal of court to give the instructions prayed for.

Attorney-General and Douglass & Spence for the State.
W. E. Murchison for defendant.

CLARK, J. This was an indictment for removing crop without notifying the lessor. The indictment set out an agreement to raise the crop on the land of one Godfrey. In the proof it appeared that the title to the land was in another person, who rented to Godfrey, who in turn subrented to the defendant. His Honor properly held that this was no variance. As to the defendant, Godfrey was landlord and vested with the right to the possession of the crop, and unless the rent was paid it could not be removed without notifying him as required by The Code, sec. 1759.

(768) The testimony was that Godfrey managed the entire business of renting and looked after the whole matter himself. There was no evidence that he had any agent. The second exception, "because there was no evidence that notice might not have been given to some agent of Godfrey's," is without merit and not supported by any evidence.

No error.

Cited: *S. v. Gibson,* 169 N. C., 322; *S. c.,* 170 N. C., 699.

STATE v. W. B. JONES ET AL.

Notice to Prosecutor—Taxing Costs—Liabilities of Prosecutor.

1. The notice required by section 737 of The Code to be given to a prosecutor to show cause why he should not be marked as prosecutor and taxed with the costs of an unsuccessful prosecution may be given on motion of the defendant's attorney.

2. Section 30 of The Code, which allows an attorney such time as he thinks necessary for the proper presentation of his client's case, applies only to the trial of criminal and civil actions, and does not apply to the arguments of counsel on motions and questions arising during the trial.

3. It is error to tax costs of defendant's witnesses against the prosecutor on a finding that prosecution was malicious and not for the public good, in the absence of a finding that the witnesses were proper for the defense.

4. Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by section 737 of The Code, judgment will be allowed to stand if the court below will make and certify the requisite finding that the said witnesses were proper for the defense.

CRIMINAL ACTION, tried before *Norwood, J.*, at March Term, (769) 1895, of MOORE.

The defendants, W. B. Jones and Susan Burt, were indicted at December Term, 1895, of said Superior Court for fornication and adultery, and upon their trial at March Term, 1895, the jury returned a verdict of "not guilty." At the opening of said trial counsel for the defendants gave notice in open court that, in case of an acquittal of the defendants, a motion would be made to mark as prosecutors and tax with the costs J. E. Phillips and T. H. B. Pierce, the said Phillips and Pierce being then present in court. The trial was completed on 6 March, and on the same day, on motion of the defendants' counsel and without the instance of the Solicitor, his Honor made the following order in said cause:

"It is ordered by the court that T. H. B. Pierce and J. E. Phillips show cause, if any they have, on Thursday of the present Term (7 March), why they should not be marked as prosecutors of record and taxed with the costs of this action."

Notice of this order was served on said Pierce and Phillips, and on return day (7 March) they entered by their counsel a special appearance, and moved to dismiss said motion, for that sufficient notice of said motion to mark as prosecutors and tax with the costs had not been given them; and upon the further grounds that the motion must be made at the instance of the Solicitor, or at least with his approval. The court overruled the motion to dismiss, and the said Phillips excepted in apt time.

After hearing testimony his Honor stated that he was convinced as to the controversy from the testimony of all the witnesses in the case at the trial, the testimony of the witnesses for the State at this hearing and the testimony of the respondent Phillips himself, (770)

and that he did not desire to hear testimony of common reports, begun possibly by respondent himself; and he refused to hear further testimony of witnesses offered by respondent to show the facts and circumstances going to prove that said prosecution was required by the public interest. To all of which the respondent Phillips excepted.

The counsel employed by the respondent Phillips to represent him in said motion then addressed the court in reference to the law and facts in said case and, before the first attorney had concluded, his Honor refused to hear them further and stopped the argument. To all of which the respondent Phillips excepted.

His Honor then proceeded to find the following facts from the evidence:

"1. That the defendant W. B. Jones was indebted to the respondent J. E. Phillips in a sum exceeding six hundred dollars, and that said Phillips had brought an action for the recovery of the same and had failed to collect it.

"2. That said respondent Phillips had consulted his counsel, J. C. Black, an attorney of this court, as to whether it would be advisable for said respondent to prosecute said W. B. Jones for fornication and adultery with the defendant Susan Burt, and had asked his said counsel if such a course would not be a help to respondent in the collection of his said debt; and that said J. C. Black, his said counsel, advised said respondent not to take such a course, telling said respondent that if he did so he would injure his case, and said counsel protested against his instituting the prosecution.

"3. That afterwards said respondent J. E. Phillips did set on foot the prosecution of this case, and for that purpose he consulted with
(771) the Solicitor for the State, and induced the other respondent to go before the Solicitor, and also before the grand jury, to find the bills of indictment.

"4. That said respondent J. E. Phillips employed counsel to assist the Solicitor in the trial of the cause."

Upon these facts his Honor adjudged as follows:

"It is therefore considered by the court that this prosecution was malicious, and that it was not required by the public interest; and it is ordered by the court that said respondent J. E. Phillips be marked prosecutor on the record, and it is adjudged that he pay the costs of the cause, to be taxed by the clerk, including the fees of the defendants' witnesses, and said respondent is ordered into the custody of the sheriff until said costs be paid."

To all of which the respondent J. E. Phillips excepted, and, for the errors assigned, appealed.

Attorney-General for the State.
W. E. Murchison and Douglass & Spence for prosecutor.

FURCHES, J. This was a motion and order of the Superior Court of Moore, taxing one Phillips with the costs of the State prosecution. W. B. Jones and Susan Burt were indicted, tried and acquitted. At the conclusion of the trial the court ordered notice to be given to said Phillips to appear on the next day and show cause why he should not be marked as prosecutor and taxed with the costs of the prosecution. Notice of this motion was served on Phillips, and on the day fixed by the order said Phillips by attorney entered a special appearance and moved to dismiss, for the reasons that he had not been properly served and that the motion was made by the counsel of defendant Jones, when it could only be made by the Solicitor or by his approval.

Neither of these objections can be sustained. The act of 1874, (772) amended by the act of 1879, The Code, sec. 737, authorized the court, upon notice, to mark Phillips prosecutor after the prosecution had ended. The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of defendant's counsel or by the court of its own motion. *S. v. Hamilton,* 106 N. C., 660. The court should find the facts. That was done in this case, and the findings are not reviewable in this Court. *S. v. Hamilton, supra; S. v. Roberts,* 106 N. C., 662, and *S. v. Owens,* 87 N. C., 565.

But Phillips through counsel makes the further objection that his Honor, after hearing his evidence, would not hear evidence of the reports in the neighborhood, and that the court stopped his counsel before he had said all he wished to say in his behalf; and insists that this is in violation of section 30 of The Code. We do not think so. This section only applies to the trial of criminal or civil *actions.* It does not apply to the argument or discussion which may and often does arise upon motions and questions during the progress of a trial. And it is well it does not. Were this so, in some counties we are satisfied it would be almost impossible to do the business of the court.

Neither do we think the other objection can be sustained. The court was the trier of the facts upon the question before it—not issue of fact, but question of fact. The court had heard Phillips' witnesses as to facts, and Phillips himself, and makes his findings from all the evidence, including that of Phillips. And after hearing all this, we do not think we can say it was error in the court not to prolong the matter and hear evidence as to the reports in the neighborhood.

But the court, after finding that the prosecution was frivo- (773) lous and malicious and not for the public good, without finding

that defendants' witnesses were proper for the defense, ordered that Phillips should pay the costs of the prosecution, including defendants' witnesses, and to this Phillips objects. The Code, sec. 737, requires that the Judge shall certify that they were proper for the defense, and we are unable to find where this question has ever been presented or directly passed upon by this Court. In *S. v. Owens,* 87 N. C., 565, which was an order taxing a prosecutor with costs, it includes such witnesses for the defense as are certified by the counsel to have been proper for the defense, and this Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. Also *S. v. Massey,* 104 N. C., 880. In *S. v. Roberts,* 106 N. C., 662, which was also a judgment taxing the prosecutor with the costs, the Judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. This Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs upon the finding of these facts.

In this case it was found that the prosecution was frivolous, malicious and not for the public good, but it fails to find that defendants' witnesses were proper for the defense, and reasoning in this case from analogy to the point decided in *Roberts' case, supra,* we must hold there was error in that part of the judgment that taxed the prosecutor Phillips with defendants' witnesses. But the Court say in *Roberts' case* the prosecutor is not necessarily relieved from this cost, if the court below should find the facts required by the statute authorizing the order. So we say in this case, that if the court below will find and certify (774) that these witnesses were proper for defendants' defense, the judgment may stand; if not, it must be modified so as not to tax the prosecutor with the witnesses for the defense.

Modified and affirmed.

STATE v. JOHN H. SNOW.

Indictment for Distilling and Selling Liquor Within Prohibited District—Judicial Notice—Statute—Local Prohibitory Laws—Validity —Repeal.

1. The courts will take judicial notice of the political subdivisions of the State; hence, where in an "omnibus" act prohibiting the sale of spirituous liquors in certain localities an alphabetical list of counties is given, each name being followed by a list of the places within a certain dis-

tance of which the sale or manufacture of liquor is prohibited, the courts will take judicial notice of the fact that the names in alphabetical order are names of counties, although the word "county" nowhere appears in the act.

2. The Legislature has the power to pass local prohibitory laws forbidding the manufacture and sale of intoxicating liquors within certain designated localities.

3. A law prohibiting the sale of intoxicating liquors within two miles of a particular church is valid, notwithstanding a part of the territory so specified is within the limits of a town whose charter had prior to such enactment empowered it to license liquor selling.

4. Private Acts 1895, ch. 107, empowering the voters of Mt. Airy to decide by election whether the sale of intoxicating liquors within the municipality should be licensed, does not repeal Acts 1893, ch. 298, sec. 2, forbidding the manufacture or sale of spirituous liquor within two miles of Oak Grove Church, in Surry, though a part of the territory so specified falls within the limits of Mt. Airy, as the only effect of the subsequent act, in case the majority of votes are for license, would be to except from the operation of the prohibitory law so much of the specified territory as is embraced within the limits of Mt. Airy.

INDICTMENT for manufacturing spirituous liquors within two (775) miles of Oak Grove Church, in Surry County, tried before *Brown, J.,* and a jury, at Fall Term, 1895, of SURRY.

By consent the jury returned a special verdict as follows:

"Oak Grove Church is near Mt. Airy, Surry County (which is an incorporated town), and is one mile outside corporate line. The defendant operates a distillery within the limits of the town of Mt. Airy, and his distillery is within two miles of Oak Grove Church, and within two miles of Male Academy in Mt. Airy. Laws 1893, ch. 298, sec. 2, is part of this finding."

The defendant distilled and sold one quart of brandy at his distillery within two months before the finding of this bill.

Under act 1895, Private Laws, ch. 107 (made a part of this finding), an election was held in May, 1895; the result was in favor of "No License" by a large majority.

Laws 1881, ch. 98; Pr. Laws 1895, ch. 159, sec. 7, are all made part of this finding.

Upon the rendering of such special verdict, the court adjudged the defendant guilty and directed the jury to render a verdict of "Guilty," which verdict was rendered and recorded.

The defendant excepted to the direction and order of the court. The court rendered judgment and fined defendant, who appealed.

Attorney-General for the State.
J. E. Boyd, J. N. Staples and Glenn & Manly for defendant.

(776) CLARK, J. Chapter 298, Laws 1893, "An act to prohibit the sale of spirituous liquor in various localities," gives as is usual in such "omnibus" acts, an alphabetical list, "Alexander, Alleghany, Anson, Ashe," etc., each name followed by a list of places within a certain distance of which the sale or manufacture of liquor is prohibited. The courts take judicial notice of the political subdivisions of the State, because they are prescribed by statute. *S. v. Ray,* 97 N. C., 510. Seeing that in this list all the names are those of counties, when *Surry* is reached it would be "sticking in the bark," indeed, not to construe that part of the act as referring to Surry County. The power of the Legislature to pass local prohibitory acts is settled in *S. v. Barringer,* 110 N. C., 525, and cases there cited. Nor is there any more force in the second objection raised by the defendant. The act (section 2) forbids the making, selling or disposing of spirituous liquor with a view to remuneration within two miles of Oak Grove Church (and divers other places) in Surry. The special verdict finds that the defendant distilled and sold spirituous liquor within two miles of said Oak Grove Church. The additional fact that said distillery was within the limits of Mt. Airy, an incorporated town, has no bearing, for even had the charter conferred on said town the right to license liquor selling, the Legislature is not debarred from curtailing or withdrawing such right by a subsequent act embracing Mt. Airy within territory wherein the sale or manufacture of spirituous liquor is prohibited. The charter (Private Laws 1887, ch. 62, secs. 31 and 35), however, if it had been enacted subsequent, instead of prior to the act of 1893, would not have abrogated by implication the express prohibition in the act of 1893. *S. v. Witter,* 107 N. C., 792.

Nor does chapter 107, Private Acts 1895, avail the defendant. That merely empowered the voters of Mt. Airy to decide by an elec-
(777) tion whether or not the sale of spirituous liquors should be licensed within said municipality. Had the majority of votes at such election been cast in favor of license, the result would have been to except from the operation of the prohibitory act of 1893 so much of the territory within two miles of Oak Grove Church as was embraced within the limits of Mt. Airy. And even then this exception would not have availed the defendant, as such modification would have permitted only the sale, but not the making, of spirituous liquor within the excepted territory. The special verdict finds, however, that such election went "in favor of 'No License' by a large majority." So the

provision of the act of 1893 (ch. 298) prohibiting the manufacture or sale of spirituous liquor within two miles of Oak Grove Church has received no modification, and the court in adjudging the defendant guilty upon the special verdict committed.

No error.

Cited: S. v. Snow, post, 779; *S. v. Bunting,* 118 N. C., 1200; *Broadfoot v. Fayetteville,* 121 N. C., 423; *Guy v. Comrs.,* 122 N. C., 474; *S. v. Sharp,* 125 N. C., 632; *S. v. Knotts,* 131 N. C., 706; *S. v. Piner,* 141 N. C., 762; *S. v. R. R., ib.,* 851; *S. v. Wolf,* 145 N. C., 445; *S. v. Blake,* 157 N. C., 609; *Newell v. Green,* 169 N. C., 463.

(778)

STATE v. JOHN H. SNOW.

Indictment for Selling Intoxicating Liquors—Local Prohibitory Acts —Reference to Statute—Jurisdiction.

1. It is not necessary that an indictment for violating the provisions of a local prohibitory act should refer to the statute, as that is a matter of law, not of fact; and if an act charged in an indictment is in fact a violation of any statute, a reference to a wrong act is immaterial and mere surplusage.

2. The jurisdiction of the Superior Court to try an indictment charging the violation of Acts 1893, ch. 298, sec. 2, which forbids the sale of spirituous liquors within two miles of Oak Grove Church, is not affected by the fact that such indictment further avers the offense to have been a violation of another local act, the penalty for which was within the jurisdiction of a justice of the peace.

INDICTMENT for selling spirituous liquors within the corporate limits of Mount Airy, an incorporated town in Surry County, tried before *Brown, J.,* and a jury, at Fall Term, 1895, of SURRY.

By consent the jury returned a special verdict as follows:

"Oak Grove Church is situated one mile beyond corporate limits of Mount Airy. The Male Academy is in Mount Airy. The defendant operates a distillery for spirituous liquors within the corporate limits of Mount Airy and within two miles of Oak Grove Church and the said Academy. The defendant distilled and sold at his distillery one quart of brandy to J. R. Huntley, for cash, within two months before the finding of this bill. Under Private Laws 1895, ch. 107 (made a

part of this finding), an election was held in said town and 'No License' received a large majority. Following acts made part of this finding: Laws 1893, ch. 298, sec. 2; 1881, ch. 98; 1895, ch. 159, sec. 7; Private Laws 1887, ch. 62."

Upon this finding the court adjudged defendant guilty, and
(779) directed the jury to so find. Verdict of guilty rendered, and defendant appealed.

Attorney-General for the State.
J. N. Staples, J. E. Boyd and Glenn & Manly for defendant.

CLARK, J. The principal points relied upon in this case are passed upon in *S. v. Snow, ante,* 774. The defendant, however, makes the additional objection that by chapter 98, Laws 1881, the sale of spirituous liquors was prohibited within three miles of the Male Academy in Mount Airy under a penalty within the jurisdiction of a justice and, this proceeding having been begun within twelve months after the offense, the Superior Court had no jurisdiction, and, further, that the indictment was defective in not charging the sale to have been "within three miles of the Male Academy in Mount Airy." It is not necessary that an indictment for violating the provisions of a local prohibitory act should refer to the statute, as that is a matter of law, not of fact. *S. v. Wallace,* 94 N. C., 827, cited and approved in *S. v. Downs,* 116 N. C., 1064. For the same reason, if the indictment should refer to the wrong act, it is immaterial and mere surplusage, when the act charged is in fact a violation of any statute. The averment as to the statute is not a matter to be proven. The indictment here alleges a sale of a quart of brandy "within the corporate limits of the town of Mount Airy in Surry County, said territory of Mount Airy being a prohibited territory and the sale of spirituous liquor therein forbidden by act of the General Assembly of North Carolina." The special verdict finds that the sale as aforesaid was made within the corporate limits of Mount Airy and within two miles of Oak
(780) Grove Church. Sale of spirituous liquor within two miles of said church is prohibited by Acts 1893, ch. 298, sec. 2, under penalty of fine and imprisonment in the discretion of the court. Upon the facts charged in the indictment and found by the verdict, the defendant had violated the latter act and the Superior Court had jurisdiction. It was mere surplusage that the indictment further averred the offense to have been a violation of chapter 98, Acts 1881, as that was a matter of law and not issuable. It is sufficient if acts are alleged and proven which constitute a violation of the statute, though another

statute may be referred to in the indictment. The defendant cannot be prejudiced thereby, as the needless averment of the statute is not a matter of proof, and knowledge of the law is conclusively presumed. Upon the facts found in the special verdict the defendant has violated equally the local prohibitory act of 1881, ch. 98, and that of 1893, ch. 298, and the jurisdiction of the Superior Court attaches by virtue of the latter.

No error.

Cited: *S. v. Smith,* 126 N. C., 1058.

STATE v. CHARLES MIZE.

Bastardy—Jurisdiction of Justice of the Peace.

A justice of the peace has by the express terms of section 31 of The Code jurisdiction to try a bastardy proceeding commenced by the voluntary affidavit of the mother.

BASTARDY PROCEEDING, tried *de novo* before *Brown, J.,* and a jury, at July Term, 1895, of ALEXANDER, on appeal from a justice of the peace.

The defendant was convicted, and moved to quash the proceeding and in arrest of judgment upon the ground that the justice of the peace had no jurisdiction. The motion was refused, and defendant appealed. (781)

Attorney-General and R. B. Burke for the State.
No counsel for defendant.

FURCHES, J. This is a proceeding in bastardy, commenced before a justice of the peace upon the voluntary affidavit of Amanda Pool, the mother of the bastard. Upon the trial before the justice the defendant was found to be the father, and, upon judgment being pronounced, appealed to the Superior Court. In that court the defendant pleaded not guilty, a trial was had, and verdict of guilty having been returned by the jury, "the defendant moved to quash the proceedings and arrest the judgment upon the ground that the justice of the peace had no jurisdiction." The case was not argued in this Court for the defendant, and we are not informed upon what reasoning he has arrived

at the conclusion that the justice had no jurisdiction. The statute (The Code, sec. 31) in express terms confers this jurisdiction upon justices of the peace. It is true that it provides that the proceeding must be commenced by the voluntary affidavit of the mother, or it may be in certain cases commenced by the county commissioners. But in this case the proceeding was commenced by the mother in the manner prescribed by the statute. And this jurisdiction of the justice has been sustained by this Court in *S. v. Wynne,* 116 N. C., 981. The judgment must be

Affirmed.

(782)

STATE v. JULIUS HICE ET AL.

Practice—Evidence of Good Character.

1. In all cases a person accused of a felony or misdemeanor may on the trial offer testimony of his good character, and this right does not depend upon the defendant having been examined as a witness in his own behalf.

2. In case a defendant offers testimony as to his good character, the prosecution may show the defendant's bad character either by cross-examination or by other witnesses.

CRIMINAL ACTION, tried before *Boykin, J.,* and a jury, at Fall Term, 1894, of CALDWELL, for the crime of fornication and adultery.

There was evidence offered on the part of the State tending to prove the guilt of both the defendants. The defendants were not offered as witnesses, and did not testify in their own behalf at the trial of the cause.

Upon the trial the defendants introduced James Miller as a witness, and asked the witness if he knew the general character of Hice, to which he answered "Yes." "What is it?" To this the State Solicitor objected. Objection was sustained by the court, the answer excluded, and the defendants excepted.

The counsel for the defendants then proposed to prove by said witness that the general character of the *feme* defendant was good. The Solicitor objected. Objection sustained by the court, and defendants excepted.

There was a verdict of guilty. Rule for a new trial by defendants, assigning as cause for a new trial the exclusion of the evidence offered as to the general character of the defendant Hice, and also as to character of the *feme* defendant.

Motion was refused, and defendants appealed.

Attorney-General for the State. (783)
George N. Folk, M. Silver and Lawrence Wakefield for defendants.

CLARK, J. "In all cases a person accused of a crime of any grade, whether a felony or a misdemeanor, has a right to offer in his defense testimony of his good character." *S. v. Henry,* 50 N. C., 65; *S. v. Johnson,* 60 N. C., 151; *S. v. Laxton,* 75 N. C., 216; 3 A. & E., 111. This right is not dependent upon the defendant having been examined as a witness in his own behalf, and was recognized long before defendants were made competent to testify. It is limited to evidence of general character, and opens the door, which would be otherwise closed, to the prosecution to show the defendant's general bad character either by cross examination of by other witnesses. *Rex v. Stannard,* 7 Carr. & P., 673; 2 Hawkins P. C., ch. 46, sec. 194. In excluding the testimony there was

Error.

Cited: S. v. Green, 152 N. C., 838; *S. v. Holly,* 155 N. C., 492; *S. v. Robertson,* 166 N. C., 361; *S. v. Morse,* 171 N. C., 778.

STATE v. D. M. BRITTAIN ET AL.

Indictment for Incest — Confession — Confidential Communication Between Husband and Wife—Evidence.

1. The general rule that evidence competent against one only of several defendants is admissible, with the instruction by the court that it shall not be considered as against the others, is subject to the exception that a confidential communication between husband and wife cannot, on grounds of public policy, be so admitted as evidence.

2. Where a wife, on threats of her husband to leave her, confessed to having committed incest, such confession, being a confidential communication, is inadmissible, and its subsequent repitition to a third party under similar circumstances, in the presence of the husband, is incompetent in the trial of an indictment against the wife and another for incest.

INDICTMENT for incest, tried before *Bryan, J.,* and a jury, (784) at Fall Term, 1895, of CATAWBA.

The defendants were convicted, and appealed. The facts appear in the opinion of *Chief Justice Faircloth.*

Attorney-General for the State.
L. L. Witherspoon and Jones & Tillett for defendants.

FAIRCLOTH, C. J. The defendants, father and daughter, are indicted for incest. This offense was not indictable at common law, but is so by statute. The Code, secs. 1060 and 1061. The *feme* defendant was married to A. H. Williams on 12 November, 1893, at whose school she had been a pupil, and was visited by him before marriage. At the time of the marriage she was visibly pregnant, and her child was born on 26 February, 1894.

About one week after the marriage the husband urged his wife to accuse her father as the father of the child, and continued to worry her for a week, telling her finally, if she would say so, he would cease worrying her and stick to her for life, and that if she did not he would go to the State of Washington the next day and leave her to sit alone. She at last said she would say "Yes" to what he would say about it. In a week he took her to his father, and at night told her if she did not state to his stepmother, Rosanna Williams, what she admitted to him, he would leave for Washington next day. He then took her to Rosanna and, sitting between them, said: "Now, Brentie, you tell Rosanna what you told me about being guilty of your Pa." She then, in that condition, admitted she had been guilty with her Pa. After this they slept together as man and wife. After Rosanna had testified, the *feme* defendant was examined and admitted that she made the con-
(785) fession under the influence and threats of her husband, but said it was not true, and deined her guilt as charged, and said her husband was the father of her child. On the trial Rosanna was examined by the State to prove this confession, when the defendants objected on the ground of incompetency by reason of the facts above stated. The court overruled the objection, stating that the confession was evidence against the *feme* defendant only. Defendants excepted. Rosanna then testified to the confession. Several other witnesses were examined, and at the close of the evidence the defendants prayed for this instruction: "That from all the evidence offered in the case, in no aspect thereof is there sufficient evidence to convict." This was refused, and that was error. After verdict, "appeal by the defendants prayed and granted."

As a general rule evidence competent against one defendant only is admissible, with instruction by the court that it shall not be received as evidence against the other. To this general rule the confession in this case is an exception, and is so on the ground of public policy.

The relation of husband and wife is confidential, from unity of interest and sometimes unity of person, as in case of a joint estate to them. The law requires and extorts this confidence, and it will protect it. Communications between them cannot be exposed to public view. The interest of the home, the parties, the children and especially the peace and order of society forbid it. Lord Coke said: "It hath been resolved by the justices that a wife cannot be produced either against or for her husband *quia sunt duae animae in corne una;* and it might be a cause of implacable discord and dissension between the husband and wife and a means of great inconvenience." Co. Litt., 6 b.

It is true that the confession under consideration does not (786) affect the husband in a legal sense, but it does affect her, and it violates the principle of public policy above referred to.

The first confession was a confidential communication made under the influence of the husband and, soon after, the second confession was made at his instance and in his presence to Rosanna, who was a competent witness, whilst the husband was not. We are to assume that the second was made under the same influence that produced the first confession. It being, then, incompetent against the *feme* defendant, and incompetent against the male defendant because it was not his confession, the evidence should have been withheld and excluded. We do not know nor undertake to consider the weight of evidence before a jury, but no reason appears why incompetent testimony should be heard by a jury.

When a confession is made through hope or fear, subsequent confessions are presumed to proceed from the same influence until the contrary be shown by clear proof, and until then the latter confessions are not admissible evidence. *S. v. Roberts,* 12 N. C., 259.

The principle of excluding such evidence is ably considered in the opinion in *S. v. Jolly,* 20 N. C., 108, 110, indicated for fornication and adultery. There, after a divorce was duly certified, the *feme* defendant and Jolly were put on trial, and the divorced husband was offered to prove the defendant's adulterous intercourse while the marriage relation existed. It was held that he was incompetent to prove that or any other fact which occurred while the marriage subsisted.

When a person is charged with crime, his answer or his silence may be considered by the jury. The evidence of Dr. Ford does not fall within that rule, as he did not charge the male defendant (787) with any offense, but talked about reports and whiskey.

With the confession excluded, we have no difficulty in holding that the evidence as a whole was not of a character to go to the jury on a

question of guilt or innocence. For the errors assigned there must be a

New trial.

CLARK, J., dissenting: It cannot be controverted that communications between husband and wife, on grounds of public policy, cannot be given in evidence, and this incompetency cannot be removed by waiver or by the subsequent divorce of the parties. But there was no offer here to give in such evidence. It was simply a confession of a crime made by a woman who happened at the time to be married, and was made to a third party, not as a transaction or communication made to her husband, but as a substantive, independent confession. She did not state in her confession that she had repeated the substance or any part of it to her husband. It would have been incompetent to have shown that she had done so either to corroborate or contradict her, but the substantive, independent confession was not rendered incompetent by the fact that perhaps she had also made it to her husband.

Nor was the bare fact that she made the confession in the presence of her husband and at his instance, he (not she) remarking that she had also told it to him, conclusive evidence of duress. There was at this time no evidence of threats or promises. His Honor, by overruling the obejction raised on that gronud, found that there was no duress, and his finding is not reviewable. *S. v. Burgwyn,* 87 N. C., 572. Besides, on the evidence as it then stood this ruling was correct. The remark of the husband that she had narrated the matter to him should have been ruled out if the defendants had asked that it be done, but they did not.

If afterwards, when the wife was examined in her own behalf, (788) she testified to a state of facts which tended to show duress, if true, his Honor should have been asked to pass upon the sufficiency of this subsequent evidence to show duress by a motion to strike out the confession, and we cannot hold that it should have been stricken out; certainly not in the absence of any ruling of the court below upon it and an exception taken. The weight of the evidence was for the jury and cannot affect the legal questions presented for review.

Cited: Autry v. Floyd, 127 N. C., 187; *S. v. Wallace,* 162 N. C., 630; *S. v. Randall,* 170 N. C., 760.

STATE v. SHEP BENTON.

Indictment for Slandering Innocent Woman—Slander—Malice—Presumption.

Where on the trial of one charged with slandering an innocent woman, the evidence was that the defendant said of a chaste woman that she looked like a woman who had miscarried, it was error to instruct the jury that the words *per se* implied malice. *Quære*, whether the words alone are of such character as to justify the court in submitting them to a jury upon a question of guilt.

INDICTMENT for slandering an innocent woman, tried before *Robinson, J.*, and a jury, at January Term, 1895, of UNION.

On the trial one Ingram Hogler, a witness for the State testified that in August, 1892, he and defendant were working together, and a conversation arose between them as to why Nancy Love had left the school she had been teaching and gone to Greensboro Female College; that defendant said in this conversation that Miss Love had returned and looked badly; that defendant saw her at a distance of 40 yards, and she "looked like a woman who had miscarried." There was also evidence on the part of the State that the defendant, after he (789) was indicted before a magistrate on this same charge, said that he intended to get witnesses by whom he would prove the charge preferred against Miss Love. There was evidence on the part of the defendant that he did not use the words testified to by Hogler, but that what he did say "that Miss Love looked like she had been confined to her bed with sickness for a long time." It was also denied by defendant through his witnesses that he used the language imputed to him by the State, after his indictment before the magistrate.

Special instructions asked by the defendant: "(1) That the words 'confined to a bed with sickness' do not in law amount to a charge of incontinency. (2) What words amount to such charge is a question of law. (3) That said words are in law not a charge of incontinency, and defendant is not guilty, and the jury should acquit. (4) That the words 'she looked like a woman who had miscarried' do not amount to a charge of incontinency, and the jury should acquit." The court gave Nos. 1, 2 and 3, and refused to give No. 4. Being requested by defendant to reduce the charge to writing, the court gave the following to the jury: "Defendant is indicted under the statute which provides that if any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken which

amounts to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. To constitute this offense the words spoken must amount to a charge of actual illicit sexual intercourse. It is admitted in this case that the woman of whom the alleged slanderous words were spoken is chaste and virtuous. If from the evidence you find beyond a reasonable doubt that defendant spoke of and
(790) concerning Nancy Love that 'she looked like a woman who had miscarried,' then the law would imply malice, as these words of themselves amount to a charge of incontinency when spoken of a single woman, as this woman is admitted to be. If you find that the words spoken were that 'she looked like a woman who had been confined to her bed by sickness,' such words would not amount to a charge of incontinency, and defendant would not be guilty. The burden is on the State to satisfy you beyond a reasonable doubt that defendant said she looked like a woman who had miscarried. If you so find, then he is guilty; otherwise, you will acquit." Defendant excepted to the refusal of the court to give the fourth instruction, and to that portion of the charge to the effect that the words alleged by the State to have been used by the defendant implied malice and were *pe se* slanderous when spoken of an innocent and virtuous single woman, Miss Love being admitted by the defendant to be such.

There was a verdict of guilty, and defendant appealed from the judgment thereon.

Attorney-General for the State.
No counsel contra.

FAIRCLOTH, C. J. The defendant is indicted for slandering an innocent woman. The indictment charges that the defendant wantonly and maliciously declared in substance that Nancy S. Love was an incontinent woman. The material evidence was that the defendant said that said Nancy "looked like a woman who had miscarried." The court told the jury that if they were satisfied beyond a reasonable doubt from the evidence that the defendant said she "looked like a woman who had miscarried," then he is guilty, and the law implies malice from such words spoken concerning a single and chaste woman, as Nancy is admitted to be. This was error, as these words do not, without some evi-
(791) dence of the conditions, circumstances and surroundings under which they were spoken, *per se* imply that he intended to say that the woman had been guilty of sexual intercourse. It was an expression of an opinion as to her personal appearance, and the defendant was entitled to explain, if he could, what he did mean. Under

the charge, however, the jury was bound to render a verdict of guilty, whatever they might have believed and whatever the defendant may have meant. The expression does not necessarily imply a previous state of pregnancy, as such an appearance might result from some other cause. In adopting this course we expressly reserve the question, if it comes to us again, whether the same words alone are of such a character as to justify the court in submitting them to a jury upon a question of guilt.

New trial.

Cited: *S. v. Harwell,* 129 N. C., 553; *McCall v. Sustair,* 157 N. C., 183.

STATE v. GEORGE W. LONG.

Indictment for Assault—School Teacher—Whipping Scholar—Malice, Definition of—Instructions.

1. If a teacher uses excessive force or inflicts such punishment upon a pupil as to produce permanent injury, or if he inflicts punishment not in the honest performance of duty, but, under the pretext of duty, to gratify malice, he is guilty of an assault.

2. Malice against mankind is wickedness, a disposition to do wrong, a diabolical heart regardless of social duty and fatally bent on mischief, while particular malice is ill will, grudge, a desire to be revenged on a particular person.

3. On the trial of a school teacher for an assault upon his pupil, the trial Judge instructed the jury that defendant was guilty if he inflicted a permanent injury or if he inflicted it from malice, "which means bad temper, high temper or quick temper": *Held,* that there was error, both because of the erroneous definition of malice and the failure to distinguish between general and particular malice, and because it cannot be known whether a verdict of guilty rendered under such instruction was based upon the finding that a permanent injury was inflicted, or that there was malice as defined by the trial Judge.

INDICTMENT for assault, tried before *Meares, J.,* at June Term, (792) 1895, of the Circuit Criminal Court of the Eastern District for MECKLENBURG.

The defendant was a school teacher and had whipped the prosecuting witness, a boy of 13 years, with a hickory switch or sprout, inflicting injuries from which the boy suffered some weeks.

Zeb Gardener testified: "I am about thirteen years old, and was going to school to Mr. Long last February. He whipped me with a hickory withe about three feet long and as large at the butt end as my thumb—whipped me for shooting a boy with a small crossbow. The boy held up his hand for me to shoot at and I shot him with a small arrow, which had a pin in the end of it. We were not mad at each other. The bow would not shoot more than three steps. I did not hear Mr. Long tell me, before I shot, not to do so. He struck me seven times with the hickory and twice with the other switch. I used crutches for more than a month to walk with. The switch he whipped me with was a sprout. Had been on good terms with Mr. Long always before that time. At the time he whipped me he said I was a good boy, had never given him trouble before, but that I had disobeyed him and he would have to whip me."

Mrs. Miller testified: "I am the grandmother of Zeb Gardener. (793) He was thirteen years old last January. Zeb came home on Monday, the day of the whipping; did not eat much dinner, and complained that his leg hurt him, where Mr. Long had whipped him. There was one cut on his leg three or four inches long—two others not so long, and were not bleeding; his stocking was bloody. This was 12 o'clock; saw it again that night; badly bruised between the cuts, which were located on the calf of the leg. Monday night he moaned all night; had to prop up his leg in bed. Tuesday night he complained and moaned all night. I waked up his father and told him about Zeb's condition. Zeb had his head thrown back and had violent pains and trembled like a leaf; gave him laudanum and other things; teeth chattered; sat up with him all night; did not seem to know anything until Friday morning; he was continually crying, 'Oh, my leg!' It was about a week before he could get up, his leg was propped up all the time; after that he went about on crutches; he complains sometimes now; used laudanum and smoked sugar on his leg; on Wednesday used vaseline and carbolic salve. Long acknowledged that he cut several times in the same place. Zeb said his knees and breast hurt him; said pain was also in his head and jaw and affected his breathing."

Jonas Gardener testified: "I am father of Zeb. I first knew of the whipping Tuesday night. He was ailing before that, but I did not know what was the matter. On Tuesday night he had spasms, jerking his head back and gritting his teeth; kept up until one hour before day. His leg was swollen and bloody; water was oozing out. He lay on the pallet for thirteen days. I then brought him to town court week; never walked at all for fifteen days, then he used crutches for some-

thing like a month. Long was at my house and said he was high strung and liable to get mad. Said he was a little off on that day and was mad. He said this in the presence of Zeb's grand- (794) mother. I sent for the doctor on Thursday, and he would not come. Long said he whipped Zeb because he was disobedient; that he never had had trouble with him before, and that he was a good boy."

The defendant, G. W. Long, introduced in his own behalf, testified: "I am a school teacher. Have been teaching for some six or eight years. Zeb Gardener, the prosecutor, was one of my pupils. On Monday morning (the day of the whipping) at recess, as I was walking out of the schoolroom on the playground, I saw Zeb have a crossbow and an arrow with a pin stuck in the end of it. I told him not to shoot on the ground, as he might injure some of the children. I was very close to him, and as I spoke he lowered the crossbow from an attitude of shooting, which satisfied me that he had heard what I said. On my return I was told that he had shot one of the boys in the hand, not inflicting any great injury. I sent for Zeb and the boy that was shot, and whipped them both with the same switch. Before whipping Zeb, I told him that I was very sorry that I had to whip him; that he had always been a good boy and had never given me trouble before, but that I had expressly commanded him not to shoot the bow on the ground, and that he had, almost immediately, violated my instructions. He said that he knew he had done wrong, and was willing to take the whipping. I struck him two licks with a small switch that I had in the schoolroom, and the switch broke. I sent one of the boys out for another switch. He returned with two; both of them were hickory sprouts of one year's growth; the largest one, at the butt end, was about the size of my little finger, and probably three feet long. I trimmed the knots off carefully and limbered it up with my hand. I then struck Zeb some six or seven (795) licks with this switch: did not entend to and do not think I struck him too hard. I whipped him around the legs; struck him on the calf of the leg (which was only protected by a stocking) unintentionally. He made no outcry until I struck him the last lick, and when he made the first sign of pain I stopped. I then whipped the other boy with the same switch, but not quite as hard as I whipped Zeb. I do not know whether I whipped him with the large switch or the small one Mr. Gardener, Zeb's father, went to the schoolhouse afterwards and got possession of both switches, and I have not seen them since. He made no complaint that day to me, and came back to school Tuesday and appeared to be as well as usual. On Wednesday I heard that his father wanted to see me, and I went to the house and saw Zeb lying on a pallet. His leg was swollen and had three whelps on the calf. In one

of them the skin was broken and it appeared to be irritated—had a bluish, reddish look, as if he had caught cold in it. I told Mr. Gardener I did not know I had hit the boy hard enough to inflict this wound, and that probably the reason the skin was broken in this place was because the hickory had struck twice in that place. I deny ever having told Gardener that I was off and was mad. I did not twist the switch under my foot, and was not in the least angry. I saw no blood oozing out of the wound on the day he was whipped or when I saw him on Wednesday at his home. I had no malice or ill will toward the boy; he had never given me trouble before, and I only whipped him because I felt it necessary to do so to maintain discipline in the school, and also thought he needed punishment for disobeying my orders."

At the close of the evidence the defendant requested the court to charge the jury as follows:

"1. That, in order to convict the defendant, the jury must be
(796) convinced beyond a reasonable doubt, or fully satisfied, that the injury was inflicted, not for punishment or for correction of the boy because of his disobedience, but from malice towards him, or that the injury is permanent.

"2. That there is no evidence of malice.

"3. That there is no evidence that the injury is of a permanent character, such as the law makes it criminal to inflict.

"4. That the defendant had the right to punish the boy, Zeb Gardener, for disobedience, for any violation of the rules of the school, and had the right, also, to whip him; and even if the jury believe that the punishment was excessive or cruel they cannot convict unless they also find that the defendant was actuated by malice towards the boy, or unless the defendant inflicted a permanent injury upon him.

"5. That if the jury find that the injury is one from which the boy, Zeb Gardener, will recover, and that the defendant was not actuated by malice, but punished Gardener because of his disobedience, they will acquit the defendant.

"6. That the judgment of the school teacher as to the amount of punishment inflicted for any disobedience of his pupils is presumed to be correct, and the burden is on the State to satisfy the jury beyond a reasonable doubt that the teacher (the defendant in this case) was either actuated by malice towards his pupil, Zeb Gardener, or that the injury inflicted is permanent."

His Honor refused to give the second and third prayers for instructions, and remarked that the first, fourth, fifth and sixth prayers had been substantially given in his general charge to the jury, and
(797) they were therefore, not read separately to the jury.

The court charged the jury generally, as follows: "A school teacher has the authority to inflict such punishment upon his pupils as in his judgment may be necessary for purposes of correction, and although he may be at fault in his judgment and inflict punishment of too great severity, in fact amounting to cruelty, yet he cannot be convicted unless he inflicts some permanent injury upon his pupil, or unless he inflicts some punishment from malice. There are, however, only two cases in which a school teacher can be convicted of a criminal assault when he is inflicting punishment upon his pupils. That is, where he acts from malice or when he inflicts a permanent injury upon the pupil. Malice means bad temper, high temper or quick temper, and if the jury find that the injury was inflicted upon Zeb Gardener from malice, as above defined, then they should convict the defendant. Or, if the jury should find that there was no such malice, and the defendant inflicted a permanent injury upon Zeb Gardener, his pupil, they should convict the defendant, even though he was at the time punishing the pupil for some disobedience or some infraction of the rules of the school. The State must satisfy the jury beyond a reasonable doubt that the defendant either acted from malice or that he inflicted a permanent injury upon Zeb Gardener before they can convict him."

The defendant excepted to his Honor's refusal to give the instructions prayed for by him, and further excepted because his Honor charged the jury that there was evidence of malice and also evidence that permanent injury had been inflicted upon the prosecutor, Zeb Gardener. The defendant further excepted because his Honor charged the jury that malice meant bad temper, high temper or quick temper, and if the defendant, inflicted the injury upon the prosecutor from bad temper, high temper or quick temper, he would be guilty as (798) charged in the indictment.

There was a verdict of guilty. The defendant moved for a new trial. The motion was overruled, and the defendant excepted, the said motion being based upon the exceptions above set forth.

There was a judgment upon the verdict; the defendant excepted and appealed.

Attorney-General for the State.
Burwell, Walker & Cansler for defendant.

FAIRCLOTH, C. J. The defendant was convicted for whipping a school child about thirteen years of age. The authority of teachers to correct their pupils for disobedience and the limitations thereon have long since been settled.

1. If they inflict such punishment as produces or threatens lasting mischief, they are guilty.

2. If they inflict punishment not in the honest performance of duty, but under the pretext of duty to gratify malice, they are guilty. *S. v. Pendergrass,* 19 N. C., 365.

His Honor charged the jury: "1. That if the defendant inflicted a permanent injury he was guilty. 2. Malice means *bad* temper, *high* temper or *quick* temper, and if the injury was inflicted from malice, as above defined, then they should convict the defendant." This definition of malice is imperfect and misleading. It may exist without temper, and it may not exist although the act may be done whilst under the influence of temper, bad, high or quick. It is well defined in *Brooks v. Jones,* 33 N. C., 260: "General malice is wickedness, a dis-
(799) position to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief." This is malice against mankind. "Particular malice is ill will, grudge, desire to be revenged on a particular person." This distinction was not explained to the jury, but the term "malice" was given to them with an erroneous definition. Whether the jury rendered a verdict of guilty on the ground of permanent injury, which was a good ground if they so believed, or on the ground of malice, "as above defined," we do not and cannot know, and we must direct that the matter be further inquired of. The error was in the mistaken definition of malice. As the case goes back, we need not discuss the other matters argued before us. The rule forbidding the use of excessive force applies to school teachers and all in like positions, as it does to all other persons.

New trial.

Cited: Drum v. Miller, 135 N. C., 216; *S. v. Thornton,* 136 N. C., 616; *S. v. Knotts,* 168 N. C., 184.

STATE v. MINOR LYTLE.

Indictment for Burning Barn—Venue—Presumptive Evidence.

1. Where an indictment charged that an offense was committed in a certain county, and on the trial there was no evidence that it was committed in that county, and there was no plea in abatement or any request that the trial Judge should instruct the jury on that matter, it was not the duty of such Judge to instruct the jury to render a verdict of not guilty.

2. Inasmuch as section 1194 of The Code provides that it shall be presumed that the offense was committed in the county in which the bill of indictment alleges it to have been committed, the defendant must make his denial by plea in abatement, if he claims the offense to have been committed in another county, and where it is claimed that it was not committed in this State at all it may be shown as a matter of defense under the general issue.

3. Where the bill of indictment charged that an offense was committed in a certain county of the State, but there was no evidence of venue, the presumption under section 1194 of The Code is that it was committed in the State.

4. On a trial for arson it was not error to permit a witness to testify that a short time before the burning defendant was complaining that the prosecutor claimed too much rent of him; that the witness asked him what he was going to do about it, and defendant replied, "I'll burn it."

5. It was not error to permit a witness to testify that on the night of the burning, about 7:30, he met a man whom he took to be defendant; that he was within seven steps of the man, in the road, near witness' house; that he was a low, chunky man; that it was too dark to see whether he was white or black; that he had his back to witness and had on a dark sack coat, and that he had known defendant ten years and seen him often.

INDICTMENT for barn burning, tried before *Ewart, J.*, at the (800) July, 1895, Term of the Criminal Circuit Court of BUNCOMBE.

The defendant was convicted, and appealed. The facts appear in the opinion of *Associate Justice Furches.*

Attorney-General and Locke Craig for the State.
Adams & Parker for defendant.

FURCHES, J. The exceptions not appearing very plainly from the record, it was agreed by the Attorney-General and Mr. Adams, who represented the defendant, to submit the case on three exceptions: 1. That there was no evidence that the offense charged (burning a barn) was committed in Buncombe County. 2. As to the admission of evidence that defendant had threatened to burn the barn. 3. The court erroneously allowed the evidence of Dawkins as to seeing defendant the night of the fire.

The first exception cannot be sustained. The indictment charged the offense to have been committed in Buncombe County. Defendant pleaded not guilty and went to trial, and there was no evi-

(801) dence introduced to show that the offense was committed in Buncombe County or any other county. It was in evidence that it was within eleven miles of Asheville. But we will leave this evidence out of the case in considering this exception. There was no such point made on the trial, no request that the court should rule upon this question, no instruction asked as to this point. But the question is attempted to be raised by the exception as to the charge of the court that, there being no evidence on this point, the court should have directed the jury to return a verdict of not guilty. For this position the counsel for defendant cited *S. v. Revels,* 44 N. C., 200, which tends to sustain his position. And while this case was decided in 1853, it seems to have been put upon the question of sufficient evidence, and a case in 6 Eng. Com. Law, 413, is cited as authority; and the statute of 1844 (The Code, sec. 1194) seems to have been entirely overlooked.

This statute reversed the rule which seems to have obtained on the trials of criminal cases before its enactment. It was intended to do so, and we must hold that it did do so. It provides that it should be presumed that the offense was committed within the county in which the indictment charges it to have been committed, and makes it a matter of defense, if this is denied by defendants, to be taken advantage of by plea in abatement, if it is alleged to have occurred in another county of this State, as held in *S. v. Outerbridge,* 82 N. C., 617; or, where it is insisted that it was not in this State at all, it may be shown as a matter of defense under the general issue as in *S. v. Mitchell,* 83 N. C., 674. These cases clearly establish the rule in such cases under the statute of 1844, *supra,* to be a matter of defense, and overrule the case of *S. v. Revels, supra.* But it was insisted by counsel for de-

(802) fendant that the act of 1844 only made this presumption as to the county in which the offense was committed, and it made no presumption that it was committed within the State. But it would be so illogical to say that it was committed in Buncombe County, which is a part of the State, and then say it was not committed within the State that we must decline to give this proposition our assent.

The second exception cannot be sustained. One Van Allen, among other things, testified that in a conversation with defendant a short time before the burning, in which defendant was complaining of the prosecutor Merrill claiming too much rent, the witness asked defendant what he was going to do about it, when defendant replied: "I'll burn it, I'll burn it, I'll burn it." This evidence was objected to by defendant, allowed by the court, and defendant excepted, and cites *S. v.*

Norton in support of his exception. But this case is distinguishable from Norton's case. That was an indictment for assault and battery. There was no dispute as to the parties engaged in the difficulty, and it was held to be incompetent, as it could not tend to explain the fight. But in that case it is said that it is competent in cases where it became material to show intent. This case is a case of circumstantial evidence. The fact that the barn was burned was not denied. But who did it was the question. The State alleged that it was the defendant, and offered this evidence as one fact, or link in the chain, connecting the defendant with the burning; that he had the motive, which is always considered a leading fact in circumstantial evidence. And in this view threats were allowed to be proved in *S. v. Rhodes,* 111 N. C., 647; *S. v. Thompson,* 97 N. C., 496; *S. v. Gailor,* 71 N. C., 88, all of these cases being for burning houses, and they were all approved by this Court.

The third exception cannot be sustained. John Dawkins, (803) among other things, testified: "I recollect the night when the barn was burnt. I met a man whom I took to be Lytle; I was in seven steps of him, the man whom I took to be Lytle, in the road near my house. He was a low, chunky man. It was too dark to see whether he was white or black. He had his back to me, had on a dark sack coat. I have known Lytle ten years, have seen him often. Had I spoken to him I would have called him Lytle. This was almost 7:30, on the Howard Gap Road. This was the night the barn was burnt." This evidence was objected to, allowed, and defendant excepted, and *S. v. Thorp,* 72 N. C., 186, is cited to sustain the exception. But it will be seen that this case is easily distinguishable from *Thorp's case.* That case holds that a witness should not be allowed to give his "impression as to the matters of which he has no personal knowledge," that is, he should not be allowed to give the results of his mind, his reasoning, as evidence, but only the results produced on his senses, as seeing, hearing, etc. In fact, the case of *S. v. Thorp* sustains the ruling of the court, as does also that of *S. v. Rhodes, supra.* It is true that it appears from the evidence sent up that, upon cross-examination by defendant, the witness Dawkins said: "I only judged it was Lytle from his chunky build and the fact that I had heard he had gone up the road that day." If this had been the evidence called out by the State under the objection of defendant, we would have held that the latter part of the sentence ("and the fact that I had heard he had gone up the road that day") was improper as a means of identifying Lytle. This would have fallen within the criticism of *Judge Reade*

in delivering the opinion in *S. v. Thorpe, supra.* But there are two reasons why it cannot avail the defendant here: it was called (804) out by him on cross-examination, and it was not objected or excepted to.

Affirmed.

Cited: S. v. Costner, 127 N. C., 573; *S. v. Holder,* 133 N. C., 711; *S. v. Lewis,* 142 N. C., 636; *S. v. Long,* 143 N. C., 674; *S. v. Carmon,* 145 N. C., 494; *S. v. Walker,* 149 N. C., 531; *S. v. Lane,* 166 N. C., 336; *S. v. Rogers,* 168 N. C., 114; *S. v. Bridgers,* 172 N. C., 882; *S. v. Clark,* 173 N. C., 745.

STATE v. RICHARD WHITT.

Practice—Suspension of Judgment—Judgment, Enforcement of after Being Suspended at Former Term of Court.

1. When a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure.

2. Where a defendant was sentenced to five years' imprisonment and, after serving six days, was brought into court at the same term and judgment was suspended on his agreeing to pay the costs of the prosecution and the money which he had embezzled from his sister, the court had the power at a subsequent term of the court, on his failure to pay the costs (but not for his faliure to return the embezzled money), to sentence him to imprisonment for one year.

THE defendant was found guilty of embezzlement at November Term, 1894, of the Inferior Court of Madison, and was sentenced to five years in the county jail of Madison, to be worked on the public roads, pursuant to the statutes in such cases provided. During the term of the said court, after an imprisonment of six days, at the suggestion of the Solicitor and counsel for the prosecution, the defendant was brought into court and agreed to pay the prosecutor, his sister, the amount which he had embezzled from her and the costs of the case. Thereupon the court ordered the Clerk to make the entry upon his record, "Judgment suspended." After the adjournment of the court the attorney for the defendant requested the Sheriff to bring the defendant before the Clerk, where and when he executed a

deed of trust to secure the prosecutor the amount embezzled and the costs of the action: and, upon the statement of the defendant (805) that he would have the same registered, the Clerk directed the Sheriff to release him, which was done. Neither the Solicitor nor the attorneys for the prosecution were present at the time, nor does it appear that either directed this action. The deed of trust was never delivered to the Register by the defendant, nor does it appear what became of it, and at the February (1895) Term of said Inferior Court the defendant, being in court and having failed to pay either the amount embezzled or the costs, upon motion of the Solicitor, was prayed into the custody and committed to jail to serve out the sentence hitherto imposed. At this term of the court, to-wit, February Term, 1895, Inferior Court, the Solicitor for the State agreed, if the defendant would file a justified bond in the sum of $500 conditioned for his appearance at the succeeding June Term, 1895, and would show to the court that he had paid to the prosecutor (his sister) the amount he had embezzled from her and the costs, that he would recommend a suspension of the judgment. After the adjournment of the court the defendant, through his attorney, filed a deed of trust on his real estate in the sum of $500 conditioned for his appearance at the next term of the Inferior Court, and thereupon the defendant was discharged. The Inferior Court was abolished, and the Criminal Circuit Court succeeded to its jurisdiction. At this, the June Term, 1895, Criminal Circuit Court, *Ewart, J.*, presiding, it appearing to the court that defendant had neither paid to the prosecutor (his sister) the amount he had embezzled from her nor the costs, and the records of the Inferior Court showing that judgment in the cause had been suspended only on motion of the Solicitor for judgment, the defendant being present, it was ordered by the court that the defendant, Whitt, be imprisoned for one year in the county jail, to be worked on the public roads under the supervision of the Sheriff, as provided by the statute. From this judgment the defendant appealed to the Su- (806) preme Court.

Attorney-General for the State.
V. S. Lusk for defendant.

MONTGOMERY, J. *S. v. Warren,* 92 N. C., 825, upon which the counsel for defendant chiefly relied, was not like the case before us. There, the judgment of the court was that defendant be confined for twelve months in the county jail, and he had entered upon the term of imprisonment. During the same term of the court, upon defendant

paying the cost of the prosecution and also certain other costs in other matters against him, which he really did not owe, and upon his further entering into bond to keep the peace and also to keep sober, the judgment was suspended and he was discharged. Some months afterwards, while drunk, he committed an assault upon a man and was arrested for the breach of the peace and the breach of the bond. Upon the hearing the court construed the former proceedings as a vacation of the sentence, and its suspension to await the defendant's observance of the conditions imposed, and pronounced judgment for the reimprisonment of defendant for the same period of twelve months. On appeal from this judgment the Court said: "The legal effect of the record, according to our interpretation, is a remission of the rest of the imprisonment upon the terms and conditions which were accepted and carried into effect by defendant." In the case now before us the defendant, after undergoing six days imprisonment under a term of five years pronounced against him, was brought before the court during the same term, and upon his agreeing to pay the costs of prose-
(807) cution into court, and to his sister the amount he embezzled from her, "judgment was suspended." He failed to pay the costs (and also failed to pay to his sister the amount which he agreed to pay her—an immaterial matter for present purposes) and in consequence thereof was arrested and compelled to give bond for his appearance at the June Term of the Criminal Court of BUNCOMBE. Before the term of that court arrived, a new court, the Criminal Circuit Court of BUNCOMBE and other counties, was established by the act of 1895, ch. 75. By the statute creating the new court the business then pending in the Criminal Court was placed under the jurisdiction of the Criminal Circuit Court. At the June Term of the last-named court, judgment was pronounced on defendant that he be imprisoned for one year because he had neither paid the amount he promised his sister nor the costs. It is well settled in this State that the judgments of a court are under its control and subject to change or modification during the term at which they are rendered. So, then, it was in the power of the presiding officer of the Criminal Court to suspend the judgment on the defendant at the time when he did, on defendant's agreement to pay the costs, even though he had served a part of his term of imprisonment. The question then arises as to whether the defendant, at a subsequent term of the court, because of his failure to pay the costs, may have a different judgment entered against him from the former one which was suspended. The second judgment, in diminution of the first, is certainly lawful. *S. v. Crook,* 115 N. C., 760. The first judgment was for five years imprisonment, the last

for one year. It is to be borne in mind that we are considering the judgment of the Criminal Circuit Court against the defendant only as based on his failure to pay the costs taxed against him in the indictment and conviction on which judgment was suspended, (808) and not on his failure to meet the agreement with his sister. A court may suspend judgment upon the understanding that a defendant will compensate an injured party by payment of money, but it adds no force to such a condition to make it a matter of record. The collection of such damages cannot be enforced by imprisonment without coming in conflict with the constitutional inhibition against imprisonment for debt. When a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs should not be paid, the judgment may be enforced for such failure. *S. v. Crook, supra.*

No error.

Cited: S. v. Everitt, 164 N. C., 406.

STATE v. W. B. BLANKENSHIP.

Practice—Appeal—Exception not Noted in Case on Appeal—Affirmance of Judgment.

Although the refusal to give instructions asked for is deemed excepted to, yet if the exception is not set out by appellant in his case on appeal it is waived, and in such case, no error appearing in the record, the judgment below will be affirmed.

INDICTMENT for forcible entry and detainer, tried at June Term of the Criminal Court for MADISON, before *Ewart, J.,* and a jury.

The defendant was convicted, and appealed.

Attorney-General for the State.
J. M. George, Jr., for defendant.

CLARK, J. The defendant asked certain instructions, which were not given. The refusal is deemed excepted to, but if the exception is not set out by the appellant in stating his case on appeal it is waived. *Taylor v. Plummer,* 105 N. C., 56; *Marshall v. Stine,* (809) 112 N. C., 697; *Davis v. Duval,* 112 N. C., 833. Indeed, no

exception whatever appears to have been made, and, no error appearing upon the face of the record proper, the judgment must be affirmed. See numerous cases cited in Clark's Code, p. 582, subhead "Where no errors are assigned."

Affirmed.

Cited: Cunningham v. Cunningham, 121 N. C., 417; *Wilson v. Wilson,* 125 N. C., 527; *Hicks v. Kenan,* 139 N. C., 338; *Hancock v. Tel. Co.,* 142 N. C., 163.

STATE v. J. H. SMITH.

Indictment for Retailing Liquor Without License—Intoxicating Liquors—Sale—Evidence, Sufficiency.

Where, in the trial of an individual for selling intoxicating liquors without license, it appeared that the prosecuting witness sent for some whiskey by defendant, gave the latter some money and told him to bring him some whiskey, which he did, and nothing was paid defendant for bringing it: *Held,* that the transaction was prima facie a sale by defendant, and the burden was upon him to show, if he could, that he was acting as agent of the witness or that the sale was otherwise illicit.

INDICTMENT for selling intoxicating liquors without license, tried before *Graham, J.,* and a jury, at Spring Term, 1895, of CHEROKEE.

On trial one Akin testified for the State: "I sent for whiskey by the defendant. I told him to bring me some liquor. I forget how much money I gave him but he brought me a quart of whiskey. He would be gone two or three hours. I never asked him where he got it. I paid him nothing for bringing it. This was in this county, within two years prior to this time." The State rested, and defendant introduced no testimony. His Honor instructed the jury, if they believed the testimony, to render a verdict of guilty, which they did. Defendant appealed.

(810) *Attorney-General for the State.*
Ferguson & Ferguson and Ben Posey for defendant.

AVERY, J. The defendant took the money of the prosecuting witness and furnished him whiskey for it. Prima facie that was a sale, whether the spirits were delivered in ten minutes or ten hours. Black Intoxica-

ing Liquors, sec. 503. The burden was upon the defendant to show that he had license, if he proposed to rely upon the defense that the sale was authorized by law (*S. v. Emery,* 98 N. C., 668; *S. v. Morrison,* 14 N. C., 299; *S. v. Wilbourne,* 87 N. C., 529), and therefore proof of the sale raised a presumption that it was illicit. Where a person is shown to have sold spirituous liquors contrary to a local prohibitory law, or in such quantity and manner, or at such place, that the sale would be unlawful without license, the burden is upon the accused, if he would excuse the act on the ground of necessity, to make good the defense. 2 Wharton Cr. Law, sec. 1506, p. 348, n. 5; *S. v. Farmer,* 104 N. C., 887; *S. v. Brown,* 109 N. C., 802. There was no testimony tending to show that the defendant was acting merely as agent for the purchaser or in any other capacity than that of seller. Proof that he was acting as agent of one who furnished the spirituous liquors would not have excused him, but would have shown him guilty as principal. 2 Wharton, sec. 1504.

It is true, as insisted by the defendant's counsel, that this Court has never held, and does not now give its sanction to the doctrine, that the purchaser from an illicit vender, even when he knows him to be such, is *particeps criminis,* and it necessarily follows that the agent through whom he buys is in no worse plight. But it was encumbent on the defendant, in order to excuse himself on that ground, to satisfy the jury that he did actually buy from another in the (811) capacity of agent for the prosecuting witness, and not as agent or employee of a person who furnished the liquor, or as the agent both of such person and the prosecuting witness.

This case is distinguishable from that of *S. v. Taylor,* 89 N. C., 577, in that there the declaration of the defendant that he wished a bottle to "get" the liquor in was some evidence which the court held should have gone to the jury for what it was worth as tending to show a purchase from some other person as the agent of the witness. That was an extreme case, but it is not necessary to follow the suggestion of the Attorney-General and question the soundness of the principle there announced by the Court, as in our case there is no evidence of agency.

No other testimony being offered but that of the witness, Akin, it was not error to instruct the jury, if they believed that, to return a verdict of guilty.

No error.

Cited: S. v. Holmes, 120 N. C., 576; *S. v. Morrison,* 126 N. C., 1124; *S. v. Blackley,* 138 N. C., 623; *S. v. Connor,* 142 N. C., 708; *S. v. Burchfield,* 149 N. C., 539, 541; *S. v. Colonial Club,* 154 N. C., 185; *S. v. Wilkerson,* 164 N. C., 443.

STATE v. WILLIAM GADBERRY.

Indictment for Murder—Degrees of Murder—Province of Jury—Instructions.

1. Under the act of 1893, sections 1, 2 and 3 of chapter 85, Acts of 1893, it is made the duty of the jury alone to determine in their verdict whether the crime is murder in the first or second degree; hence:

2. Where, on a trial of one charged with murder, although the defendant introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree.

(812) INDICTMENT for murder tried at Spring Term, 1895, of YADKIN, before *Brown, J.*, and a jury.

All the evidence for the State tended to show murder in the first degree. The facts showing the character of the homicide appear in the opinion of the Court and in the dissenting opinions. There are no exceptions to the evidence.

The court instructed the jury, after reciting all the evidence, that if they believed the evidence to be true beyond a reasonable doubt the prisoner was guilty of murder in the first degree. The court explained to the jury the degrees of murder, and also stated that the credibility of the evidence was a question peculiarly for the jury, and that in a case of this importance the jury should exercise great care and weigh the evidence well, and be fully convinced of its truth before convicting.

The defendant was convicted, and appealed, assigning as error the instruction of the court that if the jury believed the evidence the defendant was guilty of murder in the first degree.

Attorney-General for the State.
A. E. Holton for defendant.

FURCHES, J. The facts in this case present a very bad tragedy, to use no stronger word. But we have nothing to do with that. This is a court of appeals upon errors of law appearing in the transcript of record. We do not try the prisoner, but simply pass upon the correctness of the trial below. And, if we shall find error in the trial below, this does not acquit the prisoner, but only sends the case back for another trial.

The State introduced evidence showing the homicide, that defendant was the author of the homicide, and the attending and surrounding

circumstances, and rested the case. The defendant introduced no evidence, and the court charged the jury, if they believed the (813) evidence, the defendant was guilty of murder in the first degree. This charge is the error assigned and complained of by the defendant.

The evidence, as the case comes to us, would have been sufficient to have authorized the court to instruct the jury that if they believed the evidence it would be their duty to find the defendant guilty of murder, prior to the act of 11 February, 1893 (Acts 1893, p. 76), and guilty of murder in the second degree under this act. But this act created an era in the law of homicide in this State. Before that time we had but one offense of murder, and the penalty for this offense was death. But the act of 1893 divided murder into two degrees, first and second degrees. This act continues the death penalty as to the first degree, but makes the penalty for murder in the second degree imprisonment in the penitentiary for not less than two and not more than thirty years. It enacts in section 1: "All murders which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, tortue, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree, and shall be punished with death." Section 2: "All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary." Section 3: ". . . But the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree."

This statute being of recent date, we have had but few cases (814) before us involving its construction. Many of the States of the Union had preceded us in enacting this and similar statutes, Pennsylvania being the first. She passed a statute, from which ours is taken, and very nearly, if not entirely, the same as the Pennsylvania statute of 1794. The fact was called to our attention on the argument both by the Attorney-General and Mr. Holton, who argued the case for the defendant. And as the Pennsylvania statute had often been before the Pennsylvania Court for construction—which Court is recognized as one of the ablest in the Union—we were recommended by both these attorneys to consult the Pennsylvania roports, and both cited us to Pennsylvania decisions construing their statute.

The Attorney-General referred to the case of *Comrs. v. Smith,* in 2 Serg. & R. 300, decided in 1816, which seemed to support his con-

tentions; while on the other hand the counsel for the defendant cited *Lane v. Comrs.,* 59 Pa. St., 371, delivered in 1868. This case seems to have been thoroughly considered; and from the fact of the high standing of the Court as well as the fact that we were referred specially to this Court for aid in construing our statute, which is almost, if not identically, the same as theirs, and from the further fact of the great similarity in the facts and the charge of the court in that case to ours, we are induced to make several quotations from that case. The defendant in that case was indicted for the murder of his wife, and "the Commonwealth gave evidence that the deceased died by means of poison, and that it had been administered to her by the prisoner." The court charged the jury: "If your verdict is 'Guilty of murder' you must state 'of the first degree'; if 'Not guilty,' you say so, and no more." The jury returned a verdict of murder in the first degree. The prisoner sued out a writ of error, and the Supreme Court delivered thereon the opinion from which we are (815) quoting. The Court say, in discussing this charge: "Hence, it would seem to be more than ever material that the jury be charged with the responsibility and duty of finding the degree. That it is a material fact to be found is not to be denied or doubted. The statute makes it so, and with it all our decisions accord. But it is argued that, where the facts bring the case within either of the killings declared murder in the first degree, it being the duty of the jury to find a verdict in accordance therewith, a peremptory direction to find that degree is proper and right. To admit this would be to determine that this portion of the verdict is a matter of form, and to substitute a court to do that which the law says the jury shall upon their oaths do. . . . Many men have been convicted of murder in the second degree who, really guilty of a higher crime, would have escaped punishment altogether but for the distinction in degrees so carefully committed to juries by the statute." In *Rhodes v. Comrs.,* 48 Pa. St., 396, the theory of the prosecution was that the murder was committed by the prisoner in perpetrating the crime of robbery, for the prosecutor's house was robbed that day; and the prosecution claimed a conviction on that ground; and the Judge, in his charge to the jury, used almost the same language which the Judge did in this case. The language was: "If you find the defendant guilty your verdict must state 'Guilty of murder in the first degree, in the manner and form as he stands indicted.' If not guilty your verdict will simply be 'Not guilty.'" The same reason was urged in justification of this instruction as was urged here, namely, that the evidence exhibited a case of robbery by the hands of the prisoner, and therefore it must be

murder in the first degree, if anything. For so instructing, that Court felt constrained to reverse the sentence. *Wood, C. J.*, after noticing the change made by the statute in the common law in (816) respect to degrees in murder, and the duty of the jury under the statute to find the degrees, said: "Yet the Judge assumed the province of the jury and ascertained the degree in this instance, though this was a conviction by trial, and not by confession. Nothing less can be made out of his words, 'If you find the defendant guilty your verdict must state 'Guilty of murder in the first degree.' Was this leaving the degree to the jury to find? Most clearly not. It excluded all chance of deliberation on the degree, and left to them only the question of guilty or not guilty. It is in vain to argue that the Judge was more competent to fix the degree than the jury, or that the circumstances proved the crime to be murder in the first degree, if murder at all; for the statute is imperative that commits the degree to the jury. It was proper for the Judge to advise them of the distinction between the degrees, to apply the evidence, and to instruct them to which of these degrees it pointed. But to tell them they must find the first degree was to withdraw the point from the jury, and decide it himself . . . The charge being intended to be peremptory, . . . we think it impinged too strongly on the province of the jury. It did not leave them free to deliberate and fix a degree. . . . The Judge decided it, and not the jury. . . . The court always leaving them [the jury], however, free to deliberate upon and the duty and responsibility of finding the degree, if they convict." So we see that, so far as the case of *Lane v. Comrs.* is concerned, it settles this case, if we adopt it as authority; and, while we do not feel bound to do this, we see no reason why we should not. It is construing a statute identical with ours. It is from a court of high authority, and appears to have been well considered and well discussed. We have no opinions of our own to conflict with it. (817) In fact, the principal case we have where this statute is discussed (*S. v. Fuller*, 114 N. C., 885), so far as it goes, is in harmony with the reasoning in this Pennsylvania case. The reasoning, to our minds, is so clear and sound we feel no hesitation in adopting it, which we do, and it disposes of this case. It fully covers both views of it presented by the Attorney-General—that the court below should be sustained because it appeared the prisoner was in the act of committing another felony, to-wit, the abduction of the deceased at the time the homicide took place, which put the case within the first degree; and, secondly, that the jury would have found the same issue from the evidence if the court had left it to them to determine. But

we see from the reasoning in *Lane's case, supra,* that neither of these positions can be sustained. The statute in our State, as it does in Pennsylvania, by express terms confers this duty upon the jury to determine the degree, and it cannot be taken from them by the court.

There were other views of this case presented by the defendant, but, being so well convinced that the consideration of the construction of the statute determines the case, we have not thought it necessary to enter into a discussion of them.

There is error, and a *venire de novo* is ordered.

Venire de novo.

AVERY, J., concurring: it must be admitted that if the members of this Court were jurors, impanelled to try the prisoner upon the testimony offered in the court below, and considered the witnesses worthy of credit, they would not hesitate to concur in declaring the prisoner guilty of murder in the first degree. Revolting as his conduct seems to have been, and probably was, if the able Judge who presided had, after learning of the facts from a preliminary examination (818) upon a writ of *habeas corpus,* held that the prisoner was so clearly guilty of murder in the first degree that he would hear the evidence himself without impaneling a jury, and pronounce the sentence of the law upon him, the average citizen, regardless of his knowledge of the forms and technicalities of law, would understand that the fundamental right of trial by jury, acquired at the cost of blood and treasure, had been wantonly violated. The most unlearned and inexperienced of our people know that the Constitution (Article I, sec. 13) provides that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court. The Legislature, as it was authorized to do, and as every other Legislature which has enacted a statute grading homicides has done, provided that the "jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." The language of our statute (The Code, sec. 413) is equally explicit in declaring that "no Judge in giving a charge to the petit jury in a civil or criminal action shall give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury, but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The law provides plainly first, that the jury have the exclusive right "to determine in their verdict" the grade of the homicide; and, second, prohibits the Judge, in terms quite unmistakable, from telling the jury whether

any fact is fully or sufficiently proved. We have decided (*S. v. Fuller,* 114 N. C., 885), as has every respectable court in the United States where a similar statute has been passed, that when it is proved or admitted that the accused killed with a deadly weapon the common law raises, if any at all, no more serious presumption than that the prisoner is guilty of murder in the second degree, but that it (819) is the province of the jury to say whether they will, from the testimony, draw the inference that the prisoner premeditated the killing. The solution of the question whether the killing was premeditated involves a finding of what was the purpose in a person's breast, to be gathered as an inference from his acts. The law declares that the jury shall determine (upon finding the intent or purpose of the prisoner from the evidence as to his conduct, under the definition of murder in the first and second degrees given them for their guidance by the court) how they will classify the offense. The law limited the authority and duty of the Judge to defining the grades of homicide and pointing to the evidence relied upon to establish guilt of either. Instead, however, of telling the jury that it was their province to determine under his explanation of the law whether the prisoner, for however short a time, entertained the preconceived purpose to kill, he assumed the authority to decide what the law gave the jury the exclusive right to determine. He told the jury, when the law prohibited his doing so, that the proof was sufficient to make it their duty to return a verdict of guilty of murder in the first degree. If it became necessary for the jury, before fixing the grade, to inquire whether they were warranted in inferring from the evidence that there was a previous purpose to kill, the Judge violated the statute when he told them that a purpose to kill was to be irresistibly inferred, or was fully or sufficiently shown by testimony as to any conduct, however outrageous. If, upon the suggestion of the Attorney-General, we attempt to sustain the instruction upon the idea that the evidence tended to show an attempt on the part of the prisoner to abduct the deceased, the same insurmountable difficulty presents itself. We cannot repeal, and the Judge below could not disregard, the plain provision of law that the jury must fix the grade. In the discharge of (820) that duty it necessarily became their province to inquire and ascertain whether the evidence of the conduct of the prisoner convinced them of his purpose to abduct. If the language of the Judge is to be construed as meaning that the jury must infer a purpose to abduct—of the existence of which it was their exclusive province to judge—then he violated the statute in expressing the opinion that the intent to abduct was fully proved.

No principle is more clearly established than that, where guilt depends upon intent, a special verdict which omits to find the intent is imperfect, and no judgment can be pronounced upon it. If, in this case, the jury had been permitted to return as a special verdict the testimony of the mother of the girl, with all of its revolting details, but had failed to add that they found either that the prisoner had killed in the execution of a premeditated intent or that his purpose in driving the girl before him was to abduct her, it is settled law that the court could not pronounce judgment. *S. v. Blue,* 84 N. C., 807; *S. v. Oakley,* 103 N. C., 408; *S. v. Curtis,* 71 N. C., 56; *S. v. Lowry,* 74 N. C., 121. In *S. v. Bray,* 89 N. C., 480, the Court said: "The special verdict is defective in that the intent is not found as a fact. There may be evidence of intent, but the fact is not found by the jury. . . . The jury must find the fact from the evidence before them, and the intent is a question for the jury. . . . Whether, if the felonious intent were found in the special verdict, the facts would constitute the offense of larceny, . . . is a question we are not called upon to decide." So, in our case, the Judge would not have invaded the province of the jury, but would have avoided the error into which he has fallen, had he told them that if they should find from the testimony there was either a premeditated intent on
(821) the part of the prisoner to kill, or that he killed while he was attempting to carry out a purpose to abduct, they would be warranted in returning a verdict of guilty of murder in the first degree, but if they were not satisfied as to the existence of either the premeditated purpose to kill or the intent to abduct, and they believed that he killed with a deadly weapon, then the law raised a presumption of guilt of murder in the second degree, and that presumption had not been rebutted, he would have avoided the error into which he has fallen. If a special verdict would be fatally defective because the jury, in the exercise of their exclusive right, failed to find the existence of the essential element of intent in abduction or the preconceived purpose in order to constitute the highest grade of homicide, then it would seem to follow inevitably that the Judge has no more right to find the intent for them before than after they had considered and passed upon the testimony. If it be true that wherever the intent is of the essence of the offense, and the jury fail in a special verdict to state specifically that there was a criminal intent, the Judge is not at liberty to supply the defect before stating the conclusion of the law, surely, when the jury retain the right to state the verdict in the shape of a conclusion, he cannot do before what he could not do after—assume that the facts proved a guilty intent.

My brother *Furches* has cited cases exactly in point from the Court of the State where the statute originated, and in which the opinions rest upon the fundamental principles to which I have adverted. I have ventured to discuss the question upon the reason of the thing as it would be presented if no authority could be adduced from abroad. We are not acting as arbitrators, nor as citizens susceptible to the influence of the public indignation naturally aroused by such conduct as is attributed to the prisoner, but as a court, supposed to hold the scales of justice too high to be shaken on our pur- (822) pose by even our own abhorrence of cruelty. To sanction the mistake of a *nisi prius* Judge who may have been swept from his moorings by listening to testimony which could scarcely fail to excite disgust, at least, would probably be to endanger the safety of some other prisoner around whom a network of false testimony may be woven, and whose only safety may lie in the discrimination of an intelligent jury of the vicinity. If a trial Judge has the right to draw inferences for the jury, the safeguard thrown around accused persons, as well as parties to civil actions, is destroyed. I concur fully in the conclusion of the Court, and have deemed it wholly unnecessary to add anything to the clear and full discussion of authorities by *Justice Furches.*

CLARK, J., dissenting: The exact point presented in this case is decided in *S. v. Gilchrist,* 113 N. C., 673, and *S. v. Covington, post,* 834, construing the act of 1893 (ch. 85) "dividing the crime of murder into two degrees." In those cases the Judge charged in almost the very words used by the Judge in this, telling the jury that the prisoner, upon the evidence, was "guilty of murder in the first degree or of nothing." This was approved by unanimous opinion of this Court, and there is nothing in the present case which calls upon the Court to ignore its own decisions to follow the unsettled construction of the Pennsylvania Court upon a somewhat different statute. To the same effect are three decisions upon chapter 434, Acts 1889, dividing the crime of burglary into two degrees, in which the identical words are used as to the duty of the jury as in the act dividing the crime of murder, and are construed as in *S. v. Gilchrist* and *S. v. Covington, supra.* In *S. v. Fleming,* 107 N. C., 905 (on page 909), the Court holds that this does not give the jury the discretion to (823) convict of the second degree, but the conviction should be in the first or second degree, according to the evidence; and the court should instruct what degree of burglary a given state of facts would be, if found to be true. This was cited and approved in *S. v. McKnight,*

111 N. C., 690, in which it is held (opinion by *Shepherd, C. J.*) that the court did not err in refusing to charge that the defendant could be convicted of a lesser grade of burglary than in the first degree, if they believed the evidence. In the charge there approved the court instructed the jury that, if certain evidence was believed, they should convict of burglary in the first degree, and, if it was not believed, not to convict of burglary at all. The same authority was cited again in *S. v. Alston,* 113 N. C., 666, the Court holding that the Judge properly should have instructed the jury as was done in the present case. *Judge Brown* therefore followed the uniform decisions of this Court upon an exactly similar statute, which ruling is sustained by the almost uniform decisions of the courts of other States upon similar statutes. There are repeated decisions in our Court, besides those resting upon the presumption from the use of a deadly weapon, approving a charge, "If the jury believe the evidence the defendant is guilty of murder." Among these it is sufficient to refer to *S. v. Baker,* 63 N. C., 276. His Honor did not instruct the jury to convict, but simply told them that this state of facts, if found beyond a reasonable doubt to be true, would constitute murder in the first degree; just as if he would have gone on, if there had been conflicting evidence, to instruct them that another state of facts, if believed, would have constituted murder in the second degree, and still another, manslaughter. There being but one state of facts in evidence, the court, after "explaining to the jury the degrees of murder, and that the credibility of the (824) witnesses was peculiarly for the jury, and that in a case of this importance the jury should exercise great care, and weigh the evidence well, and be fully convinced of its truth before conviction," instructed the jury that this state of facts, if fully believed, would make the prisoner guilty of murder in the first degree, and if not believed, the prisoner should be acquitted. The jury found the uncontradicted testimony to be true. If these facts constitute murder in the first degree, his Honor committed no error in telling the jury so. If these facts do not constitute murder in the first degree, then his Honor erred in instructing that they did. There is nothing else in the case.

Now, what is the undisputed and uncontradicted state of facts which the jury have passed upon by their verdict, and found to be the truth? Succinctly stated, it is this: The deceased, according to her mother about ten to twelve years old, and according to the physician apparently fourteen, being "well developed" was sister to the prisoner's wife, and had been living with them in Virginia. For some reason she returned home to her parents about last Christmas, and in February

last the prisoner appeared at their house, and spent Sunday night. He wished the little girl to fondle his head, and on her refusal struck at her with a razor, and swore he would kill her. He was armed with a pistol, razor, and knife, and, firing off his pistol, swore that the girl should go back to Virginia with him, or he would kill her. On Monday the prisoner stated to the girl's brother, in the woods, that he "intended to make Tessie [the deceased] go off with him or it would go hard with her." On Tuesday the prisoner came back with his pistol and asked if the girl had returned. When she came up she attempted to run, and the prisoner followed her, grabbed her by the arm and pushed her at arm's length in front of him, pulling out his pistol, and trying to carry her off. She appealed to her (825) mother, weeping and beseeching her not to let the prisoner carry her off. The mother called the child's father to assist her in preventing the abduction. The father came from the field to rescue his child, armed with some rocks. The prisoner advanced on him with his drawn pistol, and the father took shelter behind a house. The prisoner thereupon again grabbed Tessie, and, in spite of her crying and begging her father, mother and brother to save her, pushed her along the road in front of him. The mother then commenced shrieking for a neighbor to come to her help, and the prisoner thereupon put his pistol to the child's back, fired, and ran off into the woods. She died therefrom two days later. The prisoner was not drinking.

Such are the facts in this case, which were uncontradicted, and which the jury, under the caution given them by the accomplished Judge who presided at this trial, have found to be true beyond all reasonable doubt. The jury having found the evidence to be true, we cannot throw doubt upon their finding. In this state of facts there is no element of murder in the second degree or of manslaughter which the Judge could have submitted to the jury. The sole question was whether the facts were true or not. If true, a more unprovoked, cold-blooded murder was never committed within the bounds of this State. No Legislature in North Carolina has ever passed an act which they could have intended should be construed as directing that so brutal a slaying of a helpless victim, while calling upon her kindred for help, should be held other than murder in the first degree. The last act on the subject (1893) provides: "The wilful, deliberate and premeditated killing, or any killing which shall be committed in the perpetration of or in the attempt to perpetrate . . . a felony (826) shall be deemed murder in the first degree."

It is not necessary to dwell upon the Attorney-General's second ground—that the crime, having been committed in an attempt to com-

mit abduction, which is a felony, was necessarily murder. That the prisoner was attempting to take the young girl from the care of her parents for purposes of lust is an inference which the jury might have been justified in drawing, but that the killing was, in the language of the statute, "wilful, deliberate and premeditated" is not an inference, but the necessary consequence, the very fact itself, which the jury found when they found the above state of facts to be true.

In *S. v. Norwood,* 115 N. C., 789 (since the act of 1893), the presiding Judge refused, though requested by written prayers, to submit the phases of murder in the second degree or manslaughter (and they were not even prayed for in the present case), but told the jury that "premeditation did not require any considerable length of time; and if the prisoner, after conceiving the purpose to kill, immediately carried the resolve into execution (there being in that case, as in this, no provocation or heat of passion) malice would be presumed, and the premeditation contemplated by the statute would be shown." This Court, sustaining the charge, said: "If it is shown that the prisoner deliberately determined to take the child's life by putting pins in its mouth, it is immaterial how soon, after resolving to do so, she carried her purpose into execution." In *S. v. McCormac,* 116 N. C., 1033, the Court again says: "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."

(827) A prima facie case is one which is conclusive unless evidence from which a different conclusion may be reasonably drawn appears somewhere in the case.

Aside from the previous threats shown in the present case, the prisoner placed his pistol at the back of a defenseless girl, who was offering no resistance save her cries for help. There was nothing to show that he acted thus to defend himself from her, nor as in the heat of a contest with an opponent under circumstances which could mitigate the offense to manslaughter or murder in the second degree. He placed his pistol at her back, blew a hole in her, and ran off into the woods. This is not the presumption arising from the use of a deadly weapon, but here the naked facts themselves, unless added to, are susceptible of no other interpretation, when found to be true, than that the killing was "wilful and deliberate," and hence murder in the first degree. If the jury found these facts to be true (as they did) they would not have been warranted in justice in finding the prisoner guilty of murder in the second degree or of manslaughter. As

they could not justly have done so, his Honor committed no error in not submitting those phases to them, and in telling them that if this state of facts was, beyond reasonable doubt, the truth of the occurrence, it constituted murder in the first degree.

There are decisions under the Pennsylvania statute which directly sustain the charge of the court below in this case. *Respublica v. Mulatto Bob,* 4 Dall., 145; *Comrs. v. Smith* 2, Wheeler, Cr. Cas., 79. And there is a Pennsylvania case apparently conflicting with these cases, but which can be readily distinguished. It would be a useless labor however, to consider and reconcile Pennsylvania decisions—which are not always reconcilable—and that task can best be left to the Court that made them. But one thing is clear beyond (828) all technical and skillfully drawn distinctions, and that is, by our law the wilful, deliberate killing of a human being is still murder in the first degree; and, taking the facts of this case as a jury have found them, the prisoner wilfully, deliberately, without provocation or legal cause to excite his anger against her, placed his pistol at the back of a defenseless girl, whom he was trying to carry away from her home, against her cries for help and the efforts of her father to save her and the shrieks of her mother, and in cold blood shot her to death. This is still murder in North Carolina, and of the kind for which the perpetrators can be hung. These facts can admit of but one inference, and, that being so, his Honor committed no error in telling the jury, if they found beyond all reasonable doubt that such were the facts concerning the killing, they should find the prisoner guilty of murder in the first degree and of no lesser offense.

MONTGOMERY, J., dissenting: The crime of murder, by the act of 1893 (ch. 85), is divided into two degrees. Section 1 provides: "All murder which shall be perpetrated by means, of poison, lying in wait, imprisonment, starving, tortue or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death." Section 2 makes all other kinds of murder in the second degree punishable by imprisonment. Section 3 declares "Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree."

In North Carolina, previous to the enactment of that statute, (829) if a person killed another without any or upon slight provoca-

tion, as for offensive words, for instance, or with an excess of violence out of all proportion to the provocation, the law placed him on the same plane as it did the murderer who had deliberately planned and executed a killing from a long-cherished feeling of revenge, or by waylaying for the purpose of robbery. The rule was that, where the killing was proved, malice was always presumed; and where there was malice the law declared the homicide to be murder, and the punishment death. It was to do away with this forced and artificial conclusion which the law drew of the equal guilt of the man who had committed a homicide on a sudden heat without malice in fact, even though done without provocation, and of the man who had deliberately, wilfully and premeditatedly planned the killing for revenge or greed. The statute was enacted to afford a more rational rule for the trial and punishment of him who had committed a homicide on the impulse of the moment and without malice in fact, and not to take from out the common-law rule a killing where, by undisputed testimony, it was proved to have been done under circumstances of threats and preparation and deliberation. It was not intended that it should be left to the jury to determine judicially the effect of such testimony, but that they should, as formerly, pass upon its credibility, leaving it to the Court to instruct them as to its legal effect. If, in a case where the crime has been committed since the enactment of the statute, the State should show that the killing was sudden and without provocation, and no more appears, the accused cannot be convicted, as under the old law, of murder in the first degree, but only of murder in the second degree, though a deadly weapon was used. But if the testimony is undisputed and uncontradicted and goes to show the
(830) killing by any of the means named in section 1 of the act, the rules of the common law ought to apply. The Judge ought to instruct the jury that they are to consider thoroughly the credibility of the testimony, and that, if they believe it to be true beyond a reasonable doubt, they should render a verdict of guilty in the first degree. In cases like the one before the Court the language of the act, which reads "but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree," ought not, in my opinion, to be construed to mean more than that the jury shall, under proper instructions from the Court upon the character of the testimony, consider it simply in the light of its credibility, and return their verdict as they would do in all other cases where the testimony was undisputed, and where they had received instructions from the Court as to the legal bearing and effect of such undisputed testimony, should they find it to be true. This construction is strengthened when it is noticed that the words which declare the duty and power

of the jury under this statute stand in direct connection with, and in the same sentence with, that part which treats of the nature and form of the bill of indictment.

Chapter 434 of the Acts of 1889 divides burglary into two degrees, first and second—the first punishable with death, the second by imprisonment; and section 3 of that act reads as follows: "That when the crime charged in the bill of indictment is burglary in the first degree the jury may render a verdict of guilty of burglary in the second degree if they deem it proper to do so." The last named section seems upon its face to give the jury broader latitude in making up their verdict than is conferred upon them in the act dividing murder into two degrees. This Court has passed upon the burglary statute several (831) times, and I believe it has sustained me in the view I have expressed in this opinion.

In *S. v. Fleming,* 107 N. C., 905, the defendant was indicted for burglary. On the trial the Court charged the jury that certain facts testified to amounted in law to a sufficient "breaking" if they believed the evidence; and this Court sustained the charge. It is true the bill of indictment was, in form, under the common law; but this Court said further in that case: "We do not understand the provision of the statute that on an indictment for burglary in the first degree 'the jury can return a verdict for burglary in the second degree if they deem it proper so to do' to make such verdict independent of all evidence. The jury are sworn to find the truth of the charge, and the statute does not give them a discretion against the obligation of their oaths."

In *S. v. McKnight,* 111 N. C., 690, an indictment under the Statute of 1889 for burglary in the first degree, the house broken into was in inhabited dwelling house, and the accused admitted that he had broken into and taken money therefrom. The counsel for the defendant asked the Court to instruct the jury that they might convict for a lesser offense than that charged in the bill of indictment, as provided in section 996 of The Code. The instruction was refused and this Court said, in substance, that there was no error in the refusal, for the only question to be determined by the jury was whether it was done in the nighttime, the prisoner having admitted the breaking and entering and the taking of the money. If it was done in the nighttime it was burglary in the first degree.

In *S. v. Alston,* 113 N. C., 666, the defendant was indicted for burglarly. The charge of his Honor to the jury was that, "although all the evidence was that the family was present in the house" (832) at the time the accused was charged to have broken into it, they might find him guilty of burglary in the first degree or guilty in the

second degree. This Court said in reference to that charge: "The Court should have charged the jury that if they believed from the evidence that the family was present in the house at the time of the felonious entry, as charged, they should convict the defendant of burglary in the first degree. Under such circumstances the jury are not vested with the discretionary power to convict of burglary in the second degree. The power to commute punishment does not reside with the jury." The Court further said, in substance, that it would have been improper for his Honor to have instructed the jury that all the evidence was that the family was in the house at the time of the felonious entry, and that they should find the defendant guilty of burglary in the first degree; that it was only where the jury believed that the family was in the house to be a fact that they could have returned such a verdict. The jury must pass upon the credibility of the evidence.

In the case now before the Court the accused, on his trial, offered no testimony. That which was offered by the State was undisputed and consistent. The substance of it was that the deceased, who the mother said was about ten or twelve years old, and the physician who attended her said was about fourteen, and well developed, was a sister of prisoner's wife, and had lived with them in Virginia a short while—for a part of the year 1894—returning to her home in Yadkin County about Christmas of that year. On Sunday night before the homicide, which occurred the following Tuesday (16 February, 1895), the accused arrived at the home of the deceased, from Virginia, armed with a pistol, a razor and a knife. He insisted that the deceased should fondle
(833) his head, and upon her refusal slashed at her with his razor and swore he would kill her. He then fired off his pistol and swore that the deceased had to go to Virginia with him or he would kill her. She said she did not intend to go. He left that night, but returned on the next day—Monday—and told her brother that "he intended to make Tessie (the deceased) go off with him or it would go hard with her." On Tuesday he returned and, seeing the deceased, he drew his pistol. She tried to escape from him, and ran to her mother, but he "grabbed" her and pushed her up the road. The mother called the father, at work in a field near by, who, upon his coming near, saw the situation and began to gather stones, which the accused noticing, he leveled the pistol at the father and, still holding the child, drove him behind a house on the roadside. The mother crying for the help of neighbors, and the girl begging for help from her brother and father and imploring them not to let the accused carry her off, the prisoner placed his pistol immediately upon the back of the deceased and fired it, inflicting a wound from which she died two days afterwards. He fled into the woods after he had

shot her. He was sober. There was no exception to the testimony, and, as stated before, he offered none. What was there to submit to the jury except the credibility of the testimony? The facts, if believed, constituted in law predemitation and malice. The case was well argued by the Attorney-General, and by Mr. Holton for the prisoner. The decisions of the Court of Pennsylvania were relied upon by both to help sustain their several views. The Pennsylvania statute is like ours, and was the first of its kind enacted in the States. That Court, in the earlier cases on that statute, put the construction on it which I contend for here. Later decisions of that Court have reversed the former ones, and this Court, in the opinions filed in this case, has followed the later (834) Pennsylvania cases, without, I think, giving due weight to our own decided cases in reference to statutes similar in nature to the one under consideration. His Honor instructed the jury, after reciting all the evidence, that if they believed it to be true beyond a reasonable doubt the prisoner was guilty of murder in the first degree. This was, in substance, the charge which the Court gave in *S. v. Gilchrist,* 113, N. C., 673, and which on appeal was approved. I think there was no error in the charge.

Cited: S. v. Covington, post, 862; *S. v. Thomas,* 118 N. C., 1127; *S. v. Locklear, ib.,* 1158; *S. v. Finley, ib.,* 1172; *S. v. Moore,* 120 N. C., 572; *S. v. Freeman,* 122 N. C., 1016; *S. v. Rhyne,* 124 N. C., 862; *S. v. Hicks,* 125 N. C., 640; *S. v. Bishop,* 131 N. C., 761; *S. v. Cole,* 132 N. C., 1092; *S. v. Lipscomb,* 134 N. C., 693; *S. v. Clark, ib.,* 716. *Overruled S. v. Spivey,* 151 N. C., 685.

STATE v. THOMAS COVINGTON.*

Indictment for Murder—Degrees—Evidence.

1. On a trial of one charged with murder, the only evidence of the circumstances under which the homicide was committed was contained in the prisoner's alleged confession that he entered the store of the deceased to commit larceny, deceased got between him and the door, and "I watched my chance and jumped on the old man and wrenched his pistol, and the old man halloed 'murder!' Then I shot him through the body. The old man said: 'You have got me.' I aimed to shoot him and this must have been when I shot him in the neck. And I

*FURCHES, J., having been of counsel in the court below, did not sit on the hearing of this appeal.

shot him again": *Held*, that it was proper to instruct the jury that in no view of the evidence was the defendant guilty of murder in the second degree or manslaughter, and they should either acquit or find the defendant guilty of murder in the first degree, the second and third shots being the fatal ones, and the confession showing that they were fired with deliberation and premeditation.

2. Inasmuch as the act of 1893 (ch. 85, Acts 1893), dividing the offense of murder into two degrees, and making homicide committed while perpetrating or attempting to perpetrate a felony murder in the first degree, provides that nothing contained in the act shall require any alteration or modification of the existing form of indictment for murder, it is not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893.

(835) INDICTMENT for murder, tried before *Timberlake, J.*, and a jury, at Spring Term, 1895, of CATAWBA.

It appeared from the evidence that the deceased was part owner, as a stockholder and general superintendent, of Long Island Cotton Mills, and that he lived with his family about 250 yards from the mill, and that the prisoner was an employee at the mill, being superintendent of the spinning room. It further appears that the deceased had a stock of merchandise in a storehouse about 100 feet from the mill, and that for more than a year someone had been occasionally entering said store by means of false keys and stealing some quantity of goods, and that on night of homicide deceased went to the store to sleep that he might catch the thief.

Miss Essie Brown testified: "I am daughter of James Brown, deceased. Father is dead. Lived at the time of his death one mile from Monbo post-office, in this county. Saw him last alive Wednesday night, 26 September, 1894, about 8 o'clock. He was in dinning-room at home. House from store is distant 100 feet. I next saw him Thursday morning in store, a few minutes after 6 o'clock. It was my duty to be at store at 6 to attend to the duties of store. Was often in store with father. Factory is near the store. Hands change at 6 A. M. Notice given by bell.

I was at that time in the house, getting ready to go to the store.

(836) When I got to the store, and up the steps, put key into the door to unlock it. It came open, and I found papa lying on the floor as if asleep. Saw a little blood on his hat. His body was 1½ feet from the door. I opened right door, and in opening it came near his head. Door was unlocked. Body was lying straight out, head towards the door. Whole face was on floor. Left side somewhat turned down. Blood was somewhere on the cheek. Noticed no other injury on face. I did

not stay there very long. I tried to hollow, but couldn't. After Mr. Pope started to store, I left. I said nothing to any one. When I reached factory, I saw Elam Josey, who was on lower floor. Machine which sits near door is called 'speeder.' Store could be seen from speeder. He was all I saw there. Afterward saw George, who came to me. Next Mr. Covington, prisoner's father, came. We went up to the house. Prisoner was upstairs, I think. Didn't see him. Prisoner had been working there several years. His part was upstairs. I did not see prisoner till that P. M. Osborne was not at home. He came about 9 A. M. Was next in store when I went down with Osborne, between 9 and 10 A. M. There was a roll of tin that I kept door open with. It was roofing tin. Roll was about 2 feet high, 1 foot thick. When on end it was steady. I noticed it Wednesday, for I kept door open with it. Box was standing up back of counter, about 7 feet from my father's body. Didn't notice anything wrong with tin till I went down with Osborne, when it was on other side of counter. Counters are eight feet apart. Body was near one side. Tin had blood on it and was on opposite side from where I noticed it the night before. It had much blood on it. Body was perfectly straight. Box was turned upside down. Didn't notice any stains on it. Tin cup was on counter and had mud on it. Tin was on the left of father. Tin cup had clean (837) water in it the day before. Marks of blood near matches. They were kept in small dishpan. This was overturned next morning. Three or four little stains of blood about matches. Were similar to finger prints. They were not there the evening before. Tin lamp was near father's head, and was out. Saw lamp night before. It had oil in it then. Left it on counter, on left side, on front part of counter, about opposite the matches. Didn't notice whether oil was exhausted. Father had three scratches over one eye. Had a black place on forehead, near center. Sunken place about as large as a nickel. He slept on right-hand side of counter, going in back of it. He had been sleeping there since Sunday night previous, by reason of finding evidence of some one going in store. He had no bed, but some quilts. Had to cross over counter to get to sleeping place. Door was just pushed to. There was little blood about door latch, about one or two inches. Something like print of thumb. His hat was back of counter. So was key and handkerchief. Knife was in his hat, also. Store key was in his hat. [A key is shown her, which she said "is the key that was in papa's hat."] Body remained at store till 5 P. M. It was taken to the house. Dr. Wilson was there. Discovered a shot in his breast by blood stains on his clothes. I went to the store when body had been turned. He had been shot in neck and on left side of his head, back of ears. Didn't see

Covington till that P. M., and then in yard at home. Factory was stopped at once after I went down. Defendant was out in yard talking to some men. Saw nothing else of him that day. Many persons there. He was buried Friday, before dinner. Body was taken about one mile. Didn't see defendant at burial."

Cross-examination: "Store near house. Elam Josey lives nearest the store. Just back of it. Closer than our house. Not farther
(838) than front door of courthouse. Father had a wife, myself, two brothers and two sisters. Had not slept in that part of store before Sunday night. The pistol was father's. It was 6:10 when I went to the store. Think defendant's father helped to bring the body to the house."

Redirect: "Pa was lively, laughing and talking at tea table."

The principal testimony relied upon by the State, in addition to many corroborating circumstances testified to by various witnesses, was that of Elam Josey, who testified concerning an alleged confession by the prisoner. His testimony was as follows:

"I am 23 years old. Have lived at Long Island 7 or 8 years. Am married. Live 200 or 300 yards from the factory. Have known Tom Covington twelve or thirteen years. He lived at cotton mill, at death of deceased, 400 or 500 yards from the store. Prisoner lived east from the store. Land sorter rolling and hilly, and branch between prisoner's house and store. I was in cotton mills when I first heard of the death of Mr. Brown. I got to mills at 5:45 A. M. I run speeder, which is located in lower part of the house. House is two stories. Speeder is 6 or 8 feet from entrance. Prisoner is second hand in spinning room. I am a day hand. I first saw the prisoner some time before 6—10 or 15 minutes. He got there first. Was downstairs when I first saw him. Had heard nothing, till prisoner came to me, about Brown's death. He came to me and said he 'killed old man Jim last'—some one then stepped up, and he started to the oil room to get oil. It is in the lower story. Says, 'I'll tell you more about it later on.' He looked at me again, and motioned his head to call me to him. I went to him. He pushed
(839) door open, and I followed on behind him. He said, 'I certainly killed Mr. Brown last night.' He put his hand in his pocket and pulled out a key [key is here shown witness, which he says is the key] and handed it to me. He said, 'Don't throw it in the river.' He then went upstairs, and I saw him no more. I stuck key in my pocket and went on to my work. I saw Miss Essie come to the store, put key in the door, and it opened. She stopped, and was looking in. She turned around and came to the mills, and said to me, 'Where is George?' I went and motioned to George. He came and said, 'What is the mat-

ter?' She said, 'Pa is dead.' Lee Robins came up. Me, George and Miss Essie went to the store. George gave orders for the mills to shut down. He was at the store when he said, 'Shut down.' Me and Adams' boy went back together through the lapper room. I went out and hid the key after I came from the store. I hid key in lapper house. Stuck it in the ground with my fingers, and put my heel on it. Nothing more was said about murder till next day at grave. I was at dwelling that day. That morning Covington was in the store with his father. I looked in, and some one spoke about the coroner, and I went. Had communication with prisoner Friday in woods at graveyard. I was standing near grave, and he came to me and said, 'Let's take a walk,' and said, 'I'll tell you all about it.' We got off the road apiece and he began. Said he got up that morning, slipped out from his wife, and came across the branch to get him a load of wood, and he thought he would go in store, which he did, when he got in far enough for Mr. Brown to get between him and the door. When he did, Mr. Brown said, 'Is that you, Pope?' 'I made no answer.' Says, 'Is that you, Tom? You had better speak, I have a revolver on you.' Said he watched his chance, jumped on the old man, wrenched his pistol from his hand. 'Then the old man hollowed "Murder." Then I shot him through the body. Old man says, "You have got me." I aimed to shoot him, and this must have been when I shot him in the neck. He then (840) made a turn, and I shot him again, and he fell. In the rounds I lost my hat, and knew it would not do to let my hat stay there. I hunted around and got a match and struck it. Found my hat, got out, and shut the door. Discovered blood on my hands. I washed blood off at the branch and went to the house and made a fire and called my wife up. As I came to my work from home I tramped out all my tracks I made coming from store.' Was at service at church. Prisoner was there. He never went in. Think talk was while corpse was in church. I saw Bridges, Joe Fisher, Andy Moore and Ike. Prisoner came to me while I was standing close to grave. Think he came from down the road. Didn't say what he went in for. Have seen key before. Me and prisoner have been in store before. Prisoner came and got me to go with him. We went down and went in, but I saw nothing he got. We went in again, and he got 65 cents and gave me 30 cents, which I put in my pocket. He told me he took a right smart sack of shot, money and shoes. He said shoes were too large for him, and he would let Henry have them. [Shoes are shown him, which he thinks are same shoes.] He was in his own house when he showed me the shoes. He said they were 9, and he wore 7. Covington might be best man. Ike Stewart stepped up and said, while coroner was examining witnesses, he didn't

think one man could handle Brown. Some time after that prisoner said old man Brown was not the man people thought he was. Said he could handle him as he could Charlie Robbins. Mr. Deaver arrested me on account of some talk I had with Burris. Been in jail four months. Did not tell Miss Essie because prisoner told me he would kill me if I told it, and he had said before if I ever told anything he would kill me.

It was in 1893 we did our first stealing. I was brought to jail (841) and put in cell. Next time I saw prisoner he was in jail. No one in jail but me, prisoner and John Best. I was in a different cell, but same cage. While there he came, next morning, 18th or 19th, and squatted down at my door. I says to him, 'What are you going to do?' He says, 'I am going to prepare for a better world.' Said, 'I would own it, but am afraid they will come and get me before court.' Says, 'If you tell something on me at court, as you did at J. P. trial, I would be bound to own it.' Have seen him write. I know his writing. [Letter marked 1 identified as prisoner's handwriting.] So is 2, except on back, which is mine (Josey's). So is side A of 3. So is 4, 5, 6, 7; 8, 9, 11, 12, 13 and 14 are prisoner's; 10 is mine. I was in jail when I first saw letters. He handed or sent them to me. I answered some notes he sent to me. He wrote me in a note he had torn my letters up. Had seen key before. He said he hammered out file in blacksmith shop, and him and me went on the island, and he worked on key. Worked on the little part of it with a file that day. [Letters are now read; *9* and *10*, upon objection, are withdrawn, and jury are told not to consider them in making up their verdict.] I was tried before Esquire Turner. Prisoner was in mills when tried. I was there. I testified before J. P. Was cross-examined by Covington (prisoner). He asked me, 'Didn't I holler and tell you someone had killed old man Jim?' I said, 'Didn't think he did.' Mr. Deaver, Bridges and his father and J. P. were all there. He also said, 'Didn't you misunderstand me?' I said not."

Cross-examination: "Tom Covington said he would kill me if I told anybody; this is the reason and the truth. Don't know whether I would have told if he had not threatened me. Suppose I would. He threatened after he told me these things, and beforehand he had done so. He told me once before if I told it he would kill me. Told me so before (842) I went with him. I told him I would go with him in the store. I did not know that he would be arrested. He had a heap of friends. He was a friend of mine, the reason I did not tell it. One reason was because I was afraid; another, I wanted to screen him. Have sworn about this more than twice—three or four times. Gave in evidence before the coroner. Think I was sworn. Didn't tell all before coroner.

I swore before coroner I did not know who did it and had no suspicion. This was not the truth. Admit I swore falsely once. I did it to save Tom. Would swear to a lie any time to save my friend and, with threats against me, to save my own life. Swore to it to keep from being killed myself and to save Tom's life. Would not swear to a lie to-day to save Tom's life. Have been accused of this murder myself. Wasn't first man arrested. Denied knowing anything about it. First told about it on my way to jail. Told it to Mr. Bridges, Mr. Deaver and Crawford. Was walking along the road. Didn't curse or threaten me. I told Mrs. Frye it looked hard to be in here for nothing. She said, 'Why didn't you tell on him?' I said they had me arrested, and I was not the man who did it, and Tom had told me. Did not tell John Best I swore to it to save my life. Told him I told it because I was not the man that did it. Did not tell him I told the lie to save myself. Don't know who wrote first one. Don't remember whether Mr. Yount suggested to me to write to Tom. Soon after I got here he gave me paper and told me to write down the whole affair. I was at home the night the murder was committed. Live 75 or 100 feet from store. Wife, sister and brother-in-law were at home with me. I got up at 3 A. M., and looked at clock. Went to factory at 5:45. Was at home between 3 and 5:45. Went to sleep again. Was not restless. Habit to get up (843) about 4 o'clock. Had no pistol. Prisoner was at factory when I got there. He said, 'I killed old man Jim last night.' About that time someone stepped up. He went to get oil and lampblack. Said no more till he came back from oil room. It was close about 6 o'clock. He said, 'I certainly killed old man Brown last night in the store.' Handed me the key, and said not to throw it in the river. He then went off upstairs. He told me to put key away, and I hid it in the ground. I did not make the key myself. Am not an expert in tampering with locks and keys. Did not make key for U. S. lock. Had U. S. lock, for which Jackson made me a key. Don't think I said I made the key. Didn't say I could make a key to fit any lock. I can prove who made that key. Didn't say I could make a key that would unlock any boat lock on the river. I said before J. P. I was with him twice or more, not that I went in with him twice. I did not go in the store that night and kill Mr. Brown. Had been promised no favors. Didn't say I had burned negroes' houses."

Redirect: "It was his brother George he said not to give away. Brown was stronger than I am. So is Covington. Had on, the evening before, a striped shirt. [Shirt is shown him, which he says is like the one Covington had on the evening before.] His pants had a stripe down the leg and a black patch."

Cross-examination: "I lifted with Mr. Brown. Have seen Covington and Mr. Brown lift together. Covington gave Mr. Brown all he could carry."

Samuel Turner testified: "I am J. P. before whom Covington was tried. Heard question put by Tom to Josey. He said, 'You must
(844) have misunderstood me. Didn't I tell you someone killed old man Brown?' Josey said conversation took place near the church. Also, about the conversation about the mill, Joseph said Tom Covington went to him that morning and told him that he [Tom] had killed old man Brown." The testimony taken on justice's trial is handed to justice to refresh his memory. He said it was taken down in his presence by Osborne Brown, and afterwards read over in the presence of himself, Josey, and Tom Covington. Defendant objects to his refreshing his memory. Objection overruled. Exception. "Josey said Tom told him he had killed old man Brown. Tom asked Josey if he was not mistaken. 'Didn't I tell you someone killed him?' Did not hear Josey state where he hid the key. I afterwards searched for key and found it at end of lapper room, outside, at Long Island Factory, under the dirt four or five inches. It was next morning, after he made statement the evening before, when it was found."

George W. Burris: "I am 46. Live in one mile of Long Island Cotton Mill. Have known Tom Covington 10 or 12 years. Day after homicide I was at home. Came up to lower factory and went up to upper one. Went back next day. It was second day, day of burying. I saw about 10 steps from front of store Tom Covington, who came and sat down by me. He talked a good deal about this matter. I said a good way to detect was to look at clothing for blood. When I said that, Tom Covington looked down at himself and said, 'I never thought about that.' On his right leg I saw something that resembled blood. Looked like a sprinkle or couple of drops. It was on inside of his leg. Something took my attention, and Tom Covington walked off, and came back from toward home with a different suit of clothes on. It was half an hour before he returned. Next saw him coming up to the crowd. Didn't have the same pants on. The first pair of pants he had on were striped. Don't know what became of the pants."

Cross-examination: "It was about 9 or 10 A. M., the day of
(845) the burying, that we had the conversation. I swear that there was blood on Tom Covington's pants."

For the defense Mrs. Covington, wife of the prisoner, testified as follows: "I am wife of prisoner. Remember night Brown was killed. I was at home. Live at my house. Prisoner, myself and baby. Have but two rooms. One bedroom. Cook in the other. Mrs. Bolick was

there, and slept in the same room we did the night of the homicide. Her bed one step from ours. Her house is 10 steps from ours. Doors do not face each other. She has five children. They work in mill and were there that night. She stayed with us often. I retired about 8 o'clock. Prisoner works in the daytime. Mrs. Bolick retired at same time. So did prisoner. No light in the house during night. Have a clock. Bell rings at 4 o'clock. Prisoner did not leave home that night. He got up after 5 A. M. I called him, and he was in bed. Did not have his clothes on when he got out of bed. Lit lamp, and built fire in stove. Took seat, and picked his banjo. Fooled with it till I got breakfast ready. Prisoner got up before Mrs. Bolick. He could not have left home without my knowledge. Baby slept behind. Was eating breakfast when 15-minute bell rang. Prisoner came back some time during the day. The day before he had on striped pants and same coat he has on now. The day of funeral he put on another pair of pants. I told him not to go with dirty pants. Did not change his coat, and put on same old pants after coming back. Wore same old clothes balance of the week. Had same old clothes on when arrested. Saw his clothes frequently, but never saw any blood. It looks like I could have seen it. None on his shirt and coat, as I could see. Mr. Bridges brought pants back, and a letter from him at jail. Brought shirt and slips. Brought them to Elam Josey. They were clothes he had on day of arrest and day before homicide. When brought home I examined them, (846) and found no blood. Mrs. Caldwell and Mrs. Bolick were present. Mrs. Bolick burned the pants. I told her to burn or wash them. She washed other clothes. Prisoner has the coat on. I saw lice in jail. [Shoes previously exhibited are shown her. She says look like shoes she bought of Mr. Brown.] I got second pair. Bought them myself for prisoner. Shoes are 9. Think prisoner wears 8. Box was marked 8, shoes 9. Prisoner sold them to his brother Henry. I cover slats for factory, to be used in spinning room, with kind of cloth found in our house."

Cross-examined: "Bought shoes myself in August. Prisoner had worked in mill for about two years. Store about 20 steps from factory, where he worked all day. He could wear 7 shoes. Did not wear 9. They were too large, and Henry wanted them. I told him to take them back, but he said Henry wanted them. He nor Henry bought any more. Don't suppose he had bought pair for himself in five years. Miss Essie was not in the store at the time; nor George nor Osborne Brown. Nobody but Mr. Brown, the deceased, and a little negro whose name I did not know. I first heard prisoner's pants had blood on about two weeks ago. Pants had been washed twice. Mrs. Bolick

washed them next week after Mr. Brown was killed. Pants came back Friday after prisoner was carried to jail. Did not burn the shirt. Just didn't tell her to burn it. I did not see them burned." [A shirt is here shown her, which she says is the shirt prisoner had on night of the homicide. A spot on it is shown her which she says is not blood.] Says she "knows blood when she sees it, and knows black grease, too. Don't know whether blood will come out or not. Shirt has been washed twice. No blood on pants. I looked to see if there was. Also, to see if there were lice, and anything I could see. If I had found blood it would have alarmed me. Never asked Minnie
(847) Bryan if anybody had seen shirt at Ben Litten's, and did not say, 'For God's sake let no one see it.' Mrs. Bolick kept the shirt, and Mrs. Bridges took it, I heard. Never asked Sarah Ann not to tell. No; if she wanted, no man could make her swear. Night of homicide prisoner came home after changing time about dusk. Mrs. Bolick was there. My husband has never come home and gone to bed when I did not know it. Also know any time he gets up and leaves. If he went into store, he never brought anything for me. Picked banjo morning of the homicide, and that day at dinner. Heard Mr. Brown was dead early that morning. He was a good man."

Tom Covington, the prisoner, testified in his own behalf as follows: "Night of homicide he was at home. So was his wife, child and Mrs. Bolick. Went to bed at 8 o'clock. Mrs. Bolick slept in same room. Was not up after he went to bed, until 5 o'clock next A. M. His wife called him. Was not out from time he went to bed till time he got up. Lit lamp at 5:04 A. M. Went and built fire in kitchen. Wife got up and was getting breakfast. It was a windy night and don't think I woke up all night. Think factory bell had rung when I woke, but I did not hear it. I got to the mill at 6:10. Was second boss. Looked after hands and oiled machinery. Did principal part of marking. First saw Josey at speeder. Teamster said he wanted yarn early. Went and got cup and blacking. Was dry; went to dynamo room for oil. Asked father, 'To whom mark yarn?' As we passed speeder had not seen Josey, nor had any conversation with him. He did not say anything to me. I said, 'Pull that coat off before you get it in the flyers.' I did not have any such conversation as Josey testifies to about making key and killing Mr. Brown. Did not make the key.

Had little conversation with Pope. Told him yarn was not
(848) ready yet; that Mr. Brown had not brought book down. Nothing else was said. Pope was in mill, and it was raining. I said nothing to Pope about Mr. Brown being killed. At time we were talking did not know Mr. Brown was dead. First heard it from Lee

Robbins. I ran and asked several what was the matter. When Lee told me, I went with others to the store. Went to the factory and got my hat and coat. Had on same hat and shirt I did the day before. Remember going to the window to see if Mr. Brown had come to the store. Had not marked all the sacks. Could not put number without book. I helped to turn body over. Caught it about shoulders. Right smart blood little distance from where he lay. Afterwards I went over home—not as late as 10 or 11 o'clock. I and Lee Robbins fixed bracket on banjo. Went to funeral. And went to dwelling after body was carried there, and held lamp while they were washing and dressing him. Wore same clothing I had been wearing, except pants, which I changed because wife said not to wear old pants to the funeral. No blood was on my pants. Burris did not tell me there was blood on pants. Helped dig grave. After getting out of grave I sat down next to paling by Mr. Litten. Josey then took me off. Went down road, and stopped at corner of graveyard. He said, 'Don't say anything about seeing me in the store, for fear they might think I killed Mr. Brown.' I said to him I would not tell it, provided he did not go back again, unless I was obliged to do so. He cautioned me not to say anything about it. I made no threats to Josey, then or at any other time. We took the walk at his request. I saw Josey come out of the store one time. Was working on the night shift, and one night went to the well to get water. I saw Josey come out of the store door and said, 'Old fellow, I have caught you this time.' He went on with me then to the factory, and tried to persuade me to go in store; but I would not, and told him he had better stay out. Saw (849) 65 cents he got. He gave me 35 cents of it, but he owed it to me. I did not want it, but he insisted, and I took it to pay what he owed me. I said nothing about it. Was never in store with Josey. Never saw key before. Never made threats against Mr. Brown that I remember of. We were friendly. Did not tell Pope I would kill Mr. Brown. If so, it was in fun. Had no grudge against him. Didn't try to kill him with a wrench or with broom handle." [Letter No. 7 was shown him.] Says he wrote part, and part he did not. Said he did not write "Elam, we did not go in store but one time," in the letter. "Remember writing him something like it, but I said 'you,' instead of 'we.'" Again "didn't say 'We did not take any goods,' but wrote 'You did not take any goods.' I wrote him that he had two 25-cent pieces, one 10, one 5, and alluded to the night he was caught by me coming out of store. Day Mr. Brown was killed I had on striped pair patched pants, on leg and knee and on seat. Think shirt exhibited is one I had on. Same coat I now have. Put on same clothes next morning, and continued to wear them till day of burial, and then only changed my

pants, and after returning put same pants on, and had on the same clothes when I was arrested and sent to jail. Sent clothes home from jail by Bridges, and said: 'Tell my wife to hang them out. They have lice on them.' Sent no word to burn pants, and saw no blood on shirt or pants. Spot on shirt is factory grease. Plenty of lice in jail. Wife bought the shoes, I suppose. Told her to buy a pair. She said she got them from Mr. Brown. Told her to get 8. Shoes were 9, but box 8. Did not look at them till I had put them on, and found too large. I traded shoes with my brother Henry. Wife did all the buying, except such things as she could not carry home. Weighed 130 when (850) I was carried to jail. Mr. Brown 170 or 175, and he was strong man. He didn't stand back from anybody in lifting, and was stronger than I am."

Cross-examined: "Josey said not give him away. Mr. Brown was kind to me, and I liked him. Saw Josey coming out of store three or four months before Mr. Brown was killed. I had no talk with him from the time he gave me money till we talked at the grave, except word or two occasionally. He came out of door, like others, and said he got 65 cents. Did not go and tell Mr. Brown because it was not my business to carry news. Never told my father, or anybody. Never wanted to tell what sort of debt he owed, which is mean. I said in letter he gave me 35 cents. It was for a pair of homemade knucks. [Prisoner says he wrote letter 5.] Part of it is true; part false. Went up to store when I heard Mr. Brown was killed. Great deal excitement. Said about having seen Josey go in store. Went from store to factory after hat and coat, then back to store, then home, about two hours, to dinner. Sat at home and picked banjo. Picked one thing and then another. Was sharply grieved at death of Mr. Brown, but never picked banjo in presence of death before. Talk I had with Josey was about his coat. Afraid he would catch it in machine. He was at speeder, and it was running. It was free, voluntary statement I made to Bridges coming to jail. Did not tell Bridges that what Josey swore about being in store and my being with him was true. [No. 2 is shown him, and he says front part of it he wrote; other part he thinks Josey wrote.] Pair of knucks were in my house when Mr. Brown died. Key is made of old file, but I did not make it. Never made any keys as I remember. Filed one out with George Brown. May have read Jessie James' book. Had it about year. Did not make key in prison, of steel, (851) nor go with Ben Lytton to get tobacco."

Redirect: "Had conversation with Josey in jail. Talked with him two or three times. Said he told that lie because detective and Bridges said they would hang him, and he was scared, and did not know

what to do. Said he was going to do what he could, and trust in the Lord."

John Best: He is now in jail. Says prisoner and Josey have been writing notes. "Went in room one day and lay down. Josey came in and said, 'Read this.' I read it. No. 7 is the letter. Says, 'if I kept this till court, will it do me any good?' Said I was no lawyer, and could not say. I gave him a pencil with a rubber on it. He took it and rubbed out 'you,' and put 'we' in two places. Afterwards said, 'Now, read it again. Don't you think it will do me good? Whatever you do, don't give me away.' Said, 'I am for getting Josey out.' Josey then went to prisoner's door and got up a conversation. Said, 'Tom, I did you a great wrong, and am sorry for it. They told me they would hang me, and I was scared.' I said, 'You were a fool. No two or three men could hang you, without evidence.' Lice have been in jail ever since I have been there."

Cross-examined: "The 'we' he rubbed out was near top. Can't say it was the 'we' after Elam. He rubbed out first 'we.' Don't know that he rubbed out the next one. Can't point out others. [Letter is shown him, which he says he wrote, marked Exhibit 15, and another, marked 16.] Said he never stated to any one that both said they were going to prepare to die before court. Says what is in his letter is true. Prisoner and Josey were talking. Josey said, 'Eavedrop him. He would pick him.' They were whispering all day. Prisoner said, 'I am going to pray and get ready for a better world.' Josey said, 'I am too.' Heard prisoner say, 'I am going to own it at court.' Said to (852) Josey, 'Don't give me away.' He took it and rubbed out 'you,' and put 'we' in two places. Afterward said 'Now, read it again,' and says, 'Don't you think it will do me good?' And said, 'Whatever you do, don't give me away. They might come and hang me before court.' Heard it on 19th, and wrote letter on 20th. Never heard him say who would come and get him."

Redirect: "Last letter was written to Pink Yount, the jailer Mr. Yount told me to listen and hear, and report everything I heard either one of the boys say."

Thomas Covington, prisoner, recalled, said about the whispered conversation testified to by Best: "I had told him (Josey) not to tell any such tales on me as he told at J. P. trial; for if he did they would be bound to hang me. Said he was sorry and wanted me to prepare for a better world. He said he was going to acknowledge all that he had done, and said that I would do so, too."

The court recapitulated the testimony and—saying to the jury that his notes of the testimony are only to refresh their memory and not to

govern them, that they were sole judges of what the witnesess had said, and wherever their rocollections of what the witnesses had said different from his notes, they would be governed by their recollections and not his notes—charged the jury as follows:

"The defendant is charged with the murder of one James Brown, as charged in the following bill of indictment: [The bill of indictment is here read.] The court charges you that you should not allow any feelings of indignation which you may have on account of the nature of the homicide to prejudice you against the prisoner, or allow any feelings of sympathy or pity that you may have for the prisoner, or his wife or child, to prejudice you in his favor. Under your oaths, it (853) is your duty to render a verdict according to the evidence; and if this, and this alone, satisfies you that he is beyond a reasonable doubt guilty of the murder as charged in the indictment, you will return a verdict of guilty. On the other hand, if the evidence does not satisfy you beyound a reasonable doubt that he is guilty, then you will return a verdict that he is not guilty. A good deal has been said about the improper use of money by the prosecution in this case, and improper conduct of the family of the deceased. The court charges you that there has been no evidence of the improper use of money by the prosecution, or improper conduct on the part of the family of the deceased, and these arguments you will not consider in making up your verdict. In North Carolina there are three degrees of felonious homicide, to-wit: Manslaughter, murder in the second degree, and murder in the first degree. The first, to-wit, manslaughter is the unlawful and felonious killing without malice either expressed or implied and without any mixture of deliberation whatever. Murder in the second degree is where a person forms in his mind a purpose, design, or intention to unlawfully kill a human being, with malice, but without premeditation. Murder in the first degree is any unlawful killing which is perpetrated by poisoning, or lying in wait, or any other kind of wilful, deliberate or premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape robbery, mayhem, burglary or other felony. The court charges the jury that, in no view of this case, as presented by the evidence, is the defendant guilty of manslaughter or murder in the second degree. He is either guilty of murder in the first degree or not guilty, and you will so find. The court further charges the jury that, in this case, the law raises no presumption against the prisoner, but every presumption of the (854) law is in favor of his innocence; and in order to convict him of the crime alleged in the indictment, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt,

and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is their duty to give the prisoner the benefit of the doubt and acquit him. Again, if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, then it is your duty to account for it, and find the defendant not guilty.

"The State contends that is has satisfied you beyond a reasonable doubt of the guilt of the defendant, and relies—first, on the threats, as testified to by several witnesses, whose testimony you heard, and which I have read to you, and which you will remember. The court charges you that these alone would not warrant you in convicting the defendant, but are circumstances only, which you may consider and weigh with the other testimony in the case. Second, the State relies on the testimony of the witnesses which tends to show that the defendant had for some time been entering the door of the store by a false key, the contention being that he entered the door the night of the homicide with intent to commit larceny, which is a felony, was caught by Mr. Brown and, to conceal the crime of larceny, killed the deceased. In this connection the court charges the jury that if from all the evidence in the case you are satisfied beyond a reasonable doubt that the defendant entered the store of James Brown the night of homicide with intent to commit larceny, which is a felony, and while in that sotre killed the deceased, although he did not intend or expect to kill him when he entered said store, he is guilty of murder as charged in
the bill of indictment, and you should so find. Third, the al- (855)
leged conduct of the defendant the morning after the homicide.
The evidence tended to show that the morning after the homicide the defendant had several conversations with Josey, and that he went to the window looking towards the store several times, and, in reply to a question from witness Pope about old man Brown coming down that morning, said, 'I don't suppose he will,' and to Preston Adams, who asked him what he was looking at, standing at the window, and to which he said, 'Watching it rain,' and the other things testified to by the different witnesses, which you will consider and weigh. Fourth, to the evidence tending to show he had blood on his pants. The testimony bearing on this point is that of Burris, who was sitting by the tree talking to prisoner and called his attention to some spots on his pants, and that pretty soon thereafter the prisoner went towards his home, returning in a short time with a different pair of pants. Next testimony bearing on the point is that to show the burning of the said pants at the instance of the prisoner's wife, and the alleged spot of blood on his shirt, which was brought into court and shown you, and

which Dr. Campbell testifies, in his opinion, is blood; and then the testimony of witness, the girl Myers, who said prisoner's wife sent word to Mrs. Bolick, 'For God's sake let no one see that shirt.' You will consider the testimony and circumstances surrounding this connection, together with the testimony of Dr. Campbell and Mrs. Adams as to the grease spots coming out after washing; and if, beyond a reasonable doubt, you are satisfied that there was blood on his pants and blood on his shirt, you will consider these facts in connection with the other facts and circumstances in the case. Fifth, to the confession of prisoner to Elam Josey, as testified to by said Josey. Now, if
(856) you believe beyond a reasonable doubt that this witness told the truth, and that the prisoner, when he made the confession as alleged, told the truth, the court charges you that the defendant is guilty of murder in the first degree, and you should so find. The State says he is to be believed because he is corroborated by the letters which the prisoner wrote Josey, and which you heard read; by the testimony of several witnesses, who say prisoner and Josey talking at various times and places, soon after the homicide, as testified to by said witness Josey; by the finding of the key in the very place which Josey stated he had put it; by the finding of the alleged stolen shoes; and by other testimony and circumstances, including that of John Best, the witness, who said he heard prisoner say he would own it at court, and that of witness Bridges, who said prisoner had told him, on the way to court, that what Josey had said on trial was true. The court charges you that in North Carolina our Supreme Court has held that the unsupported testimony of an accomplice will warrant a jury in convicting, provided the jury is satisfied of its truth beyond a reasonable doubt. The weight of this testimony is for you, and you should weigh it carefully and with deliberation, giving the prisoner the benefit of any reasonable doubt. These are some of the contentions of the State, and the court charges you that if you are satisfied from the testimony that the defendant is guilty beyond a reasonable doubt you will say, so, unless the testimony of the prisoner raises a reasonable doubt in your mind.

"And the prisoner says his testimony and explanation of his conduct, together with his explicit denial, is sufficient to raise this reasonable doubt, and it is a question for you to consider and decide. He says that the threats, as testified to by the State's witnesses and as a circumstance relied on by the State as tending to prove his guilt, are not true. He denies the truth of the testimony as to his having entered
(857) the store by a false key, and explains his alleged conduct in going to the window morning after the homicide by saying he

was looking for Mr. Brown to come to store and bring a book, from which he was to get data to mark certain yarns; and he denies the several alleged conversations with Josey. In regard to contention of State as to blood on his pants and shirt, he says he had no such conversation as was testified to by witness Burris; that he did change his pants, but it was at the request of his wife not to wear the old pants to the funeral. And the burning of the pants he explains by the testimony of his wife and others, that it was on account of the suspicion of lice, and denies there was any blood on his shirt, saying it was grease gotten off machinery. As to the confession of Josey, he says Josey is not to be believed, because he is under arrest charged with the killing of deceased himself, and that he is induced to become a witness against him by the hope of immunity from punishment, by the hope that it would go easier with him in case he implicated someone else in the crime, and by the further admitted fact by said Josey that in another trial he had sworn falsely about the same matter. The jury should take into consideration such facts in determining the weight which ought to be given to such testimony, and testimony given under such hope and contradiction. In regard to the letters, he says he wrote them, except the word 'we' was substituted for 'you' and sustains himself by the statement of John Best to having seen Josey erase 'you' and put 'we' in the letter. In this connection you will consider the testimony of Major Finger and Mr. Brown, and, taking all the evidence regarding the letters, you will consider and give it such weight as you may think it entitled to. If you believe beyond a reasonable doubt that the letters were not changed as alleged by the defendant, and that he told what was untrue when he said he wrote 'you' for 'we,' it is (858) a circumstance which you will consider as tending, with the testimony, to prove his guilt. In determining whether he swore falsely, you will consider the testimony of John Best, who said he saw Josey change 'you' to 'we.' But, as testimony independent and apart from that of the State, the prisoner says his own denial is sufficient to raise a reasonable doubt in you minds, and you ought to acquit him. The law gives the accused the right to testify in his own behalf, but his credibility and the weight to be given his testimony are questions exclusively for the jury, and in weighing the testimony of defendant you have a right to take into consideration his manner of testifying, the reasonableness of the story, and his interest in the result of this case; and you are to say whether it is true or for the purpose of avoiding a conviction. Another defense interposed by the defendant in this case is what is known in law as an *alibi*—that is, that the defendant was at another place at the time of the commission of the crime; and the

court instructs the jury that such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing on this point should be carefully considered by the jury, and if, in view of all the evidence, the jury believe the defendant was at another place than that where the homicide was committed, at the time of its commission, they should acquit the defendant. In order for it to be of avail, it must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place so far away or under such circumstances that he could not, with any ordinary exertion, have reached the place where the crime was committed, so as to have parti-
(859) cipated in its commission.

"These are the leading contentions of the State and of the defendant. You will consider them all carefully, keeping in mind the presumption of law that the defendant is innocent. You will consider all the testimony in the case, and when it is conflicting reconcile it if possible, and if you cannot, in determining which to believe, look at the testimony of good character offered to support witnesses on one side or the other, as case may be, and also, to discredit them, their interest in the result of this controversy, their demeanor on the stand, and any other facts or circumstances calculated to uphold or dishonor their testimony. After doing all this, and upon the whole testimony, if you have a reasonable doubt of defendant's guilt, you will find him not guilty. The rule which clothes every person accused of crime with presumption of innocence, and imposes on the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crimes to escape, but is a humane provision of law, so far as human agencies go, to guard against the danger of innocent persons being unjustly punished. So, if upon the whole evidence you believe beyond a reasonable doubt the defendant is guilty you will return a verdict of guilty."

There was a verdict of guilty of murder in the first degree. The prisoner moved in arrest of judgment, upon the ground that it appeared upon the face of the bill that the killing of the deceased, Brown, is alleged to have happened in September, 1895, a day which had not yet arrived, and upon the further ground that it is not alleged in the bill that the prisoner unlawfully killed said Brown. Motion overruled, and the prisoner excepted. The prisoner then moved for a new trial, for error of court in admitting and rejecting testimony to which prisoner objected in apt time, and excepted, as specified above, and upon the further ground that the court erred in instructing the
(860) jury—first, that murder in second degree is where defendant forms in his mind a purpose, design or intention to unlawfully

kill a human being, with malice, but without premeditation; second, that murder in first degree is any unlawful killing which is prepetrated by means of poisoning, or lying in wait, or any other kind of wilful, deliberate and premeditated killing which is committed in the perpetration or in the attempt to perpetrate any arson, rape, robbery, mayhem, burglary or other felony; third, in instructing the jury "in no view of this case, as presentel by the evidence, is the defendant guilty of manslaughter or murder in the second degree"; fourth, that the court erred in relating evidence of witness Burris to the effect that Burris called prisoner's attention to spots of blood on his clothes, when Burris did not so testify, but testified as above set forth. The court overruled motion for new trial, and gave judgment of death. Defendant appealed.

Attorney-General and L. L. Witherspoon for the State.
L. M. McCorkle, C. M. McCorkle and S. J. Erwin for prisoner.

AVERY, J. His Honor excluded from the jury the question of murder in the second degree and instructed them that in no view of the case as presented by the evidence was the prisoner guilty of murder in the second degree or manslaughter. To this the prisoner excepted. The charge is correct if there is no evidence of murder in the second degree or of manslaughter. The evidence relied upon by the State is the confession of the prisoner to the witness Josey, and circumstances detailed by other witnesses tending to confirm it. Upon the truth or falsity of the confession the guilt of the prisoner en- (861) tirely depends. If the confession of the homicide is a confession of murder in the first degree, and of neither manslaughter nor murder in the second degree, the charge is correct, for there is no evidence of either of these latter offenses. *S. v. McCormac,* 116 N. C., 1033.

This brings us to a consideration of the confession of the prisoner. Omitting what is immaterial and noticing only that part which goes to show deliberation and premeditation, the prisoner said: "I watched my chance, and jumped on the old man and wrenched his pistol, and the old man hollowed 'Murder.' Then I shot him through the body. The old man said, 'You have got me.' I aimed to shoot him, and this must have been when I shot him in the neck, and I shot him again." Conceding when he was watching his chance that, though deliberating and premeditating, his deliberation and premeditation were only extended to making an assault upon the deceased for the purpose of disarming him, and that his first shot was fired on the impulse of the

moment because of the outcry of murder raised by the deceased, the second and third shots, which were fatal ones, were fired with deliberation and premeditation, according to the prisoner's confession, and with the intent to kill. "I aimed to shoot him." These words can mean nothing else than a deliberate and premeditated attempt to shoot the deceased. To aim to shoot a person, under the circumstances detailed by the prisoner, means something more than taking aim at him with a deadly weapon. That may be done suddenly and upon the impulse of the moment. But here the words signify a purpose deliberately and premeditately formed in the mind, immediately followed by an act to execute it—the purpose to shoot the deceased, and the aiming and shooting to carry out the purpose. Under the decisions of this
(862) Court in *S. v. McCormac, supra,* and *S. v. Norwood,* 115 N. C., 791, concurring with those of every other State where a similar statute concerning murder has been adopted, it is immaterial, in determining the degree of murder, how soon after resolving to kill the prisoner carried his purpose into execution. The only question was, Did he form and execute the purpose in the manner described in the statute? This question must be answered in the affirmative if the confession of the prisoner is to be believed; and if the confession is not to be believed, then he is not guilty in any manner of the crime charged, as he did not commit the homicide. By their verdict the jury have shown that they believe the confession to be true. Applying the test which has been suggested in *S. v. Gadberry, ante,* 811, we find that, had the confession of the prisoner been incorporated by the jury into a special verdict as their finding of the facts, the court would have been constrained to declare the prisoner guilty of murder in the first degree, because the intent with which the killing was done is found inseparably connected with the finding of the act of killing. So that in this view of the evidence the killing must have been premeditated, according to the only testimony that establishes the fact of shooting.

It may perhaps be claimed for the prisoner that, inasmuch as the fact of killing with a deadly weapon raised only a presumption of murder in the second degree, and it was the duty of the State to prove beyond a reasonable doubt the premeditation and deliberation necessary to constitute murder in the first degree before a verdict of guilty of such crime could be rendered, the court should have left that question to the jury, and instructed them, unless they were satisfied beyond a reasonable doubt of the fact of premeditation and deliberation, to render a verdict of guilty of murder in the second degree. This would
(863) have been his Honor's duty if the fact of the homicide with a deadly weapon could have been separated from the evidence

establishing it and showing the circumstances under which it took place. But it is almost impossible to conceive of a case of that character, except upon a naked confession of such homicide. The confession in this case is not simply an admission of the homicide; for the prisoner not only admits the act of killing with a deadly weapon, but gives a full and detailed account of the manner and the purpose with which it was done. Accepting the account as true, it is impossible to perceive any theory upon which the question of murder in the second degree could have been submitted to the jury, or how they could have been justified in rendering a verdict of guilty of such offense, or any other offense than murder in the first degree. The effect of a presumption arising from a killing with a deadly weapon, admitted or proved, before the act of 1893 was injurious to the prisoner and operated entirely in behalf of the State, so that he burden was upon him to show mitigation or excuse. Notwithstanding such presumption, when it appeared that, in no aspect of the testimony and under no inference fairly deducible from it, the prisoner was guilty of murder, it was error in the court to refuse to instruct the jury that they must not return a verdict for any higher offense than manslaughter. *S. v. Miller,* 112 N. C., 878. Under such circumstances it was the duty of the Judge to exclude altogether from their consideration the question of murder, notwithstanding the presumption that such was the crime committed by the prisoner. The reason was that the evidence upon which the State relied to raise the presumption, by showing a homicide with a deadly weapon, at the same time had the effect to show that the offense was mitigated to manslaughter or altogether excusable.

The rule of law is the same under the present statute when the (864) prisoner seeks to avail himself of the beneficial effects of the presumption in his behalf. Where the testimony upon which he relies to establish a homicide with a deadly weapon, in order to raise a presumption of murder in the second degree, not only proves such homicide, but has a tendency to prove murder in the first degree, and under no inference fairly deducible therefrom is the prisoner guilty of murder in the second degree or manslaughter, the court should instruct the jury that it is their duty to render a verdict of guilty or not guilty. Under the construction of the statute by this Court in *S. v. Gilchrist,* 113 N. C., 673, and *S. v. Norwood, supra,* the third section does not give jurrors a discretion, when rendering their verdict, to determine of what degree of murder a prisoner is guilty. They must render a verdict according to the evidence, and believing a prisoner guilty beyond a reasonable doubt of murder in the first degree, it is their duty so to find, however much inclined to show mercy by rendering a verdict

for a less offense. Their obligation in that respect has not been changed by the statute, and is the same as it was upon the trial for homicide before its enactment, and the question was whether the prisoner was guilty of murder or manslaughter. This question has been settled by our decisions, not only in construing the act under consideration, but also the similar one dividing the crime of burglary into two degrees. *S. v. Alston,* 113 N. C., 666; *S. v. McKnight,* 111 N. C., 690; *S. v. Fleming,* 107 N. C., 905.

We are aware that the construction which has been placed upon this section of the act in some of the States, where a similar provision is found in the statutes dividing murder into degrees, is different from ours. In all cases of murder in those States, the jury having a discretion in rendering their verdict to determine of what degree (865) the prisoner is guilty, it is error in the court to confine their consideration to the question of guilty of murder in the first degree or not guilty, and thereby deprive them of the right to exercise such discretion. Not having such discretion in this State, and there being no evidence in this case but a confession of murder in the first degree, with circumstances to corroborate the confession, his Honor was correct in refusing to submit the question of murder in the second degree or of manslaughter to the jury.

The other material question raised by the prisoner is upon that part of the charge which is in the following language: "The court charges the jury that if from all the evidence in the case you are satisfied beyond a reasonable doubt that the prisoner entered the store of James Brown on the night of the homicide, with the intent to commit larceny, which is a felony, and while in the store killed the deceased, although he did not intend or expect to kill him when he entered the store, he is guilty of murder as charged in the bill of indictment, and you should so find."

To make this instruction applicable to the case, it is only necessary to say that there is evidence which tends to show that the homicide for which the prisoner was tried was committed in the attempt to perpetrate the crime of larceny, which is a felony under our law. As to the correctness of the charge of the court as a legal proposition, there can be no question in this respect, for a homicide committed in the attempt to perpetrate a felony under the circumstances detailed in the evidence in this case is murder, and was murder before the act of 1893, ch. 85. By that statute murder committed in the perpetration of a felony is now murder in the first degree. The able counsel of the prisoner, however, earnestly contends that under the indictment in this case the court should not have submitted the question of murder in the first

degree in the attempt to perpetrate a larceny to the jury, in- (866)
asmuch as there is no allegation to that effect in the indictment, and he relies upon the authority of Mr. Bishop to sustain that contention. The indictment does not contain such allegation, and the authority relied upon is to the effect for which it is cited. But another equally able expounder of criminal law, Dr. Wharton, takes the opposite view in his work on homicide, page 387, and cites various decisions of courts of last resort to sustain him. This Court, however, has decided the question adversely to the prisoner in *S. v. Gilchrist, supra.* The statute under which the prisoner is indicted contains in section 3 the following provision: "Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." The plain words of this section require no construction from the Court, and, in order to sustain the contention of the counsel for the prisoner, it would be necessary to declare a part of the section unconstitutional and overrule the decision of this Court. Under this indictment, before the act of 1893, the trial Judge would have been sustained in an instruction submitting the question of murder in the attempt to perpetrate a larceny to the jury, without any specific allegation to that effect. The act provides that murder of that character is murder in the first degree, and further provides that nothing therein contained shall be construed to require any alteration or modification of the existing form of indictment. These provisions are positive enactments that it is now unnecessary to make the specific allegation contended for by counsel to sustain the charge of the court, inasmuch as it was not necessary before the act. The form used in this (867)
case is that authorized by the act of 1887, ch. 58, and the constitutionality of this act has been sustained in the case of *S. v. Moore,* 104 N. C., 743. There is no reason for overruling that case.

This aspect of the case presented by the court is likewise dependent upon the preliminary finding by the jury that the prisoner's confession as to the killing, with all of its details, is true. The court left the jury to say whether, after determining that the prisoner had aimed to kill the deceased, they were also satisfied that he entered the store with the intent to commit a felony. Looking at the evidence as we do, the jury must in this aspect have found the killing with the premeditated intent upon the prisoner's confession as a basis, because that was an inseparable part of the confession of breaking into the store. Without the confession as a whole the breaking could not have been shown, and with the confession found it was mere surplusage to ascertain the intent

of entering, after finding a deliberate killing. So that in no view of the testimony, leaving out the confession, would there have been sufficient evidence to show the prisoner guilty of any offense; and in no aspect of the testimony, if the confession were believed, was he guilty of any less offense than murder in the first degree. We do not deem it necessary to discuss the other exceptions. After giving them a careful consideration we find no error. The judgment is

Affirmed.

Cited: *S. v. Gadberry, ante,* 822; *S. v. Thomas,* 118 N. C., 1119; *S. v. Dowden, ib.,* 1153; *S. v. Locklear, ib.,* 1159; *S. v. Freeman,* 122 N. C., 1017; *S. v. Booker,* 123 N. C., 721, 726; *S. v. Rhyne,* 124 N. C., 858; *S. v. Smith,* 125 N. C., 621; *S. v. Bishop,* 131 N. C., 761; *S. v. Cole,* 132 N. C., 1074; *S. v. Daniels,* 134 N. C., 676; *S. v. Hunt, ib.,* 688; *S. v. Lipscomb, ib.,* 693; *S. v. Matthews,* 142 N. C., 624; *S. v. Spivey,* 151 N. C., 684; *S. v. Stackhouse,* 152 N. C., 808; *S. v. Walker,* 170 N. C., 718.

APPENDIX

AMENDED RULE OF COURT

At September Term, 1895, Rule 28 of the Supreme Court (115 N. C., 884) was amended by inserting after the words "consist of," in line five of said Rule, the words "the judgment appealed from, together with."

The Rule amended reads as follows:

RULE 28. WHAT TO BE PRINTED.

Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned, as appear in the record in each action, shall be printed. Such printed matter shall consist of the judgment appealed from, together with the statement of the case on appeal, and of the exceptions appearing in the record to be reviewed by the Court; or, in case of a demurrer, of such demurrer and the pleadings to which it is entered. If the jury passed upon issues, the issues and findings thereon shall be printed, as likewise all exhibits and pleadings, or parts of pleadings, referred to in the case on appeal as necessary to show the contention of the parties. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it incidental to the argument.

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